LESSON 1

A Brief History of International Humanitarian Law

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This lesson will provide an overview of the origins and development of international humanitarian law.

In this lesson »

Lesson Objectives »

- Understand the development of customary humanitarian law.
- Understand the history of IHL treaty codification.
- Describe how IHL relates to public international law.
- Explain the differences between *jus ad bellum* and *jus in bello*.
- Understand the definition of international humanitarian law.
- Understand the historical development of international humanitarian law up to the Geneva Convention of 1864.
- Trace the development of IHL since 1864.
- Recognize the different foci of Geneva Law and Hague Law.
- Understand how international humanitarian law has its sources in public international law.
- Understand the basic rules of IHL.

Geneva. Review Conference of the Geneva Conventions. July 1906. ICRC Photo V-P-HIST-00257.

Section 1.1 General Definition of International Humanitarian Law

"International humanitarian law applicable in armed conflict(s)" means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or non-international armed conflicts. For humanitarian reasons, these rules protect persons and property that are, or may be, affected by conflict by limiting conflicting parties' rights to choose their methods and means of warfare. The expression "international humanitarian law applicable in armed conflict(s)" is often abbreviated to international humanitarian law (IHL), or simply, humanitarian law.[1] Although the military tends to prefer the expressions "laws of armed conflict(s)" (LOAC) or "laws of war", these two expressions should be understood as synonymous with IHL.

1) The International Committee of the Red Cross (ICRC) has elaborated on the definition of "humanitarian law". The international community has generally accepted this definition. ICRC, *Commentary on the Additional Protocols of 8 June 1977* (Geneva: ICRC, 1987): xxvii. Available from: <https://ihl-databases.icrc.org/ihl/INTRO/470>.

Section 1.2 Origin of International Humanitarian Law

The main subject of this course will be the study of contemporary international humanitarian law. Nevertheless, it is necessary to briefly examine the evolution of that body of law. One can say that the laws of war are almost as old as war itself. Even in ancient times, there were interesting — although rudimentary — customs that today would be classified as humanitarian. It is interesting to note that the content and aim of these customs were the same for almost every civilization around the world. This spontaneous generation of humanitarian standards, at different times and among peoples or States that possessed limited means of communication with each other, is also an important phenomenon.

This phenomenon lends credence to the historical argument regarding:

- The necessity of having rules that apply to armed conflicts; and
- The existence of a feeling in many civilizations that, under certain circumstances, human beings, friend or foe, must be protected and respected.

Although scholars generally agree that the adoption of the First Geneva Convention of 1864 marked the birth of modern IHL, it is also clear that the rules contained in that Convention were not entirely new. In reality, a large portion of the First Geneva Convention was derived from existing international customary law.[2] In fact, there were rules protecting certain categories of victims in armed conflicts and customs concerning the means and methods of authorized or prohibited combat during hostilities as early as 1000 BCE.

Although these ancient and often very rudimentary rules were not established for humanitarian reasons, but rather for purely economic purposes, their *effect* was humanitarian.

For example:

- The prohibition against poisoning wells (reaffirmed in 1899 in The Hague) was originally made in order to permit the exploitation of conquered areas.
- The first reasons for the prohibition against killing prisoners (reaffirmed and developed in the Third Geneva Convention of 1949) were to safeguard the lives of future slaves or to facilitate the eventual exchange of prisoners.

Many different civilizations throughout the world and history had such prohibitions. For example, in many parts of Africa, there were specific rules regarding the commencement of hostilities between different peoples that correspond, to a large extent, to the classical European traditional obligation of declaring war. Moreover, in a treatise called *The Art of War*, written in 500 BCE, the Chinese writer Sun Tzu expressed the idea that wars must be limited to military necessity, and that prisoners of war, the wounded, the sick, and civilians should be spared.[3] Likewise, in the Indian subcontinent, similar rules can be found. For example, in the *Code of Manu*, written in 200 BCE, one finds rules relating to behaviour in combat.[4] The Code declared that barbed or poisoned weapons were prohibited, that wounded soldiers had to be cared for, and that surrendering combatants must be spared.[5] The examples of humanitarian customs in various civilizations demonstrate that, even if the Geneva or The Hague Conventions were

2) For a definition of customary international law, see Section 1.5, The Sources of International Humanitarian Law of this course.
3) Sun Tzu, *The Art of War* (New York: Penguin Classics, 2003).
4) *The Law Code of Manu* (New York: Oxford University Press, Inc, 2009).
5) For more historical examples of other ancient rules and customs, please visit: Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, "Historical Development of International Humanitarian Law", in *How Does Law Protect in War? Vol. 1* (HDLPiW) (Geneva: ICRC, 3rd edition), 3–10. Available from: <https://www.icrc.org/en/document/how-does-law-protect-war-0>.

not universal at inception, since they were drafted and adopted by lawyers and diplomats belonging to the European and mostly Christian culture, their sentiments are nearly universal. The principles they contain can be found in very different systems of thought — both European and non-European.

