

## THE UNITED STATES AND THE DEVELOPMENT OF THE LAWS OF LAND WARFARE

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### I. Introduction

Historian Geoffrey Best has called the period from 1856 to 1909 the law of war's "epoch of highest repute."<sup>2</sup> The defining aspect of this epoch was the establishment, by states, of a positive legal or legislative foundation superseding a regime based primarily on religion, chivalry, and customs.<sup>3</sup> It is during this "modern" era that the international conference became the forum for debate and agreement between states and the "multilateral treaty" served as the positive mechanism for codification.<sup>4</sup>

While the two major "streams"<sup>5</sup> or "currents"<sup>6</sup> of the laws of war ("The Hague Laws" and "Geneva Laws") can trace their beginnings to this epoch, it is the history of "The Hague Laws" which most closely corresponds with this remarkable period. This article examines The Hague "stream" with a particular focus on the United States' role in codifying the laws of land warfare. Specifically, this article seeks to establish a definitive link between General Orders No. 100 issued by the United States in

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2. GEOFFREY BEST, *HUMANITY IN WARFARE* 129 (1980).

3. 2 L. OPPENHEIM, *INTERNATIONAL LAW* §§ 67-69 (H. Lauterpacht ed., 7th ed. 1952). For a thorough historical description of the period before 1856, see BEST, *supra* note 2, at ch. 1-2.

4. Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 116, 119 (Michael Howard et al. eds., 1994).

5. *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* XXI (W. Michael Reisman & Chris T. Antonion eds., 1994).

6. FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 7-8 (1987).

1863 (often referred to as the Lieber Code)<sup>7</sup> and The Hague Convention IV Respecting the Laws and Customs of War on Land ratified in 1907.<sup>8</sup>

While anticipating that this historical research would benefit political scientists interested in examining how variations in a state's relative power over a period of years affected its ability to develop and influence international laws and regimes, this analysis may also have significant legal implications. First, the Vienna Convention<sup>9</sup> recognizes that, though a treaty's text is the primary tool jurists use to interpret and apply the conventional law emanating from a particular treaty (such as the laws of land warfare in Hague Convention IV), it also affirms the relevance of the "legislative history [or] *travaux préparatoires*."<sup>10</sup> Therefore, if the link between codes is not merely circumstantial and tangential but is rather explicit and sequential, in other words if each code served as the basis for the subsequent code, the *travaux préparatoires* of Hague Convention IV of 1907 would logically include the entire history from the Lieber Code onward.

Second, given that the laws of land warfare are based largely on customary law, they gain strength from evidence of "both extensive and virtually uniform" practice.<sup>11</sup> Therefore, a more comprehensive historical awareness of the durability and depth of The Hague Law's roots can only help to enhance the legitimacy and strength of the laws themselves. Specifically, if this research confirms, as some assert, that America has played the "leading role in the codification of the laws of war"<sup>12</sup> this could assist United States military legal advisors and manual writers in more effec-

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7. Available in INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3-23 (Dietrich Schindler & Jirí Toman eds., 1988) [hereinafter Lieber Code].

8. Available in 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1907, at 1204-16 (U.S. Dep't of State ed., 1910); and THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed., 3d ed. 1918); *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63-92 (Dietrich Schindler and Jirí Toman eds., 1988) [hereinafter Hague Convention IV].

9. Often called the "Treaty on Treaties" and available in U.N. Doc. A/CONF 39.27 (1969), 1155 U.N.T.S. 336, *reprinted in* 63 AM. J. INTL. L. 875 (1969) (signed at Vienna 23 May 1969; entered in to force 27 January 1980; not in force for the United States). MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 14 n.19 (2d ed. 1993).

10. JANIS, *supra* note 9, at 29.

11. *Id.* at 46 (citing North Sea Continental Shelf Cases, 1969 I.C.J. 3, 44). See also The Paquete Habana, 175 U.S. 677 (1900).

12. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY xxii (Leon Friedman ed., 1972).

tively communicating the “gravity and preeminence” of particular norms to their commanders.<sup>13</sup> Such knowledge could be of great value to American military lawyers.

While not intending to produce a detailed genealogical analysis of each particular article in every existing code, it soon became obvious that the assignment of paternity, from one code to another, was desirable. For if it were demonstrated that an indisputable and sequential thread did exist, scholars could examine code revisions temporally and research records related to those modifications to ascertain what state, non-state, or individual actors brought about particular changes and why.

Albeit subtle allusions to, or inference of, an inter-connectedness between codes, historians and jurists have failed, as far as I could ascertain, to offer explicit proof that a thread truly existed. Therefore, after a brief description of three preparatory conferences, which served as precedents for the more ambitious attempts at creating a comprehensive code governing the laws of land warfare, this article undertakes the task of proving paternity. This analysis will demonstrate the unambiguous evolution starting with the Lieber Code used during the American Civil War through the Russian Proposal for the Brussels Conference<sup>14</sup> and the resulting Brussels Declaration of 1874,<sup>15</sup> via Convention II of the 1899 Hague Peace Conference,<sup>16</sup> and finally ending with Convention IV of the 1907 Hague Peace Conference which is still in force today.

In addition to the implications for international law, proof of a linkage, coupled with the fact that these codes evolved exclusively within the

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13. W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 5-6 (Horace B. Robertson, Jr. ed., 1991).

14. Available in BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 1, 1874, C. 1010, at 12-17 [hereinafter Russian Proposal].

15. Available in BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 1, 1875, C. 1128, at 157-82; and THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 25-34 (Dietrich Schindler & Jirí Toman eds., 1988) [hereinafter Brussels Declaration].

16. Available in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1899, at 537-47 (U.S. Dep't of State ed., 1899), reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed., 3d ed. 1918); reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63-93 (Dietrich Schindler & Jirí Toman eds., 1988) [hereinafter Hague Convention II].

proceedings of the three above-mentioned conferences, makes examination of the United States' role, or any actor for that matter, much easier. Subsequent analysis will conclusively demonstrate that the United States' role in the development of the laws of land warfare during this "stream" was insignificant.

## II. Groundwork (1856-1868)

"Until the mid-nineteenth century the law of war, although increasingly well-developed, remained, with few exceptions, in the realm of customary international law."<sup>17</sup> While a few bilateral exceptions existed,<sup>18</sup> it was not until 1856 that states made the first "multilateral attempt to codify in times of peace rules which were to be applicable in the event of war."<sup>19</sup>

In what Geoffrey Best calls the first "statutory measure" of this period,<sup>20</sup> the Declaration of Paris of 16 April 1856, consisted of four articles which abolished privateering, addressed maritime neutrality, and identified elements of a binding blockade.<sup>21</sup> While negotiated by only seven states,<sup>22</sup> most sea powers later acceded to this multilateral declaration.<sup>23</sup> The United States, on the other hand, did not sign this declaration.

The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of August 1864<sup>24</sup> followed the Declaration of Paris. The result of a fifteen state conference, this "brief and businesslike document [of] no more than ten articles" formalized the red cross as a symbol of neutrality and proclaimed the neutrality of the sick, wounded, and those that cared for them.<sup>25</sup> The Geneva Convention was initially signed by nine states but "in the course of time almost all the civ-

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17. Howard S. Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 307, 308 (John Norton Moore et al. eds., 1990).

18. Article XXIV of the bilateral Treaty of Commerce and Amity between the United States and Prussia, dated 1785 (8 Stat. 84), specified how prisoners of war should be treated if the two states should enter into a war. Additionally, Russia and the United States had an agreement, signed in 1854 (10 Stat. 1105), that pertained to the rights of neutrals at sea. *Id.* at 308-09.

19. *Id.* at 309.

20. BEST, *supra* note 2, at 139.

21. BRITISH STATE PAPERS 1856, Vol. LXI, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 787-90 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Paris Declaration].

