

# FOUNDATIONAL MYTHS IN THE LAWS OF WAR: THE 1863 LIEBER CODE, AND THE 1864 *GENEVA* *CONVENTION*

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## I SIR NINIAN STEPHEN

Words cannot express what an honour it is to be here as the Sir Ninian Stephen Visiting Scholar, and in the presence of two of his daughters, Mary and Ann. Sir Ninian (b 15 June 1923, d 29 October 2017) was a truly extraordinary judge, citizen and human being. His upbringing was unusual and notably multinational. As a child, whose father abandoned the family immediately after his birth, he lived variously in England, Switzerland, France, Germany and Scotland. In all this he was mostly looked after by an eccentric Australian heiress Nina Mylne — a story beautifully told by Philip Ayres in his biography of Sir Ninian.<sup>1</sup>

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<sup>1</sup> Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013) 1–17.

He moved to Australia in 1940. This was said to have been done in order to avoid the war. If that was the aim, it was quickly revised. In Australia, at the age of 18, he joined the army, seeing war service in New Guinea and New Britain.

He was a Justice of the High Court of Australia from 1972 to 1982. Then he served as the 20<sup>th</sup> Governor-General of Australia. He stepped down in 1989 to become Australia's first ambassador to the environment under Bob Hawke.

Some of his public achievements defy belief. For example, he had no less than five knighthoods.

As a Brit, I cannot forbear from commenting on his contribution in Northern Ireland. In 1992, the British and Irish governments chose Sir Ninian to head a new round of peace talks in Northern Ireland. As Timothy McCormack writes in the excellent collection of essays of Sir Ninian's many roles in public life:

It seems to me that Sir Ninian's perspicacious acceptance of the limits of his role combined with his endearing charm, his disarming wit, the sharpness of his intellect and his genuinely impartial commitment to peaceful resolution of the Northern Ireland problem combined to provide an irresistibly positive force on the process.<sup>2</sup>

In 1993–97 he served as a judge on the new international tribunal which was embarking on the task of trying war crimes in the former Yugoslavia. He was one of the judges in its first case — that of Duško Tadić. He knew about war and about the laws of war.

## II INTRODUCTION

Limiting some of the terrible human consequences of war is an age-old aspiration. In 1863–64 it found concrete expression in two innovative and important documents on the laws of war:

- The Lieber Code, issued in 1863 by United States President Abraham Lincoln to US armies in the field in the US Civil War;<sup>3</sup> and
- The first *Geneva Convention*, on wounded soldiers in armies in the field, adopted in 1864 by the representatives of 12 European states.<sup>4</sup>

These documents have a special and secure place in the history of international efforts to use law to limit war. They were responses to the wars of their time and to developments in science and technology. They are seen — especially within the country and continent from which each of them originated — as the foundation stones of the modern laws of war. Each of them is associated, more than any other documents on this subject, with one initiating

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<sup>2</sup> Timothy LH McCormack, 'International Peace Envoy' in Timothy LH McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 119, 138.

<sup>3</sup> The Lieber Code was published in numerous forms, including Thomas M O'Brien and Oliver Diefendorf, *General Orders of the War Department Embracing the Years 1861, 1862 & 1863* (Derby & Miller, 1864) vol 2, 104–16. The Lieber Code was also published as General Orders No 100: Francis Lieber and Board of Officers, *General Orders No 100: Adjutant-General's Office, Instructions for the Government of Armies of the United States, in the Field* (D Van Nostrand, 1863) ('Lieber Code'). Direct quotations below are from this 1863 edition.

<sup>4</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, signed 22 August 1864, 129 ConTS 361 (entered into force 22 June 1865) ('*Geneva Convention*').

individual — Francis Lieber and Henry Dunant respectively. Both of these men wrote that they had doubts about schemes for perpetual peace. Both texts contained important innovations — of form as well as content. Some of their principles, even some of their wording, can be traced through later codes and treaties, up to and including the military manuals and *Geneva Conventions* of the present day.<sup>5</sup>

So it is not surprising that there is something mythic about the way we think of these two codifications. Many of the stories that are told about these documents contain simplifications — in the emphasis on the newness and originality of these two texts, in the accounts of their take-up by states and army units, in the claims regarding their influence on military conduct, and in the failure to reflect on some of the moral problems that they raise. There are also simplifications in the personal stories told about Lieber and Dunant.

Are either of the stories of these two agreements properly describable as ‘myth’? The first definition of the word in the *Oxford English Dictionary* is:

A traditional story, typically involving supernatural beings or forces, which embodies and provides an explanation, aetiology, or justification for something such as the early history of a society, a religious belief or ritual, or a natural phenomenon.<sup>6</sup>

A more modest alternative definition is: ‘[a] person or thing held in awe or generally referred to with near reverential admiration on the basis of popularly repeated stories’.<sup>7</sup>

The foundational stories being considered here are hardly myths in the first sense. They did not involve supernatural beings or forces. Indeed, they were certainly not entirely fictitious or imaginary. Yet, at least in the second sense, there is something mythic in these two stories, not least in their appealing moral and historical simplicity, and in the striking role of individuals in initiating remarkable chains of events. These stories were based on some solid facts, but also on highly selective use of them. There are downsides to these foundational myths, which I will summarise at the end.

### III THE LAWS OF WAR BEFORE 1863

No serious scholar has ever claimed that the laws of war started in 1863 or 1864. This body of law had a long pre-history. The use of law to regulate armed conflict has occupied the attention of writers, scholars, statesmen and soldiers for thousands of years. In brief illustration of this obvious but important point, I will cite a very few selected examples of pre-1863 developments, which together suggest that much had happened in the laws of war well before the developments of the 1860s. I will glance first at national codes and treaties before 1850, and then at some remarkable developments in the 1850s.

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<sup>5</sup> Texts of the various subsequent treaties, including the four *Geneva Conventions* of 1949 and the two *Additional Protocols* of 1977, may be found in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 4<sup>th</sup> ed, 2004) (*The Laws of Armed Conflicts*).

<sup>6</sup> *Oxford English Dictionary* (online at 15 February 2019) ‘myth’ (n, def 1a).

<sup>7</sup> *Ibid* ‘myth’ (n, def 2b).

## A National Codes before 1850

National codes of the laws of war are not a new invention. Often they were written for particular military campaigns. One widely-remembered European example of a national code embodying certain rules on the conduct of armed forces is the 150 'Articles of War' signed by King Gustavus II Adolphus of Sweden on 15 July 1621 on the eve of regiments of the Swedish army departing to fight Russian forces in the Baltic provinces.<sup>8</sup> Typical of early codes, its incorporation of restraints on the conduct of military operations was just one part of a body of rules covering a wide range of other issues as well. Only six of the 'Articles of War' (arts 88, 90, 91, 95, 99 and 100) contain rules on classic laws of war matters: assaults on women, unauthorised attacks on towns or villages, theft, and pillage or burning of churches and hospitals.<sup>9</sup>

In the mid-19<sup>th</sup> century, Switzerland had recent experience of the utility of a national code. On 4 November 1847, at the beginning of the Swiss Civil War between the Federal Government and the Sonderbund (the breakaway group of seven predominantly Catholic cantons that opposed the plans for a new Swiss Constitution), General Guillaume-Henri Dufour, who was appointed the Commander of the Federal Army for this war, issued a well-argued and clear set of recommendations to his divisional commanders, dealing with the conduct of hostilities, treatment of captured persons, respect for the adversaries' society and institutions and more.<sup>10</sup> This statement was followed the next day by a general address to the soldiers of the Swiss Federal Forces, urging them to fight hard but also to prove themselves humane and generous.<sup>11</sup> In this month-long war Dufour achieved victory, at remarkably low overall cost. His subsequent account of this war indicates that the Federal Army suffered 78 dead on the battlefield or in hospital, and 260 wounded, making a total of about 340 men.<sup>12</sup> The losses on the Sonderbund side may have been as low as 33 dead and 124 wounded.<sup>13</sup> Overall, the losses were relatively small. This is explained, at least partly, by the fact that Dufour's humane intention was 'to decide the war, as far as possible, by mere demonstrations'.<sup>14</sup> It was largely a war of manoeuvre, and the Federal Forces' restraint was widely noted: their moderation in victory 'soon earned for the Swiss the admiration of Europe and established their right to control and settle

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<sup>8</sup> An English translation is in *The Swedish Discipline, Religious, Civile, and Military* (Butter and Bourne, 1632) (*The Swedish Discipline*). This work also contains 20 additional articles promulgated in 1632: at 69–73. See also Kenneth Ögren, 'Humanitarian Law in the *Articles of War* decreed in 1621 by King Gustavus II Adolphus of Sweden' (1996) 36 (313) *International Review of the Red Cross* 438.

<sup>9</sup> *The Swedish Discipline* (n 8) 55–7. See also Ögren (n 8).

<sup>10</sup> Général GH Dufour, *Campagne du Sonderbund et événements de 1847* (Sandoz et Fischbacher, 2<sup>nd</sup> ed, 1876) 183–5.

<sup>11</sup> *Ibid* 185–6.

<sup>12</sup> *Ibid* 171. See also his statements about the limitations of this war in a letter to the Federal Diet and in another strong proclamation to the troops: at 81, 131.

<sup>13</sup> Joachim Remak, *A Very Civil War: The Swiss Sonderbund War of 1847* (Westview Press, 1993) 157.

<sup>14</sup> W Oechsli, 'The Achievement of Swiss Federal Unity' in AW Ward, GW Prothero and Stanley Leathes (eds), *The Cambridge Modern History* (Cambridge University Press, 1909) vol 11, 234, 251.

their own concerns, social, political, and religious'.<sup>15</sup> We will encounter General Dufour again in this story.

As for the US, in the first half of the 19<sup>th</sup> century its national code was hardly satisfactory so far as the laws of war were concerned. The 'rules and articles for the government of the armies of the United States' (sometimes referred to more melodramatically as 'Articles of War'), were adopted by the US Congress in 1806.<sup>16</sup> Its 101 articles dealt entirely with matters of good order and discipline within the armies of the US. Similarly, the *Regulations of the Army of the United States*, revised by General Winfield Scott in 1825, were preoccupied with disciplinary and administrative issues; but they did also contain a few detailed provisions on certain laws of war matters such as the treatment and paroling of enemy prisoners.<sup>17</sup> Subsequent volumes entitled *General Regulations for the Army of the United States* were distinctly thin in their coverage of laws of war issues. Concerned above all with matters of efficiency, finance, and good order and discipline, they ignored almost completely such classic laws of war matters as treatment of enemy prisoners, occupation of territory, truces and neutrality.<sup>18</sup>

### B *Treaties before 1850*

Even before the second half of the 19<sup>th</sup> century when the laws of war began to be codified in multilateral treaties, some principles relating to the conduct of armed hostilities had been included in bilateral treaties. From the summer of 1776 onwards, in his key role as ambassador to France, Benjamin Franklin (1706–90) had begun to introduce the law of war principles and rules into American diplomacy.<sup>19</sup> For example, the 1785 *Treaty of Amity and Commerce* between the US and Prussia concluded with two articles making explicit and detailed provision for observance of certain basic rules if war were to break out between the two parties. The first article defined the immunity of merchants, women, children, scholars, cultivators and others.<sup>20</sup> The second specified proper treatment of prisoners of war, and began thus:

And to prevent the destruction of prisoners of war by sending them into distant & inclement countries, or by crowding them into close & noxious places, the two

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<sup>15</sup> WB Duffield, 'The War of the Sonderbund' (1895) 10(40) *English Historical Review* 675, 694.

<sup>16</sup> *Articles of War, Military Laws, and Rules and Regulations for the Army of the United States* (Adjutant and Inspector General's Office, rev ed, 1817) 9. This edition also contains certain additions and revisions. The text also available in Richard Peters (ed), *Public Statutes at Large of the United States of America* (Little and Brown, 1845) vol 2, 359–72.

<sup>17</sup> See, eg, *General Regulations for the Army, or, Military Institutes* (Davis & Force, 1825) 141 [715]–[716]. These paragraphs were cited in a letter from Confederate Secretary of War James A Seddon to Robert Ould, Confederate Agent for Exchange of Prisoners, 24 June 1863, reproduced in Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Precedent, 1983) 128, criticising the Lieber Code.

<sup>18</sup> *General Regulations for the Army of the United States, 1835* (Globe Office, 1835); *General Regulations for the Army of the United States, 1841* (J and GS Gideon, 1841); *General Regulations for the Army of the United States, 1847* (J and GS Gideon, 1847). Copies of all three inspected in the Library of Congress, Washington DC, February 2016.

<sup>19</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press, 2012) 42–7.

<sup>20</sup> *Treaty of Amity and Commerce, Prussia–United States*, signed 10 September 1785, 49 ConTS 331 (entered into force 8 August 1786) art 23.

contracting parties solemnly pledge themselves to each other & to the world that they will not adopt any such practice.<sup>21</sup>

Note the curiosity here. Before 1850, the Americans had set an example in international treaties on the laws of war (albeit in the quixotic form of Franklin's treaties), while the Swiss had produced an impressive national code. The story addressed in this paper involves a reversal of these roles: it was the Swiss who set an example in treaty form, while the Americans did so in the form of a code.

### C Humanitarian and Treaty Activity in the 1850s

In the early 1850s, two other fields to which the laws of war apply were also about to witness new developments. The first was humanitarian activity in war, especially medical aid for victims. The second was the rights and duties of neutrality in war, especially at sea.

