

6-1-2004

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Recommended Citation

Dörmann, Knut and Maresca, Louis (2004) "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments," *Chicago Journal of International Law*. Vol. 5: No. 1, Article 15.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol5/iss1/15>

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The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments

Knut Dörmann and Louis Maresca*

I. INTRODUCTION

As a result of its unique status as promoter and guardian of international humanitarian law, the International Committee of the Red Cross (“ICRC”) has been closely involved in the negotiations of humanitarian law treaties. According to the Statutes of the International Red Cross and Red Crescent Movement, one of the ICRC’s roles is to help develop international humanitarian law.¹ The article by François Bugnion also published in this issue of the Journal explains in great detail the ICRC’s mandate and the legal basis for its activities in that field as well as its contribution to core treaties of that branch of law.² This essay will focus on the ICRC’s contribution to more recent negotiations leading to specialized instruments in some very important fields: limitations and restrictions on the use of certain weapons and mechanisms to repress serious violations of international humanitarian law.

The main instruments of international humanitarian law are the four Geneva Conventions of 1949³ and their two Additional Protocols of

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¹ International Committee of the Red Cross, *Handbook of the International Red Cross and Red Crescent Movement*, Statutes of the International Red Cross and Red Crescent Movement art 5.2(g) at 422 (13th ed 1994).

² François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 Chi J Intl L 191 (2004).

³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 6 UST 3115 (1956) (hereinafter Geneva Convention I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 6 UST 3217 (1956) (hereinafter Geneva Convention II); Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 6 UST 3316 (1956) (hereinafter Geneva Convention III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), 6 UST 3516 (1956) (hereinafter Geneva Convention IV).

1977.⁴ These treaties cover the core aspects of international humanitarian law: protections for certain persons and property that are, or may be, affected by international or non-international armed conflict, as well as general limitations on the methods and means of warfare (the law on the conduct of hostilities). International humanitarian law is, however, not limited to these instruments. Other treaties deal with more specific issues, such as restricting the use of certain weapons. The following sections discuss the ICRC's involvement in the development and negotiations of the Convention on the Prohibition of Anti-personnel Mines and of the Rome Statute establishing the International Criminal Court as case studies.⁵ They provide a good indication of the varied and dynamic functions played by the ICRC in the development of international humanitarian law.

II. THE CONVENTION ON THE PROHIBITION OF ANTI-PERSONNEL MINES

The adoption of the Convention on the Prohibition of Anti-personnel Mines⁶ in 1997 was the result of an unprecedented effort by governments, international and non-governmental organizations, public personalities, and private individuals to end the suffering caused by these weapons. Rarely has such a broad coalition directed the development of international humanitarian law. Along with the International Campaign to Ban Landmines ("ICBL"), the ICRC played a lead role in the Convention's evolution.⁷ The ICRC's efforts in this area encompassed its traditional role as a source of expertise on the law and on the realities in war-affected areas, and also presented new approaches to inform and motivate political authorities and the public at large.⁸

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Adopted by the Conference on 8 June 1977, 16 ILM 1391 (1977) (hereinafter Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Adopted by the Conference on 8 June 1977, 16 ILM 1442 (1977) (hereinafter Additional Protocol II).

⁵ The authors were involved in these negotiations and the ICRC's work on these issues.

⁶ Its full name is the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, 36 ILM 1507 (1997) (hereinafter Ottawa Convention).

⁷ For an overview of the work of the various components of the international movement against anti-personnel mines, see Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin, eds, *To Walk without Fear: The Global Movement to Ban Landmines* (Oxford 1998).

⁸ 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); Jean-Philippe Lavoyer and Louis Maresca, *The Role of the ICRC in the Development of International Humanitarian Law*, 4 Intl Negotiation 501 (1999).

A. THE DEVELOPMENT OF THE CONVENTION

Anti-personnel landmines have been widely used in modern armed conflicts, and their humanitarian impact has been severe and often long-lasting. While they may have a military value when laid in preparation for or during hostilities, these weapons remain active long after the fighting ends. As a result, they have killed and injured large numbers of civilians. The presence of these weapons has also contaminated farmland, impeded reconstruction and the return of refugees and displaced persons, and hindered humanitarian work.

The ICRC's efforts to limit the effects of landmines began as early as 1956.⁹ Yet the first international rules on these weapons did not become binding until the entry into force of the Convention on Conventional Weapons ("CCW") in 1983.¹⁰ In addition to prohibiting the use of fragments not detectable by X-ray (Protocol I) and limiting the use of incendiary weapons (Protocol III), the CCW also established restrictions on the use of landmines, booby-traps, and other similar devices (Protocol II) in order to minimize their post-conflict consequences.

