



# REVUE INTERNATIONALE DE LA CROIX-ROUGE

## SUPPLEMENT

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**HISTORY OF THE LAWS AND CUSTOMS  
OF WAR  
UP TO THE MIDDLE AGES**

*We are grateful to Rear-Admiral M. W. Mouton for allowing us to bring to our readers' notice some interesting passages from his book "Oorlogsmisdrijven en hat internationale Recht"<sup>1</sup> published at The Hague in 1947. The author was at the time delegate of the Netherlands to the United Nations War Crimes Commission.*

*These extracts are taken from Chapter II, Part I, which is of particular interest to the Red Cross inasmuch as the history of humanitarian principles and customs is on a parallel with its own history.*

*We also wish to thank Mr. J. H. Rombach of the Netherlands Red Cross who translated the text into English, and Judge J. Y. Dautricourt of Brussels who lent his services for the French version. (Editor's note).*

In his work "A Study of War"<sup>2</sup>, Quincy Wright makes a distinction between *jus ad bellum* (defining the circumstances under which war may be resorted to) and *jus in bello* (the methods that can properly be used in waging war, or, the practices which ought not to be indulged in during war towards friends or even towards enemies).

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<sup>1</sup> War crimes and international law.

<sup>2</sup> Chicago, 1942, Vol. I, pp. 135 and 329.

We may, by giving a few examples, draw a picture of the development of the rules and laws of war into norms the violations of which are punished as war crimes.

Although certain usages and rules of war are found already very early in history, the motives which gave rise to these rules have much changed in character in the course of the history of civilisation. Moreover, these usages and rules applied in the beginning only in a certain group or tribe, and the practice of such usages by several tribes can be explained by the fact that either neighbouring tribes adopted them or that other groups of common origin inherited them, or that groups without any geographical connection developed the same solutions for similar problems. Only in a much later phase can we recognise usages and rules generally accepted by civilised countries <sup>1</sup>.

I believe that the motives and origins of these rules can be divided into two main groups: those of merely practical nature and those that originate from moral or ethical principles. To the first group belong motives of psychological nature as for instance the limitation of violence dictated by fear of the spirits of the defeated, and also those rules that only apply within a certain group or are accepted by neighbouring tribes impelled by the notion of self-preservation of the tribe or to attain and end with methods which do not make a return to normal friendly relations impossible. To this group in particular belong the rules to prevent the destruction of food resources in occupied territories, for instance, and that the tribe itself should be a victim of the destruction caused.

As an intermediate form I might mention those usages and rules which were based on chivalry and although found in less civilised tribes could be said to belong to the second group of rules which underlie motives of a moral nature, of which the purpose is the humanisation of war and which originated under the influence of the main religions. Their aim, for instance, was to prevent needless suffering, to limit strife to combatants only and to protect the civilian population.

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<sup>1</sup> Quincy WRIGHT, *op. cit.*, I, p. 89.

### The Primitives

Among the Primitives we usually find less cruel methods of warfare amongst tribes which were normally friendly than between tribes absolutely foreign to each other, as well as a limitation of violence during certain periods and in certain places such as temples. Above all, a natural dislike to kill persons of one's own species acted as a deterrent which can be explained for biological and psychological reasons<sup>1</sup>. In "The Golden Bough"<sup>2</sup> Frazer describes how warriors of primitive tribes—in former times the Maoris, Israelites, Australian aborigines and Indians—became "taboo" before and after a war. During that period nobody could touch the vessels they used for eating and drinking. Quincy Wright cites the following from Marett ("Sacraments" pp. 58-59) :

On the contrary the women, whose weakness does not consist in overdoing logic, greet them with a doleful cry, "Why did you kill our friends"... Nay, so far is it from being a triumphant ending to a dashing adventure that, until the taboo is lifted, not a word must be said concerning a task that from first to last was sacramental in that it raised a blind impulse to hit back to the level of a solemn and inspired duty<sup>3</sup>.

Frazer also says<sup>4</sup> :

Among the Basutos, ablution is specially performed on return from battle. It is absolutely necessary that the warriors should rid themselves as soon as possible, of the blood they have shed, or the shades of their victims would pursue them incessantly and disturb their slumbers. Thus we see that warriors who have taken the life of a foe in battle are temporarily cut off from free intercourse with their fellows, and especially with their wives, and must undergo certain rites of purification before they are re-admitted to society.

