

INTRODUCTION

The International Committee of the Red Cross (ICRC) is perhaps best known for its work in the midst of armed conflict bringing aid and assistance to the injured and sick, prisoners of war and civilians affected by the fighting. Yet, the institution also has a long history of being closely involved in the development of international humanitarian law. It was the efforts of the founder of the ICRC, Henry Dunant, which led to the adoption of the first humanitarian law treaty, the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Since that time the ICRC has continued to play an important role in the subsequent development of humanitarian law. It prepared the drafts which were the bases for the negotiations of the 1929 Geneva Convention on Prisoners of War, the four Geneva Conventions of 1949 and the Additional Protocols adopted in 1977.¹

The formal basis for the ICRC's role in this area is found in the Statutes of the International Red Cross and Red Crescent Movement. This movement, which is comprised of the ICRC, National Red Cross and Red Crescent Societies and their International Federation, and which works

¹ The full titles and dates of signature or adoption are: Convention Relative to the Treatment of Prisoners of War, signed at Geneva 27 July 1949; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva 12 August 1949; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, signed at Geneva 12 August 1949; Convention (III) Relative to the Treatment of Prisoners of War, signed at Geneva 12 August 1949; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts (Protocol I), adopted at Geneva 1 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II), adopted at Geneva 1 June 1977.

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closely with all States Parties to the Geneva Conventions of 1949,² has charged the ICRC with the task of working ‘*for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof*’³ (emphasis added). Thus, the ICRC’s involvement in the development of a ban on anti-personnel landmines was neither a unique nor an unexpected action. It was part of a long tradition.

What was unique, however, was the public campaign the ICRC embarked upon to raise awareness about the landmine problem and the plight facing mine victims and to help create the political will in favour of a treaty banning anti-personnel mines. While the ICRC has spoken out publicly in the past about the use of specific weapons, such as poison gas, its dissemination activities and advocacy on the landmine issue were of a scale never before undertaken by the institution. Its campaign focused on stigmatizing anti-personnel mines in the public conscience and supporting international, regional and local efforts to address the mines problem.

Thus, expert and non-expert literature was prepared and distributed throughout the world by National Red Cross and Red Crescent Societies and ICRC delegations. The ICRC organized scores of meetings and conferences around the world in which its medical and legal experts participated, and ICRC field delegations in mine-affected countries hosted visits of hundreds of journalists, film crews and officials, including the highly publicized visit of Princess Diana to Angola. Print and television advertisements were also produced and placed in international media on a *pro bono* basis. The value of the donated space by the media is estimated to be over 3 million US dollars, with a potential audience of over 700 million people. Never before had the ICRC undertaken such an initiative.

Long before the public campaign was launched in 1995, the ICRC was engaged in efforts to reduce the effects of the weapons and to help develop restrictions or prohibitions on their use. It consulted experts and convened several meetings and seminars to shed light on the landmine problem and to study how it could be addressed, both by legal means and in the field. Of particular relevance are the expert meetings convened in the 1970s that formed the basis of the 1980 Convention on Certain Conventional Weapons (1980 CCW), the Montreux Symposium convened by the ICRC

² As at 1 May 2000, there were 188 parties to the 1949 Geneva Conventions. The set of treaties remains one of the most universally ratified.

³ Article 5 (g) of the Statutes of the International Red Cross and Red Crescent Movement.

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in 1993, and the ICRC's statements and contributions during the 1995–1996 Review Conference of the 1980 CCW. This work continued through the Ottawa process, and the negotiation and conclusion of the Ottawa treaty at the Oslo Diplomatic Conference in 1997.

Throughout this period the ICRC was also at the forefront of efforts to bring aid and assistance to mine victims and communities in mine-affected areas. The ICRC developed surgical standards for treating mine victims and pioneered the production of low-cost, high-quality artificial limbs. It also operated mine awareness programmes to teach those living in mined areas how to recognize and avoid potentially dangerous places. As hundreds of thousands of people remain affected by the weapons, these efforts still continue today.