The cultural history of Europe also provides examples of both barbarism and humanity. The first significant development in respect to the law of war occurred in 300 BCE, with the Greek philosophical school called Stoicism. This school advocated a path towards humanity through understanding and sympathy — the need to understand and respect each other.

Between the sixteenth and eighteenth centuries, in the Renaissance and the Age of Reason, an interesting and humanitarian practice developed in Europe. Frequently, warriors met before hostilities and decided on guidelines to respect during the battle. These special agreements could, for example, establish the observance of an armistice two days per week, the obligation to collect the wounded, or a responsibility to release prisoners at the end of the war. Although warriors concluded these agreements on an ad hoc basis and limited the scope to which they applied, such precedents played a very significant role in the creation of IHL.

From this historical perspective, the documented origin of IHL developed in the mid-nineteenth century. Up to that point, the practice of the accepted rules of warfare reflected the theories of philosophers, priests, or jurists with local and special agreements.[6] However, these customs were geographically limited, and there were no international or universal rules. The first universal treaty on humanitarian law was the Geneva Convention of 1864.

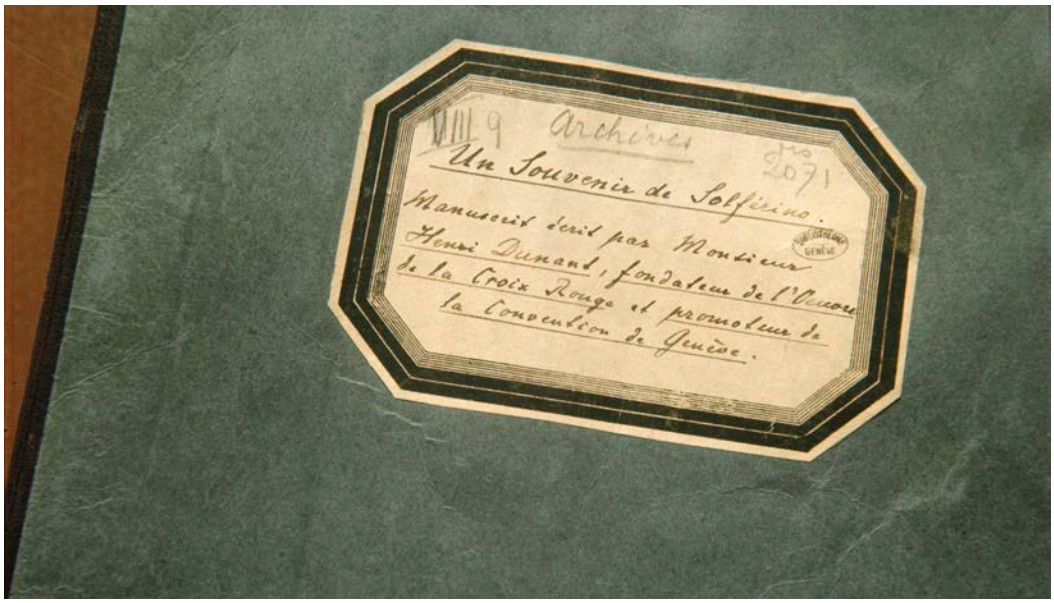
How and why did the Convention come to life?

The conception of IHL can be traced to the Battle of Solferino, a terrible conflict between French and Austrian forces that took place in northern Italy in 1859. One witness of that carnage, a businessman from Geneva named Jean-Henri Dunant (also known as Henry Dunant), was appalled not so much by the violence of that battle, but rather by the desperate and miserable situation of the wounded left on the battlefields. With the help of the local inhabitants, Dunant immediately decided to collect and care for the wounded.

Back in Geneva, Dunant published a short book in 1862, *A Memory of Solferino*, in which he vividly depicted the horrors of the battle:

> "When the sun came up on the twenty-fifth June 1859 it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields…The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them… Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were

6) A good example of such agreements is the Lieber Code of 1863 (also known as the "Code for the Government Armies in the Field"), a code of conduct promulgated by the President of the United States during the US Civil War. Also, see: Lesson 4, Section 4.1.



