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# The International Committee of the Red Cross and the Development of International Humanitarian Law

François Bugnion\*

Notwithstanding its private-initiative origins, the International Committee of the Red Cross (“ICRC”) has been the main driving force behind the development of international humanitarian law for 140 years. It was the ICRC that took the initiative which led to the adoption of the original Geneva Convention of 22 August 1864, an instrument that is the starting point of contemporary international humanitarian law and a landmark in the development of public international law; it was the ICRC that laid the groundwork for the subsequent developments of that law.

How was it that five individuals managed to have the initial Geneva Convention adopted? What was the significance of that treaty? What was the ICRC’s role in the drafting of subsequent conventions and what is its role today in relation to the development of international humanitarian law? And finally, what is the outlook for the future? These are the questions this article sets out to answer.

## I. ORIGINS OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The International Committee of the Red Cross came into being by chance. A business trip took Henry Dunant to Castiglione delle Stiviere, a few kilometers from where one of the bloodiest battles of the nineteenth century had just ended. A decisive episode in the struggle for Italy’s independence and unity, the Battle of Solferino (24 June 1859) was also the scene of the greatest slaughter that Europe had seen since Waterloo: the toll of just one day of fighting was some six thousand dead and almost forty thousand wounded. The medical

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services of the Franco-Sardinian armies were completely overwhelmed. Helped by their comrades and leaning on their rifle butts, the less seriously wounded managed to reach the township of Castiglione, where there would soon be more recumbent figures than able-bodied men. Dunant was not a doctor, and his business was urgent, but he was too compassionate to close his heart to the distress he was witnessing. Day after day, he visited the wounded in the Chiesa Maggiore and attempted to provide them with whatever comfort he could.<sup>1</sup>

On his return to Geneva, Dunant recorded what he had seen in a small book that was to mark an epoch: *A Memory of Solferino*. After a description of the battle and the neglected state in which he had found the Solferino casualties, Dunant concluded with two proposals: the creation, in the various countries of Europe, of relief societies for wounded soldiers, which would mobilize private charity resources; and the adoption of a treaty giving protection on the battlefield to the wounded and to anyone who endeavored to come to their assistance.<sup>2</sup>

The first proposal was the starting point for the National Red Cross and Red Crescent Societies found in 181 countries today. The second was the source of contemporary international humanitarian law.

*A Memory of Solferino* came off the presses in November 1862 and immediately aroused wide interest. Following publication, a five-man committee was formed in Geneva consisting of Henry Dunant, Gustave Moynier, General Guillaume-Henri Dufour, and Doctors Appia and Maunoir, the aim of which was to give shape to Dunant's ideas. After some hesitation, the committee—which would soon be calling itself the International Committee of the Red Cross—convened a conference of government experts and well known philanthropists in Geneva, in October 1863. This conference laid the foundations for the relief societies and gave birth to the Red Cross.<sup>3</sup>

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<sup>1</sup> The history of the founding of the Red Cross is well known and there is abundant literature devoted to it. The following accounts and works may be consulted in particular: J. Henry Dunant, *A Memory of Solferino* (ICRC 1986) (American Red Cross, trans), original French edition, *Un Souvenir de Solferino* (Fick 1862); Henry Dunant, *Mémoires* 32–121 (Henry Dunant Institute and Éditions L'Age d'Homme 1971) (text established and presented by Bernard Gagnebin); Alexis François, *Le Berceau de la Croix-Rouge* (Librairie Jullien and Librairie Édouard Champion 1918); Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima* 7–121 (Henry Dunant Institute 1985); François Bugnion, *La fondation de la Croix-Rouge et la première Convention de Genève*, in Roger Durand, ed, *De l'utopie à la réalité: Actes du Colloque Henry Dunant tenu à Genève au palais de l'Athénée et à la chapelle de l'Oratoire les 3, 4 et 5 mai 1985* at 191–223 (Henry Dunant Society 1988); François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* 6–28 (MacMillan 2003) (Patricia Colberg, Edward Markee, and Nicolas Sommer, trans).

<sup>2</sup> Dunant, *A Memory of Solferino* at 115–26 (cited in note 1).

<sup>3</sup> *Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l'insuffisance du service sanitaire dans les armées en campagne*, excerpt in Société genevoise d'Utilité publique, Bulletin No 24 (Jules-Guillaume Fick 1863).

The following year, in response to an approach from the Committee,<sup>4</sup> the Swiss Federal Council convened a diplomatic conference to adopt a treaty protecting the medical services of armies on the battlefield.

## II. THE ORIGINAL GENEVA CONVENTION

The Diplomatic Conference opened in Geneva on 8 August 1864 and adopted as the basis for its deliberations the draft prepared by the International Committee.<sup>5</sup> On completion of its work, it adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.<sup>6</sup> The Convention contained only ten articles, but it nevertheless marked a turning point in the laws and customs of war. By proclaiming the principle that “[w]ounded and sick combatants, to whatever nation they may belong, shall be collected and cared for” and by providing protection for medical personnel on the battlefield, the Convention totally altered the possibility of coming to the succor of the war-wounded. It transformed into a rule of law something that until then had been, at best, a practice that armies respected only if they felt so inclined.

The Committee’s initiative also demonstrated that it was possible to adopt in peacetime rules that were applicable in wartime. For the first time in history, a multilateral treaty to establish rules for the future was adopted in peacetime, independently of any settlement of an earlier conflict. The Convention of 22 August 1864 thus marks the starting point of the remarkable development of international humanitarian law that has taken place since its adoption.

What part did the ICRC play in this event? Three aspects can be identified:

- The ICRC took the initiative of the treaty and sought the support of governments, particularly that of the Swiss government, which agreed to convene the Diplomatic Conference, and of Napoleon III, who supported the approaches made by the ICRC and Berne to other states.
- The ICRC prepared the draft treaty that was used as the basis for the conference deliberations.
- Even though the ICRC was not represented in its own capacity at the Diplomatic Conference, two of its members played an eminent role as delegates of Switzerland: General Dufour, who chaired the

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<sup>4</sup> Letter to the Swiss Federal Council, 26 May 1864, in *Actes du Comité international de Secours aux Militaires blessés* 15–16 (ICRC 1871) (available at ICRC library).

<sup>5</sup> *Compte rendu de la Conférence internationale pour la Neutralisation du Service de Santé militaire en Campagne, réunie à Genève du 8 au 22 août 1864*, handwritten copy at the ICRC Library, reproduced in 36 *Revue internationale de la Croix-Rouge* 416–23, 483–98, 573–86 (1954).

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864), 22 Stat 940 (1865).

conference, and Gustave Moynier, who can be considered the main architect of the Convention.

### III. THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE ADOPTION OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949

The International Committee played a similar role at the Diplomatic Conferences of 1906, 1929, and 1949, which revised the 1864 Convention and adopted several new ones, and also at the Diplomatic Conference of 1974–77, which adopted the Protocols additional to the 1949 Conventions. Because the Geneva Conventions of 12 August 1949 constitute the bedrock of the humanitarian law in force today, we should direct our attention to the ICRC's role in the process of adopting those conventions.

The International Committee did not wait for the end of the Second World War before preparing to revise the 1929 Geneva Conventions<sup>7</sup> and the Tenth Hague Convention (1907),<sup>8</sup> nor did it wait to draft a new convention to protect civilians in time of war that had been so sadly lacking during those six years of struggle.<sup>9</sup> In a memorandum dated 15 February 1945, the ICRC announced it was initiating consultations for that purpose and asked for the support of governments and National Societies in gathering the necessary documentation.<sup>10</sup> In October 1945, the ICRC convened a meeting of experts drawn from the neutral members of the Mixed Medical Commissions, which had been responsible during the war for examining sick and wounded prisoners of war and determining their eligibility for repatriation.

