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ENDING THE SHARP WAR: PARADIGM SHIFT & THE HISTORY OF INTERNATIONAL HUMANITARIAN LAW

Alonso Gurmendi Dunkelberg

Faculty of Laws, University College London

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Supervisors: Dr. Ralph Wilde
Professor Heather Jones

I, Alonso Gurmendi Dunkelberg, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

[SIGNED]

Alonso Gurmendi Dunkelberg

Abstract

This thesis analyses the history of the law of war from the perspective of intellectual history. It maps how changes in the social, political, and legal context between the late 19th century and the mid-20th century impacted the discourses of war and its regulation. Specifically, it argues that the development of modern international humanitarian law in the 20th century is the product of the collapse of the prevailing 19th century Euro- and US-centric paradigm of “Sharp “War”, as a result of the consolidation of competing discourses about war and the international system coming from new and/or reinvigorated actors in the Global South, the Communist world and the humanitarian movement.

Impact Statement

This thesis uses historical and legal methods to propose an interdisciplinary methodology to reframe the way the history of international humanitarian law is conceived. The thesis presents this history as a process of paradigm shift, from the sharp wars of the 19th century to the humanitarian and social justice concerns brought by the rise of the post-colonial world and the humanitarian movement in the 20th. In questioning this genealogy, the thesis calls on academics, practitioners and policy makers to reframe their understanding of conflict and war. Instead of an heir to the 19th century or a completed 20th century achievement, international humanitarian law is presented as a work in progress, still trying to live to the promises of its paradigm-shifting, postcolonial, birth.

The argument advanced here, therefore, has the potential to reframe legal, political and policy debates about war in the 21st century, at a global scale. Through these findings, specific defences of modern-day belligerent tactics and expansive interpretations of permissive wartime rules justified in a long genealogy understanding of the discipline are shown to be ahistorical, and interpretations are framed within an overarching humanitarian and civilian-centred object and purpose.

The methodology proposed by this thesis also directly engages with a highly contentious academic debate between contextualist and critical approaches to legal history. The thesis proposes a way forward to bridge this divide, opening the doorway for increased interdisciplinary engagement between legal scholars and historians.

Lastly, the thesis uncovers new and/or frequently overlooked archival and bibliographical sources from Latin America, Eastern Europe, East Asia, Southern Africa, and the Pan-African Diaspora. These sources are not usually a part of the conventional history of international humanitarian law. In drawing these new connections, the thesis once again has the potential to reframe international legal discourse and scholarship, by expanding its history beyond the traditional series of European and US instruments and conferences.

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Introduction

This thesis analyses the history of the laws of war from the perspective of intellectual history. It maps how changes in the social, political, and legal context between the late 19th century and the mid-20th century impacted the discourses of war and its regulation. Specifically, it argues that the development of modern international humanitarian law in the 20th century is the product of the collapse of the prevailing 19th century Euro- and US-centric paradigm of "Sharp "War", as a result of the consolidation of competing discourses about war and the international system coming from new and/or reinvigorated actors in the Global South, the Communist world and the humanitarian movement.

This thesis sets off by arguing that a European understanding of war, that I have come to call the "Sharp War Paradigm", conditioned the kind of rules that were devised for its regulation. Following ideas initially proposed by Carl von Clausewitz, in a Sharp War, defeating one's enemies at almost any cost becomes a paradigmatic concern and almost any means and method of war that is necessary to achieve this objective becomes legal. Legal restrictions for the conduct of hostilities, therefore, tended to centre on the governance of war and the management of armies, not the wellbeing of non-combatants and those excluded from the protection of the law.[1]

This paradigm was itself moulded by the result of the racial hierarchies that dominated Western international organisation. During the 19th century, the world was divided into specific civilisational categories ("civilised", "semi-civilised" and "savage" peoples) in a system often described by international legal sources as the "standard of civilisation".[2] The further down the ladder of civilisation, the less protection one had and the less influence one exerted in the international community of the so-called "Family of [Civilised] Nations". This system thus excluded the legal arguments and cultural conceptions of war of those outside the Western "metropolis" in varying degrees. In one extreme, Black African peoples were completely excluded from even the most basic protections of the

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[1] Eyal Benvenisti and Amichai Cohen, 'War Is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective' (2014) 112 Michigan Law Review 1363, 1363.
[2] See, e.g.: Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (Cambridge University Press 2020) and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 98–178.

laws of war, being conceived as savages that did not deserve the privilege of "honourable" and "civilised" European warfare.[3] On the other, semi-civilised nations such as Japan and former European colonies with large indigenous populations but dominated by White elites, like the Latin American republics, were only taken into consideration to the degree that they sought to assimilate and/or contribute to Western culture and laws.

In approaching the laws of war and international humanitarian law from the perspective of intellectual history, this thesis distances itself from what I call the "conventional history" of international law. Conventionally, international legal scholars present the history of the regulation of war and of international law more generally as a Western-led and neutral legal project. International law, we are told, "was thus European in origin" and "thence travelled with the colonizers to the Americas, to Asia, to America and eventually to Oceania".[4] In the specific case of international humanitarian law, the branch of modern international law that studies the conduct of hostilities in war and the protections afforded to non-combatants, this is often described as a "process of humanisation", where the 19th century laws of war were increasingly refined, transitioning from more aggressive, albeit well-intentioned origins, to a truly "humanitarian law" today.[5] This transition thus takes the form of a long genealogy of increasing awareness about the horribleness of war and the need for increased concern about those not participating in or no longer able to participate in active hostilities, particularly civilians.

This thesis seeks to challenge these conventional narratives by showing that the history of the regulation of European civilised and sharp war was not a neutral legal process with cosmopolitan aspirations. Instead, I argue, the Sharp War Paradigm was a contested legal discourse[6], frequently uninterested in the protection of civilians – which are, arguably, modern international humanitarian law's most urgent concern. Instead, the 19th century laws of war were wielded by

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[3] Kim A Wagner, 'Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency' (2018) 85 History Workshop Journal 217.
[4] Ian Brownlie and James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 4.
[5] See, e.g: Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 The American Journal of International Law 239.
[6] See, e.g: Helen M Kinsella and Giovanni Mantilla, 'Contestation before Compliance: History, Politics, and Power in International Humanitarian Law' (2020) 64 International Studies Quarterly 649.

Western states as a weapon with which to secure their national interests and protect their sovereign interests in hypocritical rather than legally consistent or overarchingly humanitarian ways. I will show how this facet of the laws of war was plainly visible for those living in the nations excluded by the standard of civilisation and how they either embraced the laws of war as a means to achieve a higher position in the Family of Nations or rejected them as an uncivilised or hypocritical Western practice.

To do this, this thesis will rely on historical and legal methodology; specifically, contextualism and critical legal studies (CLS). This methodological choice, however, will require some explanation. Since 2013, Anne Orford, a prominent member of the CLS and of Third World Approaches to International Law (TWAIL) schools, has been an ardent critic of the use of contextualism in the history of international law. Orford opposes what she describes as the "policing" of CLS/TWAIL work to make sure it does not approach past texts anachronistically; that is, "in light of current debates, problems and linguistic usages" but rather always in the "context of its time".[7] This has sparked considerable methodological debate that this thesis will need to address. In order to bridge this divide between intellectual history and CLS, this thesis starts with a methodological discussion about law and history.

At its core, therefore, this thesis seeks to do three things: (i) propose a method that allows for historical exploration of the laws of war that accounts for both historical and legal method; (ii) contest the conventional history of international humanitarian law as a process of humanisation dating back to the 19th century; and (iii) reframe this history by incorporating non-Western perspectives and pursuing a richer understanding of international humanitarian law and its history. My argument is that instead of a long genealogy, the history of the laws of war and international humanitarian law can be best explained in terms of a contested discourse, where the binding legal rules under discussion do not have unique meanings and definitions but are rather legally indeterminate. It is in the comings and goings of these discourses and the indeterminate nature of law that international humanitarian law emerged, as a result of political, legal, social and cultural changes that started in the early 20th century. In other words,

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[7] Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 166, 171.

international humanitarian law can be untethered from its conventional image of a 19th century, North Atlantic creation, and instead, can be conceived as a 20th century, Global legal discourse, born as a result of the collapse of the Sharp War Paradigm and the emergence of a new one.

In order to accomplish these objectives, I divided this thesis into three sections. The first section, “Method”, is comprised of Chapters 1 and 2. Chapter 1 sets out the problem of genealogy in the history of the laws of war. The methodological hurdles of historical legal exploration are placed at the centre. Both historians and lawyers disagree on how to engage with law and history. Chapter 2, proposes a method to overcome these differences, based on insights from both contextualist history and critical legal studies. This method requires the construction of a linguistic context for the 19th century laws of war through which to track various interventions all around the Globe, significantly beyond the traditional Eurocentric genealogy.

Section II, “War”, explores the history of the laws of war in the 19th century through the direct application of the method devised in Section I. Chapter 3 starts with a contestation of the conventional idea, widespread among international legal scholarship, that the history of the laws of war in the North Atlantic consists of a long genealogy of codification conferences, each building on the previous one, from the Lieber Code to the Brussels Declaration, to the Hague and Geneva Conventions. Instead, the chapter presents the laws of war as a contested discourse were several different theories co-existed allowing for an indeterminate conception of the laws of war to emerge within an overarching paradigm of war that developed in the late nineteenth century. This paradigm stated that wars needed to be fought vigorously and to the very end, lest they become longer, more entrenched, and therefore less humane; in short, that “sharp wars are brief”.[8] Chapters 4 through 6, follow this discourse beyond the shores of the North Atlantic and into South America, East Asia and Southern Africa. Through the construction of linguistic contexts in these regions, this thesis uncovers and recentres interventions that are often kept out of the conventional story of international humanitarian law, and that offer important non-Western

[8] For a similar outlook of the 19th century laws of war see, e.g: Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) and Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (1st edn, Cornell University Press 2011).

takes on the laws of war. In particular, in all of these regions, the laws of war were plainly conceived as hypocritical tools for the furtherance of colonial and/or imperial projects, easily set aside when circumstances so demanded it; and not as a series of steppingstones in a neutral legal project to humanise war.

Section III, “Change”, analyses how the Sharp war Paradigm collapsed as a result of social, cultural and political changes in the first decades of the 20th century, reconceiving the emergence of international humanitarian law not as the *dénouement* of a long genealogy dating back to the Lieber Code, but as the result of a paradigm shift away from the Sharp War and into humanitarian-centred conceptions of international law. Chapter 7 explores the rise of Communist conceptions of international law, of Latin American and African Diaspora interventions and of civilian-centred humanitarianism in the reconceptualization of war, as the catalyst for paradigm-change. In particular, the chapter argues that the 1949 Geneva Conventions and especially their Additional Protocols, fundamentally changed the dominant paradigm of sharp war, throwing the dominant discourse into a situation of crisis, having to adapt to new expectations of what counts as acceptable conduct of hostilities in the modern world. Finally, Chapter 8 offers some conclusions, exploring what this change of paradigm means and the role of history in our understanding of international humanitarian law.

In sum, therefore, my overall thesis is that the history of international humanitarian law is better understood in terms of the collapse of the Sharp War Paradigm thanks to a fundamental change in the political, cultural, social and legal realities of the 20th century than in terms of a long process of humanisation from the Lieber Code to present times.

Section I
Method

This Section explores the methodological debates surrounding law and history. While often venturing into similar territories, both disciplines usually take markedly different approaches to each other's methods. Conventional international lawyers doing history tend to take an "insider's" view of international law and tend to disregard traditional historical methodologies. They "adopt lawyers' materials as the universe of relevant materials from which to write the history of the field", particularly, "cases".[9] This is an approach that has received increased critique both from inside[10] and outside[11] the field of international law. And yet, while these critiques agree on the fundamentals reasons why conventional histories are deficient, often times they are unable to agree on the methods with which to carry out their interventions.

This Section will explore these disagreements, from the point of view of legal and historical methodology. The Section is divided into two Chapters. Chapter One will set out the problems with the conventional history of international law and explore its critique. It will then offer an explanation for why international lawyers approach history in the way they do and use these findings to explain why a conception of a long genealogy of international humanitarian law is methodologically problematic.

Chapter Two will then propose a method with which to approach the history of the laws of war and international humanitarian law – and of international law more broadly – taking care to address the concerns of both legal and historical methodology. The method gets inspiration from intellectual history – particularly the contextualist methodology of Quentin Skinner – Critical Legal Studies and Third World Approaches to International Law. In bridging the supposed methodological divide between these schools, the thesis seeks to offer a path to

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[9] John Fabian Witt, 'A Social History of International Law: Historical Commentary, 1861–1900' in David Sloss, Michael D Ramsey and William S Dodge (eds), *International Law in the U.S. Supreme Court* (Cambridge University Press 2011). See also: Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' [2007] Time, History and International Law 27.

[10] Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 Nordic Journal of International Law 341.

[11] Lesaffer (n 9).

increased interdisciplinarity that allows for a more complete understanding of the history of law.

Chapter One
Setting Out the Problem

1. The Conventional History of the Laws of War and its Critique

The history of international humanitarian law is frequently told in the form of a long genealogy of increased humanitarianism in war. To understand what I mean by this, it is important to understand the modern concept of humanitarianism. Nowadays, humanitarianism "endeavours (…) to prevent and alleviate human suffering wherever it may be found".[12] As Barnett and Weiss state, "[t]here is widespread agreement that the essence of humanitarian action is to save lives at risk".[13] An international *humanitarian* law, therefore, is the "branch of international law limiting the use of violence in armed conflicts by (a) sparing those who do not or no longer directly participate in hostilities; (b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy".[14]

In order to achieve these humanitarian goals, the International Committee of the Red Cross (ICRC), the world's foremost humanitarian organisation, states that modern international humanitarian law is founded in five main principles: the principle of distinction (whereby civilians may not be the object of an attack); the principle of the prohibition to attack those hors de combat (meaning combatants who are incapacitated from participating in hostilities); the prohibition to inflict unnecessary suffering; the principle of necessity; and the principle of proportionality (which establishes that incidental civilian damage produced by an attack on combatants cannot be disproportionate to the expected military advantage it seeks). This is, in essence, a body of laws that places considerable importance in preventing and alleviating *human* suffering, without making a categorical distinction between the suffering of soldiers and the suffering of civilians.

[12] International Committee of the Red Cross, *The Fundamental Principles of the International Red Cross and Red Crescent Movement* (ICRC 2015).
[13] Michael Barnett and Thomas G Weiss, 'Humanitarianism: A Brief History of the Present', *Humanitarianism in Question: Politics, Power, Ethics* (Cornell University Press 2008) 11.
[14] Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does the Law Protect in War?*, vol I (Third Edition, ICRC 2011) 1.

It is this humanitarian tradition that the conventional history tries to cling to. Conventional international legal accounts of the history of international humanitarian law trace its origins to the laws of war, their 19th century equivalent; specifically in the North Atlantic. This is frequently told in an almost standardised way, with US scholar and Prussian exile, Francis Lieber, the *Father* of the laws of war, setting out the fundamentals of the discipline in his 1863 eponymous Code, and the discipline naturally evolving thereafter through an equally standardised list of international instruments: the 1864 Geneva Conventions, the 1868 St. Petersburg Declaration, the 1874 Brussels Declaration, and the 1899 and 1907 Hague Conventions, with the 1949 Geneva Conventions and their Additional Protocols as the pinnacle of its humanitarian evolution. All of these instruments are loosely associated with a single legal project to humanise war, divided, at most, by the specific area they focused on.[15] As the International Court of Justice has authoritatively stated, as far as the conventional history goes, the "Law of Geneva", led by the ICRC, "protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities".[16] The "Law of The Hague" "fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict".[17] Both "are considered to have gradually formed one single complex system, known today as international humanitarian law".[18] As the demands of humanitarianism became more dire, on account of the new ways to wage war, the Law of Geneva and the Law of The Hague simply adapted to respond to the challenge: "[s]ince the turn of the century, the appearance of new means of combat has – without calling into question the longstanding principles and rules of international law – rendered necessary some specific prohibitions of the use of certain weapons".[19] The end result of this process has been a "corpus of treaty rules (…) which reflected the most universally recognized humanitarian principles".[20]

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[15] See, e.g.: François Bugnion, 'Droit de Genève et Droit de La Haye' (2001) 83 International Review of the Red Cross 901.
[16] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (International Court of Justice) [75].
[17] ibid.
[18] ibid.
[19] ibid 76.
[20] ibid 82.

This is a Western-centred tale that seeks to legitimise international humanitarian law's position in the modern corpus of international law by foregrounding its progress through humanisation. In other words, according to this conventional history, the laws of war and international humanitarian law shared the same core concern with human suffering and the story that connects them simply explains how the former naturally evolved into the latter through a logical progression of trial and error. This therefore risks the complacency of thinking that today's harsh war tactics are an unavoidable reality of an already humanised war.

This conventional Western history is endemic, manifesting in some shape or form in some of the most authoritative sources in the discipline and as seen above, in the caselaw of its most important tribunals. The 2021 edition of Gary Solis' influential textbook, *The Law of Armed Conflict: International Humanitarian Law in War,* for instance, presents Lieber as the starting point for the discipline's most fundamental ideal: that, in war, only those acts that are "indispensable for securing the ends of the war" are legal.[21] For Solis, in setting out this principle of military necessity, the Lieber Code "suggested there are limitations on what is permissible in warfare".[22] This notion of restraint, particularly for humanitarian motives, is often shoehorned into the Lieber Code even when it also clearly approves of inhumane practices, like starvation of the enemy. These brutal practices are legitimised by the tempering power of history: they simply were "the customary law of the period" and, in any case, "Lieber ameliorates this harsh view" by adding references to humanity in Article 22.[23] Article 22, however, simply states that "the unarmed citizen is to be spared in person, property, and honor *as much as the exigencies of war will admit*"[24] (emphasis added) – hardly a staunch humanitarian rule.

This view of Lieber is, to state again, endemic. Solis' is not any textbook. It is a "highly recommended"[25], "excellent reference source"[26], "ideal for educational

[21] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (3rd edn, Cambridge University Press 2021) 34.
[22] ibid 38.
[23] ibid.
[24] Francis Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (Adjuntant General's Office 1863) art 22.
[25] Rebecca L Hall, 'Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War' [2022] Journal of Conflict and Security Law 6.
[26] David P Forsythe, 'Gary D. Solis. The Law of Armed Conflict: International Humanitarian Law in War' (2011) 12 Human Rights Review 413.

purposes”.[27] Solis is, also, not alone in his praise. In the late 1990s, renowned scholar and humanitarian, Theodor Meron, wrote about how international law was experiencing a process of humanisation. Unsurprisingly, his story of humanisation started with Lieber’s Code, which, we are told, “contained several elements that characteristically belong to the domain of human rights” and marked a quality of the laws of war as “embodying humanitarian constraints on the conduct of belligerents”.[28] Once again, focus is directed to the Code as a *limitation* of the destructiveness of war on the basis of military necessity.[29] Lieber’s Code, therefore, as Carnahan says, “may be considered the final product of the eighteenth-century movement to humanize war through the application of reason”.[30] This is equivocal. Humanitarianism, as a concept, would not even have been common parlance in the 1860s.

Similarly, in the 2021 edition of Oxford’s *Handbook of International Humanitarian Law,* Lieber’s Code is presented as a product of the philosophy of the Enlightenment, “stressing, for example, that only armed enemies should be attacked, that unarmed civilians and their property should be respected, and that prisoners and the wounded should be humanely treated”.[31] In this recollection, the Code is “remarkable” and “many years ahead of its time”, as “even today, the treaty rules on humanitarian law applicable in internal armed conflicts are more limited in their scope than the provisions of the Lieber Code”.[32]

Marco Sassòli’s textbook on international law also starts its historical overview in the 1800s. He describes Lieber’s Code as an “important unilateral instrument” that sought to “mitigate the effects of the US Civil War”.[33]

This image of Lieber and his Code as a development in the limitation of war, or the emergence of a principle of humanity in international humanitarian law,

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[27] Jacques Hartmann, ‘The Law of Armed Conflict: International Humanitarian Law in War’ (2011) 80 Nordic Journal of International Law 121.
[28] Meron (n 5) 245.
[29] Scott Horton, ‘Kriegsraison or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War’ (2006) 30 Fordham International Law Journal 576, 580 (arguing that “in introducing the concept of military necessity in the Code, Lieber’s focus is directed at its limitation”)
[30] Burrus M Carnahan, ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’ (1998) 92 The American Journal of International Law 213.
[31] Dieter Fleck, *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2021).
[32] ibid 30.
[33] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 8.

should be greatly qualified. Lieber's Code is filled with rules meant to enable the brutality of war, not restrict it. As Samuel Moyn aptly states, "[Lieber's] project shared almost nothing of the aspiration for humane war that Swiss gentlemen breathed deeply across the ocean at the same time".[34] Instead, Lieber's Code was "not merely a constraint on the tactics of the Union", but a "weapon for the achievement of Union army war aims".[35] Lieber "aimed not so much to restate the law of war as to seize it back from the peace societies and their mawkish fellow travellers"[36], rather distancing himself from the Enlightenment views of Vattel whom he dismissed as "Father Namby Pamby".[37]

Lieber's core belief was that "sharp wars are brief", meaning that "[t]he more vigorously wars are pursued, the better it is for humanity".[38] He was thus far from a humanitarian. In fact, in his Code, "[o]utside of torture, virtually all destruction seemed permissible so long as it was necessary to advance a legitimate war effort".[39] Lieber's references to humanity are, instead, "marginal and complementary to the instrumental logic of the distinction between necessary and superfluous harm"[40] – humanity does "no independent work"[41] and is a "fringe benefit, rather than a true goal".[42] Whatever constraints were found on Lieber, were the result of "a sense of honor that was as masculine as it was civilized".[43] Thus, for instance, the correlation of the "inoffensive civilian" with the qualifier "especially women and children" was coded in gendered discourses on the role of women.[44] When women "betrayed" the masculine expectations of female "modesty and decorum", engaging in political discourse, their protection as "inoffensive civilians" ceased.[45]

Lieber's character as the initiating point for a history of international *humanitarian* law is as undeserved as it is entrenched. And yet this position as the initiator of

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[34] Moyn (n 8) 105.
[35] John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press 2013) 4.
[36] ibid 181.
[37] ibid.
[38] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) art 29.
[39] Witt (n 35) 184.
[40] Pablo Kalmanovitz, *The Laws of War in International Thought* (Oxford University Press 2020) 135.
[41] ibid.
[42] Moyn (n 8) 29.
[43] Kinsella (n 8) 87.
[44] ibid 88.
[45] ibid 90–91.

history makes Lieber a central piece of the conventional history. According to Solis, “Lieber’s Code quickly became the basis of similar codes issued by Great Britain, France, Prussia, Spain, Russia, Serbia, Argentina and the Netherlands”.[46] From then on, “[m]uch of the international law of war that followed – the Hague Regulations of 1899 and 1907, the first Geneva Convention in 1864, even the 1949 Geneva Conventions – owe a substantial debt to Francis Lieber and his 1863 code”.[47]

This genealogy of treaties, set off from Lieber’s starting point, is also an endemic part of the conventional history, always told from the perspective of West-centred progress through humanisation. In the 2020 edition of *The Oxford Guide to International Humanitarian Law*, the history of the discipline is treated in the language of “update and adaptation”.[48] Thus, in this genealogy, “[t]he 1949 Geneva Conventions represent the third update of the 1864 Geneva Convention” after the 1907 and 1929 Conventions.[49]

This kind of approach, jumping from Lieber to the European codifications, is especially frequent with the 1874 Brussels Declaration. In this recollection, the provisions of the Declaration, partly inspired by the Lieber Code, made it to the 1880 Oxford Manual, which made it to the 1899 Hague Regulations. Ultimately, “[a]lthough parts of the Regulations have been superseded by the Geneva Conventions and AP I, many remain in force and are now regarded as declaratory of customary international law”.[50]

The language of “supersession” itself reveals the common practice of using uncomfortable acronyms to sanitise the laws of war’s incomplete humanitarianism, which focused almost exclusively on the welfare of combatants through the so-called Law of Geneva and not the protection of civilians during combat operations, which, as I will show later, the so-called Hague Law often simply dismissed as an inevitable horror of war. Civilians were usually conceived as objects, meant to be protected, at best, through race-coded and gender-

[46] Solis (n 21) 36.
[47] ibid 41.
[48] Jean-Marie Henckaerts, ‘History and Sources’, *The Oxford Guide to International Humanitarian Law* (Oxford University Press 2020) 3.
[49] ibid 4.
[50] Fleck (n 31) 32.

coded norms, within a general paradigm that conceived humanity as a side product of military brutality.

