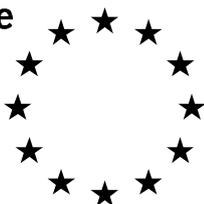


Council of Europe
Conseil de l'Europe



Strasbourg, 10/09/98
☒ CAHDI (98) 22 E

CAHDI (98) 22
Anglais seulement

**AD HOC COMMITTEE OF LEGAL ADVISERS
ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

16th Meeting
Paris, 16-17 September 1998

CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE
DISCUSSION OF THE SPECIAL REPORTS

**PRELIMINARY REPORT ON INTERNATIONAL HUMANITARIAN LAW
AND THE LAWS OF WAR**

Secretariat memorandum
Prepared by the Directorate of Legal Affairs

Foreword

1. Within the framework of the United Nations Decade of International Law, the Governments of the Kingdom of the Netherlands and the Russian Federation are called upon to organise and co-ordinate the Centennial of the First International Peace Conference.

2. In paragraph 3 of Resolution 52/154 of 15 December 1997 the United Nations General Assembly "encourages the competent United Nations organs, subsidiary organs, programmes and specialised agencies, including the International Court of Justice, the International Law Commission and the Secretariat, within their respective mandates, competence and budgets, as well as other international organisations:

- (a) To co-operate in the implementation of the Programme of Action and to co-ordinate their efforts in this respect;
- (b) To consider participation in the activities envisaged in the Programme of Action".

3. Pursuant to this Resolution and the Programme of Action (UN doc. A/C.6/52/3), the executive Secretary of the Centennial of the First International Peace Conference transmitted to the Secretariat of the CAHDI the text of the preliminary report on *International Humanitarian Law and the Laws of War* and requested its consideration by the CAHDI.

4. In addition to the CAHDI, this report was transmitted for consideration to:

- the International Court of Justice (ICJ),
- the Permanent Court of Arbitration (PCA),
- the Asian-African Legal Consultative Committee (AALCC),
- the International American Commission of Jurists of the Organization of American States (IAJC), and
- the International Law Commission (ILC).

5. The Executive Secretariat of the Centennial of the First International Peace Conference would appreciate to have the views of the CAHDI in order for the rapporteurs to include them in the revision of the reports for final discussion at the expert meetings at The Hague (18-19 May 1999) and St. Petersburg (23-25 June 1999), as well as for distribution to other interested fora.

Action required

Members of the CAHDI are called upon to consider the attached report and to comment on it with a view to providing the Executive Secretariat of the Centennial of the First International Peace Conference with the CAHDI's views.

INTERNATIONAL HUMANITARIAN LAW AND THE LAWS OF WAR

by

Christopher Greenwood

Introduction

The codification and revision of the laws of war, or, to use the term more widely employed today, 'international humanitarian law',¹ proved to be one of the most important parts of the work of the 1899 Hague Peace Conference (referred to herein as 'the Conference'). When the Conference convened, the laws of war were almost all unwritten, they covered only a comparatively small part of military activity and there was considerable controversy regarding their extent and manner of application even amongst States with otherwise similar views about international law. The Conference began the process, which has gone on throughout the twentieth century, of developing a substantial body of written law for the conduct of hostilities. The results of that century of law-making are evident. In contrast to the position in 1899, most aspects of military activity are now regulated by treaty, or by rules of customary law which are authoritatively stated in treaty texts. The degree of detail is such that any collection of the relevant agreements comprises hundreds of pages.

The Conference was held at a time when there was great optimism about the effect which scientific progress (including developments in the science of international law) could have upon the condition of humanity. Yet, as an eminent military historian has said, the undoubted progress which the twentieth century has seen in tackling the problems of famine or sickness has not been matched by progress in reducing the threats posed by war.² While the subject of this Report is that part of the law which seeks to alleviate the effects of war, rather than to prevent war itself, the same note of caution applies. For all the undoubted progress which has been made during the last 100 years in developing the law in this area, the difficulty of preserving humanitarian values in time of war is, if anything, even more acute at the end of the century than it was at the beginning.

