

# International Law and the Laws of War

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**The article examines international efforts to curb states' war-making prerogatives in the second half of the "long" 19<sup>th</sup> century. It captures new humanitarian sentiments circulating in transnational society that propelled the movements to codify the laws of war and create permanent international institutions for their implementation. The article focuses specifically on the societal efforts that led to the passage of the Geneva Convention in 1864 and the work at the two Hague Conferences in 1899 and 1907. These movements set ethical precedents in international law as well as patterns of intergovernmental cooperation that have endured to the present day.**

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## Introduction

This article reflects a recent convergence of research interests among transnational historians and legal scholars.<sup>[1]</sup> It draws attention to changing forms of international law at the foundation of a new internationalism of sentiments, organizations, and activism beginning around the mid-19<sup>th</sup> century. In this framework, the Hague Conferences of 1899 and 1907 were pivotal moments in the long 19<sup>th</sup> century, in the effort to both regulate states' war-making authority through the codification of binding international laws and to create permanent institutions and organizations for their implementation and oversight.

The article opens in 1899 at the First Hague Conference, capturing the dynamic social worlds that gave rise to these new patterns of cooperation and negotiation in international society. It then assesses the social-historical contexts for two models of the laws of war, known today for the location of their founding congresses: the Geneva model (protecting categories of individuals at risk in wartime) and the Hague model (limiting the state's methods and means of waging war). The final section examines the values underpinning the laws that were also institutionalized in new intergovernmental organizations in international society. Methodologically, the article examines law-making as a dynamic but contingent process, which sets the formulation and revision of law at international congresses in their wider societal and geopolitical contexts. In this way, it addresses the conflict of interests among and between states and peoples that limited the full impact of the laws.

## Conciliating War's Necessities with the Laws of Humanity

In May 1899 representatives of twenty-six sovereign states converged on the House in the Woods, the Dutch royal family's summer residence in The Hague, to hammer out a series of international laws and declarations designed to control states' war-making activities. Comprising a total of 100 formal delegates, the members included well-known figures in diplomatic service, high military and naval officers, among them representatives of states' military medical corps, prominent politicians, and a sizeable contingent of lawyers specializing in the new field of international law. Not surprisingly, given the geopolitical balance of power at the time and the congress' location in [the Netherlands](#), European states dominated the diplomatic gathering. Of course, in this era of imperial rivalry and a costly arms race, there were many serious divisions among them, including political status as great or small powers, and divergent orientations toward land or sea warfare.

The congress, however, was partly a global affair, reflecting a newly emerging international order of states. The [Ottoman Empire](#), which had become a recognized European power by treaty law in 1856, sent eight delegates. The [Persian Empire](#) was represented as well. Two countries from the Americas also had delegations: the [United States](#) and Mexico ([Brazil](#) declined to attend). [Japan](#) had a visible presence with seven delegates. Indeed, since the Meiji restoration in 1868, which had set the country on a course of social and economic modernization following Western European patterns, Japanese leaders had been using the language and principles of treaty law to affirm the country's place and prominence among the great imperial powers. In addition, there were representatives from [China](#), nominally sovereign and independent, and also [Siam](#) (Thailand).

At a follow-up conference – the Second Hague Conference in 1907 – the number of sovereign states in attendance rose to forty-four and the delegations now included all [Latin American countries](#) except Costa Rica and Honduras, and a number of new European states from former Ottoman territories. Otherwise, there was remarkable continuity in the social profile and occupational expertise from the First to the Second Conference. For a growing number of internationally-minded reading publics, both gatherings were gripping political and social events.<sup>[2]</sup>

And no wonder. The first Hague Conference brought together, as an integrated package, a set of ideas and principles that had been swirling around in global civil society for at least the past thirty-five years: peace, arbitration, disarmament, humanitarianism, and projects to codify the laws of war ([see external link](#)). Some of the visions, such as peace or humanity, admittedly had a much older pedigree, but they had become intertwined with international law-making practices placed in a new direction after the Crimean War (1853-1856) with a declaration of maritime law (1856). The law innovatively allowed states not part of the original agreement to accede to it. International law was being written down, thus achieving a permanent status. It was also becoming more open, and thus universal – at least in principle – to its defenders. The work of the new group of professionalizing international lawyers, so prominent at the Conference, reflected a firm belief in law's ability to bring order out of disorder and curb power through the establishment of accepted rules and regulations that would govern international ties among states. It seemed to serve, in the language of the day, the “ever progressive needs of civilization.”<sup>[3]</sup>

Beyond the codification movements, the Hague agenda expanded the meaning of war-controlling actions to include proposals for disarmament and methods of arbitration to settle disputes among states. A linkage of disarmament and peace had been at the heart of the Russian Foreign Minister Count [Michail Mouravieff's \(1845-1900\)](#) call, which had set the Hague process in motion in the first place. Addressing all states with diplomatic representation at St. Petersburg, his 1898 circular juxtaposed the “maintenance of the general peace” with a “possible reduction of the excessive armaments which were burdening all nations.” Widespread skepticism and silence in the diplomatic corps forced Mouravieff to broaden the call to seven additional items, ranging from prohibitions of certain types of [weapons](#) and modes of destruction to regularizing good offices and arbitration practices. Although central to the original Russian initiative, the proposal to prohibit “any increase of the armed forces” beyond their present numbers was the least successful item on the agenda. It ran up against states' collective understanding of their own vital national interests at play at every phase of negotiation. Most delegations would not agree to any regulated formula or method of arms reductions, rendering the concept an empty wish. The Final 1899 Act noted only that “restrictions of military charges, which are at present a heavy burden on the world, [are] extremely desirable for the increase of the material and moral welfare of mankind.”<sup>[4]</sup> Reducing armament levels was not even on the formal agenda of the Second Hague Conference.