In any case, according to the conventional account, the subsequent Hague conferences of 1899 and 1907 "continued the 'modern' codification of customary battlefield law that began with the Lieber Code"[51] and eventually became the "basis" for the Geneva Conventions of 1949.[52] A genealogy is thus formed, from the Lieber Code as the initiator of moderation in war in 1863, then to 1874, to 1880, to 1889, to 1907, to 1929, to 1949 to 1977. A continuous process of humanisation and perfecting from Lieber's raw and realist take to today's established humanitarian law. As Solis summarises it, the second half of the nineteenth century was a "watershed" for international humanitarian law.[53]

This long genealogy of humanisation, however, is, at best, incomplete. As Kinsella points out, it is only after World War II that "the international community willingly consider[ed] provisions for the protection of civilians".[54] In fact, outside of some discussion regarding implementation of the 1899 Martens Clause, "the formal laws of war, primarily the 1899, 1907 and 1929 Hague Conventions, said very little about the definition, much less protection, of the civilian because the protections and standards of civilization were said to be sufficient".[55]

The long genealogy has been the subject of increased critique. From this perspective, instead of a continuity of progress and humanisation, the history of international humanitarian law is reframed as a continuity of inhumanity, racism and a colonial mindset. In this recollection, the laws of war in the 19th century were enablers of state violence. As Samuel Moyn argues, they "strove to give states maximum control over potential chaos, licensing harsh occupations so that they would not devolve into partisan warfare".[56] Likewise, as Benvenisti and Lustig put it, "the main concern of powerful European governments was not to

[51] Solis (n 21) 48.
[52] ibid 51.
[53] ibid 52.
[54] Kinsella (n 8) 104.
[55] ibid.
[56] Moyn (n 8) 83.

protect civilians from combatant's fire, but rather to protect combatants from civilians eager to take up arms to defend their nation".[57]

Thus, the absence of the civilian from the 19th century was not a gap to be filled or an antiquated standard to be superseded by more modern standards, but a feature of the system itself. The laws of war were produced at a time where European war was becoming a national endeavour, not a contest between noblemen for the control of territory, as in centuries past. Early proponents of the laws of war saw this clearly. Decades before finalising his Code, Lieber said in 1839, "[w]ars were somewhat like duels, or tournaments and the [laws] which regulated them were carried over to the wars".[58] In the 19th century, however, "[w]hen nations are aggressed in their good rights, and threatened with the moral and physical calamities of conquest, they are bound to resort to all means of destruction".[59] The emergence of partisan warfare and national mobilisations meant, as Kinsella notes, that in 19th century war "one can never be certain that the unarmed civilian is, in fact, inoffensive" and is therefore "also already an enemy" that may be targeted when required by the "overruling demands of a vigorous war".[60]

Likewise, "persistent structural ambiguities of the laws of war, occurring in the context of the very real international legal prejudices of the time and against the background of the colonial mindset" meant as well that racialised non-Western peoples were systematically excluded from what limited protections were offered by the laws of war.[61] Thus, "[i]f the laws of war were not applied to colonial wars, it was in fact less for some principled legal reason than ultimately because of a hyper-trophied distinction between the 'civilized' and the 'uncivilized' world".[62] Indeed, "[c]onstruction of the enemy as 'un-civilized', 'savage', or 'fanatic' had severe implications for the conduct of what became known as savage warfare; it

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[57] Eyal Benvenisti and Doreen Lustig, 'Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856-1874' [2017] SSRN Electronic Journal <http://www.ssrn.com/abstract=2985781> accessed 27 April 2021.

[58] Francis Lieber, *Manual of Political Ethics* (Smith 1839) 661. It is reasonable to presume, from context, that Lieber's original term "wars" is a typo and that Lieber meant to say "laws" not "wars". I have amended to reflect this, for ease of reading.

[59] ibid.

[60] Kinsella (n 8) 86.

[61] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 278.

[62] ibid 286.

dictated and justified techniques of violence that were by the same token considered unacceptable in conflicts between so-called ‘civilized’ nations”.[63] This is hardly the outlook of a truly humanitarian law.

These critical narratives therefore do not see a particularly strong nexus between the laws of war and international humanitarian law. Mégret, for instance, complains that there is a perception that mid-20th century international humanitarian law started a “path to redemption” with the “darker antecedents” being relegated to the realm of “old history”.[64] Instead, he says, the racism of centuries past simply “sneaks back into” modern international humanitarian law. The very objective of the laws of war is to exclude – to “determine the legitimate participants in warfare”.[65] Thus, “[f]rom ‘how should one deal with ‘savages’ in war?’, the question becomes ‘who is a combatant?’ (and the implicit answer, as will have become clear, is ‘not a savage’)”.[66]

The resulting Geneva Conventions, therefore, have been insufficient. The key Fourth Convention, on the treatment of civilians, for instance, “contrary to popular understanding”, extended protection only “from arbitrary action on the part of the enemy, and not from the dangers of military operation”.[67] This, Kinsella notes, “should also make us question the contemporary celebration of the 1949 IV Convention as establishing a ‘firebreak between civilization and barbarism’; after all, even those responsible for the 1949 Conventions did not consider the rudimental strictures of protection offered by them to be wholly acceptable”.[68]

The mismatch between the conventional and critical histories is very evident when we consider their audiences. Conventional histories are presented intra-discipline, from lawyers to lawyers, while critical histories are extra-discipline, usually told in discussions about legal history, not of international humanitarian law. And while, historiographically, it is increasingly difficult to present such a Eurocentric view of international humanitarian law, legally, it is still quite common and remains the mainstream view.

[63] Wagner (n 3) 231.
[64] Mégret (n 61) 295.
[65] ibid 304.
[66] ibid.
[67] Kinsella (n 8) 117.
[68] ibid 118.

As noted above, this idea of a long genealogy of humanisation is frequently featured in debates about the nature and interpretation of international humanitarian law. In the following sections, I will test whether it is a sound application of legal history and whether its role in legal interpretation is warranted.

2. The Inter-Temporal Problem

The long conventional genealogy of progress from Lieber to Brussels to The Hague to Geneva is what John Fabian Witt calls an "insider doctrinal history approach" to international law – a method through which a lawyer "aims to find firm historical foundations for international law" because they are concerned with justifying the legitimacy of their field.[69]

Thus, when looking at past law, the lawyerly reflex is to find the oldest possible antecedent and turn it into a starting point of a long, uninterrupted genealogy of constant progress from then to now. Take, for example, the paradigmatic example of the trial of Sir Peter von Hagenbach and international criminal legal scholarship. Von Hagenbach was condemned in 1474 of committing "misdeeds, including murder and rape" in the service of the Duke of Burgundy.[70] His trial is frequently presented in international criminal law literature as the first international war crimes tribunal in history.[71] Thus, being able to trace its roots all the way back to the 15th century, international criminal law scholars are able to claim that their discipline's themes "have shown remarkable longevity" and are "older than is sometimes thought" – even if, of course, in 1474, the rules and discourse of international criminal law and war crimes trials were absolutely non-existent.[72]

This legitimising bent is not, of course, unique to international humanitarian law. It permeates most of the lawyerly histories of international law. This is because the lawyerly approach to the past is premised on notions of "inter-temporality".

[69] Witt (n 9) 165.
[70] Gordon Gregory S., 'The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 13.
[71] See, e.g.: George Schwarzenberger, 'A Forerunner of NurembergThe Breisach War Crime Trial of 1474' *The Manchester Guardian (1901-1959)* (Manchester (UK), United Kingdom, 28 September 1946) 4. and Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 17.
[72] Cryer (n 71) 21. For an analysis of this trend, see generally: Gregory S. (n 70).

This so-called “principle” of legal interpretation was set out by the “seminal”[73] case of the *Island of Palmas,* where Max Huber, former President of the ICRC, had to decide who had sovereignty over the island, the US or the Netherlands, by looking into competing claims of discovery and effective occupation. In order to decide which claim should be accepted, Huber concluded that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.[74] At the same time, however, he noted that approaching the law inter-temporally, “demands that the existence of the right, in other words its continuous manifestation, shall follow the conditions required by the evolution of the law”.[75] Thus, Huber says, the task of the lawyer is to identify a starting point, determine the content of the law in that starting point and, from then on, track the evolution of the law through time as it becomes its modern-day dispensation. History as a traceable genealogy of legal concepts as they appear through time and space.

Understanding legal history as a chronology that tracks the evolution of the law from point A to point B, however, is not without complication. To understand why, we need to test it from the perspective of the two disciplines it purports to address: historical and legal method.

a. The Long Genealogy and Legal Indeterminacy

As any student of law knows well, there are two main jurisprudential schools of thought trying to answer the question of “what is the law?” – Legal Positivism and Natural Law Theory. Their main point of divergence is where they draw the line to where the law comes from. After all, the law is a system of rules, and these rules base their validity in other rules, so on and so forth. Regulations find validity in legislation, laws find validity in the Constitution. The question is, at the utmost basic level of understanding, where does the validity of law itself come from?

[73] For scholarly works describing the Island of Palmas case as “seminal”, see, e.g.: Malcolm N Shaw QC, ‘The International Court of Justice and the Law of Territory’, *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 157 and Daniel-Erasmus Khan, ‘Territory and Boundaries’ in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (2012) 239.
[74] *Island of Palmas (Netherlands v USA)* (1928) II Report of International Arbitration Awards 829 (Permanent Court of Arbitration) 845.
[75] ibid.

For positivists, “all legal facts are ultimately determined by social facts alone”.[76] For natural lawyers, “legal facts are ultimately determined by moral and social facts”.[77] In other words, for positivists, what the law is and what the law ought to be are two separate questions, whereas for the naturalists, a law that is not as it ought to be – i.e. an immoral law – is not really a law.[78]

The debate between natural lawyers and positivists has been at the core of legal methodological debate likely since the beginning of law itself but attained particular importance after the Nazi atrocities of World War II.[79] In this time, naturalists complained that positivism’s detachment from moral principles contributed to the Nazis ability to rule unopposed – after all, Nazi law, no matter how immoral, was positive law, binding and mandatory.

Under natural law theory, therefore, positivist legal thinking was little more than a mechanical, *formal*, way of dealing with the law; [80] a system that “denies judges the opportunity to respond to the social imperatives of the case at hand”.[81] H.L.A. Hart, the renowned UK positivist, objected, drawing a distinction between legal reasoning and judicial decision making: “the positivistic privileging of social facts might indicate that legal reasoning is amoral, but it does not show the same about judicial decision making”.[82] For Hart, the nature of the law is as the nature of the language that expresses it, partially indeterminate: words are not always well defined and therefore subject to differing interpretations – a “penumbra” of uncertainty, different from a clearer “core”.[83] This penumbra, therefore, means that “logical deduction, and so deductive reasoning (…) cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules”.[84]

Natural lawyers like Fuller find the notion of the “penumbra” deeply flawed. He rather held that interpretation is seldom the product of discovery of a specific

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[76] Scott J Shapiro, *Legality* (Belknap Press: An Imprint of Harvard University Press 2013) 27.
[77] ibid.
[78] HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 593, 596–597.
[79] See, for instance, the famous Fuller-Hart debate: Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 Harvard Law Review 630 and Hart (n 78).
[80] Shapiro (n 76) 239–240.
[81] ibid 240.
[82] ibid 248.
[83] Hart (n 78) 607. See also: Shapiro (n 76) 250.
[84] Hart (n 78) 607.

core meaning of a word or phrase but rather, by looking at the purpose of the law in question.[85] So, for Hart, the question of whether a man in a bicycle can enter a park protected by a sign reading “no vehicles allowed in the park”, is solved through determining whether the word “bicycle” is part of the word “vehicle’s” core or penumbra.[86] If the latter, the judge will be able to *create* new law to solve the dispute, even through the use of moral principles. For Fuller, however, this depends on purpose: if the rule was approved in order to protect pedestrians from accidents, then a truck being placed on a pedestal within a broader World War II memorial would not be covered by the prohibition.[87] Hart’s theory, Fuller contends, would be unable to explain whether the truck fell within the core or penumbra of the word “vehicle”.

The disquisitions between Hart and Fuller – positivists and natural lawyers – therefore, give us the two main methodological avenues for legal interpretation: on the one hand, textualism – a legal text must be interpreted by paying attention to the plain meaning of the words they are contained in – and purposive interpretation – the content of what the law says is determined by what the law meant to achieve.[88]

None of these methods, however, is able to offer simple, single-answer solutions. In every scenario, the meaning of law is indeterminate – a single rule can be read in various different ways, as either it will be at least partially penumbral or dependent on how one reads its original purpose. Legal interpretation is not math, and correct answers exist along a spectrum rather than a bullseye.

This particular indeterminacy of the law is compounded when legal theory is seen from the perspective of the Critical Legal Studies school. Roberto Mangabeira Unger, one of the founders of critical legal theory, for instance, believed that the law’s biggest polemic was not whether there is one right answer or whether morality plays a role in the formation of the law, but simply

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[85] Fuller (n 79) 663.
[86] Hart (n 78) 607.
[87] Fuller (n 79) 663.
[88] Shapiro (n 76) 252–254. And on this as well, another debate ensues as to achieve according to whom? The original drafters? Or the individuals applying it? But this is beyond the scope of our analysis.

"the problem of order and freedom": how to secure the former without destroying the latter.[89]

Unger's critique of Anglo-American jurisprudence – what he calls the liberal theory of legislation – is straightforward: Liberals believe that to be effective, laws must be accepted by the citizenry. To be accepted, they need to be justifiable. To be justifiable, one would need to be able to argue that the limitations they place on individual freedom are fair. To be fair, no one's freedom should be placed above another person's, and everyone should receive as much freedom as possible, without being arbitrarily preferred over another.[90] However, as he purports to show, no liberal theory is able to achieve this because it is premised on the idea that value is subjective.

Indeed, if, as liberals purport, all value is entirely subjective, any search for freedom will necessarily imply an arbitrary choice between the subjective conception of freedom of the individual who benefits from the law over the subjective conception of freedom of the individual who is affected by it. Legislators would simply be unable to convince (let alone prove to) the "loser" that his or her added hardship was caused in the pursuit of greater freedom. In a liberal individualist world, where all value is subjective, a society can either design concrete rules that adequately tackle social issues or it can produce neutral rules that are accepted by all, but not both, not at the same time.[91]

Liberalism suffers the same problems in trying to produce a theory of adjudication – liberalism would not be able to justify a judge's decision-making process without recourse to their own subjective values.[92] Or, in Unger's words: "unless we can justify one interpretation of the rules over another, the claim of legislative generality will quite rightly be rejected as a sham".[93] In the end, laws are not just moderately indeterminate, but radically so: they can be used to defend almost any position and thus cannot be legitimate or authoritative.[94] There is no "core"; all law is "penumbral".

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[89] Roberto Unger, *Knowledge and Politics* (Edición: Reissue, Free Press 1976) 66–67.
[90] ibid 84.
[91] ibid 87.
[92] ibid 89.
[93] ibid.
[94] Ken Kress, 'Legal Indeterminacy' (1989) 77 California Law Review 283.

Since law is radically indeterminate, the Critical Legal Studies school argues, it usually follows patterns of power: those with power are benefited with favourable interpretations and those without are left to handle the harshness of the law. Duncan Kennedy, for instance, writing in the context of the US, but attempting a broader critique applicable beyond US history, states that "the contract law of 1825 was full of protective doctrines (…) [but] during the latter part of the century (…) all the doctrines were recast as implications of the fundamental idea that private law rules protect individual free will".[95] There had been, to use Morton Horowitz terminology, a "Great Transformation" of US law, around the second half of the 19th century, that coincided with the rise of legal formalism and free market liberalism.[96] And given that adjudication was a sham, these changes tended to reflect power dynamics, more than any consolidated idea of justice:

"By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society. Not only had the law come to establish legal doctrines that maintained the new distribution of economic and political power, but wherever it could, it actively promoted legal redistribution of wealth against the weakest groups in society".[97]

In sum, therefore, most theories of Anglo-American jurisprudence, but especially the Critical Legal Studies school, believe in some form of legal indeterminacy.[98] But this is something that never factors into Huber's "principle" of inter-temporality. As noted above, inter-temporality requires one to identify "first, the relevant period of time for the purpose of identifying the applicable rules of international law and, secondly, the content of that law".[99] This may facilitate the job of an adjudicator, but it does very little for a full understanding of "past law".

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[95] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685, 1729–1730.
[96] Morton J Horowitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) 253–254.
[97] ibid 254.
[98] The exception being Ronald Dworkin's philosophy. See: Ronald Dworkin, 'Hard Cases' (1974) 88 Harvard Law Review 1057 and Ronald Dworkin, 'No Right Answer' (1978) 53 New York University Law Review 1. See also: Scott J Shapiro, 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007).
[99] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95 (International Court of Justice) 139.

Take, for example, the recent example of the case of the Chagos Archipelago, at the International Court of Justice. In this case, the Court was asked to determine if the process of decolonisation of Mauritius was "lawfully completed", considering that the Chagos archipelago was separated from it in 1965, three years before independence.[100] Application of inter-temporality thus required the Court to enter into a debate: when did a right to self-determination in decolonisation crystalise under international law? Before or after 1965? This was, predictably, a Byzantine discussion: the UK, the colonial power of Mauritius, argued that the right to self-determination only crystallized after the 1960s, with the Friendly Relations Declaration of 1970 – "the first consensus resolution on the right [to self-determination], with the United Kingdom joining the consensus".[101] Mauritius, also predictably, disagreed. It stated that the right to self-determination crystalised with General Assembly Resolution 1514(XV) and that thus "[b]y the time the Chagos Archipelago was detached from Mauritius by the administering power, clear principles of international law had emerged to govern the process of decolonisation, chief among them the principles of self-determination and territorial integrity".[102]

When the Court decides between these two possible interpretations it is not establishing "the 1960s answer" to the problem. If we were to look at the 1960s through historical methodology, it would be wrong to determine "the law" based on what a specific court decided. "The law" at that time would rather incorporate all legal positions that existed at the time – the legal discourse of the time, including all possible interpretations of the rule. When the United Kingdom says that the Court erred because self-determination was not a part of the law in force in 1965, it is confusing the *majority* 1960s opinion, with all possible correct 1960s opinions. Dame Rosalyn Higgins was, after all, not *wrong* when she defended the existence of a right to self-determination in 1963.[103] Neither was Judge Cançado Trindade every time he wrote a sole dissent at the International Court of Justice. The measure of what counts as a valid 1960s interpretation of the law

[100] ibid 1.
[101] Transcript, Public Sitting (Sept. 3, 2018) 45 in: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 99).
[102] Written Statement of the Republic of Mauritius, in: ibid. Available at: https://www.icj-cij.org/public/files/case-related/169/169-20180301-WRI-05-00-EN.pdf
[103] See: Rosalyn Higgins, *The Development Of International Law Through The Political Organs of The United Nations* (1963).

cannot be whether it subscribes to majority view. There is no one single “correct” 1960s answer. From the perspective of one who is trying to understand the *history* of the law, Huber’s inter-temporal principle is, thus, at the very least, misleading.

When Huber’s inter-temporality asks us to determine the law in force at the time the dispute emerges, it asks us to make a determination that may, in fact, be impossible to make for the purposes of historical inquiry. Can we really discount otherwise valid legal interpretations of past law merely because they were not adopted by the leading and mainstream scholars of its time? Is there really nothing of value to learn for the history of a discipline from these otherwise ignored interventions?

Inter-temporality thus is an unsatisfying way to understand past law – at least outside the specific context of adjudication.

b. The Long Genealogy and Presentism

Just like with Anglo-American jurisprudence, inter-temporality also does not sit well with Western historiography (that is, the history of how history is researched and written). One of historiography’s main concerns has revolved around the role of the historian in the construction (or discovery) of history. Initially, 19th century history was dominated by empiricism. A historian’s job was to “write and present [history] in such a way that the historical truth is not distorted” by personal bias and preconceived ideas.[104] Under this paradigm, “the historian’s ability to sort out the genuine from the fabulous became paramount and considerations of textual criticism took centre stage”.[105] This was a history that was very concerned with “great men and a teleology of national communities”.[106] Historians “gloried in presenting themselves as straightforward empiricists for whom the proper task [was] simply to uncover the facts about the past and recount them as objectively as possible”.[107] The 20th century, however, came with an added focus on the role

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[104] Heiko Feldner, ‘The New Scientificity in Historical Writing Around 1800’, *Writing History: Theory and Practice* (Second Edition, Bloomsbury UK 2010) 13, citing Karl Dietrich Hüllmann.
[105] ibid 14.
[106] Matthias Middell, ‘The Annales’, *Writing History: Theory and Practice* (Second Edition, Bloomsbury UK 2010) 110.
[107] Quentin Skinner, *Visions of Politics: Regarding Method*, vol 1 (Cambridge University Press 2002) 8.

of the historian as more than just a chronicler, but as a creator. As E.H. Carr put it in his seminal work, *What is History?:*

> "The nineteenth-century fetishism of facts was completed and justified by a fetishism of documents (…) The reverent historian approached them with bowed head and spoke of them in awed tones. If you find it in the documents, it is so. But what, when we get down to it, do these documents (…) tell us? No document can tell us more than what the author of the document thought (…). None of this means anything until the historian has got to work on it and deciphered it".[108]

Especially during the second half of the 20th century, historians became more and more alive to the realization that there is no such thing as directly reporting history – to quote the eminent German empiricist, Leopold von Ranke's famous dictum – *wie es eigentlich gewesen,* "as things essentially happened". Towards the end of the 20th century, therefore, "[s]carcely anyone" believed in the "possibility of building up structures of factual knowledge on foundations purporting to be wholly independent of our judgment".[109]

Of course, these new realisations came with renewed problems. As the renowned historian of political thought, Quentin Skinner, points out: "The perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which they would not – or even could not – have accepted as an account of what they were doing".[110]

The potential excessive personal role of the historian, therefore, revealed the danger that history writing could be presentist and anachronistic. That it would not be a faithful account of the past because the historian would read into history their own present-day concerns. Thus, they would see their preferred present-day politics as a goal to be achieved and those who strove to promote it in the past as "the good guys". This was Herbert Butterfield's warning in 1931, when he wrote his famous book *The Whig Interpretation of History.*[111] In it, Butterfield complained of "the practice tendency in many historians to write on the side of

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[108] EH Carr, *What Is History?* (Penguin Books 1987) 16.
[109] Skinner (n 107) 1.
[110] ibid 59.
[111] Herbert Butterfield, *The Whig Interpretation of History* (G Bell and Sons 1963).

Protestants and Whigs, to praise revolutions provided they have been successful, to emphasise certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present".[112]

Presentism, then became the "cardinal sin of the historical profession"[113], as it represented a wedged and distorted vision of the past. Through it, "historical personages can easily and irresistibly be classed into the men who furthered progress and the men who tried to hinder it".[114] The historian, therefore, "will imagine that he has discovered a 'root' or an 'anticipation' of the 20th century, when in reality he is in a world of different connotations altogether, and he has merely tumbled upon what could be shown to be a misleading analogy".[115]

Thus, when historians confronted the conventional, legitimising, whig histories of international law, they immediately saw a presentist danger. The aim of such histories, said historian Randal Lesaffer, "is clearly not to understand what happened (…), but to give current ideas or practices roots in the distant past".[116] For him, this kind of approach "sins against the most basic rules of historical methodology" with "deplorable" results.[117] Lesaffer argued that "for most international lawyers their relationship to history is a purely functional one. They look at history because they need it to better understand current issues and trends".[118]

Instead, Lesaffer argued, historical facts should be read "as the contemporaries of the authors would".[119] His main concern with the conventional histories that international law seemed to have produced was that "[t]exts, and especially the writings of the great authors of international law are not read for what they say but for the significance they had for the further development of international

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[112] ibid v.
[113] Peter E Gordon, 'Contextualism and Criticism in the History of Ideas' in Darrin M McMahon and Samuel Moyn (eds), *Rethinking Modern European Intellectual History* (Oxford University Press 2014) 44.
[114] Butterfield (n 111) 11.
[115] ibid 12.
[116] Lesaffer (n 9) 34.
[117] ibid.
[118] ibid 33.
[119] ibid 38.

law".[120] For him, "before one can learn something from the past other than what one knows from the present one first has to let the past be the past".[121]

Lesaffer's concerns were the starting point for a much larger methodological debate that I will address in later sections. For the time being, what's important is that it highlights the potential presentist problems which conventional histories of international law, like the conventional history of international humanitarian law described above, tend to incur in.

In sum, therefore, treating the history of international humanitarian law as a long genealogy of humanisation risks using international legal concepts in a presentist and anachronistic manner. 19th century concepts are simply transported into the future, as encountered, without taking the 21st-century legal context in which they now need to operate into account.

The inter-temporal idea that one must "trace the evolution" of a concept through time is dangerously reductive, even a-historical. Just like one cannot identify a single or uniform "1860s" answer, one can also not track a single timeline where the 1860s answer became the 2020s answer. This process is not linear. Inter-temporality instead presumes that the "official" interpretation of the law went through successive "official" reinterpretations until it arrived at its "final" and "correct" dispensation in the present. This makes legal history excessively teleological. 1860s law exists because it is a starting point that allows "the law" to become the 2020s law, through steppingstones in 1863, 1949, etc.

When lawyers try to narrate the conventional history of international humanitarian law, they are acting inter-temporally. Lieber becomes the point of origin from where the rest of the discipline needs to evolve. The "laws of war of 1863" have to be properly distilled from Lieber's writings and from then on, their "continuous manifestations" – to quote Huber – must be tracked through time and space "follow[ing] the conditions required by [their] evolution".[122] This does little to offer clarity about Lieber's understanding of the laws of war or the discourse in which he wrote his interventions, because his writings are being read with the specific intent of explaining how the 1860s became the 2020s.

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[120] ibid.
[121] ibid 37.
[122] *Island of Palmas (Netherlands v. USA)* (n 74) 845.

Chapter Two
The Method

1. Enter: Methodology

Chapter 1 explored the limitations of conceiving law genealogically. It argued instead that the law, as a discursive, indeterminate and contingent creation, cannot be explained solely from the classical formulation of "inter-temporal law" – at least outside the context of litigation. It showed how this conception of legal history tied modern law to the interpretations of past majorities partial to the status quo, completely leaving aside minoritarian approaches that sought to challenge the established views.