22. The seven powers were: Austria, France, Prussia, Russia, Sardinia, Turkey, and the United Kingdom. *Id.* at 789.

23. OPPENHEIM, *supra* note 3, at § 68.

alized states acceded.”<sup>26</sup> The United States again did not participate nor did it accede to this convention until 1882 because of its tradition avoiding “entangling [European] alliances.”<sup>27</sup>

The final, what may be called preparatory conference—with a narrow scope, but multilateral nonetheless—was the St. Petersburg Conference of 1868.<sup>28</sup> Asserting, significantly, “that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy,” the resulting declaration stated simply that no contracting parties would use any exploding or flammable projectile under 400 grams.<sup>29</sup> As Roberts and Guelff note, this declaration is “regarded as expressing . . . the customary principle prohibiting the use of means of warfare causing unnecessary suffering” and “led to the adoption of other declarations renouncing particular means of warfare” at The Hague in 1899 and 1907.<sup>30</sup>

It is in the context of these initial attempts at codifying the customs related to war that the three more comprehensive conferences (i.e., Brussels in 1874; The Hague in 1899; and The Hague in 1907) need to be

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24. For the actual text of the Convention for the Amelioration of the Condition of the Wounded Armies in the Field, see *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 279-83 (Dietrich Schindler and Jiri Toman eds., 1988). While the conference which resulted in the Geneva Convention was eventually sponsored by the Swiss Confederation, Henri Dunant (he was also known as J. Henry Dunant) a civilian who consequently won the first Nobel Peace Prize, inspired it. Mr. Dunant, upon seeing the carnage of the battle of Solferino in 1859 was moved to write an influential book, *SOUVENIR DE SOLFERINO* (1862), which proposed the establishment of an international organization which would work with their governments in order to care for sick and wounded soldiers in war. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 218-19 (1947).

25. BEST, *supra* note 2, at 150.

26. OPPENHEIM, *supra* note 3, at § 68.

27. NUSSBAUM, *supra* note 24, at 219-20. According to Nussbaum, the United States' eventual official adherence to Geneva in 1882 was the result of the “long and vigorous crusade” led by Clara Barton. Despite its tardy accession, the United States never expressed opposition to its elements. *Id.*

28. Available in *BRITISH PARLIAMENTARY PAPERS LXIV* (1869), reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 101-03 (Dietrich Schindler and Jiri Toman eds., 1988).

29. *DOCUMENTS ON THE LAW OF WAR* 30-31 (Adam Roberts and Richard Guelff eds., 1982) [hereinafter *DOCUMENTS*].

30. *Id.* at 29-30.

viewed. Before proceeding, however, let us briefly examine the Lieber Code of 1863.

### III. The Lieber Code:<sup>31</sup> The Root of the Family Tree, not a “Quarry”

The United States’ role with respect to the laws of war is most obvious in the case of Francis Lieber’s code or General Orders 100. On 17 December 1862, during the American Civil War, Francis Lieber and four general officers were assigned the task of “[proposing] amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war.”<sup>32</sup>

By May 1863, the Adjutant General’s Office issued the fruits of Lieber’s efforts<sup>33</sup> in the form of “General Orders 100: Instructions for the Government of Armies of the United States in the Field.”<sup>34</sup> Although it was issued as an order to American soldiers in an internal conflict and was therefore not international in nature, the United States Military Tribunal at Nuremberg noted that army regulations (like, one must assume, the Lieber Code) while not international law *per se*, “might have evidentiary value, particularly if the applicable portions had been put into general practice.”<sup>35</sup>

After an initial draft of his code had been completed on 20 February 1863, Lieber wrote General Halleck, commander of Union forces at the time and a student of international law, stating that “nothing of the kind exists in any language” and that he “had no guide, no ground-work, no text-book.”<sup>36</sup> While stating a bit dramatically that his “guides” were simply “[u]sage, history, reason, and conscientiousness, a sincere love of truth,

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31. Lieber Code, *supra* note 7.

32. George B. Davis, *Doctor Francis Lieber’s Instructions for the Government of Armies in the Field*, 1 AM. J. INT’L LAW 13, 19 (1907). Although Francis Lieber was an American, he was born in 1800 in Germany. Between 1815 and 1826 he served in the Colberg Regiment under Bluecher, was wounded at Namur, and fought briefly in the war for Greek independence. He sought political asylum in England in 1826 and arrived in the United States soon afterwards. After teaching at the University of South Carolina for some time, he later moved to New York City where he taught at Columbia University. *Id.* at 13. Dr. Lieber died in 1872.

33. There is little evidence that the four general officers did much more than review Lieber’s draft and make minor changes. *Id.* at 19-20.

34. Lieber Code, *supra* note 7.

35. Reisman & Leitzau, *supra* note 13, at 8 (citing 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 1237 (1950)).

36. Letter reprinted in DAVIS, *supra* note 32, at 19-20.

justice, and civilization” it seems evident that he produced, as he had claimed, “the law and usage” of war as it existed at the time.<sup>37</sup> As the Supreme Court established in *The Paquete Habana* in 1900 after the Spanish American War, evidence of such “ancient usage . . . ripening” contributes to customary law.<sup>38</sup>

In a later letter (20 May 1863) written after the issuance of General Orders 100, Lieber told Halleck immodestly<sup>39</sup> that “it will be adopted as basis for similar works by the English, French, and Germans . . . [and] is a contribution by the United States to the stock of common civilization.”<sup>40</sup> While one should always read self-appraisals skeptically, his assessment, as we will see,<sup>41</sup> was not illusory. In addition to the fact that “similar manuals or codes were issued by Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893,”<sup>42</sup> its greatest impact has been on international codes.

Representative of many recent historians and legal scholars who have written on the subject, Geoffrey Best notes that “[Francis] Lieber’s code . . . served as the quarry from which all subsequent codes were cut.”<sup>43</sup> While a cursory examination of the Lieber Code and later international codes suggests the veracity of Best’s conclusion, this colorful and figurative language is misleading. Specifically, this incorrectly implies that legal scholars, military officers, and diplomats kept going back to this “quarry” when they met and wrote subsequent codes. Because this article proves that the Brussels Declaration, Hague Convention II and Hague Convention IV were actually sequential, unless the Lieber Code had an impact on the Russian Proposal or the resulting Brussels Declaration (1874), it logically has had no effect at all. Because this article will show that it did have an effect on those two documents, its subsequent role, therefore, in develop-

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37. *Id.* at 20.

38. JANIS, *supra* note 9, at 44 (citing 175 U.S. 677 (1900)).

39. In addition to immodesty, he was perhaps a bit sycophantic, for Halleck was consulted and finally approved of the orders. DAVIS, *supra* note 32, at 20.

40. Letter reprinted in Davis, *supra* note 32, at 20-21.

41. See *infra* notes 84-101 and accompanying text.

42. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 27-28 (1993).

43. BEST, *supra* note 2, at 171. For an example of this tendency in legal texts as well, see EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 11 (1992).

ment of the laws of land warfare was not as a “quarry” but as the root of The Hague Laws’ family tree.<sup>44</sup>

While this may appear as semantic quibbling, the distinction is significant beyond mere historical trivia. Specifically, proof of this assertion would provide the opportunity for historians, political scientists, and legal scholars to better trace the evolution of certain rules and note the factors and actors that influenced particular changes. Furthermore, as the introduction notes, this would also contribute to our grasp of customary law, the *travaux préparatoires* of The Hague Laws, and to a more effective presentation of the “gravity and preeminence” of particular norms to United States commanders.<sup>45</sup>

#### IV. Genealogy

Given the absence of any source that explicitly elucidated the connections from code to code, this next section is an attempt to do just that.<sup>46</sup>

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44. See *infra* notes 84-101 and accompanying text. See also Telford Taylor’s Forward in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xv, for a more apt analogy with a “cornerstone,” yet one that neither Taylor nor the editor (Friedman) adequately prove.

45. See *supra* notes 9-13 and accompanying text.

46. An article by article relationship for each of these five codes is presented in a hypertext format as well as excerpts of this paper on the World Wide Web. Grant R. Doty, *The Laws of War Genealogy Project* <[http://www.dean.usma.edu/socs/grdoty/laws\\_war/lawshome.htm](http://www.dean.usma.edu/socs/grdoty/laws_war/lawshome.htm)> [hereinafter Genealogy]. Visitors to this web site may click any article from any code and this site will provide a genealogical listing of that particular article (i.e., from the Lieber Code of 1863, to the Russian Proposal for the Brussels Conference of 1874, to the resulting Brussels Declaration of 1874, to the Hague Convention II from the Hague Conference of 1899, and finally to the Hague Convention IV from the Hague Conference of 1907). For example, if you click “Article 40” from Hague Convention IV, this site will “jump” to the “MASTER” document which will list:

- Art. 40 (Hague Convention IV, 1907). Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

- Art. 40 (Hague Convention II, 1899). Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in case of urgency, to recommence hostilities at once.