That left outstanding the effort to establish common and uniform procedures and institutions for arbitration, a diplomatic practice which, like international law-writing, had also been gathering steam through successful implementation over the past several decades. New notions, such as the idea of peace through compulsory arbitration (*arbitrage obligatoire*), were advanced in [France](#), for example. From the 1890s, this principle was associated with important reform politicians, such as [Léon Bourgeois \(1851-1925\)](#), as well as activists, notably [Frédéric Passy \(1822-1912\)](#) and [Charles Richet \(1850-1935\)](#), who founded and

headed a French organization promoting arbitration. In 1899, Bourgeois served as president of the Third Commission at The Hague that was tasked with drafting laws to settle international conflicts peacefully.<sup>[5]</sup>

Multilateral traditions among inter-American states, described by historian Greg Grandin as “a kind of American international law,” took the lead in the process. The tradition was forged by Central and Latin American leaders and jurists and focused on the principles of nonaggression and international arbitration.<sup>[6]</sup> These ideas most directly impacted the work of the Second Hague Conference, given the multitude of delegations from the Americas, although they did not necessarily speak with one voice.

In addition, the U.S. and [Great Britain](#) had been the most active sponsors of arbitration, inserting arbitral agreements and tribunals into treaty law. These efforts were tangible and relatively successful. The number of arbitral settlements had risen steadily since mid-century: by 1860, there were twenty-five agreements; between 1861 and 1880, the number rose to fifty-four; and in 1900, it reached a record of 111. In fact, many of the international lawyers at the First Hague Conference had been involved in settling disputes through arbitration. Most prominent among them was the Russian [Feodor Fedorovich Martens \(1845-1909\)](#) who, during the First Hague Conference, traveled repeatedly to and from Paris to head the Venezuelan Arbitration Court, which was negotiating a river basin border. Like Martens, these lawyers brought their firsthand expertise to the Hague deliberations. In a further step, which intertwined arbitration and law, jurists and delegates were also coming to acknowledge arbitration as the most “effective” and “equitable” method of interpreting the new corpus of binding international law that was being codified simultaneously.<sup>[7]</sup>

These interstate methods of settling disputes peacefully were followed actively – and purposefully promoted – by many different groups in transnational civil society, reflecting growing international sentiments and transnational contacts that put their stamp on the later decades of the long 19<sup>th</sup> century. Transnational and cosmopolitan ties and sentiments coexisted and intersected with admittedly pervasive and hardening nationalist and militarist identities.<sup>[8]</sup> Foremost among these activist networks were the peace movements. Toward the end of the century, hundreds of peace societies were founded throughout the world; so diverse were their membership and visions that in 1891 the groups formed an International Bureau of Peace, headquartered in [Berne, Switzerland](#). The bureau published an annual *Yearbook* to keep track of the “peace work around the world.” Many of these groups actively popularized ideas in national societies such as international solidarity, compulsory arbitration, restrictions of armaments, and beliefs in a permanent court to insure world peace.

The peace movements, broadly conceived, spawned two distinct international organizations with overlapping membership that helped facilitate the exchange of information at The Hague. One was the epistemic community of international lawyers who, in 1873, founded the Institute of International Law. The institute was a scientific body comprised exclusively of experts offering studies on practical challenges emerging in the new field of international law. Over the decades, its members wrote influential treatises on the laws of war ([see external link](#)). However, these compendia were also authored by leading military officers and diplomats of the day, reflecting the same intertwining of personnel that crafted new law at The Hague.

Professional lawyers shared a deep commitment to law as a prelude to an international order based on peace but, as professionals, distanced themselves from the peace societies. They claimed that their “collective scientific action” provided an alternative mode of intervention between those defending the rightness of war and the “utopians” championing a perfect peace. They, too, did not speak with one voice, but brought conflicting national and regional legal traditions and interests to the Hague negotiations. This reflected disagreements over arbitration (pitting German against French lawyers), the right of occupation and legitimate resistance (reflecting tensions between great and small European states), and neutral obligations on territory controlled beyond borders (a sore point for Japanese lawyers arising out of the [Russo-Japanese War, 1904-1905](#)). After 1899, the gap between lawyers and peace society members widened.

A second influential organization in civil society was the Interparliamentary Union founded in 1889. It coordinated parliamentarians, originally from France and Britain, who were pushing for arbitration treaties with the United States. The group expanded to embrace popular national representatives in practical efforts to safeguard peace. Committed to concrete steps just like the lawyers, Union members drafted statutes for a permanent international arbitral court that was brought to The Hague in 1899, among other interventions into law. Equally importantly, its membership’s transatlantic ties helped insure the call for a Second Hague Conference. Yet many members simultaneously were skeptical of the work at The Hague, rightly seeing it as a reflection of interstate power and interests, insufficiently attuned to the people’s interests. In turn, Hague conferences spurred the group to adopt more organizational cohesion and new strategy.<sup>[9]</sup>

