Introduction

When the International Law Commission (ILC) was established in 1947, it was tasked with "the promotion of the progressive development of international law and its codification".[1] At its first meeting in 1949, the Commission set about examining the areas of international law that were in need of such codification or progressive development, and the question of whether the laws of armed conflict should be selected as an area of study was raised.[2] The ILC canvassed a number of opinions, including whether "war having been outlawed, the regulation of its conduct had ceased to be relevant".[3] Ultimately, the ILC decided not to proceed with an examination of the law of armed conflict, on the basis that "if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace."[4]

The ILC position on the law of armed conflict in 1949 touches on an attitude towards the law that is often expressed by newcomers to the field: how can one "introduce moderation and restraint into an activity uniquely contrary to those qualities"?[5] How can there be laws to regulate and constrain behaviour in situations that are essentially lawless, where injury and death of persons, and damage

[1] Article 1(1), Statute of the International Law Commission, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

[2] Based on memoranda submitted to the ILC by the Secretary-General including: a Survey of International Law in relation to the Work of Codification of the International Law Commission (UN Doc. A/CN.4/1/Rev.l); Preparatory Study concerning a draft Declaration on the Rights and Duties of States (UN Doc. A/CN.4/2); The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (UN Doc. A/CN.4/5); Ways and Means of making the Evidence of Customary International Law more readily available (UN Doc. A/CN.4/6); a Historical Survey of the Question of International Criminal Jurisdiction (UN Doc. A/CN.4/7); and International and National Organizations concerned with Questions of International Law: tentative list (UN Doc. A/CN.4/8).

[3] *Yearbook of the International Law Commission 1949*, p. 281, para. 18.

[4] Ibid.

[5] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010), p. 8.

and destruction of property are a given, even a hoped-for outcome? Indeed, there is ample evidence throughout history to demonstrate that when wars erupt, barbarous acts have occurred, and the architects and perpetrators of such barbarity often escape without being held accountable for their acts.[6] However, there are also numerous examples throughout history of peoples, groups and States willingly agreeing to conduct their wars in accordance with certain humanitarian dictates and limitations.[7] The reasons for agreeing to constrain wartime conduct vary – they can be for religious, ethical, political or pragmatic reasons. Nevertheless, restraint in warfare has been as much a part of war as lack of restraint. Indeed, as this book demonstrates, States have accepted, and continue to accept and embrace, increasing regulation and sanction on their conduct in armed conflicts.

It is the question of restraint in warfare, and how it is given legal force, that is the focus of this book. Comprising nine chapters, this book looks at the major areas of IHL, putting them in historical context, so as to better understand how the law has evolved. This book also examines the current challenges for and pressures on the existing law, as IHL rules adopted in the time of cavalry and bayonets must adapt to deal with issues like drones, cyber warfare and autonomous weaponry. Chapter 1 looks at the historical development of IHL, from its origins in Europe in the 1850s, and the historical events that have shaped the law through the last century and a half. Chapter 2 then outlines the contemporary legal framework of IHL, examining the treaty and customary laws that govern conduct in armed conflict, and exploring the fundamental principles of the law. Chapter 3 examines the types of armed conflict currently regulated under IHL, and the tests that have developed to determine whether an armed conflict exists.

The book then narrows its focus to examine how individuals are dealt with under the law, and how IHL regulates conduct and provides rights and responsibilities for individuals who participate (or do not participate) in armed conflicts. The first of these chapters, Chapter 4, looks at the concept of combatants and non-combatants, and its connected status, that of prisoner of war (POW). Chapter 4 examines who is entitled under IHL to combatant status, and examines those persons who have been denied combatant and POW status under IHL. Chapter 4 also explores the current legal thinking regarding a contentious area of the law – that of direct participation in hostilities. Chapter 5 looks at the rules regarding the protection of the wounded, sick and shipwrecked members of the armed forces, and those who care for them – medical and religious personnel. This chapter also looks at the law regarding what is perhaps the most recognisable emblem in the world – the Red Cross, and its affiliated emblems, the Red Crescent and Red Crystal.

[6] Solis gives the examples of Idi Amin and Josef Mengele as just two instances of persons who were never brought to account for their acts of "butchery" (ibid., p. 8).
[7] See further Chapter 1 for examples of historical limitations on warfare.