According to Quincy Wright these ceremonies of purification find their explanation in fear of the spirits of the defeated. On the other hand they might be, together with the ceremonies of

<sup>1</sup> Quincy WRIGHT *op. cit.*, I, pp. 90-94.

<sup>2</sup> J. G. FRAZER, *The Golden Bough*, a study in Magic and Religion, abridged ed. London : see p. 210.

<sup>3</sup> J. G. FRAZER, *op. cit.*, pp. 214-215.

<sup>4</sup> *Op. cit.*, I. p. 94.

peacemaking. the result of the wish to establish normal relations once more with the former enemy <sup>1</sup>. This may also well be the origin of the amnesty clause in peace treaties.

The primitives already had a notion of chivalry. When noting the wish to re-establish the normal prevalence of sympathy over cruelty, Quincy Wright says—

A similar function may be served by the chivalric practice not infrequent among primitive people of insistence upon equal advantage in combat.

to which he adds a footnote—

Declarations of war may sometimes have this motive (see the Roman *jus fetiale*).

Generally speaking, among the primitives a natural tendency to limit violence prevails, whereas the natural prevalence of sympathy for those of the same species above abnormal cruelty can only be temporarily abandoned by artificial methods (war-dances, taboo and similar means). On the other hand this applies in particular between members of the same tribe and between neighbouring tribes rather than between completely foreign tribes. Nevertheless, there exists a tendency, says Quincy Wright, to increase friendly relations—

Consequently, the claims of a larger community embracing the neighbouring communities supplement the claims of human sympathy in developing rules of war to minimize both the duration of fighting and its rigour. It is frequently understood that blood relatives, certain diplomatic and religious personalities, certain places, such as the sea or the trees, and certain times, night for instance, are exempt from destructive activities; that poisoned weapons should not be used and that fighting should cease after a certain number of casualties; that peace, once made, should not be broken without cause. Among the more advanced people women, and children or even men captured from the enemy are spared, usually to be made slaves. The common requirement for pecuniary compensation for casualties and wounds, often paid by the victor to the loser, is a means of securing peace and of ending feuds. These rules are most extensive in the relations of neighbouring groups which are normally friendly <sup>2</sup>.

<sup>1</sup> *Op. cit.*, I., p. 94.

<sup>2</sup> *Op. cit.*, I., p. 95.

Quincy Wright sees in these usages prevailing in primitive society the main features already of the present international laws of war.

Taken as a whole, however, illustration can be found in the war practices of primitive peoples of the various types of international rules of war known at the present time; rules distinguishing types of enemies; rules defining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct and even rules outlawing war altogether. Wars to end war, which sometimes occur in Australia after minor wars, have become abnormally frequent and destructive.

We may now consider the rules in force in ancient civilisations. First of all we consult the Bible.

### The Israelites

Deuteronomy (ch. 20, v. 19 and 20) says :

“When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them; for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field is man’s life) to employ them in the siege. Only the trees which thou knowest that they be not trees for meat thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee until it be subdued.”

In the Book of Joshua (ch. 7, v. 25) we read how Achan, who had taken silver and gold from the spoils after the siege of Jericho, was stoned and burned. But, on the contrary, in Deuteronomy (ch. 20, v. 13, 14 and 16) and Samuel (I, ch. XV, v. 3) the Israelites are commanded to kill prisoners and to plunder.

In *The Bible Battells*<sup>1</sup> Bernard remarks on this ambiguity—

The people of God sometimes dealt with the subdued enemies very severely; but this was upon some special charge from God so to do; as we may see in Israël’s dealing with Gog and Sibon, with all the

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<sup>1</sup> Richard BERNARD (Rector of Batcombe, Somerset) *The Bible Battells or the sacred Art Military for the rightly wageing of warre according to the Holy Writ*, 1629.

Kings of Canaan and their people and also in Saul's destroying of Amalek, these by God's commandment were utterly to be destroyed.

Upon special reason we may read how David took a sharpe course with the Ammonites in putting them under sawes, yron harrowes, axes of yron, and made them pass through brick-kilns because they had violated the Law of Nations in abusing his messengers maliciously perverting his honest meaning (Samuel 11, ch. 12, v. 31).

(p. 247) But commonly a general after victory should not be without humanitie; but shew clemencie and mercy. To be cruel is a sign of savage nature (Ezechiell, ch. 39, v. 15; Jos. ch. 8, v. 29 and 10, v. 27).

First for the dead, they were allowed buriall; so shall Israëll do to Gog and his multitude.

