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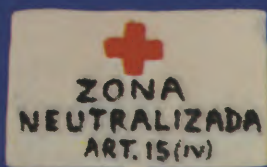
PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982)



RED CROSS BOX



INTERNATIONAL
HUMANITARIAN LAW
AND HUMANITARIAN ACTION



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INTERNATIONAL COMMITTEE OF THE RED CROSS

Sylvie-Stoyanka Junod

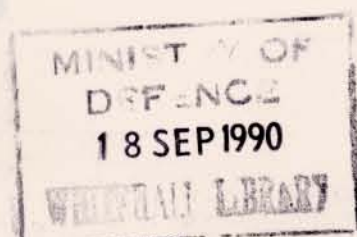
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INTERNATIONAL COMMITTEE OF THE RED CROSS

**PROTECTION OF THE VICTIMS
OF ARMED CONFLICT
FALKLAND-MALVINAS ISLANDS
(1982)**

**INTERNATIONAL
HUMANITARIAN LAW AND
HUMANITARIAN ACTION**



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Preface

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The purpose of this publication is to illustrate the implementation of the Geneva Conventions in the light of practical experience gained in the Falkland-Malvinas Islands' conflict in 1982. It is designed to promote the dissemination of knowledge of international humanitarian law by relating legal theory to actual humanitarian action taken on behalf of protected persons.

It is intended for a public who, without being specialists in international law, are interested in this subject – in particular National Red Cross and Red Crescent Societies whose tasks include the dissemination of information and the training and education of their members, but also for teachers, the media or any other persons concerned with or desirous to know more about the activities of the Red Cross and the application of the Geneva Conventions in situations of armed conflict.

Author's note: This publication is based on purely humanitarian considerations, to the exclusion of all others. The islands will accordingly be referred to as the "Falkland-Malvinas" Islands, consistent with ICRC policy in such matters. When various parties claim, and give different names to a territory, it is not for the ICRC to decide one way or the other. Consequently, it will use, in French alphabetical order, and joined by a hyphen, the names adopted by both parties. This was the rule followed during the Rhodesia-Zimbabwe conflict, as it is also in relation to the Namibia/South-West Africa situation. The analysis which follows refers to the period between 2 April 1982 and the date when the last prisoners of war were released, 14 July 1982.

It is not for the ICRC to describe the military events. The reader can refer to the historical works that have since been published as well as to the ICRC *Annual Report* for 1982 which gives an account of the humanitarian operation as a whole.

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CHAPTER I

INTRODUCTION

1. INTERNATIONAL HUMANITARIAN LAW AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

International humanitarian law is a branch of public international law applicable in armed conflicts which is designed to ensure respect for human beings, as far as is compatible with military requirements and public order, and to attenuate the hardships caused by hostilities (1).

International humanitarian law is divided into two branches: the Law of Geneva and the Law of The Hague.

1.1 The Law of Geneva

Its object is to safeguard and protect the victims of situations of armed conflict – members of the armed forces who are *hors de combat* whether they are wounded, sick or shipwrecked, prisoners of war, the civilian population, and generally all persons who do not or no longer take part in the hostilities.

The Four Geneva Conventions of 12 August 1949 constitute the body of these rules of protection. Today, with more than 161 signatory States, they are universally recognized. These Conventions have been amplified and supplemented by the adoption of two Additional Protocols on 10 June 1977 (Protocol I relating to international armed conflicts, and Protocol II relating to non-international armed conflicts), ratified at the present moment by 49 and 42 States respectively (ratifications as at January 1985).

The Law of Geneva and the Red Cross have the same origin. On the evening of the bloody battle of Solferino in 1859, Henry Dunant, aghast at the sufferings of the wounded who lay helplessly dying, conceived both the idea of the Red Cross and that of international humanitarian law. His ideas, expressed in his famous book, *A Memory of Solferino*, found a favourable response in Europe and especially in his own country, Switzerland, and were put into practice. They can be summarized as follows:

- The creation, in time of peace, of societies capable of aiding wounded soldiers in periods of conflict and thereby remedy the inadequacies of the armed forces' medical services. These aid societies were to become the National Societies of the Red Cross.
- The foundation of the "International Committee for Aid to the Wounded", a neutral relief organization to give assistance in times of armed conflict. This Committee, which was created in Geneva together with four citizens of that city (Mr. Moynier, General Dufour, Dr. Appia and Dr. Maunoir) was the origin of the International Committee of the Red Cross.
- The convening by the Swiss Government of a Diplomatic Conference attended by 16 States, which adopted, in 1864, the "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field".

This Convention lays the corner-stone of contemporary international law: wounded or sick members of the armed forces shall be aided and cared for without adverse distinction, irrespective of the side to which they may belong. Medical personnel, establishments and equipment shall be respected. They shall be marked with a distinctive emblem – a red cross on a white ground. Medical action in time of conflict is neutral; it is not an expression of support for one or other belligerent.

International humanitarian law has developed in several stages since 1864. The circle of legally protected persons has grown bigger as a result of harsh experience which, like the battle of Solferino, has exposed the inadequate protection of the victims: this protection was extended in 1899 and 1906 to shipwrecked members of the armed forces and in 1929 to prisoners of war.

In 1949, after the Second World War, the existing Conventions were revised and supplemented in the form of the First, Second and Third Conventions. The Fourth Convention extended the

(1) See J. Pictet "Principles of International Humanitarian Law".

protection conferred by international humanitarian law to a new and important category of victims, namely to civilians (2).

The Geneva Conventions transpose matters of moral and humanitarian concern into the international legal system. They incarnate the Red Cross ideal. The ICRC is their inspirer and promoter.

In addition, these same Conventions establish the legal basis for the ICRC's humanitarian mandate of protection and assistance. The ICRC is a neutral and private organization whose members are all Swiss. As a neutral intermediary, it contributes to the application of international humanitarian law by providing medical assistance to the wounded, sick and shipwrecked, seeking to improve the conditions of detention of prisoners of war, tracing missing persons and transmitting family messages. If necessary, it also organizes relief operations on behalf of the civil population by arranging for supplies of clothing, food and medicaments.

To do this, depending on the scale of the aid required, the ICRC appeals to the National Red Cross and Red Crescent Societies, the League of Red Cross and Red Crescent Societies, governments not involved in the conflict, and voluntary organizations (3).

1.2 The Law of The Hague

The Law of The Hague, or the Law of War properly so-called, determines the rights and duties of belligerents in the conduct of military operations and limits the means of inflicting damage on the enemy. These rules are contained in The Hague Conventions of 1899, revised in 1907 (twenty altogether) and, since 1977, in the Protocols additional to the Geneva Conventions. Although some of these instruments have fallen into abeyance, the rules relating to the conduct of hostilities are still equally valid today. They can be summarized in essence as follows:

In an armed conflict, the object sought by either side is to gain a decisive advantage by weakening the military potential of the enemy. The means of harming the enemy are not unlimited and all excessive suffering or destruction that goes beyond this object must be prohibited. These laws of warfare are formulated with military necessities in mind, but their inspiration is also humanitarian.

It is appropriate to make three remarks:

- (a) The Law of Geneva and the Law of The Hague have developed concurrently, but not entirely separately. Indeed important parts of the Law of The Hague which directly concerned the victims were taken over in the Law of Geneva in 1929 and 1949 (status of the wounded and shipwrecked in hostilities at sea, status of prisoners of war and civilians in occupied territories).
- (b) In order to provide better protection for the victims, the 1977 Protocols additional to the Geneva Conventions reaffirmed the fundamental principles of the Law of The Hague and enlarged upon them in the form of binding provisions, particularly with regard to the protection of civilian property and populations.
- (c) These fundamental principles of the Law of The Hague, such as the principle of distinction between military objectives and the civilian population, are now regarded as established customary law. They have, as it were, become an accepted code of behaviour, binding even for those States that are not party to these treaties. Besides, the map of the world has changed completely since 1907 and it would be practically impossible to decide, according to the classic law of the treaties, which States are still formally bound by The Hague Conventions.

The ICRC in particular and the Red Cross Movement in general are concerned first and foremost by the Law of Geneva. However, particularly since the adoption of the Additional Protocols, the ICRC is also concerned with respect for international humanitarian law as a whole, conceived as being the entire body of legislation applicable in situations of armed conflict. This brief description of the various legal instruments and their sources is intended to make the full scope of international humanitarian law better understood.

(2) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention).

Geneva Convention relative to the Treatment of Prisoners of War (Third Convention).