From the 1850s onwards, there was a remarkable development of humanitarian activity, especially as regards help to wounded soldiers. On both sides in the Crimean War (1853–56), brave individuals sought to provide or improve treatment for the wounded. The same happened in the Italian War of 1859.<sup>22</sup>

The rights and duties of neutral states in war had been addressed in a large number of bilateral treaties between states from at least the early 17<sup>th</sup> century.<sup>23</sup> Sometimes, following the conclusion of a bilateral treaty on neutrality, additional states acceded to it. A common issue addressed in many such treaties concerned the thorny question of the right (or otherwise) of neutrals to trade with belligerents.<sup>24</sup>

Here is a question, the answer to which may or may not relate to the laws of war. What was the first multilateral treaty, on any subject, that was explicitly open to all states to become parties? I suggest one possible candidate. The diplomatic conference in Paris to conclude terms of peace after the Crimean War played a leading part in negotiating the *Declaration Respecting Maritime Law* ('*Paris Declaration*') of 1856 on war at sea, which sought to establish general rules regarding treatment of neutral shipping and cargoes in war, and also declared the abolition of privateering — the granting letters of marque to private ships entitling them to carry out hostilities at sea. The *Paris Declaration* is an early example of an open-ended multilateral treaty, that, according to its terms, is open to accession by all other states in the world.<sup>25</sup> This pointed in the direction

<sup>21</sup> Ibid art 24. Similar provisions appeared in the *Treaty of Amity and Commerce*, Prussia–United States, signed 11 July 1799, 55 ConTS 15 (entered into force 22 June 1800) arts XXIII–XXIV.

<sup>22</sup> See especially the essays in Roger Durand and Jacques Meurant (eds), *Préludes et Pionniers: Les Précurseurs de la Croix-Rouge, 1840–1860* (Société Henry Dunant, 1991).

<sup>23</sup> William Edward Hall, *The Rights and Duties of Neutrals* (Longmans Green, 1874) 28, referring to 'innumerable treaties' relating to neutrality that were concluded over several centuries, in a chapter surveying the growth of the law affecting belligerent and neutral states to the end of the 18<sup>th</sup> century.

<sup>24</sup> For example, on 27 February 1801 Denmark acceded to the *Convention between Russia and Sweden for the Re-establishment of an Armed Neutrality*, 55 ConTS 411 (signed and entered into force 16 December 1800).

<sup>25</sup> *Declaration Respecting Maritime Law*, 115 ConTS 1 (signed and entered into force 16 April 1856).

of universal law, accepted and applied by all states. In addition to the original seven signatory states (Austria, France, Prussia, Russia, Sardinia, Turkey, and the United Kingdom), within two years no less than 41 other maritime states acceded to the *Paris Declaration*, and three others did so before 1914. Several of the states acceding to this agreement were non-European.<sup>26</sup>

Is there an earlier treaty on any subject that had this global character, as distinct from being open to accession only by European states? An early (and atypical) example of a treaty open to avowal by any state was the Holy Alliance of 1815: but it was a vacuous statement of general principle by a few powerful European monarchies, and of course it was nothing to do with the laws of war.

Once the 1856 *Paris Declaration* had pointed the way, other such globally open-ended multilateral agreements on the laws of war followed: leading examples are the 1864 *Geneva Convention* on wounded and sick that will shortly be discussed, the 11 December 1868 *St Petersburg Declaration* on explosive projectiles,<sup>27</sup> and 16 of the Hague conventions and declarations of 1899 and 1907.<sup>28</sup>

It may seem extraordinary that the basic international legal art form of the past 160 years or more, the multilateral treaty open to all states to join, may have emerged from what is undoubtedly a particularly difficult legal subject area, namely the laws of war. Yet there is logic in it. First and foremost, this is because, once wars have broken out, it is often impossible to get belligerents to agree terms on even such basic matters as treatment of prisoners or the rights of neutrals to trade with belligerents. It is much better done before, and done universally. And secondly, certain agreed general standards are vital for the effective harmonisation of practices between allies. That is what the 1856 *Paris Declaration* on maritime law was largely about — and it is a highly relevant issue today, in this era of coalition operations.

Why is there no foundational mythology surrounding the 1856 *Paris Declaration*? If it is indeed a pioneering example of the open-ended multilateral treaty, then there surely should be. Part of the explanation for its relative obscurity is that, with a few notable exceptions, international lawyers pay relatively little attention to scholarly legal history. Another part may be the technical character of the *Paris Declaration*'s subject-matter. And the story of the *Paris Declaration* lacks the human interest of a Lieber or Dunant. One of its main progenitors, Lord Palmerston, was perhaps too colourful a character, too obstreperous, and at the same time too official, to become a secular saint alongside these two heroes.

#### IV LIEBER CODE, 1863

On 24 April 1863, almost exactly half way through the US Civil War, the War Department in Washington DC issued 'General Orders No 100', which began with this notice, introducing a text of no less than 157 articles:

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<sup>26</sup> Schindler and Toman (n 5) 1057–8.

<sup>27</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, 138 ConTS 297 (signed and entered into force 11 December 1868).

<sup>28</sup> Sixteen of the Hague conventions and declarations of 1899 and 1907 related to the conduct of armed conflict: see Schindler and Toman, *The Laws of Armed Conflicts* (n 5).

The following ‘Instructions for the Government of Armies of the United States in the Field,’ prepared by Francis Lieber, LLD, and revised by a Board of Officers, of which Major-General EA Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.<sup>29</sup>

It may seem paradoxical that this unusually full statement of the ‘law of war’ (a term frequently used in the text) should have been issued before there was any general international treaty on land war; and even odder that it came into existence during a civil war — since such wars notoriously present multiple difficulties to those seeking to apply the laws of war. It was also unusual that a university professor should play such a central part in drafting what appeared to be an official guide for a government and its armed forces. How did all this happen? There are clues in the life story of Lieber, and in the nature of the US Civil War.

#### A *Francis Lieber: Before the US Civil War*

The Code’s origins stretch back to the Napoleonic Wars, and to the unusual life-experience of the author after whom it came to be named. One of the earliest memories of Francis Lieber (1798–1872), who was born and brought up in Berlin, was of the day in October 1806 when he wept as he saw Napoleon’s warriors, having achieved victory over the Prussians in the Battle of Jena, parading in triumph through Berlin.<sup>30</sup> This left him with a deep sense of humiliation.

In defeated Berlin in October 1806 another individual, also destined to be a renowned 19<sup>th</sup> century writer on war, shared the young Lieber’s sense of personal violation. In the wake of Prussia’s defeat at Jena, a 26-year-old Prussian army officer, Carl von Clausewitz (along with his commanding officer, Prince August), was captured by the French, and taken to Berlin, which Napoleon had made his new headquarters. While Prince August had a brief audience with the emperor, Clausewitz ‘waited in an anteroom “in completely ruined clothes”’.<sup>31</sup> He and the Prince were interned in France for much of 1807. Clausewitz never forgot the sense of humiliation that he experienced in 1806: his lifelong belief that Prussia had to prepare for total war was based on it.<sup>32</sup>

The coincidence in the lives and thoughts of Lieber and Clausewitz did not end there. In June 1815 both of them fought against Napoleon in the battles around Namur that were to culminate a few days later, on the 24<sup>th</sup>, at the Battle of Waterloo. Clausewitz played a minor and relatively unsuccessful role.<sup>33</sup> Lieber was shot and badly injured. None the less, for Lieber at least, participation

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<sup>29</sup> Lieber Code (n 3) 2.

<sup>30</sup> Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Peter Smith, 1947) 1–5. Freidel confirms his year of birth, which some have claimed was 1790, as 1798: at 3 n 4.

<sup>31</sup> Peter Paret, *Clausewitz and the State* (Oxford University Press, 1976) 126, quoting Carl von Clausewitz, *Nachrichten über Preussen in seiner grossen Katastrophe* (ES Mittler, 1888) 547.

<sup>32</sup> Paret (n 31) 118–19, 123–31.

<sup>33</sup> *Ibid* 246–50.

in this campaign was sweet revenge after the earlier humiliation.<sup>34</sup> Both Lieber and Clausewitz were left with an enduring conviction of the importance of having a state — and one large enough to survive in a world of troubles. Both believed in the importance of victory in war.

After 1815, Lieber's unusual and prolonged education included some English influences. In Italy he made the acquaintance of the Prussian minister at Rome, Barthold Georg Niebuhr, a well-known historian and author of *History of Rome*. As Lieber's biographer Frank Freidel records:

Niebuhr, saturated in the doctrines of Edmund Burke, deeply distrusted the French Revolution, yet equally despised the old regime and the *émigrés*. 'His ideal was orderly development by process of law,' and his model, Great Britain, Lieber noted.<sup>35</sup>

Lieber moved to the US in 1827 and gained recognition for his editorship of *Encyclopaedia Americana*. In 1835 he was appointed Professor of History and Political Economics at South Carolina College (now the University of South Carolina) at Columbia, South Carolina. The historian Michael O'Brien has said that South Carolina 'presented Lieber with the moral problem of slavery, an experience by which he was deeply compromised, being both antislavery and a slaveholder'.<sup>36</sup> Lieber spent 22 years there. They changed him. He

departed his life as a southern slaveholder in 1857 with a somewhat darker view of humanity, perhaps even of himself, than when he arrived in Columbia in 1835. This change affected not only his political philosophy but also his metaphysical instincts. He moved away from the German transcendentalist tradition, from the moral world of Kant, Hegel, and Schelling, and identified more and more with English empiricism. He grew impatient, for example, with Kant's hope for perpetual peace.<sup>37</sup>

While in South Carolina, Lieber 'frequently toyed with the notion of becoming an inspector of prisons in Prussia'.<sup>38</sup> It was in the period when he was teaching at South Carolina College (1835–57) that

he became rather didactic, very concerned about laying down moral rules by which young minds might be formed. Even his later drafting of the rules of war for the Union can be partly understood as an outgrowth of his experience in the classrooms of Columbia, for in their prescriptions can be seen the ghost of the proposition that soldiers are like unruly youths, who need to be told how to behave.<sup>39</sup>

Lieber resigned from his job in the South because of a combination of factors that included his opposition both to slavery and to the growing signs of secessionism, his dissatisfaction with the management of South Carolina College

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<sup>34</sup> Lieber wrote a graphic account of the campaign in Francis Lieber, 'Personal Reminiscences of the Battle of Waterloo' in Daniel C Gilman (ed), *The Miscellaneous Writings of Francis Lieber* (JB Lippincott, 1881) vol 1, 149–75.

<sup>35</sup> Freidel (n 30) 37.

<sup>36</sup> Michael O'Brien, 'The Stranger in the South' in Charles R Mack and Henry H Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 33, 34.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* 36.

<sup>39</sup> *Ibid.*

and his disappointment that he failed in his bid for the presidency of the college.<sup>40</sup> In 1857 he headed for New York, to Columbia College. In December 1862 it granted him leave of absence to work in Washington for a month at the request of the Secretary of War.<sup>41</sup>

### B *The US Civil War*

In February 1861 the Confederacy was set up, adopting a governmental structure that closely mirrored the *United States Constitution*. Hostilities in the US Civil War began on 12 April 1861. The war ended with the Confederate surrender in Appomattox County, Virginia, on 9 April 1865. How did the war appear to others at the time? Numerous terms were used, including:

- War of the Rebellion
- War for Southern Independence
- War of Northern Aggression
- Freedom War
- War of Secession
- Civil War<sup>42</sup>

Lieber, along with many others, classified the conflict as a civil war. In January 1861, three months before the outbreak of the war proper, when Charlestonians fired on the *Star of the West* (a civilian steamship chartered by the US government) to prevent it from reinforcing Fort Sumter (the large US army garrison in Charleston Harbour, South Carolina), Lieber was sure, he wrote, that he heard ‘the boom of civil war ... of the most factitious and therefore the most unrighteous civil war’.<sup>43</sup> He contested all the Southern claims to a right of secession and strongly supported the Union. As he put it in letters at the time:

[F]rom the day when my father was obliged to remove me from the window, because my sobbing attracted the attention of Napoleon’s soldiers ... to this ... my heart has warmly beaten, and unflinchingly for Liberty ... true liberty requires a *country*.<sup>44</sup>

For him in the most direct sense it was a civil war. In the spring of 1862 Oscar and Norman, two of his four sons, were actually fighting on opposite sides on the same front.<sup>45</sup> When Oscar, his eldest son, joined a Confederate legion in South Carolina, Lieber penned a reproach that was never sent.<sup>46</sup> In 1862 Oscar was

<sup>40</sup> Paul Finkelman, ‘Lieber, Slavery, and the Problem of Free Thought in Antebellum South Carolina’ in Charles R Mack and Henry H Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 11, 19–21; Lewis R Harley, *Francis Lieber: His Life and Political Philosophy* (Columbia University Press, 1899) 70–7.

<sup>41</sup> *A History of Columbia University, 1754–1904* (Columbia University Press, 1904) 135, 137. The title of Columbia University was first assumed in 1896: at 203.

<sup>42</sup> The terms listed above, and other near synonyms, can be found in the various historical works mentioned in this article, including those listed in footnote 102.

<sup>43</sup> Freidel (n 30) 302, quoting letters written by Lieber in January and February 1861.

<sup>44</sup> Freidel (n 30) 302 (emphasis in original).

<sup>45</sup> Letter from Lieber to Hillard, 11 May 1861, quoted in Freidel (n 30) 306.

<sup>46</sup> Draft letter from Lieber to Oscar Lieber, 5 March 1861, quoted in Freidel (n 30) 306.

mortally wounded at Williamsburg.<sup>47</sup> Lieber learned details of his death as he was preparing the Code. Of his other two sons, fighting on the Unionist side, Hamilton was injured, also in the spring of 1862, losing an arm;<sup>48</sup> Norman survived unscathed, and in 1865 became a Lieutenant Colonel.<sup>49</sup>

From the start Lieber saw that the Civil War had certain characteristics of an inter-state war. It was a struggle between organised states, and was largely fought by organised armed forces. As his biographer Lewis Harley put it: ‘[t]he best authorities claim, however, that our Civil War presented the general conditions of an international war’.<sup>50</sup> It is this close resemblance to international war that helps to explain the apparent paradox of a famous body of rules, seen as the precursor of much modern law of international armed conflict, being adopted in a civil war — the very form of war that has repeatedly been seen as unpromising for the application of the laws of war.