The ICRC submitted its proposals and first drafts to a conference of National Red Cross Societies, which met in Geneva in July and August 1946, to

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<sup>7</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929), 47 Stat 2074 (1933); Geneva Convention (II) Relative to the Treatment of Prisoners of War (1929), 47 Stat 2021 (1933).

<sup>8</sup> Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907), 36 Stat 2371 (1911).

<sup>9</sup> During the period between the wars, the ICRC prepared a draft convention to protect civilians in time of war and submitted it to the Fifteenth International Conference of the Red Cross, meeting in Tokyo in October 1934. The conference endorsed the draft and instructed the ICRC to make the necessary approaches that would lead to the adoption of a convention on the matter. The ICRC therefore forwarded the draft to the Swiss Federal Council, which undertook to consult with governments. Unfortunately, several states made it known that they opposed the idea. Further approaches were made in 1938 with a view to convening a diplomatic conference that would have met at the beginning of 1940. The outbreak of the World War II put paid to the project.

<sup>10</sup> *Memorandum adressé par le Comité international de la Croix-Rouge aux Gouvernements des États parties à la Convention de Genève et aux Sociétés nationales de la Croix-Rouge*, 27 *Revue internationale de la Croix-Rouge* 85 (1945).

examine the conventions and other questions relating to the Red Cross. A total of 145 delegates from 45 National Societies attended the conference, as well as representatives of the ICRC and the League of Red Cross Societies.<sup>11</sup> In April 1947, the Committee consulted the Conference of Government Experts for the study of the conventions protecting war victims. This meeting brought together seventy experts appointed by the governments of fifteen countries.<sup>12</sup>

On the basis of the conclusions reached by the two preparatory conferences and of other consultations, the ICRC formulated four draft conventions relating to the wounded and sick in armies in the field, the wounded, sick, and shipwrecked in armed forces at sea, prisoners of war, and civilians in time of war.<sup>13</sup> The ICRC submitted the draft conventions to the Seventeenth International Conference of the Red Cross, meeting in Stockholm in August 1948; the draft conventions were referred to the Legal Commission, which examined them article by article and approved them with only minor amendments.<sup>14</sup> The Stockholm Conference also declared that “these drafts, in particular the new convention on the protection of civilians, correspond to the fundamental aspirations of the peoples of the world” and recommended that “all governments meet at the earliest possible moment in Diplomatic Conference for the adoption and signature of the texts now approved.”<sup>15</sup> The ICRC revised the draft conventions to take account of the remarks of the Stockholm Conference and transmitted them to the Swiss government, depositary of the Geneva Conventions, which forwarded them to the governments of all countries invited

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<sup>11</sup> International Committee of the Red Cross, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross (Geneva, July 26–August 3, 1946)* (1947). Founded in 1919 at the initiative of Henry Pomeroy Davison, President of the War Council of the American Red Cross, the League of Red Cross Societies was a federation of National Societies. In 1991, the League changed its name to International Federation of Red Cross and Red Crescent Societies.

<sup>12</sup> International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14–26, 1947)* (1947).

<sup>13</sup> Seventeenth International Conference of the Red Cross (Stockholm, Aug 1948), *Draft Revised or New Conventions for the Protection of War Victims, Established by the International Committee of the Red Cross with the Assistance of Government Experts, Red Cross National Societies and Other Humanitarian Associations*, Doc No 4a (ICRC 1948); Seventeenth International Conference of the Red Cross, *Draft Revised or New Conventions for the Protection of War Victims, Addenda and Amendments*, Doc No 4A (ICRC 1948) (cyclostyled document).

<sup>14</sup> Seventeenth International Red Cross Conference (Stockholm, Aug 1948), *Report* (Swedish Red Cross 1948); Seventeenth International Conference of the Red Cross, *Sténogramme des séances de la Commission juridique and Résumé des débats des sous-commissions de la Commission juridique* (Aug 1948) (cyclostyled documents).

<sup>15</sup> Seventeenth International Red Cross Conference (Stockholm, August 1948), *Report*, Resolution XIX at 92–93 (cited in note 14).

to take part in a diplomatic conference to be held the following year.<sup>16</sup> The ICRC also sent the governments concerned a document entitled *Remarks and Proposals Submitted by the International Committee of the Red Cross*, containing a number of considerations resulting from its most recent research on the subject.<sup>17</sup>

Convened by the Swiss government, the Diplomatic Conference opened in Geneva on 21 April 1949 in the presence of 277 delegates representing 59 governments. Experts from the ICRC and the League of Red Cross Societies were allowed to take part, while representatives of the United Nations and of various specialized organizations were invited as observers. The work of the Conference was carried out by four main committees, which appointed sub-committees or working groups as and when they felt it necessary to do so. The drafts finalized by the Main Committees were then examined and adopted by the Plenary Assembly of the Conference. The Conference ended with the adoption of four revised or new conventions for the protection of war victims:

- The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;<sup>18</sup>
- The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;<sup>19</sup>
- The Geneva Convention Relative to the Treatment of Prisoners of War;<sup>20</sup> and
- The Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>21</sup>

All four Conventions bear the date of 12 August 1949 and entered into force in 1950.

What part did the ICRC play in the process leading up to the adoption of the new Geneva Conventions?

We have seen that it was the ICRC that took the initiative in calling the consultations without waiting for the fighting to end. It was the ICRC that organized and chaired both the Conference of Experts from National Red Cross

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<sup>16</sup> International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Red Cross Conference* (1948).

<sup>17</sup> International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals Submitted by the International Committee of the Red Cross, Document for the Consideration of Governments Invited by the Swiss Federal Council to Attend the Diplomatic Conference at Geneva, 21 Apr 1949* (1949).

<sup>18</sup> (1949), 6 UST 3114 (1956).

<sup>19</sup> (1949), 6 UST 3217 (1956).

<sup>20</sup> (1949), 6 UST 3316 (1956).

<sup>21</sup> (1949), 6 UST 3516 (1956).

Societies and the Conference of Government Experts and that prepared the initial drafts of the revised or new conventions. It was the ICRC that presented those drafts to the Seventeenth International Conference of the Red Cross. The conference discussed them, amended them, albeit slightly, and, above all, expressed its support for the ICRC drafts by recommending that all governments meet in diplomatic conference to approve them. The ICRC then revised its drafts to take account of the recommendations of the Stockholm Conference and forwarded them to the Swiss government, which was responsible for convening the Diplomatic Conference; it was those drafts that were used as the basis for the deliberations of the Conference. Finally, the ICRC attended the Diplomatic Conference in its expert capacity.<sup>22</sup> Its representatives participated in the work of the plenary meetings, the committees, and the working groups. They were given the task in particular of introducing the draft articles as they came up for discussion and were invited to take part in the deliberations. There is thus no doubt that the ICRC played a leading role in the adoption of the 1949 Conventions in force today.