Manuscript of A Memory of Solferino by Henry Dunant. Cover. ICRC Photo V-P-HIST-00963-05.

> almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death struggle."[7]

In his book, Dunant not only described the battle, but tried to suggest and publicize possible measures to improve the fate of war victims. He presented three basic proposals designed to mitigate the suffering of the victims of war. To this end, he proposed:

1. That voluntary societies be established in every country which, in time of peace, would prepare themselves to serve as auxiliaries to the military medical services;
2. That States adopt an international treaty guaranteeing legal protection to wounded and sick members of the armed forces, military hospitals, and medical personnel; and
3. That an international sign of identification and protection of medical personnel and medical facilities be adopted.

These three proposals were simple, but they have had deep and lasting consequences.

- The first proposal resulted in the whole system of National Red Cross or Red Crescent Societies (of which there are today 192 around the world).
- The second proposal gave birth to the First Geneva Convention of 1864 and to all subsequent treaties of IHL.
- The third proposal led to the adoption of the protective emblem of the Red Cross, and later on, the emblems of the red crescent and, more recently, the red crystal, a neutral alternative.

Dunant's book enjoyed enormous success throughout Europe. Although it did not present entirely original ideas, the merit of the book is in large part due to the timeliness of its message.

7) Henry Dunant, *A Memory of Solferino* (Geneva: ICRC, 1986): 41-44. Available from: <https://www.icrc.org>.

At that time, a private welfare association existed in Geneva called the Society for the Public Good. Its president, Gustave Moynier, was impressed by Dunant's book and proposed to the members of the Society that they try to carry out Dunant's proposals. This suggestion was accepted, and five members of the Society — Dunant, Moynier, Guillaume-Henri Dufour, Louis Appia, and Théodore Maunoir — created a special committee in 1863 named the International Standing Committee for Aid to Wounded Soldiers. This committee would, 15 years later, become the International Committee of the Red Cross (ICRC) (see Lesson 8).

In 1863, the Committee convened military and medical experts at a conference in Geneva. The meeting aimed to examine the practicability and feasibility of the proposals made by Dunant. The results of the meeting were encouraging, and the members of the Committee persuaded the Swiss Federal Council to convene a Diplomatic Conference, a meeting of State representatives, whose task would be to give a legal form to Dunant's proposals.

To this end, a Diplomatic Conference was held in 1864 in Geneva, and the 16 States represented finally adopted what was formally called the "Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field". Its result was an international treaty open to universal ratification (that is, an agreement *not* limited to a specific region or conflict, with binding effects on the States that would formally accept it) in which States agreed to limit their own power voluntarily in favour of the individual. For the first time, armed conflict became regulated by written, general law.

The birth of modern international humanitarian law

In 10 concise articles, the First Geneva Convention gave a legal format to Dunant's proposals. It also established general protection for military wounded and a special status for medical personnel. The conference also chose the Red Cross on a white background as the only sign of identification of all military medical services.

The fact that this conference lasted fewer than 10 days provides a clear indication of the general support given to the propositions.

Of course, more modern and comprehensive treaties have replaced the original Convention. However, it illustrates in a concise manner the central objectives of humanitarian law treaties.[8] Annex 1 contains the original Convention.

Beginning in 1866, the Geneva Convention proved its worth on the battlefield. By 1882, 18 years after its adoption, it had been universally ratified.[9]

Section 1.3 The Progressive Development of IHL (1864–2019)

Figure 1-1 shown below illustrates the key developments in IHL since the adoption of the 1864 Geneva Convention. A thorough and detailed discussion of the post-1864 development of IHL would be beyond the scope of this course. However, the student should be aware of the three main characteristics that marked this evolution:

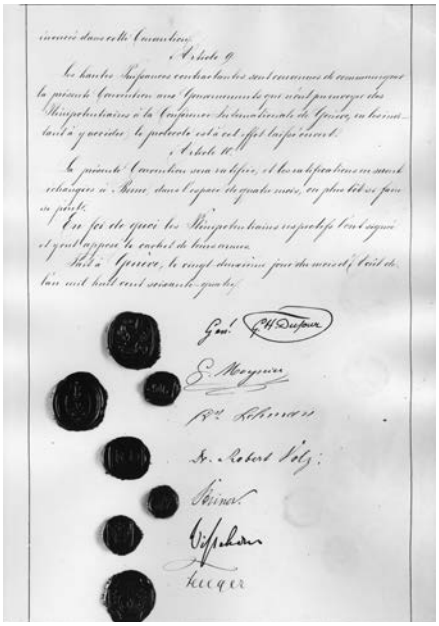
8) The First Geneva Convention of 1864 was ratified by 57 State parties, listed online. Available from: <https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument>