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention).

(3) Reference may be made to Françoise Bory's brochure published by the ICRC: "Origin and Development of International Humanitarian Law".

2. AN ENEMY OF THE LAW: IGNORANCE

It is not enough for States to ratify the Geneva Conventions and their Additional Protocols; there must also be a genuine political will to apply them. Their content and "directions for use" must also be known so that those responsible for their implementation take the appropriate steps at the proper time. For this reason their dissemination is very important, as ignorance of international humanitarian law can cost human lives.

2.1 Dissemination – a national obligation

On becoming party to the Geneva Conventions, States undertake to disseminate them, i.e. make them known, as widely as possible in their respective countries, in time of peace as in time of war (AI, 47; II, 48; III, 127; IV, 144; the Roman figures refer to the number of the Convention). Unfortunately it is found in practice that, on the whole, not enough attention has been given to this task of dissemination. Although the first responsibility lies with States, the ICRC in particular and the Red Cross Movement in general are also responsible for dissemination (4). However, until the seventies, for lack of means and personnel, only sporadic attempts to disseminate knowledge and information took place.

2.2 Awareness: Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977)

During negotiation of the 1977 Protocols additional to the Geneva Conventions there was a real awareness of the importance of dissemination which led to the Conference adopting a Resolution (5): "Convinced that a sound knowledge of international humanitarian law is an essential factor for its effective application; confident that widespread knowledge of that law will contribute to the promotion of humanitarian ideals and a spirit of peace among nations..."

The Conference reminds States of their obligations and invites them to take measures to disseminate knowledge of international humanitarian law; it then encourages the National Red Cross and Red Crescent Societies and the ICRC to do the same: it "urges the National Red Cross and Red Crescent Societies to offer their services to the authorities in their own countries with a view to the effective dissemination of knowledge of international humanitarian law;"

"Invites the International Committee of the Red Cross to participate actively in the effort to disseminate knowledge of international humanitarian law, by, *inter alia*, publishing material that will assist in teaching international humanitarian law and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols..."

This publication is part of the ICRC's dissemination activities and is designed to meet a pressing need for teaching material.

2.3 A concerted effort by the International Red Cross

In 1978, the ICRC and the League of Red Cross and Red Crescent Societies adopted a Programme of Action of the Red Cross with respect to dissemination of knowledge of international humanitarian law and of the principles and ideals of the Red Cross in order to implement and co-ordinate dissemination, education, training and research activities and to encourage States to accede to the Protocols additional to the Geneva Conventions. Drawn up initially for a four-year period, this programme has been renewed and developed and is now in its second phase.

The dissemination of knowledge of international humanitarian law and of the principles and ideals of the Red Cross is aimed at a very diverse public: the armed forces, the National Red Cross and Red Crescent Societies, high-ranking government officials, universities, schools, medical professions, the media and the general public.

(4) *Statutes of the International Red Cross, Article VI, para. 7: The ICRC "works for the continual improvement and diffusion of the Geneva Conventions".*

Constitution of the League of Red Cross Societies, Art. 5, 1j: In this field the functions of the League are: "to assist the ICRC in the promotion and development of international humanitarian law and collaborate with it in the dissemination of this law and of the Fundamental Principles of the Red Cross among the National Societies".

(5) *Extracts from Resolution 21 of the Diplomatic Conference (Dissemination of knowledge of international humanitarian law applicable in armed conflicts).*

A selection must be made of the knowledge required by each target group and the appropriate language must be used. A soldier has to know how to execute orders and an officer how to give them. A law student is not interested in the same problems as a member of the Red Cross. The dissemination of knowledge of the Red Cross principles and ideals has its own specific problems which we do not propose to discuss here. The dissemination of knowledge of the Geneva Conventions, on the other hand, encounters a series of obstacles, the three main ones being:

- (a) The abstract nature of the law;
- (b) The essential requirement for discretion and the difficulty in qualifying the situations;
- (c) The lack of illustration.

(a) *The abstract nature of the law*

International humanitarian law, like any legal text, is formulated in a technical and abstract manner. The Geneva Conventions cover a volume of 400 articles of very dry reading, and the Protocols will hardly be easier to digest. They are in essence really very simple, but ways have to be found to make them easily understandable for non-specialists.

(b) *The essential requirement for discretion and the difficulty in qualifying the situations*

International humanitarian law applies, by definition, to situations of armed conflict, i.e. considerable disorders and extreme tensions. Thus to preserve the strict neutrality of its humanitarian action, in the very interest of the victims, the ICRC is obliged to act as a rule with discretion.

Moreover, as parties to a conflict do not always recognize the applicability of international humanitarian law, the spirit is invoked more often than the letter. The Geneva Conventions as a whole apply only in situations of international armed conflict. There is only one provision laid down for internal armed conflicts, namely Article 3 common to the four Conventions. However, internal situations sometimes include international factors. Although the ICRC takes every possible step to provide the utmost protection to victims of these situations, it could happen that, by qualifying them legally as international or internal, it may run the risk of being regarded as politically biased. It thus becomes very difficult to provide examples of the law's application.

(c) *The lack of illustration*

In order to disseminate international humanitarian law it is necessary to make it a living and experienced reality capable of arousing keen, and even passionate, interest. But most examples are historical and do not reflect the world of today. There is thus a lack of illustration of the Geneva Conventions which acts as a brake and discourages the dissemination effort. In this respect, this publication represents an attempt at didactic illustration, which has not been tried up to date.

3. WHY THE EXAMPLE OF THE ARMED CONFLICT OVER THE FALKLAND-MALVINAS ISLANDS?

A number of objective factors make it a fairly unique case:

- It concerns a conventional type of armed international conflict, limited in space and time.
- The encounters took place between regular armed forces, whereas there were only three victims among the civilian population.
- This is the first case, since 1949, of wide-scale application of the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. The events in the South Atlantic revealed the shortcomings of the marking and signalling of medical transports (hospital ships, medical helicopters) and of the communication systems currently in use, and the need for their adaptation to modern techniques.
- Both parties, namely Great Britain and Argentina, invoked the Geneva Conventions to the letter and, on specific points, gave evidence of their desire to avoid useless suffering.
- The ICRC was led to develop its humanitarian activities of protection in accordance with its mandate as a neutral intermediary conferred on it by the Conventions and did so with the full consent of both parties.

4. THE CHOSEN APPROACH AND ITS LIMITATIONS

4.1 Protection of the victims

The events are described and analysed in relation to the protection of the victims (wounded, sick, shipwrecked, prisoners of war) and the civilian population, i.e. from a strictly humanitarian angle.

4.2 "Jus ad bellum" and "jus in bello"

In international law it is necessary to distinguish the right of resorting to force, i.e. to settle a dispute by force of arms, from the law applicable when hostilities exist in actual fact. The purpose of the latter is to limit the use of violence and to protect the victims of these situations. The right "to wage war", or *jus ad bellum*, is laid down principally in the United Nations Charter. The law applicable "in war", or *jus in bello*, is constituted by international humanitarian law. As its prime purpose is to protect human beings, it does not take into consideration the motives which have given rise to armed conflict. It plays a sort of "fireman's" role, but is not the investigator who determines the responsibility for the fire.

4.3 Sovereignty over the Islands and the Fourth Convention

The Fourth Convention relative to the Protection of Civilian Persons in Time of War contains a few general rules for the protection of the civilian population against the effects of hostilities (Section II), rules for the protection of civilians in occupied territories or in enemy territory, and rules relating to the internment of civilians. Whereas Section II was accepted by the parties, who agreed to the creation of a neutralized zone in and around the cathedral of Port Stanley – Puerto Argentino, the nature of the dispute concerning the sovereignty of the islands lends controversy to the formal applicability of the Fourth Convention as a whole.

In the eyes of Great Britain, there was occupation of one of its territories by a foreign army. Argentina, on the other hand, considers that the islands form an integral part of its national territory.

As a general rule, it should be noted that the Fourth Convention, like the other three, was conceived for humanitarian purposes. The spirit can be invoked even if the letter is not recognized. Disagreement on the formal applicability should not prejudice the living conditions of the civilian population.

4.4 Forthright but discreet: a comment on the proper application of international humanitarian law

It seems apparently contradictory to be both forthright and discreet. Yet it is a daily challenge to the International Committee of the Red Cross.