How the law defines and protects all those persons who are not designated as combatants or POWs – civilians – forms the focus of Chapter 6, which examines how the law protects civilians who find themselves in the hands of an adverse power in situations of belligerent occupation. Chapter 6 examines the rules that Occupying Powers must observe when, in international armed conflicts, they find themselves in temporary possession of territory that belongs to another sovereign State. Additional rules regarding protecting civilians from the deleterious effects of the conflict provide the focus of Chapter 7, which looks at the law of targeting. Chapter 8 looks at the general rules which apply to means and methods of warfare, and what kinds of weapons have been prohibited under IHL. Chapter 8 also examines a number of means and methods which have been the focus of much attention, but whose legality is highly contested, including the use of nuclear weapons, white phosphorus, depleted uranium munitions, cyber warfare, drone warfare and targeted killing. The final chapter of this book looks at how all these rules are implemented and enforced, and what mechanisms exist to hold violators of the law accountable for their acts.

Certain topics related to the law of armed conflict have not been examined in this book – for example, the law of neutrality, the interaction between IHL and human rights law, and the law on peacekeeping; furthermore, other areas of the law are touched on, but are not examined in specific detail, such as the specific rules on naval and aerial warfare, and international criminal law. This decision was made not because the authors considered the topics insignificant; rather, we wished to provide a detailed but comparatively concise assessment of what we consider to be the core rules of IHL, that would make the law accessible to newcomers to the field, but also to offer something for practitioners also.

1 Historical development of international humanitarian law

1. INTRODUCTION

For thousands of years, different societies have recognised that there are certain acts that are, and others that are not, permissible in war. There is evidence of rules regarding warfare in ancient China, India and what we now call the Middle East, dating back two millennia BC.[1] Hugo Grotius, the great seventeenth century Dutch jurist regarded as the "Father of the Law of Nations",[2] devoted one of the three books comprising his 1625 masterpiece *On the Law of War and Peace* to the rules applicable in war.[3] In it he drew on extensive examples from ancient Roman and Greek practice and literature to conclude that a number of principles were part of the "Law of Nations". Practices that he asserted were forbidden included the use of poison and poisoned weapons,[4] and rape,[5] while destruction and pillage of enemy property were permitted, as was the killing of all those in enemy territory – even women and children, and prisoners.[6] But Grotius drew a distinction between what was legally permissible and what was "right", compiling an extensive list of moral prohibitions that included the killing of women, children, prisoners of war and other categories of non-fighters, and positive requirements of moderation in the conduct of hostilities.[7]

Another great European jurist, Georg Friedrich von Martens, described a similar list of rules of warfare that had become custom by the late eighteenth

[1] See e.g. Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd edn, (Manchester University Press, 2008), pp. 26–36.
[2] L. Oppenheim, *International Law: A Treatise*, 1st edn, 2 vols. (London /New York: Longmans, Green and Co., 1905–6), vol. I, p. 58.
[3] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, in James Brown Scott (ed.) *The Classics of International Law*, (Oxford University Press, 1925), vol. 2.
[4] Ibid., pp. 651–3. [5] Ibid., pp. 656–7. [6] Ibid., pp. 646–51, 658. [7] Ibid., pp. 643, 722–77.

century.[8] Of particular interest in light of subsequent developments are von Martens's views on "the treatment of the vanquished", where he asserted that "[t]he victor, he who remains master of the field of battle, ought to take care of the wounded, and bury the dead. It is against every principle of the laws of war, to refuse or neglect to do either."[9] He described this duty as "dictated by humanity".[10]

While the laws and usages of war continued to evolve, the practice of States was by no means uniform; in many cases these were rules, as Grotius had put it, "if not of all nations, certainly of those of the better sort".[11] By the middle of the nineteenth century, many of these usages may indeed have become customary international law, but they had not been codified in a multilateral treaty. This began to change in 1856 with the Declaration of Paris at the end of the Crimean War, establishing a few short but important rules on maritime law in time of war.[12] But it was in the following decade that the modern law of armed conflict, or international humanitarian law, began to take shape from two quite separate but concurrent developments.

2. HENRI DUNANT AND THE BATTLE OF SOLFERINO

The first was the Battle of Solferino, in June 1859. Fought between the forces of Austria and a French-Piedmontese alliance, involving over 300,000 men, it was one of the great battles in the struggle to unify Italy, and the most bloody: lasting only a day, the battle left 6,000 dead and nearly 40,000 wounded.[13] Henri Dunant was a Swiss businessman who happened to arrive in the nearby town of Castiglione on the day of the battle and witnessed the aftermath. He was so moved by what he saw that he wrote a detailed account of his experiences, published in 1862 under the title "A Memory of Solferino".[14] He described how the army field hospitals were wholly inadequate and soon overwhelmed; in addition to the thousands of dead, many more thousands of wounded and dying men were left on the battlefield without water, food or medical care. It took many days for the wounded to be collected and taken to nearby villages and towns; more than 9,000 were brought into Castiglione where Dunant and the townspeople did what they could to help alleviate the