The absence of an alternative methodological approach forces legal operators to view history as a discussion between key dates: was there a right to self-determination in 1965? Or did it not emerge until after 1968? Is Lieber's military necessity still alive in 1949? Or did it become extinct? These questions may be helpful to solving a dispute in a court of law, but they do little to further our understanding of legal evolution and the content of past law. Without an alternative method that can account for the indeterminacy of past law and the non-linear nature of historical processes, decisions on what constituted "the law of 1965" or "the law of 1863" become exceedingly presentist and, frankly, arbitrary.

In this Chapter, I will explore historical and legal methods in order to propose a methodology with which to approach past law without falling into presentist or determinist pitfalls; one that does not conceive the law as a monolith that moves through time in a long and evolutionary genealogy from the oldest possible antecedent to the present. In this method, "the law" of a specific relevant date does not offer a single potential answer, but a spectrum of minoritarian and majoritarian positions, that don't always span the centuries until the present.

This method, of course, is not presented as a *replacement* to inter-temporality nor does it purport to *resolve* the inter-temporal problem. Like all historical and legal exercises, there is an element of choice: the theoretical input legal and historical operators choose to incorporate in their frameworks will have consequences on the output they produce. It is up to each operator to decide

their own methodological approach. This method is instead proposed to address the shortcomings of inter-temporality, as explained by history and jurisprudence.

Given the contentious nature of interdisciplinary work in the fields of law and history, constructing this method will take a few steps. Before I can draw the contours of a methodology, I need to address the ongoing methodological dispute regarding international legal history – particularly the one that emerged as a result of the debate between Anne Orford and Lauren Benton.[123]

This Chapter will thus start with a brief overview of historical methodology, with particular emphasis on the contextualist method defended by Benton. From there it will address Orford's challenge to the contextualist mainstream, exploring her defence of anachronism in legal method. Once both positions are properly presented, I will attempt to bridge their divide. I will then present my own methodology building upon this rapprochement.

2. Historical Methods: A Brief Introduction

In order to present a new methodology, first I will need to revisit the history of historiography, focusing on its 20th century debates. As mentioned in Chapter 1, Western historiography spent a large portion of the past century debating the role of the historian, both in reaction to the empiricist claim that a wholly faithful recollection of history was possible and in fear of presentism and anachronism.

One of the first reactions to the empiricism of the 19th century came in the shape of the Annales school of history. If the empirical paradigm demanded the critical analysis of historical events to produce a narrative "primarily concerned with the study of power and power elites", the Annales school emphasized "a broad understanding of the complex range of factors, which contribute to historical change including psychological, cultural, economic, and environmental factors".[124] For these Annalistes, human agency "could only be understood by studying the collective elements in human consciousness and activity, against which any analysis of individual action needed to be set".[125] In other words, it is

[123] See: Orford (n 7) 166 and Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 Journal of the History of International Law / Revue d'histoire du droit international 7.
[124] Eamon O'Flaherty, 'Annales School' in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)* (Elsevier 2015) 708.
[125] ibid 708.

not individual kings and princes that move history forward, but larger multi-national social and economic structures.

Take, for example, the work of Annaliste Fernand Braudel. He proposed a three-level approach to historical time, with each level operating at a different scale or rhythm. "First, he claimed that geohistorical foundations of societies changed only over very long periods. Secondly, he distinguished medium term up- and down-swings in economic life and social relationships, which happened more quickly. On the third level, in which Braudel was least interested, was what he perceived as the merely superficial history of political incidents (*histoire événemenielle)".*[126] Instead of wars and battles, Braudel "emphasized the huge influence of natural conditions upon communication, trade and production (…) [and] the role of collective structures like economic systems, states and societies, which moved only in a rhythm of generations".[127] For Braudel , the historian should study history at a deeper level of abstraction than the usual recollection of wars, coronations and conquests.

This was a completely different role for the historian. One that focused on what the Annalistes called the *longue-durée* – the long duration – instead of the short-term problems of politics and conflict. History became a "total history".

The Annalistes' approach to history, however, left an unsavoury taste in the minds of some of their later contemporaries, particularly those in the field of intellectual history – the history of ideas. For some, the Annalistes' structural method "had a baleful effect on the status as well as the methodology of intellectual history", since it was "either treated as of marginal interest, or else was studied in such a way as to provide alleged evidence in favour of the base/superstructure model itself".[128] Indeed, "[w]ith geography determining economics, and with economics determining social and political life, there was little space left for the life of the mind except as an epiphenomenon".[129]

And yet, by the late 1960s, there seemed to be very few alternatives. Approaching the history of ideas through non-structuralist methods required

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[126] Middell (n 106) 114.
[127] ibid.
[128] Petri Koikkalainen and Sami Syrjämäki, 'Quentin Skinner on Encountering The Past' (2002) 6 Redescriptions: Political Thought, Conceptual History and Feminist Theory 34, 38.
[129] ibid.

accepting “a widely held view”[130] that “[t]he whole point (…) of studying past works of philosophy (or literature) must be that they contain (…) a ‘dateless wisdom’ with ‘universal application’”.[131]

For the (now) famous intellectual historian, Quentin Skinner, this was a deficient methodology that embraced anachronistic contamination: “it will never in fact be possible” – he said – “simply to study what any given classic writer has *said* (…) without bringing to bear some of one’s own expectations about what he must have been saying”.[132] In order to rectify this methodological error, Skinner decided to launch what he himself has called “a terrorist attack”[133] on the prevailing methods of intellectual history, in the form of his 1969 influential essay *Meaning and Understanding in the History of Ideas*. Skinner’s work proved so important he became seen as the founder of a new approach to the history of ideas, known as the ‘Cambridge School.’

In *Meaning and Understanding,* Skinner starts by noting that “the current historical study of ethical, political, religious, and other such ideas is contaminated by the unconscious application of paradigms whose familiarity to the historian disguises an essential inapplicability to the past”.[134] In other words, it is a “historical absurdity”[135] to solely study what an author *said* in a particular text, as if that text responded to a particular and perennial theme that all classic authors touch upon at some point of their career, rather than to a specific historical context. More than history, such a method, he said, produced a “mythology”, wherein “the historian is *set* by the expectation that each classic writer (...) will be found to enunciate some doctrine on each of the topics regarded as constitutive of his subject”.[136] Rather than studying a particular author and text, in order to understand its specific meaning, the historian is preconditioned, even if unconsciously, to “find” an author’s doctrine on all the “mandatory themes” he is expected to have touched upon.[137]

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[130] ibid.
[131] Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’ (1969) 8 History and Theory 3, 4.
[132] ibid 6.
[133] Koikkalainen and Syrjämäki (n 128) 38.
[134] Skinner (n 131) 7.
[135] ibid.
[136] ibid.
[137] ibid.

For Skinner, this mythology is expressed in either a tendency to find "[a] given writer may be 'discovered' to have held a view on the strength of some chance similarity of terminology, on some subject to which he cannot in principle have meant to contribute"[138] or in a tendency to "trace the morphology of some given doctrine through all the provinces of history in which it appears".[139] This method, says Skinner, reduces history to "a pack of tricks we play on the dead".[140] The historian conceives their role as providing coherence with themes that simply might not be there.[141]

Skinner's complaints can easily be transferred to the kind of conventional history of international humanitarian law mentioned in Chapter 1. Tracing back concepts like "humanity" and "military necessity" through a centuries-long genealogy without considering why the person who wrote them wrote them in the first place or the context in which they appeared, would be anathema to Skinner. Thus, like lawyers seeing a "war crimes trial" in the 15th century prosecution of Peter von Hagenbach, these histories show a "tendency to search for approximations to the ideal type" where every author is an anticipation of the next.[142]

Skinner believes, instead, that two concepts can share similar nomenclature and attributes, but have nothing to do with each other, from a historical point of view. Thus, Peter von Hagenbach may have in fact been condemned for atrocities we would today deem "war crimes" by an "international tribunal", but the injection of these concepts into a 15th century trial would actually provide little insights for international criminal law today. "War crimes" and "international tribunal" are not, he would say, concepts whose morphology can simply be traced throughout time in order to find their oldest "antecedent". They belong to a specific context that likely did not emerge until the 20th century.

In order to account for this methodological error, Skinner turned to linguistics; particularly the theories of Ludwig Wittgenstein, John Searle, and JL Austin about meaning. This "turn" would irreversibly change contemporary

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[138] Skinner (n 107) 7.
[139] Skinner (n 131) 10.
[140] ibid 14.
[141] ibid 16.
[142] ibid 11.

historiography, ultimately becoming the “mainstream historiographical current”, known as contextualism.[143]

3. Contextualism

Contextualism is the historical method that, as its name suggests, insists “that we can only reliably understand the meaning of a person’s utterance, or text, through reconstructing the context of the utterance”.[144] When Skinner and most historians speak of “context” though, they do not mean the simple geographical and temporal surroundings of a specific author. “Context” is a term of art. It comes from the theories of linguists Ludwig Wittgenstein, John Searle, and JL Austin, scholars who argued that the function of words is not limited to what they call their “locutionary dimension”, i.e., the very act of saying something, considered independently of the statement’s intention.

Rather, they propose that “beyond simply saying things, words can in specific contexts be used to *do* things”.[145] Thus, beyond their “locutionary” dimension, utterances also have an “illocutionary” and “perlocutionary” dimension. The illocutionary dimension is “what the speaker is doing *in* using certain specific words” whereas the perlocutionary dimension is “what a speaker is doing *through* or *by* using specific words”.[146]

While all this jargon can get technical depending on how deep down the linguistic rabbit hole one goes, in lawyer-friendly terms, what this means is that for contextualists, there is some additional knowledge to be learned from a text that lies beyond the mere words that compose it. A poem, for instance, may cause a specific emotion on the reader – sadness, excitement, happiness. This emotion is caused by the poem’s perlocutionary force, which may or may not be recoverable through the poem’s text. But other times, there are other types of intentions that are extra-textual in nature, and that Austin called the utterance’s illocutionary dimension.

[143] Valentina Vadi, ‘International Law and Its Histories: Methodological Risks and Opportunities’ (2017) 58 Harvard International Law Journal 311, 335.
[144] Andrew Fitzmaurice, ‘Context in the History of International Law’ (2018) 20 Journal of the History of International Law / Revue d’histoire du droit international 5, 13.
[145] Annabel Brett, ‘What Is Intellectual History Now?’ in David Cannadine (ed), *What is History Now?* (Palgrave Macmillan 2002) 115.
[146] ibid.

Imagine, for instance, that a policeman sees a skater on a pond and says "the ice over there is very thin".[147] According to Skinner, beyond the sheer fact that the policeman said something, an observer would need more than just an understanding of the meaning of the words to fully understand the episode. "[W]e also need to know", Skinner says, "what the policeman was *doing in* saying what he said".[148] In this sense, the policeman may have been warning the skater and, therefore, "the utterance may have been issued on the given occasion with the (illocutionary) force of warning".[149] This is different from the issue of whether policeman ultimately achieved the perlocutionary consequence of persuading, scaring or annoying the skater *by* saying what he said.[150] Thus, to gain full uptake of what someone was trying to say, one needs to understand this illocutionary intent. And for Skinner, this is only achievable through a contextual analysis. In his words:

> "[T]he appropriate methodology for the history of ideas must be concerned, first of all, to delineate the whole range of communications which could have been conventionally performed on the given occasion by the utterance of the given utterance, and, next, to trace the relations between the given utterance and this wider linguistic context as a means of decoding the actual intention of the given writer".[151]

In other words, Skinner proposed that the historian should be concerned with more than just reading the text of a source, but should rather contextualize it, to decipher the author's illocutionary intent. As a way of example, Skinner talks about Descartes' interest on the concept of indubitable knowledge in his *Meditations,* originally published in 1641. "Why was this an issue for him at all?", he asks.[152] Traditional historians, he goes on, "have generally taken it for granted that, since Descartes was an epistemologist, and since the problem of certainty is one of the central problems of epistemology, there is no special puzzle here at all".[153] More recent scholarship would show, however, that this is wrong. Descartes had a concrete (illocutionary) intention when he wrote *Meditations:* "responding to a new and especially corrosive form of scepticism arising from the

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[147] This is the same example provided by Skinner in: Skinner (n 107) 104.
[148] ibid.
[149] ibid 105.
[150] ibid.
[151] Skinner (n 131) 49.
[152] Skinner (n 107) 83.
[153] ibid.

recovery and propagation of the ancient Pyrrhonian texts in the later sixteenth century".[154] Understanding this particular (linguistic) connection with such distant ideas is vital to understanding Descartes today – why did he use the words he used? Why is he using certain arguments and not others? The identity of the text now becomes ever richer.

Note that, for Skinner, perlocutionary intents are immaterial. One can detect whether the text is meant to elicit sadness or happiness just by reading it. But this is not the case with the author's illocutionary intentions. The author's illocutionary intention, why he wrote about that topic in that specific way, what did they want the text to achieve, is actually *the point* of what the author said – and this is not something the historian can recover from the text alone.[155] The historian's task is, therefore, "the recovery of past 'ways of speaking'" or "the recovery of specific language games".[156] In Skinner's words:

> "[W]e should start by elucidating the meaning, and hence the subject matter, of the utterances in which we are interested and then turn to the argumentative context of their occurrence to determine how exactly they connect with, or relate to, other utterances concerned with the same subject matter. If we succeed in identifying this context with sufficient accuracy, we can eventually hope to read off what it was that the speaker or writer in whom we are interested was doing in saying what he or she said".[157]

Conceiving history as an argumentative mesh where each utterance connects to a specific context of utterances but not others is an attractive model to understand the law beyond the monolithic conceptions of inter-temporalism. As noted in Chapter 1, most modern theories of legal jurisprudence conceive the law as at least relatively indeterminate, because the language that expresses it is equally indeterminate.

If the law is indeterminate and there is no single correct answer to any single legal question, then, from a linguistic point of view, the key question becomes how do we separate the legal historian's own expectations of what the law of that period was from the actual (indeterminate) construct of the law, that allows for several possible correct answers? It is in this regard that contextualism can

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[154] ibid.
[155] ibid 99.
[156] Brett (n 145) 117.
[157] Skinner (n 107) 116.

provide a valuable tool through which to better (re)construct past law. Instead of focusing on the consensus view, contextualism would conceive international law as a mesh of interconnected discourses and utterances – as, in short, a *language*. Language, here, again, is understood as a term of art. Not as English, Spanish, or French, but rather as the "different ways of talking or modes of discourse, what we might call idioms or rhetorics, within natural languages".[158] These idioms are therefore not "discovered" but "reconstructed" in the past out of "groups of texts which all rely on the same standardized formulate and commonplaces; which share the same grammar, vocabulary and rhetoric".[159] Thus, a contextualist would reconstruct the "language of natural rights" or the "language of Aristotelian science".[160] It thus stands to reason that a contextualist historian should strive to identify the "language of international law" and of "the laws of war" as well.

This way, historical approaches to the law would not discount Dame Higgins' views as a minoritarian position doomed to fail in a popularity contest vision of international law. Instead, they would treat it as part of General Assembly Resolution 1514 (XV)'s linguistic context – a way to understand exactly what it was meant to accomplish, both in illocutionary and perlocutionary terms.

4. Orford's Challenge

Before I can go into further detail into contextualism and its contributions to the method I am constructing, however, there is one more issue to address. Recently, contextualism has encountered strong resistance from some international legal circles – particularly in the writings of influential Third World Approaches to International Law (TWAIL) and critical legal scholars such as Anne Orford and Martti Koskenniemi.[161] This section will set out this challenge.

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[158] Brett (n 145) 118.
[159] ibid.
[160] ibid.
[161] For more on this literature, see: Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021); Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke De Hoon and Alexis Galan (eds), *The Law of International Lawyers* (Cambridge University Press 2017); Orford, 'On International Legal Method' (n 7); Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' [2012] NYU Institute for International Law and Justice; Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22 Rechtsgeschichte - Legal History; Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 Temple International and Comparative Law Journal 215.

Orford first complained of contextualism in an essay entitled *On International Legal Method.*[162] There, she addressed criticisms that her book *International Authority and the Responsibility to Protect*[163] had used historical methodology incorrectly. Her argument was, unexpectedly, that the alleged methodological failings were not actually a mistake, but a methodological choice.[164]

In her essay, Orford recognizes the influence of contextualism for traditional historiographical method, but states that she consciously decided against its application because of her different approach to anachronism. In her terms, contextualist historians "have focused a great deal of attention on policing the idea that past texts must not be approached anachronistically in light of current debates, problems and linguistic usages, or in a search for the development of canonical themes, fundamental concepts or contemporary doctrines".[165] For her, this is an important limitation for legal method. "The clear demarcation between past and present, or history and politics (…) requires that everything must be placed in the context of its time, and present-day questions must not be allowed to distort our interpretation of past events, texts or concepts".[166]

Instead, she frames her essay as a direct response to the historian's critique, almost as if done in representation of the entire international legal discipline. After all, she says, "those attacks see[m] to challenge the core of legal method more generally".[167] For Orford, lawyers are trained "in the art of making meaning move across time".[168] The very idea of precedent implies using the past to understand the present, and the contextualist plea to "let the past be the past" would simply cut this connection off.

For Orford, instead, her work "assumes that the proper context for understanding the legal meaning of a statement or text is not given, and is certainly not

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[162] Orford, 'On International Legal Method' (n 7).
[163] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).
[164] Orford, 'On International Legal Method' (n 7) 169. (Orford states "[w]here my approach to writing this book departed from the historical and sociological approaches proposed in the essays by Peevers and Mowbray, however, is in the questions that I asked of the archival and organizational material I assembled, the resulting aspects of the archive and the contemporary situation that I sought to emphasise in order to address those questions, and the way I presented the resulting materials").
[165] ibid 171.
[166] ibid.
[167] ibid 172.
[168] ibid.

determined by chronology".[169] In a noticeable departure from contemporary historiography, she adds that her work "accepts the legitimate role of anachronism in international legal method" and that "[i]nternational law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space".[170] International legal scholarship, she concludes, is "necessarily anachronic" because the past, "far from being gone, is constantly being retrieved as a source or rationalization of present obligation".[171]

In essence, therefore, Orford was making a bold statement, that history and law were methodologically incompatible. This statement would gain traction among critical legal scholars who increasingly viewed contextualism as a "conservative" methodology.[172]

One of Orford's earliest adopters was Martti Koskenniemi – one of the most influential legal scholars of our time. Koskenniemi's 2001 book, *The Gentle Civilizer of Nations,* explored the way that international law was developed through the eyes of specific legal scholars, focusing on "the rather surprising hold that a small number of intellectual assumptions and emotional dispositions have had on international law during its professional period".[173]

Gentle Civilizer's focus on the political *context* in which these lawyers wrote their ideas was thus an inherently historiographical question. Koskenniemi's introductory remarks are an astonishing photograph of the intersection between historiography and critical legal scholarship in a world before Orford's challenge. Koskenniemi begins *Gentle Civilizer* by criticizing the conventional history of international law. The book was an attempt to put "in a historical frame" the development of influential ideas and arguments, but without making any assumptions "about history as a monolithic or linear progress narrative".[174]

This all was a rather contextualist approach. In fact, in later essays, channelling Skinner, Koskenniemi even offers a "word of caution" for legal historians not to treat their subject matter as just "a history of legal concepts or institutions that

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[169] ibid 175.
[170] ibid.
[171] ibid.
[172] Orford, 'International Law and the Limits of History' (n 161) 301.
[173] Koskenniemi, *The Gentle Civilizer of Nations* (n 2) 2.
[174] ibid.

travel, as it were, unchanged through time, stable objects for States and their rulers to use or to react to in idiosyncratic ways".[175] Tracing back the history of a legal concept, Koskenniemi said, "takes the present concept or institution as a given and tends to reduce all prior history into the role of its 'primitive' precursor".[176] In particularly un-Orfordly-fashion, Koskenniemi even calls this "anachronistic", arguing it "would fail to account for the meaning of legal concepts and institutions for the contemporaries for whom each moment is, of course, as modern and as full of meaning as our concepts are for us".[177] Koskenniemi rather urges us to see the history of concepts as one where "contrasting meanings are projected at different periods, each complete in themselves, each devised so as to react to some problem in the surrounding world".[178] In other words:

> "Its interest lies in meaning formation ('how does a particular concept receive this meaning?') rather than the contents of any stable meaning per se. For this kind of history, legal institutions are constructed constantly anew in polemical confrontations where opposing positions clash against each other: law would be narrated as an aspect of political struggle".[179]

It is this Koskenniemi – a dare-we-say-it, contextualist Koskenniemi – that read Anne Orford's *On International Legal Method*. And in Koskenniemi's own words, it was *inspiring*.[180] Koskenniemi's subsequent writings would be fundamentally different from his *Gentle Civilizer* days. While still maintaining his criticism of anachronism as "the routine projection of present concepts, vocabularies, and biases onto people of other ages and other concerns", his next historiographical essay expanded on the "limits" of contextualism.[181] He notes that contextualism "tends to rely on a 'positivist' separation between the past and the present that encourages historical relativism, indeed an outright uncritical attitude that may end up suppressing efforts to find patterns in history that might account for today's experiences of domination and injustice".[182] Thus, for Koskenniemi, it

[175] Martti Koskenniemi, 'A History of International Law Histories' [2012] The Oxford Handbook of the History of International Law 969.
[176] ibid.
[177] ibid.
[178] ibid.
[179] ibid.
[180] Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (n 161) n 32.
[181] ibid 226.
[182] ibid.

was now important to respond to concerns about anachronism in legal method, “because many of them are so obviously relevant for international legal historiography”.[183]

From then on, Koskenniemi’s writings retained their Orfordian twist, going, according to some historians, even further than her.[184] In one of his later essays on the matter, he concludes that “regardless of the merits of placing historical subjects in their local contexts, *critical* legal history ought not rest content with this; it should not dispose of using materials drawn from other chronological moments”.[185] International legal history, he concludes, should move *beyond* context, in order to avoid contextualism’s “relativist and anti-critical nature”.[186] Once added to Orford’s original statement, Koskenniemi’s writings seemed to be creating a consensus among some critical scholars that contextualism had no place in critical legal history.

In fact, Orford’s latest and most complete critique of contextualism – 2021’s *International Law and the Politics of History*[187] – calls it an “empiricist dogma” that stands upon arbitrary rules about how history should be constructed. Orford, instead, argues that international law is “made, not found”[188] and that it therefore cannot be objectively discovered by categorically establishing what was “thinkable” in a given time.[189] On the contrary, she argues, the very act of looking into international law’s past is “creative and political work”.[190] In other words, choosing which historical evidence matters and which historical evidence does not, to define a thing called “international law in the past,” is itself a political, rather than technical, act.[191] “When a historian presents their work as offering a history of something called ‘international law’”, she says, “they throw their hat into the presentist ring”.[192] There is, she concludes, simply no such thing as an objective, impartial or verifiable answer to the question “what is international

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183 ibid 230.
184 Fitzmaurice (n 144) 10.
185 Koskenniemi, ‘Vitoria and Us: Thoughts on Critical Histories of International Law’ (n 161) 123.
186 ibid 128.
187 Orford, *International Law and the Politics of History* (n 161).
188 ibid 252.
189 ibid 140.
190 ibid 256.
191 ibid.
192 ibid.

law?".[193] Skinner's argumentative context is, thus, nothing more, than one way to reconstruct a particular concept of the international, not a rulebook and most certainly, she would say, not the result of added academic rigour. It is as politicised a concept as the critical histories contextualists object to.

5. The Historians Strike Back

Orford's challenge and Koskenniemi's conversion were received with extreme controversy and opposition in the field of historiography. Two widely respected historians, Lauren Benton and Andrew Fitzmaurice, led the charge.[194] According to Benton, Orford had misunderstood contextualism. It does not, she argues, seek to separate past from present. According to Benton, current contextualist studies show a trend "to probe histories of legal and political thought by unspooling intertwining elements of doctrine and analysing their interplay with other conceptual threads to discover their uses, significance, and historical movement".[195] In modern historiography, unlike what Orford describes, Benton says, the "composite and contingent construction of doctrine and selective transposition from one setting and one period to another" is assumed, not ignored.[196]

In other words, for Benton, affirming that there is a context for each utterance does not mean, in any way, that historical analysis is unable to make intelligent connections to account either how concepts move in time or what lessons can the past have for the present. It is simply not a process that works in the form of neatly drawn precedents, from one past utterance to the next, but rather, a contingent and chaotic process. Quoting Skinner, she notes that his theories rather argue that "an understanding of linguistic conventions makes it possible to identify the precise ways in which authors in the past were manipulating or altering conventions and, in so doing, modifying political thought".[197] This, in turn, can serve to inform the politics of the present. In her words, "Skinner argues that the most important objective of historical study is to arrive at a 'lesson in self-

[193] ibid.
[194] See: Benton (n 123) 7 and Fitzmaurice (n 144) 5.
[195] Benton (n 123) 12.
[196] ibid.
[197] ibid 13.

knowledge'. He imagines self-knowledge to be emancipatory because it would reveal the limits of constraints on contemporary political thought and action".[198]

Benton's ultimate point, though, is that the "conceptual clumsiness of the time-bound historians imagined by Orford (…) who are presumably unable and unwilling to analyse legal politics across chronological barriers" simply does not exist.[199] In her view, proper historiographical research, both through contextualism and other schools like socio-legal approaches, has a yet unexplored revolutionary potential. She tells of various recent historical analyses of international law that "reconfigure" traditional narratives and "argue for replacing a linear history running from the jus gentium to natural law to positive international law".[200] These studies, she concludes,

should not be seen as "minor corrections" but as "broader reorientations of questions about the relation between legal politics and international order, and between international law and universalism"[201] – arguably, a similar objective as CLS, only, this time, through historical methodology.