In the US Civil War, there were many official and unofficial statements indicating that humanitarian issues were being taken seriously. Some of these appear to have been unconnected with Lieber or his Code. A leading example was the US Sanitary Commission, a private relief agency established by federal legislation on 18 June 1861 — just two months after the start of the Civil War — to support sick and wounded soldiers of the US Army. It was modelled on the British Sanitary Commission, an official body established during the Crimean War (1853–56). A long and favourable ‘Note on the Work of Assistance Committees in the United States’ was presented to the October 1863 Geneva International Conference.<sup>51</sup> This note indicated that it was the practice of these Sanitary Commissions, rather than the text of the Lieber Code, that formed the main link between US and European initiatives. Here is what this note said:

Indeed, under the pressure of the bloody and terrible test which it is undergoing, America has resolved a great and very complex problem. She has lifted herself by spontaneous common action, to provide, with an abundance beyond our existing ideas, help to all types of injured and ill people and to all victims of war; she has created, alongside the federal authority, and without obtaining from it any other help than what it could not refuse, a powerful organisation, which is a sort of pacific state, marching side by side and in the greatest harmony with, the government’s war machine ...<sup>52</sup>

Others had a different view of the US Sanitary Commission. An especially strident critic was Clara Barton, who led some remarkable relief and tracing efforts in the US Civil War. She found the Sanitary Commission often uncooperative and always bureaucratic.<sup>53</sup> Irrespective of her criticisms, there was

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<sup>47</sup> Freidel (n 30) 326.

<sup>48</sup> Ibid 324–5.

<sup>49</sup> Ibid 370.

<sup>50</sup> Harley (n 40) 154, citing SJ Barrows, ‘The Ethics of Modern Warfare’ (1898) 25 (March – August) *The Forum* 555, 558 in support of this proposition.

<sup>51</sup> Théodore Maunoir, ‘Note sur l’oeuvre des comités de secours aux Etats-Unis d’Amérique’ in Comité International (ed), *Secours aux Blessés: Communication du Comité International Faisant Suite au Compte Rendu de la Conférence Internationale de Genève* (Jules-Guillaume Fick, 1864) 179 [tr author].

<sup>52</sup> Maunoir (n 51) 180 [tr author].

<sup>53</sup> See Elizabeth Brown Pryor, *Clara Barton: Professional Angel* (University of Pennsylvania Press, 1987) 100–2, 110, 136.

no ground for complacency about such efforts, as the frightening casualty statistics of the US Civil War indicated.

### C *Casualties in the US Civil War*

Overall, the US Civil War involved very high numbers of casualties. Taking military deaths as a measure, the historian James McPherson suggested in 1988 that it resulted in 620,000 soldiers losing their lives in the four years of the conflict. He pointed out that the war accounted for as many American deaths than all other US wars combined — up to and including Vietnam.<sup>54</sup>

A more recent calculation by J David Hacker, a specialist in quantitative methodology, uses careful analysis of census statistics to give an even higher total figure of about 750,000 war-related military deaths.<sup>55</sup> Part of the explanation for the increase is that his revised figure includes soldiers who died from war-related causes within a few years of their discharges but had not been counted in the usual statistics of war dead. As for civilian deaths, he indicates that these were comparatively low:

Direct targeting of the civilian population in the Civil War, however, appears to have been a rare exception rather than the rule. Even as the occupying Union army resolved to make the southern population, in the words of Gen William T Sherman, ‘feel the hard hand of war,’ Union actions were directed against southern property, not at individuals. Compared to the total warfare waged in many twentieth-century wars, civilian deaths probably represented a low proportion of war-related deaths. James McPherson has suggested 50,000 as a possible total.<sup>56</sup>

Although the high numbers of military casualties in the Civil War are a sharp reminder of the destructive potential of civil wars, bare figures cannot resolve the inherent difficulty of establishing that any particular legal code, or indeed any other factor, had a major effect on outcomes. The promulgation of the Lieber Code was followed by some of the harshest and most intense fighting of the war. In particular, it preceded the Battle of Gettysburg of 1–3 July 1863 — which involved the most casualties of the whole war. The fighting in spring 1864 also involved huge losses. However, it would be wrong to see the main purpose of the Lieber Code as wholly on the side of moderation in war. Any code of the laws of war is likely to assume that the killing of active enemy soldiers is legitimate. Indeed, it is a problem of the laws of war that they can be seen as compatible with industrial-scale killings of soldiers on the battlefield. The Lieber Code was drawn up at a time when the war was becoming more mechanised and more intense. Its provisions were far from being completely opposed to the move towards total war.

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<sup>54</sup> James M McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford University Press, 1988) 854.

<sup>55</sup> J David Hacker, ‘A Census-Based Count of the Civil War Dead’ (2011) 57(4) *Civil War History* 307, 311, 315–16. See James McPherson’s commentary in this article accepting these new figures: at 309–10.

<sup>56</sup> Hacker (n 55) 328 (citations omitted).

## D Drawing up the Instructions 1861–63

During the war, Lieber achieved both official and public recognition as an influential legal and constitutional expert. The title ‘publicist’ suited him: indeed he is said to have coined it.<sup>57</sup> Professor Lynn Hogue, a specialist in the history of military law, has a critical interpretation: ‘How Lieber came to play a role in the preparation of the code bearing his name is a story of political opportunism and persistent self-promotion.’<sup>58</sup> Whether or not that criticism is justified, he certainly had a knack of addressing key issues, of understanding what might be acceptable to the government and of influencing government decision-making. There were several episodes in which he made important inputs into US official thinking about the war.

Four months after the war began, he published an open letter in *The New York Times* about the nature and treatment of Confederate prisoners. The issue at stake was whether captured Confederates were soldiers or pirates, and also how captured Union soldiers might be treated. This issue called for ‘[c]onsiderations of law, authority, humanity, [and] wise foresight’. In concluding that traditional rules of war should be applied to prisoners, he argued that this was not a formal or diplomatic recognition of the Confederacy but was simply ‘the recognition of reality’.<sup>59</sup>

In those early months, taking on the self-assumed role of unofficial adviser, Lieber formed a close association with Attorney-General Edward Bates. In so doing, he placed himself in an awkward position:

America’s most widely quoted defender of civil liberties now labored diligently to aid Bates in ferreting out legal justification for the administration’s political arrests. At the end of April Lincoln had reluctantly suspended the writ of habeas corpus in the turbulent area between Washington and Philadelphia. This meant the denial of normal court processes of arraignment and jury trial to suspects held for disloyalty.<sup>60</sup>

Two years later, in the fall of 1863 (ie, some months after the issuance of the Lieber Code), Bates wearied of all the messages from Lieber. He wrote in his diary: ‘The Dr *theorises* very well, he suggests ends, perhaps good in themselves, but wholly ignores the principles and means of their attainment.’<sup>61</sup>

From 1862 onwards Lieber’s influence was largely due to General Henry W Halleck, Lincoln’s chief military adviser who from July 1862 to March 1864 was General-in-Chief of all the Union Armies. Known as ‘Old Brains’, Halleck was the author of a massive, wide-ranging and important work on international law,

<sup>57</sup> Freidel (n 30) 316.

<sup>58</sup> L Lynn Hogue, ‘Lieber’s Military Code and Its Legacy’ in Charles R Mack and Henry H Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 51, 51.

<sup>59</sup> Francis Lieber, ‘The Disposal of Prisoners: Would the Exchange of Prisoners Amount to Partial Acknowledgment of the Insurgents as Belligerents, According to International Law?’, *The New York Times* (New York, 19 August 1861) 5, cited in Paul Finkelman, ‘Francis Lieber and the Law of War’, *The New York Times* (online, 2 March 2013) <<https://opinionator.blogs.nytimes.com/2013/03/02/francis-lieber-and-the-law-of-war/>>, archived at <<https://perma.cc/7JSC-W7DV>>.

<sup>60</sup> Freidel (n 30) 309.

<sup>61</sup> Edward Bates, *The Diary of Edward Bates, 1859–1866*, ed Howard K Beale (United States Government Printing Office, 1933) 308, quoted in Freidel (n 30) 314 (emphasis in original).

which paid much attention to the laws of war. It was published in 1861 as the Civil War was beginning.<sup>62</sup> Halleck saw the resolution of certain legal issues, especially those relating to the status of irregular fighters and their entitlement or otherwise to prisoner of war status, as fundamental to the Union cause. As he said in a letter to Lieber in August 1862: ‘The Rebel authorities claim the right to send men in the garb of peaceful citizens to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines.’<sup>63</sup> At this prompting from Halleck (who himself had been prompted by Lieber), Lieber prepared a short booklet on *Guerrilla Parties Considered with Reference to the Laws and Usages of War*.<sup>64</sup> It is emphatically not in the form of a code. It has more the character of a scholarly survey of the variety of force structures and activities that are sometimes gathered together under the label ‘guerrilla’. He drew some sharp distinctions between different types of guerrilla fighters. He clearly favoured treating participants in a *levée en masse* as lawful combatants. Similarly, he suggested that ‘guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them’.<sup>65</sup> However, other types of guerrilla might be treated more harshly: the main conclusion of the essay was that it is for the legitimate government to work out how it will respond to rebellion, bearing in mind its own municipal law as well as the international law of war.<sup>66</sup> All this ‘must be decided by the executive power, civil and military, or possibly by the legislative power. It is not for me, in this place, to make the inquiry.’<sup>67</sup> Not surprisingly, the paper carrying this conclusion was welcomed by Halleck and others. Halleck ordered 5,000 pamphlet copies of this essay for army distribution.<sup>68</sup> However, I have not been able to verify suggestions in the literature that a version of *Guerrilla Parties* was subsequently issued by the US Government in its General Orders series.<sup>69</sup>

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<sup>62</sup> HW Halleck, *International Law, or, Rules Regulating the Intercourse of States in Peace and War* (HH Bancroft, 1861).

<sup>63</sup> Letter from HW Halleck to Francis Lieber, 6 August 1862, reproduced in Hartigan (n 17) 78.

<sup>64</sup> Francis Lieber, *Guerrilla Parties: Considered with Reference to the Laws and Usages of War* (D Van Nostrand, 1862) (*‘Guerrilla Parties’*). A slightly amended version of *Guerrilla Parties* was published in Daniel C Gilman (ed), *The Miscellaneous Writings of Francis Lieber* (JB Lippincott, 1881) vol 2, 275–92.

<sup>65</sup> Lieber, *Guerrilla Parties* (n 64) 20.

<sup>66</sup> *Ibid* 21.

<sup>67</sup> *Ibid* 22.

<sup>68</sup> Brainerd Dyer, ‘Francis Lieber and the American Civil War’ (1939) 2(4) *Huntington Library Quarterly* 449, 453; Freidel (n 30) 329, citing Letters from Henry Halleck to Francis Lieber, 6 and 20 August 1862.

<sup>69</sup> Robert Wolfe states that a modified version of the paper on *Guerrilla Parties* was ‘issued as War Department General Orders No 49’: Robert Wolfe, ‘Francis Lieber’s Role as Archivist of the Confederate Records’ in Charles R Mack and Henry H Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 42, 45. Somewhat similarly, Richard Shelly Hartigan indicates that a text dealing with the application of Lieber’s essay on guerrilla warfare appeared as General Orders No 30 of 22 April 1863: Hartigan (n 17) 92–106. There may be some confusion in these claims. Questions about these claims start with the fact that there does not appear to have been a General Orders No 30 of 22 April 1863. As regards General Orders No 49, issued on 28 February 1863, it is entirely about paroling, not about guerrillas: Hartigan (n 17) 90–1. For a long and seemingly comprehensive collection of General Orders, see O’Brien and Diefendorf (n 3).

The big issue, and the text by which Lieber's stature is measured, is of course the Lieber Code. There is no doubt that it was Lieber's idea. In August 1861 he wrote letters to US Senator Charles Sumner, and the author and bibliographer Samuel Allibone, indicating his intention 'to write a little book on the Law and Usages of War' and expressing the hope that he would 'write something which Congress might feel inclined to recommend to the army'.<sup>70</sup> In November 1862 he wrote to Halleck stating that 'the President ought to issue a set of rules and definitions providing for the most urgent issues occurring under the Law and usages of War, and on which our Articles of War are silent'.<sup>71</sup> He said in the same letter:

I do not know that any such thing as I design exists in any other country, and in all other countries the Law of War is much more reduced to naked Force or Might, than we are willing to do it, especially now, perhaps, in this Civil War, and there exists much more thorough organization in those countries; nor do single wars extend there over such distances as here.<sup>72</sup>

Lieber was not merely the inspiration for the instructions, but also provided intellectual leadership and scholarly knowledge. Yet it was not all entirely his own work. The historian Peter Hoffer, in a recent study of law and lawyers in the Civil War, offers this sober view, emphasising the role of many others both in its authorship and in its implementation:

One student of the laws of war, Stephen Neff, has called the Lieber code 'something of a masterpiece.' Some credit for it should be shared among Lincoln, Halleck, Stanton, and the Department of War's solicitor William Whiting as well as Lieber. The code's implementation, however, depended on Joseph Holt ... who now served as the advocate general — the chief lawyer — of the US Army. Holt was a Kentucky Democrat turned Republican, and though closely tied to the secessionists in his state, was by 1862 an 'intransigent Unionist,' and last but not least, a slaveholder who came to denounce slavery as a 'ghastly offense' against 'human rights.'<sup>73</sup>

Holt played a part in the drawing up as well as implementation of the Lieber Code. This is an indication of Lieber's involvement in the notably tough policy pursued by Holt, who clamped down on dissident civilians as well as on soldiers. The beginning of 1863, the very time when the instructions were being finalised, was a time of harshness of which Lieber himself was part.<sup>74</sup>

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<sup>70</sup> Letters from Francis Lieber to Charles Sumner and Samuel Allibone, 19 August 1861, quoted in Freidel (n 30) 323–4.