Despite the rules of Protocol II, civilian casualties rose dramatically in the late 1980s. Humanitarian organizations, including the ICRC, began treating large numbers of landmine victims. Many of the casualties occurred during periods when no fighting was taking place or after the hostilities had ended. In response to growing pressure from non-governmental organizations, the CCW state parties agreed to convene the First Review Conference to review and to strengthen the provisions of Protocol II. Prior to the start of the Conference, many organizations were calling for a complete prohibition on anti-personnel mines, the main source of the problem. Yet following negotiating sessions in 1995 and 1996, and in spite of the fact that some forty governments also supported a ban, the state parties agreed only on increased restrictions on the use of anti-personnel mines, requirements that anti-personnel mines have self-destruct or self-neutralization features, that rules be adopted for their clearance after the end of active hostilities, and that other measures be taken to lessen the danger to civilians, peacekeepers, and humanitarian operations.

⁹ In the *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, (Geneva 2d ed 1958), first published in 1956, the ICRC voiced concern about the effects of landmines following the end of hostilities. Article 15 of the Rules required parties to the conflict to chart minefields and provide these charts to the opposing side or authorities following the end of hostilities. Although presented at the XIXth International Red Cross Conference in 1957 and sent to states for comment, no action was ever taken to develop them into a binding instrument.

¹⁰ 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, 19 ILM 1523 (1980).

Many governments and humanitarian organizations considered the new instrument, Protocol II (as amended on 3 May 1996) disappointingly inadequate to reduce the number of civilian landmine casualties. Not only did the Protocol still permit the continued use of anti-personnel mines, but it included an ambiguous definition of “anti-personnel mine,” relied almost exclusively on self-destruct and self-neutralization mechanisms, and permitted states to delay implementation of these requirements for up to nine years. A number of states and the ICRC, the ICBL, and other organizations continued to push for a comprehensive ban treaty.

Dissatisfied with this result, the Government of Canada took the initiative by inviting countries and organizations supporting a ban to Ottawa, Canada to develop strategies aimed at eliminating these weapons.¹¹ At this meeting, fifty governments committed themselves to a plan of action to ensure that a ban treaty was concluded at the earliest possible date and to increase resources for mine clearance and mine-victim assistance. At the closing of this conference, the Canadian government challenged all states to return to Ottawa in December 1997 to sign a treaty prohibiting the production, stockpiling, transfer, and use of anti-personnel mines.

The formal follow-up to the 1996 Ottawa meeting took place in Brussels, Belgium. Representatives of 154 countries attended the *Brussels International Conference for a Global Ban on Anti-personnel Mines*—the largest gathering of governments to date for a conference devoted specifically to the issue of landmines.¹² On the closing day, ninety-seven governments signed the Brussels Declaration calling for the convening of a diplomatic conference in Oslo to negotiate a treaty banning anti-personnel mines.

Formal treaty negotiations took place from 1 to 18 September 1997 at the *Oslo Diplomatic Conference on an International Total Ban on Anti-personnel Land Mines*. Ninety-one countries took part in the negotiations as full participants and thirty-eight countries were present as observers, as were the ICRC, the ICBL, and the United Nations. Negotiations were successful, and on 18 September the Ottawa Convention¹³ was adopted. One hundred twenty-three states signed the Convention at a ceremony held on 3 to 4 December 1997 in Ottawa. As of 1 February 2004, 141 states are parties to the instrument.

The Convention contains the comprehensive ban on anti-personnel mines that was called for by many of the organizations working in countries affected by these weapons. It prohibits the use, production, stockpiling, and transfer of anti-personnel mines (Article 1) and requires state parties to destroy their anti-

¹¹ The conference, *Towards a Global Ban on Anti-personnel Mines*, took place in Ottawa, Canada, 3–5 October 1996.

¹² The conference was held 24–27 June 1997.

¹³ Cited in note 6.

personnel mine stockpiles (Article 4) and to clear territory contaminated by these weapons (Article 5). It also contains provisions to eliminate the suffering caused by anti-personnel mines. All state parties in a position to do so must also provide assistance for mine clearance, mine awareness, and victim assistance (Article 6).