#### IV. THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTION OF 12 AUGUST 1949

In the process of drafting the Additional Protocols, the ICRC played a role largely comparable with the one it had played during the drafting of the 1949 Conventions, except on one point: in 1949, it was the ICRC that took the initiative in the consultation process, while in the case of the Additional Protocols, the International Conference on Human Rights, meeting in Tehran in 1968, provided the initial impetus.<sup>23</sup> The ICRC doubted that a world deeply divided by the Cold War could possibly reach agreement on a revision of humanitarian law, but equally it felt that it could not abdicate responsibility for the task that people were trying to assign it. Nor could the ICRC relinquish to other institutions the role it had assumed for more than a century in the domain of the codification and development of humanitarian law. Its legal experts therefore went back to the drawing board. The most elementary prudence required, however, that nothing be done that would undermine the 1949 Conventions. In those conditions, the aim could only be to supplement those

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<sup>22</sup> Because of the Soviet Union's hostility towards it, the ICRC had to wait until just before the opening ceremony of the Diplomatic Conference before receiving confirmation that it could attend, since the Swiss Federal Council feared that the Soviet government might use the presence of the ICRC as an excuse to decline to take part in the work of the 1949 Conference, just as it had declined, for other reasons, to attend the 1929 Conference. Catherine Rey-Schyrer, *Les Conventions de Genève de 1949: une percée décisive*, 81 *Intl Rev Red Cross* 209, 209–39, 499–529, in particular see pages 232 and 234 (1999).

<sup>23</sup> International Conference on Human Rights (Tehran, Apr 22–May 13, 1968), *Resolution XXIII*, in *Final Act of the International Conference on Human Rights*, Doc A/CONF 32/41 at 18 (UN 1968).

Conventions by means of Additional Protocols. In other respects, we find once again the functions performed earlier: the ICRC organized and chaired the consultations between experts drawn from governments and from National Red Cross and Red Crescent Societies;<sup>24</sup> the ICRC prepared the draft Additional Protocols;<sup>25</sup> and the ICRC submitted them to the Twenty-Second International Conference of the Red Cross,<sup>26</sup> and then forwarded them to the Swiss government, which was responsible for convening the Diplomatic Conference. Its experts participated in the work of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, as they had done at the 1949 Conference.<sup>27</sup>

## V. LAW OF GENEVA AND LAW OF THE HAGUE

The adoption of the Geneva Convention of 22 August 1864 showed that it was possible to take advantage of peacetime to establish rules intended to limit the violence of war and to protect its victims. It also allowed the diplomacy of a small neutral country to achieve a major success. Those two lessons did not escape the attention of the Russian government.

Russia, at the time, was not far from a situation of undeclared war with the British Empire for the control of Central Asia and access to the Indian Ocean. Worried that the British had developed explosive bullets, Tsar Alexander II had

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<sup>24</sup> Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (The Hague, Mar 1–6, 1971), *Report on the Work of the Conference*, Doc D-O-1195b (ICRC 1971) (cyclostyled document); Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, May 24–June 12, 1971), *Report on the Work of the Conference* (ICRC 1971); Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2d Sess (Vienna, Mar 20–24, 1972), *Report on the Work of the Conference*, Doc D-1254b (ICRC 1972) (cyclostyled document); Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2d Sess (Geneva, May 3–June 3, 1972), *Report on the Work of the Conference* (ICRC 1972) (two volumes).

<sup>25</sup> International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (1973); International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (1973).

<sup>26</sup> *Resolution XIII*, in *Resolutions Adopted by the XXIIInd International Conference of the Red Cross*, 14 Intl Rev Red Cross 19, 30 (1974); International Committee of the Red Cross, *Report on the Study by the XXIIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, Doc CDDH/6 (1974) (cyclostyled document).

<sup>27</sup> *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977)* (Federal Political Department, Bern 1978) (seventeen volumes). On 8 June 1977, the Conference adopted two additional protocols: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 ILM 1391 (1977); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 16 ILM 1442 (1977).

the idea of outlawing their use in his armies. Fearful, however, of putting his troops at a disadvantage if he deprived them of a fearsome weapon, he decided that he would prohibit their use only if the other sovereigns would do likewise. The Imperial Cabinet therefore convened a conference that resulted in the adoption of the Declaration of St. Petersburg of 29 November/11 December 1868, which lays down the fundamental principles of the law of war and prohibits the use of explosive projectiles weighing less than 400 grams.<sup>28</sup>

That Declaration marks the starting point of a new body of law intended to limit the evils of war by regulating the methods and means of combat. The main stages of this development were the Brussels Conference of 1874, which adopted a Declaration concerning the Laws and Customs of War,<sup>29</sup> and the Hague Peace Conferences of 1899 and 1907, which adopted a series of treaties relating to the conduct of hostilities on land and at sea.<sup>30</sup>

The Third Peace Conference, which should have been held in 1914, could not meet because of war. But states found other opportunities to reaffirm and develop the rules relating to the conduct of hostilities. We may cite in particular the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925;<sup>31</sup> the Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at The Hague on 14 May 1954;<sup>32</sup> the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972;<sup>33</sup> the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or

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<sup>28</sup> St. Petersburg Declaration of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, in International Committee of the Red Cross, *Handbook of the International Red Cross and Red Crescent Movement* 296–97 (ICRC 13th ed 1994).

<sup>29</sup> *Actes de la Conférence réunie à Bruxelles, du 27 juillet au 27 août 1874, pour régler les lois et coutumes de la guerre*, reproduced in De Martens, 4 *Nouveau Recueil général de Traités, Second Series* 1–228 (1879). For Henry Dunant's role in the project to convene the Brussels Conference and the way that initiative was taken up by the cabinet in St Petersburg the reader may refer to Y. de Pourtalès and R.-H. Durand, *Henry Dunant, Promoter of the 1874 Brussels Conference, Pioneer of Diplomatic Protection for Prisoners of War*, 15 *Intl Rev Red Cross* 61 (1975); Roger Durand, *Les prisonniers de guerre aux temps héroïques de la Croix-Rouge*, in *De l'utopie à la réalité: Actes du Colloque Henry Dunant tenu à Genève au palais de l'Athénée et à la chapelle de l'Oratoire les 3, 4 et 5 mai 1985* at 225–97 (cited in note 1).

<sup>30</sup> *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (Oxford 1920) (Division of International Law of the Carnegie Endowment for International Peace, trans); 1–3 *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (Oxford 1920) (Division of International Law of the Carnegie Endowment for International Peace, trans) (three volumes).

<sup>31</sup> (1925), 26 UST 571 (1975).

<sup>32</sup> 249 UN Treaty Ser 240 (1954).

<sup>33</sup> (1972), 26 UST 583 (1975).

to Have Indiscriminate Effects of 10 October 1980;<sup>34</sup> the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 13 January 1993;<sup>35</sup> and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, concluded at Ottawa on 18 September 1997.<sup>36</sup>

Because the 1899 and 1907 Hague Conventions are still the mainstay of the law governing the conduct of hostilities, it has become customary to refer to the “law of The Hague” to describe the set of rules relating to the conduct of hostilities, while the expression “law of Geneva” is used to describe the set of rules dealing with the protection of war victims, as set forth in the Geneva Conventions in particular. Although victims are as much the central focus of one set of rules as of the other, the means used to protect them under the law of The Hague differ, to some extent, from those of the Geneva Conventions. Unlike the Geneva Conventions, which primarily aim to protect the victim once affected (the wounded, the shipwrecked, prisoners of war, or civilians in the power of the adverse party), the law of The Hague aims mainly to protect combatants and non-combatants by restricting the methods and means of combat. In a sense, one might view the law of The Hague as working “upstream” from the law of Geneva and emphasizing mainly prevention. The law of The Hague and the law of Geneva converged with the adoption of the two Protocols Additional to the Geneva Conventions of 12 August 1949, which brought up to date and developed not only the rules relating to the protection of war victims, but also those governing the conduct of hostilities.<sup>37</sup>

While the ICRC has been and still is the driving force behind the development of the law of Geneva, its contribution to the development of the law of The Hague seems much more modest. The ICRC did not attend the 1868 St. Petersburg Conference; nor was it represented at the two Hague Peace Conferences.<sup>38</sup> It was not until after the First World War that the ICRC took the first initiatives in an effort to appeal to states to reinstate or supplement the rules

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<sup>34</sup> S Treaty Doc No 103-25 (1993).