<sup>71</sup> Letter from Francis Lieber to Henry Halleck, 13 November 1862, reproduced in Hartigan (n 17) 79.

<sup>72</sup> Letter from Francis Lieber to Henry Halleck, 13 November 1862, reproduced in Hartigan (n 17) 80.

<sup>73</sup> Peter Charles Hoffer, *Uncivil Warriors: The Lawyers' Civil War* (Oxford University Press, 2018) 121 (citations omitted).

<sup>74</sup> On Lieber's association with Holt, see Elizabeth D Leonard, *Lincoln's Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky* (University of North Carolina Press, 2011) 180–2, 186, 216.

E *Form and Content of the Instructions*

When, on 20 February 1863, Lieber circulated a few copies of a printed draft of his instructions, they were entitled *A Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land*.<sup>75</sup> Two months later, when the considerably revised text was published, the title had changed. Against Lieber's wishes, the word 'code' had disappeared.<sup>76</sup> The latter term implied a more formal legal category, and might have raised the perennially difficult question of whether Senate approval was needed. Since, in his letters to Sumner and Allibone in August 1861, Lieber himself had mentioned that 'Congress might feel inclined' to recommend his proposed rules,<sup>77</sup> he can hardly have been surprised by the change of title to avoid mirroring the document in political controversy. So at the time of its issuance, and for the rest of the Civil War, the document attributed to Lieber was generally referred to as the 'Instructions' or 'General Orders No 100', not as the 'Code'.<sup>78</sup>

At all events, the document had merits, in form as well as substance. Freidel has written:

Perhaps one of the greatest merits of the order was its form, highly characteristic of Lieber's writing. It was less a rigid legal code than a persuasively written essay on the ethics of conducting war. This made it usable for tough-minded Union officers, unschooled in the laws of war, who must be convinced rather than ordered. ... In sum, General Orders 100 was a logical outgrowth of the conflict, a guide for its conduct, and an interpretation of its meaning.<sup>79</sup>

How original was the Code? As we have seen, there was relatively little to draw upon in previous US national codes, so it is not surprising that Lieber's instructions contain only one brief reference to the 'Rules and Articles of War' of the US.<sup>80</sup> While he appears to have drawn more on European writings than on any existing US code, he also draws on the range of practical land warfare issues that arose in the Civil War. The titles of the 10 sections are:

- I Martial law — Military jurisdiction — Military necessity — Retaliation
- II Public and private property of the Enemy — Protection of persons, and especially of women; of religion, the arts and sciences — Punishment of crimes against the inhabitants of hostile countries
- III Deserters — Prisoners of War — Hostages — Booty on the Battlefield
- IV Partisans — Armed enemies not belonging to the hostile army — Scouts — Armed prowlers — War-rebels

<sup>75</sup> James F Childress, 'Francis Lieber's Interpretation of the Laws of War: General Orders No 100 in the Context of His Life and Thought' (1976) 21 *American Journal of Jurisprudence* 34, 38.

<sup>76</sup> *Ibid* 38–9.

<sup>77</sup> Letters from Francis Lieber to Charles Sumner and Samuel Allibone, 19 August 1861, quoted in Freidel (n 30) 324.

<sup>78</sup> Childress (n 75) 39.

<sup>79</sup> Freidel (n 30) 335–6.

<sup>80</sup> Lieber Code (n 3) art 13.

- V Safe-conduct — Spies— War-traitors — Captured messengers — Abuse of the flag of truce
- VI Exchange of prisoners — Flags of truce — Flags of protection
- VII The Parole
- VIII Armistice — Capitulation
- IX Assassination
- X Insurrection — Civil war — Rebellion

Within this broad structure, some contentious issues were addressed. A striking example in section I is art 16, which declared with admirable clarity that both torture and the use of poison were prohibited. Yet Lieber can be criticised both for the breadth of scope of the instructions, and for some of their specific provisions. The very fact of covering such a full range of activities left him open to criticisms that most of his instructions merely reflected the interests and principles of the Union side.<sup>81</sup> Also, some of the provisions are merely descriptive of certain practices, without explicit comment. Thus art 18 reads simply:

When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.<sup>82</sup>

Military necessity and retaliation are two issues on which the Lieber Code has been most criticised. This problem haunts the interesting survey by the ethicist James Childress:

Necessity and retaliation offer civilian and military leaders two ways to adapt the laws of war to changing military conditions. They seem to imply that a belligerent must always be free to employ winning strategies or tactics even in violation of *jus in bello*. But such an implication would not do justice to the other side of Lieber's interpretation of the laws of war: whatever the aims of the war, and however it is fought, some obligations toward the enemy continue. Unfortunately, he did not adequately grasp or reconcile these opposing tendencies in the laws of war.<sup>83</sup>

The closely related subject of total war is the most troubling, as what he says on that appears to call into question the whole idea of imposing limits on the conduct of war. For example, art 29, after saying that peace is the normal condition of nations in modern times, ends with this short paragraph: 'The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.'<sup>84</sup> This is immediately followed by art 30 (the final article of section I), which has an almost Clausewitzian tone. It carries his thought about sharp wars forward, but what exactly is its meaning? It reads, in full:

Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its

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<sup>81</sup> This would of course form part of the criticism of the Lieber Code made by the Confederate military leadership and mentioned below: see below 176–7.

<sup>82</sup> Lieber Code (n 3) art 18.

<sup>83</sup> Childress (n 75) 68.

<sup>84</sup> Lieber Code (n 3) art 29.

own end, but the means to obtain great ends of state, or to consist in defence against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.<sup>85</sup>

Not surprisingly, Confederates interpreted this apparent rejection of ‘conventional restriction’ as sinister, and indicated their preference for pre-existing law.<sup>86</sup> The spectre of total war was also raised by art 86, prohibiting ‘[a]ll intercourse between the territories occupied by belligerent armies’.<sup>87</sup> This was hugely problematic in the US Civil War.<sup>88</sup>

#### F *Influence in the Civil War*

It is sometimes suggested that General Orders No 100 of 22 April 1863 was not actually released until mid-May.<sup>89</sup> There may well have been delays in circulating copies to many of the intended recipients, especially as Union forces were spread over a vast area and on many distinct fronts. However, the evidence that copies were in circulation before May is persuasive. From the start, some officers at the receiving end of the Lieber Code took a dim view of them. In April 1863, Colonel Charles Wainwright, in charge of a Unionist artillery regiment, recorded in his diary the following entry:

I cannot make out exactly what the Administration is driving at. ... General Order No 100, just received, which under guise of ‘Instructions for the Government of Armies in the Field’ is a defense of its radical abolition principles. The ‘Instructions’ are drawn up by Professor Francis Lieber, a very learned student and bookworm no doubt, and revised by Major General Hitchcock, an old theoretical fool. I would not give a fig for the opinion of either of these gentlemen on practical politics, though they are both very well posted as to all German theories.<sup>90</sup>

Did the Instructions make a difference during the Civil War? Claims that the Lieber Code had a moderating influence on the conduct of the war are frequently made but hard to prove. So are claims about the extent to which this Code may have served the purposes of the government and the cause of victory. It is certainly hard to dispute the proposition that, in the summer of 1863, the tendency was towards total war.

Freidel suggests that the Instructions did have some practical relevance in certain specific matters, such as the handling of prisoners:

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<sup>85</sup> Ibid art 30.

<sup>86</sup> Letter from James A Seddon, Confederate Secretary of War to Robert Ould, Confederate Agent of Exchange, 24 June 1863, reproduced in Hartigan (n 17) 120–30.

<sup>87</sup> Lieber Code (n 3) art 86.

<sup>88</sup> See, eg, Letter from J Holt, Judge-Advocate-General to EM Stanton, Secretary of War, 25 January 1865, reproduced in Hartigan (n 17) 140–5.

<sup>89</sup> The suggestion of a mid-May release appears in Freidel (n 30) 335 n 42; Hartigan (n 17) 106.

<sup>90</sup> Allan Nevins (ed), *A Diary of Battle: The Personal Journals of Colonel Charles S Wainwright 1861–1865* (Harcourt, Brace & World, 1962) 184. This statement appears in the book under the date 23 April 1863, which is the day before the Lieber Code was officially issued, but may well have been written a few days later. This diary entry refers to Major General Ethan Allen Hitchcock, a Union general.

Lieber's sharp strictures on exchange and paroling, already anticipated by Halleck in General Orders 49, helped end the flagrant abuses which had been so helpful to the Confederates.

...

But recognition was slow, for the Union commanders and military governors seem to have attached relatively little importance to the order. ...

Quite possibly the order did help somewhat to standardize the basic conduct of the war.<sup>91</sup>

Lynn Hogue also expresses doubts about the influence of the Instructions on the Union forces: 'After all, the Code's persisting significance in international law is undisputed. But its role during the Civil War, especially when evaluated from the perspective of its influence on the conduct of the Union Army, is less clear.'<sup>92</sup> More dismissively the historian Harry Stout comments: 'Union generals showed scant interest in the code and soldiers none.'<sup>93</sup>

The American writer David Bosco has also indicated some grounds for doubt about the Code's effects:

Lieber's life and thought embodied some of the most serious contradictions in the struggle to humanize warfare. Those contradictions became painful as the Civil War grew more intense, and whether the gifted scholar restrained the conduct of the fighting in any way is uncertain at best. He certainly did not resolve the tensions he confronted; 150 years after his death [sic], his adopted country is still struggling to reconcile the competing demands of security and humanity, principle and pragmatism.<sup>94</sup>

How about the effect of the Instructions on the Confederacy? From the time they were promulgated, some Union leaders clearly thought that General Orders No 100 could be used as a weapon against the Confederacy. Thus Major General D Hunter of Headquarters, Department of the South, in transmitting a copy of the Instructions to one of his regimental commanders, wrote in June 1863:

If, as is threatened by the rebel Congress, this war has eventually to degenerate into a barbarous and savage conflict, softened by none of the amenities and rights established by the wisdom and civilization of the world through successive centuries of struggle, it is of the first moment that the infamy of this deterioration should rest exclusively and without excuse upon the rebel Government. It will therefore be necessary for you to exercise the utmost strictness in insisting upon compliance with the instruction herewith sent ...<sup>95</sup>

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<sup>91</sup> Freidel (n 30) 337–8 (citations omitted).

<sup>92</sup> Hogue (n 58) 57.

<sup>93</sup> Harry S Stout, *Upon the Altar of the Nation: A Moral History of the American Civil War* (Viking, 2006) 193.

<sup>94</sup> David Bosco, 'Moral Principle vs Military Necessity' (Winter 2008) *The American Scholar* <<http://theamericanscholar.org/moral-principle-vs-military-necessity/#.UnWFZJGjPjP>>, archived at <<https://perma.cc/PG2H-EW6U>>. Lieber had died in 1872, hence 136 years before.

<sup>95</sup> Letter from Major-General D Hunter to Colonel James Montgomery, 9 June 1863, reproduced in Hartigan (n 17) 114.

In the same month when this was written, the Confederate states and forces denounced the Code. Confederate Secretary of War James Seddon, in a classic of sustained legal invective, dismissed it thus:

Order No 100 is a confused, unassorted, and indiscriminating compilation from the opinion of the publicists of the last two centuries, some of which are obsolete, others repudiated; and a military commander under this code may pursue a line of conduct in accordance with principles of justice, faith, and honor, or he may justify conduct correspondent with the warfare of the barbarous hordes who overran the Roman Empire, or who, in the Middle Ages, devastated the continent of Asia and menaced the civilization of Europe.<sup>96</sup>

This verbal assault did not mean that the Confederates could ignore the Instructions completely. Indeed, as Freidel records, they made some use of them:

Despite the propaganda use Southerners made of the regulations, they showed vital concern over the drastic new provisions concerning paroling and prisoners of war. Moreover, they took advantage of the fact that the order bound the Union forces as completely as their own. They sought at once to apply it in a case of purported wanton violence and unauthorized destruction of property.<sup>97</sup>

During the war, there was one important court case in which Lieber's Instructions featured. It concerned US Congressman Clement Vallandigham of Ohio, a 'Peace Democrat', who had defied a general order issued in Ohio on 13 April 1863 that public expressions of support for the Confederacy would no longer be tolerated.<sup>98</sup> In Ohio on 1 May 1863 he made a speech to the effect

that the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites ...<sup>99</sup>

Shortly thereafter he was tried by a US Army military commission in Ohio, where he was found guilty and sentenced to imprisonment for the duration of the war. The case went up to the US Supreme Court, which rejected his appeal: its decision in *Ex parte Vallandigham* relied partly on 'the instructions for the government of the armies of the United States' (ie the Lieber Code), and held that the Union commander in Ohio had acted in accordance with them.<sup>100</sup>

Many historians of the US Civil War say nothing about the Lieber Code. Hogue pointed out that a leading history of the war by James McPherson made no mention at all of Francis Lieber or his Code. He concluded that this omission was largely justified, especially in light of such events as Sherman's campaign in Georgia in summer 1864.<sup>101</sup> Lieber and the Code are also absent from numerous

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<sup>96</sup> Letter from James A Seddon, Confederate Secretary of War, to Robert Ould, Confederate Agent of Exchange, 24 June 1863, reproduced in Hartigan (n 17) 120–1.

<sup>97</sup> Freidel (n 30) 339.

<sup>98</sup> *Ex parte Vallandigham*, 68 US 243, 243–4 (1863).

<sup>99</sup> *Ibid* 244.

<sup>100</sup> *Ibid* 248–9; Hogue (n 58) 58. See also Leonard (n 74) 182–4.

