

# The ICRC in the First World War: Unwavering belief in the power of law?

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## Abstract

*This article provides insight into how, during the First World War, the ICRC handled the oversight of the respect of the 1906 Convention on the Wounded and Sick and the 1907 Hague Convention on Maritime Warfare, steadfastly working to uphold the law. It examines the ICRC's view on the applicability of the Conventions, describes its handling of accusations of violations of international humanitarian law and, finally, shows how the ICRC engaged in a legal dialogue with States on the interpretation of various provisions in the 1906 Convention.*

**Keywords:** International humanitarian law, Geneva Convention 1906, treatment of the wounded and sick, International Committee of the Red Cross, First World War.

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## Introduction

The First World War is seen as a watershed moment in the history of public international law. The cataclysmic nature of the conflict led many to question

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whether international law itself could survive the onslaught. Yet the international legal system was not broken by the war, and the *ius in bello* itself was eventually strengthened, rather than done away with, after the end of the conflict.

One of the most shocking things about the First World War is the sheer number of killed and wounded, even during lawful combat, in seemingly futile battles. On the western front, hundreds of thousands were killed and wounded in the major battles, with thousands dying “on a quiet day”.<sup>1</sup> From today’s perspective, it seems astonishing that it was not somehow illegal to plan battles in which 10,000 casualties per day – for one’s own side alone – were expected.<sup>2</sup> It seems unconscionable and outrageous that generals continued to send soldiers to walk across fields with almost no protection, directly into the line of machine gun fire, after lengthy but inefficient artillery barrages. The descriptions of the well-known battles of 1914–1918, and the numbers of dead and wounded, are mind-boggling. The law could do little to stop much of that carnage, as much of it was lawful – and still would be today.<sup>3</sup>

Added to that were the millions of prisoners of war (POW), held for years as the war dragged on. Also during the First World War, vast territories were occupied and civilians were dragged into the miasma of total war.<sup>4</sup> Moreover, because it was a war fought between empires, it quickly became a global war, even if western historical memory remains stubbornly fixated on the trenches of Western Europe.<sup>5</sup> Likewise, while the static nature of trench warfare often dominates our impression of the conflict, the beginning and the end of the war was mobile, even in Western Europe; moreover, elsewhere in the world, trench warfare was uncommon.<sup>6</sup>

At the time of the outbreak of the First World War, the International Committee of the Red Cross (ICRC) was “a small philanthropic organization” consisting of about a dozen people.<sup>7</sup> Within two months, it had multiplied by a factor of ten to a staff of 120, and yet again to 1200 only a few months later.<sup>8</sup> How could a little Swiss organization respond effectively to such large-scale carnage and worldwide strife?

1 Leo van Bergen, *Before my Helpless Sight: Suffering, Dying and Military Medicine on the Western Front, 1914–1918*, UK, Ashgate, 2009.

2 Mark Harrison describes the fact that the British public began to consider its servicemen more compassionately beginning in the 1850s. See Harrison, *The Medical War: British Military Medicine in the First World War*, Oxford University Press, 2010, p. 7 ff. See also Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War*, Ithaca, Cornell University Press, 2014, p. 3.

3 Hull makes the same point, *ibid.* See also Stephen Neff, *War and the Law of Nations*, Cambridge, Cambridge University Press, 2005, p. 203, who makes the point that the law at the time was more limited when it comes to prohibitions on certain weapons.

4 Hew Strachan, “The First World War as a global war”, *First World War Studies*, vol. 1, 2010; Marc Ferro, *La Grande Guerre 1914–1918*, Editions Gallimard, 1966 (reprint 1990).

5 H. Strachan, above note 4.

6 David Reynolds, *The Long Shadow: The Great War and the Twentieth Century*, London, Simon and Schuster, 2013, pp. xix–xxiii.

7 Daniel Palmieri, “An institution standing the test of time? A review of 150 years of the history of the International Committee of the Red Cross”, *International Review of the Red Cross*, vol. 95, 2013, p. 7.

8 *Ibid.*, footnote 21 and accompanying text.

New research on humanitarian action of the Great War period is shedding light on the complex constellation of actors and re-shaping the way we think about the early days of the humanitarian movement.<sup>9</sup> The ICRC is well known for its monumental efforts in respect of POWs during the First World War. This article investigates a different facet of the ICRC's work, however. It aims to provide some insight into how, during the First World War, the ICRC handled the oversight of the respect of the 1906 Convention on the Wounded and Sick<sup>10</sup> and the 1907<sup>11</sup> Hague Convention on Maritime Warfare.<sup>12</sup> Its central argument is that, by steadfastly seeking to apply the 1906 and 1907 Conventions, the ICRC demonstrated a stubborn belief in the power of law to limit the nefarious effects of conflict, even in an era of industrialized warfare and at a time when international law itself was in turmoil.

This paper relies on the *International Bulletin of Red Cross Societies* published by the ICRC during the war as one of its key primary sources. The *Bulletin* was an important tool for communication and exchange of information between the Red Cross Committees (today known as National Red Cross or Red Crescent Societies) of all States, which the ICRC had been mandated to facilitate.<sup>13</sup>

## The 1906 Geneva Convention and 1907 Hague Convention X

The First World War broke out on the eve of the fiftieth anniversary of the adoption of the Geneva Convention for the Amelioration of the Condition of

- 9 See for example Annette Becker, *Les Oubliés de la Grande Guerre: Humanitaire et culture de guerre*, Paris, Hachette, 2003; Heather Jones, "International or transnational? Humanitarian action during the First World War", *European History Review*, vol. 16, 2009; Bruno Cabanes, *The Great War and the Origins of Humanitarianism 1918–1924*, Cambridge, Cambridge University Press, 2014; Branden Little, "An explosion of new endeavours: global humanitarian responses to industrialized warfare in the First World War era", *First World War Studies*, vol. 5, 2014; see also other articles in the same "Special Issue: Humanitarianism in the Era of the First World War", *First World War Studies*, vol. 5, 2014. For histories of the ICRC with a section on ICRC action during the First World War, see John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Colorado, Westview Press, 1996, pp. 280–285; André Durand, *History of the International Committee of the Red Cross: from Sarajevo to Hiroshima*, Geneva, Henry Dunant Institute, 1978/1984; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Geneva, ICRC, 2003.
- 10 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906 (entered into force 9 August 1907).
- 11 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907 (entered into force 26 January 1910).
- 12 There are many other important aspects of its work that are interlinked with this issue – in particular, its position on the use of poison gas, which deserves further research in its own right. See also Leo van Bergen and Maartje Abbenhuis, "Man-monkey, monkey-man: neutrality and the discussions about the 'inhumanity' of poison gas in the Netherlands and International Committee of the Red Cross", *First World War Studies*, vol. 3, 2012, among others.
- 13 See *Bulletin International des Sociétés de la Croix-Rouge*, no. 2, January 1870, p. 60. Berlin Conference of 1869. The first *Bulletin International des Sociétés de la Croix-Rouge* (BISCR) was published in October 1869, and it appeared four times per year thereafter. The limited primary sources on which this paper is based (ICRC Archives) means that it cannot claim to be part of a "critical" history of the institution, but hopefully makes a meaningful contribution to the debate. See also the contribution of Daniel Palmieri in this volume.

the Wounded in Armies in the Field of 1864.<sup>14</sup> The 1864 Convention was only ten articles long and had proven to be relevant but insufficient as early as 1871, following the Franco-Prussian war.<sup>15</sup> It was revised in 1906 following the Russo-Japanese war, around the same time as the revision of the Hague Conventions of 1899.