- Art. 51 (Brussels Declaration, 1874). The violation of the armistice by one of the parties gives the other party the right of denouncing it.

- Art. 67 (Russian “Proposal,” 1874). The violation of the clauses of an armistice by either one of the parties, releases the other from the obligation of carrying them out, and warlike operations may be immediately resumed.

- Art. 145 (Lieber Code, 1863). When an armistice is clearly broken by one of the parties, the other party is released from all obligations to observe it.



The best way to demonstrate a nexus between various conferences and codes is to begin with the most recent convention during this period and work backwards.

A. Hague Convention IV (1907)<sup>47</sup>

In the case of The Hague Laws related to land warfare, the most recent code of this epoch is Convention IV Respecting the Laws and Customs of War on Land stemming from the 1907 Hague Peace Conference.<sup>48</sup> As the Russian proposal for this conference noted, one of the four agenda items was consideration of “[a]dditions to be made to the provisions of the convention of 1899 [Hague Convention II] relative to the laws and customs of war on land . . . .”<sup>49</sup> Given the use of Convention II of 1899 as the starting point for the 1907 conference one could logically conjecture that the resulting code would bear strong similarities. This assumption is correct.

As the conference transcripts<sup>50</sup> and an article by article comparison<sup>51</sup> confirm, “the revision of [Convention II] was not undertaken with a view of recasting them but only in order to make amendments in points of detail, and the alterations [made] no very material changes.”<sup>52</sup> Each Hague Convention IV article save one has a close predecessor in the 1899 code. Even the verbiage barely changed; specifically, “that it was found necessary to modify but eleven of the original [Convention II] articles, and to add but three paragraphs . . . .”<sup>53</sup> is further incontestable evidence of consanguinity.

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47. Hague Convention IV, *supra* note 8.

48. As Schindler and Toman note:  
[t]he provisions of . . . [Convention IV, like Convention II] are considered as embodying rules of customary international law. As such they are also binding on states which are not formally parties to them . . . [additionally these rules] were partly reaffirmed and developed by the two Protocols Additional to the Geneva Conventions of 1949, adopted in 1977.

THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63 (Dietrich Schindler & Jirí Toman eds., 1988) [hereinafter Schindler & Toman].

49. 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1906, at 1629-31 (U.S. Dep’t of State ed., 1909) [hereinafter 2 FRUS 1906].

50. 1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, PLENARY MEETINGS OF THE CONFERENCE 83-85 (Division of International Law of the Carnegie Endowment for International Peace trans., James Brown Scott ed., 1920) [hereinafter 1 PROCEEDINGS 1907].

51. See Genealogy, *supra* note 46.

52. ALEXANDER PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR 261 (1909).

In fact, in Schindler and Toman's *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, the conventions are printed side-by-side, "[a]s the two versions . . . differ only slightly from each other. . . ."<sup>54</sup> Given such proof, it is not surprising that scholars do not miss this obvious connection between these two codes.

#### B. Hague Convention II (1899)<sup>55</sup>

Establishing paternity for Convention II with Respect to the Laws and Customs of War on Land and the annexed Regulations of the 1899 Hague Peace Conference is more problematic. Although the 1899 conference agenda,<sup>56</sup> which included an item listed as "the revision of the declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels conference and still remaining unratified,"<sup>57</sup> seems to communicate its kinship, the issuance of the *Oxford Manual*<sup>58</sup> in 1880 has often misled students of international law.

Published by the Institute of International Law (founded in 1873 with the urging of Francis Lieber<sup>59</sup>), this manual's preface notes:

It may be said that independently of the international laws existing on the subject, there are day-to-day certain principles of justice which guide the public conscience, which are manifested even by general customs, but which would be well to fix and make obligatory. This is what the Conference at Brussels attempted . . . and it is what the Institute of International Law, in its turn, is trying to-day to contribute.<sup>60</sup>

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53. GEORGE B. DAVIS, *The Amelioration of the Rules of War on Land*, 2 AM. J. INT'L L. 63, 66-67 (1908).

54. Schindler & Toman, *supra* note 48, at 63.

55. Hague Convention II, *supra* note 16.

56. While some sources such as the INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONVENTIONS AND THEIR OFFICIAL REPORTS 3-5 (James Brown Scott ed., 1916) [hereinafter U.S. INSTRUCTIONS AND REPORTS] have listed eight themes or subjects, the United States Department of State lists only seven in Count Mouravieff's second circular. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1898, at 551-53 (U.S. Dep't of State ed., 1901) [hereinafter FRUS 1898]. Regardless, the laws and customs of war are referred to in the next to the last agenda item (sixth or seventh).

57. FRUS 1898, *supra* note 56, at 552.

58. The authentic text was in French and was *translated and reprinted* in English in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 26-42 (James Brown Scott ed., 1916). Schindler & Toman, *supra* note 48, at 35-48.

59. THOMAS E. HOLLAND, *STUDIES IN INTERNATIONAL LAW* 88 (1898).

It is this manual's historical placement between Brussels in 1874 and The Hague in 1899, as well as its reference to Brussels, which seems to have caused many scholars to assume that there is some clear relationship between them. An example of this tendency is L.C. Green's comment that the *Oxford Manual* is "equally important" as the Brussels Declaration and that the two documents "provided the basis on which the Hague Convention of 1899 concerning warfare on land rested."<sup>61</sup> Perhaps more of a concern is Schindler and Toman's inclusion of the text of this manual in their collection of texts and their comment that "[m]any of the provisions of the two Hague Conventions can easily be traced back to the Brussels Declaration and the *Oxford Manual*."<sup>62</sup> This chronologically-based analysis, however, is simply wrong and misleading to scholars who rely on Schindler and Toman's selection of codes.

In addition to the fact that the texts of The Hague deliberations<sup>63</sup> confirm that the Brussels Declaration of 1874, and not the *Oxford Manual*, served as the organizing document and touchstone throughout the various debates, an article by article comparison of the codes clearly indicate that the latter's impact was insignificant. In fact, any similarities between the *Oxford Manual* and Convention II are due to the manual's replication of large parts of the Brussels Declaration. Had the *Oxford Manual* never been published it seems unlikely Convention II would have been significantly different.

Specifically, it is clear from a detailed comparative analysis of the Brussels Declaration and Convention II that, notwithstanding minor revisions, only eight articles were newly created at The Hague in 1899 and only two Brussels' articles were completely abandoned.<sup>64</sup> Most importantly, none of those newly created articles were derived from the *Oxford Manual*. In comparison, eighteen articles in Convention II (almost a third) have no predecessors in the *Oxford Manual*. While the manual may have contributed to the debate of the period, this analysis demonstrates clearly

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60. Schindler & Toman, *supra* note 48, at 36.

61. LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 88 (1985).

62. Schindler & Toman, *supra* note 48, at 25.

63. *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899*, at 50-69, 474-578 (Div. of Int'l Law of the Carnegie Endowment for Int'l Peace trans., James Brown Scott ed., 1920) [hereinafter *PROCEEDINGS 1899*].

64. See Genealogy, *supra* note 46.

that its value in the development in the laws of war has been misrepresented.

The importance of this analysis should not be understated. One may now conclude emphatically that the unratified Brussels Declaration was the sole and significant predecessor of Hague Convention II (1899) in this law of land warfare family tree. While the laws of land warfare would be no less valid if they had evolved outside of multilateral conferences (e.g., the *Oxford Manual*), the fact that they did allows scholars to trace their development more clearly by simply examining the very detailed conference minutes and notes. Had the *Oxford Manual* been in the family tree such an inquiry would be more difficult if not impossible. Furthermore, one can now reasonably endeavor to use conference proceedings for Brussels and The Hague Conferences as *travaux préparatoires* for The Hague Laws and to ascertain the United States or any actor's role in evolution of the laws of land warfare.

### C. Brussels Declaration (1874)<sup>65</sup>

The study of the Brussels Conference of 1874 is difficult because the resulting "declaration" was never ratified. While it is true that primary source information (English language) is available in the form of dispatches from the British delegate to the conference,<sup>66</sup> the United States' absence contributes to the paucity of secondary sources on the subject.<sup>67</sup>

As a result of this dearth of material on Brussels, it is not surprising that few historians or legal scholars address this conference and the resulting declaration in much detail. This is despite the fact that it served as the

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65. Brussels Declaration, *supra* note 15.

