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# Is IHL a Sham? A Reply to Eyal Benvenisti and Doreen Lustig

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## Abstract

*This contribution is inspired by the thought-provoking article ‘Monopolizing War’ by Eyal Benvenisti and Doreen Lustig. My Reply argues that early 19th-century IHL codification projects in the eyes of European governments did not primarily serve domestic anti-revolutionary purposes. It also takes a somewhat sceptical stance as to the recent scholarly trend, which reduces historical explanations for the development of international law to domestic contexts in one or more powerful states involved in the respective law- and policy-making process. Building on the intriguing historical critique of early IHL’s ‘humanizing substance’ developed in ‘Monopolizing War’ and by referring to more recent IHL codification projects (small arms, nuclear weapons, aerial bombing, autonomous weapons), the second part of the contribution sketches four ‘de-humanizing’ discursive strategies, which arguably haunt international humanitarian law-making until today: (i) cynical window dressing; (ii) constructing an ontological wall; (iii) utilitarian reasoning; and (iv) excluding the periphery.*

## 1 Introduction

In 1899, after the official termination of the First Hague Conference, *The London Times* commented on the results of what is often seen as a late 19th-century diplomatic breakthrough in adopting a set of legal rules aimed at preventing and restraining war between nations:

The Conference was a sham and has brought forth a progeny of shams, because it was founded on a sham. We do not believe that any progress whatever in the cause of peace, or in the mitigation of the evils of war, can be accomplished by a repetition of the strange and humiliating performance which has just ended.<sup>1</sup>

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<sup>1</sup> Quoted in J. H. Choate, *The Two Hague Conferences* (1913), at 56.

Many activists and progressive journalists were indeed disappointed with the meagre results of the conference, in particular in the field of disarmament, the prohibition of war and compulsory jurisdiction in case of international disputes. The way in which the governments from Europe's great powers put their national military interests first in the negotiations created revulsion and distrust among many civil societal activists and diplomats from smaller states. The chief German delegate had towards the end of the negotiations conceded that, also due to the intransigence of his own delegation, the result of the First Hague Conference resembled a 'fiasco' compared to the expectations raised by the initiators, and that what was at least needed was a 'peaceful-looking cloak' to cover the enormous gap between expectations and results.<sup>2</sup>

Regarding the rules of international humanitarian law (IHL) drawn up during the two conferences, the reactions among observers were more mixed. As a matter of fact, during the two Hague Conferences in 1899 and 1907,<sup>3</sup> states agreed or re-affirmed basic rules defining this field of international law, including its fundamental principles, such as duties of the belligerents to protect civilians during and after military conflicts, basic protections for prisoners of war and the prohibition of specific military operations and modes of combat deemed to cause 'unnecessary' suffering on the battlefield.

A substantial part of the rules adopted at the two multilateral conferences had been considered part of international customary law by international legal experts before 1899 and had been the object of at least partially successful codification attempts in the second half of the 19th century. Historical accounts of these legal developments tend to refer to the Paris Declaration Respecting Maritime Law (hereinafter 'Paris Declaration') (1856), the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (hereinafter 'Geneva Convention') (1864), the Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles (hereinafter 'St. Petersburg Declaration') (1868) and the first more comprehensive Project of an International Declaration Concerning the Laws and Customs of War (hereinafter 'Brussels Declaration'), the latter including, inter alia, rules on the participation and protection of civilians in warfare (1874).

It is this pre-history of the Hague Conferences which is being told in the illuminating article 'Monopolizing War' by Eyal Benvenisti and Doreen Lustig.<sup>4</sup> The topics of the four conferences and their respective legal or political outputs are quite diverse, ranging from neutrality rules in sea warfare (Paris Declaration) to the prohibition of explosive rifle bullets

<sup>2</sup> C. D. Davis, *The United States and the First Hague Peace Conference* (1962), at 88. "Gaps" between civil-society expectations and the results, as well as associated diplomatic and legal strategies in the field of disarmament and international humanitarian law, constitute the main focus of a current research project led by Andreas Hasenclever and the author in the framework of the German Research Foundation's Collaborative Research Centre 923 "Threatened Orders" at the University of Tuebingen. See <https://uni-tuebingen.de/forschung/forschungsschwerpunkte/sonderforschungsbereiche/sfb-923/projekte/mobilisierung-f/r07internationale-ordnung/>.