[8] G. F. von Martens, *Summary of the Law of Nations*, trans. William Cobbett (Philadelphia: Thomas Bradford, 1795), pp. 279–97. Georg Friedrich von Martens (1756–1821) was a German jurist and diplomat; to avoid confusion with the Russian Fyodor Fyodorovich Martens (1845–1909), whose name in French and German is translated as "de Martens" and "von Martens" (see e.g. n. 38 below), G. F. von Martens will be referred to in this book as "von Martens", and Fyodor Fyodorovich Martens as simply "Martens".
[9] Ibid., p. 295. [10] Ibid. [11] Grotius, *De Jure Belli ac Pacis Libri Tres*, p. 652.
[12] Declaration Respecting Maritime Law, Paris, 16 April 1856, in force 18 April 1858, 115 CTS 1.
[13] François Bugnion, "Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)" (2012) 94 IRRC 1299 at 1301.
[14] Jean-Henri Dunant, *A Memory of Solferino*, 1862, trans. by the American Red Cross (Geneva: ICRC, 1939).

suffering. But there were few medical supplies and fewer doctors, and wounds quickly became infected from the heat, dust and lack of treatment. Dunant organised a group of volunteer helpers, as "[t]he convoys brought a fresh contingent of wounded men into Castiglione every quarter of an hour, and the shortage of assistants, orderlies and helpers was cruelly felt."[15]

After a few days the crisis eased as the wounded were transported to hospitals in larger towns, but as Dunant discovered when he left Castiglione for Brescia, there was a shortage of voluntary orderlies and nurses everywhere.[16] A poignant example of the lack of care cited by Dunant was of a dying soldier who had letters from his family at the post office, that would have brought him great comfort, but the hospital workers refused to fetch them. When well-meaning townspeople brought unsuitable food to the hospitals, access was limited to those with official authorisation, which few were willing to seek, and their "charitable zeal" began to wear off.[17] Dunant saw that "selected and competent volunteers, sent by societies sanctioned and approved by authorities, would easily have overcome all these difficulties".[18] He therefore called, in his 1862 book, for the establishment of societies for the relief of the wounded – organisations of experienced volunteers, recognised and accepted by commanders and armies in the field, who would provide immediate treatment of the wounded on the battlefield – and for States to agree by treaty to grant such access.[19] This would alleviate suffering as early as possible, and prevent the exacerbation of injuries, amputations and deaths that had resulted from neglect and infection at Solferino.[20] This was not an original idea, as Dunant admits, but the instant popularity of his book ensured its wide dissemination.[21]

3. THE 1864 GENEVA CONVENTION

Dunant's suggestions were taken up by the Geneva Society for Public Welfare, and in early 1863 a committee including Dunant was set up to develop these ideas.[22] The committee organised an international conference in Geneva later that year which discussed a draft convention the committee had prepared, and passed a number of resolutions agreeing to the establishment of national committees; these would supply voluntary medical personnel to armies in the field and these volunteers would wear a white armband with a red cross as a uniform, distinctive sign.[23] Another important step was the conference's recommendation that all countries adopt a uniform flag and sign for their medical corps and facilities, and that medical

[15] Ibid., p. 60. [16] Ibid., p. 102. [17] Ibid. [18] Ibid., p. 103. [19] Ibid., pp. 124–6.
[20] Ibid., pp. 116–28. [21] Ibid., pp. 124, 9. [22] Ibid., pp. 129–39.
[23] ICRC, "Resolutions of the Geneva International Conference, Geneva, 26–29 October 1863", www.icrc.org/applic/ihl/ihl.nsf/INTRO/115?OpenDocument.

personnel, hospitals and ambulances, as well as the wounded themselves, should be recognised as neutral.[24]

To give effect to these principles, at the behest of the committee the Swiss government invited States to a diplomatic conference which, in August 1864, adopted the landmark Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The core provisions of the Convention were neutrality of the wounded and those who care for them, the adoption of the red cross on a white background as the distinctive sign for medical facilities and personnel, and an obligation to collect and care for the wounded and sick on the battlefield, regardless of nationality.[25] These were radical provisions: for the first time, international law applied to an activity – war – which (apart from some maritime questions) had previously been ruled by force; moral ideas of humanity moderated State interests; and international law protected private actors, such as the voluntary relief societies, on the battlefield.[26]