Most of Benton's concerns are shared by Andrew Fitzmaurice. He complained of methodologies where "past authors were judged to have failed to conform to principles of equality and universality that were themselves (…) not available to most of the early modern subjects who had failed to conform to them".[202] In fact, he agrees with Benton that "[a]ny quick review (…) of the works of so-called Cambridge school historians, the methodological followers of Skinner, will reveal that their work always attempts to use the past in order to understand the present and does so explicitly".[203]

Fitzmaurice takes particular issue with Koskenniemi's point that contextualism is conservative, or at least morally relativist. As he sees it, Koskenniemi's critical argument that "the validity of our histories lies not in their correspondence with 'facts' or 'coherence' with what we otherwise know about a context, but how they contribute to emancipation today"[204] is particularly troublesome, because it fails

[198] ibid.
[199] ibid 32.
[200] ibid 30.
[201] ibid 31.
[202] Fitzmaurice (n 144) 8.
[203] ibid 14.
[204] Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (n 161) 129.

to understand one of the main objectives of contextualist histories: to avoid the manipulation of historical fact for present political purposes.[205] According to Fitzmaurice:

> "Koskenniemi would argue that such manipulation is a good thing when it contributes to 'emancipation'. That may be so, but who is to judge which causes are emancipatory and, once such principles of historical practice are accepted, who is to restrict such practices to questions of emancipation? Reactionary and conservative political programs – including programs directly opposed to emancipation – have always had their own versions of history and arguably the most dominant ones".[206]

Fitzmaurice thus presents historiographical methodology not as a barrier to progressive understandings of history, but rather a guardian, keeping history from being misused – in any way – for political manipulation. For Fitzmaurice, rather, even if a historian is not exactly "writing history with the explicitly stated goal of contributing to 'emancipation today'", they are nonetheless still concerned with the political issues of today – they just happen to address them "through writing history".[207] Indeed, for Fitzmaurice, what Orford and Koskenniemi propose has little resemblance to history as a discipline. Rather, it is a critique that "focuses upon the use of the present to produce distorted understandings of the past rather than upon using the past to understand the present".[208]

6. Bridging the Methodological Divide

More than an unbridgeable epistemological incompatibility, the current controversies surrounding law and history (or more accurately, some TWAIL scholars and some contextualist scholars) might be better described as a miscommunication. Orford faults historians for not being aware of the political nature of their own interventions and the effect they have on the history they report. In essence, her concern is that historians are demanding lawyers to adapt to the "correct" way of writing history and conform to the "official" recollection of what was "thinkable" in a given historical context. And yet, the idea that there could be such a thing as an "ultimate history"[209] where every single historical event is officially mapped and objectively defined, seems to be

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[205] Fitzmaurice (n 144) 13.
[206] ibid.
[207] ibid 15.
[208] ibid.
[209] "Ultimate History" is a term used by EH Carr. See: Carr (n 108) 7.

absolutely foreign to the kind of anxieties that dominate modern historiography and its disquisitions about the role of the historian.

Understood this way, more than an argument from epistemic arrogance, the contextualist one is an argument from epistemic anxiety: how to produce the most accurate account of the past when, like Orford says, the very act of looking alters the result. As Fitzmaurice says, the contextualist answer to this problem is to approach it philosophically, by looking into the question of meaning and how it is made.[210] More than trying to find an objective definition of international law, the contextualist claim is subjective: how one conceives this linguistic context will affect the result.

And yet, as mentioned above, these linguistic connections are not freely interpreted, but reconstructed following a linguistic method. Context is not *discovered* but *reconstructed,* by determining applicable language rules. If contextualism requires us to conceive the law as a language, then the construction of its (linguistic) context must be a jurisprudential exercise. After all, it is jurisprudence that provides the rules for the language of law.

Perhaps the problem, therefore, as Orford points out, is that it is a common feature in some influential contextualist works to disregard the work of the lawyer and claim to have discovered a context that distances itself from the typical legal sources. In Benton's influential book *Rage for Order,* for instance, her goal was to "look away from international law and international lawyers" in order to find international law in the "correspondence of middling officials about colonial legal conflicts and charters, records showing the legal strategies of the empire's most vulnerable subjects, the reports of commissions of inquiry, notes on colonial scandals, communications across political communities by merchants and sojourners, traces of colonial violence, [and] the rumblings of small wars".[211] This practice of "middling officials", however, must be filtered through the language rules of the time – the jurisprudence of international law and international lawyers. This is where Orford's critique is at its strongest: "international lawyers have focused on practices for as long as there have been international

[210] Fitzmaurice (n 144) 13.
[211] Lauren Benton, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2018) 21.

lawyers".[212] Instead, "what shifts in the work of Benton and Ford is whose practices count as relevant and why".[213]

In other words, Orford's main critique of Benton and Ford's work is that they made a *jurisprudential* mistake. In seeking to determine what was the conception of international law that they wanted to move away from, they chose to focus on one specific kind of language rules: the scholarship of Anne-Marie Slaughter, Benedict Kingsbury and other members of the Global Administrative Law project.[214] As Orford says, these were not "neutral or objective accounts that 'teach us' what the 'stuff of international law' really is".[215] Instead, they are "normative interventions that attempted to reshape perceptions of the nature and future of international law".[216] In other words, the international law that Benton and Ford were running away from was not well constructed, precisely because it did not speak well with the specific language they were venturing into – namely, jurisprudence. There is, after all, no incompatibility between looking at the practice of middling officials and applying international legal reasoning.

This should not mean, however, that contextualism as a whole is wrong; merely that the way it was put together in this specific case had an issue that was very noticeable for a lawyer, even if not for a historian. It is not, I argue, an either/or discussion, but a call for greater interdisciplinarity in the legal work of historians and the historic work of lawyers. Take, for example, Arnulf Becker Lorca's influential book *Mestizo International Law.*[217] Becker Lorca's is a lawyer's argument that seeks to find the non-Western histories of international law. Like Benton and Ford, he does not wish to find the answer for "what international law is" in the classical pages of Vattel and Lauterpacht, but, instead of focusing on the correspondence of middling officials, Becker Lorca looked at the figure of the non-Western international lawyer, seen here as a strategic intervener; someone who "had no special interest in international legal thought as such" but that rather "appropriated the discourse of international law and intervened in professional

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[212] Orford, *International Law and the Politics of History* (n 161) 259.
[213] Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021) 259.
[214] Orford, *International Law and the Politics of History* (n 161) 259.
[215] ibid.
[216] ibid.
[217] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press 2015).

debates with the intention of changing existing international legal rules, doctrines and institutions".[218] For him, therefore, "international law emerged out of the interaction between Western and non-Western sovereigns as well as from the professional rapports and debates between Western and non-Western international lawyers".[219]

But where Benton and Ford's work suffers from having filtered out the contemporaneous jurisprudential debates of international law's intellectual history, Becker Lorca's suffers from focusing on them almost exclusively. Becker Lorca's intellectual history of a *mestizo* international law builds its case atop neatly drawn sources, mostly books, *travaux preparatoires*, and the occasional speech – the distilled political interventions of jurists, not the raw material of government communications, commissions of inquiry, criminal trials and the interventions of professional organisations. While an immensely valuable contribution, it is valid to criticise Becker Lorca for artificially limiting the relevant context to the persona of the international lawyer.

Becker Lorca, for instance, presents Argentinean jurist, Carlos Calvo, as someone consciously intervening in international law to change it for the benefit of his region, particularly in what he saw as a double standard with regards to intervention.[220] While Becker Lorca does acknowledge Calvo as a member of the Latin American elite that based their ideas on "the culture, tradition and values of 'Western civilization'" through an "obsessive preoccupation with the recognition of their participation and contribution to development of Western culture"[221], this is done to the exclusion of other aspects of the Latin elite's "contribution" to international law discourse. As Obregón notes, Calvo was a white supremacist and in his writings consistently offered "a justification for the conquest and management of native populations in the region as inherent to the Creole civilizing mission".[222] Focusing on his lawyerly interventions vis-à-vis his European colleagues is only part of the story.

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[218] ibid 17.
[219] ibid 11.
[220] ibid 62.
[221] ibid 106.
[222] Liliana Obregón, 'Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 257.

The open secret of the so-called “Latin American contribution” to international law is that it was not a project for emancipation.[223] Latin American elites, like Calvo, descended from European backgrounds and, writing from Paris and London, defended a strong principle of non-intervention for extra-regional aggression, but had no qualms justifying the extermination of indigenous peoples in their “sovereign” land.

These dark sides of the *mestizo* nature of international law will not usually be recoverable from the isolated passages of Calvo and other 19th century Latin American scholars’s books and speeches. The extent of the hegemonic idea of civilisation’s influence over the concept of 19th century international law is, most likely, still hidden in the practice of “middling officials” and their correspondence, in the archival records of Argentina, Brazil, Chile, etc.

This, equally, does not mean that critical legal approaches to the history of international law are *wrong.* On the contrary, engagement between critical studies and contextualism is not necessarily incompatible.

In short, therefore, Orford wants contextualists to be open about the politics of their intervention – that the sources they are reading and the paradigms they are using to interpret them are ideologically loaded rather than objective. Benton’s critique of Orford, in turn, would be that she is finding the politics of each intervention without a consistent method, risking inserting conclusions into her analysis that are more unwitting manipulations of the historical record than a political intervention meant to reveal historical injustices[224]

More than an argument against interdisciplinarity, therefore, the debate is evidence of its necessity. Neither of these critiques is a foundational disagreement. Contextualists want to determine a linguistic context from where to identify the illocutionary intent of an author in order to gain full uptake of what they were trying to do/say with their intervention. Orford wants to approach historical interventions politically, in full awareness that there is no such thing as a neutral claim; all authors were and are trying to do/say something with their interventions. When seen this way, the alleged epistemic incompatibility between

[223] For a conventional story of Latin America’s “contribution” see: Marcelo G Kohen, ‘La Contribución de América Latina al Desarrollo Progresivo del Derecho Internacional en Materia Territorial’ (2001) XVII Anuario Español de Derecho Internacional 57–77.
[224] Benton (n 123) 7.

law and history dissipates. Factoring in political motivations is not incompatible with contextualism. Building a legal context with which to critically read the law is not incompatible with critical legal scholarship.

In fact, both critical and contextualist approaches can (perhaps unexpectedly) share much potential synergy. As Matthew Craven has argued, the contextualist critique of evolutionary histories "is one that chimes with 'new stream' approaches to international law which treat with considerable suspicion the idea that the history of international law may be presented in terms of an enlightened narrative of progress".[225] Indeed, both approaches seek to reconstruct the past in ways that do not purposefully try to legitimise the present.

Take the case, for example, of the concept of sovereignty. As Cass noted in the late 1990s, before Orford's challenge, early critical scholarship argued that "an examination of sovereignty reveals that the linear historical story is wrong, and that its acceptance has skewed our current understanding of the doctrine's meaning".[226] In this sense, "It is necessary to move away from a sovereign model of power in order to begin to think about the ways in which the reading and writing practices of international lawyers are themselves political".[227] Said in other terms, to understand the meaning of sovereignty, we must understand the illocutionary intent of each utterance of the term, in order to reconstruct a context that sheds light into why that specific author was using that specific term in that specific way. The history of sovereignty would thus not be the linear account of what Vitoria, Bodin, Grotius, and Vattel said about sovereignty, but the history of how the argumentative contexts of each intervention inter-relate through time. In simpler terms, there isn't a fundamental epistemological contradiction between reconstructing a context to identify why an author was writing the way they were writing about sovereignty as a concept of international law and identifying an author's politics to see how what they said about sovereignty affected the construction of international law as a concept. Both claims are compatible, and it is in this sense that this project will tackle Orford's challenge going forward.

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[225] Matt Craven, 'Introduction: International Law and Its Histories' [2007] Time, History and International Law 1, 9.
[226] Cass (n 10) 355.
[227] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 78.

7. Proposing a Method

As I mentioned above, intellectual history's linguistic turn led to the creation of Quentin Skinner's contextualist methodology, as the "recovery of specific language games".[228] In this conception, "[h]ow someone conceives of something is what linguistic connections and moves they make – no more".[229] As Skinner put it himself: "any act of communication will always constitute the taking up of some determinate position in relation to some pre-existing conversation or argument".[230] Therefore, "if we wish to understand what has been said, we shall have to identify what exact position has been taken up".[231]

If the job of the contextualist historian is therefore the recovery of languages, understood as "ways of talking or modes of discourse",[232] then a historical approach *to law* should keep in mind that law itself is a language. To gain understanding of a specific legal utterance, the historian ought to situate and interpret it within the legal discourse to which it is connected .

This is not, despite Orford's challenge, the same as limiting it to a specific historical time. As Skinner himself notes, "[t]here is no implication that the relevant context need to be an immediate one".[233] As noted before, in Skinner's approach, authorial intent is recoverable through an illocutionary act – what did the author intend to do in writing the way they did. Discovery of this act requires turning to the "argumentative context of their occurrence" in order to establish how they mesh with other utterances related to the same matter.[234] A 16th century scholar may very well be intending a response to Aristotle, Augustin of Hippo, or Aquinas. Whichever it is, that text will be part of the linguistic context, regardless of the chronological distance between them.

But if the historical aspect of the approach requires the recovery of the language connections, the legal aspect explains what the rules are for determining "what is the law" and how the rules of this law operate with one another – the theories of legislation and adjudication. As I mentioned above, most approaches to

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[228] Brett (n 145) 117.
[229] ibid.
[230] Skinner (n 107) 115.
[231] ibid.
[232] Brett (n 145) 117.
[233] Skinner (n 107) 116.
[234] ibid.

jurisprudence accept that the law (or, perhaps, the legal language) is indeterminate: that there is some level of core and penumbra that needs to be established before understanding the legal system. The critical approach to law, however, firmly states that law is *radically* indeterminate.[235] That is, that "legal questions lack single right answers (…) permit[ting] multiple outcomes to lawsuits".[236] Picking the ultimate legal answer would usually correspond with an arbitrary preference, commonly following the interests of the powerful or the ruling classes.

When combined, Contextualism and Critical Legal Theory would require the legal historian to recover the language of a radically indeterminate law. They would, therefore, look into the possible legal-linguistic connections a specific utterance was making at the time of its creation and analyse what role indeterminacy and power played in the making of those connections.

In order to reassess the history of international humanitarian law through this contextualist/critical methodology, the following chapters will approach it as discourse, meaning as a set of statements organised by specific rules and conventions that create a specific way to discuss a specific subject.[237] I will start by tracking the argumentative context and illocutionary intent of Lieber and his Code – why did he write in the way he did? What was he trying to do? Who and what was he responding to? Thus, instead of a linear progression from Lieber to the European codification conferences of Brussels 1874 and Hague 1899, I will re-construct the 19th century discourse on the regulation of war in the US and Europe, following the linguistic connections to wherever they lead.

As it will soon become apparent, these connections do not follow a linear progression, as the mainstream conventional account suggests, but a much more diverse one. Rather than "the law of 1863", I treat Lieber as one intervention, one utterance, within a broader paradigm of Western war, albeit an influential one. As the contemporary discussions and the archival record in Europe show, the view that the laws of war needed to be codified was not as

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[235] Judith Wagner DeCew, 'Critical Legal Studies and Liberalism: Understanding the Similarities and Differences' (1990) 18 Philosophical Topics 41, 41.
[236] Kress (n 94) 283.
[237] For a more detailed approach to discourse formation see: Michel Foucault, *Archaeology of Knowledge* (Psychology Press 2002). Thus, for example, there is a specific discourse we call "medicine", distinct from when someone just talks about someone's health.

popular as the conventional history argues. Many of the positions advanced by European governments in the 1874 conference were the result of resistance to the idea of codification and a defence of the “unwritten rules” of war. Moreover, these debates show profound disagreement between the states and jurists of the 1860s and 1870s on what “the law” was; particularly in the topic of partisan warfare, that the Lieber Code focused so much on.

This discourse, in addition, was not geographically tied to the North Atlantic. Following the linguistic context of Lieber and the jurists of his time reveals contemporaneous debates in places as diverse as Peru, Japan and Namibia about the nature of “Western” War. Following these linguistic connections reveals debates that have been otherwise erased from the historical record. From Latin American jurists who opposed the application of the Lieberian principles as a “barbarian” and “uncivilised” form of war to the Japanese embrace of Lieberian war as a means of obtaining reputational points with Europe, to Black African resistance to European colonial war in South West Africa. All of them are connected to the history of the laws of war in non-linear ways that offer a richer understanding of the discipline. The key, therefore, is to trace who was saying what about whom and where, instead of simply following a series of steppingstones from one Western historical landmark to the next.

Section II
War (1863-1914)

Chapter 1 set out the problem with the conventional history of international humanitarian law and its critique as a linear story that treats the law as a monolith that moves through time and space. Chapter 2 presented a specific methodology, both contextualist and critical, with which to contest this conventional history. Specifically, the methodology will reconstruct the linguistic and argumentative context of the laws of war in the 19th century by looking at the law as discourse, through the language of (critical) law.

I argue that most of what has been described as the conventional history, from Lieber to the European codifications, to the Geneva Conventions, has followed an inter-temporal approach to historical method, leading to the obscuring of non-Western legal views. The ultimate objective is to present the 19th century not as a well of clarified and purified wisdom, but as a contested arena where various interpretations of the laws of war co-existed all around the world.[238]

Chapter 3 will look at the argumentative context of the laws of war in Europe and the United States, revisiting some of the main facts and interventions of the conventional history through a contextualist and critical approach. This section argues that unlike what is commonly advanced, the laws of war in Europe and the US were not a monolith, but a cacophony. The Section argues that, at the time, there were three fundamental conceptions of the laws of war – one predominantly in the United States; one in the great European military powers of the time; and one in the so-called *Pétit États*, the "small states" most often victims of great power aggression.

Chapter 4 will then look at the laws of war in the context of the War of the Pacific and the general war discourse generated in South America as a result.[239] Contrary to the US and European experience, this discourse inverted the standard of civilisation to argue against the sharp war. Through these

[238] See, e.g.: Kinsella and Mantilla (n 6).
[239] Mauricio Rubilar Luengo, '"La Prusia Americana": Prensa Argentina e Imaginario Internacional de Chile Durante La Guerra Del Pacífico (1879-1881)' (2015) 33 Revista de Historia y Geografía 83.

interventions, a nascent idea of European war as a rather “barbarian” endeavour began to emerge.

Chapter 5 will look at the image of the laws of war from the perspective of Meiji Japan and its attempts at using the laws of war not as a body of rules to be litigated, but as a means for attaining so-called “civilised status” in the eyes of the West. This aspect of the laws of war as a leverage strategy, not law, is presented as one of the aspects why long durée connections between modern international humanitarian law and the 19th century laws of war is controversial: they are bodies of law that have very different social purposes.

Chapter 6 will analyse European colonial war from the perspective of Hendrik Witbooi, a Nama indigenous chief and national hero of Namibia. This section will illustrate the exclusion of the laws of war to colonial settings as a hypocritical choice by racist European colonial empires, showing how they had little concern for a concept of humanitarianism as we conceive it today.

Chapter Three
The Emergence of the "Sharp War"

1. Jomini vs. Clausewitz

This Chapter addresses the emergence of the Sharp War Paradigm within the context of 19th century European history. Understanding this process requires to previously understand the concept of "civilised" war itself. The idea that European war, as regulated by the (European) law of nations, was a superior and more elevated form of war was particularly popular throughout the 19th century. At the time, European nations perceived that membership in the "club" of sovereign and civilised nations gave them access to rules that were *better* than the rules that regulated other political communities.

These racialised and racist hierarchies impacted the regulation of many a phenomenon, including law and warfare. In the context of international law, 19th century Western scholars sought to organise the rights and obligations of different political communities according to what international legal scholarship calls the "standard of civilisation", premised on the idea of the European state as the highest echelon of human existence.[240] Communities in so-called "semi-civilised" and "savage" societies were excluded, in varying degrees, from the application of the law. When translated to the regulation of war, this meant that in the European mind, the application of international law to wars between European powers resulted in a more civilised engagement than the wars of and against the peripheral other. The rise of 'race-thinking' also emboldened ideas that civilized war only applied to Europeans. The notion of "civilised war", therefore, dominated the legal discourse of European war throughout the 19th century.

This "civilised" war, however, was an overarching term that allowed differing conceptions of war to develop under its overlying guidance. At the beginning of the 19th century, in the immediate aftermath of the Napoleonic Wars, the predominant paradigm of civilised war was that of Napoleon's Swiss-born military strategist, Antoine Henri de Jomini. Jomini conceived civilised war strategy as an almost geographical science. He described war's fundamental

[240] See, e.g.: Tzouvala (n 2) and Koskenniemi, *The Gentle Civilizer of Nations* (n 2).

principle as “[t]o throw by strategic movements the mass of an army, successively, upon the decisive points of a theater of war, and also upon the communications of the enemy as much as possible without compromising one's own”.[241] In other words, it is the commander’s job to look at a map, draw a proverbial line in the sand next to the enemy’s decisive point, and best determine how to force the enemy’s forces behind said line. In Jomini’s words, “the point will be the possession of the hostile capital, or that of a province whose loss would compel the enemy to make peace”.[242]

In this conception, war is essentially a tournament, a match. Armies in a field will *manoeuvre* from one side of the “pitch” to the other, until one loses a key point and sues for peace. However, as Jomini wrote these words, technological and political changes in European society and its relationship with military forces were already rendering such notions obsolete.[243] The rise in nationalism and the idea of a “national war” would make this kind of war a relic.

This was the case of the famous Peninsular War. In 1807, Napoleon received permission from the King of Spain to cross through Spain into Portugal. He quickly conquered Portugal and, noting a unique opportunity, decided to betray Spain and take it as well. With Jomini at his side, he swiftly defeated Spain’s army, crossing out all the fortresses and capitals from his proverbial Jominian map. By May 1808, Napoleon’s brother, Joseph, sat on the throne of Spain and the war, supposedly, ended.

The people of Spain, however, had other plans. By late May, all major Spanish cities had risen in open revolt against the French. But not in a Jominian war of positions. Instead, the Spanish faced Napoleon’s forces in isolated small skirmishes meant to make France’s presence unsustainable. These *guerrillas,* “small wars” as the Spanish would call them, were a relatively new occurrence. In his classic *The Art of War,* Jomini addresses them by saying they are “rarely seen”.[244] He was, however, aware of their paradigm shifting characteristics: “No

[241] Antoine Henri Jomini, *The Art of War* (William Price Craighill and George Henry Mendell trs, 2004) 70.
[242] ibid 88.
[243] Isabel V Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Cornell University Press 2005) 98. Hull speaks of a “post-Napoleonic world of stronger, activist states with more resources of money, manpower, technology, and industrial strength that made armed force much stronger than it had ever been”.
[244] Jomini (n 241) 29–30.

army, however disciplined, can contest successfully against such a system applied to a great nation", he says, "unless it be strong enough to hold all the essential points of the country, cover its communications, and at the same time furnish an active force sufficient to beat the enemy wherever he may present himself".[245]

Jomini laments the potential arrival of a new era of national wars. He is acutely aware of the carnage that such "wars of extermination" can cause and argues that "without being a utopian philanthropist, or a condottieri, a person may desire that wars of extermination may be banished from the code of nations".[246] Jomini thus longs for the "good old times, when the French and English Guards courteously invited each other to fire first" and openly complains of the "speculative persons" who "hope that there should never be any other kind [of war], since then wars would become more rare".[247] In other words, he complains about those who see military conflict not as a tournament between European gentlemen but as a war to the death.

Writing more or less at the same time-period as Jomini but attaining widespread prominence among military circles later in the century, Carl von Clausewitz despised what he called the "useless geometrical principle" predominant in his time.[248] He conceived war very differently. "War", he said, "is thus an act of force to compel our enemy to do our will".[249]

Instead of lamenting the prospects of so-called wars of extermination, Clausewitz embraced them, and prepared his world-famous manifesto on war as a means to explain how to exploit the new "character of contemporary warfare".[250] In Clausewitz's conception, rather than trying to take over a point in a map, "direct annihilation of the enemy's forces must always be the dominant consideration".[251] After all, he says, the decisive determination of victory in any engagement is "the relative strength of unused reserves still available".[252]

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[245] ibid 33.
[246] ibid 34.
[247] ibid 35.
[248] Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds, Princeton University Press 1984) 135.
[249] ibid 75.
[250] ibid 220–229.
[251] ibid 228.
[252] ibid 249.

Whoever has less soldiers able to fight the next day is likely the side that will flee the field. This is why "if we read history with an open mind, we cannot fail to conclude that, among all the military virtues, the energetic conduct of war has always contributed most to glory and success".[253]

This Clausewitzian idea that war should be fought energetically and vigorously, without respite until the enemy has been annihilated responds to a completely different conception of "civilised war". In this thesis, I will refer to this conception as the Sharp War Paradigm. According to Clausewitz, war ought to be fought to the very end and as intensely as possible, with no room or patience for Generals who invite each other to fire first. War was not an elegant tournament, but a means to an end; pragmatic, brutal, and uncompromising. Clausewitz strongly believed that the brutality of war was not a problem to solve but a feature to embrace. In fact, he stated, "[t]o introduce the principle of moderation into the theory of war itself would always lead to logical absurdity".[254] Reading his classic *On War* is, without a doubt, reading a clear justification of almost any extreme practice in time of war.