The 1906 Geneva Convention contained thirty-three articles and was similar in substance to the 1929<sup>16</sup> and 1949<sup>17</sup> Conventions on the Wounded and Sick, which contain thirty-nine and sixty-four articles, respectively. It required that the wounded and sick be ‘respected and cared for, without distinction of nationality, by the belligerent in whose power they are.’<sup>18</sup> It set down obligations to search for the wounded after every engagement and ‘to protect the wounded and dead from robbery and ill treatment’, and required that the dead be properly interred and that information on the wounded, sick and dead be forwarded to the authorities of their country.<sup>19</sup> Furthermore, it provided rules on the protection of medical personnel of the armed forces – the ‘sanitary formations’ in the language of 1906.<sup>20</sup> Much like the law as it exists today, in 1906 medical personnel were protected from attack as long as they were not “used to commit acts injurious to the enemy”.<sup>21</sup> Finally, the Convention contained rules on the return of medical personnel who had fallen into the hands of the enemy.<sup>22</sup> The interpretation and application of these latter rules was a source of controversy during the war, one which illustrates an important aspect of how the ICRC engaged in a dialogue on the interpretation of international humanitarian law (IHL) at the time.

In addition to the 1906 Convention, the ICRC oversaw the implementation of Hague Convention X of 1907<sup>23</sup>, which essentially contained the adaptation of the Geneva Convention on Wounded and Sick to conflicts at sea.<sup>24</sup>

14 Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field, Geneva, 22 August 1864 (entered into force 22 June 1865).

15 E. Odier, “La Convention de Genève par le Dr. C. Lueder”, *BISCR*, no. 26, April 1876, p. 84.

16 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

17 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

18 Article 1 of the 1906 Convention.

19 Articles 3 and 4 of the 1906 Convention.

20 Articles 6–9 of the 1906 Convention.

21 Article 7 of the 1906 Convention.

22 Articles 9 and 12 of the 1906 Convention.

23 Hague Convention on Maritime Warfare, above note 11.

24 Hague Convention X of 1907 was the revised version of Hague Convention III of 1899. See Neville Wylie, “Muddied Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906”, in Maartje Abbenhuis, Annelise Higgins and Christopher Barber (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907*, Abingdon, Routledge, forthcoming.

## Role of the ICRC in implementation of the 1906 Convention

The 1906 Convention did not give the ICRC a formal role in overseeing its implementation.<sup>25</sup> States seem, however, to have expected it to be involved in monitoring and the ICRC did so in the following ways: first, by reminding States parties to the conflict of their obligations under the Convention; second, by transmitting and publishing allegations of violations of the Convention it received; and third, by issuing legal interpretations of the 1906 Convention and 1907 Hague Convention X, initiating a dialogue with States on the interpretation of the law. Its closely related activities included working to enable the repatriation of severely sick and wounded POWs and issuing a very small number of appeals on its own initiative. These all occurred in addition to its efforts to coordinate the work of National Societies, which were very active as auxiliaries to the medical services of the National Armed Forces, and, of course, alongside its work in favour of POWs.<sup>26</sup>

### Reminding the Parties of their obligations under the Convention

For the law to be effective, States have to know it applies and give orders to comply with it. From the very start of the war, in August 1914, the ICRC had received complaints of violations of the 1906 Convention. Citing an attack on a hospital, the Austrian Red Cross requested the ICRC to remind all belligerents of their obligations under the 1906 Convention.<sup>27</sup> On 21 September 1914, the ICRC thus issued what may be considered its first “*rappel du droit*”: it sent an appeal to all States parties to the conflict, reminding them of the need “to ensure the rigorous and faithful application” of the Geneva Convention of 1906.<sup>28</sup>

The appeal stated:

To the highest authorities of the belligerent powers

The International Committee of the Red Cross respectfully takes the liberty to remind your government of the need to see to it that the Geneva Convention of 6 July 1906 is rigorously and faithfully applied.

The accusations that have been expressed on both sides and reproduced by the press seem to show that the provisions relating to the respect of wounded and sick, without distinction of nationality, and to the protection of medical personnel and equipment ... are not sufficiently observed.

25 The ICRC had been given the mandate, through the Resolutions adopted at Red Cross Conferences, to coordinate the work of the National Societies.

26 See especially A. Durand, above note 9, pp. 31–96; J. Hutchinson, above note 9, pp. 280–283. The ICRC’s role in assessing legal aspects of the treatment of POWs is beyond the scope of this article.

27 *BISCR*, vol. 45, no. 180, October 1914, pp. 239–240. Also reprinted in André Durand, *De Sarajevo à Hiroshima*, p. 36.

28 A *rappel du droit* is probably best thought of as a kind of *note verbale*.

The extent of the battlefields and size of the armies present doubtless make monitoring difficult at times, but we are convinced that if precise instructions are given to army commanders, the Geneva Convention will be respected everywhere and always, for the greater good of the belligerents.

In appealing to your government, the International Committee, central organ of the Red Cross Societies, whose intervention is founded solely on its recognized moral authority, is conscious of its duty to fulfil the humanitarian mission that has been conferred on it.

It hopes that its voice will be heard by all and will contribute, by recalling the charitable purposes of the Convention, to improve the fate of wounded or sick soldiers.<sup>29</sup>

At the time of the outbreak of the First World War, the ICRC was in the practice of issuing a bulletin to all Red Cross and Red Crescent National Societies at the beginning of an armed conflict to encourage all National Societies to assist the States in conflict. The appeal of 21 September 1914, however, is the first instance of an appeal directly to State governments to respect their obligations under the Convention.<sup>30</sup>

The tone of the appeal suggests the ICRC had some trepidation about taking this initiative. It was careful to emphasize that its appeal to States was based solely on its recognized moral authority and reiterated that it was conscious of its own need to fulfil the humanitarian mission with which it is entrusted. Furthermore, when it reprinted the appeal in the *Bulletin*, the ICRC pointed out that it issued the appeal at the behest of the Austrian Red Cross.<sup>31</sup>

Nowadays, it is standard ICRC practice to provide a document known (in the ICRC) as a “rappel du droit” to each party to an armed conflict. This document outlines, in the ICRC’s view, certain key legal obligations of the parties during the conflict and serves as the basis for the ICRC’s dialogue with the parties to the conflict.<sup>32</sup>

When it comes to the substance of the appeal, two aspects stand out. First of all, the expression of the ICRC’s conviction as to the effectiveness of precise instructions for ensuring the respect for the law in the third paragraph of the appeal demonstrates that, already at the time, the ICRC clearly understood that for the Conventions to be effective, armed forces needed to be instructed to do

29 *BISCR*, no. 180, October 1914, pp. 239–240 (author’s translation).

30 During the Franco-Prussian war of 1870–71, instead of issuing the appeal itself, the ICRC planned to ask the Swiss Federal Council to obtain the word of the French and German governments that they would “se conformer” not only to the 1864 Geneva Convention, but also to the 1868 draft articles (that had not been ratified). By coincidence, the Swiss had already planned to do so. See *BISCR*, no. 5, October, 1870, pp. 10–11. At the time of the Russo-Japanese war, the ICRC sent an offer of services to the National Societies of Russia and Japan and published their responses in the *Bulletin*. See *BISCR*, no. 137, January 1904, p. 136.

31 *BISCR*, no. 180, October 1914, p. 239.