The centenary of the 1899 Peace Conference, coinciding as it does with the 50th anniversary of the adoption of the Geneva Conventions and the end of the United Nations Decade of International Law, thus provides an excellent opportunity to reflect on the development of the laws of war. The purpose of this Report will be to recall some of the achievements and failures of the last century and to attempt to identify those parts of the laws of war which stand in greatest need of attention at the end of the twentieth century. The Report will focus on the analysis of four main subjects, or themes, which are of particular significance for the future of the laws of war. Most, though not all, of these themes were touched on at the Conference, even if developments during the succeeding hundred years have taken them in directions very different from those which might have been envisaged in 1899. The approach adopted, in respect of each of these themes, will be to conduct a stocktaking of the principal achievements and failures of the twentieth century, to identify the principal problems which remain unresolved and, where appropriate, to suggest how such problems might be addressed.

At the end of a century which has seen so much of war and in which the laws of war have proved so comparatively ineffectual, it seems obvious that that law must be seen as deficient

¹ Not all parts of the laws of war can strictly be regarded as humanitarian but the doctrinal debate about which rules should be characterised as humanitarian and which should not falls outside the scope of this report. For the sake of simplicity, therefore, the terms 'laws of war' and 'international humanitarian law' will be treated as synonymous in this report. The term 'law of armed conflict' is also treated as synonymous with 'laws of war'.

² J. Keegan, *War and Our World* (BBC, 1998), 1.

and the record of the last hundred years be adjudged one of failure rather than achievement. This Report will certainly identify deficiencies in several areas of the law. Yet the principal conclusion is not that the world needs new law, or different law, but that the law which we have needs to be made more effective. As Sir Franklin Berman has put it:

It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is 'satisfactory' or not, but rather how to secure or compel compliance with the law at all. It may be that we have now passed from a great phase of law-making to a period where the focus is not on new substantive law but on how to make existing law effective.³

As a preliminary to the main discussion, the Report begins (Part II) with a brief examination of the laws of war issues which came before the Conference, and its successor of 1907, and a survey of the approach adopted at those conferences. Thereafter, the following themes will be examined in greater detail:

(1) *the scope and application of the laws of war* (Part III), a section which will examine the place of the laws of war in international law as a whole, their relationship with the prohibition on resort to force in the United Nations Charter and with other areas of law, such as the law of human rights, as well as considering the circumstances in which the laws of war become applicable.

(2) *the conduct of hostilities in international armed conflicts* (Part IV), which will discuss the substantive law applicable to armed conflicts possessing an international character, in particular the law relating to belligerent occupation, weapons, targets and combatancy and the law of naval warfare.

(3) *the conduct of hostilities in internal armed conflicts* (Part V), which will conduct a similar examination of the law applicable to armed conflicts occurring within a State.

(4) *methods for ensuring compliance with the law* (Part VI), which will look at the means of implementing the law considered in the earlier parts of the Report.

Finally, a concluding section (Part VII) will make some tentative suggestions regarding what should be considered the priorities for the future in this area of the law.

The present Report is of a preliminary nature. It was always the intention that it would be reconsidered and revised in the light of the discussions to be held as part of the commemoration process, with a final version of the Report being produced in 1999. There is, however, an additional reason why the Report, and particularly Parts VI and VII, must be regarded as possessing a preliminary character. At the time that this Report was drafted (June 1998), the Intergovernmental Conference on the Proposed International Criminal Court was opening in Rome. The work of this Conference is likely to have a considerable impact on the laws of war and, in particular, on the methods for ensuring compliance with those laws. Until the outcome of the Rome Conference is known, it would obviously be premature to engage in any detailed comment on the law in relation to war crimes.

³ Sir Franklin Berman, Preface to Lady Fox and M. Meyer (eds.), *Effecting Compliance* (1993), p. xii.