These initiatives seemed to reflect a new idea that ordinary people could impact policy deliberations on topics as grave as war and peace. In an affirmation of the principle, hundreds of peace advocates, including one of the luminaries of the movement, the Baroness Bertha von Suttner (1843-1914), and sponsors of other causes and campaigns, descended on The Hague, accompanied by a host of reporters and journalists determined to cover the events. At both Hague conferences, von Suttner's residence became a hub of meetings and exchanges for delegates and representatives of civil society groups. Von Suttner had risen to international prominence with the publication of her widely translated antiwar novel, *Lay Down Your Arms (Die Waffen nieder)*, published in 1889.<sup>[10]</sup>

The presence of so many peace advocates during the months of deliberations gave the Hague movement the enduring, although inaccurate label "Peace Conference." A 1910 encyclopedia entry similarly concluded that peace, once absent from the purview of international law, had now become an object of study, with methods and procedures spelled out nearly as precisely as those governing the conduct of war. The presence of so many interested lay parties, however, created a dilemma for the official delegates. As high government and military officials, they understood that they could not fully flaunt the "public opinion" now weighing into foreign affairs. No country could be seen to disregard at will the practices of "civilized" states and the "public conscience." Yet, as officials and professionals, they were deeply skeptical of the newfangled notion of public opinion. One of the first acts of both conferences was to close the deliberations off to the public.<sup>[11]</sup>

Objects of deep contemporary interest, the Hague Conferences, as it turns out, were pivotal in shaping the organization of international life and law far into the future. In 1899, diplomatic conferences of large and small states were rare occurrences, as were agreements establishing permanent international organizations and bodies. Both are prominent features of international society and life today. In addition, the Hague work of codifying the laws of war has served as a lasting foundation for what is known as international humanitarian law, a subset of international law applied to the treatment of individuals in armed conflicts (the Geneva model) and to the methods and means of warfare (*ius in bello*), proposing limits to the way force may be used (the Hague model).

In a reversal of nomenclature, but not substance, today's international humanitarian law centers on the revised Geneva Conventions of 1949 and 1977. But in the late 19<sup>th</sup> century, The Hague was the paradigmatic conference seeking, in its own language, to reconcile war's necessities with the laws of humanity (as well as the necessities of commerce with wartime). Its study helps provide, in Akira Iriye's compelling conception, a counter narrative to a history that wrote the coming of war in Europe in 1914 as inevitably following a "predetermined...road." The cumulative effort to curb war's excesses and promote peace was as central to the construction of the later 19<sup>th</sup> century international order as war itself.<sup>[12]</sup>

## International Humanitarian Law: The Geneva Model

By the 1860s, a discourse of humanitarianism had returned to global society, tied squarely to war's human costs. In earlier decades, humanitarian sentiments had animated the transatlantic anti-slave trade and abolition movements, which purposefully harnessed the Enlightenment concept of common humanity for their causes. The cause of abolition spread the language of humanity far and wide.<sup>[13]</sup> But, now, a growing number of philanthropic figures and educated people became concerned with the plight of wounded soldiers on the battlefield. While not absent from the global scene, wars had been relatively scarce on the European continent since the Napoleonic era.

With the spread of nationalist territorial demands and identification with minority, often Christian, communities in Ottoman lands, wars returned as standard political contests. News concerning the Crimean War (1853-56), the campaigns for Italian unification (1848-70), the German wars of unification (1864-71), and even the U.S. Civil War (1861-65) was avidly sent across the seas through [telegraph communication](#) and new wartime journalism. But the nature of [warfare](#) had changed. Gone were the old regimes' mercenary armies, along with their extensive medical provisioning. With conscript armies, commanders believed they could replace soldiers easily rather than invest in their health and recovery. Yet in this era of people's wars, a soldier was someone's husband, father or brother. The new context helps explain the mounting public interest in war's casualties, the perceived need by authorities and military officials to attend to public opinion in wartime, and a growing sense of the soldiers' fate as a common human link transcending geographical borders. Convergence of these complex sentiments helped establish new international organizations and write new international laws.

The lead, as it turns out, was taken by Henri Dunant (1828-1910), a Swiss businessman whose travels serendipitously brought

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him to Solferino in northern Italy in June 1859, the place of a decisive battle in the struggle for Italian unification. What Dunant saw on the battlefield haunted him: 30,000 wounded soldiers of both military camps dying after the battle because of inadequate medical attention. Returning to Geneva, he wrote a scathing account entitled *A Memory of Solferino*, which he self-published in 1862 as an “open letter to world leaders and opinion makers”. He then sent it to Europe’s dynastic courts, prominent military leaders, doctors, writers and philanthropists. The book became an instant success and was quickly translated into seven European languages. With its searing details of horror and misery, it effectively evoked humanitarian sentiments, creating immediate, visceral connections between distant readers and his symbol of suffering humanity, the wounded enemy soldier. But unlike the workings of humanitarianism in the anti-slavery campaigns, which rarely envisioned the slave as a human being with rights, Dunant tied his vision to a legal regime, which his movement helped create.<sup>[14]</sup>

The key to Dunant’s success were two innovations. The first was a proposal for *permanent* voluntary relief associations formed and trained in peacetime and designed to supplement states’ military medical corps in wartime. The second was treaty law protecting those persons *hors de combat* – at the outset, the wounded soldier of any nationality and those offering medical relief and religious succor. His proposal found consistent support among high government and military authorities and worked, ultimately, because different governments around the world officially recognized the volunteers. While in origin a masculine project (although not understood as such) with its attention on the male citizen-soldier, it found ardent support among women. These women were initially female dynasts in the courts of Europe and privileged women in women’s patriotic relief societies, which had worked since the French Revolution to aid veterans of the revolutionary (and subsequent) wars, as well as the poor and destitute in [urban societies](#). Typically under dynastic patronage, these organizations were readily remolded to meet Dunant’s specifications.<sup>[15]</sup> Ad hoc relief efforts had also emerged organically in the Crimean War and Italian campaigns.