The very Heathen performed this to their slaine enemies; for at the request of Scipio Asdrubal did bury the Roman Tribunes. To cast out to dogges and fowles the bodies of the slaine and not bury them is inhuman cruelty.

Now concerning the living (p. 249)—

I. There must be a reverend respect had of men of the Church, ever sacred by the Law of Nations. Nebuchadnezzar gave a charge to looke well to Jeremy, and to doe him no hurt (Jeremy, ch. 39, v. 10-12).

II. To keep good quarter with all such as do yeeld themselves, and to whom faith hath beene promised to give them life and to use them well.

III. To shew mercy to prisoners and captives and not to be blood-thirsty.

The Israelites did not slay such as they tooke captives, but shewed mercy and great compassion unto the lame, poore and wounded, so mercy should be shewed to women, children and old folkes. To slay poore prisoners in cold blood is a note of a savage and implacable nature but here is to be excepted such prisoners taken as do deserve justice to be executed upon them, as did Agog the King of the Amelikites (Samuel 1, ch. 15, v. 32-33).

And also such great ones as have caused rebellion, as the Princes of Juda did, who counselled Zedekiah to hold out against Nebuchadnezzar, contrary to his oath, and the word of God delivered by Jeremy. These Nebuchadnezzar tooke and gave sentence upon them.

### Ancient India

In this early civilised part of the world we find rules of warfare. According to Viswanatha<sup>1</sup> the origin of these rules must be sought in the Vedas in which the divine laws are revealed. These laws and rules of conduct, taken together as "Dharma" (duty), were also the basis for international law between groups, distinct from the present Law of Nations which is still based on agreement between States.

The said rules are known from the religious literature, from secular authors like Kantilya and from the reports of travellers; for instance, Megasthenes (300 B.C.) said<sup>2</sup>:

... the combatants allow those engaged in husbandry to remain quite unmolested. Besides, they neither ravage an enemy's land with fire nor cut down its trees. Nor would an enemy coming upon a husbandman at work on land do him harm for men of his class, being regarded as public benefactors, are protected from all injury.

In the Mahabharata, we read that the following were not to be slain in battle—

Those who are sleeping, thirsty, fatigued or insane; those who are fleeing or walking along the road; those who are engaged in eating or drinking; those who have been mortally wounded or extremely weakened by wounds; those who are in fright; those who are unfit for further action; those who are struck with grief and those who are camp followers or doing menial services.

The Aryas forbid the slaughter of those who have laid down their arms, of those who beg for mercy with dishevelled hair and joined hands, and of fugitives.

We also refer to the ordinances of Manu<sup>3</sup>, i.e.—

91. Nor should any one (mounted) slay an enemy down on the ground, a eunuch, a suppliant, one with loosened hair, one seated, one who says "I am thy prisoner".

92. Nor one asleep, one without armour, one naked, one without weapons, one not fighting, a looker-on, one engaged with another.

<sup>1</sup> S. V. VISWANATHA, *International Law in Ancient India*, Bombay, London 1925, pp. 11 and 13.

<sup>2</sup> VISWANATHA, *op. cit.*, pp. 17, 30-31.

<sup>3</sup> Arthur Coke BURNELL, Ph. D. C. I. E., *The Ordinances of Manu. Completed and edited by Edward W. Hopkins*, Ph. D., London, 1884.

93. Nor one who has his arms broken, a distressed man, one badly hit, one afraid, one who has fled; remembering virtue one should not slay them.

About booty, we read <sup>1</sup>—

97. But they must give a special portion (of the booty) to the king; such is the Vedic revelation (Cruti) and that which is not separately captured is to be given by the king to all the soldiers.

98. This real and eternal law for soldiers has been declared; from this law a Ksatriya slaying enemies in battle should not fall away.

In the book of Viswanatha already cited this rule resembles Art. 55 of the Hague Regulations concerning the Laws and Customs of War on Land; "All immovable properties in the enemy country were subject to temporary utilisation by the invader." Two other rules that show some resemblance with the said Hague regulations (Articles 52, 46 and 56) are <sup>2</sup>—

Only in dire necessity could he make exactions from the enemy people. The private property of the enemy country appears in other respects to have been exempt from the violence and risks of warfare. Temples and their property in the places under military occupation and the private property of individual citizens were on no account to be seized.

In the book of Viswanatha it is said that the "levée en masse" is permitted but guerilla warfare is forbidden, and on the following page are cited some rules that are nearly literally the same as the four points of Art. 1 of the Hague Regulations <sup>3</sup>—

Unlimited violence was not to be perpetrated on these combatants; certain means and methods of destruction were forbidden; and against Indrajit is hurled the charge that he had violated the rules of fair fighting when he made Lakshmana the target of his poisoned arrow.