The ICRC was, of course, not the only organization working to bring a comprehensive ban into existence. Parallel efforts were undertaken by the International Campaign to Ban Landmines (ICBL) which was awarded the 1997 Nobel Peace Prize for its work on this issue, National Red Cross and Red Crescent Societies, United Nations agencies and governments. The ICRC worked closely with all those striving for a comprehensive ban treaty. Today it remains engaged with these partners to ensure that the Ottawa treaty is implemented and respected.

This book is a chronology of the major events and a compilation of key documents charting the ICRC's contribution to the 1980 CCW, to the CCW's Review Conference held in 1995–1996, and to the Ottawa process. It is published to facilitate research and reflection on the role of the ICRC in international efforts to respond to the landmines problem. The documentation includes statements and declarations made at major conferences and meetings, the texts of many ICRC publications on mine-related issues, ICRC reports and contributions submitted to negotiating sessions as well as other texts on legal issues and victim assistance. The first part of the book provides an overview of the humanitarian law principles applicable to all weapons and the development of the rules regulating the use of anti-personnel mines in Protocol II of the 1980 CCW. The second part covers the period leading up to and through the 1995–1996 CCW Review Conference. Finally, the third part covers the Ottawa process and the development and adoption of a comprehensive ban treaty.

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PART 1

From principles to rules: regulating
mines up to the 1980 Convention on
Certain Conventional Weapons

1

Historical background: the international law governing weapons

International humanitarian law is the branch of international law concerned with the waging of warfare.¹ It regulates the conduct of hostilities and the treatment of those not actively participating in the conflict (namely, civilians, the wounded and sick, and prisoners of war). It seeks to minimize suffering and ensure that both combatants and civilians are treated humanely. Although international treaties on the subject are of fairly recent origin, practices regulating armed hostilities are evident throughout history. Even before there were States, battles fought between tribes, clans or other groups were often governed by rules to mitigate the effects of armed violence. The ancient texts of many civilizations show that in war, prisoners were not to be killed but taken and well treated; women, children and the elderly were not to be harmed; and warriors should not use barbarous weapons or methods of attack.² While such practices were often founded on grounds of religion, morality or honour, they are the forerunners of the legal regime States have developed to regulate armed conflict.

International humanitarian law is based on the precept that the sole objective of war is to overpower the armed forces of the opponent.³ Men become the legitimate object of attack solely because of their relationship

¹ International humanitarian law was traditionally known as the 'law of war' and today is also commonly referred to as the 'law of armed conflict'.

² See Sumio Adachi, 'A Process to Reaffirmation of International Humanitarian Law – A Japanese View', *Proceedings of the National Defence Academy*, 48 (March 1994), 437–477, on the Japanese code of behaviour 'Bushido', and Nagendra Singh, 'Armed Conflicts and Humanitarian Laws of Ancient India', in Christophe Swinarski (ed.) *Studies and Essays of International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: Martinus Nijhoff, 1984), pp. 531–536.

³ H. Lauterpacht (ed.), *Oppenheim's International Law*, 7th edn (London: Longmans, 1952) vol. II, pp. 226–227.

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with the making of warfare. In his renowned work *The Social Contract* (1762) Jean-Jacques Rousseau formulated one of the law's philosophical footings:

War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men but as soldiers'.⁴

From this, States have concluded that, at all times, a distinction must be made between the fighting forces of an adversary and its civilian population. Civilians cannot be the object of attack and the lives of soldiers who are wounded or lay down their weapons must be spared. Like its early antecedents, international humanitarian law is founded upon the precept that the infliction of gratuitous violence offends certain human values.