<sup>3</sup> Paris Declaration Respecting Maritime Law (Paris Declaration) 1856, Martens Nouveau Recueil Generale des Traites, xv, 791; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva Convention) 1864, 129 CTS 361; Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles (St Petersburg Declaration) 1868, 138 CTS 297; Project of an International Declaration Concerning the Laws and Customs of War (Brussels Declaration) 1874.

<sup>4</sup> Benvenisti and Lustig, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874', 31 *European Journal of International Law (EJIL)* (2020) 127.

(St. Petersburg Declaration), to rules on bombardment of open and defenceless towns and the potential prisoner-of-war status of civilians taking up arms against an invading foreign army (Brussels Declaration). The authors claim that the move to codification in the field of international law was not primarily an attempt to mitigate the effects of violence on European battlefields, but a re-assertion of governmental authority in an age of civil unrest, revolutions and rising nationalism. By way of a sophisticated historical reconstruction, the authors develop an alternative overarching narrative regarding these supposedly foundational events of international humanitarian law-making. In their view, the main governmental motivation for co-operation in these pre-Hague conferences was to stabilize the internal political orders against socialist and nationalist movements. Humanitarian motives of civil society actors at each conference could eventually be pushed aside by 'key' European governments and served as a camouflage for internal restorative purposes. Benvenisti and Lustig's approach resonates with recent works in international legal history that try to explain developments in international law-making by particular domestic circumstances in the states at the forefront of new legal developments.

Despite the fact that the depiction of the move to humanitarian law as a domestic restorative practice of 19th-century European governments does not come across with full conviction, the article is a highly stimulating read and conveys a wealth of interesting historical insights and raises highly important questions regarding the value and significance of international humanitarian law-making. IHL can, indeed, serve as camouflage for, or legitimation of, excessive violence, and international humanitarian law-making inevitably entails the reproduction of a potentially violent nation-state-based order. And, indeed, the question of why international humanitarian law-making often ends up legitimizing specific forms of warfare, rather than effectively restraining violence, haunts the field until this very day. But before addressing the broader question of whether and to what extent IHL can be considered a 'sham' – that is, a body of norms without, or at least without enough, 'humanizing substance' – let me turn to the specific Benvenisti–Lustig narrative of IHL as an internal restorative practice first.

## 2 Reading 19th-Century IHL Norms from Paris to Brussels as an Anti-Revolutionary Strategy?

In a sense, a broader narrative of 19th-century international law as a restorative practice has a more conventional undertone than Benvenisti and Lustig's article seems to imply. At least for the first decades of the 19th century, mainstream historians used the term 'restoration' in order to depict the era of the so-called 'Holy Alliance' led by the Austrian Foreign Minister Klemens von Metternich. What, in the eyes of Metternich and his great power counterparts, was called the 'European Concert System', developed after the Vienna Congress, primarily served the purpose of preventing revolutionary and bellicose upheavals and wars similar to those which had swept through Europe in the Napoleonic era.<sup>5</sup> The monarchies involved in the Holy Alliance were

<sup>5</sup> On this era, see Lev, 'The Transformation of International Law in the 19th Century', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011) 111, at 121–128.

afraid of the new enigmatic amalgam of liberalism and nationalism threatening the old order of the dynastically shaped European state-system. Increased cooperation was seen by Metternich as an important instrument to confront revolutionary tendencies on the continent and to preserve the old monarchical order, if necessary, by joint armed intervention. From this perspective, however, the problem with the IHL-as-internal-restoration argument, as suggested by Benvenisti and Lustig, is that this repressive and restorative phase of the self-proclaimed ‘Holy Alliance’ during the 1850s was already beginning to belong to a bygone era. This is perhaps also the reason why the authors do not embed their argument in this post-Vienna context. The central arguments supporting the narrative are, instead, the following: firstly, the rules adopted at the above-mentioned pre-Hague Conferences predominantly helped to stabilize European governments in the face of civil unrest at home; and secondly, this first set of rules at a closer look had too little, if any, ‘humanizing substance’.