9) Under Art. 2 of the 1969 *Vienna Convention on the Law of Treaties*, "ratification […] mean[s] in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty". United Nations, *Vienna Convention on the Law of Treaties*, Treaty Series, 23 May 1969, Part I, Article II, 1(b). Available from: <https://treaties.un.org>.

1. The constant enlargement of the categories of war victims protected by humanitarian law (military wounded, sick and shipwrecked, prisoners of war, civilians in occupied territories, the entire civilian population), as well as the expansion of the situations in which victims are protected (international and non-international armed conflicts).

2. The regular updating and modernization of the treaties to account for the realities of recent conflicts. For example, the rules protecting the wounded adopted in 1864 were revised in 1906, 1929, 1949, and 1977. Critics have therefore accused IHL of always being "one war behind reality".[10]

3. Two separate legal currents have, up until 1977, contributed to this evolution:



Next to last page of the Geneva Convention of 22 August 1864. ICRC Photo V-P-HIST-00121-07.

   - **Geneva Law,** mainly concerned with the protection of the victims of armed conflicts; that is, the non-combatants and those who no longer take part in the hostilities; and
   - **The Hague Law,** whose provisions relate to limitations and prohibitions of specific means and methods of warfare.

Formation of International Humanitarian Law

1000	Formation of initial humanitarian customs
	Formation of regional humanitarian customs (all over the world)
	Conclusion of treaties containing humanitarian clauses (clauses on peace, armistice, and capitulation)
1864	**First Geneva Convention**
1868	Declaration of St. Petersburg
1899	The Hague Conventions
1906	**Review of the First Geneva Convention**
1907	The Hague Conventions
1925	Geneva Protocol on chemical weapons
1929	**"First" and "Third" Geneva Conventions**
1949	**First, 2nd, 3rd and 4th Geneva Conventions + Common Art. 3***
1954	Convention for the Protection of Cultural Property in the Event of Armed Conflict
1977	**Additional Protocols to the 1949 Geneva Conventions**
1980	Convention on Certain Conventional Weapons
1993	Chemical Weapons Convention
1995	Protocol on Blinding Laser Weapons
1996	Revision of the 1980 Convention

10) Sassòli, Bouvier, and Quintin, "Historical Development of International Humanitarian Law".

1997	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty)
1998	Adoption in Rome of the Statute of the International Criminal Court
1999	Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict
2000	Optional Protocol on the Involvement of Children in Armed Conflict
2003	Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)
2005	**Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (the "Red Crystal")**
2008	Convention on Cluster Munitions
2013	Arms Trade Treaty (ATT)
2017	Treaty on the Prohibition of Nuclear Weapons (TPNW)

Note: Geneva Law treaties above appear in bold; the Hague Law instruments appear in regular font.

*The Conventions currently in force have replaced the older Geneva Conventions.

Figure 1-1

These two legal currents were practically merged with the adoption of the two Additional Protocols of 1977 to the four Geneva Conventions of 1949. The 1949 Geneva Conventions currently in force have essentially replaced the older Geneva Conventions.

Strictly speaking, the Hague Law originated in the Declaration of St. Petersburg, which was proclaimed by a conference convened by Alexander III, the Tsar of Russia, in 1868. The Declaration prohibited the use of explosive bullets and enunciated some basic principles relating to the conduct of hostilities (see Lesson 4).

In 1899 the so-called First Peace Conference was convened in the Netherlands by another tsar, Nicholas II, in The Hague. That Conference adopted several Conventions whose general goal was to limit the evils of war. Among other things, these Conventions prohibited:

- The launching of projectiles from balloons;
- The use of poisonous gases; and
- The use of dumdum bullets.

One of the main achievements of this Conference was the adoption of a principle named for its initiator, Friedrich Martens, the legal adviser of the Russian Tsar. The Martens Clause states:

> "Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as the result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[11]

11) The Martens Clause was developed and reaffirmed in subsequent treaties (e.g. in Art. 1, para. 2 of Additional Protocol I of 1977 and preamble para. 4 of Additional Protocol II of 1977). Available from: <https://www.icrc.org>; The Hague, "Hague Convention II — Laws and Customs of War on Land", 18 October 1907. Available from: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>.