Dunant’s ideas, then, were turned into action, resulting in the calling of two conferences. Both took place through the efforts of a small Geneva philanthropic society, the Geneva Public Welfare Society, which became the [International Committee of the Red Cross](#) (ICRC) in 1875 ([see image](#)). One of its members, the lawyer [Gustave Moynier \(1826-1910\)](#), had seen Dunant’s book and adopted his cause as the Society’s cause. Under its own authority, the Swiss group called together interested parties for a three-day conference in late October 1863 to coordinate the founding of relief associations. It turned itself into a Central Committee to prepare guidelines and coordinate the necessary exchange of information. Thirty-six people attended. Eighteen were government representatives from fourteen states who reported back home on the deliberations, preparing the ground for further action. The rest were members of charitable organizations and interested individuals. Importantly, as pointed out in one of Dunant’s earlier circulars, battlefield medical relief work – a self-proclaimed humanitarian project to aid all wounded soldiers by the state’s revitalized military medical corps or by volunteers – required protection under a universally recognized sign of [neutrality](#). Delegates made that symbol the red cross, inverting the colors of the Swiss flag ostensibly to honor their hosts.

With a seeming logic, a second conference – a diplomatic conference called by the Swiss Federal Council – met in August 1864. This one was attended solely by European states. Invitations had also been extended to the Sublime Porte (the Ottoman Empire), the United States, Mexico and Brazil. Following a proposal prepared by the Central Committee, delegates debated, drafted, and signed the Geneva Convention on 22 August 1864; within four months, the Convention had been ratified by ten states and became binding international law. True to the new spirit of international law, Article 9 allowed states not present to accede to it.<sup>[16]</sup>

At the outset, the Geneva Convention had a limited purview, providing legal protection for wounded soldiers and the medical personnel working in the mobile military [hospitals](#) and ambulances on the battlefield. But it established new precedents, making rights and protections for categories of people *in wartime* a matter of international agreement; rights no longer were the sole preserve of constitutional arrangements. In time, its protections also came to define prisoner of war status and create ad hoc clearinghouses for the exchange of information on prisoners during wartime, a task eventually taken over by the ICRC. Codes, too, sought greater clarity on the status of the nonbelligerent – the civilian in wartime.

However, difficulties emerged immediately, unsettling the law from the start. The Ottoman Empire adhered to the Convention one year later but, in principle, refused to accept the cross, seeing it not as a neutral sign but as a Christian symbol deeply upsetting to Muslim sensibilities. At all subsequent law-writing congresses prior to 1914, Ottoman representatives demanded parity for the red crescent to reflect the Muslim identity of the dynastic house ruling over its complex multi-ethnic and religious empire. At times, they were supported by Persian and Siamese delegations. In addition, in all of its subsequent wars, the Russo-Ottoman (1878), [Tripolitanian](#) (1911-12) and [Balkan wars \(1912-13\)](#), Ottoman authorities imposed a compromise on the

ground: they demanded and achieved reciprocal recognition of cross and crescent for the duration of each war. Formal legal acknowledgement of the red crescent had to wait until the revised Geneva Convention of 1929.<sup>[17]</sup>

Equally unsettled, ironically, was the role of the volunteer [Red Cross](#) (and [Crescent](#)) societies at the heart of Dunant's vision. In 1864, military leaders balked at recognizing a place for volunteers on the battlefield and excluded them from the legal safeguards. But the founding of national wartime relief societies continued apace; increasingly coordinated by government and military regulation, their wartime services, tested first in the Prussian-Danish war of 1864, became indispensable to states' overall defense agendas. In their many national publications and reports of activities in the local press, furthermore, they spread the word about the successes of their humanitarian undertaking. Drawing on an accumulating record of practical wartime experiences, Red Cross leaders and personnel also were among the most active in transnational society pushing for revisions of the Geneva Convention. Prodded by the Central Committee, a first step was taken already in 1868, clarifying, for example, the medical services required under enemy occupation and, significantly, extending its provisions to naval warfare. This draft convention, however, was never ratified, leaving the revision work to a later day.

The unfinished work of Geneva was immediately relevant to the overall agenda of the Hague Conference in 1899, where participants were determined to convert the existing practices, customs, and laws of war into a broader written code. Here, leadership of the international Red Cross movement played a formative, if not purposeful, role, helping incorporate the Geneva Convention into the Hague instructions wholesale through Article 21. It read in part that "the obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention." The same language showed up in 1907. The [ICRC](#) was determined to maintain control over the effort to revise the Geneva Convention, however, inserting a "wish" in 1899 (a formal diplomatic statement about a future course of action, which typically reflected states' inability to resolve a controversy) that a special conference "might be summoned by the Swiss Government" for the revision of the Geneva Convention. That diplomatic meeting took place in June 1906 between the First and Second Hague conferences. It was then that the personnel of the national Voluntary Aid or Red Cross societies became fully protected under international law.<sup>[18]</sup>

## International Humanitarian Law: The Hague Models

Dominated by international lawyers, the second working commission at The Hague in 1899 was tasked with preparing a written code on the laws of war *on land*. They drafted Convention IV on The Laws and Customs of War on Land. Its task was relatively straightforward although, as it turned out, deeply controversial in matters of military occupation and people's resistance to it. The lawyers and diplomats had a wide range of written precedents to draw on, including, importantly, the Lieber Code promulgated during the U.S. Civil War (1863); the Petersburg declaration proscribing the use of certain types of weapons in war (1868); and a draft statement on the laws of war adopted in [Brussels](#) on 27 August 1874, which had never been ratified. Furthermore, the new international law institutes had been gathering materials and publishing on the topic. They had developed their own consensus positions, which they made available to the delegates.<sup>[19]</sup>