Hints provided by the authors sustaining the first argument are, *inter alia*, the contents of those new rules, which protected the sovereignty of the occupied state, including its legal system and private property. These rules of occupation indeed had a stabilizing function for the occupied society during and after war, but this set of rules was applicable only in the highly exceptional and usually momentary situation of foreign occupation. They had no relevance for internal revolutions in times of peace. From these norms alone it can hardly be inferred that the first IHL conferences were conducted for internal restorative purposes.

A further historical policy move analysed as evidence by Benvenisti and Lustig is the reluctance of some governmental representatives in Brussels in 1874 to give all civilians taking up arms against a foreign army the full protection of the new set of norms protecting regular soldiers. To construe, based on the German representative’s intransigence in Brussels on that issue, however, that the Brussels Conference had generally been instrumentalized as an anti-revolutionary event, inspired by the fear of European governments that someone at home could ‘put a gun on every socialist’s shoulder’, might overstretch the historical evidence presented. Again, these rules were designed for the exceptional situation of participation of civilians in an inter-state war. And, more importantly, the deliberations in Brussels, and the compromise finally reached, did not rule out that civilians taking up arms against foreign troops could have prisoner-of-war status. The Brussels Declaration is the first international document that actually provides for prisoner-of-war status for civilians taking part in inter-state war.<sup>6</sup> To argue that some of the norms debated at these conferences were imposed by great powers in order to exclude allegedly undisciplined civilian fighters from battlefields and zones of occupation is one thing; to portray these pre-Hague IHL conferences as being predominantly concerned with internal revolutions is quite another.

<sup>6</sup> Brussels Declaration, *supra* note 3, Arts 9–11. See in particular the wording of Article 11: ‘The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy, both shall enjoy the rights of prisoners of war.’

While the Benvenisti–Lustig argument provides us with a fresh ‘reasons for international law-making are domestic’ perspective on the birth-period of modern IHL, the various insightful historical hints sustaining the restorative argument do not add up to a new encompassing narrative of the pre-Hague era. And while the ‘reasons for international law-making are domestic’ approach, in general, promises a more differentiated historical analysis, it also comes with the danger of oversimplifying the complex discursive structures leading to new normative expectations in international relations.<sup>7</sup> A historical focus on the domestic politics of one or two powerful nations also tends to underrate the influence of coalitions of opposing smaller states on multilateral norm-creation processes. In every historical work, there is inevitably a temptation to assimilate historical evidence into one’s own *Vorverständnis* (prior understanding) of a certain era, or into a grand narrative – a temptation that finds its methodological limits in the available historical sources. The Brussels Declaration is a good example of a document that was decisively shaped by numerous diverging interests of great powers *and* small states, between empires and non-empires, by different systems of conscripting and organizing military forces, public expectations, as well as by significant differences in armaments and industrial capabilities. Playing out in internal instructions from the capital and in complex, formalized negotiations in Brussels, most of these interests were of a military or foreign policy nature and were not primarily related to potential or past internal rebellions, such as the experiences with the Paris Commune.

Somewhat surprising is that a contribution that interprets the move to codification in IHL as a re-assertion of governmental authority in an age of civil unrest and revolutions makes so little of the contemporary international legal regime of civil wars. All the more so since the second half of the 19th century is considered as the golden age, if there ever was one, of the institute of belligerency and neutrality during civil wars. In a nutshell, this legal regime foresaw an ‘internationalization’ of an on-going internal rebellion or civil war through a recognition of ‘belligerency’ triggering the application of IHL (including prisoner of war status) and neutrality rules prohibiting external intervention. The institute of ‘belligerency’ thus came with legal privileges for rebellions that in terms of intensity and scale had passed the threshold demarcating a mere insurgency from that of belligerency (civil war). Today, most international legal scholars hold that the institute of belligerency has – perhaps unfortunately, taking into account the slaughtering in Syria – fallen into desuetude after World War II; and with it, its constraining potential for internal and external participation in civil wars.