66. See *infra* note 79 and accompanying text.

67. See *infra* notes 107-113 and accompanying text. But see BEST, *supra* note 2, at 345-46 n.43. Best comments in this endnote that following the conference, "[e]very international lawyer, I believe, felt obliged to publish something about [Brussels]." He offers, however, only one English language secondary source and then only a chapter as an example: THOMAS E. HOLLAND, *STUDIES IN INTERNATIONAL LAW* ch. 3 (1898). Furthermore, a recent (18 February 1998) subject search of the Library of Congress catalog at <<http://webpac.library.yale.edu/webpac-bin/wgbro-ker?02182215113431+%2Daccess+top%2ELib%5FCong>> reveals that only two items exist: one short document written in 1874 and another (in French) written in 1974. FOREIGN AFFAIRS COMMITTEES OF YORKSHIRE, *THE BRUSSELS CONGRESS AND DECLARATION OF PARIS: TO THE QUEEN'S MOST EXCELLENT MAJESTY, THE HUMBLE AND LOYAL PETITION OF THE FOREIGN AFFAIRS COMMITTEES OF YORKSHIRE, ASSEMBLED IN CONFERENCE AT KEIGHLEY, MARCH 28, 1875* (1875); JEAN DE BREUCKER, *LA DÉCLARATION DE BRUXELLES DE 1874 CONCERNANT LES LOIS ET COUNTUMES DE LA GUERRE* (1974).

feeder document for fifty-two out of the sixty Hague Convention II articles.<sup>68</sup> While some, including Geoffrey Best<sup>69</sup> and Schindler and Toman,<sup>70</sup> do acknowledge that Brussels did play a role in the development of the laws of war, there are many scholars who by their omission of material on the subject seem to further the notion that it was not significant. For example, neither Edward Kwakwa's description of the "International Laws of Armed Conflict in Historical Perspective"<sup>71</sup> nor Michael Howard's *The Laws of War*,<sup>72</sup> make any reference to Brussels. Even Oppenheim's treatise *International Law* minimizes this conference's importance and resulting declaration by citing Brussels only in a footnote and without reference to its role in the lineage in the laws of land warfare.<sup>73</sup> This penchant for inadequately addressing the Brussels Conference, for whatever reason, is particularly evident in terms of exploring the foundation of its unratified declaration.

While eventually sponsored by the Russian government, the impetus of the conference was a private group called the Society for the Amelioration of the Condition of Prisoners of War.<sup>74</sup> This society's president Count de Houdetot, in a letter dated 28 March 1874, citing as precedents both Geneva and St. Petersburg and addressed to "all the Governments of Europe," proposed that states send delegates to a 4 May conference in Paris to address "the treatment of soldiers who become prisoners of war."<sup>75</sup>

In a 6/18 April<sup>76</sup> dispatch, Prince Gortchakow of Russia, not only responded favorably to the society's invitation, but also noted Russia's intention of "laying before the Cabinets a project for an International Code with the object of determining the laws and usages of warfare."<sup>77</sup> Subsequently (17/29 April), the Prince forwarded a thirteen chapter (seventy-one article) proposal which he intended to serve as a "starting point for ulterior

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68. See *supra* note 64 and accompanying text.

69. BEST, *supra* note 2, at 156.

70. Schindler & Toman, *supra* note 48, at 25.

71. KWAKWA, *supra* note 43, at ch. 2.

72. THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994).

73. OPPENHEIM, *supra* note 3, §§ 68, 228 n.2.

74. Russian Proposal, *supra* note 14, at 3.

75. *Id.*

76. Russian Old/New dating convention.

77. Russian Proposal, *supra* note 14, at 5-6.

deliberations, which, we trust, will prepare the way for a general understanding” and “definite code.”<sup>78</sup>

An examination of the British delegate’s (Major General Sir Alfred Horsford) dispatches<sup>79</sup> provides precise documentation of the nexus between the Russian Proposal and the Brussels Declaration. Of particular note is his comprehensive 4 September 1874 report that first lists the “original [Russian] project,” followed by a detailed “résumé of discussion” about the conference deliberation, followed by the “modified text” of the Brussels declaration.<sup>80</sup> His dispatches can serve as an English speaking scholar’s window into the conference and furnish a roadmap of the changes made. An analysis of Horsford’s notes plainly indicates that the Russian Proposal served as the model for discussion and is closely related to the final declaration.

Despite this certain relationship between the Russian Proposal and the Brussels Declaration, the former is perhaps the most slighted branch in the laws of land warfare family tree. Although it follows that authors who do not mention Brussels<sup>81</sup> also do not address the Russian Proposal, even those that do mention it often distort its significance.

For example, while Schindler and Toman mention a “draft of an international agreement concerning the laws and customs of war submitted . . . by the Russian Government,” their assertion that this “draft” was adopted with only “minor alterations” (but not ratified), belies the fact that of the three conferences, there were more discussions and modifications made between the Russian Proposal and the Brussels Declaration than between Brussels and Convention II (1899) or between Convention II and Convention IV (1907). While it is true that only four articles in the final declaration have no predecessor in the Russian Proposal, seven articles out of seventy-one were completely dropped (compared with two from Brussels to Convention II of 1899 and none between 1899 and 1907).<sup>82</sup> Significant

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78. *Id.* at 5-17.

79. The dispatches can be found in Brussels Declaration, *supra* note 15. Geoffrey Best notes that daily dispatches are “a full-looking account” and that his final report is a “fine summary of it all.” BEST, *supra* note 2, at 345-46 n.43.

80. Brussels Declaration, *supra* note 15, at 157-82.

81. See *supra* notes 68-73 and accompanying text.

82. See Genealogy, *supra* note 46. Note that the assertion that no articles were dropped between 1899 and 1907 includes the transfer of articles 57-60 to “Convention (V) respecting the rights and Duties of neutral Powers and Persons in Case of War on Land.” Schindler & Toman, *supra* note 48, at 92 n.1.

structural changes were also made (i.e., chapters and headings). Therefore, it seems that Schindler and Toman's decision not to print the Russian Proposal in their self-described "comprehensive collection"<sup>83</sup> of texts on the subject is unwise, especially considering their reproduction of the over-rated *Oxford Manual*.

In addition to the problem of not listing the Russian Proposal in collections of codes, the more significant issue is the failure to acknowledge the Russian Proposal's undeniable placement in the family tree or the *travaux préparatoires* of The Hague Laws. While perhaps understandable given the lack of material on the subject, the risks involved are extensive particularly if scholars attempt to demonstrate, as this article does, the specific role of various state, non-state, or individual actors in the development of the laws of war.

#### D. Russian Proposal (1874)<sup>84</sup>

The source of the Russian Proposal is perhaps the most difficult to pinpoint, in large part due to the lack of material on the Brussels Conference. While research uncovered no writings definitively identifying the source of the Russian Proposal, a number of participants at Brussels made later reference to the role of the Lieber Code. For example, one Russian delegate to both Brussels and The Hague in 1899, Feodor de Martens, made an "allusion [while at The Hague] to [the Lieber Code] and acknowledgment of its value" relative to Brussels.<sup>85</sup> Additionally, George B. Davis wrote that Dr. Bluntschli, a German legal scholar, and the chairman of the committee on codification at Brussels, admitted that "[i]n the performance of this duty, his chief reliance was the admirable codification which had been prepared by Doctor Lieber . . . so that the Brussels code bears in every article a distinct impression of the [Lieber Code], prepared eleven years before by his lifelong friend and co-worker."<sup>86</sup> While these quotes, coupled with the fact that General Orders 100 (Lieber Code) was "the first official attempt to gather together in one document substantially all the customary law of war on land,"<sup>87</sup> seem to support the conclusion that it must have played some role at Brussels in 1874, it is not evident that an

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83. Schindler & Toman, *supra* note 48.

84. Russian Project, *supra* note 14.

85. U.S. INSTRUCTIONS AND REPORTS, *supra* note 56, at 45.

86. Davis, *supra* note 32, at 22.

87. Levie, *supra* note 17, at 309.

explicit article by article connection with the Russian Proposal has ever been established.