<sup>101</sup> Hogue (n 58) 58.

other accounts of the war. The footnote indicating this is necessarily long.<sup>102</sup> References to Lieber are also absent from accounts of the diplomacy surrounding the war.<sup>103</sup>

Some limits in the war were due, not to the Instructions considered on their own, but to concern about retaliation. Thus at the beginning of 1864 Lieber responded to an enquiry from Montgomery C Meigs, the Quartermaster General, as to whether the army could legally employ idle prisoners of war. Lieber replied strongly in the affirmative. Freidel comments: ‘International law did permit prisoners to work, but fear that the Confederates would retaliate by employing Union captives in unhealthful or dangerous occupations deterred army officials from introducing Meigs’s proposals.’<sup>104</sup>

On the difficult issue of whether there should be post-war trials of leaders or other members of the Confederate forces, Lieber was much preoccupied but not always completely consistent. In April 1865, as the war was drawing to its end, he advised President Lincoln to put on trial ‘a dozen to twenty of the top men, or failing that, their flight to Europe’.<sup>105</sup> And in May 1865 he published an article arguing that Southern prisoners, even if they had been paroled, were still liable to be tried for violations of the rules of war.<sup>106</sup> However, in September 1866, in a memorandum that he never published, he modified this, on the grounds that individuals should not be punished for temporary obedience to the rebel government.<sup>107</sup> After the war, Lieber was head of the archive office from July 1865 to 1867, meticulously sifting, sorting and classifying documents from the Civil War, and still considering whether some pointed to the need for criminal prosecutions.<sup>108</sup>

### G Subsequent Influence in the US

After the Civil War ended in April 1865, what was the influence of the Lieber Code in the US? Freidel states: ‘Hostilities had scarcely come to a close before General Orders 100 began to acquire authority and the extreme veneration of

<sup>102</sup> Other American histories of the Civil War making no mention of Lieber or the Code include: Fred Albert Shannon, *The Organization and Administration of the Union Army 1861–1865* (Arthur H Clark, 1928) vols 1–2; Henry Steele Commager (ed), *The Blue and the Gray: The Story of the Civil War as Told by Participants* (Bobbs-Merrill, 1950) vols 1–2; John G Barrett, *Sherman’s March through the Carolinas* (University of North Carolina Press, 1956); David S Sparks (ed), *Inside Lincoln’s Army: The Diary of Marsena Rudolph Patrick, Provost Marshal General, Army of the Potomac* (Thomas Yoseloff, 1964); Frank J Welcher, *The Union Army 1861–1865: Organization and Operations* (Indiana University Press, 1989–1993) vols 1–2; Jeffrey C Hall, *The Stand of the US Army at Gettysburg* (Indiana University Press, 2003); Donald R Jermann, *Civil War Battlefield Orders Gone Awry: The Written Word and Its Consequences in 13 Engagements* (McFarland & Company, 2012); Williamson Murray and Wayne Wei-siang Hsieh, *A Savage War: A Military History of the Civil War* (Princeton University Press, 2016).

<sup>103</sup> For example, there is no reference to Lieber or the Code in Ephraim Douglass Adams, *Great Britain and the American Civil War* (Longmans Green, 1925) vols 1–2.

<sup>104</sup> Freidel (n 30) 349 (citations omitted).

<sup>105</sup> Ibid 358, summarising letters from Francis Lieber to Charles Sumner, March – April 1865.

<sup>106</sup> Francis Lieber, ‘The Status of Rebel Prisoners of War’, *The Independent* (New York, 10 May 1865), cited in Freidel (n 30) 362.

<sup>107</sup> Freidel (n 30) 363.

<sup>108</sup> Ibid 370–5; Wolfe (n 69) 46.

army officers and experts on international law.’<sup>109</sup> It gradually came to be called a ‘code’ — as Lieber has suggested back in February 1863.

Lieber’s Code is in tension with (though certainly not contradictory to) a strong US tradition of waging total war. This has been called the Jacksonian tradition after Andrew Jackson, victor of the Battle of New Orleans in 1815 and President of the US 1829–37.<sup>110</sup> As Walter Russell Mead has put it:

Once wars begin, a significant element of American public opinion supports waging them at the highest possible level of intensity. The devastating tactics of the wars against the Indians, General Sherman’s campaign of 1864–65, and the unprecedented aerial bombardments of World War II were all broadly popular in the United States.<sup>111</sup>

As we have seen, Lieber had not rejected the idea of total war. Moreover, even Lieber’s few really unequivocal prohibitions — those against torture and assassination are the prime examples — came to be modified in subsequent US practice. Torture was used in the extraordinarily violent circumstances of the US–Philippines war of 1899–1902. One of those charged and convicted with ordering the administration of ‘water cure’ in the Philippines was Major Edwin F Glenn. He served in the Philippines during the anti-US insurrection, and was convicted of forcing prisoners to ingest large quantities of dirty water during interrogations. He put up a strong defence, claiming that what he did was not illegal. He was punished with only a \$50 fine and one month’s suspension. He emerged from the court-martial a hero and continued to serve in the Judge Advocate General’s Department.<sup>112</sup> Then in 1913, he was put in charge of updating the old Civil War instructions. The result, *Rules of Land Warfare*, was published by the US War Department in 1914, and was updated in 1934 and 1940.<sup>113</sup> John Witt, in his sceptical account of the influence of the laws of war in US history, makes this remarkable (but insufficiently footnoted) observation:

At the war crimes trials of Nazis in American-occupied Germany from 1946 to 1949, provisions of the laws of war that Glenn had written would be cited and argued about at length by prosecutors and defense lawyers alike. No one noted that they had been crafted by a convicted torturer, a man whom we would today (following Lieber and Bluntschli) call a war criminal.<sup>114</sup>

#### H *Global Influence of the Lieber Code*

There have been many famous and notably generous tributes to Lieber’s global influence. Two — one European, one American — have been particularly emphatic.

<sup>109</sup> Freidel (n 30) 339.

<sup>110</sup> Walter Russell Mead, ‘The Jacksonian Tradition: And American Foreign Policy’ (1999) 58 (Winter) *The National Interest* 5, 7–9.

<sup>111</sup> *Ibid* 6.

<sup>112</sup> Christopher J Einolf, *America in the Philippines, 1899–1902: The First Torture Scandal* (Palgrave Macmillan, 2014) 61, 70–2, 159–61, 171.

<sup>113</sup> Witt (n 19) 363.

<sup>114</sup> *Ibid*. He provides no detail on the extent to which provisions of United States military manuals were discussed at the various war crimes trials in US-occupied areas in Germany.

In 1866 the Swiss jurist Johann Kaspar Bluntschli (1808–81), a close friend of Lieber, published a short treatise on the law of war, *Das Moderne Kriegsrecht*, in which he made brief references to the Lieber Code and the 1864 *Geneva Convention*.<sup>115</sup> Yet this book was to form a link between the two texts we are considering here. Its greatly enlarged second edition (1872) contained (instead of a foreword) two long letters to Lieber plus extended coverage of the 1864 *Geneva Convention* and the full English text of the Lieber Code.<sup>116</sup> Bluntschli's essay on 'Lieber's Service to Political Science and International Law', written shortly after Lieber's death in October 1872, is a particularly interesting assessment.<sup>117</sup> It identifies Lieber as a scholar who transcended the division — pervasive in German 19<sup>th</sup> century academic life — between idealism and a historical approach. Similarly, it depicts him as transcending a divide in US public life between moralism and a more political approach. Bluntschli states baldly, and only partly correctly:

The Instructions for the Government of Armies of the United States in the Field were drawn up by Lieber at the instance of President Lincoln, and formed the first codification of International Articles of War (*Kriegsvölkerrecht*). This was a deed of great moment in the history of international law and of civilization.<sup>118</sup>

Bluntschli concludes with a paragraph on Lieber's influence in founding the Institut de Droit International, formed in Ghent in 1873, which 'forms a permanent alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world'.<sup>119</sup>

Dr Bluntschli was counsellor of the German delegation at the Brussels Conference of 1874, which provided a basis for the conventions adopted at the Hague Peace Conferences of 1899 and 1907.<sup>120</sup> So through him there is a direct link between Lieber and The Hague. But the link was just one of many, and was far from being direct or unquestioned. In both style and content the 1874 Brussels *Declaration concerning the Laws and Customs of War*, which was largely based on a Russian draft, was very different from the Lieber Code, especially on the issue, which was critically important to the smaller European states, of the right to resist an invader.<sup>121</sup> Also, the 1874 document, and certain other documents of the period, attracted much military criticism, especially from

<sup>115</sup> JC Bluntschli, *Das Moderne Kriegsrecht der Civilisirten Staaten* (CH Beck, 1<sup>st</sup> ed, 1866) iii–iv.

<sup>116</sup> JC Bluntschli, *Das Moderne Kriegsrecht der Civilisirten Staaten* (CH Beck, 2<sup>nd</sup> ed, 1872) v–x, 327–35, 483–514. Freidel (n 30) 340. Bluntschli also wrote a short essay on international law issues in the Franco–Prussian War of 1870–71: JC Bluntschli, *Das Moderne Völkerrecht in dem Französisch-Deutschen Kriege von 1870* (Fr Bassermann, 1871). Its 31-page text (of a lecture given on 22 November 1870) contains very little on the law of armed conflict.

<sup>117</sup> JC Bluntschli, 'Lieber's Service to Political Science and International Law' in Daniel C Gilman (ed), *The Miscellaneous Writings of Francis Lieber* (JB Lippincott, 1881) vol 2, 7–14.

<sup>118</sup> Ibid 12.

<sup>119</sup> Ibid 14.

<sup>120</sup> Richard R Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No 100' (1963) 3(26) *International Review of the Red Cross* 234, 249.

<sup>121</sup> WJ Ford, 'Resistance Movements and International Law' (1967) 7(79) *International Review of the Red Cross* 515, 528.

senior German officers, some of it directed against Bluntschli himself. As Geoffrey Best put it in his masterly book on *Humanity in Warfare*, Bluntschli was to become ‘the object of the later nineteenth-century military’s two most heavy-weight rebukes’ — from General Julius von Hartmann and Field Marshal von Moltke.<sup>122</sup> In short, Bluntschli’s idea of a smooth progression of humanitarian ideas from Lieber to The Hague runs into trouble in several ways.

A second famous tribute to Lieber came from a quintessentially American source, Elihu Root (1845–1937). He was a former Secretary of War and Secretary of State, who in 1906 became founder and first President of the American Society for International Law (‘ASIL’) — a post he held for a record 18 years.<sup>123</sup> His presidential statement to ASIL on 24 April 1913 — the 50<sup>th</sup> anniversary of the Lieber Code — is a classic exposition of the Code’s influence. It is full of valuable detail, but in places Root took the mythology surrounding the Lieber Code to a new level:

These instructions directed the action of the Union officers and controlled the conduct of the Union forces during that great war which ended in the triumph of the armies on which their limitations were imposed.

...

Although the instructions were prepared for use in a civil war, a great part of them were of general application, and they were adopted by the German Government for the conduct of its armies in the field in the war of 1870 with France. It is interesting that this work of a simple private citizen should become the law controlling the mightiest forces of both the country of his adoption and the country of his birth.<sup>124</sup>

The views of Bluntschli and Root have been shared by countless others. It was in the same spirit — and with the same lack of attention to awkward historical detail — that in 1983 Hartigan said of the Code: ‘This document was to have a profound effect on the international law of land warfare. The governments of Prussia, France and Great Britain copied it. The Hague and *Geneva Conventions* were indebted directly to it.’<sup>125</sup> Such statements are a key part of the foundational myth. They exaggerate the extent of its adoption and practical application, and in particular its impact in war — both the US Civil War and the Franco-Prussian War.<sup>126</sup>

## V 1864 *GENEVA CONVENTION*

### A *Solferino: Battle and Memory*

The origin of the 1864 *Geneva Convention* has a simplicity and linearity that is ideal for a foundational myth. In June 1859 Henry Dunant (1828–1910), a

<sup>122</sup> Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson, 1980) 144–5.

<sup>123</sup> Anne-Marie Slaughter, ‘Rereading Root’ (2006) 100 *American Journal of International Law* 203.

<sup>124</sup> Elihu Root, ‘Francis Lieber’ (1913) 7(3) *American Journal of International Law* 453, 456.

<sup>125</sup> Hartigan (n 17) 1.

<sup>126</sup> Many major works on that war make no mention of this adoption. See, eg, Michael Howard, *The Franco-Prussian War: The German Invasion of France, 1870–1871* (Methuen, 1981).

young banker from Geneva, travelling in northern Italy on private business, finds himself in the small town of Castiglione at the time of the Battle of Solferino. He was horrified by the sheer number of casualties, both dead and wounded, and at the chaotic nature of relief efforts, in which he took an active part. Large numbers of soldiers wounded in the battle were in Castiglione, and Dunant stayed in the area to do what he could for them. In November 1862 he published, privately, a book about these haunting events, *Un Souvenir de Solferino*.<sup>127</sup>

There is no dispute that this was a significant battle in the long struggle against Austrian control of northern Italy, and for Italian unity. Fought on 24 June 1859, the Battle of Solferino was the last in world history in which the main armies involved were all commanded by their respective reigning monarchs. The Austrians were under the command of Emperor Joseph I, and the two allied forces were under Victor Emmanuel II of Sardinia (soon to be King of Italy as well) and Emperor Louis-Napoleon of France. The battle has been the subject of extensive controversy. The performance of the two main allies was and is disputed. There is disagreement about the quality of the generalship, and about whether the outcome was quite the decisive Italian and French victory that was claimed.<sup>128</sup> This battle, which was quickly followed by a compromise peace in which Austria retained some of its Italian lands, was — in size of battlefield and numbers of fighting men — larger than the Battle of Waterloo in 1815.<sup>129</sup>

Dunant emphasises, correctly, that the numbers involved in the battle were large. Official figures cited by a British military historian in 1907 indicate that the armies and their casualties at Solferino were as in Table 1.<sup>130</sup>

Table 1: Numbers of troops, and Casualties, in the Battle of Solferino, 24 June 1859

	Austrian Soldiers	French and Italian Soldiers
Total at start of battle	189,648	173,603
Killed	2,292	2,313
Wounded	10,807	12,102
Missing	8,638	2,776

There are some apparent discrepancies between these figures and those cited by Dunant, whose generally higher figures are entirely explicable by the fact that

<sup>127</sup> J Henry Dunant, *Un Souvenir de Solferino* (Imprimerie Jules-Guillaume Fick, 1862) (*Un Souvenir de Solferino*). This is the original (not for sale) edition of a work that was subject to many subsequent changes by the author. An English translation, *A Memory of Solferino*, was published by the International Committee of the Red Cross, Geneva: Henry Dunant, *A Memory of Solferino* (International Committee of the Red Cross, 1986) (*A Memory of Solferino*). This edition does not indicate on which French edition it is based, but it does contain a facsimile of pages 16 and 17 of the 3<sup>rd</sup> French edition, showing Dunant's corrections: at 68–9.