<sup>7</sup> Samuel Moyn’s *The Last Utopia* (2010), quoted by Benvenisti and Lustig, arguably rather one-dimensionally explains the global move to human rights in the 1970s as a domestically inspired US discourse going global under the Carter Administration.

### 3 Where Did IHL Lose Its ‘Humanizing’ Substance or Did It Never Have One?

A critical claim made in ‘Monopolizing War’ is that a considerable number of norms adopted at these pre-Hague conferences were devoid of a ‘humanizing substance’. New rules ‘prohibited so little’ and allowed so much that they only demonstrated the reluctance of governments to constrain themselves on the battlefield. Explosive bullets had been prohibited, while other forms of ammunition were declared legal in St. Petersburg.<sup>8</sup> Moreover, according to Benvenisti and Lustig, the Geneva Convention of 1864 had shifted the responsibility to take care of the wounded on Western battlefields to the Red Cross, rather than insisting on governmental responsibility for the soldiers,<sup>9</sup> and in Brussels the protection of civilians against bombardments had remained insufficient.<sup>10</sup> It is one of the numerous merits of this elegantly written contribution that it helps to deconstruct heroic progress narratives in the field of IHL. Benvenisti and Lustig here follow in the acknowledged footsteps of other authors who have shown how many of the IHL rules finally codified at the two Hague Conferences had been watered down to meaninglessness, or by design remained inefficient in curbing the evils of war.

In a seminal 1994 *Harvard International Law Journal* article on the history of IHL norms from 1899 onwards, Jochnick and Normand made the argument that, by producing inefficient norms, codified IHL from the very beginning helped to legitimize excessive violence instead of mitigating or prohibiting it.<sup>11</sup> Benvenisti and Lustig extend this argument to the pre-Hague era with new and convincing historical evidence. From the examples referred to by Benvenisti and Lustig and prior historical work on the development of IHL norms, four de-humanizing discursive strategies can arguably be discerned, which haunt international humanitarian law-making until today: (i) cynical window dressing (Section 3.A); (ii) constructing an ontological wall (Section 3.B); (iii) utilitarian reasoning (Section 3.C); and excluding the periphery (Section 3.D).

#### A Cynical Window Dressing

Benvenisti and Lustig refer to the act of what can be called ‘cynical window dressing’ in the negotiations on the St. Petersburg Declaration. While the new prohibition on specific flaming and explosive bullets in the final document was hailed as a great success, an initial and much more far-reaching Prussian proposal to ban all weapons that needlessly aggravated the suffering of soldiers had been rejected.<sup>12</sup> Other historical research on the prohibition of explosive bullets has pointed to the fact that, at the

<sup>8</sup> Benvenisti and Lustig, *supra* note 4, at 142–144.

<sup>9</sup> *Ibid.*, at 139–141.

<sup>10</sup> *Ibid.*, at 161–164.

<sup>11</sup> Jochnick and Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’, 35 *Harvard International Law Journal* (1994) 49. On law as an ethical or political vocabulary for claiming legitimacy in military operations, see D. Kennedy, *Of War and Law* (2006), at 39, 14.

<sup>12</sup> On the Prussian proposal, see Benvenisti and Lustig, *supra* note 4, at 144.

time of negotiations, the military significance of this specific form of ammunition was marginal at best, because it involved too many security risks for the soldiers using it.<sup>13</sup> It has been a general pattern in IHL codification up until today that only those weapons that, for most of the participating governments and their military experts, have become irrelevant or useless in future armed conflicts will be readily prohibited by a new law. Another example are successful disarmament negotiations or moratoria on weapons that either are not yet ready to be used for military purposes, such as the pre-World War I moratorium on aerial bombing, or have lost their usefulness in war because of the development of new weapons. Such prohibitions in international conventions can be presented to civil society actors and the interested public as a great success and a 'progress of civilization' without having any humanitarian impact.