A dozen years after this, the Geneva committee adopted the name by which it is now known: the International Committee of the Red Cross (ICRC).[27] Thus the experiences of one man witnessing the effects of one battle led directly to two milestones in the development of modern international humanitarian law: the 1864 Geneva Convention, and the founding of the Red Cross and Red Crescent Movement. In recognition of his contribution, Dunant was the joint recipient of the first Nobel Peace Prize, in 1901.[28]

4. THE LIEBER CODE 1863

Meanwhile, the other major development arose indirectly out of the Civil War in the United States (1861–5). At the beginning of the war, Francis Lieber was a highly regarded professor at Columbia in New York, writing and lecturing on military law.[29] The war raised difficult legal questions for the Union forces, such as whether the exchange of prisoners, customary in warfare, would amount to recognition of the Confederacy as a belligerent, i.e. a sovereign power, rather than an unlawful rebel force.[30] Lieber published his opinions on these issues, and his advice was regularly sought by the Union government, particularly another international lawyer, Henry Halleck, who was appointed General-in-Chief of the Union armies

[24] Ibid.
[25] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, in force 22 June 1865, 129 CTS 361.
[26] Jean Pictet (ed.), *Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952) ("GC I Commentary"), p. 11.
[27] ICRC, Resolutions of the Geneva International Conference.
[28] The Nobel Prize, *The Nobel Peace Prize 1901,* www.nobelprize.org/nobel_prizes/peace/laureates/1901/.
[29] Ernest Nys, "Francis Lieber – His Life and His Work" (1911) 5 AJIL 355 at 355.
[30] Francis Lieber, "The Disposal of Prisoners", letter to *The New York Times*, 19 August 1861.

in 1862.[31] Lieber persuaded Halleck that because the existing army regulations were far from comprehensive, a code of all the laws and usages of war should be drawn up. Halleck agreed, appointing Lieber to a War Department board of five men to prepare such a code. Drafted by Lieber and revised by the board, the "Instructions for the Government of Armies of the United States in the Field" were issued by the Union government as General Orders No. 100 in April 1863.

The "Lieber Code" was the first time a government had set out explicit rules not only on matters of internal discipline, as previous military codes had done, but also on the treatment of enemy forces and civilians.[32] It covered, in its 157 articles, everything from rules on occupation of enemy territory, protection of civilians and civilian objects, and the treatment of prisoners of war, to assassination and the rules applicable in civil war. The Code had a profound influence, being adopted to varying degrees by Great Britain, France, Prussia, Spain, Russia, Serbia, the Netherlands and Argentina.[33] It formed the basis of draft conventions in 1874 and an 1880 manual on the laws of land warfare prepared by the Institute of International Law.[34] More enduringly, it also found expression in the second and fourth Hague Conventions of 1899 and 1907 (discussed below), as well as influencing the later Geneva Conventions.[35]

5. THE 1868 ST PETERSBURG DECLARATION

The 1860s saw another innovation with the 1868 St Petersburg Declaration, the first international agreement to prohibit particular weapons.[36] Bullets had recently been invented that exploded on contact with the target, and were being adopted for military purposes. Because such bullets would cause considerably more damage to the human body than traditional bullets, the Russian government decided that they were an inhumane form of weapon.[37] It invited States to an International Military Commission to discuss the issue and the result was a binding declaration, ratified or acceded to by nineteen states at the time, prohibiting the use in time of war of bullets which were "explosive or charged with fulminating or inflammable substances".[38]

[31] Richard Shelly Hartigan, *Lieber's Code and the Law of War* (New York: The Legal Classics Library, 1995), pp. 2–14.
[32] Ibid., pp. 2–5.
[33] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010), p. 40.
[34] Hartigan, *Lieber's Code*, p. 22. [35] Ernest Nys, "Francis Lieber – His Life and His Work", 391–2.
[36] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, in force 29 November/11 December 1868, 138 CTS 297 ("St Petersburg Declaration").
[37] Ibid.
[38] St Petersburg Declaration, first operative paragraph. The Declaration applied to "any [such] projectile of a weight below 400 grammes", thus allowing their use against hard objects such as artillery and gun carriages

With many of that time believing that "the object of making war is to kill",[39] it is of particular significance that the participants noted the need "to conciliate the necessities of war with the laws of humanity", and affirmed that:

> the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[40]

These concepts of balancing military necessity and humanity, and the avoidance of unnecessary suffering, are at the heart of international humanitarian law. They are discussed further in Chapter 2.