<sup>128</sup> For a useful summary of the main controversies see Denis Mack Smith, *Victor Emanuel, Cavour, and the Risorgimento* (Oxford University Press, 1971) ch 5.

<sup>129</sup> George Martin, *The Red Shirt and the Cross of Savoy: The Story of Italy's Risorgimento (1748–1871)* (Eyre & Spottiswoode, 1970) 502–3.

<sup>130</sup> These figures are from Colonel HC Wylly, *The Campaign of Magenta and Solferino 1859* (Swan Sonnenschein, 1907) 196, 219–20. The preface and text indicate that they are based on official sources.

they encompass a longer time-period and a broader geographical reach, and count the sick as well as the wounded.<sup>131</sup>

Dunant's book caused a shock because of its revelations about the absence of any systematic and organised help for those injured in battle. Following the French Revolution and the introduction of conscription, many armies had become careless about the health of their troops, whose numbers could always be made up by new levies. There was no agreement on the status of medical personnel. The official historian of the International Committee of the Red Cross ('ICRC'), François Bugnion, summarised the situation at Battle of Solferino thus:

[A]mbulances were poorly marked, with each country using a flag of a different colour: white for Austria, red for France, yellow for Spain, and black for other countries. Soldiers would at best know only the markings of their own ambulances ...<sup>132</sup>

Dunant's book gives a gruelling account of the battle itself and the aftermath for the wounded. He makes no claim that the practice of organised humanitarian aid to the wounded is new. While accurate on many essentials, it is not quite the neutral account that many might wish it to have been. Dunant's sympathies were mainly with the Italo-French side, and in addition he praises 'the excellent organization of the French Army from the humanitarian point of view'.<sup>133</sup> His account of the battle itself, including the plight of the wounded, does not appear to have been challenged by historians of this battle.<sup>134</sup>

Toward the end of the book he states that the Battle of Solferino was 'in the view of any neutral and impartial person, really a European catastrophe'.<sup>135</sup> The book is famous because he asked some questions pregnant with meaning for the future, the first of which was: 'Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the

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<sup>131</sup> Dunant suggests that the Austrian Army had available in the area of the battle only about 170,000 men, as against 189,000 in the table based on Wylly (n 130): Dunant, *Un Souvenir de Solferino* (n 127) 3; Dunant, *A Memory of Solferino* (n 127) 14. However, Dunant provides some notably high figures when he states in a footnote:

From June 15 to August 31, according to official figures, the sick and fever-stricken alone received in the Brescia hospitals numbered 19,665, more than 19,000 of these being men of the Franco-Sardinian Army. The Austrians, on their side, had at least 20,000 sick in their hospitals in Venetia, aside from the quantities of wounded who were also being nursed there.

Dunant, *Un Souvenir de Solferino* (n 127) 73 n 1; Dunant, *A Memory of Solferino* (n 127) 87 n 1.

<sup>132</sup> François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, tr Patricia Colberg, Edward Markee and Nicolas Sommer (Macmillan, 2003) 13 ('*ICRC and the Protection of War Victims*') (citations omitted).

<sup>133</sup> Dunant, *A Memory of Solferino* (n 127) 13, 33–6, 52, 110 n 1; Dunant, *Un Souvenir de Solferino* (n 127) 1–2, 22–4, 42, 96 n 1.

<sup>134</sup> Dunant's book is not mentioned in Wylly (n 130). It is mentioned in Lt Col Patrick Turnbull, *Solferino: The Birth of a Nation* (Robert Hale, 1985) 133, 157, 173–4; and very briefly in Frederick C Schneid, *The Second War of Italian Unification 1859–61* (Osprey Publishing, 2012) 57.

<sup>135</sup> Dunant, *A Memory of Solferino* (n 127) 106; Dunant, *Un Souvenir de Solferino* (n 127) 92.

wounded in wartime by zealous, devoted and thoroughly qualified volunteers?’<sup>136</sup>

He went on to pose another question — whether at a meeting of ‘princes of the military art’, they should

take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?<sup>137</sup>

Dunant’s *Un Souvenir de Solferino* sparked off much discussion of the idea (which itself was hardly new) that relief work in war should be organised on a much better footing. On 9 February 1863 Dunant’s book was discussed at a meeting of the Geneva Public Welfare Society, the chairman of which was the lawyer Gustave Moynier, to whom Dunant had sent a copy of his book. Despite some scepticism, the meeting appointed a committee of five to prepare a paper on the subject. Its president was General Guillaume-Henri Dufour, the successful commander of the federal forces in the 1847 Swiss Civil War, and its other members being Moynier, Dunant and two doctors with much relevant specialist knowledge and commitment, Dr Louis Appia and Dr Théodore Maunoir. It became the International Committee for Relief for Wounded Soldiers; and then ultimately, at its meeting on 20 December 1875, it was to adopt its present name ‘International Committee of the Red Cross’.<sup>138</sup> François Bugnion is right to point out that Lieber and his Code had little or no connection with these events in Europe in 1863. In his monumental history of the ICRC he mentions Lieber just once.

And it was around the same time [that the five-member Geneva Committee met] that the American Lawyer Francis Lieber drew up his *Instructions for the Government of Armies of the United States in the Field*, which resembled the International Committee’s programme in more ways than one.<sup>139</sup>

Actually, the differences between the documents are as striking as the similarities, but that is because they emerged separately, and had distinct subject matters and functions.

### B *The 1863 Conference in Geneva*

The committee of five set up by the Geneva Public Welfare Society convened an international conference in Geneva, to which it invited every European government. They got a strong response to the invitations to the conference largely because of the fame and distinction of their two most famous members, Dufour and Dunant. The conference was held on 26–29 October 1863, with General Dufour as president. It was attended by 36 people of whom 18 were

<sup>136</sup> Dunant, *A Memory of Solferino* (n 127) 115; Dunant, *Un Souvenir de Solferino* (n 127) 102.

<sup>137</sup> Dunant, *A Memory of Solferino* (n 127) 126; Dunant, *Un Souvenir de Solferino* (n 127) 113.

<sup>138</sup> Bugnion, *ICRC and the Protection of War Victims* (n 132) 8, 9 n 11.

<sup>139</sup> *Ibid* 14. See also at 26 n 22. This is the only reference to Lieber in the book.

representatives of 14 governments.<sup>140</sup> Article 1 of its resolutions declared: ‘Each country shall have a Committee whose duty shall be, in time of war and if the need arises, to assist the Army Medical Services by every means in its power.’<sup>141</sup> So from the start the commitment was not to replace national military medical services, but to assist them. And art 8 stated that voluntary medical personnel attached to armies ‘shall wear in all countries, as a uniform distinctive sign, a white armband with a red cross’.<sup>142</sup> This was the beginning of the Red Cross movement. But it was not yet formally agreed by states; and it was not yet anything that could be called law. There was also evidence of disagreement on an issue that was fundamental to the entire project of assisting the wounded. The conference made a ‘recommendation’ (which appears to have had a less elevated status than a resolution)

that in time of war the belligerent nations should proclaim the neutrality of ambulances and military hospitals, and that neutrality should likewise be recognized, fully and absolutely, in respect of official medical personnel, voluntary medical personnel, inhabitants of the country who go to the relief of the wounded, and the wounded themselves ...<sup>143</sup>

Some members of the International Committee felt that this might be a step too far.<sup>144</sup> In particular, Moynier, who by nature was methodical and cautious, had reservations about Dunant’s sometimes emphasis on the neutrality of medical aid services.<sup>145</sup> Moynier would later write a short history of the first 10 years of the Red Cross in which, although there was a brief mention of Dunant’s book on Solferino, his name was nowhere mentioned.<sup>146</sup>

### C The 1864 Conference in Geneva

Just under one year later, on 22 August 1864, the first *Geneva Convention* was born. A meeting of the representatives of 12 European states, which had been summoned on the initiative of the Geneva group and again met under the presidency of Dufour, concluded two weeks of deliberations by signing the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*.<sup>147</sup> This turned the original Dunant idea of a ‘Convention inviolate in character’, and the *Resolutions and Recommendations of the Geneva International Conference of 1863*, into a treaty negotiated and agreed by

<sup>140</sup> 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(888) *International Review of the Red Cross* 1299, 1315–16.

<sup>141</sup> Geneva International Conference, *Resolutions and Recommendations of the Geneva International Conference of 1863* (29 October 1863) art 1 (‘*Resolutions and Recommendations 1863*’), reproduced in *Handbook of the International Red Cross and Red Crescent Movement* (International Committee of the Red Cross, 14<sup>th</sup> ed, 2008) 515.

<sup>142</sup> *Resolutions and Recommendations 1863* (n 141) art 8.

<sup>143</sup> *Ibid* 516 (Recommendation B). An earlier and fuller account of the results of the 1863 conference is Maunoir (n 51).

<sup>144</sup> Bugnion, *ICRC and the Protection of War Victims* (n 132) 14–16.

<sup>145</sup> Angela Bennett, *The Geneva Convention: The Hidden Origins of the Red Cross* (Sutton Publishing, 2005) 37–9, 45–6, 56–7.

<sup>146</sup> Gustave Moynier, ‘Les dix premières années de la Croix Rouge’ (1873) 4(16) *Bulletin International des Sociétés de la Croix-Rouge* 165.

<sup>147</sup> *Geneva Convention* (n 4).

governments. Article 1 of the *Geneva Convention* (albeit with certain inevitable qualifications) accepted Dunant's emphasis on neutrality, at least as regards ambulances and military hospitals. In art 7, the Red Cross symbol was now recognised by states, and could take the form not just of an armlet, but also of a flag to be adopted for hospitals, ambulances and evacuation parties. This official adoption of the Red Cross symbol, which is the reverse of the Swiss flag, has been credited, tentatively but persuasively, to General Dufour.<sup>148</sup>

In the intervening years the treaty has been revised and updated at least five times. That is a tribute to the continuing relevance of its subject, and also to the changing character of war. However, the first revision, the 1868 *Additional Articles Relating to the Condition of the Wounded in War*, failed to secure any ratifications and never entered into force.<sup>149</sup> As Geoffrey Best suggested, this reaction, which became more pronounced after the Franco-Prussian War of 1870–71, may have been due to the resentment felt by the military at the humanitarians' intrusions into their affairs, and also at the 1864 Convention's 'repeated invocation of that risky word "neutrality"'.<sup>150</sup> As was demonstrated in many armed conflicts in the decade following the adoption of the 1864 Convention, there were some significant achievements, but there were also numerous problems in the implementation of rules protecting medical services in war.<sup>151</sup>

#### D The US and the 1864 Geneva Convention

Many states were slow to indicate adherence to the 1864 *Geneva Convention*. Within two years, in addition to the original 12 signatory states, only six other states had acceded to it. However, 39 others (several of them non-European) did so between 1866 and 1908. The US acceded to it on 1 March 1882.<sup>152</sup>

Why did it take the US so long — 18 years — to accede to the *Geneva Convention*? One factor may have been a feeling that these matters were already addressed in the Lieber Code. Another may have been a reluctance to think about international or any other kind of war after the horrors of the Civil War. But perhaps the decisive factor was the high degree of suspicion with which the US viewed European powers in the wake of their performance in the US Civil War. Not surprisingly, the US was distinctly guarded about the 1864 conference. Here is what the Secretary of State, William H Seward, wrote in July 1864 to his Minister Resident in Switzerland, Mr George Fogg:

The object of the proposed congress is certainly laudable and important, and the department sees no objection to your being present on the occasion. You are therefore authorized to attend the meeting in an informal manner, for the purpose

<sup>148</sup> Bennett (n 145) 51.

<sup>149</sup> *Additional Articles Relating to the Condition of the Wounded in War*, signed 20 August 1868, 138 ConTS 189; Best (n 122) 151; Schindler and Toman (n 5) 369.

<sup>150</sup> Best (n 122) 151–2.

<sup>151</sup> See Bennett (n 145) 113–24. For a contemporary Red Cross view of certain achievements, see Gustave Moynier, 'La Convention de Genève pendant la guerre franco-allemande' (Pt 1) (1873) 4(14) *Bulletin International des Sociétés de la Croix-Rouge* 51; Gustave Moynier, 'La Convention de Genève pendant la guerre franco-allemande' (Pt 2) (1873) 4(15) *Bulletin International des Sociétés de la Croix-Rouge* 104.

<sup>152</sup> Schindler and Toman (n 5) 367–8.

of giving or receiving such suggestions as you may think likely to promote the humane ends which have prompted it.

It is hardly necessary to add that your presence at the congress would be improper if any of the insurgent emissaries of the United States in Europe should be permitted to take part in its proceedings.<sup>153</sup>

Later in July, Seward wrote to Fogg reiterating the bitterness the US Government felt towards many European powers on account of their conduct in the US Civil War:

It must be remembered that the European maritime powers appear to have lifted up the insurgents of our country to the condition of lawful belligerents. Most of the lesser states range themselves with these maritime powers in this new and injurious attitude towards the United States.<sup>154</sup>

Fogg reported to his Secretary of State on 6 August 1864:

The object of the originators of this congress is undoubtedly good and worthy of encouragement; whether, however, the object is likely to be attained in the way proposed is at least problematical. I confess to great doubts on the subject, doubts which the result will confirm or dissipate.