<sup>35</sup> S Treaty Doc No 103-21 (1993).

<sup>36</sup> 36 ILM 1507 (1997).

<sup>37</sup> The International Court of Justice underlined the merger of these areas of law:

These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 (July 8, 1996).

<sup>38</sup> As far as we know, the ICRC was not invited to attend the 1868 Conference in St. Petersburg, nor the 1899 and 1907 Hague Peace Conferences. However, Mr. Édouard Odier, a member of the ICRC, attended the First Peace Conference as a member of the Swiss delegation.

relating to the conduct of hostilities. In a letter of 22 November 1920 to the president and members of the first Assembly of the League of Nations, the ICRC asked for the adoption of a series of measures intended to make war less inhuman, particularly restrictions on aerial warfare to military objectives exclusively, the absolute prohibition of asphyxiating gases, the prohibition of bombing of open or undefended cities, and the prohibition of the deportation of the civilian population.<sup>39</sup>

In addition, the ICRC put these issues before the Tenth International Conference of the Red Cross, meeting in Geneva from 30 March to 7 April 1921. The Conference endorsed the ICRC's proposals without hesitation and demanded in particular "the absolute prohibition of the use of gas as a means of combat."<sup>40</sup>

The ICRC continued its efforts to bring about the prohibition of chemical weapons, particularly following the Washington Conference on the Limitation of Armament.<sup>41</sup> In the end, it was the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, meeting in Geneva from 4 May to 17 June 1925, that deserved the credit for reinstating the prohibition of poisonous weapons, by adopting the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.<sup>42</sup> As far as we know, the ICRC played no direct part in that final phase of the negotiations.<sup>43</sup> There is, however, no doubt that the ICRC was instrumental in the adoption of the Protocol by its appeals, by its approaches to governments and by mobilization of public opinion.<sup>44</sup> We dare not imagine what the Second World War would have been without the Protocol.

After the 1949 Conventions were adopted, the ICRC renewed its efforts to bring about the development of rules relating to the conduct of hostilities. It

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<sup>39</sup> Letter from the International Committee of the Red Cross to the Assembly of the League of Nations, *Limitation de la guerre*, ICRC Archives, File No B CR 82, reproduced in 24 *Revue internationale de la Croix-Rouge* 1348 (1920).

<sup>40</sup> International Committee of the Red Cross, *Dixième Conférence internationale de la Croix-Rouge réunie à Genève du 30 mars au 7 avril 1921*, Res XII, in 3 *Revue internationale de la Croix-Rouge* 330, 336–37 (1921).

<sup>41</sup> Letter from Gustave Ador to Charles Evans Hughes, Secretary of State of the United States (16 February 1922), reproduced in 38 *Revue internationale de la Croix-Rouge* 161 (1922).

<sup>42</sup> Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 26 UST 571 (cited in note 31).

<sup>43</sup> Isabelle Vonèche Cardia, Note for the record, *Protocole de 1925* (Apr 26, 2001) (ICRC Archives, File No 141.2-1).

<sup>44</sup> "[T]he ICRC, in 1917, took the lead in a movement of opinion which was to lead to a protocol, known as the Geneva Protocol of 17 June 1925, prohibiting the use of chemical and bacteriological weapons." André Durand, *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima* 262 (Henry Dunant Institute 1984); see also id at 89–96.

could not help but be concerned by the imbalance between the law of Geneva, which the 1949 Diplomatic Conference had brought completely up to date, and the law of The Hague, which had remained in the state in which the 1907 Conference had left it. Ten years after the destruction of Coventry and five years after Hiroshima, the rules relating to aerial bombing still dated from the era of the airship.

In an appeal of 5 April 1950 entitled "Atomic Weapons and Non-directed Missiles," the ICRC pointed out that protection was not feasible within the radius affected by the atomic bomb. The use of this weapon instituted an entirely new conception of war that made it impossible to respect the main principles of humanitarian law. The ICRC appeal also pointed out that "the suffering caused by the atomic bomb is out of proportion to strategic necessity; many of its victims die as a result of burns after weeks of agony . . ." The ICRC therefore requested the governments signatory to the 1949 Geneva Conventions to take "as a logical complement to [those] Conventions . . . all steps to reach an agreement on the prohibition of atomic weapons, and in a general way, of all non-directed missiles."<sup>45</sup>

To support its words with action, the ICRC convened a conference of experts in 1954 to examine the legal issues relating to the protection of civilian populations and other war victims against the dangers of aerial warfare and against the use of weapons of mass destruction, and it prepared, with the help of particularly well qualified experts, a draft set of rules for the limitation of the dangers incurred by the civilian population in time of war. The resulting draft convention aimed at four goals: reinstating the principle of the immunity of civilian populations from the effects of war, which had been flouted outrageously throughout the Second World War; defining military targets, which were the only ones that could legally be attacked; stipulating the precautions to be taken in planning an attack; and prohibiting target-area bombing and also weapons whose harmful effects, particularly by the dispersion of incendiary, chemical, bacteriological, radioactive, or other agents could escape from the control of those who employed them and endanger the civilian population.<sup>46</sup>

The draft rules were submitted to the Nineteenth International Conference of the Red Cross, meeting in New Delhi in October and November 1957.

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<sup>45</sup> *International Committee of the Red Cross—To the High Contracting Parties Signatory to the Geneva Conventions for the Protection of the Victims of War. Atomic Weapons and Non-directed Missiles*, 3 *Revue internationale de la Croix-Rouge* English Supplement 70 (1950). It should be noted that the ICRC had already raised the issue of a possible prohibition of nuclear weapons in an appeal launched on 5 September 1945, less than one month after Hiroshima. *La fin des hostilités et les tâches futures de la Croix-Rouge*, 27 *Revue internationale de la Croix-Rouge* 657 (1945).

<sup>46</sup> *Réunion d'experts pour la protection juridique des populations civiles*, 36 *Revue internationale de la Croix-Rouge* 255 (1954); International Committee of the Red Cross, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* (2d ed 1958).

Discussion focused on the issue of the prohibition of atomic weapons. The ICRC draft was attacked by both the Soviet delegation, which demanded an outright ban on nuclear and thermonuclear weapons, and the Western countries, which denounced as illusory any ban on the use of certain weapons not supported by general disarmament and effective control measures. In the end, the Conference instructed the International Committee to refer the draft to governments for consideration.<sup>47</sup> That finished it off.

It was ten years before the ICRC decided to return to the drawing board. From 1969 onwards, it held consultations that led to the adoption of the Protocols additional to the Geneva Conventions, which brought up to date much of the law of the conduct of hostilities. It also participated in the drafting of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 (“Convention on Certain Conventional Weapons”)<sup>48</sup> and the adoption of the Protocols to that Convention, and also in the adoption of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (“Ottawa Convention”) concluded on 18 September 1997.<sup>49</sup>

The Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross, meeting in Geneva in October 1986, draw no distinction between the law of Geneva and the law of The Hague as far as the competence of the ICRC in the domain of the development of international humanitarian law is concerned.<sup>50</sup> The recent Review Conference of the Convention on Certain Conventional Weapons acknowledged the expertise and role of the ICRC in matters relating to the development of rules governing the conduct of hostilities. The Conference’s final declaration, adopted on 21 December 2001, recognized “the crucial role of the International Committee of the Red Cross” and encouraged it “to continue to work to facilitate further ratifications and accessions to the Convention and

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<sup>47</sup> Resolution XIII, in *Résolutions Adoptées par la XIXe Conférence Internationale de la Croix-Rouge*, 39 *Revue internationale de la Croix-Rouge* 679, 684–85 (1957); Nineteenth International Conference of the Red Cross (New Delhi, Oct–Nov 1957), *Final Record Concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* (ICRC 1958) (cyclostyled document).