The equivalent commission expanding the codification work at the Second Hague Conference in 1907 had a more difficult task. While delegates rewrote some aspects of the 1899 treaty law on land warfare and sharpened legal definitions of the rights of neutral powers and property in wartime, their main charge centered on codifying the laws on warfare *at sea*, seeking in part to secure international commerce against the "surprises of war." These topics included the legality of converting merchant ships to warships, definitions of effective blockade, lists of contraband, and prize law. These were only a few of the many areas that formed "long subject[s] of deplorable disputes," in the words of the British international lawyer [Alexander Pearce Higgins \(1865-1935\)](#). Higgins translated and compiled the full texts (with commentary) of the most important components of the laws of war prepared at international conferences from 1856 to 1909 for his students ([see the work](#)).

In seeking agreements on maritime law in wartime, delegates in 1907 had very few written laws to draw on. No significant piece of legislation for war at sea had been agreed on since the 1856 Declaration of Paris, which sought to reconcile differing practices (a continental and an Anglo-American tradition) on capturing enemy goods (on privateering and effective blockage), which had come to light during the Crimean War. Given the "divergent views and practices" that continued to separate delegations, the Second Hague Conference failed to resolve many issues of sea warfare, notably the continuously thorny matters of prize law.<sup>[20]</sup> In an important new step, however, the delegates reached an agreement to establish an International Prize Court (Convention XII) as a court of appeals. This replaced the existing prize law mechanism, which relied on differing national legal traditions, with a uniform international procedure. It left unclear which laws would govern the Court's judgments, however.

As a seemingly logical next step in law-writing, the [British government](#) called for another conference to address the legal lacunae left over from the Second Hague Conference. This gathering met in London from 4 December 1908 to 26 February 1909. It deviated from the innovative precedents set by the Hague Conferences. These had been diplomatic meetings of small and great powers, reflecting the principle (however fictive) of the fundamental equality among sovereign states in international society. Each delegation, no matter its size, had one vote only and agreement had to be unanimous. By contrast, in London, the Great Powers (Britain, France, Germany, Austria-Hungary, Italy, Russia, Japan and the United States), together with [Spain](#) and Holland, wrote the law themselves. The 1909 document, known as the Declaration of London, established an international law of prize. Ironically, in 1911 the British House of Lords rejected the bill, fearing its contraband rules favored a continental naval power like Germany. The law remained unratified, although its provisions guided Ottoman and Italian practices during the Turco-Italian war.<sup>[21]</sup>

Throughout the Hague deliberative processes, international lawyers and diplomats debated the finer points of law and all manner of terms and specificities. Despite attention to detail, the codification movement could not keep up with the pace of technological and socioeconomic change around it. Just when it banished certain types of weapons, as declared at St. Petersburg, new classes of armaments were manufactured; just as it sought to proscribe the dropping of projectiles and explosives from balloons, the bomber was waiting in the wings. Similarly, its ongoing effort to precisely differentiate the distinct categories of belligerents from civilians was thwarted by [industrial warfare](#), which soon blurred the lines.

And yet, in its distinctive blend of law and ethics, it laid down lasting principles for the waging of war. In tandem with the humanitarian side of Geneva law, the Hague model contributed three additional modes of moral restraint that have endured, even when admitting the deeply problematical relationship between law and practice. First, its principles set limits to the means of waging war (an early version of arms control, which, if it did not successfully ban targeted weapons, at a minimum restricted their *use*.) Second, the Hague architects wrote a code of conduct for war. Third, they reaffirmed the relevance of international customary law even in the absence of a formal, positive code of law.

In the process, the codes also defined war for the purposes of the law they were writing. Reflecting limitations in the universal vision, warfare was defined as international war between “civilized” states alone – that is, between sovereign states that, in circular fashion, affirmed their civilized status by adhering to the law. This understanding exempted from the laws’ safeguards the bitter struggles waged by colonial peoples against the forces of imperialist impositions that were accelerating later in the 19<sup>th</sup> century. Many of these wars were taking place precisely around the time of the Hague Conferences: the Philippine rebellion against the United States (1899), the Boer War in southern Africa (1899-1902), the European intrusion into China during the Boxer rebellion (1900-01), and the [German government’s](#) vicious campaign against the Herero and Nama peoples in its main settlement colony of Southwest Africa (Namibia) (1904-07). Bowing to Great Power claims, these wars were seen as internal matters of the various empires and therefore outside the jurisdiction of international law. In a similar vein, when the Chinese delegate [Lou Tseng-Tsiang \(1871-1949\)](#) called for clarification of the definition of “war” at the Second Hague Conference – alluding to the invasion of China by the [imperialist](#) powers under the verbal subterfuge of “expedition” – he was pointedly ignored.<sup>[22]</sup>

The Hague conventions put forward the important concept of limiting warfare, even though they reflected a narrow definition of “war.” Article 22 offered a concise statement of the principle. It says, “[t]he right of belligerents to adopt the means of injuring the enemy is not unlimited.” The convention’s instructions listed a series of actions in wartime that contravened this principle, prohibiting, for example, the use of certain types of modern technology (among them, the hollow-point bullets, explosive projectiles and poison gases). They forbade “treacherously” killing or maiming the enemy or destroying enemy property, towns, villages or buildings – acts that were seen to bring “excess” suffering to soldiers and civilians alike. Here, they drew on the sentiments of St. Petersburg, which had asserted that the “only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” Seeking to prohibit all other actions that resulted in “excess” suffering, the architects used law to open up a new humanitarian sphere of protection where, in their emblematic formulation, the “necessities of war” were expected to “yield to the requirements of humanity.” Other articles also governed military authority over an occupied territory.