B. THE ROLE OF THE ICRC

Much as it participated in the development of the Geneva Conventions of 1949 and the 1977 Additional Protocols, the ICRC was closely involved in the work to address the anti-personnel mine problem in the First CCW Review Conference.¹⁴ The ICRC began consulting with experts about the problem in 1993, and in April of that year it organized a major international meeting of independent experts from armed forces, industry, medical circles, humanitarian agencies, non-governmental organizations, and the UN to examine the problem and the possible means to address it. The report of this meeting, the Montreux Symposium, was sent to governments and became an important reference for future work.¹⁵

Preparations for the Review Conference began in 1994. State parties requested the establishment of a group of government experts to examine ways to address the landmine problem. The ICRC was invited to participate as an observer and was subsequently requested to prepare a background document outlining “[t]he rationale for amending and the ways and means of improving Protocol II of the Convention, as well as the military and humanitarian perspectives concerning the amendment of Protocol II of the Convention.”¹⁶

¹⁴ The ICRC was also involved in the development of the CCW. It hosted a series of expert meetings in the 1970s to look at the question of conventional weapons. The proposals and reports from these meetings became the starting point for the discussions and negotiations of the CCW. See Maresca and Maslen, eds, *The Banning of Anti-personnel Landmines* at 19–89 (cited in note 8).

¹⁵ International Committee of the Red Cross, *Symposium on Anti-personnel Mines, Montreux 21–23 April 1993: Report* (Geneva 1993).

¹⁶ *Progress Report of the Group of Governmental Experts to Prepare the 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*, UN Doc CCW/CONF.I/GE/4 (1994), which can be found in UN Doc CCW/CONF.I/16 at 70 (1996). A letter sent by the state parties to the Secretary-General of the United Nations, dated 22 December 1993, states that the working group should consist of “Governmental experts designated by States non Parties to the Convention.” Id at 66. It added that “representatives of the International Committee of the Red Cross could participate in the work of the group as observers.” Id.

The ICRC report was submitted to the Group of Governmental Experts in April 1994.¹⁷ In addition to the urgent work on anti-personnel mines, the document outlined other issues that might be considered by the Review Conference. These included expanding the CCW's scope of application, creating a mechanism to monitor compliance, a new protocol on blinding laser weapons, and requirements to reduce the occurrence of unexploded submunitions. Of these proposals, the main focus of the Group and the Review Conference was anti-personnel mines and blinding laser weapons.¹⁸

Throughout the expert meetings and the Review Conference itself, the ICRC participated as an observer. In this capacity it made formal interventions, submitted proposals on a variety of issues, and commented on the submissions made by states and other organizations. It sought to ensure that the work and the results of the Conference would be in accordance with and would not weaken the existing principles and rules of international humanitarian law, would meet the needs of mine victims and mine-affected communities, and would prevent the use of anti-personnel mines in future conflicts.

The Ottawa process was much different than the CCW negotiations. The states and organizations involved agreed on the need for a comprehensive prohibition on anti-personnel mines. As a result of the work done in the CCW, many of the issues related to a ban had already been examined and discussed. Thus, the Ottawa process focused on identifying the elements that a comprehensive ban treaty should contain and creating the political climate most likely to encourage widespread support and adherence to a ban treaty.

Similar to its role in the CCW, the ICRC participated in the Ottawa process as an observer.¹⁹ It continued to contribute its expertise in international humanitarian law and its experience in both treating landmine victims and operating in mine-affected areas, and it commented extensively on the draft texts

¹⁷ Adopted as "[t]he rationale for amending and the ways and means of improving Protocol II of the Convention as well as the military and humanitarian perspectives concerning the amendment of Protocol II of the Convention," prepared by the International Committee of the Red Cross. UN Doc CCW/CONF.I/GE/6 (1996).

¹⁸ In addition to the amendment of Protocol II, the CCW Review Conference adopted an additional Protocol on Blinding Laser Weapons (Protocol IV). 35 ILM 1218 (1996). This protocol prohibits the use and transfer of laser weapons that cause permanent blindness. Just as it was involved in the negotiation process of amended Protocol II, the ICRC was involved in the development of this new Protocol. It organized four expert meetings to collect information and provided documentation to the Review Conference. A compilation of the reports is published in Louise Doswald-Beck, ed, *Blinding Weapons: Reports of the Meetings of Experts Convened by the International Committee of the Red Cross on Battlefield Laser Weapons, 1989-1991* (ICRC 1993). See also, Louise Doswald-Beck, *New Protocol on Blinding Laser Weapons*, 36 Intl Rev Red Cross 272 (1996).