<sup>48</sup> Alongside the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, meeting in Geneva from 1974 to 1977, the ICRC held two conferences of government experts on the use of conventional weapons: the first met in Lucerne from 24 September to 18 October 1974, and the second in Lugano from 28 January to 26 February 1976.

<sup>49</sup> Louis Maresca and Stuart Maslen, eds, *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross* (Cambridge 2000).

<sup>50</sup> Article 5.2(g) of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986, in *Handbook of the International Red Cross* at 422 (cited in note 28).

its annexed Protocols, to disseminate their contents and to lend its expertise to future Conferences and other meetings related to the Convention and its annexed Protocols.”<sup>51</sup>

## VI. ICRC OPERATIONS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

Can the ICRC also make a contribution to the development of international humanitarian law through its initiatives aimed at providing protection and assistance to war victims?

There is no doubt that it can. Indeed, even if we were to suppose that the ICRC is not qualified to contribute through its operations on the ground to the development of international humanitarian law<sup>52</sup>—a hypothesis that we, for our part, are not prepared to concede—the fact remains that states do respond to ICRC initiatives, which thereby contribute to the development of international humanitarian law. Two examples illustrate this influence: the extension of the use of the red cross sign at sea and the creation of neutralized zones in war on land.

The Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, signed at The Hague on 18 October 1907, reserved for hospital ships the exclusive right to use the red cross emblem at sea.<sup>53</sup> During the Second World War, however, the rampant shortages in Germany and occupied Europe obliged the ICRC to institute a major aid campaign to feed

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<sup>51</sup> Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, Dec 11–21, 2001), *Final Document*, UN Doc CCW/CONF.II/2 at 9 (2001), available online at <<http://disarmament2.un.org/ccw/ccwmeetings.html>> (visited Mar 28, 2004).

<sup>52</sup> The matter at issue here, of course, is the legal personality of the ICRC. On this point, the reader may refer to the following works: Julio A. Barberis, *El Comité internacional de la Cruz Roja como sujeto del derecho de gentes*, in Christophe Swinarski, ed, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 635 (ICRC and Martinus Nijhoff 1984); Christian Dominicé, *La personnalité juridique internationale du CICR*, in Swinarski, ed, *Studies and Essays* at 663; Denise Plattner, *Le statut du délégué du CICR sous l'angle du principe de l'inviolabilité de sa personne*, in Swinarski, ed, *Studies and Essays* at 761; Paul Reuter, *La personnalité juridique internationale du Comité international de la Croix-Rouge*, in Swinarski, ed, *Studies and Essays* at 783; Christian Koenig, *Observer status for the International Committee of the Red Cross at the United Nations: A Legal Viewpoint*, 31 *Intl Rev Red Cross* 37 (1991); Christian Dominicé, *L'accord de siège conclu par le Comité international de la Croix-Rouge avec la Suisse*, 99 *Revue générale de Droit international public* 5 (1995) (English summary at 36); Giovanni Distefano, *Le CICR et l'immunité de juridiction en droit international contemporain: fragments d'investigation autour d'une notion centrale de l'organisation internationale*, 12 *Revue suisse de droit international et de droit européen* 355 (2002); Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* at 954–72 (cited in note 1).

<sup>53</sup> Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (cited in note 8).

allied prisoners of war in German hands. Since the necessary supplies could not be acquired in Europe, the only solution was to import them from overseas. To provide transport across the Atlantic, the ICRC chartered several ocean-going vessels, which of course raised the issue of protecting and distinguishing those vessels. The ICRC arranged to obtain the safe conducts needed, and to obtain the agreement of the belligerents to distinguish the vessels by displaying the red cross emblem. The ICRC also gained the consent of the belligerents to use the red cross emblem to distinguish the Swedish vessels assigned to the aid campaign in Greece. As a result, the ICRC vessels carried more than 450,000 tons of aid destined for allied prisoners of war in the hands of the Axis forces, while the Swedish vessels carried more than 700,000 tons of supplies to be used to feed the population of Greece, which was suffering a terrible famine. The red cross emblem was also used to distinguish vessels assigned to operations to repatriate the war wounded.<sup>54</sup>

The 1949 Diplomatic Conference condoned this extension of the use of the red cross sign by authorizing the ICRC and the League of Red Cross Societies to use the red cross sign at all times. Article 44 of the First Geneva Convention thus stipulates: “The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the Red Cross on a white ground.”<sup>55</sup>

Zones of refuge provide the second example. During the period between the two world wars, a number of conventions intended to establish hospital or safety zones were drafted under the auspices of associations of military doctors and the ICRC. None of the drafts resulted in an agreement, and aerial bombing devastated the civilian population throughout the Second World War. Alarmed by the development of aerial warfare, the ICRC organized further consultations of experts on this issue after the war and inserted into the draft convention on the protection of civilians a clause providing for the possibility of setting up zones of refuge so as to better protect the civilian population against the effects

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<sup>54</sup> International Committee of the Red Cross, *Report of the “Foundation for the Organization of Red Cross Transports” on Its Operations since Its Inception in April 1942 up to 31st December 1946, Delivered to the International Committee of the Red Cross, Geneva, in March 1947* (1947); International Committee of the Red Cross, *3 Report of the International Committee of the Red Cross on Its Activities during the Second World War (September 1, 1939–June 30, 1947): Relief Activities* 127–65 (1948); *Rapport final de la Commission de Gestion des Envois de Vivres du Comité international de la Croix-Rouge (Octobre 1941–août 1942)*, prepared by its liquidator, Mr. Évangélos Papastratos, Commission de Gestion des Envois de Vivres du Comité international de la Croix-Rouge, Athens (Mar 1945); *Ravitaillement de la Grèce pendant l’occupation 1941–1944 et pendant les premiers cinq mois après la libération: Rapport final de la Commission de Gestion pour les Secours en Grèce sous les auspices du Comité international de la Croix-Rouge* (Société hellénique d’Édition SA 1949).

<sup>55</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 UST at 3144 (cited in note 18).

of hostilities.<sup>56</sup> In accordance with the recommendations of the experts, the draft article provided for the establishment of relatively permanent zones at a distance from the front.

When the Palestine conflict broke out, the ICRC drew the attention of its delegates to the draft article, and it was at the time of that conflict that the first zones of refuge under the control and responsibility of the International Committee were created. From the moment the United Nations adopted the plan for the partition of Palestine, it was clear that fighting would break out when the mandatory power withdrew, as announced, on 15 May 1948. The area most coveted—and most seriously threatened—was obviously Jerusalem, with its Arab and Jewish population of 150,000. On 24 March the ICRC delegate proposed that safety zones be established in which the civilian population could find refuge in case of need and tried to secure the agreement of both parties.<sup>57</sup> On 13 May 1948 the ICRC delegation announced that three safety zones had been established:

- Zone I: buildings and compounds of the King David Hotel, the YMCA (Young Men's Christian Association) building, and the Terra Santa Convent;
- Zone II: buildings and compounds of Government House (the headquarters of the British mandate administration), the Arab College and the Jewish Agricultural School;
- Zone III: buildings and compounds of the Italian School and the Italian Hospital.

