

TWENTY-SIXTH INTERNATIONAL CONFERENCE
OF THE RED CROSS AND RED CRESCENT

Budapest, November-December 1991

**REAFFIRMATION AND DEVELOPMENT
OF INTERNATIONAL HUMANITARIAN LAW**

**INFORMATION CONCERNING WORK ON
INTERNATIONAL HUMANITARIAN LAW
APPLICABLE TO WAR AT SEA**

(Item 6.2 on the provisional agenda of the
Commission on International Humanitarian Law)

Document drawn up
by
the International Committee of the Red Cross

Geneva, 1991

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1. Background

Resolution VII of the Twenty-fifth International Conference of the Red Cross noted that "some areas of international humanitarian law relating to sea warfare are in need of reaffirmation and clarification on the basis of existing fundamental principles of international humanitarian law" and appealed to "governments to coordinate their efforts in appropriate fora in order to review the necessity and the possibility of updating the relevant texts of international humanitarian law relating to sea warfare".

This text was motivated by the fact that although the law relating to land warfare has been reaffirmed in recent treaties, in particular the two Protocols of 1977 additional to the Geneva Conventions of 1949, this has not been the case as regards the law on the conduct of hostilities at sea. The last treaties on this subject date from 1907 and one in 1936 which only cover a few specific issues and which have been rendered outdated in some respects by developments in technology and new practices. There is therefore a certain degree of uncertainty as to the present law, particularly as operations at sea differ from those on land in some important ways.

Further, the customary law that developed prior to the first world war made an appropriate balance between military and humanitarian needs that suited naval practices of the nineteenth century and this balance still needs to be respected with rules that are modified to be applicable in modern conditions.

2. Developments since the Twenty-fifth International Conference of the Red Cross

Developments have taken place both on the national level and by meetings of experts from different countries. This report will refer to the most important developments in the international humanitarian law of sea warfare of which the ICRC is aware at this date (end May 1991), and is not, therefore, exhaustive.

2.1. National developments

Some states have since 1986 prepared or further developed military manuals which include sections on the law of sea warfare and which reflect those states' perception of the present state of customary law.

The most notable of these is the publication in 1987 of the United States Commanders Handbook on the Law of Naval Operations (NWP 9), which is a manual

devoted principally to the law of sea warfare. An annotated supplement to this manual was published in 1989 (NWP 9 (Rev. A)/FMFM 1-10).

There are further some draft manuals, not yet published, that contain important sections on naval warfare. The ICRC has been informed of the following drafts:

- United Kingdom: JSP 383 Joint Service Manual on the Law of Armed Conflict
- Germany: Humanitarian Law in Armed Conflicts ZDv 15/2
- Canada: Canadian Forces Law of Armed Conflict Manual
- Italy: Manual of International Law for Naval Officers
- Sri Lanka; International Law Governing the Conduct of Naval Warfare

There are in addition other States that have begun to draft new military manuals containing sections on the law of naval warfare.

Coordination of national measures

The ICRC is aware of a number of efforts of coordination by governments with experts from other States in the development of the law of naval warfare:

- The USA invited comments from experts on its manual, some of which could be given prior to publication of the Annotated Supplement to the manual. In addition, a number of scholars from different countries have been asked to write their views on certain aspects of the manual, and these papers will be published by the Naval War College (Newport, USA).
- The Judge Advocate General's office of Canada sent comments on the US manual at the beginning of 1991, and Canada intends to use these comments, together with the NWP 9, as guidance for its own commanders until Canada's own manual is completed.
- The Swedish Government will be holding a small informal meeting of experts in June 1991 to discuss the Swedish Draft Protocol on sea mines, earlier versions of which have been presented in United Nations fora. This draft is proposed by the Swedish Government as a possible additional Protocol to the 1980 Convention on conventional weapons.

- The German Government is hosting a meeting in October 1991 to which it has invited, in their personal capacity, governmental experts from twenty countries, and experts from the ICRC and the International Institute of Humanitarian Law of San Remo. The purpose of this meeting is to examine its draft manual, so that the text might be improved before publication. As indicated above, this draft manual has an important section on the law of naval warfare.
- A number of governmental experts are attending, in their personal capacity, the series of meetings organised by the International Institute of Humanitarian Law of San Remo for the clarification and modernisation of the law of armed conflict at sea. This is described in the section of this report on international meetings of experts and is reported on in more detail in the annexed report of the International Institute of Humanitarian Law.
- There have been a number of national symposia at which governmental, military and academic personnel analysed the present condition of the law of naval warfare, for example, at Brest (France) on 15-16 October 1987.