¹⁹ In addition to the diplomatic conferences held in Brussels and Oslo, meetings to develop various elements of a draft text were also held 12 to 14 February 1997 in Vienna and 24 to 25 April 1997 in Bonn.

of the treaty. Throughout the process, the ICRC asserted the following: the treaty must contain an unambiguous definition of an anti-personnel mine; the treaty must be comprehensive by banning the use, production, stockpiling, and transfer of anti-personnel mines; and the treaty must contain provisions on the need for victim assistance, mine clearance, and mine awareness. While the ICRC welcomed the inclusion of mechanisms to monitor implementation, it did not want verification issues to hinder the establishment of a clear norm against the weapons. As reflected in the final text adopted in Oslo, the Convention successfully addressed many of these areas.

An unusual feature of the ICRC's work on anti-personnel mines was its advocacy campaign to help create public and political support for a comprehensive ban treaty, conducted in close cooperation with National Red Cross and Red Crescent Societies. This was the first time that the ICRC had engaged in public promotion for the development of international humanitarian law. Launched in December 1995, the campaign combined elements of the ICRC's traditional role of providing expert information to governments with dissemination of information to the general public. Its goal was to raise awareness about the effects of mines, the needs of mine victims, and the desirability of a ban treaty. It also sought to stigmatize anti-personnel mines in the public conscience so that their use would be viewed, by governments, the military, and the general public, as abhorrent, just as the use of poison gas is now considered an outrage.

The campaign had three elements. The first was the provision of expertise to the discussions taking place in international, regional, and national fora. The ICRC's medical and legal experts participated in meetings throughout the world. The second element was the dissemination of campaign materials, both specialist and layman's publications, on the human costs of landmines. The ICRC published and distributed large quantities of documents on the humanitarian, legal, medical, and rehabilitative aspects of the landmine problem. It also commissioned a study on the military utility of landmines, examining the benefits and problems of their use from a military perspective.²⁰ This study was particularly effective in prompting discussions in military circles and promoting a re-appraisal of these weapons.

The final, and most unusual, element of the campaign was the use of mass media. Print and television ads were produced and placed throughout the international media on a pro bono basis. The ads not only focused on the need for a ban treaty but were also used to increase awareness about the plight of mine victims and solicit support for victim assistance programs. National societies also placed the ads in national media. In total, twelve print advertisements and four television commercials were produced. The media

²⁰ International Committee of the Red Cross, *Anti-personnel Landmines: Friend or Foe?* (1996).

space donated was estimated to be in excess of four million Swiss francs, with a potential audience of over seven hundred million people. ICRC delegations in war-affected countries also assisted journalists in their efforts to examine the landmine problem.²¹

The public advocacy conducted by the ICRC and campaigns conducted by other organizations such as the ICBL highlighted the important role that public opinion can play in the development of international humanitarian law. Public pressure was a vital element in creating the political will necessary for action against anti-personnel mines among governments and armed forces. Such a global and concerted effort has rarely been seen in the development of new rules on the conduct of warfare.

Through its efforts in the development of the Convention on the Prohibition of Anti-personnel Mines, the ICRC acted within its mandate to work for the faithful application and development of humanitarian law. In many respects its role was traditional: acting as a facilitator for the development of the law, providing expert legal and medical advice, and sharing a perspective gleaned from working closely with the victims of armed conflict—all expected ICRC activities. But its public advocacy was a new element, which served to focus, in a rapid and dynamic manner, public attention on a major humanitarian crisis. In the view of the ICRC, this media campaign had a major influence on the conclusion and wide ratification of the Convention.

The Convention on the Prohibition of Anti-personnel Mines is just one weapons issue about which the ICRC has been active. As mentioned above, the ICRC also played a role in the development of the Protocol on Blinding Laser Weapons in 1995 (Protocol IV to the CCW). More recently, it was one of the principal organizations behind the creation and adoption of the Protocol on Explosive Remnants of War adopted in 2003 (Protocol V to the CCW). It has also launched an initiative on Biotechnology, Weapons, and Humanity to reduce the risk that developments in biotechnology can be used to the detriment of humankind.