The Martens Clause, understood today as of general applicability, has acquired the status of a customary rule. The effect of the clause is to underline that in cases not covered by IHL treaties, persons affected by armed conflicts will never find themselves completely deprived of protection. Instead, the conduct of belligerents remains regulated at a minimum by the principles of the law of nations, the laws of humanity, and from the dictates of public conscience.[12]

Fyodor Fyodorovich Martens (in Russian), Frédéric Frommhold (de) Martens (in French). ICRC Photo V-P-PER-E-00199 by E. Bieber.

Another important success of the 1899 First Peace Conference was the extension of the humanitarian rules from the Geneva Convention of 1864 to the victims of naval conflicts. This adaptation is at the origin of the present Second Geneva Convention of 1949.

In 1906, the Geneva Convention of 1864, which protected the wounded and the sick of armies in the field, was revised. Although the revision expanded the Convention to 33 articles from the original 10 in the 1864 version, the fundamental principles remained the same.

In 1907, a second Peace Conference was convened in The Hague. On this occasion, the Conventions of 1899 were revised, and some new rules were introduced. Among the additions were a definition of combatants, rules on naval warfare, rules on the rights and duties of neutral powers, rules on military occupation, and rules regarding prisoners of war (POWs).

In 1925, as a direct result of the suffering endured during the First World War (1914–1918), a Protocol prohibiting the use of gas was adopted. Although it was adopted in Geneva, this Protocol clearly belongs, according to its content, to the legal current of the Hague Law.

In 1929, a Diplomatic Conference was convened in Geneva by the Swiss Confederation. The main results of that Conference were:

- The second revision (after 1906) of the 1864 Convention. This Convention was again modified. Among the new provisions, mention should be made of the first official recognition of the emblem of the red crescent. Although that emblem had been used as early as 1876, it was only in 1929 that it was authorized by law.
- The other remarkable success of the 1929 Conference was the adoption of the Convention relative to the Treatment of Prisoners of War (also a result of the First World War). Partially examined during the Peace Conferences of 1899 and 1907, this important issue was not deeply studied before 1929.

In 1949, just after the Second World War (note the parallel to the First World War and the Conference of 1929), the four current Geneva Conventions were adopted. The First (protection of sick and wounded), Second (protection of the shipwrecked), and Third Conventions (prisoners of war), are mainly revised versions of former Conventions. The Fourth Convention, establishing protection for the

12) Sassòli, Bouvier, and Quintin, "Sources of Contemporary International Humanitarian Law", in HDLPiW Vol. 1, 10.

civilian population, is an entirely new amendment and constitutes the greatest success of the 1949 Conference. Another decisive improvement of the 1949 Diplomatic Conference was the adoption of Article 3, common to the four Conventions, the first international provision applicable in situations of non-international armed conflicts. Up until the adoption of common Article 3, non-international armed conflicts (or "civil wars" as they were qualified in those times) were considered as purely internal affairs, in which no international rules were applicable.

In 1954, recognizing that military operations have often resulted in the destruction of irreplaceable cultural property — a loss not only to the country of origin but also to the cultural heritage of all people — the international community adopted the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. A Protocol dealing with cultural property during times of occupation was adopted at the same time as the 1954 Convention. Although the 1954 Convention strengthens protection for cultural property, its provisions have not always been adequately implemented. To address this problem, a second Protocol to the 1954 Convention was adopted on 26 March 1999. It provides for a new regime of protection, "enhanced protection", for the cultural properties of the greatest importance to humanity.

In 1977, after four sessions of Diplomatic Conferences, two Additional Protocols to the Geneva Conventions of 1949 were adopted. The First Protocol is related to the protection of victims of international armed conflicts — the second to the protection of victims of non-international armed conflicts. To some degree, this Second Protocol can be regarded as an enlargement of Article 3 common to the four Geneva Conventions.

In 1980, another important convention was adopted under United Nations auspices — the Convention on Prohibitions or Restrictions on the use of Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. This instrument limits or prohibits the use of mines, booby traps, incendiary weapons, and non-detectable fragments.

Geneva. Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts. June 1977. ICRC Photo V-P-CER-N-00017-13 by Jean-Jacques Kurz.