2.2. International meetings of experts

A number of meetings have taken place since 1986 at which experts were gathered to consider the present state of the law of sea warfare. We may mention in particular a symposium organised by the Naval War College, Newport, USA, on 1-3 February 1990 which considered the question of targeting merchant shipping and which gathered US naval personnel, as well as academic and military personnel from North America and Europe. The law of armed conflict at sea has also been the subject of discussion at the American Society of International Law, a panel in 1988 having been devoted to the legality of the types of force at sea used during the Iran/Iraq conflict and the Lieber Group in 1989 and 1990 considering developments in the law of naval warfare.

The International Committee of the Red Cross participated in these meetings as well as a number of others which included a study of humanitarian law applicable to armed conflicts at sea.

The most consistent study of this question, however, is one undertaken by the International Institute of Humanitarian Law of San Remo, in cooperation with a number of other bodies. The International Committee of the Red Cross actively participates in this study

which began in 1987. A large number of governmental experts also participate in their personal capacity as well as academic personnel. Yearly meetings have been held since 1987 and will continue to do so with the aim of producing a document reflecting the present state of international customary law and including certain proposals where the law is controversial or uncertain. These meetings have gathered experts from a large number of countries; analytical reports and commentaries are prepared for each meeting and conclusions of the discussions are drafted. More detail of the work of this study is contained in the annexed report of the International Institute of Humanitarian Law. It may be noted that the discussions and conclusions of these meetings have already helped some governments with their assessment of the law when drafting their own manuals.

The Twenty-seventh International Conference of the Red Cross and Red Crescent will be informed of the results of this effort and in particular of the final document drafted as well as of possible further actions.

INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW

Report of the
study on the international law
of armed conflict at sea.

May 1991

The International Institute of Humanitarian Law began a series of meetings in 1987 for the purpose of studying the present law of armed conflict at sea. These meetings are now in a process of drafting a document that reflects the conclusions of these meetings as to the present content of customary law, based on recent state practice, and also incorporating some suggestions. The experts participating in these meetings, many of whom are from Ministries of Defence and Ministries of Foreign Affairs, all attend in their personal capacity. Each stage of the work will now be briefly described and then an indication will be given as to the work still to be undertaken.

San Remo 15-17 June 1987

This initial meeting was organised in cooperation with the Institute of International Law of the University of Pisa (Italy) and Syracuse University (USA). It gathered forty-three persons from academic and governmental backgrounds from twenty countries. The purpose of that initial meeting was to have a general discussion on a number of fundamental questions in order to assess which areas need further study. The subjects discussed in that meeting were, in particular, the law of armed conflict at sea in the context of the *jus ad bellum*, the impact of the present law of the sea, the problem of new technologies in sea warfare, certain difficulties relating to humanitarian protection of victims at sea, and implementation. That meeting adopted a resolution which recalled certain basic principles and decided that a study should be undertaken to apply these principles to the regulation of armed conflict at sea. A number of factors were then listed that should be taken into account in such a study.

Madrid 26 - 29 September 1988

This second meeting was organised in cooperation with the Spanish Red Cross, and was attended by forty persons from twenty countries. It discussed a number of subjects and then considered the best method of continuing the study in future meetings. This was incorporated in a Plan of Action adopted at the meeting.

The Plan of Action and organisation of subsequent meetings

It was decided at Madrid that the most constructive approach would be to attempt to identify areas of agreement on certain fundamental aspects of the law of sea warfare and to consider some proposals where the law is uncertain or controversial. The Plan of Action foresees the careful discussion of selected subjects per meeting and the recording of the conclusions of the

meeting in a document. The method to be followed is also indicated to some extent in the Plan of Action, foreseeing in particular yearly meetings of five days each, carefully prepared in advance.

Bochum 10 - 14 November 1989

This meeting was organised in cooperation with the Institute for International Peace-Keeping Law and Humanitarian law of Bochum University, and with the German Red Cross in the Federal Republic of Germany.

The subject considered was the first indicated in the Madrid Plan of Action, namely, the military objective and the principle of distinction in the law of naval warfare. The meeting was attended by thirty-three participants from seventeen countries.