32 For examples of notes verbales, or *rappels du droit*, see ICRC, “Conflict in the Middle-East”, *International Review of the Red Cross*, vol. 31, issue 280, 1991, pp. 22–28.

what their States had signed up for. Article 26 in the 1906 Convention called for its dissemination to troops and “to the people at large”; educating armed forces and the public on the rules of IHL continues to this day to be an important aspect of the work of States, national Red Cross and Red Crescent societies, and the ICRC to ensure the laws of armed conflict are respected.<sup>33</sup> The obligations to respect and ensure respect of the Convention as well as to ensure its execution have, furthermore, been reinforced in the subsequent iterations of the Geneva Conventions.<sup>34</sup>

In this light, it is interesting to note that Isabel Hull, an American historian, has argued in respect of the First World War that the States that had integrated the obligations in the various Geneva and Hague Conventions into their military manuals and distributed them to their forces long before the war showed, in her analysis, better overall respect for international law during the war.<sup>35</sup>

The second aspect in relation to the *rappel du droit* is more surprising from a legal point of view. Curiously, legally speaking, the 1906 Convention did not formally apply during the First World War. The 1906 Convention contained a *si omnes* clause, which meant that it only applied in a conflict if *all parties to the conflict* were parties to the Convention.<sup>36</sup> In 1919 Paul des Gouttes, Secretary of the ICRC and the principal legal adviser at the time, published an article in the very first issue of the *International Review of the Red Cross* in which he summarized the law applicable during the conflict.<sup>37</sup> He acknowledged that, since Montenegro was not a party to the 1906 Geneva Convention and had been a party to the conflict since the start of the war, “we must conclude that in *strict law the Geneva Convention of 6 July 1906...never had binding force, in this war, for the belligerent States.*”<sup>38</sup>

Was the ICRC conscious of this state of affairs when it issued the appeal to States to respect the 1906 Convention? Given that the issue of the *Bulletin* of July 1914 (just prior to the outbreak of the war) was a special issue commemorating the fiftieth anniversary of the 1864 Convention, containing lists of States signatories or adherents to the 1864 and 1906 Conventions, and given that it listed Montenegro with no date of signature or ratification of the 1906 Convention, it was certainly in a position to be aware of this lacuna.<sup>39</sup>

33 See also the updated Commentary on Article 47 of the First Geneva Convention, ICRC, *Commentary on the First Geneva Convention*, 2016.

34 See especially Article 1 common to all four Geneva Conventions and Article 45 of the First Geneva Convention. The predecessor to Article 45 is Article 25 in the 1906 Convention: “It shall be the duty of the commanders in chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this convention.”

35 I. Hull, above note 2, pp. 83–88.

36 Article 24 of the 1906 Convention reads: “The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention”.

37 Paul Des Gouttes, “De l’applicabilité des Conventions de La Haye de 1889 [sic] et de 1907, ainsi que de celles de Genève de 1864 et de 1906”, *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, vol. 1, issue 1, 1919, pp. 3–10.

38 *Ibid.*, pp. 9–10, emphasis in original (author’s translation).

39 *BISCR*, no. 179, July 1914, pp. 171–174.



The Hague Conventions also contained *si omnes* clauses. Beginning in 1917, the ICRC published assessments on the applicability of 1907 Hague Convention X.<sup>40</sup> It did so to substantiate the legal basis of a communication it had issued condemning the decision announced by the German Imperial government that it would torpedo and sink, without warning and without distinction, all hospital ships leaving a specified zone of the English Channel and the North Sea.<sup>41</sup> The first study, published in 1917, concluded that since all parties to the conflict had signed the 1899 and 1907 Hague Conventions on maritime warfare, the 1907 Convention was fully applicable between them.<sup>42</sup>

That interpretation was updated in a second study in 1918 to take into account the entry of twelve additional States in the war. In addition, that study amended the interpretation of 1917, which had concluded that since all States were *signatories* of the 1907 Maritime Convention, they were all bound by it.<sup>43</sup> That interpretation had not given full weight to Article 25 of that Convention, which requires that the Convention be ratified, and not just signed, to be binding.<sup>44</sup> Since Serbia and Montenegro had signed but not ratified the 1907 Hague Convention X, it was never binding. Furthermore, in regard to the Hague Convention (IV) on land warfare of 1907, the ICRC had acknowledged in the *Bulletin* in 1918 that even the 1899 version of that Convention had only been in force until August of 1917, when Liberia and Costa Rica entered the war.<sup>45</sup> Arriving at this conclusion, the ICRC insisted that it was best to have a rigorous legal interpretation, even if the result was negative. However, it went on, the tribunal of public opinion would judge the actions of States, no matter the niceties of the law.<sup>46</sup>

Considering the grave concerns with respect to the protection of hospital ships that arose during the war, and the fact that the ICRC based its vast activities for POWs on another of the Hague Conventions (and a resolution of the International Conference in 1912), the *de jure* non-applicability of the Hague Conventions had potentially serious consequences. However, in the article published in 1919, after the armistice, Paul des Gouttes insisted that no State denied the applicability of the Conventions on this basis.<sup>47</sup> He emphasized that

40 “Le torpillage des navires-hôpitaux: Etude de droit et de fait”, *BISCR*, vol. 48, no. 191 July 1917, p. 223; “De l’applicabilité des Conventions de La Haye de 1899 et de 1907 concernant les lois et coutumes de la guerre sur terre”, *BISCR*, vol. 49, no. 193, January 1918, p. 18.

41 The communication was published in *BISCR*, vol. 48, no. 190, pp. 140–142. See also *BISCR*, vol. 48, no. 191, July 1917, pp. 223–236.

42 *BISCR*, vol. 48, no. 191, July 1917, pp. 226–227.

43 Original interpretation: *BISCR*, vol. 48, no. 191, July 1917, pp. 226–227. Revised interpretation: *BISCR*, vol. 49, no. 193, January 1918, pp. 18–27.

44 See Paul des Gouttes, above note 37, p. 3. According to des Gouttes, this was a change from the 1899 Convention to the 1907 Convention – the 1899 Convention required only signature.

45 “De l’applicabilité des Conventions de La Haye de 1899 et de 1907 concernant les lois et coutumes de la guerre sur terre”, *BISCR*, vol. 49, no. 193, January 1918, p. 26. See, however, I. Hull, above, note 2, p. 89, stating that the Hague Convention II of 1899 was “in effect for the entire First World War” (citing Oppenheim).

46 *Ibid.*, pp. 26–27.

47 P. des Gouttes, above note 37, pp. 6 and 7.



States continued to consider themselves bound by the Conventions and, furthermore, that they developed the agreements on POWs on the basis of the Hague Conventions of 1899 and 1907.<sup>48</sup>

It is perhaps not entirely accurate to say that the applicability of the Hague Conventions was never challenged, however, as the following example illustrates. In November of 1914, Turkey had requested permission from Russia for free passage of its hospital ships through the Black Sea. Russia refused on the grounds of the “delay taken by Turkey in ratifying this Convention”.<sup>49</sup> In the *Bulletin*, the ICRC characterized this refusal as “purely formalistic” and “incapable of excusing the refusal which renounced all efforts to date to lessen the evils of war and to diminish the suffering that results from it.”<sup>50</sup> The ICRC’s position is consistent with its initial analysis that States that had signed, but not ratified, the Conventions were bound by them, on the basis of the 1899 text.

Despite this example, the picture painted by des Gouttes is, however, not inappropriately rosy. To the best of the author’s knowledge, other than this example, the response of States to the allegations of violations of the various Hague Conventions was not based on a general denial of the *de jure* applicability of the Conventions themselves or of a denial of the legal obligations therein.