Major disagreements, notably over the status of civilian insurgency in occupied lands, threatened to derail the work of the Second Commission in 1899. The statesmen from the smaller states, particularly Holland and [Belgium](#), wanted a right of resistance to military occupation, drawing on traditions of peoples’ militias; representatives of the larger states, particularly

imperial Germany, wanted to declare civilian armed resistance illegal under all circumstances. To handle these issues and overcome the impasse on civilian insurgency, Fedor Martens, the prominent Russian lawyer, proposed a compromise. Known as the Martens Clause, it was inserted into the Preamble of the 1899 Convention (IV). The passage reads in part, “[u]ntil a perfectly complete code of the laws of war is issued, the Conference thinks it right to declare that in cases not included in the present arrangement, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” The clause suggests that behaviors not explicitly prohibited by treaty law may not be permitted because they contravene these higher “laws.” Its ethical norms have guided the operation of international humanitarian law ever since.<sup>[23]</sup> In a further innovation, the revised 1906 Geneva Convention and the Hague Convention concerning land warfare in 1907 included the first statements about accountability for violations of the laws. Article 28 of the Geneva Convention enjoined states to pass legislation forbidding the “pillage and maltreatment” of the wounded, should the prohibition be insufficiently covered in the state’s military code. Article 3 of the Hague Convention warned belligerent parties that violators of its code “shall, if the case demands, be liable to pay compensation.”

## International Arbitration and Institution-Building

Equally important, the work of the Hague Conferences matched law with concrete institution-building in international society. In this sense, it fit into the new internationalism that stressed the values of cooperation and interdependency and sought their realization in durable institutions. Toward the end of the 19<sup>th</sup> century, states were using treaty law to create standing intergovernmental organs to oversee many areas of mutual concern. Among the first problems targeted were the need for standardized weights and measures, uniform postal and telegraph rates, and quarantine protocols to contain the spread of communicable diseases such as cholera and the plague. Thus, for example, in 1865 treaty partners established the International Telegraph Union and in 1874 they created the Universal Postal Union, with its headquarters in Berne, Switzerland.

Similarly, the First Hague Conference turned the values and diplomatic practices of “mediation” and “arbitration” into a permanent mechanism for arbitral settlement. This step produced the Convention for the Pacific Settlement of International Disputes (I) and subsequently, its revisions and addendums in 1907. Publicity about the initial agreement in 1899 elicited much contemporary excitement, seemingly justifying the public expectations for peace. As binding law, the signatory powers agreed to use their “best efforts” to insure a peaceful settlement of international differences. Prominent lawyers at the time, too, saw it as the “great ... marker of international progress.”<sup>[24]</sup>

The Hague Convention I was a complex agreement that had a number of parts involving different methods of arbitration: good offices and mediation (title II), international commissions of inquiry (title III), and international arbitration as such (title IV). Many techniques had already been part of diplomatic parlance, such as the statements by the Congress of Paris in 1856, which called on the disputing states to use, “in so far as circumstances would allow,” the “good offices of a friendly Power.” Not surprising, then, that the members of the Third Commission writing the Convention in 1899 reached consensus relatively swiftly on many aspects of the new law, including the parameters of good offices, the procedures for international commissions of inquiry which, notably, allowed states to exempt matters they considered vital to their national interests and honor, and the details for the agreement (*compromis*) states prepared before sending a case to arbitration.

In heated dispute, however, was the proposal to establish a Permanent Court of Arbitration with a standing international bureau to oversee the court’s operations. Such a court had not been part of the original call by the czar’s minister; his agenda only mentioned settling minor quarrels and raised the possibility of compulsory arbitration for specific matters involving transoceanic canals and international rivers. Proposals for a continuously sitting court soon entered the agenda, and, as one delegate noted wryly, “things were getting serious.” While most delegations opposed compulsory arbitration as an undue challenge to state sovereignty, the imperial German government objected to a permanent court and even a permanent bureau. Such a step, argued Georg Münster von Derneburg (1820-1902), head of Germany’s delegation, was nothing but “troublesome professors interfering with diplomacy.”<sup>[25]</sup> The German representatives threatened to withdraw from further negotiations; diplomatic pressure forced a compromise. While called a “permanent” court, the arbitral body did not sit continuously, but was called into session as needed; however, its international bureau became permanent and was strengthened by the authority to encourage arbitration when disputes broke out ([see external link](#)).

Part of the agenda for the Second Hague Conference called explicitly for “improvements” on the arbitral convention that had



come to light in the actual practice of “The Hague Court,” as international jurists began calling it. Between the First and Second Hague Conferences, the Permanent Court had adjudicated four cases. In addition, a Commission of Inquiry had also been called that successfully resolved a dispute in 1904 between Britain and Russia, which had for a time threatened war. There had also been over thirty-three bilateral arbitral agreements in which states took on the obligation to use arbitration – as far as possible. 1907, then, seemed a propitious time to begin work to strengthen the bases of arbitration. Besides, two additional and, from the controversies they invoked, bold proposals were also floated. Both originated in the Americas, reflecting the distinct regional contribution to international legal discourse, if not to newly defined jurisdictions.