III. INTERNATIONAL CRIMINAL COURT (“ICC”)

The negotiations leading to the establishment of the ICC are another example of considerable ICRC involvement in the development of international humanitarian law. Why were these negotiations important to the ICRC? It believes that it is essential for international humanitarian law—as well as for any

²¹ Most notable was the visit of Princess Diana to Angola in January 1997. The British Red Cross organized and arranged the visit through the ICRC delegation in Luanda. The ICRC and other organizations often took journalists of both the electronic and print media to medical treatment centers and rehabilitation clinics to speak with victims and to put them in touch with other humanitarian organizations working in the area.

other body of law—to be properly respected and applied in practice. There are certainly various ways of ensuring this,²² but it is obvious that a law that is not supported by sanctions is generally difficult to enforce. Impunity for the most serious violations is therefore clearly unacceptable.

Existing treaties of international humanitarian law prior to the Rome Statute establishing the ICC placed the responsibility to enact legislation and to provide for effective penal sanctions on the individual state parties. The Geneva Conventions and Additional Protocol I specifically require states parties to repress grave breaches of international humanitarian law, which are considered war crimes. In accordance with the respective provisions, state parties are obliged to search for persons alleged to have committed, or to have ordered to be committed, such breaches and to bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, hand such persons over for trial to another state party.²³ For other breaches of the Conventions and of Protocol I, the state parties must take the measures needed to suppress them. In spite of these rules, however, states rarely fulfilled their duty to provide for or exercise their jurisdiction. Regardless of the appeals made by the ICRC and others asking states to comply with their obligations under the Geneva Conventions and Additional Protocol I, the situation remained static. Until the mid-1990s, the vast majority of war crimes trials were limited to crimes committed during the Second World War.

The creation of international tribunals was a solution to this rather unsatisfactory situation. With the establishment of two ad hoc tribunals, one for serious violations committed in the territory of the former Yugoslavia since 1991 (“ICTY”),²⁴ and the other for serious violations committed in Rwanda or by Rwandan citizens between 1 January 1994 and 31 December 1994 (“ICTR”),²⁵ the situation improved slightly. Because these ad hoc tribunals were of limited geographical and temporal scope, the international community felt the need for a permanent international criminal court. The idea for such a court was as old as

²² The treaties of international humanitarian law provide for mechanisms and procedures for ensuring compliance with their provisions. Some of these mechanisms are the designation of Protecting Powers (Geneva Convention I art 8; Geneva Convention II art 8; Geneva Convention III art 8; Geneva Convention IV art 9; Additional Protocol I art 5), the institution of an enquiry (Geneva Convention I art 52; Geneva Convention II art 53; Geneva Convention III art 132; Geneva Convention IV art 149), the International Fact-Finding Commission (Additional Protocol I art 90), and cooperation with the UN (Additional Protocol I art 89) and the ICRC (for example Geneva Convention I art 9; Geneva Convention II art 9; Geneva Convention III art 9, 126; Geneva Convention IV art 10, 143; Additional Protocol I art 81). See full citations in notes 3 and 4.

²³ Geneva Convention I art 49; Geneva Convention II art 50; Geneva Convention III art 129; Geneva Convention IV art 146; Additional Protocol I art 85. See full citations in notes 3 and 4.

²⁴ International Criminal Tribunal for the former Yugoslavia.

²⁵ International Criminal Tribunal for Rwanda.

the United Nations itself.²⁶ Efforts to create one were part of the work of the UN International Law Commission for many years, but without success. This inertia was largely due to the existence of the Cold War and the highly controversial question of defining the crime of aggression. Yet with the end of the Cold War and the many atrocities committed in Rwanda and the former Yugoslavia, the idea of a permanent court gained momentum.

The ICRC strongly supported the goal of creating a permanent international court.²⁷ It hoped that such a court would overcome the situation at that time, when the repression of serious violations required a national willingness and ability to prosecute, elements which were often illusory. In order to garner wide support for the establishment of an international criminal court, the ICRC brought the issue to the International Conference of the Red Cross and Red Crescent in 1995,²⁸ which urged states to increase international efforts to establish permanently an international criminal court (Res. 2), and to the Council of Delegates in 1997.²⁹ Along with many states and organizations, the ICRC and the National Societies of the Red Cross and Red Crescent followed and supported the negotiations and adoption in 1998 of the Rome Statute establishing the ICC.

A. PREPARATORY WORK AND THE DIPLOMATIC CONFERENCE IN ROME

The ICRC was active throughout the process of negotiating the Rome Statute. It had observer status at the various preparatory meetings and at the diplomatic conference that negotiated and adopted the Statute. The ICRC's main concerns were war crimes, which directly relate to international humanitarian law.³⁰ Thus it paid particular attention to the definitions of these crimes. It took the view that the ICC's jurisdiction must cover all grave breaches of the Geneva Conventions as well as of Additional Protocol I. Moreover, it believed that other serious violations of international humanitarian law, in particular those committed in non-international armed conflicts, must also be included. In the ICRC's view, this was essential to giving the ICC the

²⁶ Eric David, *Principes de droit des conflits armés* 673 (Brussels 2d ed 1999).