It was proposed that the neutralized buildings and compounds would be indicated and their limits clearly shown by means of the red cross emblem; that only women, children, and the aged, without distinction of race, religion, or nationality, would be admitted to the safety zones; and that they would be given only temporary asylum, while fighting was actually taking place. The ICRC would be responsible for the general supervision of the safety zones. The Arab and Jewish authorities agreed to these arrangements.<sup>58</sup>

In fact, Zone III never really came into existence. Zone I, where the ICRC delegation had its headquarters, was respected until the first truce came into force on 11 June 1948. The ICRC could only announce that Zone I would cease to exist on 22 July, shortly after resumption of fighting.

The neutrality of Zone II was generally respected in spite of a serious incident in August 1948. In October, realizing that there was no longer any need for this zone, the ICRC ended it, and, with the agreement of the parties to the

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<sup>56</sup> Draft Convention Relative to the Protection of Civilian Persons in Time of War art 12, in *Draft Revised or New Conventions for the Protection of War Victims* at 158–59 (cited in note 13).

<sup>57</sup> International Committee of the Red Cross, *Hospital Localities and Safety Zones* 23 (1952).

<sup>58</sup> *Id.* at 26–29.

conflict, handed over Government House to the United Nations Truce Supervision Organization (UNTSO), which still occupies it.<sup>59</sup> Thus, in spite of several incidents such as are inevitable in time of war, Zones I and II were respected throughout the battle for Jerusalem, largely because the ICRC kept one or more delegates, assisted by dedicated nurses, permanently in each. Their effective supervision of the zones gave the belligerents a firm guarantee that they were being used only for their proper purpose.

Although the number of people who actually found temporary refuge in those zones remained much lower than the ICRC had anticipated,<sup>60</sup> it would have been irresponsible not to take that experience into account in the context of the work aimed at drawing up the new Geneva Conventions. However, the neutralized zones of Jerusalem were a departure from the proposals made by the International Committee based on the conclusions of the conferences of experts that had met to discuss those issues.<sup>61</sup> While the experts had envisaged relatively permanent zones located a long way from the front, practice had led to the creation of temporary zones on the very spot where fighting was taking place. The ICRC therefore added to the draft conventions that it had communicated to states and National Societies invited to attend the Stockholm Conference, by proposing a new draft article on neutralized zones.<sup>62</sup> The outcome was Article 15 of the Fourth Convention:

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;

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<sup>59</sup> Id at 29–36.

<sup>60</sup> The ICRC delegation had made arrangements to accommodate several thousand refugees at a time, but for various reasons only a small fraction of that number took refuge in the neutral zones. ICRC Archives, file G.59/1/GC, file IV, *Guerre civile en Palestine*, Mission de M. de Reynier (box 830) and file XX, *Zones de sécurité sous pavillon CICR* (box 843); *Les Zones de Sécurité Constituées en Palestine Sous le Drapeau du Comité International de la Croix-Rouge*, 30 *Revue internationale de la Croix-Rouge* 409 (1948); *Zones sanitaires et zones de sécurité*, 33 *Revue internationale de la Croix-Rouge* 442, 469–83 (1951); *International Committee of the Red Cross: Report on General Activities (July 1, 1947–December 31, 1948)* at 105–09 (ICRC 1949); *Hospital Localities and Safety Zones* at 23–36 (cited in note 57); and monthly articles entitled *Le Comité International de la Croix-Rouge en Palestine* in the *International Review of the Red Cross* at 30 *Revue internationale de la Croix-Rouge* 329 (1948), 30 *Revue internationale de la Croix-Rouge* 456, 460–63 (1948), 30 *Revue internationale de la Croix-Rouge* 552, 558–59 (1948), 30 *Revue internationale de la Croix-Rouge* 615, 615–18 (1948), 30 *Revue internationale de la Croix-Rouge* 781 (1948).

<sup>61</sup> *Rapport relatif aux localités et zones sanitaires et de sécurité*, 28 *Revue internationale de la Croix-Rouge* 391 (1946).

<sup>62</sup> Draft Article 12(b) of the Draft Convention Relative to the Protection of Civilian Persons in Time of War, in International Committee of the Red Cross, *Draft Revised or New Conventions for the Protection of War Victims: Addenda and Amendments*, Doc No 4A at 13–14 (cited in note 13).

- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.<sup>63</sup>

In both cases, developments of international humanitarian law were the direct consequence of initiatives taken by the ICRC in conflict areas. Many more examples could be given. Indeed, the development of international humanitarian law appears to mirror, largely, ICRC operations in the field. The development of ICRC operations on the ground could perhaps truly be said to be the main driving force behind the development of international humanitarian law.

In *Prosecutor v. Tadić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly acknowledged the ICRC's contribution to the development of customary international humanitarian law:

As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavored to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions . . . .

The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.<sup>64</sup>

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<sup>63</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 UST at 3516 (cited in note 21). For the legislative history of Article 15 of the Fourth Convention (Article 12(b) of the provisional numbering used during the preparatory works), see Seventeenth International Conference of the Red Cross, *Draft Revised or New Conventions for the Protection of War Victims: Addenda and Amendments*, Doc No 4A at 13–14 (cited in note 13); XVIIe Conférence internationale de la Croix-Rouge, *Résumé des débats des sous-commissions de la Commission juridique* 51; *Revised and New Draft Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Red Cross Conference* at 117–118 (cited in note 16); 1 *Final Record of the Diplomatic Conference of Geneva of 1949* at 115–16, 300; 2-A *Final Record 1949* at 626–30, 783–86, 807, 816–17, 850; 2-B *Final Record 1949* at 190, 392; 3 *Final Record 1949* at 105–06 (Federal Political Department, Bern 1949).

<sup>64</sup> *Prosecutor v Tadić*, Case No 160 (ICTY Appeals Chamber, Oct 2, 1995), in Marco Sassòli and Antoine A. Bouvier, eds, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 1159, 1185–86, ¶ 109 (ICRC 1999).

## VII. THE ROLE OF THE ICRC TODAY

The Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross, meeting in Geneva in October 1986, stipulate that the role of the ICRC is, among others, to prepare any development of international humanitarian law.<sup>65</sup> What, specifically, does this involve?

The first requirement is to monitor the implementation of international humanitarian law. The ICRC, whose task it is to endeavor at all times to provide protection and assistance to the victims of conflicts and which is generally in daily contact with all the warring parties, is particularly well placed to observe the needs of victims and how belligerents discharge their humanitarian law obligations.

The second requirement is the need to analyze behavior so as to distinguish cases where the current rules are really inadequate from violations of international humanitarian law. When repulsive acts are committed, the natural tendency is to demand the adoption of new rules, when in fact the problem is usually a matter of violations of existing rules.<sup>66</sup> If it is found, however, that legislation is not adequate and that a development of the rules is desirable, the ICRC must start by gathering the documents and doing the research that will make it possible to demonstrate the need for a development, to identify what is being done by states and the other entities concerned, and to familiarize itself with work that may perhaps have been done outside the organization. It must organize consultations among experts from different countries and legal traditions. The purpose of the consultations should not only be to acquire the necessary expertise but also to determine whether there is sufficient political will for the successful adoption of new rules.

Based on the views of the experts, the ICRC then prepares draft articles. Before submitting them to a diplomatic conference, the ICRC has always sought the support of the International Conference of the Red Cross and Red Crescent and we noticed, for instance, the decisive support which the Seventeenth International Conference, meeting in Stockholm in 1948, expressed for the draft

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<sup>65</sup> Article 5.2(g) of the Statutes of the International Red Cross and Red Crescent Movement, in *Handbook of the International Red Cross* at 422 (cited in note 28).