As the waging of warfare became the province of States, governments sought to ensure that many of the early practices would become legally binding rules and, in the late nineteenth century, began to codify some practices in international treaties. The 'father' of the Red Cross and Red Crescent Movement, Henry Dunant, helped initiate this process by the publication of *A Memory of Solferino* in 1863⁵ as did Professor Francis Lieber, author of a document on the rules of war for government troops in the American Civil War.⁶ Dunant's book drew world attention to the realities of war and the dangers posed by the 'new and frightful weapons of destruction which are now at the disposal of the nations'. His efforts prompted the Swiss government to invite many of the world powers to a diplomatic conference to adopt the first international humanitarian law treaty, the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This helped set in motion the process through which the international community came to ban the use of exploding bullets, poison gas and bacteriological warfare and, more recently, blinding laser weapons and anti-personnel landmines.

Early international humanitarian law treaties did not specifically address deployment of landmines even though ancestors of the devices were used

⁴ Jean Jacques Rousseau, *A Treatise on the Social Contract*, Book I, Ch. IV.

⁵ Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1986).

⁶ Instructions for the Government of Armies of the United States in the Field (General Orders No. 100) commonly referred to as the 'Lieber Code'. In addition to being one of the factors inspiring the codification of the laws of war, it was also the impetus for the development of military manuals.

in the American Civil War. These treaties did, however, prohibit the use of certain types of weapons and established a number of fundamental principles generally applicable to all weapons. Over time these principles were confirmed as part of customary international law and as such apply to all States and every side in an armed conflict.⁷ Of particular relevance to the use of landmines are the following principles:

- The right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.
- It is forbidden to use weapons which ‘cause superfluous injury or unnecessary suffering’.
- In the conduct of hostilities, parties to a conflict must always distinguish between civilians and combatants.

From these restrictions, it follows that weapons which inflict injury or suffering greater than what is required to render a soldier *hors de combat* are prohibited. Furthermore, it is forbidden to attack civilian and soldier without discrimination and, consequently, any weapon which is inherently indiscriminate must not be used. While the development of international treaties concerned with anti-personnel landmines is discussed throughout the remainder of this book, it was these principles which were most often at the forefront of the legal discussions about the banning of the weapons. They are recognized in the preamble of the Ottawa treaty as one of the bases for the instrument’s prohibitions⁸ and remain valid restrictions on the use of anti-tank and anti-vehicle mines. Below is a brief overview of the international instruments outlining the development of the above-mentioned principles and providing additional historical and legal background for the comprehensive ban which came to fruition in the Ottawa treaty.

⁷ International law is not only found in international treaties. Customary international law is unwritten law and is comprised of the practices which States undertake believing that they are under a legal obligation to do so. It often allows the law to develop without the need for convening formal negotiations but rather through the consensus of action. While a treaty applies only to those States that have formally adhered to it, customary law applies to all States unless they have consistently objected to the practice involved.

⁸ The 11th paragraph of the preamble reads as follows, ‘Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants’.

The Declaration of St Petersburg 1868⁹

The Declaration of St Petersburg is the first formal international agreement banning the use of a particular weapon. In 1868 the czar of Russia, Alexander II, invited governments to St Petersburg to ‘examine the expediency of forbidding the use of certain projectiles in the time of war between civilized nations’. The impetus behind this conference was the development of a bullet which exploded upon impact with ‘soft’ substances, including the human body. This was an advance on an earlier bullet developed by the Imperial Russian Army, which detonated solely on hard surfaces, the primary purpose of which was to destroy ammunition wagons. When used against humans the new projectile was no more effective than the ordinary bullet yet caused injuries and suffering beyond what was required to render a soldier *hors de combat*. Recognizing the danger that the new bullets posed to the troops of all States, the representatives of nineteen governments adopted the Declaration of St Petersburg.

The declaration prohibits the use of lightweight explosive projectiles, which are defined as bullets weighing less than 400 grams and either explosive or charged with fulminating or inflammable substances. While the declaration is exceptional because it is the first formal agreement prohibiting the use of a certain weapon in war, it is also significant because it established a number of fundamental principles concerned with the conduct of hostilities and which would come to play an important role in the future development of international humanitarian law. In banning these munitions, the participating governments concluded that:

The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

For this purpose it is sufficient to disable the greatest possible number of men;

This object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

The employment of such arms would, therefore, be contrary to the laws of humanity.