²⁷ The ICRC's association with the concept of international criminal justice is as old as the ICRC itself: ICRC founder Gustave Moynier first proposed an international criminal court 140 years ago.

²⁸ Members of the International Conference of the Red Cross and Red Crescent include the recognized national Red Cross and Red Crescent societies, the International Federation of the Red Cross and Red Crescent Societies, and the ICRC, as well as all state parties to the Geneva Conventions.

²⁹ The Council of Delegates is composed of the three components of the International Red Cross Movement mentioned in note 28.

³⁰ See Lavoyer and Maresca, 4 *Intl Negotiation* at 517–25 (cited in note 8).

appropriate tools to end impunity for crimes committed in the majority of contemporary armed conflicts. Taking into account the legislative developments in many states since the early 1990s, the decisions made in the Statute for the Rwanda Tribunal³¹ and the case law of the ICTY,³² the exclusion of war crimes from the Rome Statute committed in non-international armed conflicts would have been a major setback.

In addition to these substantive matters, and with a view to making the ICC truly effective, the ICRC was particularly interested in making the exercise of the ICC's jurisdiction effective and in ensuring the independence of the prosecutor.³³ With these aims in mind, it tried to convince states of its positions through official statements in formal and informal meetings, networking, and lobbying. Moreover, in 1997, the ICRC prepared a draft list of war crimes, together with a commentary for the February session of the Preparatory Committee, and submitted a paper entitled *State Consent Regime vs. Universal Jurisdiction*.³⁴

The diplomatic conference in Rome was strongly influenced by the extremely active and productive role played by some 230 non-governmental organizations.³⁵ There is no doubt that their activities had an important influence on the group of like-minded states supporting the establishment of an effective court. Many of the ICRC's concerns and interests were shared by states and NGOs and thus its views fell on fertile ground.

In retrospect, it may be difficult to assess what concrete impact the specific work of ICRC had on the outcome. It may, however, be safe to say that the ICRC's expertise in international humanitarian law influenced in a significant

³¹ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 art 4, 1 Intl Crim Trib Rwanda YB 77, 93 (1994–96).

³² See, for example, *Prosecutor v Tadic*, Case No IT-94-1-AR72, 1 Judicial Rep Intl Crim Trib for the Former Yugoslavia 352 (Kluwer Law Intl 1999) (Appeals Chamber, decision on the defense motion for interlocutory appeal on jurisdiction).

³³ For the ICRC positions taken prior to the Rome Diplomatic Conference, see International Committee of the Red Cross, *Establishing an International Criminal Court: Towards the End of Impunity*, available online at <<http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList320/3479A9BCD756A7D4C1256B66005B6966>> (visited Mar 2, 2004).

³⁴ Available online at <<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList320/F460C74CA18E5F5C1256B66005C27D5>> (visited Mar 2, 2004). For additional discussion, see Marie-Claude Roberge, *The New International Criminal Court: A Preliminary Assessment*, 325 Intl Rev Red Cross 671 (1998).

³⁵ The ICRC worked actively with them but nevertheless preserved its traditional neutral and independent stance in doing so. While the NGOs were generally more outspoken, the ICRC relied more on its habitual quiet but firm humanitarian diplomacy. See Lavoyer and Maresca, 4 Intl Negotiation at 519 (cited in note 8).

way the final list of war crimes adopted. Regrettably, not all serious violations of international humanitarian law have been included in Article 8 of the Statute—namely, some grave breaches of Additional Protocol I were not retained. But most of the crimes in the 1997 ICRC proposal found their way into the Statute. The inclusion of crimes committed in non-international armed conflicts was a particular success. It clearly confirmed the acceptance of individual criminal responsibility for serious violations of international humanitarian law committed in non-international armed conflicts, a consensus that developed in the early 1990s.