<sup>66</sup> This was seen clearly when Saddam Hussein set fire to Kuwait's oil wells in February 1991, causing unprecedented atmospheric pollution. There were calls from everywhere to adopt new norms aimed at preventing a repetition of such behavior. There was even talk of the need for a fifth Geneva Convention to protect the environment in time of armed conflict. Based on a mandate given to it by the United Nations General Assembly, the ICRC organized two consultations of experts and submitted two reports to the General Assembly that made it possible to demonstrate that new codification was unnecessary.

conventions prepared by the ICRC.<sup>67</sup> The National Red Cross and Red Crescent Societies can influence their respective governments and must also be mobilized. It is undeniable that the Ottawa Convention banning anti-personnel mines could not have been adopted had the Movement not had a common position and had the National Societies not been called upon to approach their respective governments.<sup>68</sup>

Should the ICRC also appeal to public opinion? The question is a complex one. Clearly, governments will be reluctant to interest themselves strongly in a new draft humanitarian law treaty without the pressure of public opinion. On the other hand, those same governments could well withhold their support if they have the feeling that the ICRC is appealing to public opinion in order to apply pressure to them. The ICRC's margin for maneuver in this area is slim.

Since the ICRC does not have the authority to convene a diplomatic conference to revise or make additions to the Geneva Conventions, it must forward its drafts to the Swiss government, which is the depositary of the Conventions.<sup>69</sup> The role of the ICRC does not end, however, when it forwards its draft conventions to the Swiss Federal Council. ICRC representatives played an active part at the Diplomatic Conferences of 1929, 1949, and 1974–77; they were given the task, in particular, of explaining the draft articles tabled and took part in the deliberations and meetings of the plenary, the committees, or the working groups. The ICRC's role is not simply to explain the texts and to provide legal and technical expertise, important as this is to the successful

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<sup>67</sup> On the decisive role played by the International Conferences of the Red Cross and Red Crescent in the development of international humanitarian law, the reader may refer to Philippe Abplanalp, *The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement*, 35 Intl Rev Red Cross 520 (1995).

<sup>68</sup> Council of Delegates, *Resolutions of the Council of Delegates*, Res No 3: Mines, 33 Intl Rev Red Cross 488, 491–93 (1993); Council of Delegates, *Resolutions of the Council of Delegates*, Res No 10: Anti-Personnel Landmines, 36 Intl Rev Red Cross 139, 151 (1996). See also Maresca and Maslen, eds, *The Banning of Anti-personnel Landmines* (cited in note 49). The Council of Delegates of the International Red Cross and Red Crescent Movement is the body where the representatives of all components of the Movement meet to discuss matters which concern the Movement as a whole; the members of the Council are the delegations from National Societies, the ICRC, and the Federation.

<sup>69</sup> François-Charles Pictet describes the relationship in this way:

A kind of sharing of responsibility has come about: it is the task of the ICRC to take the initiative when it perceives the need for new rules of law and to formulate draft articles. Once this preparatory work has been completed, where appropriate with the help of outside experts, it is the task of the Swiss Federal Council to convene a diplomatic conference to consider the texts. Organizing and chairing such a conference is by no means a sinecure. The host country's responsibility in both material and political terms is considerable, because the country is inevitably held responsible for the success, or possibly failure, of the negotiations.

*Le CICR, sa signification pour la Suisse dans le monde d'aujourd'hui*, Assemblée des délégués (Mar 27, 1981), in *Forum Helveticum* 21, 26.

outcome of any codification process. It also has to make the voice of war victims heard at gatherings of diplomats, military personnel, and lawyers, who are concerned first and foremost with the interests of their respective governments.

When a treaty is finally adopted, it is the ICRC, once again, that is responsible for publicizing it and inviting states to become party to it.

## VIII. PROSPECTS FOR THE FUTURE

The Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Conference of the Red Cross meeting in Geneva in October 1986, stipulate that the role of the ICRC is in particular “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.”<sup>70</sup> What are the prospects today for the development of international humanitarian law?

Following the tragic events of 11 September 2001, many voices were raised, in the United States and elsewhere, questioning the relevance of international humanitarian law in the context of the fight against terrorism.

In a desire to find answers to those questions, the ICRC organized in 2003 five regional conferences of experts on international humanitarian law; they met in Cairo, Pretoria, Kuala Lumpur, Mexico, and Bruges (Belgium). The general feeling among the experts consulted, who came from every region of the world, was that international humanitarian law applicable to international armed conflicts is on the whole adequate to deal with the protection needs arising from present-day conflicts. The experts recognized that it would be desirable to enhance the protection of victims of non-international armed conflicts but did not conceal their doubts as to whether states had the political will to adopt any new rules applicable to such conflicts.<sup>71</sup>

In a declaration adopted by consensus, the Twenty-eighth International Conference of the Red Cross and Red Crescent, which met in Geneva from 2 to 6 December 2003, unequivocally recognized the relevance of international humanitarian law in today's armed conflicts.<sup>72</sup> The ICRC, for its part, has no

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<sup>70</sup> Article 5.2(g) of the Statutes of the International Red Cross and Red Crescent Movement, in *Handbook of the International Red Cross* at 422 (cited in note 28).

<sup>71</sup> Twenty-eighth International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 22 (ICRC 2003), available online at <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALFN/\\$File/Reaf%20and%20dev-Main%20report-Oct%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALFN/$File/Reaf%20and%20dev-Main%20report-Oct%202003.pdf)> (visited Mar 28, 2004).

<sup>72</sup> Twenty-eighth International Conference of the Red Cross and Red Crescent (Geneva, Dec 2–6, 2003), *Declaration*, 85 Intl Rev Red Cross 885, 888–91, and Twenty-eighth International Conference of the Red Cross and Red Crescent, *Resolution 1*, 85 Intl Rev Red Cross 885, 886–87 (2003).

draft comprehensive revision of the Geneva Conventions or their Additional Protocols in the works today. The difficulty of new codification in an international community that is deeply divided and that currently has more than 190 members is all too apparent.<sup>73</sup>

Experience shows, moreover, that developments in international humanitarian law have never occurred *durante bello* but always after the end of hostilities.<sup>74</sup> The world, however, is still in a climate dominated by the consequences of 11 September 2001.

Finally, one can never be sure that a draft codification will result in a real improvement in protection for the individual. The law of war represents a compromise between humanitarian requirements, on the one hand, and the imperatives of the conduct of hostilities, on the other. If an attempt were made to renegotiate the Geneva Conventions and their Additional Protocols in the current climate, the probable result would be an enhancement of the coercive measures available to states to guarantee their security, to the detriment of the protection of individuals.<sup>75</sup> An overall revision is therefore not on the agenda. However, the ICRC does wish to see certain specific projects succeed that address developments with clearly defined objectives. Those objectives relate in particular to certain technological developments in weaponry, where the ICRC is eager to maintain the adequacy of law in the face of technological development.

In the last few years, the ICRC has directed its efforts to the following four areas in particular:

- the prohibition of blinding laser weapons, which was achieved by the adoption on 13 October 1995 of Protocol IV to the 1980 Convention;<sup>76</sup>
- the prohibition of anti-personnel landmines, which cause atrocious damage among the civilian population, in many cases well after the

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<sup>73</sup> The mechanisms for drafting treaties are still, in the main, the same as they were at the time of the Congress of Vienna (1814–15), which brought together the representatives of eight states that all belonged to the same geographical area and all shared the same political culture and whose diplomats spoke the same language.

<sup>74</sup> It was thus the 1929 Diplomatic Conference that drew the lessons from the First World War, and the 1949 Conference that drew those from the Second World War. The wars of national liberation, which were at the heart of the deliberations of the 1974–77 Conference, were mostly over before that Conference opened.