Despite testimony from Brussels participants seeming to confirm a close relationship between codes, some historians still do not even mention Lieber's impact on Brussels or the Russian Proposal.<sup>88</sup> Those that do mention these codes have likely skirted the paternity issue because of the apparent lack of conclusive proof of the lineage between Lieber and the Russian project (in comparison with the extensive evidence that exists for the two Hague Conferences in the form of widely disseminated conference proceedings). As a result, scholars have either written cryptically that the Brussels' "debates were based on a Lieber-like Russian draft code"<sup>89</sup> or broadly that the Lieber Code "prepared the way for the calling of the 1874 Brussels Conference and the two Hague Peace Conferences . . ."<sup>90</sup> While not incorrect, these claims imply a relationship that may or may not exist.

Legal texts have also been less than clear. While some texts do not even make reference to Lieber or Brussels,<sup>91</sup> one author who does, writes simply that the Lieber Code, "served as a model for subsequent codification efforts" and does not even mention the Russian Proposal or Brussels.<sup>92</sup> Oppenheim's *International Law*, which does acknowledge that Lieber did represent the "first endeavour to codify the laws of war" makes no mention of any explicit connection between Lieber's code and the Russian Proposal (which he does not mention) or the Brussels Declaration (which he mentions simply in a footnote).<sup>93</sup> The most resolute yet brief expression of a relationship between these codes can be found in Schindler and Toman's introduction to the Lieber Code. They write:

[The Lieber Code] strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Confer-

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88. See, e.g., HOWARD, *supra* note 72.

89. BEST, *supra* note 2, at 156.

90. DOCUMENTS, *supra* note 29, at 7. But see, CALVIN D. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962). Davis is slightly more helpful acknowledging a close relationship between codes because he cites de Martens as commenting later that the Lieber Code "inspired much of the work of the Brussels Conference." *Id.* at 132.

91. See, e.g., JANIS, *supra* note 9, at 162-76.

92. KWAKWA, *supra* note 43, at 11.

93. OPPENHEIM, *supra* note 3, §§ 68, 228 n.2.



ence in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.<sup>94</sup>

Even this passage, however, does not offer incontestable evidence of the source of the Russian Proposal, like that which exists for the other codes. Specifically, while the other codes evolved in conferences which provide researchers evidence in the form of minutes or diplomatic dispatches, any proof of similarities between General Orders 100 and the Russian Proposal beyond mere testimonials from Brussels participants must come from a detailed comparative analysis of each code.

While any numerical comparison between the 157 article Lieber Code and the 71 article Russian Proposal is likely to result in the snap judgment that there could not possibly be a relationship, this is incorrect.<sup>95</sup> In fact, the length of General Orders 100 is due in large part to three factors. First, many of Lieber's articles were not "laws" as is the case with the previously discussed codes, because of his stylistic use of articles as paragraph marks. For example, he uses one article (article 54) merely to define "hostages" and another (article 40) to declare that "[t]here exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land."<sup>96</sup> Second, the Lieber Code was written as an order for an army fighting a civil and not international war. Finally, it was not a consensus document like the multilateral treaties of The Hague or Brussels. As Thomas Holland wrote in 1898, the Lieber Code was "perhaps unnecessarily long and minute . . . not well arranged, and certainly more severe than the rules which would be generally enforced in a war between two independent states."<sup>97</sup> This critique, however, should not preclude a more measured judgment based on a detailed analysis of the articles.

Such an analysis is clear. Although fifty-three out of the original 157 were seemingly discarded by the Russian Proposal, it is just as accurate to stress that only twelve of the seventy-one articles in the Russian Proposal do not seem to have a predecessor in Lieber's code.<sup>98</sup> While it is true that the verbiage between the Lieber Code and the Russian Proposal is significantly different relative to other codes examined here, the themes and content are quite similar.<sup>99</sup> This methodology of comparing articles together

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94. Schindler & Toman, *supra* note 48, at 3.

95. See Genealogy, *supra* note 46.

96. Lieber Code, *supra* note 7.

97. HOLLAND, *supra* note 59, at 85.

98. See Genealogy, *supra* note 46.

with the allusions to the Lieber Code made by Brussels' participants,<sup>100</sup> including Russians, does seem to provide substantial evidence of a direct genealogical relationship.

#### E. Lieber to the Hague

Given the above discussion, a comprehensive and temporal analysis of the various articles from Lieber to the Hague Convention IV of 1907 shows, not surprisingly, that over two-thirds of the fifty-six articles in Hague Convention IV can be effectively traced from the Lieber Code of 1863, through the Russian Proposal for the Brussels Conference and the Brussels Declaration of 1874, via the Hague Convention II of 1899, to the Hague Convention IV of 1907.<sup>101</sup>

As mentioned in the introduction, establishing the existence of a sequential thread or family tree contributes to international law two ways. First, it demonstrates the clear and lengthy, but generally unrecognized, legislative history for the laws of land warfare. Second, this analysis furthers our grasp of the durability and depth of The Hague Laws' roots. This evidence, coupled with the fact that the articles in these codes evolved beginning with Brussels in 1874 exclusively within the proceedings of the above-mentioned conferences, makes determination of the impact of specific state, non-state, and individual actors much easier.

Given that the role of the United States in the development of the Lieber code was as obvious as it was significant, the remaining chronological analysis, therefore, focuses solely on the United States' role during the three conferences of 1874, 1899, and 1907. As this research will demonstrate, the promulgation of General Orders 100 in May 1863 was in fact the high water mark of United States efficacy in the development of the laws of war.

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99. The verbiage differs, one must conclude, because of the different formats (i.e., order versus international law) and more importantly because the author of the Russian Proposal was not limited, as were those who modified the other codes in the forum of an international conference, to merely deviating from a previous international code.

100. See *supra* notes 85-86 and accompanying text.

101. See *Genealogy, supra* note 46.

## V. The United States and the Development of the Laws of Land Warfare

## A. The United States and the Russian Proposal and Brussels Declaration, 1874

While seldom cited,<sup>102</sup> the Brussels Conference (and by correlation the Russian Proposal which served as the basis for debate), was arguably the most important conference of the three discussed in this article. The United States' absence meant that it did not participate in the debates which eventually produced a code from which forty-five articles (out of fifty-six) are predecessors of articles in Hague Convention IV.<sup>103</sup> In these terms, it had more impact on the laws of war than any other conference. The major question for this section, therefore, is not what influence the United States had at this conference, for it had none. The questions are rather why did the United States not attend and was its absence an abdication of its power to affect the rules of war.

As mentioned previously,<sup>104</sup> a private organization desiring that "all the Governments of Europe" meet to discuss "the treatment of soldiers who become prisoners of war" originally proposed this conference.<sup>105</sup> A 16 May 1874 memorandum from the Society for the Amelioration of the Condition of Prisoners of War to Britain's Derby seems to indicate that the Russians desired that "different American and Asiatic States" be invited to the conference.<sup>106</sup> Despite this fact, however, it appears that no invitation was extended to any non-European states until July, and then only to Persia and the United States.<sup>107</sup>

While a search of U.S. Department of State records<sup>108</sup> reveals no mention of any invitation (also recall the dearth of English language books on the subject),<sup>109</sup> a British Foreign Office telegraph dated 18 July provides the only clue that the United States was in fact invited. It states simply that "[t]he Russian Government invited the Government of the United States on [8 July], and again [on 17 July], to be represented at [the] Brus-

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102. *See supra* notes 66-73 and accompanying text.

103. *See* Genealogy, *supra* note 46.

104. *See supra* note 74 and accompanying text.

105. Russian Proposal, *supra* note 14, at 3.

106. *Id.* at 19-20.

107. BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 2, 1874, C. 1083, at 2, 8.

108. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (U.S. Dep't of State ed., various).

109. *See supra* notes 66-73 and accompanying text.

sels Conference. The Government of the United States have [sic] declined, on the ground[s] of the lateness of the invitation.”<sup>110</sup>

While twenty-one days may have been insufficient notice, it also seems plausible that the United States’ aversion to “entangling” itself in Europe (as evidenced by its continued failure to accede to the Geneva Convention of 1864) played a role.<sup>111</sup> The lack of primary documents or secondary sources on the subject of the United States’ views, however, makes this unclear. Similarly unclear is the influence the United States would have had at the conference had it attended. America was not a great power at the time, and Lieber’s death in 1872 left it without a prominent jurist on the subject who may have significantly influenced the debate.