As always in international negotiations, the treaty adopted is a compromise between opposing positions. One such compromise, which may have implications on ensuring compliance with international humanitarian law in the future, was the article of the Statute that allows states to avoid the prosecution of their nationals for war crimes committed on its territory for seven years after the Statute's entry into force for that state. The ICRC regretted this decision because it conveys an impression that war crimes are not as serious an offence as genocide or crimes against humanity, for which an opt-out is not possible.³⁶ Thus far, the vast majority of states that have become a party to the Rome Statute have refrained from invoking this option. It is hoped that states not yet party to the Statute will follow their example and that those which have made such a declaration will withdraw it when they realize that the ICC is properly serving the interests of justice.³⁷

B. THE WORK OF THE PREPARATORY COMMISSION IN THE CONTEXT OF THE ELEMENTS OF CRIMES

Following the adoption of the Rome Statute, other related instruments needed to be negotiated in order to make the future court operational. These instruments included the rules of procedure and evidence as well as the elements of crimes ("EOC"). The Preparatory Commission for the International Criminal Court ("PrepCom") was mandated to draft these instruments by 30 June 2000. In September 2002 the Assembly of States Parties adopted the documents, which the PrepCom had approved by consensus, without further substantive debate. Articles 6 (crime of genocide), 7 (crimes against humanity), and 8 (war

³⁶ See Yves Sandoz, Statement on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Final Plenary Meeting, Rome, 18 July 1998, available online at <<http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList320/2AF2C3E7FE528BE2C1256B66005BCA8F>> (visited Mar 28, 2004) (speaking as head of the delegation of the International Committee of the Red Cross).

³⁷ Among the ninety-two state parties to the Rome Statute, only Colombia and France have made a declaration under article 124, see <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>> (visited Mar 28, 2004).

crimes) of the Rome Statute set out lists of crimes over which the Court will have jurisdiction, including some fifty war crimes.³⁸ With a view toward providing greater certainty and clarity concerning the content of each crime, Article 9 was added. It states that the “Elements of Crimes shall assist the Court in the interpretation and application of Arts. 6, 7, and 8. They shall be adopted by . . . the members of the Assembly of States Parties.”³⁹ On the basis of that rule, the EOC will guide the future judges and will therefore be of crucial importance for the work of the ICC in the interpretation of the provisions on crimes.

The ICRC had observer status and was active throughout the negotiating process of the PrepCom. The negotiations on the elements of war crimes were of particular interest, given the ICRC’s mandate. Its main objective was to ensure that the elements properly reflected existing international humanitarian law. To that end, the ICRC lobbied extensively. It was consistently called upon by state delegations to give expert advice in formal and informal consultations. Thus it was able to share its views directly with negotiating states.

In order to assist the PrepCom’s drafting of the elements of war crimes, the ICRC researched and prepared a study of existing case law and of the instruments of international humanitarian and human rights law. The aim of the study, which was submitted in seven parts, was to provide government delegations with the necessary legal background. The study proved to be a crucial working tool throughout the negotiations and was repeatedly cited as the reference text guiding the discussion. The study was officially submitted to the PrepCom at the request of seven states (Belgium, Costa Rica, Finland, Hungary, Republic of Korea, South Africa, and Switzerland).⁴⁰

³⁸ Rome Statute of the International Criminal Court, 37 ILM 99 (1998) (hereinafter Rome Statute).

³⁹ Rome Statute art 9.

⁴⁰ Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, South Africa and Switzerland Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (a), of the Rome Statute of the International Criminal Court*, UN Doc PCNICC/1999/WGEC/INF.1 (1999); Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (b), (c) and (e) of the Rome Statute of the International Criminal Court*, UN Doc PCNICC/1999/WGEC/INF.2 (1999); Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (b), (i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (xi) and (xii), of the Statute*, UN Doc PCNICC/1999/WGEC/INF.2/Add.1 (1999); Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (b), (c) and (e) of the Rome Statute of the International Criminal Court*, UN Doc

Costa Rica, Hungary, and Switzerland used the results of the study to present their own text proposals for EOC during the PrepCom negotiations.⁴¹ As pointed out by the Chairman of the PrepCom and current president of the ICC, Judge Philippe Kirsch, “[t]he ICRC not only contributed the jurisprudential study, but carried on to play a pivotal role in the Elements negotiations. . . . The imprimatur of the ICRC can be seen throughout the Elements of Crimes.”⁴²