I could have wished, however, in view of the great practical solving by our countrymen and countrywomen of nearly all the problems likely to be considered by this congress, that some member of the United States National Sanitary Commission, familiar with the practical working of that organization, and able to speak from personal observation on the field of battle and in the hospitals, should have been commissioned, either by the government or by the Sanitary Commission itself. The exhibit such a person would have been able to make would, I am sure, have told more powerfully than any theories in favor of the ends sought to be realized by the originators of the proposed congress.

In the absence of such a person, I shall cheerfully communicate such facts as I may be in possession of, and which may appear apposite to the purpose and spirit of the occasion, not of course venturing to do or say anything which can be construed into a committal of the government of the United States to any measure or course whatever.<sup>155</sup>

In September 1864 Fogg duly reported to Seward on the results of the 1864 Geneva conference, but received no reply. Two months later he followed up with this plaintive note:

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<sup>153</sup> Letter from William H Seward to George G Fogg, 13 July 1864, reproduced in US Department of State, *Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Second Session Thirty-Eighth Congress, Part IV* (Government Printing Office, 1865) 386 ('*Papers Relating to Foreign Affairs*'). For an earlier and more optimistic letter see Letter from George G Fogg to William H Seward, 24 January 1863, reproduced in US Department of State, *Message of the President of the United States, and Accompanying Documents, to the Two Houses of Congress, at the Commencement of the First Session of the Thirty-Eighth Congress, Part II* (Government Printing Office, 1864) 1308–9.

<sup>154</sup> Letter from William H Seward to George G Fogg, 28 July 1864, reproduced in *Papers Relating to Foreign Affairs* (n 153) 387–8.

<sup>155</sup> Letter from George G Fogg to William H Seward, 6 August 1864, reproduced in *Papers Relating to Foreign Affairs* (n 153) 399–400.

I have the honor to transmit herewith the enclosed copy of a note from the federal council, inviting the adherence of the government of the United States to the convention concluded by the international congress, at Geneva, August 22, 1864, for the amelioration of the condition of sick and wounded soldiers.

By reference to article 9 of the convention — a copy of which convention I transmitted to you in my despatch of September 14, No 70 — you will perceive that the protocol was left open to enable those governments not there represented, or not represented by delegates empowered to sign the convention, to become parties to the same thereafter.

As it is provided in the convention that the ratification should be exchanged at Berne, the federal council deem it their duty to extend the invitation herewith enclosed.

I had hoped to receive, ere this, an acknowledgment of my despatch above alluded to, with the views of the State Department in relation to the convention. Thus far I have received nothing indicating that the despatch, copies of the convention and other papers, have ever been received by you. Mr Miller writes me that the package containing them was forwarded by the steamer which left Liverpool on the 24<sup>th</sup> September. I cannot, therefore, suppose it failed to reach its destination, and can only explain to myself its failure to be acknowledged on the supposition of its having been reserved for examination, and subsequently laid by and forgotten. It may readily be supposed that I would like to be enabled to give some sort of response to the question: ‘Will the United States accede to the convention?’ A question of no little interest among the people and in a country where the opinion and decision of the government of the United States are deemed of the very highest authority and importance.

As I indicated to you in my former despatch, I have in no manner committed the government, as, indeed, I had no authority to do, on this question. On the contrary, I have informally answered, when inquired of by the members of the federal council, or by my colleagues of the diplomatic corps, that it was very doubtful, by reason, if no other, of the present condition of our country, and of the impossibility of making the rebel authorities parties to the convention, or compelling them to respect its provisions.

Trusting soon to be in possession of your views in relation to this matter, and of the intentions of the government thereon ...<sup>156</sup>

It appears from the record that no reply was forthcoming. US accession to the treaty might not have happened at all — and certainly not when it did — but for the activities of the formidable Clara Barton, a citizen who had been deeply involved in innovative and effective relief work in the US Civil War. Then, in 1869–71, while in Europe for a much-needed rest, she heard for the first time about the 1864 *Geneva Convention*, and also had her first encounter with the Red Cross network. In the Franco-Prussian War and its chaotic aftermath she assisted

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<sup>156</sup> Letter from George G Fogg to William H Seward, 26 November 1864, reproduced in US Department of State, *Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the First Session Thirty-Ninth Congress, Part III* (Government Printing Office, 1866) 211–12 <<https://history.state.gov/historicaldocuments/frus1865p3/d221>>, archived at <<https://perma.cc/H34V-JCHN>>.

with relief supplies and was distressed to discover that the Red Cross badges were not always respected. In the years after her return to the US she campaigned to found the American National Red Cross, achieved in May 1881, and she also lobbied hard to secure US accession to the 1864 *Geneva Convention*, which was finally achieved in 1882.<sup>157</sup>

### E Great Britain, Florence Nightingale and the 1864 Geneva Convention

Where was Great Britain in the great events that led to the 1864 *Convention*? At that first meeting, in October 1863, the total inadequacy of the medical services was acknowledged by all the generals and military physicians assembled in Geneva. Only the British delegate could claim otherwise. As François Bugnion comments: ‘Britain was then the only country to have a military medical corps worthy of the name; the disasters of the Crimean War — and the example of Florence Nightingale — had had a salutary effect.’<sup>158</sup> In the run-up to the 1864 conference the British indicated that the organisation of the British Army ‘renders the intervention of voluntary relief workers superfluous’.<sup>159</sup> One could speculate whether the British position in 1863–64 was evidence of the supreme quality of British military medical services, or of British smugness. However, behind some of the hesitations in the United Kingdom there is evidence of serious concern about the moral hazard of taking responsibility for the sick and wounded away from governments.

In July 1864 Florence Nightingale, with her usual tough-mindedness, wrote to Thomas Longmore, Professor of Military Surgery and one of the two British delegates to the Geneva conference that was to meet the following month. She was critical of the voluntary system envisaged at Geneva, then added in brackets:

(I need hardly say that I think its views most absurd — just such as would originate in a little state, like Geneva, which never can see war. They tend to remove responsibility from governments. They are *practically* impracticable. And voluntary effort is desirable, just insofar as it can be incorporated into military system.)<sup>160</sup>

Then at the end of August she partially recanted:

I agree with you that it will be quite harmless for our government to sign the convention as it now stands. It amounts to nothing more than a declaration that humanity to the wounded is a good thing. It is like an opera chorus ... Besides which though I do not reckon myself an inhuman person I can conceive of circumstances of *force majeure* in war when the more people are killed, the better.<sup>161</sup>

<sup>157</sup> Pryor (n 53) 156–9, 168, 189–205.

<sup>158</sup> Bugnion, *ICRC and the Protection of War Victims* (n 132) 12, 25 n 5.

<sup>159</sup> Maunoir (n 51) 19 [tr author].

<sup>160</sup> Letter from Florence Nightingale to Thomas Longmore, 23 July 1864, reproduced in Lynn McDonald (ed), *Florence Nightingale on Wars and the War Office* (Wilfrid Laurier University Press, 2011) 586 (emphasis in original). In this extract, the word ‘Geneva’ appears to be an update: she had originally written Baden: at 586 n 5.

<sup>161</sup> Letter from Florence Nightingale to Thomas Longmore, 31 August 1864, reproduced in McDonald (n 160) 587. Note the similarity to the statement in the Lieber Code that ‘[s]harp wars are brief’: Lieber Code (n 3) art 29.

At the August 1864 Geneva conference, Great Britain was there, but it was not one of the 12 signatories of the first *Geneva Convention*. On 18 February 1865 Great Britain did catch up by acceding to it.<sup>162</sup> However, Nightingale did not change her stance. In November 1870, when the Prussian Army was approaching Paris, she agreed with the view that:

The Prussian government makes war cheap by throwing all its duties and responsibilities with regard to its *sick* men overboard, and leaving us and others to pick them up *if we please. If not, not*. It is exactly what we told our own government, in 1864 with regard to the *Geneva Convention*: 'Take care that it in no way diminishes the responsibilities of each belligerent government for its own sick and wounded, and for making preparations in time of peace for its sick and wounded in time of war.'<sup>163</sup>

Florence Nightingale's objections were not motivated by animosity against Dunant. Writing to him in 1872, and perhaps influenced by his work during the Franco-Prussian War, she praised 'your noble work, work truly of God and of God's civilization'.<sup>164</sup> Yet she had raised a question about Dunant's project that would prove enduringly difficult.

#### F Questions about Dunant's Roles

Despite Dunant's extraordinary achievements, which were central in creating both the Red Cross movement and the first of a long stream of *Geneva Conventions*, it has long been known that he was a complex character who was not always successful in human relations or in his various business ventures. On the International Committee he had a longstanding disagreement with Moynier, who was consistently sceptical about his attempt to get all medical services in war to be declared neutral. Dunant suffered from mental problems, and failed in some of his financial activities. In April 1867 the financial firm in which he had been deeply involved, *Crédit Genevois*, was declared bankrupt; and in August 1868 the Geneva Trade Court condemned him for deceptive practices in the bankruptcies in which he had been involved. In September 1867, in the midst of these scandals, he offered his resignation from the secretaryship of the International Committee, which not only accepted the offer but also removed him from membership of the Committee.<sup>165</sup>

Granted that he had serious flaws, a key question remains. How innovative was Dunant's emphasis on humanitarianism? As we have seen, he did not invent the whole idea of the law of armed conflict, which had emerged over centuries, and had been advocated in the 18<sup>th</sup> century by, among many others, a proud citizen of Geneva, Jean-Jacques Rousseau. Nor did Dunant introduce the general principle of humanitarianism to Geneva, which had form in this matter. In 1761,

<sup>162</sup> Schindler and Toman (n 5) 368.

<sup>163</sup> Letter from Florence Nightingale to Harry Verney, 1 November 1870, reproduced in McDonald (n 160) 588–9 (emphasis in original). She had written similar letters to Verney on 18 January 1869.

<sup>164</sup> Letter from Florence Nightingale to Henry Dunant, 4 September 1872, reproduced in McDonald (n 160) 592.

<sup>165</sup> 'Henry Dunant (1828–1910)', *International Committee of the Red Cross* (Web Page) <<https://www.icrc.org/en/doc/resources/documents/misc/57jnvq.htm>>, archived at <<https://perma.cc/VNN6-WWHT>>. See also Bennett (n 145) 86–103.

over 100 years before Dunant's book was published there, an enthusiastic English visitor to Geneva, George Keate, wrote *A Short Account of Geneva*, in which he said:

There is certainly no Place, which has been more eminent for its Humanity than Geneva; for most of its Inhabitants were originally such, as were persecuted by the Romish Church, and fled thither, as to a Place of Refuge; where they met with the greatest Ease and Encouragement, and secured at the same Time their Property, and their Conscience.

They have five Foundations for the poor, which all together annually expend between 15 and 20000 Pounds Sterling.<sup>166</sup>

The same humanitarian purpose can be detected in the foundation, in 1828, of the Geneva Public Welfare Society, the primary aim of which was to improve institutions for relieving, reducing and preventing poverty.<sup>167</sup> As noted above, it was this society that, in February 1863, started the whole process of turning Dunant's proposals into action. The 19<sup>th</sup> century had not only seen many movements of a humanitarian character, including the campaign for abolition of the slave trade, but had also begun to see a new emphasis on humanitarian action in war. Florence Nightingale's work for wounded soldiers in Crimea had been initiated several years before the publication of *Un Souvenir de Solferino*, and had stirred Geneva.<sup>168</sup>

What was new in 1863–64, as compared to the Geneva of 1761, was the form and purpose of humanitarian action. When a group of men in this city, 'the Geneva Committee', convened the first-ever international conference on the treatment of the wounded in war, their central idea of bringing humanitarian action on or close to the battlefield in an organised and professional way, and on an international legal basis, was innovative. It is true that Dunant and Moynier have been chided for not paying much attention to the work of earlier jurists, or to some contemporary publicists concerned to alleviate suffering in war.<sup>169</sup> Yet Dunant and his colleagues deserve much of the credit for taking the project forward in the way they did. They worked hard to apply Red Cross principles, and the skills of medical workers, in the wars of their time, including the Franco–Prussian War of 1870–71. The results of all this work were distinctly mixed.<sup>170</sup> The importance of that humanitarian work, and its connection with the larger cause of international peace, was recognised in 1901 by the award of the first

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<sup>166</sup> George Keate, *A Short Account of the Ancient History, Present Government, and Laws of the Republic of Geneva* (R and J Dodsley, 1761) 152–3.

<sup>167</sup> François Bugnion, 'Geneva and the Red Cross' (Essay, International Committee of the Red Cross, 3 May 2005) 22 <[https://www.icrc.org/en/doc/assets/files/other/geneve\\_et\\_croix\\_rouge\\_anglais.pdf](https://www.icrc.org/en/doc/assets/files/other/geneve_et_croix_rouge_anglais.pdf)>, archived at <<https://perma.cc/P2HG-3FXZ>>.

<sup>168</sup> Violet Kelway Libby, *Henry Dunant: Prophet of Peace* (Pageant Press, 1964) 80–1.

<sup>169</sup> Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (HarperCollins, 1998) 28.

<sup>170</sup> Moorehead's coverage of the Red Cross efforts in the Franco–Prussian war is particularly extensive. *Ibid* 60–8, 71–86, 90–1, 121–2. Her list of sources on these efforts is at 724–5. See also above n 151.