Conversely, weapons that have reached a stage of development and potential usefulness in future wars for one or more governments, like airplanes in the inter-war period, will either not be banned at all or only prohibited by those states that do not have the industrial capabilities or financial means to acquire them. States in possession of the weapon or a related weapons program will usually block negotiations on a ban or not ratify the relevant instruments. Too many resources have been invested in the development of the new weapon, and too many political and military goals are attached to its potential use. The result in practice is a sort of 'weapons determinism': once invented and produced by one state, the new weapon will ultimately be used by all states that can afford it.<sup>14</sup> And after the legal discourse has been moved from an initial (unsuccessful) debate on a complete prohibition to one on regulating the use of a new weapon, the related new forms of violence inevitably become *legal* elements of military practice. The move from absolute prohibition of a weapon to regulating its distribution or use in the absence of compulsory jurisdiction places IHL at a 'vanishing point' of international law.<sup>15</sup> What we are thus indeed often left with is 'window dressing' or, more concretely, a set of specific rules which legitimize excessive violence rather than constraining it.<sup>16</sup> The on-going negotiations on automated weapons systems are a case in point.<sup>17</sup>

## B Constructing an Ontological Wall

IHL law-making to both prohibit specific weapons and to alleviate suffering during and after military conflicts often seems to encounter an invisible discursive wall, which blocks its humanitarian potential. As long as international law is conceived of as a law

<sup>13</sup> Jochnick and Normand, *supra* note 11, at 66.

<sup>14</sup> Isabel Hull has used the term 'weapons positivism' in order to describe the attitude of German military experts and international lawyers before and during World War I. See I. Hull, *A Scrap of Paper* (2014), at 265. I view 'weapons determinism' as a general discursive pattern in IHL.

<sup>15</sup> Lauterpacht, 'The Problem of the Revision of the Law of War', 29 *British Yearbook of International Law* (1952) 360, at 381–382: 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.'

<sup>16</sup> See Jochnick and Normand, *supra* note 11, at 56.

<sup>17</sup> On this (depressing) debate, see N. Bhuta et al. (eds.), *Autonomous Weapons Systems: Law, Ethics, Policy* (2016).

between sovereign nation states, the existence or ‘survival’ of a nation-state remains a presupposed meta-value, which allegedly cannot be transcended. In 19th-century continental European international legal discourse, this idea finds its expression in the notion of the ‘fundamental right of states to self-preservation’. From this notion it follows that every new weapon and every military practice, even the most inhumane, could potentially be used to secure the survival of a nation-state, and thus be deployed for a purpose that helps to realize the conceived meta-value of national existence. As a consequence, any attempt to prohibit new weapons and the practice of slaughtering soldiers and civilians, called an ‘armed conflict’, can be countered by insisting on the inherent or ontological necessity of states to preserve their existence. War in that sense is always an option, and the possession of ‘modern’ weapons is inherently legitimate; a complete legal ban in turn becomes inconceivable. That this is not only an archaic 19th-century discursive structure but is still very much part of present-day international legal discourse was testified to in the ICJ *Nuclear Weapons Advisory Opinion* of 1996. The ICJ stopped short of declaring a complete prohibition of the use of nuclear weapons in the following (in)famous quote: ‘[the Court] cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.’<sup>18</sup>

Another recent example is the cherished multilateral ‘small arms treaty’ which was concluded to suppress the proliferation of small arms. During the negotiations, a complete prohibition of trade in small arms was blocked by the argument that for legitimate self-defence and for the protection of the internal order of states, international trade in small arms must in principle be allowed.<sup>19</sup> Hence, the main goal of the instrument to prevent the proliferation of small arms, including to conflict zones, could not be curbed by the treaty; it continues to be on the rise.<sup>20</sup> Speaking of the second half of the 19th century, Benvenisti and Lustig demonstrate the unwillingness of European governments to ‘agree on constraints over the exercise of violence, either in 1864 or in 1868’.<sup>21</sup> Relying on the ontological discursive structure outlined above, governments to this day manage to block or reframe humanitarian initiatives advanced through the medium of IHL in a way that depletes new norms of their humanitarian substance.