A publication of this kind can therefore on no account raise unsolved problems, nor provide controversial material. The discretion shown by the ICRC in the interest of the victims cannot, however, be equated with mutism. In this particular instance, the parties to the conflict took a number of steps in accordance with the Geneva Conventions and with the help of the ICRC. It therefore seems possible to present it as a case study of international humanitarian law in practice. This demonstration of the "proper application of international humanitarian law" calls for a few preliminary remarks:

- The victims – always too many, whatever the number – and their grieving families must not be forgotten.
- The ICRC is no more competent to judge and to condemn than to give "certificates of good conduct".
- The dissemination of knowledge of international humanitarian law must never allow war to appear acceptable. It must simply demonstrate that, if the machinery of violence is dismantled, a component of peace can also be found – respect for the wounded, the shipwrecked or the prisoner and measures to safeguard the civilian population.

4.5 A didactic conception

Although it is not reserved for the exclusive use of the National Red Cross and Red Crescent Societies, this brochure is designed as didactic material for use in the latter's dissemination activities. On the one hand emphasis is placed on the world of the Red Cross, on the other hand

priority is given to clarity rather than the interpretation of shades of meaning, and the author has tried as far as possible to simplify the legal background while relating it to actual events and activities.

4.6 An encouragement to dissemination

Dissemination is one of the rare activities of the Red Cross whose short-term results are difficult to assess. Moreover, it is hard to do. How can attention be sustained by the mere recital of the historic battle of Solferino?

It is extremely difficult to counterbalance the scenes of violence shown on television or the pictures in the press by presenting volumes of theories that appear utopian or philosophical. To convince people, one has to be able to provide examples. The value of a rule is appreciated in the light of practical experience.

All people, whatever their position, who find themselves called upon to apply humanitarian law, must accept its value not only because they are obliged to do so by the force of the law, but above all because they themselves are convinced of its usefulness. Dissemination must promote this inculcation of human values which is also achieved through the force of public opinion, discipline and tradition.

This study has been prepared at the request of numerous National Red Cross and Red Crescent Societies that wish to have illustrations of the Geneva Conventions in actual application at their disposal. Its publication is financed by the Norwegian Red Cross.



British helicopter with protective emblems
(British Ministry of Defence, copyright reserved)



Argentine hospital ship *Bahía Paraíso*
(Photograph by the Argentine Ministry of Defence)

CHAPTER II

IMPLEMENTATION OF THE CONVENTIONS

1. ARGENTINA AND GREAT BRITAIN

Some legal aspects

Argentina and Great Britain ratified the Geneva Conventions on 18 September 1956 and 23 September 1957 respectively. Under the terms of these Conventions:

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" (first article common to the four Conventions).

The Conventions provide for some rules that are applicable in peacetime. Several examples may be mentioned:

- Instruction of the armed forces and dissemination among the civilian population in general (6);
- Promulgation and application of legislation on the use of the Red Cross emblem to prevent abuses thereof (7);
- The positioning of hospital and safety zones and localities in such a way as to shelter the most vulnerable members of the civilian population in the event of conflict (8).

The latter type of measure may be included in general civil defence programmes.

However, the vast majority of the rules of the Conventions are applicable in time of armed conflict.

1.1 Application of the Conventions and the concept of armed conflict

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (9).

Provision is therefore made for the Conventions to apply even if the state of war is not recognized; it is sufficient that an armed conflict exists.

Why?

First of all, humanitarian law is designed to meet emergency situations. Protecting and assisting victims cannot depend on political considerations. Furthermore, declared wars virtually no longer exist today. The use of force is regulated by the United Nations Charter and is envisaged only in the event of legitimate defence. Legitimate defence is generally contested by the opposing party or parties.

The term "armed conflict", on the other hand, qualifies a situation in which armed hostilities exist *de facto*. The concept of war has legal connotations, whereas armed conflict is a factual concept; for this reason it is preferable in the context of humanitarian law to use the generic term of "armed conflict".

(6) See Articles I, 47; II, 48; III, 127 and IV, 144.

(7) See Articles I, 44, 53 and 54.

(8) See Article 14 of the Fourth Convention and Article 23 of the First Convention, with their technical annexes.

(9) Article 2 common to the four Conventions, para. 1.

1.2 Cases of occupation

"The Convention shall apply to all cases of total or partial occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed military resistance" (10).

It turns out that, when the dispute specifically relates to the sovereignty of a territory, its occupation is most often contested by one of the parties, which may entail a refusal to recognize the formal applicability of the law. However, the humanitarian purpose of the Conventions must always be borne in mind. Provision has been made for the event of occupation in order to guarantee decent living conditions for the civilian population, whatever the circumstances may be, i.e. even if they live under the control of foreign armed forces. The spirit of the Convention is based solely on humanitarian criteria.

1.3 Some factual elements

One consequence of the military confrontation between the two countries was the severance of their diplomatic relations. There then followed a period of negotiations, with mediation by the U.S. Secretary of State, the President of Peru and the Secretary-General of the United Nations, when some hope of a settlement through diplomacy remained.

Neither at this stage, nor subsequently, did the parties recognize a state of war. Such recognition would doubtless have marked a boundary which neither side was willing to cross; indeed it could have had legal and humanitarian consequences likely to aggravate the problems between the two countries, such as the internment of British civilians in Argentina and Argentine civilians in Great Britain.

Without prejudging the assessment that either of the two parties might make as to the exact moment when the Conventions came into force, suffice it to say that in the second half of April 1982, when an armed clash appeared imminent, the ICRC, in accordance with the right of initiative vested in it by the Conventions, offered its services to both parties in the form of a verbal note to remind them of their obligations under those same Conventions. This offer was accepted by both sides.

2. THE ICRC

2.1 Humanitarian right of initiative of the ICRC

The ICRC has a humanitarian right of initiative which is universally acknowledged and is based on both tradition and law. Since its creation in 1863, it has exercised this traditional right encouraged by States and National Red Cross Societies, who confirmed it firstly in the Statutes of the International Red Cross and then (for States alone) in the Geneva Conventions.

2.2 The statutory right of initiative

In the Statutes of the International Red Cross, this right is laid down as follows (11):

"As a neutral institution whose humanitarian work is carried out particularly in time of war, civil war, or internal strife, it endeavours at all times to ensure the protection of and assistance to military and civilian victims of such conflicts and of their direct results."

"It takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution." (Article VI, paras. 5 and 6 of the Statutes of the International Red Cross.)

Apart from armed conflicts, this statutory right of initiative of the ICRC enables it to offer its services even in situations of internal disturbances and internal tensions which are not covered by international humanitarian law. It also confers an indispensable flexibility on the ICRC's work, since the victims' interests consequently do not have to be subordinated to considerations of a legal nature.

(10) Article 2 common to the four Conventions, para. 2.

(11) The Statutes of the International Red Cross were adopted by the International Red Cross Conference. The International Red Cross Conference brings together every four years not only constituent bodies of the International Red Cross, namely the National Red Cross and Red Crescent Societies, their federation, the League of Red Cross and Red Crescent Societies, and the International Committee of the Red Cross, but also representatives of States party to the Geneva Conventions.

2.3 Right of initiative under the Conventions

The right of initiative of the ICRC is also confirmed by the Geneva Conventions and their 1977 Protocols.

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief." This Article 9 of the First Convention is repeated, *mutatis mutandis*, in the other three (Articles II, 9; III, 9; IV, 10).

This traditional and statutory right of initiative, confirmed by the Geneva Conventions, enables the ICRC to offer its services to the governments or authorities concerned, without this offer being regarded as interference in their internal affairs or as the adoption of a political or legal standpoint.

In situations of non-international armed conflict, the ICRC's right of initiative is laid down in Article 3 common to the four Conventions.

2.4 The ICRC's offers of service

As far as events in the South Atlantic are concerned, the ICRC, always concerned for the fate of victims, closely followed the development of the situation from the start.

In view of the growing tension, it first offered to the Argentine Government to examine the possibility of creating hospital and safety zones, both on the continent and on the archipelago, to protect the most vulnerable groups of the civilian population (the sick, women, children ...) in the event of danger. As was explained above, these measures are already applicable in peacetime, as provided for by Article 14 of the Fourth Convention and Article 23 of the First Convention.

The Argentine Government accepted this proposal. An ICRC mission, accompanied by two of its representatives, went to Patagonia from Buenos Aires at the beginning of May for this purpose, but was unable to continue the journey to the archipelago for technical reasons (in particular the lack of any means of transport).