Regardless of such counter-factual suppositions, rejecting the invitation to attend the conference in any capacity (e.g., as an observer) or for whatever reason, resulted not only in its inability to influence the proceedings (notwithstanding the impact of the Lieber Code)<sup>112</sup> but also its ability to follow or report on the conference. This, and perhaps the lack of significance that the United States placed on this conference, is evident in the first U.S. dispatch related to the Brussels Conference, written after its conclusion. In this document, the diplomat Eugene Schuyler noted, “as the proceedings of the congress have been kept secret, and it has been impossible for me to communicate anything more than rumors of its actions and occupations, I have refrained from writing you on the subject.”<sup>113</sup>

At the time, the failure to ratify the concluding declaration may have appeared to vindicate the United States’ decision not to attend the conference in Brussels. Such an assessment, however, would be wrong owing to the comparatively minor changes to the laws of war that subsequent conferences enacted.<sup>114</sup>

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110. BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 2, 1874, C. 1083, at 8. The eventual attendees included delegates from Germany, Austria, Belgium, Spain, France, Greece, Italy, Netherlands, Portugal, Russia, Sweden, Switzerland, Turkey, Denmark, and Great Britain.

111. NUSSBAUM, *supra* note 24, at 219-20.

112. *See supra* notes 85-86 and accompanying text.

113. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1874, at 1014 (U.S. Dep’t of State ed., 1875). Only 39 pages are devoted to a *post hoc* analysis of the Brussels Conference.

114. *See Genealogy, supra* note 46.

## B. The United States and Hague Convention II, 1899

Two weeks after the United States signed a protocol ending hostilities with Spain, and almost twenty-five years after Brussels, the Russians again called for an international peace conference. A 12/24 August 1898 rescript issued for the Czar by Count Mouravieff, the Russian Minister for Foreign Affairs, stated that the narrow purpose of this meeting was the discussion of the “grave problem” of checking the increase in armaments.<sup>115</sup>

This time, however, unlike the tardy invitation to the Brussels Conference, the response from the United States was favorable.<sup>116</sup> Although most states attributed this rescript to self-serving Russian motives, and while there was at least some skepticism of Russia’s intent within the United States,<sup>117</sup> President William McKinley’s response to the original August invitation was reportedly, “Why, of course we will accept it.”<sup>118</sup>

It is highly questionable, however, that the apparent U.S. enthusiasm can be attributed to the concurrence of United States and Russian views towards disarmament. Unlike the United States which was a rising world power, Russia was burdened by the economic and social costs of keeping pace in a highly militarized and competitive European state system. The United States was a likely candidate for increased military spending and exertion. Their apparent excitement, therefore, likely rested in the desire to satisfy the significant international and U.S. peace movements.<sup>119</sup>

Four months after Russia distributed the original rescript with its narrow agenda on limiting armaments, they issued a follow-up circular which was much broader in scope.<sup>120</sup> Dated 30 December 1898/11 January 1899, this document identified seven<sup>121</sup> “themes to submit to an international discussion at the actual conference.”<sup>122</sup> Notably, the second to the last item was the “revision of the declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels conference and still remaining unratified.”<sup>123</sup>

After Russia announced that the neutral Dutch would play hosts at The Hague and the date was set for 18 May 1899, the United States began

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115. FRUS 1898, *supra* note 56, at 541-42.

116. DAVIS, *supra* note 90, at 38-39.

117. *See id.* at 38-46 for an explanation of the perceived and actual motives behind the rescript.

118. CALVIN D. DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION 7 (1975).

its preparation for the conference.<sup>124</sup> The first task for the United States was selecting the delegation. After some fierce lobbying by aspiring delegates and their patrons, in mid-March, President McKinley finally selected Ambassador Andrew White to head the delegation.<sup>125</sup> After adding Seth Low, Stanford Newel, and George Frederick Holls as delegation secretary, the State Department turned to the question of military delegates.<sup>126</sup> Secretary of State John Hay suggested, and President McKinley approved, the appointment of Captain Alfred Thayer Mahan, author of *The Influence of Sea Power* (1890), a prestigious addition to the delegation. For an Army representative, “Secretary Hay consulted the adjutant general of the army General H.C. Corbin, and Corbin suggested an ordinance

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119. One European leader was cited as stating that there was a “bit of devilry” in the call for the conference because any state who refused to attend would be branded as wanting to “break the peace.” DAVIS, *supra* note 90, at 40. An analysis of official diplomatic correspondence reveals that U.S. statesmen sought to “satisfy the expectations and longings of the peace movement while sacrificing none of the essential demands of the movement for war.” For example, the Department of State’s “Instructions to the American Delegates,” included an annex which noted: “[t]he introduction of a brief resolution (regarding international arbitration—a popular cause for the American peace movement) at an opportune moment . . . would at least place the United States on record as a friend and promoter of peace” 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1907, at 1142 (U.S. Dep’t of State ed., 1910) [hereinafter 2 FRUS 1907]. In the body of the instructions, there is the more realistic observation that the idea of halting military increases was “at present, so inapplicable to the United States . . . [that it] could not be profitably discussed.” PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1899, at 511-13 (U.S. Dep’t of State ed., 1901) [hereinafter FRUS 1899].

120. FRUS 1898, *supra* note 56, at 551-53; DAVIS, *supra* note 90, at 50-53.

121. See *supra* note 56 and accompanying text (discussion of actual number of agenda items).

122. FRUS 1898, *supra* note 56, at 552.

123. *Id.* at 552. The other “subjects” included: (1) a limitation or reduction in land and naval forces/armaments; (2) disallowing the use of new firearms or explosives more powerful than currently used; (3) limitation of explosives and prohibition of dropping projectiles from balloons; (4) prohibition of the use of submarines or ships armed with rams; (5) adaptation of the Geneva Convention of 1864/68 for naval war; (6) the neutralization of naval vessels to rescue those shipwrecked after naval battles; and (7) the use of good offices, mediation, and voluntary arbitration in order to prevent armed conflict. *Id.* at 552-53.

124. DAVIS, *supra* note 90, at 52-53.

125. *Id.* at 64-73.

126. *Id.* at 73-74.

officer, Captain William R. Crozier,” an officer like Mahan with no legal expertise.<sup>127</sup>

David Jayne Hill, Assistant Secretary of State, was assigned the job of preparing the official “instructions to the American delegates,” which were dated 18 April 1899, and were embarrassingly short and vague on the issue of the laws and customs of war.<sup>128</sup> The instructions stated simply that:

The fifth, sixth, and seventh articles, aiming in the interest of humanity to succor those who by the chance of battle have been rendered helpless, thus losing the character of effective combatants, or to alleviate their sufferings, or to insure the safety of those whose mission is purely one of peace and beneficence, may well awake the cordial interest of the delegates, and any practicable propositions based upon them should receive their earnest support.<sup>129</sup>

The singular reference to those wounded in battle and those attempting to rescue them implies an inadequate understanding of the scope or content of the Brussels Declaration. While this instruction seems at least partially applicable to the fifth and sixth items dealing with the application of the Geneva Convention to naval warfare and the neutralization of vessels attempting to rescue shipwrecked sailors, it offers practically no useful guidance to properly evaluate the more comprehensive laws of land warfare.<sup>130</sup>

At the conference, the second subcommission of the second commission dealt with the laws of land warfare (the first subcommission dealt with laws of maritime warfare).<sup>131</sup> Contrary to what Leon Friedman infers in his “documentary history”<sup>132</sup> of the law of war, the head of the United States delegation, the so-called “leading figure” of international law, Andrew White, played no significant role in the debates of the two subcommission regarding the laws of war.<sup>133</sup> While Newel, a lawyer, was

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127. *Id.* at 75.

128. *Id.* at 75.

129. FRUS 1899, *supra* note 119, at 512.

130. It is also possible that the Department of State read the Russian circular with the view that the items dealing with firearms and explosives, having been listed first, were more significant.