<sup>75</sup> On the penalty for failed codification, the reader should refer to the excellent article by Professor Richard R. Baxter, *The Effects of Ill-Conceived Codification and Development of International Law*, in *En hommage à Paul Guggenheim* 146 (Faculty of Law of the University of Geneva and Graduate Institute of International Studies 1968).

<sup>76</sup> Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Protocol on Blinding Laser Weapons (Protocol IV), 35 ILM 1218 (1998).

fighting is over; the prohibition was achieved with the adoption of the Ottawa Convention on 18 September 1997;<sup>77</sup>

- the extension to non-international armed conflicts of the scope of the 1980 Convention on Certain Conventional Weapons; the extension was achieved with the adoption of the amended Article 1 on 21 December 2001;<sup>78</sup>
- the adoption of a legal instrument concerning the explosive remnants of war: every recent conflict has left on the battlefield vast quantities of unexploded ordnance, particularly because of the massive use of cluster bombs. These munitions cause devastation among the civilian population, in many cases long after the fighting is over.<sup>79</sup> A new Protocol to the 1980 Convention (Protocol V) on Explosive Remnants of War was adopted on 28 November 2003.<sup>80</sup>

With respect to the future, the ICRC is particularly concerned by three issues: anti-vehicle mines, the question of the emblem, and protections of victims of internal conflicts.

First, provided there is an adequate basis for consensus among interested governments, the ICRC is ready to conduct consultations with a view to the adoption of a legally binding instrument regulating the use of anti-vehicle mines, which continue claiming victims long after fighting is over; such a protocol could in particular specify the minimum weight necessary for detonating the mines and provide for self-neutralizing mechanisms.

Second, the ICRC would like to see adopted a draft Protocol additional to the Geneva Conventions on the emblem: we know for a fact that the

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<sup>77</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, 36 ILM 1507 (1997) (cited in note 36).

<sup>78</sup> *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Text with Amendments and Protocols Adopted through 21 December 2001* at 12–13 (ICRC 2002).

<sup>79</sup> Every explosive ammunition is normally fitted with a safety device that prevents it from exploding unexpectedly, particularly when the shot is fired or when the bomb is dropped. When the shot is fired or the bomb dropped, the safety device is unlocked; the projectile is then likely to explode on the slightest contact. Unexploded projectiles are generally more sensitive than mines. For civilians, the risk of accidents due to the presence of unexploded ordnance increases after the fighting ends, since civilians seek to resume normal life by starting to cultivate the land again, collecting firewood, letting their children play in the open, etc. That is when the unexploded ordnance—which serves no useful military purpose, even during the fighting—causes the greatest devastation.

<sup>80</sup> Item 10 of the provisional agenda, Meeting of States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 2003 Sess Geneva (27–28 November 2003) UN Doc CCW/MSP/2003/2 (2003); Louis Maresca, *Adoption of the Protocol on Explosive Remnants of War (Protocol V) by States Parties to the Convention on Certain Conventional Weapons, 17–28 November 2003*, note DC/JUR/MINA 03/163 (2003) (available in the ICRC archives).

coexistence of two emblems—the red cross and the red crescent—jeopardizes their protective value, especially in situations where the belligerents use different emblems to distinguish their medical services. Furthermore, this situation has so far prevented formal recognition and acceptance of Israel's relief society (Magen David Adom in Israel) because it uses an emblem that is not recognized by the Geneva Conventions. The consultations held in recent years, and particularly in 2000, made it possible to identify a comprehensive and lasting solution to this issue, on the basis of which it seemed possible to arrive at a consensus. The ICRC had prepared, with the help of government and Movement experts who met in a joint working group, a draft Protocol III additional to the Geneva Conventions. Agreement was about to be reached, and the Swiss government had agreed to convene a Diplomatic Conference to adopt the Protocol before the end of 2000, when the resumption of confrontations in the Middle East forced the suspension of the consultations. The ICRC and the International Red Cross and Red Crescent Movement are nevertheless determined to reach a comprehensive and lasting solution to the question of the emblem, based on the draft Protocol III, as soon as circumstances permit.<sup>81</sup>

Finally, while it is widely accepted that the law applicable to international conflicts generally meets the protection needs of the victims of those conflicts provided the rules in force are respected, it is equally certain that the rules applicable to non-international armed conflicts offer the victims of those conflicts only minimal protection. To be convinced of this one has only to compare the draft Protocol II that the ICRC submitted to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–77) with the text finally adopted by the Conference. An enhancement of the protection afforded to the victims of those conflicts would be desirable and could, for example, take the form of a set of minimum provisions that would be applicable in all circumstances and all armed conflicts, regardless of their status. It remains to be seen, however, whether states are prepared today to accept a tightening of the rules applicable to non-international armed conflicts.

## IX. CONCLUSIONS

The International Committee of the Red Cross was created to promote Dunant's two ideas: the creation of relief societies for the wounded and the adoption of a treaty to protect the wounded and anyone who endeavored to come to their aid. No one had imagined that the organization would intervene

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<sup>81</sup> Standing Commission of the Red Cross and Red Crescent, Twenty-eighth International Conference of the Red Cross and Red Crescent, *Report on the Follow-up of Resolution 3 of the 27th International Conference on the Emblem* (ICRC 2003); François Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem* (ICRC 2d ed 2003).

on the battlefield to provide protection and assistance to the victims of war, and the ICRC itself asserted for a long time that its place was not in the theatre of hostilities.<sup>82</sup> History, however, decided otherwise, and, since the time of the Franco-Prussian war of 1870, it has been the ICRC's task to play the role of a neutral intermediary between belligerents. That role has developed continuously, and today the ICRC is mainly known for its activity in conflict areas. Nevertheless, the ICRC has never renounced the mandate for which it was created, particularly where the development of international humanitarian law is concerned. That role has lost none of its importance. In fact, from the historical standpoint, one may wonder which is the more important: operations on the ground or the development of law. On the scales of history, do the 11,000 visits to places of detention that ICRC delegates made during the Second World War and the 450,000 tons of aid routed to the prisoner-of-war camps outweigh the 1929 Convention on the Treatment of Prisoners of War? The question, however, is irrelevant, because each requires the other. How effective would the delegates' work have been without the backing of the Convention? What would have been the fate of the Convention without the action taken by the delegates responsible for ensuring it was respected?

One can thus understand what makes the nature of the ICRC's work so special. It is not embodied in any particular activity—be it operations on the ground, or the development of law—but rather in the way those two foci of the ICRC's work complement each other: operations that are backed by humanitarian law, while contributing to the development of that law.

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<sup>82</sup> The Committee's reluctance is apparent from many of its own statements. During the Franco-Prussian War of 1870–71, it wrote:

On several occasions, surprise has been expressed that we have not sent a representative to the theatre of hostilities; it should be superfluous to explain . . . why we have not done so. Our place was not on the battlefield, and the [Red Cross Societies] on either side would not have been surprised by our absence. We have remained where our duty kept us, and where our presence was required by unceasing work.

*Notice sur les travaux du Comité international du 15 juillet au 30 septembre 1870*, 5 *Bulletin international des Sociétés de Secours aux Militaires blessés* 1, 12–13 (1870) (original in French). Thirty years later the Committee was to state: "The International Committee, devoid of any power whatsoever, had no authority to ensure the strict observance of those rules for whose adoption it had largely been responsible; its mission was limited to promoting those rules, and it had no intention of overstepping that limit." *La part du Comité international de la Croix-Rouge dans l'histoire de la Convention de Genève*, 124 *Bulletin international des Sociétés de la Croix-Rouge* 208, 216 (1900).