One of the cases had a noteworthy origin. Its direct antecedent came from a verdict reached by the Permanent Court on 22 February 1904 in a dispute between Great Britain, Germany and Italy against Venezuela. Because of claims on public debt bonds by their nationals, the three European powers had blockaded and bombarded Venezuelan ports in 1902. Immediate protests gave rise to two interconnected legal doctrines. The Drago Doctrine, named for Argentina’s foreign minister, [Luis Mario Drago \(1859-1921\)](#), stated that public debt cannot lead to intervention; the Calvo Doctrine, named for the prominent South American jurist [Carlos Calvo \(1824-1906\)](#), required that foreign claimants on debt must use all local remedies before turning to their national governments for redress. These principles reflected a fear that otherwise, stronger states would threaten to collect debt by force. The issue was discussed as a measure to reduce conflicts between the states at the Third [Pan-American Conference](#) in Rio de Janeiro in July 1906, which then called on the upcoming Hague Conference to take it up.

The final outcome, Convention II on The Limitation of the Employment of Force for the Recovery of Contract Debts, proved disappointing for most Latin American delegates, who offered dissenting reservations on its provisions. Establishing compulsory arbitration for the collection of public loans and contractual debt, it actually protected foreign financial investments by ensuring redress through international arbitral and not national judicial systems. The second distinctly new proposals came from the U.S. delegation, which called for the creation of a second court, the Judicial Arbitration Court, to supplement the Permanent Court. It was to be a *judicial* body, with permanent judges (although called arbitrators) deciding legal matters with reference to its own precedents. It had the potential to develop a consistent body of case law in the international field. The idea floundered on tensions between the powerful and weaker states because no agreement could be reached on how to choose judges for the court. It only showed up as a “wish” for the future.<sup>[26]</sup> Despite hopes for significant revision, the arbitral system created at The Hague remained embedded in geopolitical power calculations, assuring its operation only when the states agreed to it. However, precedents set by the Hague arbitral mechanisms echoed later in the work of the Permanent Court of International Justice of the [League of Nations](#).

## Conclusion

In the second half of the long 19<sup>th</sup> century, through negotiated rules and regulations, international law and its attendant institutions entered into the international order dominated by sovereign states, unequal power, and conflict of interests. Debates about the nature and extent of war-making were central to this new order, which increasingly brought state authorities into formal consultations to address their areas of mutual concern. Preceded by the Geneva Conference and other international law-writing endeavors, the Hague Conferences were emblematic of these changes and avidly followed by all manner of civil society groups, advocates of peace, and diverse professional and international organizations pursuing their own agendas. Reflecting and promoting notions circulating far and wide about the promises of science to provide rules for the betterment of human society, these conferences codified the laws of war for land and sea and sought arbitral mechanisms to insure peace among nations.

Beset by contradictions, neither law nor civil society action could ultimately halt the steps to war in July and August 1914. From the perspective of law, the war began “ominously” – Germany violated the neutrality of Belgium, and Britain dropped the principle of effective blockade and expanded its contraband list “beyond anything envisioned in international law.”<sup>[27]</sup> For the first several years of the war, however, much of the Geneva Convention remained in force; cases of flagrant violence against prisoners increased after 1916 mostly at the local level. All belligerents appealed to The Hague when it served their interests.<sup>[28]</sup> Still, the potential of law for the future was not lost on contemporaries. Writing in 1917, in the depth of war, the British international lawyer [Thomas Barclay \(1853-1941\)](#) lamented how “belligerent Governments” had modified –and “even torn up” – many legal documents. But, he added with hopeful caution, “the present war, fortunately for mankind, is no criterion of the ultimate scope of human wisdom.”<sup>[29]</sup>