The ICRC was encouraged to publish its study of existing case law and as a result prepared a commentary on the Elements of War Crimes⁴³ that is essentially an update of the study submitted to the PrepCom.⁴⁴ The purpose of that commentary is to provide judges, prosecutors, and lawyers at the national and international level with the background information needed to implement international humanitarian law properly in the future prosecution of war crimes listed in the Rome Statute. It should be kept in mind that neither the definition of the crimes in the Rome Statute nor the document on EOC as adopted by the PrepCom provides the complete picture necessary for an accurate interpretation of the crimes. For example, both the Statute and the EOC use certain legal terms (such as “attack,” “military objective,” or “civilian population”) without defining them. However, the treaties of international humanitarian law, from which the crimes derive, do contain specific definitions. Judges, prosecutors, and defense lawyers will therefore have to look to these treaties of international humanitarian law for clarifications. The commentary indicates where to find these definitions, in case law and other sources, and so may aid practitioners. Given that the PrepCom left certain controversial issues unresolved and that the EOC therefore amounts to more or less a reproduction of the Statute’s wording, it will be necessary to consult these other sources. The commentary also

PCNICC/1999/WGEC/INF.2/Add.2 (1999); and Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Rome Statute of the International Criminal Court*, UN Doc PCNICC/1999/WGEC/INF.2/Add.3 (1999). The study was based on an extensive analysis of international and national war crimes trials. It reviewed existing case law from the Leipzig trials and from post-Second World War trials (including the Nuremberg and Tokyo trials), as well as national case law and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Available national case law on war crimes was also studied.

⁴¹ Another comprehensive text proposal was made by the USA. Both text proposals guided the negotiations.

⁴² Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* xiv (Cambridge 2003) (with contributions by Louise Doswald-Beck and Robert Kolb).

⁴³ *Id.*

⁴⁴ Since completion of the initial study for the PrepCom, substantial jurisprudence has emerged from the ad hoc tribunals for the former Yugoslavia and Rwanda.

contains a short description of the negotiating history or *travaux préparatoires* for further guidance.

C. ICRC ADVISORY SERVICE, PROMOTION, ASSISTANCE IN NATIONAL IMPLEMENTATION, ETC.

International humanitarian law treaties need to be universalized and properly implemented at the national level if they are to be effective. Through its Advisory Service on International Humanitarian Law, the ICRC promotes the ratification of treaties of international humanitarian law and encourages states to prepare and enact national legislation and other necessary measures to apply these treaties at the national level. Its activities consist of producing ratification kits, organizing regional meetings to inform participants about the implications of a particular treaty, sharing information on how best a treaty can be implemented, producing practical guidelines and model legislation, and exchanging information among states. ICRC legal experts provide states with technical assistance, for example, on legislation to prosecute war criminals as required by the various international humanitarian law instruments,⁴⁵ to implement the requirements of the Convention on the Prohibition of Anti-personnel Mines, and to protect the Red Cross and Red Crescent emblems.⁴⁶ A databank on national measures of implementation has been set up and is accessible on the ICRC website.⁴⁷

IV. CONCLUSIONS

The strength and the specific role of the ICRC lie in its mandate, which is composed of two important aspects: protecting and assisting victims of armed conflicts on the one hand, and serving as a promoter and guardian of international humanitarian law on the other. Through its operations in conflict situations, the ICRC identifies the concrete problems that victims face in their daily lives, which allows it to assess their protection needs and draw conclusions for a possible need to develop the law.

⁴⁵ See Geneva Convention I art 49; Geneva Convention II art 50; Geneva Convention III art 129; Geneva Convention IV art 146; Additional Protocol I art 85. See full citations in notes 3 and 4. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices as Amended on 3 May 1996 (Protocol II) art 14, 35 ILM 1209 (1996); Ottawa Convention art 9, 36 ILM 1507 (1997); Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art 28, 249 UN Treaty Ser 215 (1954), and its Second Protocol art 15–17, 38 ILM 769 (1999).

⁴⁶ Geneva Convention I art 54; Geneva Convention II art 45; Additional Protocol I art 18. See full citations in notes 3 and 4.

⁴⁷ See <<http://www.icrc.org/ihl-nat>> (visited Mar 28, 2004).

If it comes to the conclusion that such a need exists, the ICRC will collect relevant documentation, identify relevant legal issues, and, usually with the aid of experts from governments, national Red Cross and Red Crescent societies, and other institutions, prepare texts to be submitted to a diplomatic conference. During such conferences the ICRC usually participates as an observer and shares its expertise with negotiating states. In addition, the ICRC has often served as a facilitator, raising awareness about international humanitarian law with governments, the military, and the general public.

All these various functions were important elements of the ICRC's involvement in a variety of weapons restrictions negotiations and in relation to the establishment of the ICC. As shown in its public advocacy work on anti-personnel mines, the ICRC can also employ a dynamic and proactive approach to creating public and political support for international humanitarian law developments.