Shortly after, the situation having deteriorated, the ICRC offered its services on behalf of civilians, sick or wounded combatants, shipwrecked persons and prisoners of war, while reminding both parties of their obligations under the Geneva Conventions. This offer was accepted by both sides. The ICRC operation, which will be described in the following chapters, was co-ordinated and developed under the responsibility of ICRC headquarters in Geneva and with the participation of the ICRC's regional delegation for the South Cone, which is based in Buenos Aires.

3. THE NATIONAL RED CROSS SOCIETIES

It should be recalled that members of a Red Cross Society can be assigned to the medical services of the armed forces. This possibility, which the Conventions provide for (Article I, 26), was not used in this particular case. The two National Societies of Argentina and Great Britain developed a number of activities in connection with the conflict, but of a different kind since, from a geographical point of view, they were not concerned in the same way.

3.1 Argentine Red Cross

In order to meet the most immediate needs, should the hostilities extend to the mainland, the Argentine Red Cross and the ICRC, in agreement with the League, set up a three-part emergency programme:

(a) *Blood collection*

The necessary equipment was provided by the ICRC with a contribution from the Colombian Red Cross.

(b) *First-aid posts*

Ten independent first-aid units, each consisting of ten people, were set up. Four of them were sent to the southern part of the country at the end of May (Bahía Blanca, Comodoro Rivadavia, Rio Gallegos).

(c) *Training of volunteers*

This programme was drawn up and carried out by the League of Red Cross and Red Crescent Societies, which sent teaching material; the ICRC also made a direct contribution by providing instructional and dissemination material.

3.2 British Red Cross

Though even further away from the scene of hostilities, the British Red Cross nevertheless developed many activities in connection with the conflict. Firstly by maintaining close daily contact with the ICRC headquarters in Geneva, a contact that was all the more important since the ICRC, though invited to do so, did not think it necessary to establish a delegation in London in view of the excellent communications system between Switzerland and Great Britain. The British Red Cross also did much for dissemination, in particular by providing the departing fleet with copies of the Geneva Conventions both in English and in Spanish, sent to London by the ICRC at its request. This Society had to answer many requests for news of families who had relatives on the islands, by maintaining communication as far as possible with its local section in Port Stanley – Puerto Argentino. This activity is a traditional task of National Red Cross and Red Crescent Societies and the ICRC Central Tracing Agency (12), which work on behalf of families separated by a conflict (transmission of family messages, enquiries into the whereabouts of missing persons, reuniting of dispersed families).

4. SWITZERLAND AND BRAZIL

When diplomatic relations are broken off, the nationals of the countries concerned who are domiciled in the territory of the opposing party find themselves without the diplomatic protection of their embassy. It is then customary to ask a third country to safeguard diplomatic, commercial and financial interests, i.e. temporarily to fulfil the interrupted role of the diplomatic mission by ensuring legal protection for such nationals and their property.

Great Britain asked Switzerland to represent it, while Argentina approached Brazil.

Such countries are known as Protecting Powers. This institution – born of custom – has been embodied in international law in two forms: on one hand, the Protecting Power, as described above, is laid down by the Vienna Convention on Diplomatic Relations of 1961 (13); on the other hand, the Geneva Conventions also provide for a specific mandate as a Protecting Power (14).

It is in fact the designation, by the parties, of one or more countries to play, if need be, a mediating role, propose their good offices and assist in the application of the rules of protection, thereby exercising a certain control over their application. It should be noted that the designation of a Protecting Power does not prevent the action of the ICRC, for which provision is expressly made in the Conventions (15).

In the course of the events in the South Atlantic, the parties did not formally appoint Protecting Powers within the meaning of the Geneva Conventions. In such a case, the Conventions stipulate that a body such as the ICRC shall assume the humanitarian tasks assigned to the Protecting Powers (16). These tasks also correspond to the traditional tasks of the ICRC. They are activities which help to provide the protected persons with the assistance and care the circumstances require. This explanation is very theoretical because the appointment of a Protecting Power within the meaning of the Geneva Conventions only seldom occurs in practice and it is usually the ICRC which assumes the humanitarian tasks, in accordance, moreover, with its own mandate. The Falkland-Malvinas Islands' conflict is therefore not an exception in this respect. However, it should be mentioned that Switzerland and Brazil, though not Protecting Powers within the meaning of the Conventions, nevertheless contributed to their application by serving as communication channels and intermediaries (e.g. notification of hospital ships, repatriation of an Argentine prisoner of war via Brazil).

(12) See Article 25 of the Fourth Convention: family news, and Section V of the Fourth Convention (Articles 136–141).

(13) "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled ...c), the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State" (Article 45 of the Vienna Convention).

(14) "The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict". (Articles 8/8/8/9 of the Geneva Conventions).

(15) Articles 9/9/9/10 of the Conventions.

(16) Failing the designation of a Protecting Power, there is an obligation to accept the offer of services of a humanitarian organization such as the ICRC. (Articles 10/10/10/11 of the Conventions).

5. URUGUAY

Uruguay, in its capacity as a neutral country, bordering Argentina, and situated at a sailing distance of about four-and-a-half days from the archipelago, also played a part in the application of the Conventions.

It is likewise a Party to the Geneva Conventions. As such, this country has undertaken not only to respect them, but also to ensure that they are respected (17).

The Conventions stipulate that Neutral Powers shall apply the provisions by analogy if they receive protected persons (wounded, sick, etc.) on their territory (18).

In this particular case, on a rather pragmatic basis, the Uruguayan Government allowed wounded British servicemen to be repatriated by air from Montevideo, medicaments for British hospital ships to pass through their territory under the supervision of ICRC delegates, and Argentine prisoners to be repatriated and handed over to representatives of their own authorities, also in Montevideo.

(17) Article 1 common to the four Conventions.

(18) Article 4 of the First Convention.



Argentine hospital ship *Almirante Irizar*
(Photograph by the Argentine Ministry of Defence)



British passenger ship converted into a hospital ship
(Photograph by L/PHOT D. du Feu)

CHAPTER III

THE WOUNDED, SICK AND SHIPWRECKED

1. THE PRINCIPLE OF RESPECT AND PROTECTION

The respect for and protection of wounded, sick or shipwrecked soldiers who are members of the armed forces are the very reason for the existence of the First and Second Conventions; they have been the essence of international humanitarian law since its inception.

Legal texts and experts always refer to both respect and protection, and one may wonder why. The explanation is very simple. The first obligation is to respect the wounded, sick or shipwrecked, i.e. not to attack them, but on the contrary to safeguard any adversary who is *hors de combat*. The second obligation is to take concrete steps to protect them: to seek, assist and care for them without distinction of nationality. Non-discrimination and urgency are the two fundamental criteria. Thus, care will be given to the seriously wounded enemy before treating the friend with lesser injuries. Assistance covers medical care, but also spiritual help. This is why the Conventions stipulate that "religious personnel", such as priests and ministers of religion, be protected in the same way as medical personnel.

The Second Convention, relating to the protection of the wounded, sick and shipwrecked members of the armed forces at sea, is an adaptation to maritime warfare of the First Convention (19). The Falkland-Malvinas Islands' conflict is the first instance in which this Convention has been applied since its adoption in 1949.

2. THE BENEFICIARIES

The Conventions distinguish between the military wounded, sick and shipwrecked (Articles I, 13 and II, 12) and the civilian wounded, sick and shipwrecked (Article IV, 6). With regard to rescue and assistance, however, there is no difference between military and civilian. The guarantees of respect and protection are absolutely the same.

In its recent developments, moreover, international humanitarian law places the civilian and military wounded, sick and shipwrecked in one and the same category and gives a single definition of them (20). The distinction made in the Conventions is designed to establish which persons are entitled to prisoner-of-war status (21).

As far as shipwrecked persons are concerned, the manners and customs of seafaring are such that their rescue is in any case a moral and legal obligation which prevails in all circumstances, whether in peace or in armed conflict.

3. METHODS OF ACTION

Respect by the parties for the obligations to protect and assist the wounded, sick and shipwrecked depends of course on the instructions received by the officers responsible and other ranks, but above all on the measures taken to organize relief and assistance.

The circumstances and the nature of the armed clashes during the conflict in the South Atlantic gave vital importance to medical transports, in particular to ships and helicopters.

(19) *The First and Second Conventions contain absolutely identical principles; this is why the example of the Falkland-Malvinas Islands can serve as an illustration for both.*

(20) *Article 8 of Protocol I.*

(21) *First Convention, Article 14: "... the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war...". Second Convention, Article 16: "... the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war...".*

Indeed, not only did the hostilities partly take place at sea, but the geographical distance of the British fleet from its home port meant that soldiers wounded in the archipelago had to be treated on hospital ships.