At the same time, however, it is worth noting that *On War* is not a finished work. Clausewitz died an early death in November 1831, aged 51, trying to defeat a cholera epidemic while on deployment in the Polish-Prussian border. *On War* was published posthumously in June 1832 by Marie von Clausewitz, his wife, "without one word being added or deleted".[255] In a note, written in 1827, Clausewitz calls his *opus magna* a "rather formless mass that must be thoroughly reworked once more".[256]

Because of this, *On War's* recipes for what constitutes an effective and successful war have been subject to many interpretations over the decades.[257] Despite Clausewitz's modern-day fame as the founder of a nearly dogmatic theory of war, adoption of his ideas rather formed a discourse, with distinct and often contradictory interventions, depending on the particular speaker's position and context. To understand the different conceptions of war and of the laws of

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[253] ibid 229.
[254] ibid 76.
[255] ibid 67.
[256] ibid 69.
[257] Michael Howard, 'The Influence of Clausewitz' in Michael Howard and Peter Paret (eds), *On War* (Princeton University Press 1984) 28.

war that existed at the time, it is important to understand how a specific intervention understood Clausewitz and adapted it to the author's particular context within a changing Europe, where nationalism and the professionalisation of armies were replacing the peasant armies of early modern times.

Importantly, as Jomini predicted, a large part of these discussions revolved around a relatively new development in European war: the national uprising. Clausewitz wrote about "popular uprisings", calling them "a phenomenon of the nineteenth century" that had both opponents and supporters.[258] Yet, unlike Jomini, he did not lament them. Guerrilla warfare was simply "another means of war"[259], a natural development of the new conditions predominant at the time.[260] In faithful Clausewitzian fashion, he does not worry if this new kind of war will bring more suffering or make war more terrible. Clausewitz is only focused on whether it can be used as an effective tactic in the defence of a territory.

Clausewitz was sceptical that bands of brigands could defeat a regular army without the support of their own army as well. "To be realistic", he says, "one must therefore think of a general insurrection within the framework of a war conducted by the regular army, and coordinated in one all-encompassing plan".[261] He also places considerable importance on the population's ability to stay dispersed. Faithful to his views on war's brutality, he warns that "[w]here a population is concentrated in villages, the most restless communities can be garrisoned, or even looted and burned down as punishment" – something that cannot be done in say rural and isolated farming areas, where "the element of resistance will exist everywhere and nowhere".[262]

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[258] von Clausewitz (n 248) 479. Clausewitz's assertion requires some precision. There were national uprisings before the 19th century, such as the 1790 lévée en masse during the French Revolution as well as the 1798 Irish rebellion. Thus, instead of nineteenth century, it would perhaps be more accurately described as a late 18th century phenomenon that became established towards the early 19th.
[259] ibid.
[260] ibid. (Clausewitz argues that popular uprising is, "in fact, a broadening and intensification of the fermentation process known as war". He argues that "[t]he system of requisitioning, and the enormous growth of armies resulting from it and from universal conscription, the employment of militia – all of these run in the same direction when viewed from the standpoint of the older, narrower military system, and that also leads to the calling out of the home guard and arming the people").
[261] ibid 480.
[262] ibid.

All in all, Clausewitz seems to embrace the idea of war until the very end through popular war "either as a last resort after a defeat or as a natural auxiliary before a decisive battle".[263] On the first option, Clausewitz is categorical:

> "A government must never assume that its country's fate, its whole existence, hangs on the outcome of a single battle, no matter how decisive. Even after defeat, there is always the possibility that a turn of fortune can be brought about by developing new sources of internal strength (…). There will always be time enough to die; like a drowning man who will clutch instinctively at a straw, it is the natural law of the moral world that a nation that finds itself on the brink of an abyss will try to save itself by any means".[264]

In other words, rise up if it means you can steal a victory; and exterminate the rebels through collective punishment if it means you can impose one. It is the reactions to this *dictum* that would define European and US approaches to war in the years to come.

2. Clausewitz Codified

An ocean away, in July 1862, General Henry Wagner Halleck of the United States was fighting a brutal civil war against the secessionist Confederate States of America. In Missouri, where he had been stationed until being offered the rank of General-in-Chief of the Union Armies, hostilities grimly followed Clausewitz's predictions. Union forces had secured a victory and Confederate Major General Sterling Price had withdrawn his forces. Halleck was, at least in theory, in full control.[265] Instead of peace, though, he found himself engulphed in a bloody and gruesome guerrilla war against Confederate "bushwackers" who "engaged in indiscriminate violence against Union soldiers, prisoners, and civilians alike".[266]

As a dedicated student of Jomini and his "geometric" conception of war, Halleck was at a loss.[267] He had ordered that all fighters "not commissioned or enlisted" in the Confederate army would be prosecuted and executed.[268] This, however, did not seem to solve the problem. In April 1862, the Confederate Congress responded by passing the Partisan Ranger Act. According to this Act, the Confederate government could "commission officers to form bands of partisan

[263] ibid 483.
[264] ibid.
[265] Witt (n 35) 188.
[266] ibid.
[267] ibid.
[268] ibid 191.

rangers who were to be in the service of the Confederacy, paid by the Confederacy, and subject to the same regulations as other soldiers in the Confederate armies”.[269] This was, of course, a cop-out. As Witts explains, “what the Confederacy had shown (…) was that a belligerent could very easily extend commissions to irregulars and thus give them the status of soldiers deserving prisoner of war treatment”.[270]

Halleck was a personal friend of Francis Lieber, then a Professor of Political Science at Columbia College, in New York. A Prussian exile and former soldier, Lieber was well-versed in the military sciences and had a keen interest in the study of the laws of war. Not only had he lobbied West Point Academy, albeit unsuccessfully, to set up a course on the matter in 1859[271] but he had spent the better part of a year trying to convince the Union government to let him write “a little book on the Law and Usages of War, affecting the Combatants”.[272]

Halleck knew of his friend’s interest in creating a code of the laws of war, and thus turned to him for legal clarity on the issue that most vexed him: partisan warfare. Since Halleck’s request opened a doorway for Lieber to plant the seeds of a code, he gladly took on the task, producing a memorandum (or as he called it, a pamphlet)[273] under the title of *Guerrilla Parties, Considered with Reference to the Laws and Usages of War*.[274] This was not an easy task. At the time, the laws of war were essentially unwritten, at best scattered throughout the often-contradicting writings of various scholars, from Grotius and Vattel to Wheaton and Westlake. *Guerrilla Parties* was as much an act of legal interpretation as it was of legal creation. It was also a profoundly un-Clausewitzian exercise, since Clausewitz very firmly believed that the laws of war could play no role in the conduct of hostilities. And yet, Clausewitz’s influence in Lieber’s writings can be very clearly distinguished.

[269] ibid 190.
[270] ibid 192.
[271] Matthew J Mancini, ‘Francis Lieber, Slavery, and the “Genesis” of the Laws of War’ (2011) 77 The Journal of Southern History 334.
[272] Lieber’s initial interest in the codification of the laws of war related to what he perceived as a “lack of knowledge in the laws of war” surrounding the actions of Union commanders when dealing with self-emancipated slaves. For more on this see, generally, Mancini (n 271).
[273] ibid 330.
[274] Francis Lieber, *Guerrilla Parties, Considered with Reference to the Laws and Usages of War* (1862).

Just like Clausewitz, Lieber considered that European civilised war was changing – that the time of Jomini's geometrical principles would give way to a different paradigm of war. "Down to the beginning of the first French revolution, towards the end of the last century", Lieber notes, "the spirit which pervaded all governments of the European continent was, that the people were rather the passive substratum of the State than an essential portion of it (…). [W]ars were chiefly cabinet wars, not national wars – not the people's affairs".[275] This, Lieber says, coinciding with Clausewitz, is changing. "Since that time most constitutions contain provisions that the people have a right to possess and use arms; everywhere *national* armies have been introduced, and the military law of many countries puts arms into the hands of all".[276] For Lieber, it is this difference that separates the Spanish *guerrillero* or the Missouri bushwacker from the regular partisan, risen *en masse* to the defence of their country, in assistance of their army. In other words, guerrilla men benefitted from prisoner of war status if they engaged in open warfare, wearing distinctive emblems, without engaging in pillaging, and with some level of permanent structure.[277]

Knowing that Lieber was a student of Clausewitz is particularly relevant for understanding the argumentative context in which Lieber's laws of war were drafted. The writings of Clausewitz would not be translated into English until the London edition of 1874.[278] In fact, his ideas would not become mainstream in the United States until the early 20th century – with the first US translation appearing only in 1943. And yet, very clearly, Lieber, a former Prussian soldier, capable of reading the German original, was well versed in his theories.

In a footnote of his 1839 book, *Manual on Political Ethics* Lieber surveys the various definitions of war available at the time, mentioning the work of "General Clausewitz", citing to the 1835 edition of *On War*.[279] Lieber calls it "a work which bears the imprint of a powerful mind".[280] In fact, a few pages later, Lieber himself declares that "[w]hen war is declared my avowed object is to injure my enemy as much as possible, *in order to compel him to peace at my will"* (italics added).[281]

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[275] ibid 14.
[276] ibid 15.
[277] Witt (n 35) 193.
[278] von Clausewitz (n 248) xi.
[279] Lieber, *Manual of Political Ethics* (n 58) 631.
[280] ibid.
[281] ibid 660.

Lieber's *dictum* bears striking resemblance to Clausewitz's definition of war as "an act of force to compel our enemy to do our will". Thus, for Lieber, "[i]f destruction of the enemy is my object, it is not only right, but my duty, to resort to the most destructive means".[282] After all, he noted, "[t]he more actively this rule is followed out the better for humanity, because intense wars are of short duration".[283]

This idea stayed with Lieber throughout his career. When Halleck finally asked Lieber to pursue his famous Code[284], he made sure he included this conception of intense war in it. Article 29 of the Code reads: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief".[285] This was a similar statement to Clausewitz's maxim on the energetic conduct of war, seen above, only with humanity replacing "glory and success" as the side-product. This is also the reason why I refer to the Clausewitzian understanding of war as the Sharp War Paradigm. Lieber's intervention operationalised Clausewitz's ideas, cloaking them in legal garbs. The most important of these garbs being his conceptualisation of military necessity in legal terms. Thus, according to Lieber's Code:

> "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".[286]

In other words, absent a specific prohibition set out by the laws of war, in a "sharp war" anything that is indispensable to destroying one's enemy is legal. Military necessity "admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war".[287] The only express limitation was cruelty, defined in terms of necessity: "the injury done in war beyond the necessity of war is at once illegitimate, barbarous, or cruel".[288] Given this framework, "virtually any use of force was permissible if required by military necessity" and "[v]irtually

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[282] ibid.
[283] ibid.
[284] On December 12th, 1862. See: Witt (n 35) 229.
[285] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) art 29.
[286] ibid 14.
[287] ibid 15.
[288] Lieber, *Manual of Political Ethics* (n 58) 663.

every limit in the code was shadowed by a necessity exception".[289] Despite being a staunch opponent of the idea of a "law of war", Clausewitz would have probably thought of Lieber's Code as a lesser evil.[290] His opposition was premised on the idea that the laws of war would insert notions of "kindness" or "moderation" into war[291]; Lieber's law of war did not.

As noted above, Lieber's "sharp war" was particularly gruesome for civilians. "The citizen or native of a hostile country is thus an enemy", the Code stresses, "and as such is subjected to the hardships of war".[292] And while the Code does note that "[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor", this is only "as much as the exigencies of war will admit".[293] Likewise, while "private citizens are no longer murdered, enslaved or caried off to distant parts", the "inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war".[294] In fact, Lieber allows for reprisals, since "[a] reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage".[295]

Lieber drafted his Code specifically to address the situation with Confederate partisans and bushwackers. This made sharp war most inhumane when it dealt with civilians that resisted an occupation. "War-rebels", the Code states, "are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same".[296] If captured, "they may suffer death (…) whether called upon to do so by their own, but expelled, government or not".[297] The population has the right to rise up in a "levy *en masse"* to resist an invasion by an approaching army. "[I]f, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their

[289] Witt (n 35) 234.
[290] von Clausewitz (n 248) 75.
[291] ibid.
[292] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) art 21.
[293] ibid 22.
[294] ibid 23.
[295] ibid 27.
[296] ibid 85.
[297] ibid 85.

protection".[298] Perhaps the best expression of the spirit of the Code is encapsulated by its Article 156:

> "The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war".[299]

Put in practice, the Code was quite unsuccessful at reducing the hardships of war. The infamous "March to the Sea", by Union Major General William Tecumseh Sherman, is a good example. After fighting yet another guerrilla war in Memphis, Sherman had become convinced that "all in the South are enemies of all in the North" and that the US was not "only fighting hostile armies, but a hostile people".[300] Sherman, acting with full knowledge of his superiors (including Halleck, with whom he corresponded often) "attacked the morale of the southern people, taking the war directly to southern noncombatants to destroy the population's willingness to fight".[301]

Lieber was quite satisfied with Sherman. In a letter to Halleck, he enthusiastically noted that "Sherman moves his army better than Uncle Sam [delivers] our letters".[302] His only concern, faithful to his Code, was making sure that his actions did not turn into "mere ruthless revenge".[303] Of course, they did. Then again, Sherman, like Lieber and Clausewitz, shared the same crucial belief. As he himself put it: "the more awful you can make war the sooner it will be over".[304] Sharp wars are brief.

When seen in context, therefore, Lieber's Code is not so much the birthing ground of international humanitarian law, but a response to specific military needs arising out of a particular (Clausewitzian) paradigm of war. Lieber's contribution, therefore, was to turn the more theoretical Clausewitzian conception of war into a functional and practical rulebook for European states to pursue their national interests. As I will show in later sections, in fact, through the application of the standard of civilisation doctrine, these Clausewitzian laws of

[298] ibid 51–52.
[299] ibid 156.
[300] Witt (n 35) 276.
[301] ibid 277.
[302] Letter from Lieber to Halleck of February 24, 1865, quoted by: ibid 280.
[303] Letter from Lieber to Halleck of February 11, 1865, quoted by: ibid.
[304] ibid 279.

war were expressly excluded when these interests led European nations to attack populations they had racialised as inferior in colonial contexts. For all of Lieber's talk about sharp wars leading to greater humanity, the rules of the standard of civilisation made perfectly clear for all participants that the laws of war were not meant to encumber European ventures outside of the "civilised world", where the Sharp War took even more aggressive shape.

3. Germany's Kriegsraison

Like Lieber before him, it would be fair to assume Jomini would consider Helmuth von Moltke, Chief of the Prussian General Staff, yet another "speculative person". Moltke, another keen student of Clausewitz, would be Bismarck's chosen man to lead the wars of German unification against Austria in 1866 and France in 1870. Moltke's ultra-offensive, merciless total war impressed other world powers, who quickly perceived Prussia as an idealized military society, and Clausewitz as its ideological guru. It was, in fact, because of Moltke's impressive record that *On War* was translated into English in 1874.[305]

Just like Lieber's, though, Moltke's approach to Clausewitz was also self-serving. Where Lieber discounted Clausewitz's ideas about the futileness of international law in regulating war, Moltke discounted Clausewitz's principle that war was politics by other means. Moltke instead "insisted that political considerations came into play only before and after the war, not during the course of operations and combat".[306] This created a hyper-aggressive understanding of an already aggressive Clausewitzian paradigm. As explained by Best, this was simultaneously "heretic" and "not un-Clausewitzian".[307] It was heretic because it was a stark departure from "Clausewitz's clearest dicta about the priority of political purpose".[308] At the same time, however, "that war was a phenomenon which, far from being within the power of well-meaning men and publicists to set limits and controls upon it, must burst all moral and legal boundaries and impose upon its devotees its own rules and necessities"[309] is also a profoundly

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[305] von Clausewitz (n 248) xi.
[306] Helmuth von Moltke, *Moltke on the Art of War: Selected Writings* (Daniel Hughes ed, 1995) 21.
[307] Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson 1980) 146.
[308] ibid.
[309] ibid.

Clausewitzian ideal. As noted above, *On War's* own internal contradictions helped to legitimise this reading of Clausewitz.

While we cannot be certain that Moltke ever had direct access to Lieber's writings, we do know that Lieber's ideas were available to him. Many of Lieber's key concepts on war appeared in Johan Caspar Bluntschli's *Das Moderne Völkerrecht* in 1868 – in fact, he transcribed an English text of the Code as an annex.[310] Bluntschli, a German-speaking and highly influential Swiss legal scholar at the University of Heidelberg, was a personal friend of Lieber, and based the format and some of the content of *Das Moderne Völkerrecht* on Lieber's code. Bluntschli is very clear on this. At the beginning of the book, "instead of the Preface", he tells his readers, he will offer "a Letter to Professor Dr. Francis Lieber in New York".[311] Here, Bluntschli says, Lieber's "fine idea to provide a short form of the laws of war as Field Instructions to the American Army" *inspired* him to write his own book "in the form of a codification".[312] Lieber approved of this, telling Bluntschli his project was a "noble and daring" idea.[313]

We also know that several sections of Bluntschli's work bear astounding resemblance to Lieber's Code. Article 549 of *Das Moderne Völkerrechts* states, for example, that:

> "The violence of war may do everything that military necessity requires, that is, insofar as its measures appear necessary in order to achieve the means of war and are in accordance with the general law and the customs of war among civilized peoples".[314]

This is, of course, a direct translation of Lieber's concept of military necessity, or as Bluntschli calls it, "the main deciding rule for the law of war".[315]

We know as well that sometime before the Wars of German Unification, Prussia adopted a Code of its own. This Code, however, remained unpublished. The earliest reference to it is the 1880 book *Political and Legal Remedies for War,* by

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[310] Johann Caspar Bluntschli, *Das moderne Voelkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (CH Beck 1868).
[311] ibid III. (Original: "Unstatt des Vorworts, ein Brief an Professor Dr. Franz Lieber in New York").
[312] Betsy Baker Roeben, 'The Method Behind Bluntschli's "Modern" International Law' (2002) 4 Journal of the History of International Law / Revue d'histoire du droit international 249, 290.
[313] Letter of April 16th, 1866 from Lieber to Bluntschli, quoted in ibid 289.
[314] Bluntschli (n 310) 308. (Original: Die kriegsgewalt darf alles das thun, was die militärische Nothwendigkeit erfordert, d.h. soweit ihre Massregeln als nöthig erscheinen, um den Kriegszwed it Kriegsmitteln zu erreichen und in Uebereinstimmung sind mit dem allgemeinen Recht und dem Kriegsgebrauch der civilisirten Völker).
[315] ibid. (Original: die entcheidende hauptregel für das Recht der Kriegsgewalt).

Sheldon Amos, where he notes the “close relationship observable between these ‘Instructions’ [meaning the Lieber Code] and the regulations of the so-called ‘Prussian Military Code’ – a code which has never been published, but the substance of which can be pretty accurately collected from the constant references made to it by Prussian commanders in the proclamations and manifestos issued in the course of the late invasion of France”.[316]

Indeed, Moltke’s actions during the Franco-Prussian War of 1870 were a masterclass in the most aggressive kind of sharp war. It took Moltke less than two months to completely annihilate his enemy.[317] And yet, just like Halleck in Missouri or Napoleon in Spain, Moltke’s war did not end. The French people persevered, rising up in open revolt against the advancing Prussian army – something that “confounded the Prussian General Staff”.[318] Moltke, says Hull, “no longer reckoned with an equal partner with whom he could negotiate but instead an enemy [who must be forced] to surrender unconditionally”.[319] Faithful to his creed, Moltke responded to the French resistance with a ferocious war of reprisals and collective punishment against the civilian population. If Moltke’s military victories in the field awed Europe, his counterinsurgency in France shocked its conscience.

Moltke believed that French citizens risen in arms – the so-called *franc-tireurs* – were not soldiers and thus could not benefit from the privileges and protections offered by the laws of war. They, instead, were to be persecuted and shot. Those who supported them were to be punished.[320]

Lieber would agree. Under the terms of his code (and presumably the unpublished Prussian Military Code) “war-rebels” who “rise up in arms against the occupying or conquering army” and “men who commit hostilities (…) without commission, without being part and portion of the organized hostile army” are not public enemies and “may suffer death” upon capture.[321]

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[316] Sheldon Amos, *Political and Legal Remedies for War* (Harper & Brothers 1880) 315.
[317] Hull (n 243) 117.
[318] ibid.
[319] ibid 118.
[320] ibid.
[321] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) arts 82 and 85.

As Hull recalls, Moltke issued orders for mayors of occupied towns to report *franc-tireurs* under penalty of having their houses burned down; villages where *franc-tireurs* were detected were subject to collective fines; farms were franc-tireurs were given sanctuary were burned down; heavy requisitions were imposed on the civilian population to feed the Prussian army and civilians were forced to provide intelligence under penalty of death.[322] As one order stated:

> "It would be recommended that, in those places where rail disturbances have often occurred, hostages consisting of local mayors or otherwise prominent persons should be taken on the trains as hostages, preferably in the locomotives".[323]

Through the Franco-Prussian War, civilians "were pulled into the vortex of war" and "were less protected from severe treatment than were prisoners of war".[324] It was the Sharp War Paradigm applied in its utmost extreme.

Moltke's approach to sharp war would soon cement itself in the newly created German state. General Julius von Hartmann, for instance, argued in 1877 that "[w]ar means the temporary suspension of [the international legal] order, which it replaces with battle".[325] This application of military necessity allowed for truly disturbing practices – particularly when, like in France, the population did not maintain its peaceful status during occupation. "Where there is popular uprising", Hartmann said, "terrorism becomes a necessary military principle".[326] This German expectation of "civilian docility"[327] was perhaps best described by Best as the "arch-occupier argument". According to this, "the ends of humanity in warfare were met as best they could be when an invaded or occupied populace stayed in its homes and went to its normal work-places, and kept itself assiduously and conspicuously apart from whatever hostilities might still be going on".[328]

The idea of docility, however, is not inherent to Clausewitz. As noted above, Clausewitz believed war should continue so long a single man remained armed

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[322] Hull (n 243) 118.
[323] ibid 118–119.
[324] ibid 119.
[325] Hartmann, Militarische Nothwendigkeit und Humanität, Deutsche Rundschau 13 (1877), 123, cited by ibid 124.
[326] Hartmann, Militarische Nothwendigkeit und Humanität, Deutsche Rundschau 13 (1877), 462 cited by ibid.
[327] ibid 125.
[328] Best (n 307) 181.

and ready to fight. Thus, again, the Prussian/German conception of war stood upon a reconfigured and nuanced reading of Clausewitz's ideas. In other words, despite the evident Clausewitzian connections, Moltke, Hartmann, Lieber, and Bluntschli did not all think alike.

Bluntschli was one of the "men of 1873", as Koskenniemi refers to the founders of the *Institut de Droit International*.[329] He sought to "articulate and represent" the *conscience juridique du monde civilisé*.[330] While he was no pacifist, he was a believer in the progressive development and humanization of war; in the idea that the great minds of the world could build together a better international law. As Kalmanowitz states, "[f]or Bluntschli, humanity was a 'pillar' of international law, in fact the ultimate source of its legitimacy and the engine of its dynamism and progressive effect".[331] This, predictably, put him at odds with the Prussian military command – particularly with Moltke.

In fact, Moltke – to use Geoffrey Best's language – subjected Bluntschli to one of the 19th-centuries "most heavy-weight rebukes".[332] In 1880, Bluntschli sent Moltke a copy of the model code of the law of war produced by the *Institut.* Moltke responded to Bluntschli with such a ruthless take-down as to be worthy of extended reproduction:

> "Before all else, I entirely appreciate the philanthropic efforts being made to alleviate the evils of war. [But] perpetual peace is a dream, and not even a beautiful dream. War is an element of the divine order of the world. In it are developed the noblest virtues of man: courage and self-denial, fidelity to duty and the spirit of sacrifice; soldiers give their lives. Without war, the world would stagnate and lose itself in materialism".[333]

Following his hyper-aggressive reading of Clausewitz, Moltke rather complained that Bluntschli purported to "restrict" the object of war to the destruction of the enemy's armed forces. "No", answered Moltke, categorically, "beyond that one must attack all the resources of the enemy government, his finances, his

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[329] Koskenniemi, *The Gentle Civilizer of Nations* (n 2) 48.
[330] ibid 47.
[331] Kalmanovitz (n 40) 138.
[332] Best (n 307) 144.
[333] Letter from Moltke to Bluntschli, December 11, 1880, quoted in: ibid 145.

railroads, his supplies, and even his prestige".[334] For Moltke, "the greatest kindness in war, is to bring it to a speedy conclusion"[335]. Sharp wars are brief.

This particularly German formulation of the sharp war is often described by the term "*Kriegsraison*", which "maintains that belligerents may do whatever they feel is necessary to prevail in an armed conflict, as military necessity overrules all law".[336] Thus, as German scholar Carl Lueder argued, departures from the laws of war were justified "when circumstances are such that the accomplishment of the war-aim, or the escape from extreme danger, is hindered by sticking to it".[337]

This particularly German take on the laws of war would soon clash with the competing understandings coming from elsewhere in Europe.

4. A Humanitarian Parenthesis

While Moltke and Lieber were busy drafting rules and tactics of Sharp War, the historical founder of the ICRC, Henri Dunant, was travelling in northern Italy, when he came across the aftermath of the Battle of Solferino. The story is almost mythological in its nature[338]: having seen the horrors of battle and the insufficient and chaotic efforts to relieve the wounded soldiers, he embarked on a personal campaign to set up a humanitarian organisation that would be in charge of centralising relief for the wounded through a principle of neutrality. This was the origin of the ICRC and the Geneva Movement.