The procedure adopted in this meeting yielded good results and has therefore been followed in subsequent meetings. The rapporteur for this meeting was Commander W. Fenrick (Office of the Judge Advocate General, Canada) who submitted a substantial and thorough report on the subject. The participants were then invited to write short comments on the report which were distributed before the meeting. The meeting itself, which lasted five days, subdivided the work in accordance with the major sections in Commander Fenrick's report, namely, general principles, ships and aircraft exempt from attack, when enemy merchant ships or neutral merchant ships may or may not be attacked, and ruses of war and perfidy at sea. There was also a special working session devoted to identification which was considered a useful background to the legal discussions. A "sub-rapporteur" was appointed for each subject who introduced each working session by summarising the main points of the rapporteurs' report, outlining the main points in the participants' comments to the report and suggesting the most constructive method of discussing the subject. A working group then drafted numbered paragraphs on the rules that were agreed to be customary law during the discussions and also included proposals agreed during the meeting. Proposals which are not presently accepted customary law are clearly indicated in the document as innovative. The draft of the working group was discussed on the last day by all participants and some modifications made.

Results of the Bochum meeting

The results of this meeting was a document of thirty-seven numbered paragraphs divided into seven sections as follows:

- A. Basic rules: includes the basic rules of distinction, proportionality and precautions in attack as well as a definition of military objectives.
- B. Protected enemy vessels: lists vessels that are protected from attack and specifies the conditions for such protection.
- C. Protected enemy aircraft: lists aircraft that are protected from attack and specifies the conditions for such protection.
- D. Merchant vessels of States not party to the conflict: indicates the basic rule that such merchant vessels cannot be attacked and then lists certain exceptions to this rule.
- E. Enemy merchant vessels: indicates that enemy merchant vessels can only be attacked if they meet the definition of a military objective and gives certain indications as to activities that are liable to render such merchant ships military objectives.
- F. Enemy warships and military aircraft.
- G. Perfidious conduct and ruses of war: lists certain types of behaviour that would constitute perfidy at sea.

It was decided by the participants that the contents of the document are provisional as certain parts of the text may need to be adjusted as a result of later discussions. The text will therefore not be distributed in its present condition, but the whole document will be shown once the series of meetings are concluded.

Toulon 19 - 23 October 1990

This meeting was organised in cooperation with the Institut Méditerranéen d'études stratégiques of the University of Toulon and with the French Red Cross.

The subject considered was the second indicated in the Madrid Plan of Action, namely, methods and means of combat in naval warfare. The meeting was attended by thirty participants from sixteen countries.

The rapporteur for this meeting was Drs. G.J. Van Hegelsom from the Netherlands Ministry of Defence and the meeting divided the subject into the following sections for discussion; general principles, the use of sea mines, the use of long-distance weapons, in particular torpedoes and missiles, precautions to be taken by weapon carriers, the use of blockade and the creation of special zones at sea by belligerents.

Results of the Toulon meeting

The meeting drafted a document of forty numbered paragraphs divided into five sections as follows:

- A. General Principles: includes principles of law prohibiting the employment of means or methods of warfare that cause superfluous injury or unnecessary suffering or which are indiscriminate, and the prohibition of the denial of quarter.
- B. Precautions in attack: includes precautions to be taken in relation to the choice of targets and to the limitation of incidental damage.
- C. Means of warfare: includes in particular specific rules on the use of sea mines.
- D. Methods of warfare: lists conditions for instituting a blockade or other special zones.
- E. Deception: lists prohibited deceptions and conduct that amounts to perfidy. The paragraphs from section G of the Bochum document were inserted into this section.

The participants once again stressed that this document is provisional and subject to later modification and harmonisation with the Bochum document.

Bergen 20 - 24 September 1991

This meeting will be organised in cooperation with the Norwegian Navy School of Tactics and will discuss two subjects. The first is the fourth subject on the Madrid Plan of Action, namely, visit, search and seizure - conditions of applicability. The rapporteur for this subject is Dr. W. von Heinegg of the Institute for International Peace-Keeping Law and Humanitarian Law, Ruhr University, Bochum. The second subject is the effect of the United Nations Charter on the law of armed conflict at sea. This subject is not listed as such in the Madrid Plan of Action, but the need for a separate thorough discussion was expressed by the participants in Bochum and Toulon. The rapporteur for this subject is Mr. Christopher Greenwood of Magdelene College, University of Cambridge.

Future meetings

It is foreseen to hold a meeting in autumn 1992 on the question of maritime areas. The purpose of this will be to consider the new sea areas and regions introduced into the law of the sea which did not exist when the traditional law of naval warfare developed. This meeting will attempt to analyse how these innovations in the law

of the sea affect military operations which under the traditional law could be carried out on the high seas and in belligerent territorial waters.

It will need to be decided which meetings will be necessary after this date to complete the Madrid Plan of Action and to harmonize in a final text the conclusions of the prior meetings. It is hoped to complete the exercise by 1993.