Remarkably, however, neither of the studies published by the ICRC assessed the applicability of the 1906 Geneva Convention. According to des Gouttes, its applicability had never been questioned.<sup>51</sup> This was the case until almost the end of the war. It turns out that the question of its applicability was raised in one case, however. The United States, on the basis of the *si omnes* clause, stated its view that the Convention of 1906 was not applicable.

The issue arose when Dr Ferrière, on behalf of the Medical Personnel service of the International Prisoner of War Agency, proposed to contact the German Minister of War to request the release of twelve American medical personnel who were being interned in a German POW camp.<sup>52</sup> This proposal was accepted by the American Red Cross and the ICRC followed up on it.<sup>53</sup> The German War Ministry responded by saying that since the United States does not consider the Geneva Convention (1906) binding in the conflict, it did not see any reason to treat medical personnel in accordance with the treaty.<sup>54</sup> The President of the ICRC quickly followed up on the matter with the United States legal officer in Berne, who confirmed it as correct. The ICRC subsequently contacted

48 *Ibid.*

49 Original: “retard apporté par la Turquie à la ratification de cette Convention [Hague].”

50 *BISCR*, no. 181, January 1915, pp. 18–21 (author’s translation).

51 P. des Gouttes, above note 37, p. 10.

52 Letter (no. 8247) from Dr Ferrière to Carl P. Bennett (American Red Cross), 4 July 1918. Archives, CICR, A CS 069.

53 Letter (no. 8387) from Dr Ferrière to M le Docteur Hecker (Department of Medicine, War Ministry), 22 July 1918, Archives, CICR, A CS 069.

54 Letter in response to letter no. 8387, From “J.A.” (War Ministry) to the ICRC, 6 September 1918. Curiously, the ICRC does not seem to have pursued the avenue that this state of affairs opened up, which would have been to rely on the 1864 Geneva Convention and the principle that medical personnel must be entirely at liberty to choose whether they remain or return to their forces (Article 3), Archives, CICR, A CS 069.

the American Ambassador in Berne, expressing its “astonishment” at this interpretation.<sup>55</sup> It pointed out that “the American Red Cross, this gigantic institution in its international action is rooted in this convention”, and went on to say, “and we cannot well understand how today America says that the Convention is not binding upon her.’ The letter emphasized that “All the belligerents especially the great Powers have always insisted on the principles of the Geneva Convention being enforced, and the newly made agreements between them on prisoners have taken the Convention as [their basis].” It closed with an enquiry as to whether America “maintains her point of view concerning the Geneva Convention.”<sup>56</sup>

The ICRC received confirmation of the legal interpretation of the United States on 9 December 1918, probably as the *Bulletin* was going to press and a month after the armistice was signed. This seems to be the most likely explanation for why des Gouttes appeared not to be aware of the issue earlier.<sup>57</sup>

In any case, the consequence is that, strictly speaking, as the 1864 Geneva Convention had no *si omnes* clause, the parties to it were bound by it throughout the First World War. However, aside from the American case described above, the *de jure* inapplicability of the 1906 Convention does not seem to have had any real impact on the treatment of the wounded and sick or the protection of medical personnel throughout the war.

Following the First World War, the *si omnes* clause was done away with. The ICRC had acknowledged in its studies on the Hague Conventions that the clause had been designed to ensure that States would be on an equal footing in a conflict, but that it was inserted at a time when no one had foreseen a conflagration like the First World War, with entirely distinct fronts and many parties.<sup>58</sup> In fact, the revised Conventions expressly rejected any approach that resembled the *si omnes* clause:

The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.<sup>59</sup>

55 Letter (no. 6048) from President Naville to Minister Stovall, 23 September 1918, Archives CICR, A CS 069. Note that the US Ambassador in Bern during the war had the title “Envoy Extraordinary and Minister Plenipotentiary”, which explains the use of the title “Minister”.

56 *Ibid.*

57 The letter from the United States Legation in Berne explaining the position based on Article 24 of the 1906 Convention was sent to Mr Naville on 9 December 1918, and des Gouttes’ article appeared in the January 1919 issue of the *International Review*. See Letter from R. [sic, P.] Stovall to Edouard Naville, 9 December 1918, A, CICR, A CS 069.

58 *BISCR*, vol. 48, no. 191, July 1917, p. 225. See also *BISCR*, vol. 49, no. 193, January 1918, p. 23.

59 Article 25 of the 1929 Convention on Wounded and Sick.

Article 2 common to the 1949 Geneva Conventions extends this principle even further, stating:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

In his commentary on the 1929 Geneva Convention on Wounded and Sick, Paul des Gouttes emphasized the evolution away from the *si omnes* clause and again reiterated that States had not claimed that the Convention did not apply to justify non-compliance during the First World War. Des Gouttes wrote, “the facts, backed by the signatures of the signatories and by the humanitarian interests of all, outweighed the law.”<sup>60</sup>

### Publication and transmission of allegations of violations of the 1906 Geneva Convention and 1907 Hague Convention

During the First World War, over the period 1914–1919, the ICRC published close to eighty allegations of violations of the 1906 Geneva Convention and 1907 Hague Convention on Maritime warfare in the *Bulletin*.<sup>61</sup> In fact, there was a section in every *Bulletin* published during the war entitled, “Complaints” (in French: “Protestations”). These allegations were not based on the ICRC’s own observations; rather, they were allegations received from the central committees of the National Red Cross or Red Crescent Societies of the States involved in the war. This method of oversight may come as a surprise for those familiar with the organization’s longstanding (and present-day) methods of working, and especially its confidential approach.<sup>62</sup>

From a historical perspective, it is interesting to note that as early as 1870, the ICRC was requested to denounce alleged violations of the 1864 Geneva Convention. However, taking the view that it could be counter-productive to decry each and every alleged violation, it decided to only raise its voice when the facts were general and undeniably common knowledge.<sup>63</sup> Furthermore, throughout the 1870s it expressed a preference for working quietly behind the

60 P. Des Gouttes, *Commentaire de la Convention de Genève de 1929 sur les blessés et maladies*, ICRC, 1930, p. 188; quoted in J. Pictet (ed.), *Commentary on the First Geneva Convention*, Geneva, ICRC, 1952, p. 34.

61 A. Durand, above note 9, p. 38.

62 ICRC, “The International Committee of the Red Cross’s (ICRC’s) confidential approach: Specific means employed by the ICRC to ensure respect for the law by State and non-State authorities. Policy document. December 2012”, *International Review of the Red Cross*, vol. 94, no. 887, 2012, pp. 1135–1144. See also ‘Memorandum: The ICRC’s privilege of non-disclosure of confidential information’, *International Review of the Red Cross*, vol. 97, issues 897/898, 2015, pp. 433–444.

63 *BISCR*, no. 5, October 1870, p. 11. In the words of the *Bulletin*, “d’une notoriété incontestable”. There may have been such requests made during the wars prior to the beginning of publication of the *Bulletin*, but the ICRC’s archives have not been consulted on this point.

scenes to encourage respect of the 1864 Geneva Convention.<sup>64</sup> Nevertheless, at the beginning of the Second World War, the ICRC reserved the right to publish the allegations of violations it received.<sup>65</sup> Max Huber, writing prior to the outbreak of the Second World War, stated that as a rule, it generally did so.<sup>66</sup>

The ICRC's reason for transmitting the allegations of violations it received was to encourage States to investigate them so that they could take measures to stop violations by their own armed forces.<sup>67</sup> One of the reasons the ICRC published the allegations in the *Bulletin* was that it was the principal tool of communication with all National Red Cross Societies. The ICRC therefore sought to inform all National Societies that were or could become active (in particular as auxiliaries to the medical service of the armed forces) of the issues that arose in the course of the conflict. The publication in the *Bulletin* did not occur in lieu of confidential communication with governments, but alongside it.