3.1 Hospital ships

Four British and two Argentine hospital ships respectively were operating during the conflict, in accordance with the provisions laid down in Section III of the Second Convention.

Hospital ships are destined to bring help to the wounded, sick and shipwrecked, to treat them and to transport them; their function is therefore strictly humanitarian. To enable them to carry out these tasks satisfactorily, the Convention stipulates that on no account may these ships be attacked or captured, but must be respected and protected at all times.

The respect for and protection of hospital ships depend on four conditions, which were fulfilled and illustrated by the case of the Falkland-Malvinas Islands' conflict:

- The ship's characteristics must be communicated to the opposing party (notification).
- The necessary steps must be taken so that it can be identified (identification and markings).
- The movements of the combatants must not be hampered in any way (example of the Red Cross Box).
- The ship must be subject to a right of control.

3.1.1 Notification

The name and description of the ship must be notified to the opposing party ten days before the ship is employed. "The characteristics which must appear in the notification shall include registered gross tonnage (22), the length from stem to stern, and the number of masts and funnels" (Article 22 of the Second Convention).

The British hospital ships

- S.S. *UGANDA*
With 16,907 tons and a length of 164.5 metres, the *Uganda* was the largest of the British hospital ships. It is a school cruise steamer which was requisitioned and converted into a hospital ship. With a capacity for over 500 patients, the *Uganda* was a veritable floating hospital.
The British authorities notified the Argentine authorities through the Swiss Government, on 13 April 1982, that this vessel was a hospital ship.
- H.M.S. *HERALD*, H.M.S. *HECLA*, H.M.S. *HYDRA*
These three ships were notified to the Argentine authorities on 19 April 1982. They are three similar oceanographic survey vessels (gross tonnage: 2,898 tons; length: 79.3 metres) which were converted into hospital ships for receiving 60 to 100 wounded patients.
The principal role of these ships was to evacuate the wounded and sick to Montevideo in Uruguay (about four-and-a-half days by sea), from where they were repatriated to Great Britain by air.

The Argentine hospital ships

- A.R.A. *BAHIA PARAISO*
The Argentine authorities notified the British authorities on 7 May 1982, through Brazil, that this was a hospital ship. This is a ship of 10,000 tons and 130 metres in length which is normally used by the Argentine navy for large transports in the Antarctic. It had the capacity to receive more than 100 wounded.
- A.R.A. *ALMIRANTE IRIZAR*
At the same time, the *Almirante Irizar* was notified to the British authorities as a hospital ship. This was also a naval vessel normally used as an icebreaker in the Antarctic; it has a displacement of 11,811 tons and a length of 119 metres.
A third vessel, the *Puerto Deseado*, was also notified to the British authorities, but it was not actually used as a hospital ship, active hostilities having ended before it was put into service.

(22) The gross tonnage expressed in units/tons of 100 cubic feet approximately represents the total volume of the ship's hull and of certain spaces (superstructures).

It should be noted that the Second Convention really was designed as a technical and practical legal instrument. It is thus laid down, for example, that the protection stipulated for hospital ships applies to hospital ships of any tonnage and to their lifeboats, wherever they are operating. But for convenience and safety reasons, the parties to the conflict were requested to try, as far as possible, "to utilize for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross" (Article II, 26).

In fact, none of the hospital ships used during the conflict had a smaller gross tonnage, which shows not only respect on both sides for the provisions of the Convention, but also the pragmatism of the negotiators in 1949.

3.1.2 Identification and marking

The hospital ships were marked for identification as stipulated in Article 43 of the Second Convention, namely that all exterior surfaces shall be white, dark red crosses shall be painted on each side of the hull and on the horizontal surfaces, and a white flag with a red cross shall be flown at the mainmast as high as possible.

But the traditional marking methods proved to be insufficient in view of the modern techniques of maritime warfare and the particularly difficult climatic conditions in the South Atlantic at that time of the year.

Visibility

Even if the ship is completely illuminated, the red crosses are not very visible at night. By day, they are also difficult to identify, especially in poor weather.

This problem was examined by experts during the Diplomatic Conference on Humanitarian Law (1974–1977). A set of regulations concerning identification were adopted in the technical annex to Additional Protocol I. These regulations advocate the use of a light signal, such as a flashing blue light clearly visible thanks to the frequency of the flashes. This blue light is also specified in the International Code of Signals issued by the International Maritime Organization, which is currently being revised. The Protocols have not yet been ratified by Great Britain and Argentina and use of the flashing blue light is not yet very widespread.

It is interesting to note in this respect that the experimental use by the British during the conflict of an improvised flashing blue light (police car type) enabled a ship to be identified with binoculars at a distance of seven nautical miles, whereas normal visibility was one nautical mile.

Radio signal

Although radiocommunications played an important part during the conflict, it must be stressed that the specifications concerning urgency and safety transmissions, and medical transports, which appear in the Regulations, are not yet sufficiently well known (23).

Identification by radar and underwater acoustic identification

At present, non-belligerent vessels are not fitted with radar transponders. Radar identification of these ships is being studied by ITU. Means of underwater acoustic identification to enable submarines to identify hospital ships are also being examined. The Falkland-Malvinas Islands' conflict has demonstrated the importance of perfecting and using all these new identification and signalling techniques. It has also shown that it is indispensable to make the technical annex to Protocol I as widely known as possible in order to ensure the effectiveness of methods of assistance and protection for the wounded, sick and shipwrecked.

The negotiators of the 1949 Conventions had also foreseen the development of technology in stipulating that the "Parties to the conflict shall at all times endeavour to conclude mutual agreements in order to use the most modern methods available to facilitate the identification of hospital ships and boats" (Article II, 43 *in fine*).

(23) The Radio Regulations came into force on 1 January 1982 in accordance with the specifications of the International Telecommunication Union (ITU), Article 40.

3.1.3 A neutral zone on the high seas: the Red Cross Box

Article II, 30 stipulates that "*such vessels shall in no way hamper the movements of the combatants*".

At Britain's suggestion, and without any special agreement in writing, the parties to the conflict established a neutral zone at sea. This zone, called the Red Cross Box, with a diameter of approximately twenty nautical miles, was located on the high seas to the north of the islands. Without hampering military operations, it enabled hospital ships to hold position, in particular the *Uganda*, and exchange British and Argentine wounded.

Such an arrangement, for which no provision is made in the Second Convention, is perfectly in keeping with the spirit of this Convention and shows that international humanitarian law must not claim to be exhaustive. When the desire to respect the obligations of protection is present, such measures as the establishment of this neutral zone at sea can be improvised as circumstances permit and require, and a certain flexibility remains in the application of the law. Inside the Red Cross Box, and between the hospital ships in general, radiocommunications were an important factor in efficiency and good functioning: on one hand, the classical use of radiocommunications between the ships and, on the other, the use by the British – for the first time in the history of medical transports – of radiocommunications by satellite.

For whereas the Argentine hospital ships were able to use coastal radio stations on the Argentine shore, the British had no similar facilities, but instead established radiocommunications between their hospital ships and with their bases in Britain via the INMARSAT satellite system (24). This system also enabled ICRC delegates to communicate directly by radiotelephony and radiotelex with their headquarters in Geneva.

It must be stressed here that the Second Convention forbids hospital ships to use a secret code for their transmissions. The use of secret codes is considered an act harmful to the enemy and can deprive a hospital ship of protection (Article 34). This amounts to forbidding a hospital ship to communicate with the military fleet of the party to which it belongs, because if it communicates in clear, the incoming messages would reveal the position of the vessels of its own fleet.

This ban has humanitarian consequences, however, since it prevents a hospital ship from being notified of the arrival of a contingent of wounded and does not enable it to prepare to receive them.

3.1.4 Inspection of hospital ships

Article 31 of the Second Convention stipulates that the parties to the conflict have a right to control and search hospital medical ships and rescue craft. In particular, they may, "either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observance of the provisions contained in the present Convention".

At the request of the two parties, the ICRC dispatched an expert with instructions to visit the British and Argentine hospital ships in order to verify that the installations were in conformity with the requirements of the Second Convention.

All the technical explanations concerning identification and marking and signalling contained in this chapter are based on the findings of this expert.