6. THE 1868 ADDITIONAL ARTICLES, 1874 BRUSSELS DECLARATION, 1880 OXFORD MANUAL

Some States attending the St Petersburg conference had been willing to broaden the discussion to consider prohibiting other "barbaric" means of warfare, but this was precluded by other States, notably Great Britain, which insisted on retaining complete freedom in the choice of means.[41] Fundamental divisions between States as to the existence and extent of the laws and customs of war continued for the next thirty years. In 1868 an unsuccessful attempt was made to clarify some of the provisions of the 1864 Geneva Convention and extend them to naval warfare, in the Additional Articles relating to the Condition of the Wounded in War.[42] The Additional Articles did not come into force, but their object was eventually achieved by one of the 1899 Hague Conventions.[43] In the Franco-German War of 1870–1 the belligerents accused each other of violating the laws and customs of war, and public opinion in many European quarters demanded an end to the "uncertainty and anarchy" surrounding these questions.[44]

while prohibiting them in small arms: Fyodor de Martens, *La Paix et la Guerre* (Paris: Arthur Rousseau, 1901), p. 88 (note this is the French version of the name of Fyodor Fyodorovich Martens).

[39] "The Emperor of Russia on Projectiles", *The Sydney Morning Herald*, 26 August 1868, p. 6, trove.nla.gov.au/ndp/del/article/13171704.

[40] St Petersburg Declaration, fifth operative paragraph and preamble.

[41] Martens, *La Paix et la Guerre*, pp. 89–91.

[42] Additional Articles relating to the Condition of the Wounded in War, Geneva, 20 October 1868, 138 CTS 189.

[43] Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, The Hague, 29 July 1899, in force 4 September 1900, 187 CTS 443 ("Hague III 1899").

[44] Martens, *La Paix et la Guerre*, p. 98 (Pert translation).

This led to the Russian government again taking the initiative in inviting States to a conference in Brussels in 1874, to discuss a draft code of the laws of war on land.[45] The first draft was prepared by Fyodor Fyodorovich Martens, revised and expanded by a Russian government commission, and submitted to the conference.[46] The conference agreed a draft code in the Brussels Declaration of 1874, drawing in part on the Lieber Code, but States were not ready to commit to binding prescriptions as to how they should conduct war and defend themselves. A major area of disagreement concerned the laws of occupation, a subject of great contention in the recent Franco-German War, and in particular, who would be entitled to combatant status when a population took up arms against an occupier.[47] The Declaration, influenced by States such as Holland and Belgium, recognised as lawful combatants a population that rose *en masse* against an occupier, which Germany could not accept.[48] Great Britain was also obstinately opposed to a binding code, while the smaller powers called it a "code for invasion".[49]

The 1874 Declaration lacked any binding effect but the following year the newly-formed Institute of International Law began work, using the Declaration as a starting point, on ways to restrain the destructive effects of war, while recognising its inevitable necessities.[50] As the rapporteur for the project (Gustave Moynier, a leading member of the original International Committee of the Red Cross) noted, the Institute accepted that an international treaty was perhaps premature; it therefore produced, and adopted at its meeting in Oxford in 1880, a Manual on the Laws of War on Land that it hoped States would use as a basis for national legislation.[51]

7. THE 1899 AND 1907 HAGUE CONVENTIONS

As the nineteenth century continued to see more wars, rapid advances in weaponry and mounting expenditure on arms, the Russian government once more proposed an international conference.[52] In 1898 it invited all States represented in St Petersburg to a conference with the object of seeking means to limit the "progressive increase of military and naval armaments, a question the solution of which becomes evidently more and more urgent in view of the fresh extension given to these

[45] Ibid., p. 99. [46] Ibid., p. 103.
[47] Peter Holquist, *The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874–1878* (Washington: The National Council for Eurasian and East European Research, 2004), p. 13.
[48] Ibid., p. 11; Martens, *La Paix et la Guerre*, pp. 372–3. [49] Martens, *La Paix et la Guerre*, pp. 100, 121.
[50] Institute of International Law, Resolutions, "Examen de la Déclaration de Bruxelles de 1874", 30 August 1875, www.idi-iil.org/idiF/resolutionsF/1875_haye_02_fr.pdf; Institute of International Law, Manuel des Lois de la Guerre sur Terre, 9 September 1880, www.idi-iil.org/idiF/resolutionsF/1880_oxf_02_fr.pdf, Preface.
[51] Institute of International Law, Manuel 1880, Preface. [52] Solis, *The Law of Armed Conflict*, p. 51.