At the beginning of the First World War (at the time, the “European War”), the ICRC stated as its policy that it would publish some of the protests or allegations of violations received from the parties without ascertaining the veracity of the complaints therein and would also publish the responses received.<sup>68</sup> It did not publish all of the complaints it received, leaving aside those that the governments had made reciprocally or that they had sent to all powers, as it considered that such complaints were outside of its sphere of responsibility (“ressort”).<sup>69</sup> Furthermore, in general the ICRC limited itself to publishing complaints regarding the implementation of the 1906 Geneva Convention and 1907 Hague Conventions on maritime warfare and aspects of the other Hague Convention related to POWs. However, even if the letters contained complaints of alleged violations of other aspects of the law, such as on the conduct of hostilities (attacking undefended towns), it seems that they were not necessarily redacted before publication.

64 *BISCR*, no. 25, April 1876, pp. 164–165.

65 “Memorandum sur l’activité du Comité international de la Croix-Rouge en ce qui a trait aux violations du droit international”, *BISCR*, September 1939, vol. 70, no. 445, pp. 766–769.

66 Max Huber, “Croix-Rouge et neutralité”, *Revue Internationale de la Croix-Rouge*, 18th year, May 1936 p. 359. The research undertaken for this paper did not include an empirical analysis to determine the accuracy of Huber’s statement.

67 The Stenographic notes from the Stockholm Conference in 1948 reveal the ICRC’s motivation for doing so, and also its despair at the end of the Second World War in relation to the effectiveness of this practice and the lack of investigations following the receipt of a complaint. See *XVIIe Conférence Internationale de la Croix-Rouge* (Stockholm, August 1948), Commission Juridique, Sténogramme des séances, “Sixième séance”, 28 August 1948, pp. 121–124.

68 “La guerre européenne”, *BISCR*, no. 180, October 1914, pp. 241–242. This was a continuation of a practice it had developed in the Balkan wars prior to the First World War. They also said, “Nous mentionnons, sous la rubrique des pays respectifs, les mémoires et rapports des commissions d’enquêtes officielles, dont les affirmations, ne fussent-elles que partiellement vraies, sont un tissu d’indescriptibles horreurs et procurent un invincible haut-le-cœur. Il ne nous appartient pas, heureusement, de nous prononcer à cet égard. Tout au plus pouvons-nous mentionner ici les violations précises de la Convention de Genève qui ont été portés directement à notre connaissance.” “La guerre européenne”, *BISCR*, no. 183, July 1915, p. 303 (but see also summary of reports in that issue, pp. 353 and 388–289).

69 “La guerre européenne”, *BISCR*, no. 180, October 1914, p. 241.

The style and format of the complaints varies widely. They range from letters up to ten pages long, alleging a whole slew of violations, to telegraphs succinctly alleging one. Some included statements similar to depositions or witness statements that formed the basis of the complaint and yet others (allegations and responses) were apparently supported by photos.<sup>70</sup> Following the publication of the allegation of a violation, the ICRC published any response received from the National Society to which it was addressed. These responses were often drafted by the army high command and transmitted to the National Society to send on. In some cases, there was also a rejoinder. In rare cases, the ICRC also weighed in on the facts when it transmitted the letters from one Red Cross society to another.<sup>71</sup>

This exchange can be seen as creating a kind of forum in which States could work out the contours of the obligations of the 1906 Convention. In terms of substance, approximately thirty complaints alleged attacks on hospitals, dressing stations, or medical facilities by aerial bombardment or land attacks.<sup>72</sup> A further twenty or so alleged ill-treatment of medical personnel or of the wounded and sick, including capturing and arresting medical personnel, firing on the wounded and sick and alleged orders to fire on the wounded.<sup>73</sup> A small number of complaints addressed violations of the use of the Red Cross emblem. In regard to the 1907 Hague Convention on Maritime Warfare, the ICRC published in the *Bulletin* fifteen allegations relating to the seizure, torpedoing, bombardment and free passage of hospital ships.<sup>74</sup>

As a general rule, the ICRC did not comment on the well-foundedness of the complaints and announced that it would not investigate or interfere. This was particularly the case where the parties were alleging violations of the Convention that involved unlawful attacks on hospitals, ambulances, wounded and sick, or medical personnel. This is logical: the ICRC was not in a position to have first-hand knowledge of the circumstances leading to the complaint or to verify the complaint. However, it seems to have taken a slightly different approach in the situation of complaints involving requests, such as for the granting of free passage of a hospital ship, or the return of medical personnel. In these cases, the ICRC seems to have concluded that it could add its voice in support of the plea to

70 In at least one case, however, the ICRC pointed out that it had not received any photos along with the letter it reprinted, and presumably for that reason, no photos were reproduced in the *Bulletin*. See “La guerre européenne”, *BISCR*, no. 189, January 1917, pp. 15–17.

71 See, for example, the letter sent on 29 April 1916, in relation to the torpedoing of the hospital ship *Portugal*. In its letter of transmission to the Ottoman Red Crescent, the ICRC acknowledges that it cannot say whether, as the Ottoman government had alleged, the ship was being used as a troop transport and was not marked as a hospital ship in accordance with the Hague Convention, but it recalls that it had officially communicated that the *Portugal* was a hospital ship. *BISCR*, no. 187, July 1916, pp. 285–286.

72 See the enumeration of complaints in the *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, pp. 14–16.

73 See *ibid.* pp. 16–18. Numbers are approximate because the ICRC included complaints of allegations regarding events occurring during the Russian Revolution and other conflicts that followed the First World War in its 1921 Report.

74 *Ibid.* pp. 18–19.

respect the Convention. This occurred in relation to the request for free passage of a hospital ship (described above)<sup>75</sup> and is apparent in its publication of its views on the return of medical personnel (described below).

The replies published in the *Bulletin* unquestionably substantiate des Gouttes' claim that States did not invoke the *de jure* non-applicability of the Conventions to justify any violations. Thus, in a sense, what plays out in these pages can be seen as an interpretation of the law at the time.<sup>76</sup> At the same time, most often it comes down to a question of fact, with the parties to the conflict each presenting opposing views of the circumstances of the alleged violation.<sup>77</sup>

One must be careful not to misconstrue this manner of proceeding publically in dealing with allegations of violations by States as the ICRC engaging in a fully public dialogue with States in respect of the 1906 Convention. Although it is surprising that the ICRC published these allegations and responses in the *Bulletin*, rather than privately transmitting them to the governments concerned, it is important to note that it was not the ICRC itself alleging the violations.

Furthermore, it should be recalled that reciprocity and reprisals were heavily used during the First World War, to the grave detriment of the victims. The ICRC was acutely aware of the risk of reprisals – especially against POWs – and it appealed to the parties to stop using them.<sup>78</sup> There is also evidence that it worked behind the scenes to encourage parties to avoid creating circumstances that could give rise to reprisals. Thus we must surmise that the ICRC somehow weighed the potential costs in terms alleged violations being used to justify reprisals or for propaganda purposes and concluded that it was nevertheless beneficial to publish allegations received. On the other hand, reciprocity was a factor in the refusal to return medical personnel.