131. DAVIS, *supra* note 90, at 125.

132. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xiv-xv, xxiii, 153.

also a member of the second commission, he allowed the two military men, both non-lawyers, Mahan in the first subcommission and Crozier in the second, to do the United States bidding. As Calvin Davis notes, “at no time did [Newel] say anything in the commission—or any other part of the conference—which reporters thought worthy of recording.”<sup>134</sup>

While Mahan’s role in the first subcommission was notable despite his lack of legal experience, one historian writes bluntly that, “while Crozier listened, the second subcommission revised the laws of war in the Declaration of Brussels.”<sup>135</sup> During the twelve meetings of the subcommission, Crozier only spoke up five times and two of those were to ask for mere clarifications.<sup>136</sup> He did successfully speak in favor of the rights of small powers by supporting the successful elimination Article Four of the Brussels Declaration.<sup>137</sup> Opposition to this article, which addressed the obligation of government officials of occupied states to faithfully support the occupying army, was based, Crozier asserted, on his “guiding principle” that the United States “did not fear invasion but could afford to be as humane towards invaded countries as anybody.”<sup>138</sup>

The second and final so-called “contribution” that Crozier made to the development of the laws of war regarded the seizure and destruction of private property (Article 13g of the Brussels Declaration which became Article 23g in Convention II and IV).<sup>139</sup> Because he knew that the issue of private property at sea, which was not an agenda item, was important to the United States, he suggested that the combined issue (i.e., private property

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133. DAVIS, *supra* note 90, at 122.

134. *Id.* at 127.

135. *Id.* at 132-33.

136. PROCEEDINGS 1899, *supra* note 63, at 521, 536, 555, 558.

137. Brussels Declaration *reprinted in* Schindler & Toman, *supra* note 48, at 28.

138. DAVIS, *supra* note 90, at 133.

139. *Id.* at 133. The text of article 13g reads: “Any destruction or seizure of the enemy’s property that is not imperatively demanded by the necessity of war [is forbidden].” Schindler & Toman, *supra* note 48, at 29.



at sea and on land) be considered by another division of the conference. Not surprisingly, this had no effect on the laws of land warfare.<sup>140</sup>

While he may have been understating Mahan's role, Crozier's self-analysis was correct when he later wrote that:

Mahan and I have had little or no constructive work, that has nearly all fallen to the lot of the people attending to arbitration, but we have had to be constantly on guard that something unfavorable to the United States should not find its way into agreements. Sentinel duty is fatiguing.<sup>141</sup>

The lack of any real United States contribution to the "laws of land warfare" debate, is not all that surprising for three reasons. First, as mentioned above, the "instructions" failed to discuss the United States' objectives regarding the laws of land warfare which reveals that either the author (i.e., David Jayne Hill) did not grasp that agenda item or this was not an area of interest to the United States.<sup>142</sup>

Second, Crozier was clearly selected based on his qualifications as the inventor of a gun carriage, wire wrapped rifle, and an improved ten-inch gun, not for being a lawyer.<sup>143</sup> Some believe that Crozier's selection revealed a conscious decision by the Department of State to ensure that "decisions at The Hague restricting improvement of war equipment should not hinder the military development of the United States."<sup>144</sup> While his efforts in the armaments debates (first commission) were noteworthy, his lack of legal background or preparation for the discussions surrounding the laws and customs of war is embarrassing. In fact, his lack of legal interest and preparation was glaringly revealed when he telegraphed the adjutant general on 13 June (almost a month into the conference) and asked that a copy of the Lieber Code be sent to him.<sup>145</sup>

Finally, as a mere army captain, he held the lowest rank of any of the primary military delegates. One may conjecture that his exclusion from one informal meeting with respect to the Dum Dum bullet debate was very

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140. PROCEEDINGS 1899, *supra* note 63, at 491-93.

141. DAVIS, *supra* note 90, at 136.

142. *See supra* note 129 and accompanying text.

143. FREDERICK W. HOLLS, THE PEACE CONFERENCE AT THE HAGUE AND ITS BEARINGS ON INTERNATIONAL LAW AND POLICY 40-41 (1900).

144. DAVIS, *supra* note 90, at 132.

145. *Id.* at 132.

likely the result of his lack of rank and may have been evidence of a conference-wide problem as well.<sup>146</sup>

Regardless of the cause, the United States did not play a major role in developing Convention II with Respect to the Laws and Customs of War on Land and the annexed regulations. While it is true that only minor modifications from Brussels were made,<sup>147</sup> this seems like a further case of the United States abdicating what power it may have had to affect the rules of land warfare.

### C. The United States and Hague Convention IV, 1907

The final forum for debating and altering the laws of war during this epoch and within The Hague “stream” of international law, was the Second Hague Peace Conference of 1907. By this conference, it appears the United States had finally learned most of the lessons from 1874 and 1899. Specifically, it did attend the conference and it did send a very qualified and high ranking army officer as a delegate. The results, however, were similar.

Although in 1904 the United States had suggested holding a second peace conference,<sup>148</sup> it was not until the termination of the Russo-Japanese War, that Russia proposed another meeting at The Hague.<sup>149</sup> In April 1906, the Russians issued a “programme of the contemplated meeting” which included four items, one of which was the consideration of “[a]dditions to be made to the provisions of the convention of 1899 relative to the laws and customs of war on land . . . ”<sup>150</sup>

For a year after the issuance of the proposed agenda, there was significant diplomatic discussion regarding the issue of disarmament which delayed the selection of a conference date. During this period, the United

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146. HOLLIS, *supra* note 143, at 38-52, 103-104.

147. As mentioned earlier, a detailed comparative analysis of the 56 article Brussels Declaration and the 60 article Hague Convention II reveals that notwithstanding minor revisions, only eight articles were newly created at the Hague in 1899 and only two Brussels' articles were abandoned. *See supra* note 64 and accompanying text.

148. DAVIS, *supra* note 118, at 111-12.

149. 2 FRUS 1906, *supra* note 49, at 1629-31. *See also* DAVIS, *supra* note 118, at 123.

150. 2 FRUS 1906, *supra* note 49, at 1629-31. The other items were: (1) improvements to the convention relative to the peaceful settlement of international disputes regarding the court of arbitration and international commissions of inquiry; (3) a convention relative to the laws and customs of naval warfare; and (4) additions to the convention of 1899 for the adaptation of the Geneva Convention of 1864 to maritime warfare. *Id.*

States began announcing the members of its delegation. The top delegate, Joseph Hodges Choate, who was often called the “head of the American Bar,” was clearly a “good choice.”<sup>151</sup> Horace Porter, Uriah Rose, and David Jayne Hill completed the civilian portion of the delegation and the military delegates were Admiral Charles Sperry and General George B. Davis.<sup>152</sup>

Davis, as the army representative who would attend the meetings related to the laws of land warfare, stood in sharp and impressive contrast to Crozier in the first conference. After enlisting at age sixteen and serving in the Civil War, he graduated from West Point in 1871 as a cavalry officer.<sup>153</sup> He later joined the Judge Advocate Corps in 1888 and his service as a professor of law at his *alma mater* provided him the opportunity to write extensively on the subjects of military and international law, including the laws of war.<sup>154</sup> His books were all considered “standards in [their] respective branches.”<sup>155</sup> In 1901 he was promoted to the rank of Brigadier General and was assigned as the Judge Advocate General of the Army, a position he held for ten years, during which time he served as the legal advisor to the Secretary of War and as a delegate not only to the second peace conference, but also to the Geneva conferences in 1903 and 1906.<sup>156</sup> Undoubtedly he was as qualified a military delegate that the United States could have sent to The Hague.

On 20 April 1907, ten days after the date of the conference was finally determined, the United States delegation met to discuss the positions they ought to take, the only meeting of the entire delegation “for which a record exists.”<sup>157</sup> While unable to find the minutes of that meeting<sup>158</sup> which historian Calvin Davis used in his book on the subject, his synopsis makes no

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151. DAVIS, *supra* note 118, at 125.

152. *Id.* at 125-128.

153. FORTY-SIXTH ANNUAL REUNION OF THE ASSOCIATION OF GRADUATES OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, NEW YORK, JUNE 11TH 1915, at 129-30 (USMA Association of Graduates ed., 1915) [hereinafter USMA REUNION 1915].

154. *Id.* at 131-33.