And the same in the Ordinances of Manu—

One should not, fighting in battle, slay enemies by concealed weapons, nor with barbed or poisoned weapons, nor with fire-kindled arrows. (*See Article 23a of the Hague Regulations.*)

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<sup>1</sup> BURNELL, Lecture VII, pp. 97-98.

<sup>2</sup> VISWANATHA, *op. cit.*, pp. 135-136.

<sup>3</sup> VISWANATHA, *op. cit.*, pp. 144-145, 148-149.

Whereas in Viswanatha we read: *Weapons which caused unnecessary pain or which inflicted more suffering than was indispensable to overcome the foe are condemned by all ancient authorities*, (See Article 23 a of the Hague Regulations) which rule undoubtedly falls under the ethical group.

Another rule which corresponds with Article 23 (d) of the Hague Regulations states—

Refusing to give quarter is forbidden.

Concerning prisoners of war, the development of Indian civilisation shows already an important amelioration<sup>1</sup>—

As regards the combatants who were captured in war, their lot improved from utter destruction and slavery in the initial stages to more humane treatment in later ages.

In the Ordinances of Manu captivity is ranged under the seven kinds of slavery, but there is also a rule in the Mahabharata which stipulates care of the wounded, and among them the wounded prisoners who, when recovered, were sent home. Other laws forbid collective penalties (see Article 50 of the Hague Regulations) and protect religious institutions and monuments of art, as well as medical personnel and persons who were engaged in scientific pursuits.

Finally, Viswanatha mentions that the criterion of the enemy character of a ship cargo is the port of destination of the ship, independently of the flag under which she sails.

(To be continued)

M. W. MOUTON.

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<sup>1</sup> VISWANATHA, *op. cit.*, p. 154.

# INTERNATIONAL COMMITTEE OF THE RED CROSS

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## CONSTITUTION OF THE RED CRESCENT OF THE UNITED ARAB REPUBLIC

GENEVA, September 10, 1959.

### *427th Circular*

*to the Central Committees of the National Red Cross  
(Red Crescent, Red Lion and Sun) Societies*

LADIES AND GENTLEMEN,

The unification of Egypt and Syria into a single State has resulted in the merging of the Egyptian Red Crescent, founded in 1912, and the Syrian Red Crescent, founded in 1942. This has now been effected and the unified Society has adopted the title: Red Crescent of the United Arab Republic, with its headquarters in Cairo.

The Society will comprise two branches, which will exercise their humanitarian activity in the province of Egypt and the province of Syria, respectively. Each branch will retain its administrative autonomy in the province concerned, under the direction of the central headquarters in Cairo.

The constitution of the Society has been approved by the Government of the United Arab Republic which has, furthermore, recognised it as auxiliary to the military medical service.

INTERNATIONAL COMMITTEE

The new Society has submitted its Statutes to the International Committee of the Red Cross, and the latter has found them to be generally in conformity with the conditions for the recognition of national Societies.

Having regard to the fact that this is not a case of the establishment of a new Society, but of the merging of two existing Societies, the International Committee considered that there was no need to grant fresh recognition. Instead, it has decided to extend to the Red Crescent of the United Arab Republic the recognition previously granted to the Red Crescent of Egypt and that of Syria.

This Society, which is now unified and, in that form, a member of the International Red Cross, will therefore continue its humanitarian activity during this new phase of its existence. The International Committee expresses its best wishes for the Society's future success.

FOR THE INTERNATIONAL COMMITTEE  
OF THE RED CROSS

**Léopold BOISSIER**

*President*

**RECOGNITION OF THE RED CROSS  
OF THE MONGOLIAN PEOPLE'S REPUBLIC**

GENEVA, September 15, 1959.

*428th Circular*

*to the Central Committees of the National Red Cross  
(Red Crescent, Red Lion and Sun) Societies*

LADIES AND GENTLEMEN,

We have the honour to inform you of the official recognition of the Red Cross of the Mongolian People's Republic by the International Committee of the Red Cross.

This Society applied for recognition by the International Committee by a letter dated June 5, 1959, which reached Geneva only at the end of August. The application was accompanied by a copy of the Society's Statutes, of the decree of the Council of Ministers of June 16, 1939, according national recognition to this Society, together with a report on the Society's work. In addition, the President of the Society confirmed by telegram that it fully subscribed to the obligations under Nos. 9 and 10 of the conditions for recognition which require that the applicant Society adhere to the Statutes of the International Red Cross, maintain close contact with the national and international members of that institution and honour the fundamental Red Cross principles.