It is difficult to assess how representative the complaints were of the situation on the ground. It seems that some States (via their national societies) were more prone than others to complain to the ICRC regarding the implementation of the Conventions.<sup>79</sup> Furthermore, it is difficult, if not impossible, one hundred years after the fact, to properly assess the effectiveness of the approach of the ICRC at the time. One would also need to examine the relevant files in national archives, which unfortunately was not possible for this paper. Even so, the dialogue on the content of the obligations in the 1906 Geneva Convention and 1907 Hague Convention that it permitted provides a little

75 See above note 49 and accompanying text.

76 For example, in *BISCR*, vol 47, no. 185, January 1916, pp. 23–29.

77 In one case it was suggested that recourse be had to an arbitral tribunal, but this proposal was rejected. Baron von Spiegelfeld of the Austrian Red Cross made the suggestion. See *BISCR*, no. 188, October 1916, pp. 391–394.

78 Appeal of 12 July 1916. Again, the ICRC published the responses it received to its appeal in the *Bulletin*, *BISCR*, No. 188, October 1916, pp. 379–387.

79 Daniel Segesser made this point during the conference “Law as an Ideal? The Protection of Military and Civilian Victims to the Test of the First World War”, Geneva, 26–27 September 2014. He argues that the propensity of Balkan states to send protests to the ICRC flows from the action of the ICRC during the Balkan wars immediately preceding the First World War. By 1919, however, the ICRC remarked that governments were now contacting it directly in regard to violations, instead of going through Red Cross or Red Crescent National Societies. *BISCR*, no. 204, August 1919, p. 1000.

glimpse of how States understood the Conventions at the time. Furthermore, it substantiates des Gouttes' remarks at the end of the war that States did not attempt to justify violations by claiming that the Conventions did not apply. Given the turmoil in the international system at the time, it is indeed worthy of note that States did not seek to escape the limits set by the *ius in bello* in their entirety by insisting on the technical inapplicability of the law.

For the ICRC, this public dialogue served another important role. In an article published in 1920, des Gouttes, pleading for further codification of IHL, wrote,

Was it not a tribute to these conventions, flouted/besmirched though they were, that concern was shown on all sides to excuse one's own lapses, to try to justify the violations committed? We have constantly observed it during this war, and we cannot help believing in a better future in which, guided by precise and applicable texts, the fear of public stigma will stay the criminal arm.<sup>80</sup>

This is perhaps an odd trait of international lawyers – to seem less concerned by “violations” of a rule when at least the State engaging in that behaviour does not seek to assert that in fact there is no such rule. For international lawyers, these kinds of responses are taken as strengthening the legal norm because they do not call the norm itself into question. For those on the battlefield, however, paying lip service to the Conventions brings little or no relief. Des Gouttes' remarks also suggest that he fervently hoped that more detailed legal norms and morality would be mutually reinforcing and lead to more humane behaviour in wartime.

### Engaging in dialogue on the law by issuing legal interpretations

During the conflict, the ICRC also published its own interpretations of the 1906 Geneva Convention and 1907 Hague Convention on Maritime Warfare in the *Bulletin*, focusing on two topics of great concern to it.<sup>81</sup> This article will focus on the ICRC's interpretation of the rules on the retention of medical personnel under the 1906 Geneva Conventions.

Very early in the war, France and Germany were not returning each other's medical personnel, arguably contrary to what they were supposed to do under Article 12 of the 1906 Convention. Article 12 reads:

Persons described in Articles 9, 10, and 11 [medical personnel] will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power. When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as

80 Paul des Gouttes, “Les Conventions de la Haye de 1899 et de 1907 d'après le professeur A. Pillet”, *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, vol. 2, issue 13, 1920, pp. 22–26, at p. 26 (author's translation).

81 See for example “Le torpillage des navires-hôpitaux Etude de droit et de fait”, *BISCR*, no. 191, July 1917, pp. 223–236.



may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

Article 9 of the Convention stipulates that medical personnel may not be treated as POWs, meaning they may not simply be held until the end of hostilities. According to the ICRC's report at the end of the war:

By the end of 1914, hundreds of doctors and many more than a thousand nurses and stretcher bearers, as well as many male and female persons from National Red Cross Societies and hundreds of military chaplains had been retained for weeks, or even months, since the fighting of August and September. They were held, inactive or almost inactive, in concentration camps or fortresses.<sup>82</sup>

As with all legal provisions, there is some room for interpretation in the terms of this article. For example, what circumstances suffice to conclude that “their assistance is no longer indispensable”? Are there limits on what it means to “continue” in the exercise of their functions? Does it include being transported with the members of the armed forces they serve to POW camps far away from where they were captured? If so, for how long? Can “continue” be interpreted to include providing care for new health problems that arise among the POWs during captivity, or is it limited to providing the care immediately needed by the wounded at the time of their capture? Can they be retained on the grounds that their assistance is needed (“indispensable”) to care for the wounded and sick of the detaining powers’ own armed forces?<sup>83</sup>

In the January 1915 *Bulletin*, which was the second one published since the start of the war, the ICRC expressed some reserve as to the appropriateness of providing an interpretation on Articles 9 and 12.<sup>84</sup> Nevertheless, it then proceeded to do just that in a fifteen-page-long essay, which was carefully reasoned, insisting on the law and the spirit of the agreement. The interpretation relied on treaty interpretation techniques familiar to today’s international lawyers, including paying attention to the plain meaning of the words,<sup>85</sup> the intentions of the drafters and the works of the most renowned publicists of the time from Belgium, France and Germany. It tried to distil principles underpinning different proposed conventions (and earlier proposals to revise the 1864 Convention) by an Austrian member of parliament and officers of the Swiss armed forces. Furthermore, it considered the antecedent of Article 12 in the 1864 Convention, acknowledging that the rule had

82 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 92 (author’s translation). This may have been particularly a problem in Europe: Mark Harrison indicates that captured medical personnel seem to have usually been returned in accordance with the Conventions between the UK and Turkey, for example. See Harrison, above note 2 at pp. 285–287.

83 An explanation of the regime on the retention of medical personnel under the 1949 Conventions can be found in the updated commentaries to Article 28 of the First Geneva Convention: ICRC, *Commentary on the First Geneva Convention*, 2nd edn, 2016.

84 In particular, the ICRC seems to have considered that while the 1864 Convention was clearly under its purview, the 1906 Convention was completely independent of the organization and within the domain of States. See *BISCR*, no. 181, January 1915, pp. 23–80 at p. 33.

85 *BISCR*, no. 181, January 1915, p. 37 (plain meaning of word “continue”).

changed,<sup>86</sup> to support its interpretation that the starting point is that medical personnel should be free.

The essay acknowledged that not all of the questions posed were addressed in the discussions in the drafting committee when the 1906 Convention was adopted, such that the *travaux préparatoires* could not provide all the answers.<sup>87</sup> Nevertheless, it set out answers to many of the questions above, arriving at the conclusion that it was only in limited circumstances and for limited reasons that medical personnel could be retained. Furthermore, according to the ICRC's interpretation, Article 12 did not permit a party to move retained personnel elsewhere; they could only be used to care for the wounded and sick with whom they are captured and who need medical personnel to *continue* caring for them.<sup>88</sup>

In a subsequent issue of the *Bulletin*, in July 1915, the ICRC published the interpretations that the German and British governments had circulated on Articles 9 and 12 of the 1906 Convention.<sup>89</sup> The German government's interpretation allowed for a slightly wider use of medical personnel who had fallen into enemy hands in that it allowed for them to continue to provide care for a longer period of time and tending to new health problems that may arise among the POW population, including in case of an outbreak of an epidemic. The British government's interpretation was more closely aligned with the stricter reading of the Article given by the ICRC.