155. *Id.* at 133. Additionally, one of his texts, revised and issued after his death, located in the Yale Law School Library included evidence of his standing in the legal community. GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW, WITH AN ACCOUNT OF ITS ORIGIN, SOURCES, AND HISTORICAL DEVELOPMENT inscription, back inside cover (Gordon E. Sherman ed., 4th ed. 1916). Specifically, Simon Baldwin, the head of the Yale Law School handwrote a note to the editor that “it is a tribute to his memory that you found so few changes necessary.”

156. USMA REUNION 1915, *supra* note 153, at 135-36.

157. DAVIS, *supra* note 118, at 173.

mention to the laws of land warfare. In contrast, “questions about the use of sea power in war received more attention than [any other issue].”<sup>159</sup> This emphasis on sea power and the neglect of issues related to land warfare was, one will see, similarly evident in the delegation’s “instructions,”<sup>160</sup> and seems to confirm the view that the United States saw itself as a naval power. While beyond this article’s scope, an analysis of the effect of the United States’ self-perception as a naval and not a land power on defining its role in the development of the laws of land versus naval warfare clearly is an area ripe for further research.

Immediately following this meeting, Elihu Root, the Secretary of State, began to write the “instructions to the American delegates.”<sup>161</sup> While they were four times as long as those for the first conference, the lack of discussion in the preparatory meeting on the subject of the law of land warfare was mirrored by a dearth of guidance in the official instructions. When they were finally issued, after the delegates had left for The Hague, the instructions referring to the laws of land warfare, stated in their entirety:

Since the code of rules for the government of military operations on land was adopted by the First Peace Conference there have been occasions for its application under very severe conditions, notably in the South African war and the war between Japan and Russia. Doubtless the powers involved in those conflicts have had the occasion to observe many particulars in which useful additions or improvements might be made. You will consider their suggestions with a view to reducing, so far as is practicable, the evils of war and protecting the rights of neutrals.<sup>162</sup>

It is this short and vague passage, characteristic of the United States’ apparent lack of interest in the laws of land warfare, and not General Davis’ seemingly exceptional legal qualifications and military rank, that

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158. Calvin Davis’ footnote says “Minutes, Am. Commission Apr. 20, 1907, pp. 1-4” yet research uncovered no bibliographic reference to such a source. DAVIS, *supra* note 118, at 170 n.2.

159. DAVIS, *supra* note 118, at 171.

160. See *infra* note 161 and accompanying text.

161. 2 FRUS 1907, *supra* note 119, at 1128-44.

162. *Id.* at 1137.

presaged the passive role that he, and therefore the United States, took during this conference.

It was the first subcommission of the second commission that dealt with the laws of land warfare. Because “[t]here was general agreement that the 1899 Convention [II] Concerning the Laws and Customs of War on Land had proved satisfactory,” they were able to complete their enterprise in three working meetings over a three week period.<sup>163</sup> As mentioned earlier there were “no material changes” to Convention II.<sup>164</sup> While a review of the subcommission transcripts indicates that some countries’ delegates did participate actively by proposing amendments and debating possible changes, General Davis did not speak once during the any of the deliberations.<sup>165</sup> As Calvin Davis writes:

Throughout the deliberations of the subcommission [Davis] had nothing to say. His silence was perhaps unfortunate, for no delegate knew more than he of the development of the laws of war during the American Civil War; the analysis of the 1899 convention [II] which he had prepared for his delegation would have proved useful to the delegates of other nations.<sup>166</sup>

Davis’ inactivity, which seemed to be foreshadowed by his instructions, meant that for the third conference, the United States did not contribute to the development of the laws of land warfare.

The fact that only minor changes were made to Convention II of the 1899 Hague Peace Conference,<sup>167</sup> demonstrating the existence of a consensus among participants, might vindicate the United States’ indolence. This theory, while perhaps merited in explaining a single instance of quiescence, is, however, unsatisfying if applied to each and every conference, for it fails to effectively capture the multiple factors which seem to have contributed to its passivity during this epoch.

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163. Davis, *supra* note 118, at 200.

164. *See supra* note 53 and accompanying text.

165. 3 PROCEEDINGS OF THE HAGUE CONFERENCES: THE CONFERENCE OF 1907, MEETINGS OF THE SECOND, THIRD, AND FOURTH COMMISSIONS 97-144 (Div. of Int’l Law of the Carnegie Endowment for Int’l Peace trans., James Brown Scott ed., 1920) [hereinafter 3 PROCEEDINGS 1907].

166. DAVIS, *supra* note 118, at 207.

167. *See supra* note 53 and accompanying text.

## VI. Conclusion

The United States' repeated failure to use what power it had in 1874, 1899, and 1907 to affect the evolution of the laws of land warfare clearly had multiple causes. First, there was the failure to even attend the Brussels Conference due to either tardiness of invitation or aversion to "entangling alliances."<sup>168</sup> In 1899 it was the possible misreading of the czar's circular<sup>169</sup> and the assignment of a low ranking armaments inventor rather than a legal scholar as the military delegate.<sup>170</sup> The lack of effective conference preparation or instructions<sup>171</sup> and the United States' self-perception as a naval and not a continental power<sup>172</sup> had an impact in both Hague conferences. While ascertaining the proportional impact of each of these factors may be difficult, the net effect is indisputable and contrary to what Telford Taylor implied in his Forward to *The Law of War: A Documentary History*.<sup>173</sup> Specifically, following the publication of Lieber's code as General Orders 100 in 1863, the United States did not effectively contribute anything to The Hague Laws relating to land warfare as they evolved during this period.

While the case of the United States may seem simplistic given its inactivity in these three conferences, it does provide both an insight into the United States' outlook, interests and behavior during this period, and is a good illustration of what scholars can accomplish with the "laws of war-family tree" firmly established.<sup>174</sup>

The conference records are detailed enough for historians or political scientists to easily select any state, non-state or individual actors and examine their particular role in the evolution of laws of land warfare. Having gleaned such information from the historical record, one could determine how a country's relative power in the world was put to use in the development of the laws of war. While these conferences were consensus forums, one might fairly hypothesize that the greater a state's power the more influence they possessed in the conferences. Additionally, one might examine how a state's self-image as a naval or continental power, status quo or revisionist power, rising or falling power, affected its interests and

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168. See *supra* notes 103-114 and accompanying text.

169. See *supra* notes 129-130 and accompanying text.

170. See *supra* notes 127, 143-146 and accompanying text.

171. See *supra* notes 128-129, 157-162 and accompanying text.

172. See *supra* notes 157-160 and accompanying text.

173. See *supra* note 10 and accompanying text.

174. See *Genealogy*, *supra* note 46.

behavior. Furthermore, one could ascertain what other factors such as just completed wars (e.g., the Franco-Prussian War before Brussels, the Spanish-American War before the 1899 Hague Conference, or the Russo-Japanese War before the 1907 Hague Conference) or existing and prospective alliances may have affected these conferences. These are just a few of the insights that this analysis may provide.

This article reveals a number of areas ripe for further historical research. Above all else, given this “family tree,” similar analyses can and should be done for other individuals (e.g., de Martens), non-state (e.g., Red Cross) or state (e.g., Great Britain) actors. Of particular note, one must ask why Russia played such a dominant role during this epoch.<sup>175</sup> Given the dearth of material on the subject, the Brussels Conference of 1874 appears to be the most promising subject for future inquiry. Lastly, a comparison between the United States Army and Navy regarding their outlook and preparation for these conferences is intriguing.

Proof of a “family tree” contributes to international law as well. Given that the link between codes is in fact explicit and sequential (i.e., each code did serve as the basis for subsequent codes), the *travaux préparatoires* of Hague Convention IV (1907) logically includes the entire history from the Lieber Code forward. Furthermore, this research affirms that the practices codified in Convention IV were “both extensive and virtually uniform” for many years.<sup>176</sup> As noted in the introduction, this more comprehensive historical analysis regarding the durability and depth of The Hague Law’s roots can only help to enhance the legitimacy and strength of the laws themselves. Lastly, while the United States did not play, as some assert, the “leading role in the codification of the laws of war”<sup>177</sup> the fact that the Lieber Code is the “root” of this family tree of laws, does matter and may contribute modestly to U.S. military lawyers’ ability to more

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175. BEST, *supra* note 2, at 346 n.44.

176. JANIS, *supra* note 9, at 46.

177. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xxii.

effectively communicate the “gravity and preeminence” of particular norms to their commanders.<sup>178</sup>

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178. Reisman & Leitzau, *supra* note 13, at 5-6.