## INTERNATIONAL COMMITTEE

The study of these documents in conjunction with the Secretariat of the League of Red Cross Societies has shown that the conditions for recognition of a national Society by the International Committee have been fulfilled. The International Committee has pleasure, therefore, in announcing the recognition of this Society, which marks a new step towards universality and brings the number of member Societies of the International Red Cross to eighty-four<sup>1</sup>.

In particular, the objective of the Mongolian Red Cross is to improve health education, to achieve healthier working conditions, and to assist the victims of war, natural disasters and accidents. It provides assistance to the public authorities. The Society was founded in 1939, and, according to the report which it transmitted to Geneva, has constantly developed its activities. It has branches throughout the country.

The Mongolian People's Republic acceded to the four Geneva Conventions of 1949 on December 20, 1958.

The supreme body of the Society is the Republican Congress, the general assembly of delegates, which elects the Central Committee, with its headquarters at Oulan-Bator. The President of the Society is Mrs. D. Tumendelger.

The International Committee of the Red Cross has great pleasure in admitting this national Society into the International Red Cross, accrediting it by the present notice to all other national Societies, and recommending it to their kind attention. It expresses its best wishes for the Society's future and the success of its charitable work.

FOR THE INTERNATIONAL COMMITTEE  
OF THE RED CROSS

**Léopold BOISSIER**

*President*

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<sup>1</sup> The number of member Societies was already eighty-four following the recognition of the Ghana Red Cross Society (Circular No. 424). In the meantime, however, (Circular No. 427) the International Committee has recognized the unified constitution of the Red Crescent of the United Arab Republic which, by merging two Societies, reduced by one the number of member Societies of the International Red Cross

**VISITS TO DETAINED PERSONS IN  
RHODESIA AND NYASALAND**

Following the internal disturbances which occurred last February in the Federation of Rhodesia and Nyasaland, a number of persons were deprived of their liberty and interned in camps or prisons.

In pursuance of the efforts made by the International Committee of the Red Cross for some years past to lend its assistance to this category of detained persons, its delegate in Rusape, Mr. G. C. Senn, was asked to approach the Federation authorities to request permission to visit the camps and prisons where persons detained as a result of the events were held. The request met with the favourable consideration of the Federation authorities and, in the course of the spring and summer, Mr. Senn visited Kentucky, Gwelo, Khami and Marandellas prisons in Southern Rhodesia and Kanjedza internment camp and Zomba Prison in Nyasaland.

During each visit the delegate of the ICRC was able to speak freely without witnesses with detainees of his choice. As customary, he informed the authorities concerned of the points noted and his suggestions, which met with favourable consideration and were given rapid effect.

Reports on these visits to camps and prisons have been sent to the authorities in Salisbury.

## THE ICRC ASSISTS VICTIMS OF THE EVENTS IN LAOS

*September 25, 1959.* — The International Committee of the Red Cross has decided to make available the sum of Sw. Fr. 37,000 for the sending of relief supplies to the Red Cross of Laos. The recipients will be the victims of recent events, in particular refugees in the operational areas and military wounded.

The list of relief supplies was drawn up following a visit to Laos by Mr. André Leuenberger, delegate of the ICRC in Saigon, and includes blankets, condensed milk, hospital beds and layettes. The supplies are on the point of being forwarded to Vientiane.

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## RED CROSS ASSISTANCE TO RESETTLED ALGERIAN CIVILIANS

*October 7, 1959.* — On several occasions since 1957 the International Committee of the Red Cross has distributed relief supplies to Algerian civilians resettled in certain areas after military operations. According to information received, one million persons have thus been resettled inland in Algeria.

In order to help these persons, the French Red Cross has undertaken relief actions in behalf of the children by means of mobile nursing teams. Wishing to give support to this action the ICRC recently made a gift of medical supplies valued at 10 million French francs, consisting of polyvitamin tablets and eye-drops. These supplies were distributed in August and September by the French Red Cross in the presence of a delegate of the ICRC. A further distribution is planned for the autumn, which will include concentrated cod-liver oil, eye-drops and a load of blankets. These supplies, valued at about 9,500,000 French francs, have just been dispatched by the ICRC to Algiers and will, as for the first consignment, be distributed by French Red Cross teams in the presence of a delegate of the ICRC.

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