3.2 Medical helicopters

These played an important part during the conflict. Each of the hospital ships had one or more medical helicopter, i.e. helicopters used exclusively for transporting and evacuating the wounded, sick and shipwrecked, or personnel (e.g. ICRC delegates) and medical equipment, which were marked with the Red Cross emblem in accordance with Article 39 of the Second Convention. This method of marking proved insufficient, however, and radar identification of these helicopters was established by tacit agreement between the parties.

The small number of medical helicopters available did not permit really effective action. It should be recalled that, under Article 18 of the Second Convention, the parties must, "without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick".

In the South Atlantic, combat helicopters made up for the insufficient number of medical helicopters by joining in to help transport and evacuate the wounded and shipwrecked.

They carried out these missions of assistance and relief at their own risk and peril because, as they were not medical aircraft properly speaking, they were not under any special protection. But such action is in the true spirit of humanitarian law, since the obligation to succour the wounded and shipwrecked is one of the most fundamental. These were measures of pressing necessity which are not governed by law.

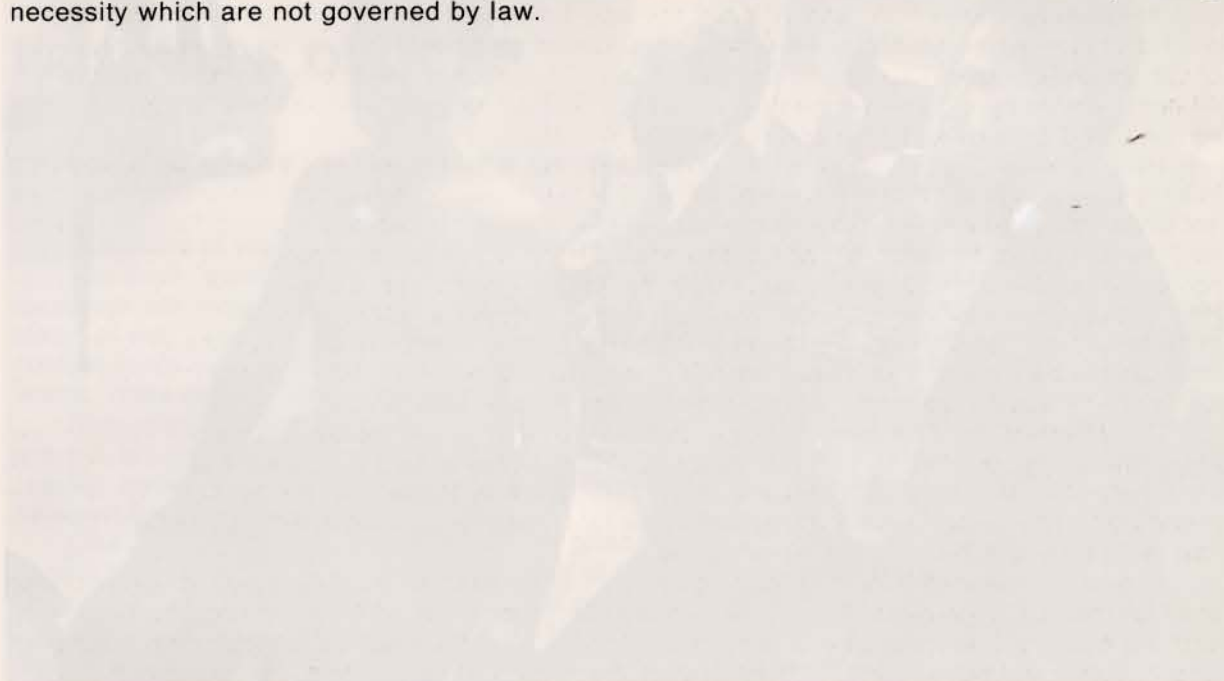


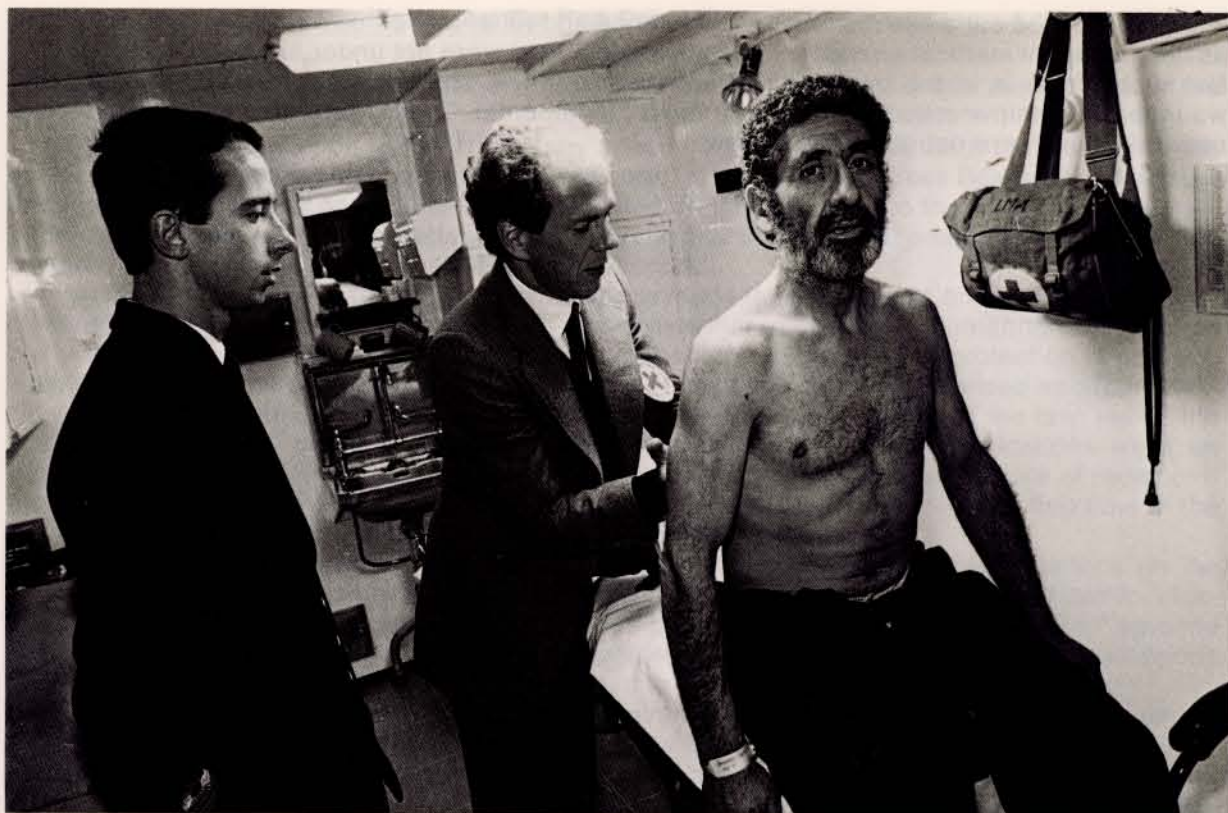
FIGURE 1. The United Nations Commission on Human Rights, 1948, and the International Committee of the Red Cross, 1949, were the first to recognize the obligation of states to provide humanitarian assistance to persons of war status.

2. OBLIGATIONS OF THE PARTIES TO THE CONFLICT

The States occupying powers of war must assume responsibility for them. They are under the obligation to provide them with medical, food, clothing, and to provide to their families of origin lists of prisoners and information enabling their families to be reassured of their fate. They



FIGURE 2. The United Nations Commission on Human Rights, 1948, and the International Committee of the Red Cross, 1949, were the first to recognize the obligation of states to provide humanitarian assistance to persons of war status.



ICRC medical delegate aboard a hospital ship

(photograph by ICRC)

This has few humanitarian consequences, however, since it prevents a hospital ship from being notified of the arrival of a contingent of wounded and sick (Article 19) or prisoners of war (Article 20).

2.2.4 Inspection of hospital ships



ICRC delegate with Argentine POWs

(photograph by ICRC)

CHAPTER IV

PRISONERS OF WAR

1. THE CONCEPT OF PRISONER OF WAR

Prisoners of war are under the protection of the Third Geneva Convention of 1949.

The term "prisoner of war" has become generic. The reference to war is indeed very often inappropriate, since at present there are practically no more declared wars or legally recognized states of war. The Third Convention, like the other three, applies as soon as a situation of armed conflict exists in fact; the term "prisoner of war", being customary, has been retained. In other words, there can be "prisoners of war" without a war, but not without an armed conflict.