<sup>18</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. (1996) 226, at 263, para. 97.

<sup>19</sup> See Preamble to the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Report of the United Nations Conference, 9–20 July 2001, at 7: ‘Reaffirming ... the right of each State to manufacture, import and retain small arms and light weapons for its self-defence and security needs ...’ (emphasis added).

<sup>20</sup> See UN Security Council, Report of Secretary General on Small Arms and Light Weapons, 30 December 2019, UN Doc. S/2019/1011, stating that: ‘Civilians own more than 850 million firearms worldwide, vastly outweighing the number estimated to be owned by the military and law enforcement sectors combined’ (emphasis added).

<sup>21</sup> Benvenisti and Lustig, *supra* note 4, at 144.



### C Utilitarian Balancing

The second de-humanizing strategy prevalent in the field of IHL is utilitarianism. On a meta level, IHL as a field of international law seems to rest on a utilitarian calculus. War is considered a reality in international relations and by regulating methods of warfare and prohibiting unnecessary violence on the battlefield these rules will on balance reduce suffering, even if the price is to legalize extremely violent practices in the first place. As a consequence, the concept of war as an absolute evil promoted by radical pacifism is excluded or made invisible in the discursive practice called IHL. In the Preamble of the Declaration of St. Petersburg referred to by Benvenisti and Lustig, we find this rationale famously expressed:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity . . .<sup>22</sup>

According to this rationale there is ‘necessary’, and therefore lawful, violence with the aim to ‘disable the greatest possible number of men’ and other violence, which is unnecessary and therefore ‘contrary to the laws of humanity’.<sup>23</sup> The contradicting values of necessary violence to conduct war on the one hand (‘military necessity’) and ‘alleviating the calamities of war’ on the other have been part and parcel of codification projects in the field of IHL ever since. Another aspect of this basic discursive constellation is that new and ever more deadly weapons can always be justified as a more ‘efficient’ and thus more ‘humane’ way of ‘weakening the military forces of the enemy’ in the shortest time possible.<sup>24</sup> Hence the 20th-century moral justifications both for ‘chirurgical’ drone attacks as being more precise and for massive bombardments forcing the enemy to surrender, with both these forms of blowing human beings to pieces ‘on balance’ allegedly ‘saving’ lives.

In the early pre-World War I phase analysed by Benvenisti and Lustig, the guiding approach is to identify ‘unnecessary’ violence and to prohibit related practices by bright-line rules. The calculus (balancing) between ‘military necessity’ (*Kriegsraison*) and ‘alleviating the calamities of war’ (*Kriegsmanier*) is being made in negotiations, and the result has usually been a clear prohibition that every *military* expert at the conference table could agree on. After the two world wars, however, a new set of IHL norms delegated the balancing act to the military commanders on the battlefield. Bright-line rules in some areas turned into broad and flexible rules, which now required a concretization of proportionality requirements on the battlefield. Governmental experts

<sup>22</sup> See St. Petersburg Declaration, *supra* note 3.

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

<sup>24</sup> *Ibid.*

with these new flexible rules now arguably pushed IHL even beyond Lauterpacht's 'vanishing point' of international law.

Benvenisti and Lustig are very critical of the first pre-Hague IHL norms as compared to later post-war developments in IHL, and in particular of Article 15 of the Brussels Protocol which prohibited the bombardment of open and defenceless cities, villages and settlements.<sup>25</sup> This rule (the Brussel's Protocol was never ratified), however, was a bright line rule, which almost literally became part of codified IHL rules in the first Hague Conference in 1899.<sup>26</sup> More often than not it was disregarded by first the Axis powers and then in response by the Allies during World War II executing devastating 'morale bombing' campaigns on large cities with dubious legal justifications.<sup>27</sup> Post-World War II legal developments in IHL law-making in 1977 made the bright-line prohibition subject to a balancing act between military advantages and civilian casualties.<sup>28</sup> The Western German representative at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974–1977) even stated that the respective new (balancing) rule against indiscriminate bombardments of civilian areas did not rule out any specific weapon to be used for such bombardments, including nuclear weapons.<sup>29</sup> From this perspective, the 20th-century set of rules, even though plagued by inhumane utilitarian reasoning in its creation, at least had created a certain number of absolute legal prohibitions, some of which unfortunately over time have been replaced by new 20th-century norms allowing for utilitarian balancing in their application.