Nobel Peace Prize to Henry Dunant for his role in founding the International Committee of the Red Cross.<sup>171</sup>

A more difficult set of issues concerns Dunant's actions and beliefs. There are discrepancies between the simple and much-told story of Henry Dunant and the more complicated and messy reality. His life story has been the subject of many misunderstandings, assisted by what Jean-Daniel Candaux, in a meticulous dissection of a work based on Dunant's writings, has called 'the obscurantist zeal of hagiographers and the blatant exploitation by publicists'.<sup>172</sup> Two aspects of his life will be mentioned here: his religious beliefs, and his reasons for being in Castiglione. Although these two matters have not been emphasised by the Red Cross movement, they were mentioned briefly in a Red Cross publication in 2011.<sup>173</sup>

In his youth in a well-to-do family in Geneva, Dunant had been a committed member of the Réveil, a Christian evangelical movement led by the controversial Pastor François Gaussen. Under one or other of his names (he was also known, using his fourth Christian name, as Louis Gaussen) he wrote many books of often melodramatic biblical interpretation. In 1843–44, in a book entitled *Geneva and Jerusalem*, he advocated that the Jews around the world should be evangelised: there should be a 'general conversion of the Jews ... and their return to Jerusalem'.<sup>174</sup> The Réveil movement distinguished itself both from Catholicism and from the National Protestant Church. It put great emphasis on individual piety, ecclesiastical reform, and good works including assistance for the poor.<sup>175</sup> From about 1847 onwards, the pillars of Dunant's life were active charity, literal reading of the Bible, and evangelical proselytising. He helped to found the Christian Union in Geneva in 1852, and he was also present at the First World Conference of Young Men's Christian Associations, held in Paris in 1855.<sup>176</sup> Against this background, it is possible to see the ICRC, or at least Dunant's part in its creation, as a product of a particular Christian tradition of thought and action. It is very different from today's humanitarianism which tends, at least in many countries, to be either secular or syncretic.<sup>177</sup>

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<sup>171</sup> The award was jointly to Henry Dunant for his role in founding the International Committee of the Red Cross, and to Frédéric Passy for his roles in founding the Inter-parliamentary Union and the first Universal Peace Congress: 'Henry Dunant: Facts', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/peace/1901/dunant/facts/>>, archived at <<https://perma.cc/FP8Y-FLCQ>>; 'Frédéric Passy: Facts', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/peace/1901/passy/facts/>>, archived at <<https://perma.cc/88KA-ZCWB>>.

<sup>172</sup> Jean-Daniel Candaux, 'Pour une nouvelle lecture des "Mémoires" d'Henry Dunant' (1978) 28(1–2) *Revue suisse d'histoire* 72, 92 [tr author]. This article is a detailed critique of Henry Dunant, *Mémoires*, ed Bernard Gagnebin (Institut Henry-Dunant et les Editions de l'Age d'Homme, 1971), which is a version of Dunant's memoirs covering many phases of his life, based on his disordered papers.

<sup>173</sup> Roger Durand, *Henry Dunant, 1828–1910*, tr Glynis Thompson (International Federation of Red Cross and Red Crescent Societies, 2011) 18, 29.

<sup>174</sup> L Gaussen, *Geneva and Jerusalem: The Gospel at Length Preached to the Jews, and Their Restoration at Hand* (WH Dalton, 1844) 36.

<sup>175</sup> Daniel Warner, 'Henry Dunant's Imagined Community: Humanitarianism and the Tragic' (2013) 38(1) *Alternatives: Global, Local, Political* 3, 10–12.

<sup>176</sup> *Ibid* 10–11, 24 n 47.

<sup>177</sup> See generally Warner (n 175).

In his *Un Souvenir de Solferino*, Dunant had claimed that he was ‘a mere tourist’ who just happened to be close to Solferino when the battle took place.<sup>178</sup> He was not there by chance. He was trying to meet Emperor Louis-Napoleon of France, whom he greatly admired, and was actually bearing a short book that he had written. Entitled *L’Empire de Charlemagne rétabli, ou le Saint-Empire Romain reconstituée par Sa Majesté L’Empereur Napoleon III*, and printed in May 1859, it carried a dedication to the Emperor.<sup>179</sup> This was no sudden attention-seeking device. In the style of Gausson, it was full of grandiose historical prophecy. It offered a theory of the legitimacy of French Imperial rule starting with Charlemagne and proceeding through Napoleon I; and on that basis it envisaged Napoleon III as the leader of a huge confederation that would carry the flame of civilisation to various lands, including North Africa.<sup>180</sup> The fact that Dunant had business interests in North Africa was not coincidental: indeed he was also carrying a work he had prepared about his North African schemes, with an even longer, and no less grandiose, title. He did succeed in meeting the French emperor, reportedly on 28 June, but was mortified to receive shortly thereafter a note from Louis-Napoleon’s civil attaché, Charles Robert, thanking him for his volume on the *Saint-Empire Romain* but declining the dedication and requesting him to suspend publication.<sup>181</sup>

The lasting impression that Gausson’s ways of thinking left on Dunant did not end with this rebuff, nor with Dunant’s participation in the work of the International Committee. In 1866, for example, he wrote a detailed proposal document addressed to Napoleon III calling for the creation of a Universal International Society for the Renovation of the Orient. He even dreams of a ‘world empire’, if the reconstitution of the Orient can be effected by the French emperor ‘with the sympathy and support of the English’.<sup>182</sup> He also envisages the Ottomans gradually giving up control of Palestine, the Jews to be re-established there, a railway built from Jaffa to Jerusalem, the area to be neutralised by a treaty which would be analogous to the 1864 *Geneva Convention* on the wounded in war. All this and more would be under the suzerainty of Napoleon III, successor of Charlemagne, and it would lead to French becoming a universal language.<sup>183</sup> This was mostly superficial fantasy: an example of universalist thinking that fails to achieve its objectives. Although its proposal for moving the Jews was not identical to that in Gausson’s book *Geneva and Jerusalem* two decades earlier, it still demonstrated racial insensitivity.

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<sup>178</sup> Dunant, *A Memory of Solferino* (n 127) 16; Dunant, *Un Souvenir de Solferino* (n 127) 5.

<sup>179</sup> One useful source on Dunant’s purpose in travelling to Italy is Alexis François, *Aspects d’Henri Dunant: le bonapartiste, l’affairiste, le sioniste* (Librairie de l’Université, 1948) 17.

<sup>180</sup> *Ibid* 23.

<sup>181</sup> *Ibid* 16–25. See also Ellen Hart, *Man Born to Live: Life and Work of Henry Dunant, Founder of the Red Cross* (Gollancz, 1953) 93.

<sup>182</sup> Henry Dunant, *Société internationale universelle pour la rénovation de l’Orient* (Épreuve Confidentiel Exemplaire Unique, 1866) 1 [tr author].

<sup>183</sup> *Ibid* 8.

## VI CONCLUSIONS ON FOUNDATIONAL MYTHS OF THE LAWS OF WAR

The 1863 Lieber Code and the 1864 *Geneva Convention* have much in common. Each resulted in part from its principal instigator, Francis Lieber and Henry Dunant respectively, witnessing, and being deeply moved by, major European battles of the time: Jena and Waterloo on the one hand, and Solferino on the other. Each of these men wanted his favoured side to win. Each of them made a proposal for a set of written rules that was finalised in less than 24 months. Each text can be seen as the result of a benevolent external non-military influence (a professor and a young businessman respectively) initiating a process intended to introduce at least a modicum of humanity into the conduct of war.

The important part played by the leading individual in each case was supplemented by the key roles of their close associates whose skills, reputations and positions were essential for the advancement of the plans. The Lieber Code's adoption in 1863 depended crucially on the work of Judge Advocate General Holt and President Lincoln's chief military adviser General Halleck. The Red Cross movement was launched, and the 1864 *Geneva Convention* became law, thanks to the outstanding parts played by General Dufour and the lawyer Gustave Moynier, as well as their distinguished and innovative medical colleagues, Dr Appia and Dr Maunoir. The inspired, quixotic and unreliable Dunant could not have made headway with his project without them.

Both documents, and the humanitarian movement that gave rise to them, owed much to scientific and industrial developments. Much discussion of technology and war tends to relate to the effects of new technologies on weapons systems, but no less important are their effects on public perceptions of war. Three key developments in the mid-19<sup>th</sup> century were (1) electric telegraphy, enabling reports to get back to headquarters and also to the public at home; (2) railways, enabling troops and relief workers to be moved to the battlefield, and the wounded to be taken to hospitals; and (3) war photography. The first war photographs were taken during wars in the late 1840s and early 1850s in North America and the British Empire. During the Crimean War and the US Civil War, many photos appeared in the press, bringing the suffering of war home to citizens in an unprecedented way.<sup>184</sup>

One legacy of these two documents, and of the attractive visions of how they materialised, is that they established, or at least reinforced, the distinction between two ideas of the 'ownership' of the laws of war. On the one hand, the Lieber Code of 1863 represents the government-owned model of the law: the US government (and in particular its executive side) had ownership. On the other hand the 1864 *Geneva Convention* represents a model of the law as the product of initiatives by a non-governmental body (the International Committee, later ICRC) followed by formal international diplomatic negotiations by many states, with Switzerland playing a special role. At times in the intervening years, both states and the ICRC have displayed at times monopolistic tendencies over the ownership and interpretation of the laws of war. It is highly understandable, but it is also an arrangement that can obviously lead to friction.

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<sup>184</sup> See generally Yakup Bektas, 'The Crimean War as a Technological Enterprise' (2017) 71(3) *Notes and Records of the Royal Society London* 233.

The most obvious difference between the two documents is that Lieber was addressing a civil war, while Dunant was witness to an international one. There is a longstanding view that civil wars are much harder to bring within the domain of the laws of war than are international wars. It is remarkable that, in the drawing up of the Lieber Code if not always in its implementation, such a serious attempt was made to bring a civil war within the ambit of law. However, Switzerland had experienced a short civil war in 1847 in which General Dufour, commanding the Swiss Federal Army, had placed unusual emphasis on key principles of the laws of war.

The two documents also exemplify two different approaches to the laws of war. Lieber represents a maximalist approach, in which a wide range of military actions is subject to a code. One price of doing that may have been making generous allowance in the Code for military necessity. The very much shorter 1864 *Geneva Convention* represents a minimalist approach: the best that states could agree was to do with the protection of a small group of people who are non-combatants or at least *hors de combat*, including the sick, the wounded and those helping them. Today the *Geneva Conventions* are now as ambitious in scope as Lieber was in 1863, but the relative rarity of their effective implementation suggests that the debate between minimalist and maximalist approaches is not over.

Both documents were products of a much broader movement of the times that sought to strengthen the idea of humanitarian and other limits to at least certain aspects of warfare. Bugnion is explicit about this, and claims, justifiably, that the Geneva Committee was exceptional because it 'took the necessary initiatives to transform its ideas into reality. In doing so it was ahead of its time — and this was — and remains — its first title to legitimacy.'<sup>185</sup>

In both cases the stories of how these texts came to be written, and of their impact in the wars of their time, have been exaggerated, and awkward facts have often been omitted. So in both cases there have been various foundational myths, some of which have survived and developed for well over 150 years. This is not necessarily a disaster. These myths have served the useful purpose of emphasising the innovative character of new rules to impose at least modest limits on the conduct of war, the high motives of those involved in the process of developing the rules, the importance of their implementation in the wars of the time and their value as a template for later lawmaking efforts.

The main downside of most of these attractive visions is that they obscure the extent to which the laws of war have a very long history, and are not simply an invention of modern societies. These visions also tend to ignore or downplay the extent to which the laws of war can also arise from the ethos, professional standards and practical interests of armed forces, and of the governments that they serve. One could go further and ask: do the foundational stories of these agreements place the laws of war in an attractive but simplified intellectual framework, at the idealistic rather than realistic end of the spectrum, that makes them relatively easy to dismiss? Does the assumption that implementation was relatively straightforward not deceive us so that we fail to see how similar the problems were then to those that we face now? One could even speculate that

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<sup>185</sup> Bugnion, *ICRC and the Protection of War Victims* (n 132) 15.

these foundational myths, to the extent that they revolve around the actions of individual civilians, could be an encouragement to legal overreach by individuals and institutions that do not have extensive knowledge or understanding of war.

A further downside arises from the tendency — particularly strong in the case of the Lieber Code — to exaggerate the extent of implementation. Such exaggeration feeds the idea that there was once something approaching a ‘golden age’ in implementation of the laws of war, and that this has now been lost. In fact implementation of the laws of war has always been a problematic area, and remains so today. The study of implementation is not just a question of seeing how completely or otherwise existing law has been followed. Every war is also a test of the adequacy or otherwise of the law itself, which is why many lawmaking efforts — including the Lieber Code, the 1864 *Geneva Convention* and numerous subsequent agreements — have taken place during or immediately after major wars.

The myths surrounding the Lieber Code and the 1864 *Geneva Convention* may in each case serve a nationalistic purpose. It may do no harm if American and Swiss citizens can take a certain parental pride in the Lieber Code and the *Geneva Conventions*. But other countries also have legitimate claims to have played an originating role in the laws of war. Britain and France deserve some credit for the 1856 *Paris Declaration* on maritime warfare; and Russia had a key innovative role in the late 19<sup>th</sup> century, especially in initiating the 1868 *St Petersburg Declaration* and the 1899 and 1907 Hague conventions and declarations.

Did the stories surrounding the two documents serve to reinforce the image of international law as essentially a European and North American, or simply a Christian, creation, not necessarily applicable to the native inhabitants of Southern lands, including of course colonies? As indicated here, this is a serious concern. One could cite, for example, Henry Dunant’s business projects in French colonies, and his visionary but ill-considered plans to reorganise the Middle East and return the Jews to it. It is worrying, too, that the first book in which both our documents appeared together was Bluntschli’s 1866 work entitled *Das Moderne Kriegsrecht der Civilisirten Staaten* or *The Modern Law of War of Civilised States*. Among colonial powers, including the UK, that habit of thought (that we are civilised and they are not, so the usual rules do not apply) persisted, and influenced the conduct of British forces in many colonial campaigns.

It has not been my purpose to debunk the myths surrounding these two documents. Myths are important to all difficult and dangerous enterprises. The myths contain enough truth that they are likely to survive a more realistic and variegated telling of the stories that gave rise to them. My purpose has rather been to raise some questions about the downsides to the creation myths of the laws of war. These relate to how we think about those laws, how they emerged and the influence they have had. They are downsides that may have consequences for us even today.