The concept of prisoner of war is nevertheless a legal concept. With rare exceptions which are not apposite to illustrate the case that concerns us, a prisoner of war is a member of the regular armed forces who has fallen into the power of the adverse party in an armed conflict between States (25).

One of the most important aspects of prisoner-of-war status is the fact that the prisoner cannot be judged or condemned for the fact of having taken up arms. In doing so, he has, as it were, exercised "his function". He can be punished for having done so badly, i.e. for having committed offences against humanitarian law, but not for having taken up arms. This is not the case in situations of internal armed conflict in which members of the armed opposition, in the event of capture, are guaranteed humane treatment and judgment, but can be condemned for the mere fact of having taken up arms. They are not legally entitled to prisoner-of-war status.

2. OBLIGATIONS OF THE PARTIES TO THE CONFLICT

The States detaining prisoners of war must assume responsibility for them. They are under the obligation to provide them with decent living conditions and to transmit to their country of origin lists of prisoners and information enabling their families to be reassured of their fate; they must repatriate them without delay after the cessation of hostilities (26).

In the Falkland-Malvinas Islands' conflict, both parties showed a willingness to release the prisoners very quickly. Among the prisoners of war there were civilians, particularly those on the island of South Georgia when the Argentine armed forces landed and, subsequently, the thirty-four Argentine civilians captured by British forces on the same island on 25 April.

Legally, these civilians are not prisoners of war, but civilian internees within the meaning of the Fourth Convention relative to the protection of the civilian population. It must simply be noted that the status of prisoner of war or civilian internee may prove important, particularly in cases of legal or administrative decisions, but the conditions of treatment are similar.

States have the same obligations towards interned civilians as towards prisoners of war and must likewise provide them with decent living conditions (27).

In the South Atlantic conflict, civilian internees and prisoners of war received identical treatment, were released together and were handed over to the representatives of the authorities of their respective countries.

3. ICRC ACTIVITIES AND THEIR LEGAL BASES

The role of the ICRC is to assist the parties to the conflict in observing the rules of humanitarian law in general and of the Third Convention in particular.

(25) The civilian auxiliaries of the armed forces (Article III, 4) must also be accorded prisoner-of-war status.

(26) See Articles 12 to 15, Articles 70, 122 and 118, Third Convention.

(27) Article 27 of the Fourth Convention.

3.1 Visits to prisoners of war

The Third Convention assigns a supervisory function to the ICRC; this function is discharged by visits to prisoners of war.

"Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred..."

"The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited." (Article 126 of the Third Convention.)

Much of the ICRC's activity in connection with the South Atlantic conflict consisted in visiting prisoners. Some were visited on land, such as a group of Argentine prisoners on the archipelago at Ajax Bay, or a British prisoner who had been taken to north-west Argentina; others were visited in a transit camp. This was the case of Argentine prisoners captured in South Georgia who were transported from Ascension Island (transit point) to Montevideo in an ICRC aircraft.

Yet others were visited on arrival in Uruguay (1,013 Argentine prisoners captured at the battles of Goose Green and Port Darwin, conveyed there on board the British ship *Norland*). Mention must also be made of the 24 Argentine prisoners picked up after the attack on the trawler *Narval* and taken to Montevideo on board the hospital ship *Hecla*. At the end of active hostilities, the ICRC visited a large number of prisoners in the course of release operations in which it took an active part (28).

3.2 Work by prisoners of war

The Third Convention provides, subject to certain conditions, for prisoners of war to work during their period of detention. Owing to the circumstances and the geographical and meteorological conditions, combined with the rapid release of prisoners, no prisoner-of-war camps were set up and the problem of work consequently did not arise. In view of the danger to the civilian population, the British quickly began to mark the mined areas. Although this was not without risk, some Argentine prisoners of war who were specialized in engineering voluntarily worked with the British soldiers in this task. With regard to work, Article 52 of the Third Convention stipulates: "Unless he is a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature... The removal of mines or other such devices shall be regarded as dangerous labour."

On visiting these prisoners, the ICRC made sure that they were doing this marking work without compulsion. However, after a mine blew up the British decided to do without the voluntary assistance of the Argentine prisoners of war.

3.3 Transmission of information relating to prisoners of war

This is both an obligation for the parties to the conflict detaining prisoners and an important and traditional ICRC activity which is carried out by each delegation in the field, in co-ordination with the Central Tracing Agency at ICRC headquarters in Geneva.

The purpose is to transmit to the authorities of the prisoners' own countries all information relating to prisoners of war or civilian internees, to wounded or dead soldiers (lists of those captured, death certificates, details of places of burial) and to facilitate the exchange of family news between the prisoners and their next of kin.

In order to do so, the British authorities, as soon as hostilities began, set up an official information bureau concerning prisoners of war in their power, in accordance with Article 122 of the Third Convention (29). The Argentine authorities did not formally set up such an office, but the tracing section of the ICRC delegation in Buenos Aires worked in close contact with the general staffs of the various armed forces. The delegation registered all the prisoners visited by

(28) The term "repatriation" is used in this text in its accepted generic sense and should not therefore be interpreted as the adoption of any standpoint as to the problem of sovereignty over the archipelago, which is the subject of dispute between Great Britain and Argentina.

(29) Until the end of active hostilities, the British authorities registered the prisoners of war using capture cards as specified in Article 70 of the Third Convention. In the final phase, it became impossible to register them immediately owing to the numbers involved and the prisoners were registered at the time of their release so that this could be effected as quickly as possible.

the ICRC and transmitted all available information concerning them to the authorities in their own countries. In addition, about 800 prisoners were able to receive news of their families through the delegation.

The Central Tracing Agency in Geneva which, by definition, centralizes and co-ordinates all information, for its part closely collaborated with the national office set up by the British authorities in London. The work of the Central Tracing Agency is governed by Article 123 of the Third Convention.

3.4 Release operations

Article 118 of the Third Convention stipulates that "*prisoners of war shall be released and repatriated without delay after the cessation of active hostilities*". No specific provision is made for the assistance of the ICRC, but it frequently happens, as was the case during the South Atlantic conflict, that the ICRC is requested by the parties to help in the smooth execution of these operations.

These releases took place in two distinct phases, firstly during, and then very quickly after, the hostilities.

The Falkland-Malvinas Islands' conflict provides a rare example of prisoners' being released even before the end of hostilities.

The British soldiers and the group of civilians captured by the Argentine forces when they landed on the island of South Georgia and on the Falkland-Malvinas archipelago were released almost immediately, via Montevideo, without the ICRC's participation.

In May and June, the ICRC took part in several release operations:

- On 13 May, 188 Argentine soldiers and civilians taken prisoner by British troops in South Georgia were flown in an ICRC aircraft from Ascension Island, where they were in a transit camp, to Montevideo where they were handed over to the representatives of the Argentine Government.
- On 2 June, 23 Argentine civilians and one Argentine soldier, picked up after the attack on the trawler *Narval* were handed over by the ICRC to the Argentine authorities at Montevideo and transferred to the British hospital ship H.M.S. *Hecla*.
- On 12 June, the ICRC participated in formalities for the release of 1,013 Argentine prisoners of war captured during the battles of Goose Green and Port Darwin and transported to Montevideo on board the British ship *Norland*.

These speedy releases on both sides limited the suffering that a period of detention in the very harsh winter conditions of the southern hemisphere would have involved and were conducive to the tentative negotiations between the parties, which were then taking place at the United Nations. They are in complete accordance with the spirit of humanitarian law, which prevailed in this case even before the letter of the law was applied.

At the end of the hostilities, i.e. after 14 June 1982, a great number of prisoners were released in several groups over one month.

10,489 soldiers were thus able to return home in six major operations, which were the subject of agreements between the parties. The ICRC participated in five of them.

From the point of view of humanitarian law, two comments can be made concerning these release operations. They were carried out on the basis of agreements between the parties: on the one hand by British merchant ships requisitioned by the Royal Navy (the *Norland*, *Canberra* and *St. Edmund*), on the other hand by the Argentine hospital ships *Bahía Paraíso* and *Almirante Irizar*.

These measures, which were adopted for reasons of necessity and practical convenience, are not laid down in the Geneva Conventions. Indeed, the repatriation of prisoners does not technically belong to the tasks of a hospital ship as stated in Article 22 of the Second Convention. Moreover, the British ships used for this purpose did not display a distinctive sign. In this particular case, the hostilities were over and these ships sailed after an *ad hoc* agreement had been reached between the parties, but the problem of transporting prisoners by sea, which was acute during the Second World War (30), has never been clearly resolved neither by the Geneva Conventions nor more recently by their Additional Protocols.