⁹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight. St Petersburg. Entered into force 11 December 1868.

These principles build upon the canon set forth by Rousseau and from them one can conclude that the parties to a conflict do not have unlimited choice in the way they wage war, and that weapons which cause gratuitous suffering or injury or certain death are not to be used.

In renouncing the use of lightweight explosive projectiles, therefore, governments balanced the military value of such a weapon against humanitarian considerations. This balance would also become an important formula in the future examination of weapons. As was provided in the final paragraph of the declaration:

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

The Brussels Declaration of 1874

Following the meeting in St Petersburg, Alexander II again took the initiative and convened a conference to discuss a possible agreement outlining the laws and customs of war. Fifteen European governments attended the conference in Brussels and considered a draft treaty proposed by the Russian government. While the conference participants adopted the document with minor alterations, it was never ratified by States, and thus, did not become a binding international instrument. Article 12 of the document is particularly notable for including, in addition to the ban on the use of projectiles established in the Declaration of St Petersburg, a prohibition on the use of poison or poisoned weapons and ‘arms, projectiles or material calculated to cause unnecessary suffering’. Although the text never came into force, the conference and the draft document were important steps in the movement towards the codification of the laws of war and many subsequent developments can be traced back to them.

The Hague Conventions of 1899 and 1907

A prohibition on specific types of weapons was also one result of the Hague International Peace Conference of 1899. This conference brought together twenty-six States and sought, among other things, the most effective means of ‘limiting the progressive development of existing armaments’ and ‘the

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revision of the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, and not yet ratified'.¹⁰ The Hague conference resulted in the conclusion of three conventions and two declarations relevant to the conduct of warfare, all of which were eventually ratified and became international law.

Most relevant to this discussion is Convention II and its regulations¹¹ which cover land warfare. Importantly, the Convention confirms the norms outlined in the Declaration of St Petersburg and those considered at the Brussels Conference.¹² It also affirms an obligation to distinguish between those persons taking part in the hostilities and those who are *hors de combat*.¹³ Two declarations attached to the Convention outlaw the use of specific kinds of weapons. The first (Declaration IV, 3) prohibits the use of projectiles which expand or flatten upon entering the human body.¹⁴ These so-called 'dum-dum' bullets cause injuries similar to the horrific wounds inflicted by the lightweight projectiles proscribed in 1868. They were developed and manufactured by the British in India for use in colonial warfare and their development and use were the subject of intense debate within and outside the United Kingdom.¹⁵

The second declaration (Declaration IV, 2) bans the use of projectiles diffusing asphyxiating or deleterious gases.¹⁶ This reflects an initial attempt to ban gas warfare and its scope was later broadened by the 1925 Geneva Protocol presented below.

The Hague Convention of 1899 is also noteworthy for introducing the so-called 'Martens clause'. This clause, found in the instrument's preamble and named after its author, the Russian delegate de Martens, provides:

¹⁰ Russian Circular note of 30 December 1898.

¹¹ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. The Hague, 19 July 1899. Entered into force 4 September 1900.

¹² See Article 22 and Article 23 (e).

¹³ The Convention requires that prisoners of war are to be treated humanely (Article 4) and prohibits a declaration that no quarter will be given (Article 23(d)). In Article 21 it also affirms the obligations upon belligerents under the Convention for the Amelioration of the Wounded in Armies in the Field. Geneva, adopted 22 August 1864. Entered into force 22 June 1965.

¹⁴ Declaration (IV, 3) concerning Expanding Bullets. The Hague, 29 July 1899. Entered into force 4 September 1900.

¹⁵ Edward M. Spiers, 'The Use of Dum-Dum Bullets in Colonial Warfare', *Journal of Imperial and Commonwealth History* 4 (1975), 3–14. The bullets were so called because they were manufactured at the cantonment of Dum-Dum, located several miles north-east of Calcutta.

¹⁶ Declaration (IV, 2) concerning Asphyxiating Gases. The Hague, 29 July 1899. Entered into force 4 September 1900.