## Notes

1. ↑ For international law perspectives, see Nussbaum, Arthur: *A Concise History of the Laws of Nations*, New York 1950, p. 191; Koskenniemi, Martti: *The Gentle Civilizer of Nations. The Rise and Fall of International Law*, Cambridge 2001. For historical perspectives, see Iriye, Akira: *Global Community. The Role of International Organizations in the Making of the Contemporary World*, Berkeley 2002; Quataert, Jean H.: *Advocating Dignity. Human Rights Mobilizations in Global Politics*, Philadelphia 2009.
2. ↑ Eyffinger, Arthur: *The 1899 Hague Peace Conference. "The Parliament of Man, The Federation of the World,"* The Hague et al. 1999, pp. 126f; Davis, Calvin DeArmond: *The United States and the Second Hague Peace Conference. American Diplomacy and International Organization, 1899-1914*, Durham 1975, pp. 182-86; Dudden, Alexis: *Japan's Colonization of Korea. Discourse and Power*, Honolulu 2005, p. 11.
3. ↑ Higgens, A. Pearce: *The Hague Peace Conferences and Other International Conferences concerning the Laws and Uses of War*, Cambridge 1909, pp. 2, 207. My discussion of law draws heavily on this valuable source of documents.
4. ↑ Higgens, *Hague Peace Conference 1909*, pp. 39, 67.
5. ↑ The organization was the *Société française pour l'arbitrage entre les nations*. See Guieu, Jean-Michel: *Le Rameau et le glaive. Les militant français pour la Société des Nations*, Paris 2008, pp. 22-26; and also Eyffinger, *1899 Hague Peace Conference 1999*, pp. 140-44.
6. ↑ Grandin, Greg: *The Liberal Tradition in the Americas. Rights, Sovereignty and the Origins of Liberal Multilateralism*, in: *The American Historical Review* 117/1 (February 2012), p. 70.
7. ↑ Best, Geoffrey: *The Restraint of War in Historical and Philosophical Perspective*, in: Delissen, Astrid J. M. / Tanja, Gerald (eds.): *Humanitarian Law of Armed Conflict. Challenges Ahead. Essays in Honour of Frits Kalshoven*, Dordrecht et al. 1991, p. 13; Peace, in: *Encyclopedia Britannica* 21 (1910), p. 8. For Martens' arbitration expertise, see Eyffinger, *1899 Hague Peace Conference 1999*, p. 177.
8. ↑ Historians have shown how national affiliation in many ways was the precondition for international organizing at the time. Rupp, Leila J.: *Worlds of Women. The Making of an International Women's Movement*, Princeton 1997.
9. ↑ Abrams, Irwin: *The Emergence of the International Law Societies*, in: *Review of Politics* 19/3 (1957), pp. 371, 377; Uhlig, Ralph: *Die Interparlamentarische Union. 1889-1914*, Stuttgart 1988, pp. 48-58, 250-56.
10. ↑ Information on von Suttner at the Hague conferences is in Davis, *United States 1975*, pp. 24 and 111; Eyffinger, *1899 Hague Peace Conference 1999*, pp. 55-58.
11. ↑ *Peace 1910*, p. 4; Eyffinger, *1899 Hague Peace Conference 1999*, pp. 31-35, 55-68.
12. ↑ Iriye, *Global Community 2002*, pp. 18f; Herren, Madeleine: *Internationale Organisationen seit 1865. Eine Globalgeschichte der internationalen Ordnung*, Darmstadt 2009, pp. 23f.
13. ↑ Festa, Lynn: *Humanity without Feathers*, in: *Humanity. An International Journal of Human Rights, Humanitarianism, and Development* 1/1 (Fall 2010), pp. 3-27.
14. ↑ Bugnion, François: *From Solferino to the Birth of Contemporary International Humanitarian Law*, issued by ICRC.org, online: <http://www.icrc.org/eng/resources/documents/article/other/solferino-article-bugnion-240409.htm> (retrieved: January 2010), pp. 3-11.
15. ↑ Quataert, Jean H.: *Staging Philanthropy. Patriotic Women and the National Imagination in Dynastic Germany, 1813-1916*, Ann Arbor 2001, pp. 39-49, 67-74.
16. ↑ *Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle*, in: Higgens, *Hague Peace Conference 1909*, pp. 8-12.
17. ↑ *Geneva Red Cross Archives (ACICR)*, AF (Ancien Fonds), 19, 2 "Appel à l'humanité pour l'organisation d'une Société de Secours aux blessés dans l'Empire Ottoman," 1868 and Project Moynier, "La Croix-Rouge et l'Islamisme," a confidential report circulating in 1906 at the time of the international conference to revise the Geneva Convention.
18. ↑ Higgens, *Hague Peace Conference, 1909, Hague IV. Laws and Customs of War, Chapter III, Art. 21*, p. 233 and *Geneva Convention, 1906, Art. 10*, p. 24.
19. ↑ For the Lieber Code, see Nussbaum, *A Concise History 1950*, p. 196. For the influences of lawyers, see Barclay, Thomas: *International Law and Practice, with Appendices*, London et al. 1917, pp. vi-vii.
20. ↑ Higgens, *Hague Peace Conference 1909*, p. 457.
21. ↑ *The Declaration of London* is in Barclay, *International Law 1917*, pp. 13-19.
22. ↑ Davis, *United States 1975*, p. 211.
23. ↑ *The International Military Tribunal at Nuremberg in 1946* used the clause's assumptions to establish jurisdiction over "crimes against humanity" as grave breaches of international customary law; it also became part of Common Article 3 of the revised Geneva Conventions of 1949. See Roberts, Adam / Guelff, Richard (eds.): *Documents on the Laws of War*, Oxford 1989, pp. 153-56, 217.

24. ↑ Higgens, Hague Peace Conference 1909, p. 164; Davis, Calvin deArmond: *The United States and the First Hague Peace Conference*, Ithaca 1962, p. 164; a view echoed in Best, Geoffrey: *Peace Conferences and the Century of Total War. The 1899 Hague Conferences and What Came After*, in: *International Affairs* 75/3 (1999), p. 628.
25. ↑ The quotes are found in Davis, *United States* 1962, p. 142, 139, and 152.
26. ↑ Higgens, Hague Peace Conference 1909, pp. 184-97; Davis, *United States* 1975, pp. 251-76.
27. ↑ Nussbaum, *A Concise History* 1950, pp. 245f.
28. ↑ Jones, Heather: *Violence against Prisoners of War in the First World War. France, Britain and Germany, 1914-1920*, Cambridge 2011, pp. 11ff, 17f.
29. ↑ Barclay, *International Law* 1917, p. 19.
30. ↑ I want to thank the two anonymous readers for their useful suggestions for revisions, which helped sharpen and focus this analysis of international law-writing in the context of the evolving geopolitical order in the second half of the “long” 19<sup>th</sup> century.

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## Citation

Quataert, Jean H.: *International Law and the Laws of War*, in: 1914-1918-online. *International Encyclopedia of the First World War*, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin, Berlin 2014-10-08. DOI: [10.15463/ie1418.10483](https://doi.org/10.15463/ie1418.10483).

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