However, one of the pragmatic solutions that was chosen by the parties, i.e. the use of merchant ships, is in keeping with a practice that goes back to the naval wars of the seventeenth and eighteenth centuries: the cartel-ship. Cartel-ships were ships under military control expressly commissioned to enter into contact with the enemy fleet and to exchange or transport prisoners of war. To identify themselves, they hoisted the flag of truce and the colours of the two parties to the conflict.

(30) At least 15,000 prisoners of war and civilian internees disappeared at sea as a result of blind attacks directed against the ships that were carrying them. Report of the ICRC on its Activities during the Second World War, page 319.

The conflict in the South Atlantic thus revealed a deficiency in humanitarian law and revived an old custom for transporting prisoners by sea – the cartel-ship.

3.5 Prisoners killed or injured in special circumstances

Article 121 of the Third Convention stipulates that:

"Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power."

"A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power."

"If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible."

Following two incidents which brought about the death of five Argentine prisoners of war during their detention, and a third incident, as a result of which one Argentine prisoner was injured, the British authorities, in conformity with the provisions of the aforesaid Article 121 of the Third Convention, carried out enquiries and drew up reports which were forwarded through the ICRC to the Argentine Government.

3.6 Burial – Identification of the dead

Respect for the dead – deeply rooted in the manners and customs of all people – forms part of humanitarian law. Under the Geneva Conventions the identification of the bodies, their burial and the marking of graves are likewise the responsibility of the parties and are obligations sometimes difficult to fulfil in the circumstances of a conflict. Article 17 of the First Convention sets forth the measures and precautions to be taken so that the dead may rest in peace and their families are notified and are not left in uncertainty:

"Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body."

"As soon as circumstances permit, and at the latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves together with particulars of the dead interred therein."

During the fighting on the archipelago, in very difficult climatic conditions, the dead were buried with all the precautions and respect that circumstances permitted, most of them in temporary collective graves

In February 1983, the mortal remains of 218 Argentine soldiers were reinterred in individual graves at the military cemetery of Darwin. Of these, 78 could be identified by name, while 26 bore a regimental number enabling their country of origin to identify them. Unfortunately, and although technical examinations were made of the slightest evidence available (personal effects, etc.), 114 bodies could not be identified for lack of an identity disc.

CHAPTER V

PROTECTION OF THE CIVILIAN POPULATION

1. THE GENERAL PRINCIPLE OF PROTECTION

Respect for, and the protection of, the civilian population is one of the fundamentals of international humanitarian law, which is based very largely on the principle of distinction between military objectives and the civilian population.

This principle, which was established in the Law of The Hague, has become part of accepted customary law. Nations are therefore bound to respect it in the conduct of hostilities even if they have not entered into any specific legal covenant to do so. The Geneva Conventions of 1949, which above all lay down rules for the protection of victims and include little reference to the conduct of hostilities, make no mention of it.

However, as we have seen above, when these Conventions were extended and supplemented by the Additional Protocols of 1977 (31), it was found necessary to reaffirm this fundamental principle, the respect of which is one of the most important factors in protecting the civilian population.

The Falkland-Malvinas Islands' conflict provides a rare example of hostilities conducted by both sides with particular concern for the safety of the civilian population, as there were only three civilian casualties.

The instructions received both by the Argentine armed forces when disembarking on the island of South Georgia and on the archipelago and by the British pilots and soldiers emanated from the desire to respect the civilian population. However, mention must also be made of the precautionary measures which were taken by the parties to protect the civilian population in accordance with Part II of the Fourth Convention.

2. PRECAUTIONARY MEASURES

At the request of the ICRC, concerned as to a possible extension of the hostilities, the Argentine Government agreed that a joint mission be organized to study means of ensuring the safety and protection of the civilian population in potentially dangerous zones, both on the coast of Patagonia and on the islands. The first part of this mission was carried out in early May. The objectives were as follows:

- To examine the possibility of setting up hospital and safety zones for the most vulnerable sections of the population in accordance with Article 14 of the Fourth Convention, which provides for the establishment of such zones even in time of peace.
- To make an on-the-spot assessment whether there were concentrations of the civilian population and hospitals close to strategic objectives.
- To contact branches of the National Red Cross in order to assess their means of action in emergencies.

The places visited were Comodoro, Rivadavia, Puerto Deseado, Rio Gallegos and Sarmiento.

Unfortunately, the second phase of the mission, which was planned for the islands, could not be put into immediate effect for technical reasons (difficulties of travel by sea, the runway of Port Stanley – Puerto Argentino airport out of use). ICRC representatives were able to reach the archipelago only on 9 June, having been invited to embark on board a British hospital ship at Montevideo; on 10 June, two of these representatives left again for the capital of the archipelago on board an Argentine hospital ship, to which they had been transferred within the Red Cross Box zone.

After discussions with the civilian population, and with the consent of the Argentine and British authorities, it was then decided at the suggestion of the ICRC representatives to set up a neutralized zone in the centre of the town, comprising the cathedral and a clearly defined area around it, in accordance with Article 15 of the Fourth Convention.

(31) Neither Argentina nor Great Britain are as yet party to the Additional Protocols.

The purpose of this zone was to shelter the following persons, without distinction, from the dangers of combat (32):

- (a) "Wounded and sick combatants or non-combatants";
- (b) "Civilian persons who take no part in hostilities and who, while they reside in the zones, perform no work of a military nature".

Though formally agreed upon this zone was not used, as active hostilities came to an end soon after.

The law distinguishes between hospital and safety zones and localities (Article IV, 14) and neutralized zones (Article 15), and there is naturally an explanation for this apparent complexity. Provision is made for hospital and safety zones only for certain particularly vulnerable members of the population (the wounded and sick, the infirm, children, and the aged, as specified in the Convention). To shelter them, zones are selected which will probably remain outside the combat area. This is moreover why provision is made for their location to be selected in time of peace. A neutralized zone, on the other hand, is generally created within an area where hostilities already exist. It is open to the civilian population as a whole, and steps must be taken to guarantee that no combatant enters it, in order to preserve its neutrality. It is duly marked by the distinctive sign of the Red Cross and the ICRC usually assumes overall responsibility and control for it.

3. THE CONTROVERSY AS TO THE "OCCUPATION" OF THE TERRITORY AND THE STRICT APPLICABILITY OF THE FOURTH CONVENTION

Several rules are set out in Part II of the Fourth Convention relative to the protection of the civilian population. Their aim is to protect the latter from the effects of hostilities. Particular provision is made for the establishment of the zones mentioned in the previous paragraph, the protection of hospitals and their personnel, the free passage of medical supplies, food and clothing, and also the exchange of family news. Several articles are also concerned with conditions of internment for civilians. However, a substantial part of the provisions of the Fourth Convention relate to the living conditions of the population in occupied territories.

Relations between the occupying power and the civilian population during the Second World War gave rise to serious difficulties. Particular consideration was given to this aspect when the Fourth Convention was adopted in 1949.

In the case of the Falkland-Malvinas Islands' conflict, no marked problems arose as a result of the islanders living side by side with the Argentine armed forces, if only because the Argentine military operation caused no casualties and the duration of the events was relatively brief.

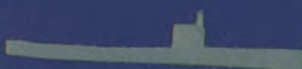
From the juridical point of view, however, the very origin of the dispute between Great Britain and Argentina has led to different views as to the strict applicability of the Fourth Convention. For the British, there is no doubt that the islands "were occupied" by the Argentines. In Argentine eyes, there can be no doubt of Argentine "sovereignty" over the islands as an integral part of the national territory.

When such a case arises in practice, the ICRC does everything within its power in the interests of the persons entitled to protection, i.e. to ensure that the parties respect the humanitarian provisions of the Convention even if its formal applicability is not recognized by one or other of them.

The briefness of the events did not make any such formal steps necessary and, in accordance with the provisions of Part II of the Convention, all the precautionary measures for the general protection of the population during hostilities were duly acknowledged and respected.

(32) "Wounded and sick combatants or non-combatants" means the wounded and sick, both military and civilian. This wording of 1949 seems rather less apt today. In fact, a combatant can very well continue to fight even if he is wounded. Consequently he is protected by humanitarian law only if he has stopped fighting and commits no further hostile act. Additional Protocol I deals with this particular point (Article 8: definitions).

DELEGACION
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