These diverging interpretations arose at a time when there was a typhus epidemic raging in a number of German POW camps, with a death rate reaching 30% in places.<sup>90</sup> This was probably not a coincidence. The presence of medical personnel from the captured armed forces may thus have provided additional essential care at a time when it was urgently needed, with the advantage of a shared language and culture between medics and the sick. At the same time, this interpretation arguably lessened the burden on the detaining power's medical personnel, as it may have been used to reduce their exposure to the risk of contracting disease by relying on them as little as possible to provide care.<sup>91</sup>

86 In the 1864 Convention, medical personnel were to be free to choose whether they remained in captivity with their own armed forces or returned to the forces still in the field. See Article 3 of the Convention for the Amelioration of the Wounded in Armies in the Field, Geneva, 22 August 1864.

87 *BISCR*, no. 181, January 1915, p. 35.

88 *Ibid.*, pp. 44–45.

89 The German government circulated its interpretation in January 1915 and the British government circulated its in March 1915; the ICRC reproduced both in the July *Bulletin*. It is not entirely apparent that these interpretations were issued in response to that given by the ICRC. The ICRC indicates that the German government's interpretation was received in London on 28 January 1915; the British Government's response was dated 22 March. See *BISCR*, no. 183, July 1915, pp. 314–319.

90 Heather Jones, *Violence against Prisoners of War in the First World War: Britain, France and Germany, 1914–1920*, Cambridge, Cambridge University Press, 2011, pp. 93–110 especially at pp. 96–97; Frédéric Médard, *Les Prisonniers en 1914–1918: Acteurs méconnus de la Grande Guerre*, France, Editions Soteca, 2010, pp. 235–237.

91 Jones indicates that some British reports of German POW camps allege that POWs who had typhus were isolated and left to their fate. It is difficult, she acknowledges, however, to know to what extent these claims were based in truth and to what extent they were mostly propaganda. See H. Jones, above note 90, p. 97.

Obviously, it simultaneously increased the risk for the retained medical personnel.<sup>92</sup>

Even so, information was available at the time to show that only a minority of POWs who died did so as a consequence of battle wounds.<sup>93</sup> Thus even outside of situations such as the typhus epidemic, other illnesses contracted in detention proved fatal in greater proportion than war wounds.<sup>94</sup> This state of affairs may help to explain the impetus for the broader interpretation given by some parties of the care medical personnel could be retained to provide.

In every issue of the *Bulletin* published during the war, the ICRC repeated its concerns and reiterated the obligations of States to return medical personnel.<sup>95</sup> By January 1916, when France and Germany were not at all returning medical personnel, they viewed positively an accord between Austria–Hungary and Russia setting a percentage of what number of personnel could be retained in order to look after their own prisoners.<sup>96</sup> However, the ICRC considered that this agreement was acceptable due to the extenuating circumstances of vast numbers of POWs (almost one million on each side) and mutual ignorance of the other’s national languages.<sup>97</sup> The ICRC did not accept that the same circumstances could be invoked to justify such an agreement between Belgium, Britain, France and Germany.<sup>98</sup>

Even so, by the end of the war this approach was partially codified in the relevant Article in the 1929 Convention on the Wounded and Sick, which says, “In the absence of an agreement to the contrary, they shall be returned...”<sup>99</sup> Furthermore, the notion of agreeing on a percentage to retain was fully codified in the 1949 Convention on Wounded and Sick and remains the rule today.<sup>100</sup>

The ICRC was not always at ease with this interpretation of Article 12 of the 1906 Convention, however. In its report on its activities after the war, the ICRC wrote:

The reason given to justify this measure was that the care of prisoners in camps could, in case of generalized disease or epidemics, require the presence of doctors in a number proportionate to the number of prisoners, and that the state of war reduced to a minimum the number of available national doctors (military or civilian) near the camps.

Whatever this argument is worth, it was in any case in conformity with the spirit of the Geneva Convention to reduce to a minimum the number of

92 The issue of whether the typhus epidemics were intentionally permitted to ravage POW populations by the detaining power is irrelevant for the legal interpretation under scrutiny here. On that question, see H. Jones, above note 90, pp. 93–110.

93 F. Médard, above note 90, pp. 233–236.

94 *Ibid.*, p. 234.

95 See e.g. *BISCR*, no. 185, January 1916, pp. 41–42.

96 *BISCR*, no. 185, January 1916, pp. 70–72.

97 *Ibid.*

98 *Ibid.*, p. 72.

99 Article 12, paragraph 2 of the 1929 Convention on the Wounded and Sick.

100 Article 31, paragraph 2: “As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps.” See also the updated commentary on Articles 28 and 31 of the First Convention in ICRC, *Commentary on the First Geneva Convention*, 2nd edn, 2016.

doctors, nurses, stretcher bearers and chaplains retained for this purpose, and to return medical personnel, who were urgently recalled to the theatre of hostilities to their country and army. There was a question of law, of justice, of charity, and by reciprocity, of interest for each of the belligerents.<sup>101</sup>

The despair the members of the ICRC felt at the failure to return medical personnel is palpable in the pages of the *Bulletin*.<sup>102</sup> At the end of the war, in the General Report sent to all National Societies, the ICRC expressed the extent of its fear, saying,

As of the summer of 1915, no or almost no repatriation of medical personnel had taken place between France and Germany and we wondered whether we would henceforth have to consider the Geneva Convention to be nothing more than a token philanthropic agreement, only good for peacetime at best.<sup>103</sup>

In comparison with the tens of thousands killed and wounded, sometimes on a daily basis, the ICRC's concern with the failure to repatriate medical personnel quickly may seem overwrought and beside the point. Indeed, reading the *Bulletin*, one is struck by what is conspicuous in its absence – there are no clear mentions of the massive numbers of the wounded and killed in the major battles. However, the ICRC's preoccupation with the failure to return medical personnel makes much more sense when one considers that, from the organization's perspective, the best help it could provide to the enormous numbers of wounded on the battlefield was to make sure that there were medical personnel present in sufficient numbers to care for them.

The ICRC's spontaneous appeal to States in 1915 calling for short ceasefires to collect the wounded further supports this view. To this end, the ICRC had sent an open letter to all belligerent States calling for a short ceasefire (*suspension d'armes*) to permit the nurses of the armies present to collect the wounded and identify and bury the dead. At the end of the war, it lamented:

101 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 92 (author's translation).

102 In July 1917, Dr Ferrière's report on the POW Agency indicates some of the progress made on this file. In relation to yet another practical problem that impeded the timely return of such personnel, the German government had proposed the establishment of a uniform certificate, produced by the Defence Minister (war minister), to clearly prove the status of medical personnel and allow them to have the benefit of the Convention. Ferrière concedes that a uniform certificate would certainly provide a better guarantee than papers given by *chefs de corps* or units and is in principle accepted by the French. Expressing a hope that this solution will be applied regularly and will allow for rapid repatriation without new formalities or negotiations, Ferrière concludes, "If not, what is the Geneva Convention, and the humanitarian principal it wanted to ensure, worth?" "Agence internationale des prisonniers de guerre", *BISCR*, no. 191, July 1917, p. 296. Curiously, at the Conference of Neutral National Societies in 1917, acting President E. Naville presented the implementation of the 1906 Convention as greatly satisfactory. On the other hand, he presented the situation of POWs as highly worrisome due to the unprecedented scale of the situation. Of course, internal discord in an organization in terms of perception of a situation is not unusual and may explain the disconnection between Naville's remarks and Ferrière's despair. Furthermore, Naville probably wanted to encourage the Neutral National Red Cross Societies to focus on POWs, an area in which they may have had more agency.