In 1863, the same year the Lieber Code was published, Dunant and four other like-minded humanitarians (the so-called "Committee of Five", including Gustave Moynier and Guillaume-Henri Dufour) met in Geneva and created the International Committee for Relief for Wounded Soldiers. Through this Committee, they invited the nations of Europe to a humanitarian conference in Geneva. The resulting 1864 Geneva Convention was nothing like the Lieber Code. As Kalmanovitz notes, "its approach to limitation is novel and not quite in line with Enlightenment views on regular war".[339] In this Geneva Convention,

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[334] Letter from Moltke to Bluntschli, December 11, 1880, quoted in: ibid.
[335] Letter from Moltke to Bluntschli, December 11, 1880, quoted in: Witt (n 35) 342.
[336] Catherine Connolly, '"Necessity Knows No Law": The Resurrection of Kriegsraison through the US Targeted Killing Programme' (2017) 22 Journal of Conflict and Security Law 463, 466.
[337] Best (n 307) 173.
[338] See, e.g.: Sir Adam Roberts KCMG FBA, 'Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 Geneva Convention' (2019) 20 Melbourne Journal of International Law 39.
[339] Kalmanovitz (n 40) 135.

"Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer".[340] This is a different conception of war entirely and was often resisted by the more military oriented minds of the time[341], even if the actual commitments it required of states were rather modest.[342] In fact, "Lieber and his Code had little or no connection with these events".[343]

Despite the Geneva Movement's efforts to expand and update the Convention's provisions, these humanitarian concerns were never the focus of 19th century international law-making. The progress of further like-minded instruments was "stunted by the governments' responses".[344] Thus, while the 1868 Geneva Conference, which sought to produce "Additional Articles Relating to the Condition of the Wounded in War" was a complete failure and could not secure a single ratification[345], the 1868, state-led, Saint Petersburg Declaration Renouncing the Use of Explosive Projectiles under 400 Grammes Weight secured seventeen.

This Declaration famously framed humanitarianism differently than its Geneva equivalents, stating that its mission was to fix the "technical limits at which the necessities of war ought to yield to the requirements of humanity".[346] Thus, while the lofty rhetoric of humanity was present in the Declaration, stating that the only "legitimate object of a war" is to "weaken the military forces of the enemy" and thus that "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable", its practical results were quite limited. It banned a single kind of ammunition and completely ignored both the humanitarian provisions of the 1864 Geneva Conventions or the wellbeing of civilians. In fact, "Governments' main

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[340] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, art. 5. Published in: D Schindler and J Toman (eds), *The Laws of Armed Conflict* (Martinus Nijhoff Publishers 1988) 280–281.
[341] Best (n 307) 151–152.
[342] Benvenisti and Cohen (n 1) 1392. Arguing that the Convention "did not impose onerous duties on governments or armies" that were "required merely to allow voluntary Red Cross associations access to the battlefield to treat wounded or captured soldiers and dispose of the dead".
[343] Roberts KCMG FBA (n 338) 27.
[344] Benvenisti and Cohen (n 1) 1392.
[345] Roberts KCMG FBA (n 338) 29.
[346] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November 1868. Published in: Schindler and Toman (n 340) 102.

practical advantage from this agreement was better control of their own armed forces' use of ammunition".[347]

The humanitarian movement of Geneva, 1864, had a minor influence in the way the laws of war would be defined later in the century. The hope of the Geneva Movement was that "once the obligation to care for wounded enemy soldiers became firmly entrenched in military discipline, soldiers would start questioning the appropriateness of wounding enemies in the first place", leading to the end of war itself.[348] While a noble end, it was not an extended one during the 19th century – nor, one might add, did it ever come true.[349] In fact, as I will show in the next section, European nations had very little patience for attempts at limiting their military options during war.

5. The Conference that No One Wanted

Early in the 1800s, Jomini left France to join the Russian army as an advisor. Eventually, he would have a son, Alexander Henrikhovich, Baron de Jomini. After his father's death, in 1869, Alexander worked as a bureaucrat at the Russian Foreign Ministry. Like his father, he was a student of war and a military officer.

This was a peculiar time and place to be a student of war. Tsarist Russia had recently led the diplomatic push to adopt the St. Petersburg Declaration banning exploding bullets.[350] There is copious scholarship trying to solve the mystery of why an autocracy like tsarist Russia would embrace the cause of regulating war. Holquist notes that "[a]s a rule, existing treatments dismiss Russia's interest in international law as insincere and ephemeral, motivated either by fiscal and military considerations or the personality of the autocrat".[351] For Riepl, for instance, Russia was a pragmatist idealist: "promoting humanity was actually in the interest of the State" because it would limit the damage suffered by Russian forces in the field.[352] For Benvenisti and Lustig, Russian embrace of international law was purely pragmatic: as the largest standing army in Europe, it needed to

[347] Benvenisti and Cohen (n 1) 1393.
[348] Kalmanovitz (n 40) 147.
[349] See, e.g.: Moyn (n 8).
[350] Michael Riepl, *Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Place* (Nomos 2021) 33.
[351] Peter Holquist, 'The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874-1878' (2004) 6.
[352] Riepl (n 350) 41.

know with certainty which rights and which duties came with it.[353] Holquist, however, attempts a more systemic answer. He argues that, beyond the government's own interests, "[i]nternational law allowed certain sectors of Russian educated society, on the one hand, to uphold and promote the principle of law within an autocratic political order" and, on the other, "it allowed them to stake a claim – despite Russia's autocracy – to Russia's preeminence in a field reserved explicitly for 'civilised nations'" – a way for the elite to "negotiate its relationship with 'the West'".[354] This is a persuasive explanation, considering that, as Mälksoo concludes, "historically, international law has been a thoroughly 'civilizational' affair in Russia", a nation consistently divided between conflicting European and Slavic identities.[355] Whatever the ultimate explanation, as of the late 1860s, Russia's role in the formation of the laws of war was undeniable.[356]

It is at this point in time, in late March 1874, that several governments in Europe and the Americas received a missive from the Count of Houdetot, Chairman of the Executive Committee of the Society for the Amelioration of the Fate of Prisoners of War, humbly requesting them to send delegations to a diplomatic conference to be held on May 4th, in Paris.[357] The Russian response was almost immediate. On May 13th, European governments received a missive from Prince Gortchakow, the Russian Foreign Minister, noting that Russia had already been elaborating their own "counter-project" and requested the Paris meeting to be put on hold.[358] This project was "more general" in nature and would convene the nations of Europe (but not Asia or Latin America) to a meeting in Brussels, in mid-July.[359]

The Brussels Conference is, as has been mentioned before, a fundamental part of the conventional history of international humanitarian law. It is, in fact,

[353] Benvenisti and Cohen (n 1) 1388.
[354] Holquist (n 351) 7–8.
[355] Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015) 71.
[356] Lauri Mälksoo, 'F.F. Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law' (2014) 25 European Journal of International Law 811.
[357] Letter from the Count of Houdetot to Her Majesty the Queen of England, dated 28 March, 1874, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I, No. 8, The National Archives of the United Kingdom (TNA) FO 412/15.
[358] Letter of May 13, 1874 from Lord Tenderden to the Secretary to the Admiralty, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 10, TNA FO 412/15.
[359] Letter of May 15, 1874 from the Count Houdetot to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 13, TNA FO 412/15.

presented as the next logical step in its evolution, after Lieber's ground-breaking Code. As the story goes, the Russian counter-project had been prepared by an ambitious (and now famous) 28-year-old public servant by the name of Fedor Martens. Martens sent his draft to Dimitry Milyutin, Russia's Minister for War, explicitly indicating "which articles from the Lieber code serve as the basis for his own articles".[360] This has led to the widespread conclusion that the Code directly inspired the resulting Brussels Declaration and that there is a process of fluid continuity between the rules contained in it and those contained in the Code.

And yet, tracking the archival record shows a much less direct connection between Lieber and Brussels. In fact, when the Russian Government finally delivered Martens' draft to the European governments, instead of excitement at the possibility of regulating war and continuing the Lieberian effort, the general reaction was one of apprehension and frustration. We know this because Great Britain, who was itself unsure about attending, sent missives to "ascertain the views of foreign Governments" about the proposal, and the responses were, in general, negative.[361]

The Ambassador to Germany, Mr. Adams, confirmed that the Government there were not happy, but felt they had "no alternative" but to attend.[362] Emperor Wilhelm I had accepted the invitation of Tsar Alexander – his nephew – without consulting Bismarck or anyone in the Government. Considering the recent background of the Franco-Prussian War, where France had accused German troops of extensive violations of the laws of war, the Emperor's acceptance "evidently embarrassed" the German government, that "desire[d] to restrict the programme" and "would doubtless prefer not to touch upon questions connected with the Geneva Conventions".[363] Moreover, Germany "would not have accepted an invitation from a French or other private society", but refusing the invitation of

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[360] Holquist (n 351) 12.

[361] Letter of June 11, 1874 from Lord Tenterden to the War Office, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 24, TNA FO 412/15.

[362] Letter of June 18, 1874, from Mr. Adams to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 40, TNA FO 412/15.

[363] Letter of June 18, 1874, from Mr. Adams to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 40, TNA FO 412/15.

another sovereign state was more complicated.[364] The only reason they felt there was a low risk in participating was because they "calculated that the members will soon find out that so vast a programme cannot be executed by them at once" and that "an early adjournment will be found necessary, and thus, for the present at least, nothing will come of the Conference".[365]

The Austro-Hungarians were equally unimpressed by the Russian draft. Count Andrássy, Foreign Minister of Austria-Hungary, revealed in confidence to the British Ambassador that while he would "have no objection" to the humane treatment of prisoners of war, he had nonetheless "serious doubts" about forming "a code of laws for circumstances in which, it may be said, all legality and rights are in abeyance".[366] As far as Count Andrassy was concerned, such a code would "favour the interests of an invading army at the expense of the country invaded", meaning "the interests and independence of States unable or unwilling to remain armed in times of peace would be seriously compromised".[367] Thus, the Count hoped that the British would indeed send a representative so that "the two Governments might communicate confidentially with each other, with a view to promoting a general agreement on the points which are not objectionable, and to having others withdrawn from the programme on which it would be inexpedient to lay down definitive rules or regulations".[368]

The French said they did not "much relish" the proposed Conference, but that they felt "bound to accept it" out of deference to the Russian Tsar.[369] In fact, the Duc Decazes, the French Foreign Minister, revealed to the British Ambassador that "so long as the proposal for a Conference had emanated from the Comte de

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[364] Letter of June 18, 1874, from Mr. Adams to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 40, TNA FO 412/15.

[365] Letter of June 20, 1874. From Mr. Adams to the Earl Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 43, TNA FO 412/15.

[366] Letter of June 17, 1874 from Sir A. Buchanan to the Earl of Derby, in: in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 44, TNA FO 412/15.

[367] Letter of June 17, 1874 from Sir A. Buchanan to the Earl of Derby, in: in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 44, TNA FO 412/15.

[368] Letter of June 17, 1874 from Sir A. Buchanan to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 44, TNA FO 412/15.

[369] Letter of June 22, 1874, from Lord Lyons to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 48, TNA FO 412/15.

Hondetot [sic] and a private society, he had refused to give it any countenance".[370] Moreover, he "apprehended many inconveniences from the proposed discussions" and had been "very careful not to commit himself in any degree as to the specific questions treated in the Russian draft".[371] Their main interest, in any case, was far from humanitarian. As the British Ambassador in Brussels reported, "it is possible that France still smarting from the rigour with which the German rules of war were employed against her, might be induced to agree to most of the Articles of the Russian project, in the hope of having the opportunity of applying them with equal severity to Germany".[372]

The Belgians were equally unsatisfied, telling the British that they did not wish to be seen as opposing the Russian project, but that "an examination of it has shown that it contains many points to which she cannot give her consent".[373] They instead proposed to divide the conference in two parts "by confining its deliberations on the present occasion to the settlement of questions of humanity, connected with the wounded and prisoners of war, so as to form a Supplement to the Geneva Conventions, and by adjourning the discussion of the political articles of the Russian project to a future occasion".[374] The Belgian views, the British Ambassador reports, "tend to eliminate or postpone the greater number of the seventy-one Articles comprised in the 'project'".[375]

The British themselves also showed profound doubts about the Russian project. In a letter to Lord Loftus, British Ambassador to Russia, the UK Foreign Office reported that "Her Majesty's Government are not convinced of the practical necessity for such a scheme for the guidance of military commanders in the field,

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[370] Letter of June 23, 1874, from Lord Lyons to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 52, TNA FO 412/15.
[371] Letter of June 23, 1874 from Lord Lyons to the Earl of Derby, Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 52, TNA FO 412/15.
[372] Letter of July 5th, 1874, from Mr. Lumley to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 10, TNA FO 412/16.
[373] Letter of July 7, 1874 from Mr. Lumley to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 19, TNA FO 412/16.
[374] Letter of July 7, 1874 from Mr. Lumley to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 19, TNA FO 412/16.
[375] Letter of July 19, 1874, from Sir H. Barron to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 75, TNA FO 412/16.

and cannot but fear that, unless the discussion is conducted in the most guarded manner, the examination of any such project in a Conference at the present junction may reopen causes of difference and lead to recrimination between some of the Delegates appointed to take part in it".[376] The British expressed concern about the potential expansion of the Conference's scope and whether it would include naval combat. The rule set out by the British Government, therefore, was that it was "firmly determined not to enter into any discussion of the rules of international law by which the relations of belligerents are guided, or to undertake any new obligations or engagements of any kind in regard to general principles".[377]

These negative views were everywhere. The Dutch were of the opinion that the project "should be rather restricted than extended".[378] The United States even rejected the invitation, saying it had arrived too late.[379] In fact, not even the Institute of International Law at Ghent was satisfied with Russia's proposal. They complained of the "purely military mode in which it is proposed at the Congress to treat International questions which may affect so seriously the interests of non-combatants".[380] While the Institute initially considered sending a formal complaint, they decided against it after the British statement, because they thought that while the project remained "utterly indefensible", it had "received its death blow" at the hands of the British.[381]

It seemed, rather, that the only ones that were keen on attending were those who had been uninvited. In the Count of Houdetot's original plans, the Paris organisers sent invitations to "various States of South America, who had eagerly

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[376] Letter of July 4, 1874, from Earl of Derby to Lord A. Loftus, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 60, TNA FO 412/15.
[377] Letter of July 4, 1874, from Earl of Derby to Lord A. Loftus, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part I No. 60, TNA FO 412/15.
[378] Letter of July 18, 1874, from Sir E. Harris to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 74, TNA FO 412/16.
[379] Letter of July 18, 1874 from Mr. Watson to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 60, TNA FO 412/16.
[380] Letter of July 5th, 1874, from Mr. Lumley to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 10, TNA FO 412/16.
[381] Letter of July 7, 1874 from Mr. Lumley to the Earl of Derby, in: Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Part II No. 19, TNA FO 412/16.

accepted them".[382] After the Paris Conference was suspended upon request by the Russian government, the South American delegations still arrived in Paris in time, unable to change their travel plans. From there, they requested permission to participate in the Brussels negotiations but were denied and left stranded in France.[383]

In sum, instead of a codifying moment where the nations of Europe were "inspired" by the Lieber Code, the Brussels Conference is the result of historical contingency. Out of respect for the Russian Emperor, the Conference that no one else wanted went ahead, with Alexander Jomini as Chairman, on July 27, 1874.

6. The Battle of the Clausewitz

Martens – who would go on to become one of the most renowned scholars of his century – had seen first-hand the carnage brought about by the Franco Prussian War.[384] He was taken aback by the realisation that two unquestionably "*civilised"* states could engage in egregious conduct, accusing each other of violating the customs of war.[385] He was convinced that the problem lay in the differing interpretations of the frequently specious and doctrinal sources that contained the laws of war.[386] His proposal for an international conference to clarify these rules served the double purpose of providing legal clarity for the nations of Europe on the contours of civilised war and catapulting Russia's pedigree as a promoter of civilisation.[387]

This interest in legal certainty was probably why Martens turned to the work of Francis Lieber and his much-lauded Code.[388] If uncertainty was the problem, certainly a set of rules to organise a sharp war would solve it. Martens thus "carefully cross-listed the articles of Lieber's code alongside the parallel provisions of his own proposed text".[389] In the end, Martens original draft (hereinafter referred to as the "Martens Draft") had a noticeable Lieberian flair.

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[382] Conférence de Bruxelles, 1874, *Actes de la Conférence de Bruxelles: 1874* (1874) 67.
[383] ibid 69.
[384] Holquist (n 351) 11.
[385] ibid.
[386] ibid 12.
[387] See generally: Holquist (n 351).
[388] ibid 12.
[389] Witt (n 35) 343.

The text started with a kind of preamble, containing 5 “general principles”. Given their relevance, I quote them in full below:

> “(1) An international war is a state of open struggle between two independent States (acting alone or with allies), and between their armed and organized forces.
>
> (2) War operations must be directed exclusively against the forces and means of warfare of the enemy State, and not against its subjects, as long as the latter do not themselves take an active part in the war.
>
> (3) To achieve the objective of war, all the means and all the measures of war, that conform to the laws and customs of war, and that are justified by the necessities of war, are allowed.
>
> The laws and customs of war do not only prohibit unnecessary suffering and barbaric acts committed against the enemy; they also require the competent authorities to immediately punish those guilty of said acts, unless they are caused by an absolute necessity.
>
> (4) The necessities of war cannot justify: treason with regards to the enemy, nor the fact of declaring them outside the law, nor the authorisation to use violence and cruelty against him
>
> (5) In the event that the enemy fails to observe the laws and customs of war, as defined by this Convention, the opposing party may have recourse to reprisal, but only as an inevitable evil, without ever losing sight of the duties of humanity”.[390]

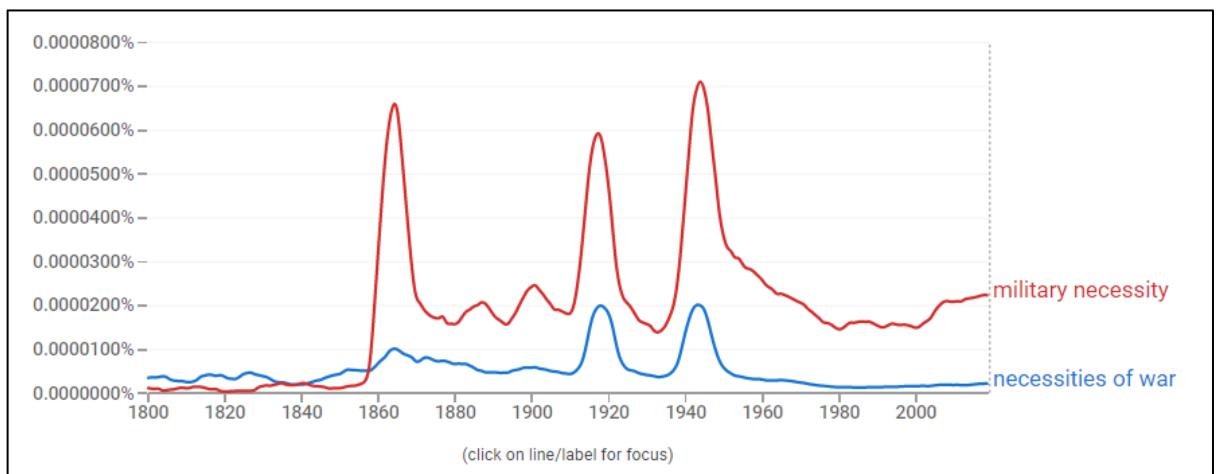
The Lieberian influence here is clear. Principle 2, for instance, is remarkably similar to Article 22 of the Lieber Code, which stresses, as I have noted above, that “[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”.[391] The key difference, of course, is the change of this final qualifier for a more narrow reference to active participation in hostilities, instead of the exigencies of war. On this regard, Marten’s draft appears to allow the belligerents less discretion with regards to the targeting of civilians.

At the same time, reference to Lieber’s military necessity is adapted in Principles (2) and (3), which were clearly influenced by Articles 14 to 16 of the Lieber Code. Yet, where Lieber’s necessity did not allow acts of wanton cruelty, which were prohibited through a specific rule, Martens’ Principle (3) adds an extra exception, stating that punishment of those who cause “unnecessary suffering and barbaric

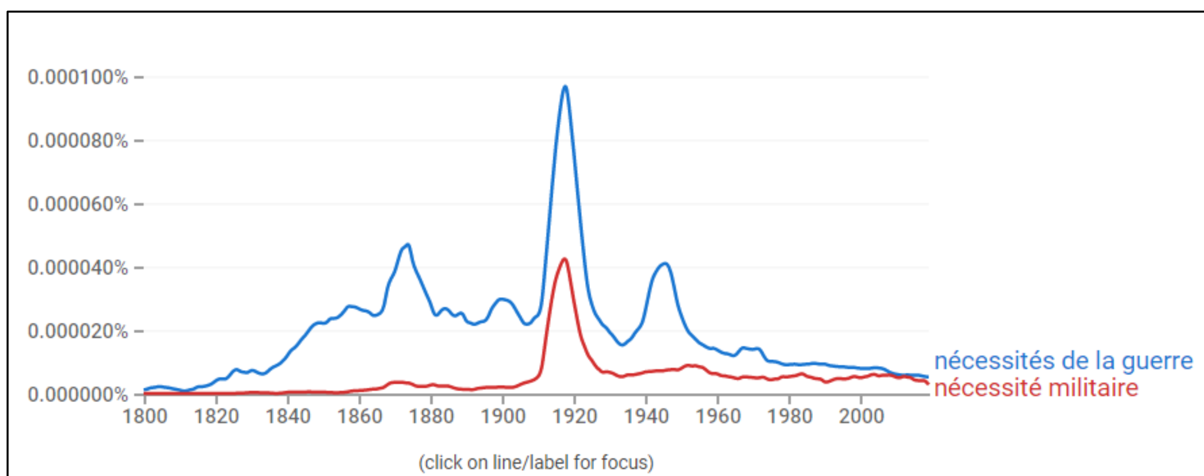
[390] Conférence de Bruxelles, 1874 (n 382) 8.
[391] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) art 22.

acts" can be set aside if they were justified by an "absolute necessity". Similarly, Principle (4) states that the necessities of war "cannot justify" certain types of reprehensible conduct, suggesting that, for Martens, other controversial conducts could be justified by it.

These nuanced differences hint that Martens gave more importance to military necessity's function as an exception than as an enabling underlying principle. Reference to this function is less common in the Lieber Code, that treats military necessity as a permeating and overarching principle. There is of course the aforementioned Article 22, as well as a few others. Article 38 states that "[p]rivate property (…) can be seized only by way of military necessity". Article 116 states that "[a]n honorable belligerent allows himself to be guided by flags or signals of protection *as much as the contingencies and the necessities of the fight will permit".* In general, as the following Google Ngrams show[392], the term "military necessity" was more common in 19th century English sources (which frequently used it as a principle in need of a definition: "military necessity is") than in French ones, which tend to refer more often to "the necessities of war" (a term more frequently used as an exception; *"except when demanded by the necessities of war"*).



[392] Google Ngrams illustrate and quantify the occurrence of specific phrases in the Google corpus of books.



In the end, the final text of the Declaration omitted Martens' "general principles" entirely. The Declaration only mentions military necessity in three occasions: In article 3, arguing that occupants shall "maintain the laws which were in force (…) unless necessary"; in article 13(g) forbidding any destruction or seizure of enemy property "that is not imperatively demanded by the necessity of war"; and in article 40, allowing requisitions that "are connected with the generally recognized necessities of war".[393] The Lieberian idea that "military necessity" admits or justifies "all the means and all the measures of war" is nowhere to be found.

The proceedings of the Brussels Conference give no guidance as to why these sections were removed. The correspondence of Major-General Sir A. Horsford, the British delegate at Brussels, simply states that the principles "were not brought forward for discussion, and do not find any place in the modified text", even when "[t]he Principles themselves, however, had necessarily to be considered in the course of the Conference, as they form the groundwork of several Articles of the Project".[394]

In any case, Lieber's preference for a standalone definition of "military necessity" instead of an exceptional "necessities of war" might have to do with his German legal background, which had "developed a uniquely robust doctrine of military necessity", as seen above with the concept of *Kriegsraison.*[395] It is not really surprising to discover, in fact, that, as noted by Fabian Witt, in his private

[393] Conférence de Bruxelles, 1874 (n 382) 288.
[394] Letter of September 4, 1874, from Sir A. Horsford to the Earl of Derby, inclosing a Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare, in: Correspondence with Major-General Sir A. Horsford respecting the Conference at Brussels on the Rules of Military Warfare, No. 52, p. 161, TNA FO 412/18.
[395] Isabel V Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press 2014) 25, 44–47.

notebooks, Lieber “translates the phrase military necessity as ‘*raison de guerre’”*[396] – the literal translation of German *kriegsraison* – instead of the more exact translation (and the term currently used by the French *Manuel de Droit des Conflits Armées)*, *nécessité militaire*.[397]

As noted above, *Kriegsraison* was the natural development of Moltke’s ideas of war. As Connolly notes, “[a]t the operational level, Kriegsraison allows for the untrammelled application of the principle of military necessity; any action can be justified once it can be said to be militarily necessary”.[398] This was incompatible with both Lieber’s and Marten’s concepts, but particularly with the latter.