<sup>25</sup> 'Fortified places are alone to be sieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded': see Brussels Declaration, *supra* note 6, at 29.

<sup>26</sup> See Hague Regulations Respecting the Laws and Customs of War on Land of 1899, Art. 25: 'The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited.' This rule was supplemented by the addition 'by whatever means' in 1907 in order to enclose aerial bombardment, see M. W. Roysse, *Aerial Bombardment and the International Regulation of Warfare* (1928), at 113.

<sup>27</sup> By claiming to have targeted a military objective by drawing an analogy to Article 2 of the Hague Convention on Bombardment by Naval Forces of 1907, see, e.g., Kriege, 'Die völkerrechtliche Beurteilung des Luftkriegs im Weltkrieg', in J. Bell (ed.), *Völkerrecht im Weltkrieg*, Band IV (1927), at 97. For this insight regarding the inter-war debates on aerial warfare, I am indebted to Enno Mensching, senior researcher in the above-mentioned Collaborative Research Centre 923 'Threatened Orders' at the University of Tübingen, who works on the legal regulation of aerial warfare in the 19th and 20th centuries.

<sup>28</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51, para 5, considering the following types of attacks as indiscriminate:

'(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*' (emphasis added).

<sup>29</sup> CDDH/SR. 41 (Off. Rec. VI, S. 188), the Western German delegation did not refer to nuclear weapons explicitly but at the same time did obviously assume and imply the legality of their use under the new norm with its statement.

### D Excluding the Periphery

The fourth and last de-humanizing strategy which became visible in this early phase of IHL analysed in 'Monopolizing War' is the complete discursive exclusion of application of the new prohibitions to peoples not recognized as sovereign entities by European powers. Whatever humanizing effect IHL norms may have had after these early 19th-century conferences, they were not held to be applicable in wars in the colonial peripheries of the great powers. Justifications for this exclusion were either of a formal nature, such as non-ratification or 'reciprocity', or based on racial stereotyping and alleged necessities in warfare against 'savages'.<sup>30</sup> It is noteworthy in this context that even in the 1950s and 1960s the application of common Article 3 of the 1949 Geneva Conventions, which prohibited torture and inhumane treatment of detained fighters and civilians in non-international armed conflicts, had been far from established practice in the wars of liberation against the European colonizers. Both the UK in Kenya and the French government in Algeria systematically used interrogation techniques involving torture, performed extrajudicial executions and carried out mass detentions of civilians, often permitting widespread sexual violence against women. Both governments in their communications with the Red Cross denied the applicability of common Article 3 to these conflicts.<sup>31</sup> It also has been a recurring political pattern in this field that new and particularly controversial weapons systems or means of warfare are first tested and deployed in the peripheries of great powers. And the fact that all attempts to create efficient disarmament obligations in the late 19th and early 20th centuries had ultimately failed probably has more to do with the perceived need among the dominant powers to employ troops and weapons in their (colonial) peripheries than the classic focus on potential intra-European conflicts would suggest.

<sup>30</sup> For *ius in bello* and violence in the colonies that later reappears in the Great War, see Mégret, 'From Savages to Unlawful Combatants: A Postcolonial Look at International Law's "Other"', in A. Orford (ed.), *International Law and Its Others* (2005) 265. For an *ius ad bellum* perspective, see von Bernstorff, 'The Use of Force In International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State', 29 *EJIL* (2018) 233.

<sup>31</sup> On these communications, see F. Klose, *Menschenrechte im Schatten kolonialer Gewalt: Die Dekolonisierungskriege in Kenia und Algerien 1945–1962* (2009), at 151–164.