103 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 94 (author's translation).

Unfortunately, this suggestion, which would have eased many anxieties and likely saved many lives, was not accepted by governments. Only Italy and Russia showed themselves to be in favour of it; but, given the lack of reciprocity, such measures could not be contemplated.<sup>104</sup>

One historian states that up until 1917, the parties nevertheless sometimes observed pauses in hostilities to collect the wounded, even during major battles.<sup>105</sup> During such pauses, the medical personnel collected the wounded and sometimes even signalled the “enemy” wounded to the “enemy” medical personnel, thereby enabling them to be picked up and cared for by their own side.<sup>106</sup> Accounts indicate, however, that it took stretcher-bearers as long as ten hours to move 400 metres through deep mud – after a long wait for the stretcher-bearers to arrive to pick up the wounded person in the first place; and while a wounded person was likely to be picked up “sooner or later” during the battle of the Somme in 1916, by the time of the Battle of Passchendaele in 1917, “a stretcher case had no real chance at all” of being picked up.<sup>107</sup> At other times, orders were given to leave the wounded on the battlefield.<sup>108</sup>

In light of the horrific conditions of the war, the ICRC’s insistence on a strict reading of the rules on the return of medical personnel – and on the need to respect of the law more generally – becomes much more poignant. At the same time, the record indicates that, when it comes to the legal interpretation of the rules, it listened attentively to the concerns of the parties and pragmatically took into account the facts on the ground. Its insistence on the respect of the rule was principled and dogged, but not dogmatic, as is shown by its acceptance of the accords between Austria–Hungary and Russia on percentages of personnel to be retained.

## Conclusion

The publications and correspondence on IHL during the First World War examined above show that the ICRC placed enormous importance on reaching a shared understanding of IHL in order to enhance its implementation and respect. The Great War had caused it to fear, on occasion, that the 1906 Convention was “a token philanthropic agreement” and it worked hard to make sure it was not consigned to that fate.

The ICRC began by reminding the Parties of their obligations under the 1906 Convention. While it turns out that even in the ICRC’s legal reading at the

104 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, pp. 75–76 (author’s translation).

105 At least on the Western Front. The historical record available to the author does not permit to determine the extent to which this respect was generalized throughout the world.

106 This may be seen as an informal way to exchange the wounded on the battlefield, as provided for in Article 2 of the 1906 Convention.

107 van Bergen, above note 1, pp. 297–300.

108 *Ibid.*, pp. 292–294, 306.

end of the war the 1906 Convention was not formally binding on the Parties, up until the last months of the war its applicability was never called into question. The shock and utter dismay felt by the ICRC when it learned that the USA considered the Convention non-binding is evident in the correspondence. While from a legal point of view the interpretation by the USA should not have been surprising (and was perfectly correct in law), it can be surmised that the ICRC at the time felt the whole legal foundation on which it was built, including the extremely active National Societies, was being pulled out from under it. In later iterations of the 1906 Convention and the others, the potential for the inapplicability of IHL on such technical grounds was eliminated.

Moreover, the interpretations the ICRC published on Articles 9 and 12 of the 1906 Convention during the war display a rigorous and principled understanding of the law, as well as a willingness to take into account the extenuating circumstances of the conflict. The ICRC engaged in a semi-public dialogue with States on the law in addition to its usual bilateral, confidential discussions.

On a purely factual level, one should not draw the conclusion from this essay that the 1906 Convention on the Wounded and Sick was not respected during the First World War. In fact, the general picture of compliance appears to be somewhat mixed and rather suggests that implementation was fairly good overall. First of all, the States involved in the First World War took seriously their obligation to be able to provide care for the wounded and sick. States had invested heavily in creating effective medical services and leaned on the eager support of their National Red Cross Societies to help collect and care for the wounded and sick.<sup>109</sup> This was not something that the ICRC could take for granted: contrary to what one might imagine nowadays, in the past, armed forces' medical services did not devote many resources or much effort to preserving the health and welfare of its soldiers.<sup>110</sup> At the same time, it must be acknowledged that some historians have argued that without the medical service returning (healed) wounded and sick soldiers to the front, it would have been impossible to continue the war.<sup>111</sup> Among the French forces, for example, more than five million wounded and sick were cared for by the French medical service, 90% of whom afterwards were able to return to active service.<sup>112</sup> Half of those wounded were wounded at least twice, and hundreds of thousands were wounded

109 See, for example, Mark Harrison; Vincent Viet. The picture of readiness is uneven, however. While the British had 20,000 medical personnel at the start of the war (and 150,000 at the end), the Belgians had only five ambulances in 1914. van Bergen, above note 1, p. 285 ff. The medical services of the colonial armed forces were also more sparsely staffed and equipped. Harrison, pp. 52–58.

110 Mark Harrison, *The Medical War*, pp. 3–8, comparing UK, US and German medical services. For the French, see Vincent Viet, *La santé en guerre 1914–1918: Une politique pionnière en univers incertain*, 2015, Presses de Sciences Po. Only some fifteen years prior to the outbreak of the First World War, for example, during the war in South Africa, Lord Kitchener had requisitioned medical transports for other purposes, with the result that thousands of servicemen sick and dying of typhus were left exposed near the front. Harrison, pp. 6–7.

111 Harrison (Conclusion) and van Bergen, above note 1.

112 Vincent Viet, *La santé en guerre 1914–1918: Une politique pionnière en univers incertain*, 2015, Presses de Sciences Po, pp. 294–295.

four times, only to return to the trenches.<sup>113</sup> Even so, it is infinitely more humane to provide care and treatment than to ignore the plight of the wounded and sick. In this respect, it seems that the imperatives of humanitarian law and military concerns coincided, probably greatly facilitating the respect of these obligations.

More broadly, two major historical accounts of the treatment of the wounded and sick seem to indicate that, aside from a fairly limited number of incidents, the wounded and sick themselves were by and large respected and protected. Indeed, when the war on the Western Front became a mobile war again in 1918, armed forces' medical services treated and cared for enemy wounded as their armies rapidly advanced through new territory – despite the challenges this entailed. There are accounts indicating this was also sometimes the case on other fronts (e.g. Gallipoli).<sup>114</sup> The historical record furthermore suggests that, at least on the Western Front, medical personnel and stretcher bearers were by and large respected on the battlefield. They were rarely deliberately shot at, but their work left them very exposed to enemy fire.<sup>115</sup> The evidence seems to suggest that the legal obligations regarding the treatment and care of the wounded and sick were well understood and integrated into the standard practice in many armed forces.

From today's perspective, it may be tempting to think that it was easier to implement IHL, and especially the obligations to protect the wounded and sick, during the “quaint” times of trench warfare in the First World War. The true picture appears to be more mixed. In any case, there was a rich dialogue on the contours of the legal obligations at the time, which has continued to this day.

113 *Ibid.*

114 Harrison, above note 2.

115 On the Western Front, stretcher bearers had high casualty rates. van Bergen, above note 1, pp. 288 and 299.