These different ways of approaching the Sharp War hint at the contested nature of the European legal discourse on war. Instead of a standalone principle, like in German and English-speaking sources, Francophone necessity was more frequently conceived as a specious catchall exception. Thus, in Lieber’s conception, the laws of war are primarily permissive: “military necessity allows of X, unless prohibited”.[399] In the Brussels Declaration, however, it is primarily prohibitive: “X is prohibited unless justified by military necessity”.[400] And finally, in Germany’s *Kriegsraison*, the laws of war are simply irrelevant: “military necessity allows X, regardless of a prohibition”.[401]

These three conceptions, however, were not the subject of profound disagreement at Brussels. As Hull notes, “though historians have seen the Brussels Conference as occurring at the apex of the doctrine of military necessity in nineteenth-century Europe, that doctrine was seldom explicitly discussed”.[402] Instead of a complicated and nuanced debate about the specific definition of military necessity, all nations were rather content with leaving the laws of war as specious as possible, as shown by the general reluctance to show up in Brussels in the first place.

[396] Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016) 101.
[397] See: Ministère de la Défense, *Manuel de Droit Des Conflits Armés* (Secrétariat Général pour l’administration 2012).
[398] Connolly (n 336) 466.
[399] Lieber, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (n 24) art 14.
[400] See, generally: Conférence de Bruxelles, 1874 (n 382).
[401] See: Best (n 307) 144.
[402] Hull (n 395) 67.

Whatever its theoretical and philosophical contours, nowadays, there seems to be consensus among most contemporary military powers that military necessity cannot act as an underlying principle allowing for flexibility there where it has not been expressly mentioned as an exception in the *lex scripta*. Expressions to this regard are common, stating that "the modern law of armed conflict takes full account of military necessity"[403], that "States have crafted the law of war specifically with war's exigencies in mind"[404], or that "considerations of military necessity is already an element of IHL".[405] In other words, while the US term "military necessity" has become dominant, its content is the result of a rejection of German *Kriegsraison* and an embrace of the Francophone concept of necessity as exception. As Michael Schmitt states, in the modern canon, "[e]xtant treaty law therefore reflects an agreed upon balance between military necessity and humanity, such that neither independently justifies departure from its provisions, unless otherwise specifically provided for in the law".[406]

Back in 1874, discussions focused instead on much more practical concerns. As the Russian War Minister, Dimitrii Miyliutin, told Alexander Jomini, when delivering his instructions to the Russian delegation, "the most difficult issue at the conference was likely to be the question 'to whom does the right of combatant belong, in the case when a war is one of peoples [*narodnaia voina*], when the population of a portion of it, has taken up arms".[407] This had been, after all, exactly the issues of contention during both the Franco-Prussian War and the US Civil War, as well as during the Mexican American War (1846-48) and the Second French Intervention in Mexico (1861-67).[408]

In fact, the German representatives, under the advice of Johann Bluntschli himself, arrived in Brussels with the very specific goal of imposing strict

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[403] UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (The Joint Doctrine & Concepts Centre 2004) s 2.3.
[404] US Department of Defense, *Law of War Manual* (Office of General Counsel, DoD 2016) 54.
[405] Danish Ministry of Defence and Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Rosendahls 2016) 68.
[406] Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' in Michael N Schmitt (ed), *Essays on Law and War at the Fault Lines* (T M C Asser Press 2012) 94.
[407] Quoted by Holquist (n 351) 13. See also, Tracey Leigh Dowdeswell, 'The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification' (2017) 54 Osgoode Hall Law Journal and Hull (n 395) 61–68.
[408] See, e.g.: Marcos Pablo Moloeznick, 'Insurgencia y contraguerrilla durante la guerra de intervención francesa en México (enseñanzas para la doctrina de guerra mexicana)' [2008] Revista del CESLA 119.

requirements for belligerent participation, in order to restrict the right of the population to rise up in arms as they had done in France and Missouri.[409] The German first representative, Major General Kosntantin Bernhard von Voigts-Rhetz, former Chief-of-Staff for Prince Friedrich Karl during the war with France, “wanted volunteers to be under regular army command and to have been organized and trained already in peacetime”.[410] In Germany’s view:

> “The population of a locality that is de facto occupied, that rises in arms against the established authority, is subject to the laws of war in force for the occupying army. The population of a non-occupied locality, surprised by the enemy and spontaneously combating the invading troops, will be considered belligerents so long as they have not had time to organise in accordance with Article 9 [regulating the requirements of belligerent status] and that they comply with the laws and customs of war”.[411]

This is the arch-occupier position referred to above, including its expectation of civilian docility. “Russia and Germany were concerned that a stringent definition of genuine occupation would force them to leave too many active troops in the occupied zone” and so they tended “to consider areas ‘occupied’, and thus subject to the laws of occupation, when other nations would consider them still part of the front, governed by very different rules”.[412] Thus, civilians could organise in militia-like bodies to rise *en masse* against an approaching German army, but once this army crossed the line demarcating the city’s limits, civilians behind this line should accept their fate and remain peaceful. If they did not, they would be subject to reprisals and cruel punishment, without the right to be deemed lawful belligerents.

This is why Jomini, who had been selected as Conference Chair, opened the momentous occasion making everyone fully aware of the tense situation: “There are very contradicting ideas on war”, he said, “[s]ome would like to make them more terrible so as to make them less frequent. Others would like to turn them into a tournament between regular armies, with the people as simple spectators”.[413]

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[409] Hull (n 395) 61.
[410] ibid.
[411] Remarks of the Delegate of Germany, Session of 18 August 1874, Conférence de Bruxelles, 1874 (n 382) 158.
[412] Hull (n 395) 61.
[413] Opening Remarks of Baron Jomini, Plenary Session of 29 July 1874, Conférence de Bruxelles, 1874 (n 382) 22.

Jomini's diagnosis, however, seems equivocal on hindsight. It implies that the disagreement between the participants in Brussels was a humanitarian one: one side (the Germans and Russians) wanted to keep civilians out of hostilities, thus turning wars into a brief tournament, while another wanted civilians to rise up and suffer the reality of war, thus making wars longer and more terrible. But this is a misstatement of both positions.

The German position did not mean to make war "less terrible". In practice, because of its outdated and unrealistic expectation of docility in a time of nationalism, Germany's sharp war, as seen above, resulted in very terrible results. Germany wanted legal authorisation to exterminate resistance under the banner of fighting what Lieber had called "war-rebels". Whatever the desires of Jomini (and his late father) the era of tournament warfare was simply over, having been replaced, as predicted by Clausewitz, by a new standard of *national*, "sharp" war.

The self-styled *Petit États* – Brussels, the Netherlands and Switzerland – mounted a defensive wall against the German and Russian approaches to insurrection, but never running away from a Sharp War Paradigm. In his first speech, the Belgian representative, François August, Baron Lambermont, made his priorities crystal clear:

> "When a large state is attacked, generally the war only affects a part of its territory. If the population of the invaded part cannot contribute to the defence of the country, the bulk of the nation remains standing and can prolong the fight. On the contrary, a small state [*un petit État*] can be occupied as soon as it is invaded. (…) The independence of Belgium is not under attack or under threat. But if it were the case, Belgium would defend itself until the very end [jusqu'à la dernière extrémité]".[414]

Jomini and the Germans were well aware of this position. In his opening remarks, Jomini stated:

> "The Russian Project has been criticised for paralysing the rights of the defending side. This criticism is unfounded. (…) [T]he nature of war has changed. It used to be a kind of drama in which personal strength and courage played a key role. Today, individuality has been replaced by a formidable machine put in motion by ingenuity and science. Because of this, we must regulate, to put it somehow, the inspirations of patriotism. Otherwise, by opposing powerfully organised armies to irregular training, we run the risk of

[414] Remarks of the Delegate of Belgium, Session of 30 July 1874, ibid 31.

> compromising national defence and make it more fatal both for the invaded country and the aggressor".[415]

But it is this very idea that the nature of war is changing that inspires the position of the *Petit États* as well. In Lambermont's own words:

> "Undoubtedly it is good that war is not waged without rules (…) but, at the same time, we must measure the scope of the system that is being so seriously recommended. When all nations have organised their forces for regular war, when all men in all parts are ready to march as soon as the first cannon is fired, the force of numbers will never be on the side of the secondary states. It is therefore primarily for them that it is important to maintain the powerful spring called patriotism intact".[416]

For the *Petit États,* civilians that rise up in *levée en masse*, both before and during an occupation, should receive belligerent status, and have a right to wage war in defence of their motherland. When seen in the context of the history of "civilised" war described above, both of these claims – Germany's and Belgium's – are inspired by differing readings of Clausewitz. One, read through the German lens of civilian docility and Moltke's belief in the hyper-aggressiveness of war, blamed unorganised militias for prolonging war and thus increasing their brutality, when sharp wars should instead be brief. The other, anchored in Clausewitz's own writings about guerrilla warfare, demanded a right to fight a sharp war until the very end. Both sides were trying to use the language of law to re-codify a Clausewitzian discourse that best suited their own strategic positions.

In this Battle of the Clausewitz, agreement was impossible. As the British Foreign Minister, the Earl of Derby, noted in the aftermath of the Conference, the difficulty in the negotiations "demonstrate that there is no possibility of an agreement (…); that the interests of the invader and the invaded are irreconcilable; and that even if certain rules of warfare could be framed in terms which would meet with acquiescence, they would prove to exercise little more than the fictitious restraint deprecated by the Russian Government at the opening of the Conference".[417] Trying to find common ground where none existed, therefore, Jomini's only solution became deletion. Whole articles were

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[415] Opening Remarks of Baron Jomini, Plenary Session of 29 July 1874, ibid 22.
[416] Remarks of the Delegate of Belgium, Session of 14 August 1874, ibid 141.
[417] Letter of January 20, 1875 from the Earl of Derby to Lord A. Loftus, No. 20, in: TNA FO 881/2579

removed from the Martens Draft, particularly those relating to armed resistance in occupied territories.[418]

There were few cases of compromise. In the case of *levée en masse* in non-occupied territories, for instance, in order to avoid having to delete yet another article, Jomini presented a mid-way position: civilians rising spontaneously and *en masse* to resist an invasion would be "regarded as belligerents" (which appeased the Belgian position) if they had not "had time to organize themselves in accordance with Article 9" and "if they respect the laws and customs of war" (which appeased the German position).[419] This is, to this day, the official definition of a *levée en masse,* regulated both in Section 10 of the Brussels Declaration and Article 4(A)(6) of the III Geneva Convention of 1949.[420] But even this small compromise is deceiving, as it was never meant to limit *levée en masse* to non-occupied land (as it has done so to this day) but rather not preclude the right of an occupied population to take up arms against an occupying force by an express prohibition.[421]

Another case of general agreement, one that revealed the nature of the rules being negotiated, was that of city bombardment. During the negotiations, the delegates received a petition from the citizens of the Belgian city of Antwerp who complained that, ironically, the Martens Draft seemed to give more importance to paintings and churches than human lives. Indeed, according to the Draft Declaration, "if a town (…) is defended (…) all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes" – *not* residential houses.[422] The citizens of Antwerp thought, not without reason, that this was absurd. They requested that the delegates "admit as a principle of

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[418] See e.g.: Session of 18 August 1874, Conférence de Bruxelles, 1874 (n 382) 154–168.
[419] Intervention of Baron Jomini, Session of 18 August 1874, ibid 161.
[420] See: *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
[421] Intervention of the Delegate of Belgium, Session of 18 August 1874, Conférence de Bruxelles, 1874 (n 382) 162. For more on the history of levée en masse, see, generally: Emily Crawford, 'Tracing the Historical and Legal Development of the Levee En Masse in the Law of Armed Conflict' (2017) 19 Journal of the History of International Law 329.
[422] Conférence de Bruxelles, 1874 (n 382) 40.

humanity that we cannot bombard residential areas [*quartiers de villes*], even in fortified towns".[423]

The delegates at Brussels reacted with disbelief. Voigts-Rhetz, the German delegate, expressly requested that the minutes reflect his conviction that "bombardment is one of the most effective means to achieve the objective of the war" and that it was therefore impossible to address the Antwerpians' concerns.[424] The delegate of Austria-Hungary suggested that the Conference did not have the capacity to even answer the request. Not even Lambermont, the Belgian representative, supported a concrete answer and "did not ask for [the petition] to be answered at that time".[425]

In the end, the Conference issued a vague and diplomatic answer, stating that "the Commission has the firm confidence that any commander of civilised armies complying with the principles that the Brussels Conference aims to have sanctioned through international regulation, will always consider it a sacred duty to use all means that depend on him, in the event of a siege of a fortified city, in order to respect private property belonging to harmless citizens, as far as local circumstances and the necessities of war will allow".[426] In other words, any potential for restraint relied in the expectations diplomats had of "civilised" commanders, not binding rules, and was always qualified by the catchall "necessities of war" terminology. In essence, bombarding cities was too fundamental, too essential to war, to be abandoned. Protecting civilians was clearly not the priority.

This lack of concern for civilians was also evident when delegates discussed the issue of reprisal. Now nearing the end of the conference, a tired Jomini asked the delegates to address this final matter. But Lambermont would not allow reprisals to be justified through law. He noted that "the principle of reprisals is in itself of an odious nature" and requested the section be deleted as well.[427] For Lambermont, the issue should be left "in the domain of unwritten law, under the

[423] ibid 40–41.
[424] ibid 41.
[425] ibid.
[426] ibid 273.
[427] Intervention of the Delegate of Belgium, Session of 20 August 1874, ibid 193.

sanction of the public conscience, waiting until the progress of science and civilisation offers a fully satisfactory solution".[428]

On August 27, the conference ended with the adoption of the Brussels Declaration we know today. From an initial 71 sections, the final document had only 56. And the "general principles" included in the Preamble were one of the most noticeable deletions.

The history of how Lieber's Code allegedly "inspired" the Brussels Declaration is therefore much more complicated than a simple straight line, as the conventional history would have us believe. The Brussels Declaration is the result of disagreement between differing conceptions of the laws of war within a Clausewitz-inspired Sharp War Paradigm, where most of those present at the conference would have rather left the rules of war in the realm of unwritten law. Lieber's own conception was just one more iteration of the Clausewitzian paradigm, not any kind of timeless wisdom that the delegates at Brussels were eager to imitate.

In any case, it is clear that the Brussels Convention was not, as has been argued before, a victory for moderation in war.[429] Instead, Brussels is a story of disagreement. It gave "no clear guidance on the most controversial issues" leaving each state to interpret the Declaration's silences as best they saw fit – either as a "realm of no limits, of purely self-imposed limits, or of limits imposed by the laws of nations, the public conscience, or humanity".[430] Instead of an attempt at codification and legal determinacy, the Brussels Declaration was evidence of the many laws of war in existence in 19th century Europe, and the parties' desire to leave as much of the law as possible as indeterminate as possible, without offending the Russian Tsar.

7. Rematch at The Hague

The fundamental disagreement between the two dispensations of the sharp war confronted at Brussels heralded the "unfruitful results" born by its Declaration.[431]

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[428] Intervention of the Delegate of Belgium, Session of 20 August 1874, ibid. As Hull notes, this is an early version of the Martens clause, for which Lambermont, undeservedly, has received little to no historical credit. See: Hull (n 395) 65.
[429] See, e.g.: Dowdeswell (n 407).
[430] Hull (n 395) 65.
[431] Comments by British representative Sir. John Ardagh. See: James Brown Scott, *The Proceedings of the Hague Peace Conferences* (Oxford University Press 1920) 51.

By 1899, at the time of the Hague Peace Conference, no state had ratified it. In fact, the Russian Imperial Government's stated objective for the Hague Conference was the *revision* of the Brussels Declaration in order to make it acceptable in "binding force" to the governments of Europe.[432]

Twenty-five years after Brussels, however, the German-Belgian disagreement on *levee en masse* continued to be as alive and controversial as ever. At The Hague, the Belgian delegate, Auguste Marie François Beernaert, gave a key speech restating his government's position regarding occupation of territory. He posited the question "whether it is wise in advance of war and for the case of war, expressly to legalize rights of a victor over the vanquished, and thus organize a regime of defeat".[433] For Beernaert, the *levée en masse* compromise of 1874 was not enough by 1899, and if Germany was unwilling to agree to granting them a right to rise up against an occupying force, then maybe it would just be best to not regulate the situation at all and let things be decided by customary law and the chivalry of civilised warfare.

Martens, now Conference chairman, "energetically insisted upon the necessity of not abandoning the vital interests of peaceable and unarmed populations to the hazards of warfare and international law".[434] Facing a very real risk of full Conference failure, though, Martens proposed yet another compromise – this time in the form of a Declaration. This is the now famous "Martens Declaration", usually seen as a cornerstone of the "humanisation of war". Yet the Declaration's original purpose, as evidenced by its oft-omitted first paragraph, was not to humanise war, but to tacitly enable the Belgian-style of war without angering the Germans too much. Indeed, *in full*, the Declaration states:

> "The Conference is unanimous in thinking that it is extremely desirable that the usages of war should be defined and regulated. In this spirit it has adopted a great number of provisions which have for their object the determination of the rights and of the duties of belligerents and populations and for their end a softening of the evils of war so far as military necessities permit. It has not, however, been possible to agree forthwith on provisions embracing all the cases which occur in practice.

[432] ibid 52.
[433] ibid 417.
[434] ibid 418.

> On the other hand, it could not be intended by the Conference that the cases not provided for should, for want of written provision, be left to the arbitrary judgment of the military commanders.
>
> Until a perfectly complete code of the laws of war is issued, the Conference thinks it right to declare that in cases not included in the present arrangement, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.
>
> It is in this sense especially that Articles 9 and 10 adopted by the Conference must be understood."[435]

In other words, rather than aiming at the protection of unarmed civilians from the hardships of bombardment and collective punishment, the Martens Clause sought to protect partisan fighters from inhumane treatment or summary execution upon capture through a loophole that satisfied Germany's dislike for an express humanitarian provision that protected partisan rights.[436] In this reading, the Martens Clause is not so much a steppingstone in the creation of a "humanitarian" law, but yet another tool for European armies to use to their advantage, whether to argue partisans were not subject to belligerent privileges or to argue that they could not be shot on sight. Of course, the language of the clause did permit its understanding to adapt to the growing concerns of a more complete notion of humanitarianism, especially in later decades. Today, the Martens Clause is a staple of international *humanitarian* law, but this was not by design.

This warlike origin of the Martens Clause is revealed by the reaction to the British delegate's proposition to add an additional amendment expressly

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[435] ibid 419.

[436] This is, in fact, the dominant understanding of the Clause today – that it is a humanitarian tool for the protection of civilians, not a principle of war allowing in practice for the rebellion of occupied provinces. As the ICTY stated in *Kupreskic,* "[a]s an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (…). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity". This is a reading that would have never occurred to the drafters of the Hague Conference or Martens himself, as it would contradict one of the essential tenets of "civilised war": that necessary harm against civilians is lawful.

adopting a right “which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to the invaders by every legitimate means”.[437] While most delegations felt the amendment “added nothing to the declaration which Mr. MARTENS had read”[438], the German technical delegate, Colonel Gross von Schwarzhoff, exploded in opposition. According to the minutes, he “emphatically asserted” that “belligerent status depended only on conditions that are very easy to fulfill [sic]” and that he therefore saw no need even for the provisions regulating *levée en masse*.[439] Germany’s support for pre-occupation *levée en masse*, he said, had been offered “in a spirit of conciliation”, but that “[a]t this point”, considering Britain’s new amendment, Germany’s concessions cease, as it was “absolutely impossible” for him “to go one step further and follow those who declare for an absolutely unlimited right of defense”.[440] Given the consensus surrounding the Martens Clause, the UK withdrew its amendment, “for sake of harmony”.[441]

In its original formulation, therefore, the Hague Convention sought to permit both conceptions of sharp war to tolerate each other as best as possible, without formally prohibiting either. Belgian partisans would not benefit from belligerent rights (and so had no right to prisoner of war status). At the same time, though, they were also not banned (but simply “not provided for”) and therefore could not be treated in uncivilised ways if captured.

Just like its Belgian predecessor, therefore, the Hague Convention of 1899 was also not a development in search of greater humanity, but yet another battleground for the differing readings of Clausewitz at the heart of the laws of war to take shape.

8. The Many Laws of War

This Chapter has shown that rather than a monolith, the idea of the laws of war in the 19th century was a contested and indeterminate mesh of different interpretations operating under the umbrella of a Clausewitz-inspired understanding of war. The US, German, Belgian, Russian etc. conception of the

[437] Scott (n 431) 420.
[438] ibid.
[439] ibid.
[440] ibid.
[441] ibid.

laws of war cannot thus be singled out as the "correct" 19th century answer to the inter-temporal question "what was the content of the laws of war in 1874?" All of them were arguably part of a broader legal discourse.

Tracing a genealogy of the laws of war from the Geneva Conventions back to Lieber, passing through the 1899 Hague Convention and the 1874 Brussels Declaration is thus not a straightforward process. First, the 19th century argumentative context did not operate under a humanitarian conception of war, where civilians were (at least nominally) to be protected from the hardship of war. Civilians were, rather, individuals that could be harmed if necessary for the destruction of the enemy and who were considered of lesser status and importance to soldiers in war. Second, the idea that there would even be a single legal theory to trace international humanitarian law back to in 1899 and 1874 is ambitious. The law in the 19th century was a debate – a discourse. Lieber's Code and the Brussels Declaration, as seen above, have important differences in the way they conceive the laws of war. How one weaves these connections from present to past is a nuanced procedure that requires historical rigour.

Instead of presuming a single genealogy of humanisation, the method proposed by this thesis encourages us to reconstruct a legal argumentative context to see how ideas evolved through time. For example, after World War II, the practical debate about *levée en masse* was superseded by a different discourse; one that sought to delegitimise German *Kriegsraison* – the idea that any necessary act justifies a violation of the laws of war. In so doing, as noted above, a specific understanding of the law took dominance, one where military necessity has already been incorporated into all discussions of the lex scripta, and therefore military necessity can no longer act as a broad underlying exception to violations of the laws of war. This is, for example, the position that is now common among US law of war experts. As Michael Schmitt points out, making reference to US contemporary military doctrine, "[m]ilitary necessity was weighed by nations as each express prohibition was promulgated, and again at the time each State Party ratified or acceded to each treaty".[442] In other words, necessity cannot justify violating the laws of war.

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[442] Schmitt (n 406) 94.

This debate about the definition of military necessity may have been of interest to some more philosophically-oriented scholars, including Francis Lieber, Johan Caspar Bluntschli or even Martens, but it was not a debate that featured prominently in the process of codification that influenced the development of the laws of war and, eventually, international humanitarian law. The emergence of this theoretical debate will need to be explored by visiting how the 19th century instruments, such as the Brussels Declaration and the Hague Convention, were read in later decades and, particularly, in the run up to Geneva, 1949. This is not a chronologically sequential process, but a non-linear web of different interventions in different times and places.

Construction of this web, however, is not limited by geographical scope. Instead of making a linear jump from Brussels to the Hague to Geneva, exploring who was reading the legal instruments of the 19th century will inevitably lead to different geographical contexts. Lieber, Martens and Bluntschli were not just read in Europe. It is the job of the legal historian, therefore, to find these non-Western interventions.

Traditionally, these interventions are framed in the language of "contribution" – the African or Latin American or Asian contribution to international law.[443] This frames non-Western interventions in the formation of international (humanitarian) law as ideas that were added to the "mainstream" timeline of legal evolution, instead of as integral components of the web of arguments that made up what could be referred to as "international law" in any given 19th century day. This is not how this thesis conceives the law. Instead, conceived as a discourse, where no definitive or "official" law exists at any given point in time, the law works as a debate. A specific intervention's legal or historical validity does not depend on whether it was able to "contribute" to the canonical discussions in Paris or Brussels, but rather on the merits of its illocutionary intent and legal interpretation within the linguistic context of international law. To fully understand the law in the 19th century, historical and legal methodology will demand a full

[443] For examples of such scholarship see: JM Yepes, 'La Contribution de l'Amérique Latine Au Développement Du Droit International Public et Privé (Volume 32)', *Collected Courses of the Hague Academy of International Law* (Brill 1930); Taslim Olawale Elias and Richard Akinjide, *Africa and the Development of International Law* (Martinus Nijhoff Publishers 1988).; Kohen (n 223).

appraisal of all available interventions, not just those that engaged with the canon.

In the following Chapters, therefore, I will reconstruct the argumentative context of international humanitarian law by tracing the interventions of non-Western scholars and diplomats, by raising the question: how did Latin American, African and Asian actors read, write and discourse about the regulation of war in the 19th century. By doing so, instead of approaching them as mere contributions to a European canon, I hope to present a richer understanding of the origins of international humanitarian law, for modern-day legal historians to explore and even reconceive.

Given the fragmented nature of the archival records in the Global South, however, such reconstruction of an argumentative context is a tall order. Because of this, I am limited by the information available to me today. For this reason , the following chapters will focus on three specific contexts: 1) South America, 2) Japan, and 3) Southern Africa.

Chapter Four
Criollo Sharp War

1. Meanwhile, in Latin America…

This Chapter explores the legal indeterminacy and contested nature of the laws of war from the perspective of Latin America. It will show how the rules of the European and US canon were both embraced and reinterpreted by various actors, in ways that are traditionally omitted by the conventional history of the laws of war. Ultimately, it will explore the work of scholars who rejected the Sharp War Paradigm of war as "uncivilised" and who planted early seeds of a more complete concept of humanitarianism in the region.

Latin American approaches to the laws of war pre-date the Lieber Code and the European codification process.[444] As noted by Castaño Zuluaga, the South American wars of independence frequently involved the signing of capitulations; i.e. agreements through which a defeated army agreed to surrender an area – frequently a city or fortress – to a besieging enemy. Traditionally, in European practice, these terms of surrender tended to focus on the conditions of treatment for captured or surrendering armed personnel. The 1870 Capitulation of Sedan, for instance, that ended the Franco Prussian War, was a short, 6-article document, whereby "the French Army, placed under the orders of General de Wimpffen, finding itself actually surrounded in Sedan by superior forces, is prisoner of war".[445] Principal concern in this capitulation was the fate of French officers who, on account of their "brave defence", were granted a parole exception: instead of being rendered prisoners, they would "give their word of honour, in writing, not to bear arms against Germany, and not to act in any other manner against her interests until the end of the present war".[446] Those who did not accept these terms would be "conducted in good order into the peninsula formed by the Meuse near Iges" where they would be handed over to German commissioners. No provision was reserved for the protection of French civilians

[444] See, generally: Luis Ociel Castaño Zuluaga, 'Antecedentes Del Derecho Humaniario Bélico En El Contexto de La Independencia Hispanoamericana (1808-1826)' (2012) XXXIV Revista de Estudios Histórico Jurídicos 323.
[445] Protocol of Capitulation of Sedan, published in: George Hooper, *The Campaign of Sedan: The Downfall of the Second Empire - August-September 1870* (George Bell and Sons 1909) 355–356.
[446] ibid.

soon to be under German occupation. In fact, both in the Brussels and Hague Conferences, the section dedicated to capitulations in general was reduced to a single article, which mandated respect for “military honour”.

Much to the contrary, capitulations in South America tended to specifically address civilian protection. This was the case of the 1823 Capitulation of Zulia, by which the defeated Royalist forces handed the city of Maracaibo to Colombian rebel forces. Article 9 of this Capitulation established that “the neighbours and inhabitants of Maracaibo and its Province will be treated in equal fashion [*en la misma*], in accordance with the protective laws of the Republic, whichever their conduct and opinions during the occupation of this country by the Spanish troops under the command of Mr. General Moráles, subjecting everything to an absolute amnesty [dándose todo á un olvido absoluto] and ensuring that their persons and properties are highly respected, and that they will have support to address their just complaints to the constituted authorities”.[447] Civilians, in fact, both Spanish and Colombian, wherever their allegiances lay, were given free transport for themselves and their families to the island of Cuba, which remained under Spanish control. Similar provisions can be found in the Capitulation of Puerto Cabello of 1823[448] and the Capitulation of Ayacucho of 1824, although this last one had a few more restrictions.[449] In fact, the benevolent terms of the Capitulation of Ayacucho “generated suspicions in the political world of its time”, giving rise, in contemporary times, to unfounded speculation in Spanish historiography that the liberal sectors of the Royalist army

[447] Capitulación de Zulia, August 4th, 1823, published in: Manuel Ezequiel Corrales, *Documentos Para La Historia de La Provincia de Cartagena de Indias, Hoy Estado Soberano de Bolivar En La Unión Colombiana*, vol II (Imprenta de Medardo Rivas 1883).

[448] See Article 17: “That the neighbours and other inhabitants of this plaza be respected in their person whatever their opinions may have been, without preventing their exit now or whenever they so wish to, wherever they may want to go, whether carrying their goods, selling them or leaving them in the administration of a person of trust, whichever is more convenient to them”. Published in: José Félix Blanco, *Documentos para la historia de la vida pública del libertador de Colombia, Perú y Bolivia: Puestos por orden cronolólogico, y con adiciones y notas que la ilustran*, vol 9 ("La Opinión nacional 1876) 108.

[449] See Article 4, which states no person shall be “disturbed for their prior opinions, even when they have performed services in favour of the King’s cause” whenever “their conduct does not disturb the public order and where according to law”. Likewise, Peru-based property of Spanish subjects living in Spain would be respected for up to three years, provided their conduct “was not in any way hostile to the cause of freedom and independence of America". Published in: Castaño Zuluaga (n 444) 359–361.

betrayed the King's cause and agreed to lose the battle ahead of time in exchange for better treatment.[450]

This increased awareness of civilian protection in South American capitulations was not, however, the result of any particular humanitarian bent of the independentist forces. Both the independentist and royalist camps often resorted to punitive terror practices. In fact, in 1813, Simon Bolivar himself issued a proclamation declaring Colombia's war in Venezuela would be "to the death", meaning that any Spaniard that did not support his cause, whether civilian or not, would be killed by his army.[451] It was a brutal war, as terrible as any European one.

The civilian immunity clause of South American capitulations rather mirrored the events of the Spanish Peninsular War against France. As Racine notes, "[m]any of the most important figures who were involved in the prosecution of the War to the Death either had travelled or fought in Napoleonic-era Spain and had brought their prejudices and tactics along with them to the Venezuelan theatre".[452] These practices, however, also included the events of the famous siege of Zaragoza, in 1809, which was seared in the minds of combatants, and remains an important moment of heroic Spanish resistance even to this day. At Zaragoza, the French had encountered fierce and relentless resistance from the Spanish garrison.[453] Fighting was brutal and carried out street by street, leading to tens of thousands of deaths and the general destruction of city infrastructure. But the Zaragozans refused to surrender, rallying their forces to the cry of "yes to destruction, no to surrender!" [*destrucción sí; rendición no*].[454]

When it became clear that Spanish victory was impossible, and Spanish and French commanders met to discuss terms of surrender, it was clear to everyone that the population would not accept a blanket capitulation. The Capitulation of Zaragoza, therefore, incorporated a civilian pardon as a way to "vanish within reason the idea of capitulation that so much tormented Zaragozans".[455] Instead

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[450] For an analysis of these theories, see: ibid 361.
[451] Karen Racine, 'Message by Massacre: Venezuela's War to the Death, 1810–1814' (2013) 15 Journal of Genocide Research 201.
[452] ibid 201.
[453] Miguel Allué Salvador, *Los Sitios de Zaragoza ante el Derecho Internacional* (Tip de M Sevilla 1908) 109.
[454] ibid.
[455] ibid.

of a defeat that left them at the mercy of a victorious army, the French allowed the Zaragozans to perceive their sacrifices as a heroic and phyrric victory.[456]

The Zaragozan's isolated conquest of a civilian immunity thus frequently fed through, even if often only on paper, to the capitulations written by the Spanish and Colombian armies, that were filled with veterans of the Peninsular War. Thus, for example, in 1812, when Venezuelan revolutionary Francisco de Miranda capitulated before Domingo de Monteverde, the Spanish Captain-General of Venezuela, the treaty "included an amnesty clause that guaranteed the safety of the lives and property of patriot sympathizers".[457] And yet, "[o]n the very same day that the San Mateo armistice was signed, patriots reported that European Spaniards were leading bands of violent *negros* in attacks against their sympathisers".[458]

Regardless of its rate of compliance, the relevance of this pre-Lieber South American and Spanish practice is that it normalised the inclusion of civilian protection provisions in South American laws of war documents. This would become particularly important after the Spanish Revolution of 1820, where military commanders forced the Spanish King, Ferdinand VII, to adopt the liberal Constitution of 1812 and end monarchical absolutism. The new liberal Spanish government circulated instructions to its commanders to enter into negotiations to resolve the so-called "American question" through peaceful means.[459] The adoption of the liberal Constitution had been, after all, an old demand of the revolutionaries and it was not inconceivable to believe that there was room for agreement.

After a decade of internecine conflict, however, such a resolution was impossible. Colombia, led now by the stern independentist Simon Bolivar, saw itself as a different political entity than Spain and would fight for its independence. At the same time, however, Bolivar's troops were tired and direct negotiations with Spain could bring forth the possibility of belligerent recognition

[456] In fact, the Capitulation of Zaragoza is, to this date, honoured in Spain as a moment of pyrrhic victory and heroism, rather than defeat.
[457] Racine (n 451) 206.
[458] ibid.
[459] Lionel Muñoz Paz, 'Como naciones civilizadas. El armisticio y la regularización de la guerra o Riego y Quiroga en tierra firme' (2021) XXIV XXIV Coloquio de Historia Canario-Americana (2020) 1, 3.

for Colombia.[460] Protracted negotiations with Spain, therefore, were to Bolivar's advantage, even if not to his liking.

As a result of these negotiations, Spanish and rebel forces signed two treaties known as the Armistice of Trujillo and the Treaty for the Regularization of War.[461] This latter is of particular importance, because it was specifically designed to address the ongoing "war to the death". As its Preamble noted, its purpose was to "express to the world the horror with which [the parties] see the war of extermination that has devastated until now these territories, turning them into a theatre of blood".[462] The treaty was therefore drafted "in accordance with the laws of enlightened nations [*naciones cultas*], and the most liberal and philanthropic principles".[463] Its main rule, set out in Article 1, was clear: "The war between Spain and Colombia will be waged as is waged by civilised peoples, so long as these practices do not contradict any of the articles of the present treaty, which must be the first and most inviolable rule of both governments".[464]

These rules of "civilised peoples" provided for the exchange and humane treatment of prisoners of war and for the protection of the wounded, anticipating the Lieber Code by almost half a century. Interestingly, given the regional practice of incorporating civilian immunity provisions in law of war instruments, the treaty included a provision specifically designed to address the status of civilians in occupied territories: "the inhabitants of the peoples that were alternatively occupied by the arms of either government will be highly respected, will enjoy broad and absolute freedom and security, whatever their past or current views, destination, services and conduct, with regards to the belligerent parties".[465] Significantly, there is no exception to this rule; no qualifier – as in the Lieber Code – that humane treatment of civilians would only be guaranteed "as much as the exigencies of war will admit".

While Bolivar used the Armistice of Trujillo to strengthen his own strategic position and violated it as soon as it was expedient to him[466], the Regularisation

[460] ibid 6.
[461] Tratado de Regularización de la Guerra, 1820. The text is published in: Castaño Zuluaga (n 444) 342.
[462] Tratado de Regularización de la Guerra, Preamble.
[463] ibid., Preamble.
[464] ibid, art. 1.
[465] ibid., art. 11.
[466] Castaño Zuluaga (n 444) 338.

Treaty had a more lasting impact.[467] As Castaño Zuluaga concludes, "after Trujillo, the conduct of the war would have other characteristics, more chivalrous, giving it a display of courtesy [*una paraphernalia de cortesía*] to the degree that everything became protocol between the leaders of both sides".[468]

By June of 1821, thanks in part to the strategic advantage obtained by Bolivar during the short respite of armistice, Colombia had defeated the Spanish forces in Venezuela, leaving Peru as the last Spanish stronghold in South America. In 1822, Bolivar marched south, to Peru, to definitively secure Colombian and South American independence. It took him two more years, but in 1824, in the Battle of Ayacucho, Spanish forces in South America were finally defeated.

Independence brought about new challenges for the young American republics. Their status under international law was particularly tenuous. The risk of recolonisation or loss of territory to European expansion was particularly great. It was because of this risk that in 1823, the United States declared its famous "Monroe Doctrine", stating that it would not allow European recolonisation of American territory. Regardless, at the time, no state in the Western Hemisphere, not even the United States, was powerful enough to stop this. In 1833, the United Kingdom took the Malvinas islands from Argentina. Buenos Aires, the Argentinean capital, was blockaded by French and/or British forces in 1838, 1845, and 1850. The Peruvian Chincha islands were occupied by Spain in 1864 and the Chilean port of Valparaíso was bombarded in 1866, also by Spain. Mexico, in fact, was invaded by France in 1862. Independent Latin America in general needed to strengthen and legitimise its own position in the international community, as independent states, not colonisable land ready for invasion. In the mid-19th century, the way to do this was to demonstrate to Europe that Latin America was part of the "civilised" world – and to do this, the region turned to international law.

Independent Latin America was in an enviable position when it came to staking its claim to the 19th century club of civilised states. In Brazil, the transfer of the Portuguese court to Rio de Janeiro and the creation of the Empire of Brazil helped maintain an image of continuity with the European tradition. In the new

[467] Muñoz Paz (n 459) 7.
[468] Castaño Zuluaga (n 444) 337.

republics of Latin America, local European-descendant elites, known as the "*Criollos*", perpetuated this aura of continuity through strategic interventions within European circles.[469]

These *Criollos* "assume[d] themselves as being part of the metropolitan centre (as descendants of Europeans), while at the same time challenging the centre with notions of their own regional uniqueness (as natives of America)".[470] Traditionally, these interventions are seen in a positive light, frequently referenced as the "Latin American contribution" to the progressive *development* of international law – a Global South project for emancipation.[471] Indeed, for Kohen, for instance, Latin American participation *transformed* international law from a set of rules premised on gunboat diplomacy and colonialism to one premised on territorial integrity, the prohibition of conquest and the permanence of borders.[472] From this point of view, one might even dare say that modern-day international law would not have emerged if it wasn't for these *Criollo* interventions.

And yet, at the same time, these interventions responded not to a selfless desire to improve international law but rather as a means to secure the interests of those who controlled the region's international relations – the white *Criollos* who sought to consolidate Latin American independence, not the Indigenous, Black, Asian and Pacific Islanders who were exploited to sustain the Latin American independentist project.

Thus, for instance, the *Criollo* republics defended a strong principle of non-intervention for extra-regional aggression, such as the Calvo and Drago doctrines, in order to keep European powers out of Latin American lands and ports, but had no problems with embracing the same kind of European standard of civilization against the indigenous peoples who lived in their "sovereign" land. These so-called "savage" populations, particularly in the Amazon, the Patagonia and Araucanía, were excluded from Criollo legal structures and often violently

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[469] Liliana Obregón, 'Between Civilisation and Barbarism: Creole Interventions in International Law' (2006) 27 Third World Quarterly 815. For an analysis of how this consciousness expressed itself in the specific context of the laws of war, see also: Alonso Gurmendi Dunkelberg, 'Des-Encanto: Latin America and International Humanitarian Law' (2022) 24 Yearbook of International Humanitarian Law (forthcoming).

[470] Obregón (n 469) 817.

[471] Kohen (n 223) 57.

[472] ibid 59.

expelled, if not systematically exterminated, as a direct result of the Criollo's efforts to "occupy", "populate" and "develop" their newly obtained states.

In other words, the idea of Latin America's contribution as a project for emancipation is a suspect one. It is true that it did provide essential building blocks for the production of today's international law. It would, however, be untrue, to argue that it was a project of emancipation – at least not emancipation for everyone. It is thus a mistake to reduce the South American history of international law to a "genealogical account of authors and their contributions to the discipline and the current international order".[473] As Pérez Godoy stresses, the *Criollo* "periphery" was not a "passive periphery" nor part of a "Völkerrechtsgeschichte der Opfer" – a history of interational law of victims.[474] International law was not a means to Latin American liberation through decolonization, but a tool to enable the continuation of settler colonialism by the descendants of European colonizers, now turned republican elites.[475]

The Amazon, for instance, rapidly became a frontier land – the border between the civilised and savage worlds, where cannibals lurked.[476] The accusation of cannibalism was particularly effective for justifying the application of unrestrained military violence against indigenous peoples. As Espinosa notes, the colonisers sought to:

"[P]roject their own violence and their own fears on to the 'other' that is classified as dangerous and violent, and that therefore must be pacified, controlled or eliminated. This way, the conquistador not only tries to legitimise his dominion as conquistador, but also justify the use of violence as a central part of its civilising task".[477]

In the final few decades of the 19th century, and fuelled by the discovery of the rubber tree, civilised war was deployed in all its brutality against the "savage cannibal natives" that allegedly swarmed the Amazon. As William Herndon, an

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[473] Fernando Pérez Godoy, 'The Co-Creation of Imperial Logic in South American Legal History' (2019) 21 Journal of the History of International Law / Revue d'histoire du droit international 485, 494.
[474] ibid 495.
[475] ibid 496.
[476] See, e.g.: Oscar Espinosa de Rivero, '¿Salvajes Opuestos al Progreso?: Aproximaciones Históricas y Antropológicas a Las Movilizaciones Indígenas En La Amazonía Peruana' (2009) 27 Anthropologica 123.
[477] ibid 128.

American 19th-century explorer, wrote in 1853, it was the Amazonian native's destiny to disappear: "Civilization must advance, though it tread on the neck of the savage, or even trample him out of existence".[478]

But the wars against indigenous populations were not the only instance in which the standard of civilisation permeated South America's war discourse. The American republics' desire to participate in the standard of civilization made them enthusiastic adopters of the language of the laws of war, as it emerged from the pages of European and US military scholars. In fact, it only took three years for Bluntschli's *Modern International Law of Civilised States*[479], to be translated into Spanish. In 1871, José Diaz Covarrubias, Professor of International Law at the *Escuela Especial de Jurisprudencia de México,* translated the book, adding his own notes and commentaries, and annexing a translated copy of the Lieber Code as well.

This translation is an interesting window through which to observe the status of Latin American approaches to the laws of war within the 19th century argumentative context. Diaz Covarrubias' translation of Lieber's Code, for instance, conspicuously omits references to military necessity. In Article 14 – containing the definition of military necessity – Diaz Covarrubias uses instead the phrase *las exigencias de la guerra,* i.e. "the exigencies of war".[480] In articles 15 and 16 – indicating what is admitted and what is not admitted by military necessity – Covarrubias translates "military necessity" with the terms *guerra* ("war") and *leyes de la guerra* ("laws of war") indistinctively.[481] The Spanish term *necesidad militar* is simply non-existent.

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[478] William Herndon, *Exploration of the Valley of the Amazon* (Robert Armstrong, Public Printer 1854) 224.

[479] Johann Caspar Bluntschli and José Díaz Covarrubias, *El Derecho Internacional Codificado Por M. Bluntschli* (José Díaz Covarrubias tr, José Batiza 1871).

[480] ibid. See Appendix, 6 (Original: Las exigencias de la guerra, como la entienden las naciones civilizadas del mundo moderno, son el conjunto de medidas indispensables para alcanzar con seguridad el objeto de la guerra, y deben ser conformes á las leyes y usos modernos de esta). In English, this Spanish text reads: "The exigencies of war, as they are understood by the world's civilised nations, are the sum of measures that are indispensable for confidently achieving the object of the war, and must be in accordance with its modern laws and usages". Compare this translation with Lieber's original: Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

[481] ibid. See Appendix, 7. Article 15 is translated into Spanish thusly: "La guerra autoriza la destrucción o la mutilación de los enemigos armados y de cualesquiera otra persona cuya destrucción sea incidentalmente *inevitable* en los encuentros á mano armada; autoriza la captura de todo enemigo ó de cualquiera otro, útil á su gobierno ó especialmente peligroso para

This is an interesting choice. The conventional history of international humanitarian law places enormous importance in Lieber's definition of a standalone principle of military necessity, treating it as almost a historical constant that arrived – inter-temporally –practically unchanged to modern days. Diaz Covarrubias' choice of words, like the Brussels Declaration's adoption of a necessity exception, not principle, suggest a less interiorised conception of necessity. After all, Latin American *Criollo* authors like Díaz Covarrubias were not crystalising local usages of war into written form – they had arguably already

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el captor; autoriza para destruir toda especie de propiedades; para cortar los caminos, canales ú otras vías de comunicación; para interceptar los víveres y municiones del enemigo; para apoderarse de todo lo que pueda suministrar el país enemigo para la subsistencia y seguridad del ejército, y para recurrir á toda clase de astucias que no impliquen una violación de los compromisos expresamente contraídos durante la guerra, ó de los que resultan implícitamente de las leyes modernas de la misma. Los hombres que toman las armas unos contra otros en una guerra regular, no pierden su carácter de séres morales, responsables entre sí y para con Dios". In English, this reads: "War authorises the destruction or mutilation of *armed* enemies and of any other person whose destruction may be incidentally *inevitable* in armed encounters; it authorises the capture of all armed enemies or any other, useful to their government or especially dangerous for the captor; it authorises destroying any kind of property; cutting roads, canals or other means of communication; intercepting enemy supplies and munitions; appropriating everything that may provide the enemy country with sustenance and security for its army, and to resort to all kinds of ruses that do not imply a violation of commitments expressly agreed during the war, or those that result implicitly from its modern laws. Men that take up arms against one another in regular war do not lose their character of moral beings, responsible to each other and to God". Once again, compare with Lieber's original text: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God". Article 16 is translated into Spanish with this text: "La guerra no autoriza para cometer actos de crueldad, es decir, para causar sufrimientos por el solo placer de ocasionarlos ó por ejercer una venganza; tampoco autoriza para maltratar ó herir, fuera de combate, á un enemigo, ni para hacerle sufrir tormentos con el objeto de arrancarle noticias ó datos. Las leyes de la guerra no permiten en ningún caso hacer uso del veneno, ni devastar por complacencia un distrito enemigo; dichas leyes admiten la astucia, per condenan la perfidia, en general, la guerra no implica ningún acto de hostilidad que sea de tal naturaleza, que, sin necesidad alguna, haga mas difícil el restablecimiento de la paz". In English, this text reads: "War does not authorise the commission of acts of cruelty, that is, to cause suffering only for the sake of causing them or to exert a vengeance; it also does not authorise to mistreat or wound outside of combat, an enemy, nor to make them suffer torments with the object of wrenching news or information. The laws of war do not allow in any case the use of poison, nor complacent devastation of an enemy district; these laws allow for ruses, but condemn perfidy, generally, war does not imply any act of hostility that is of such a nature that, without any need, makes it more difficult to re-establish peace". Compare this with Lieber's original text for article 16: "Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult".

done so in 1821. Instead, translating European and US texts was a strategic choice meant to signal that Latin America was "civilised enough" to play by these European and US rules, never mind their differences or the details of black letter law.

Diaz Covarrubias' translation of Lieber's article 14, therefore, sounds less like a nuanced transcription of a principle ("military necessity (…) consists in…", in Lieber's original) than as a statement of fact: "the exigencies of war (…) are the sum of measures that are indispensable for confidently achieving the object of the war, and must be in accordance with its modern laws and usages".[482] Thus, while in Lieber, there is a logical connection between articles 14, 15 and 16, all related to explaining what exactly is this principle called "military necessity", this is not the case in Diaz Covarrubias' translation. In the latter, article 14 simply sets out what war *demands* of belligerents (using the Spanish term *exigencia,* "demand"[483]*)*, while articles 15 and 16, in turn, set out conduct that *war,* not military necessity, *authorises.*

This is, of course, not to say that Diaz Covarrubias was necessarily oblivious to the concept of a sharp war or was unaware of the notion of military necessity, but rather that his objectives – his illocutionary intent – when translating these concepts was different from that of Bluntschli's. While the latter was expanding on Lieber to try to put these principles in practice for European wars, the former was instead making European and US rules of civilised war available to Latin American society, as part of the "civilising" trend of the late 19th century, in the hopes that *Criollo* elites would learn to speak the same "civilised" language. Compliance with these rules (or their faithful translation) was less important than the adoption of the rules itself.

Diaz Covarrubias was not, after all, a man of arms, nor was he particularly involved in the study of war. He was a jurist and a politician, appointed to the Chair of Natural and International Law of the *Escuela de Jurisprudencia*. His other most well-known work is an 1875 book on public schooling, not the laws of war.[484] He translated Bluntschli because, since 1869, he was using it as a

[482] ibid. See Appendix, 6
[483] The Cambridge Spanish-English Dictionary translates "exigencia" as a "demand" or a "requirement".
[484] Manuel Cruzado, *Memoria para la bibliografía jurídica mexicana* (Mexico, Imp de E Murguia 1894) 65.

textbook in his international law classes.[485] Translating the Lieber Code, therefore, was part of a greater task, not specifically related to the laws of war, but to international law more generally. "Of the modern works on international law, there is no other that is as adequate to serve as text in the Schools in which this science is studied, as that of Bluntschli", he said.[486] He believed this because "a textbook [*una obra de texto*] must not be a work of extensive discussions that tire the intelligence of students and that do not fit within a good didactic method".[487]

Díaz Covarrubias was therefore looking for a simple international law textbook, not a convoluted and nuanced discussion on the laws of war. This explains what appears as a rather unorthodox approach to the laws of war. Covarrubias, for instance, translates Bluntschli's definition of military necessity in ways that seem detached from the debates and theories prevalent in the North Atlantic. Following Lieber and the fundamentals of the US/German understanding of necessity, Bluntschli's article 559 states:

> "The violence of war may do everything that military necessity requires, that is, insofar as its measures appear necessary in order to achieve the means of war and are in accordance with the general law and the customs of war among civilised peoples".[488]

Díaz Covarrubias, however, translates this paragraph as follows:

> "In time of war it is <u>licit</u> to do everything that <u>military operations</u> require, that is, what is necessary for achieving the object of the war <u>without violating the general rights of humanity</u> and the usages permitted in war by civilised nations".[489] (underline added)

There are several interesting shifts in translation worth noting here. First, note the change from German *darf* ("may") to Spanish *lícito* ("licit") implying a sense of legality rather than possibility. Second, note the addition of a specific reference to "the general rights of humanity" (*los derechos generales de la*

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[485] ibid 63.
[486] Bluntschli and Covarrubias (n 479) VII.
[487] ibid.
[488] Bluntschli (n 310) 308. (Original: Die kriegsgewalt darf alles das thun, was die militärische Nothwendigkeit erfordert, d.h. soweit ihre Massregeln als nöthig erscheinen, um den Kriegszwed it Kriegsmitteln zu erreichen und in Uebereinstimmung sind mit dem allgemeinen Recht und dem Kriegsgebrauch der civilisirten Völker).
[489] Bluntschli and Covarrubias (n 479) 271–272. (Original: Es lícito hacer en tiempo de Guerra todo lo que exigen las operaciones militares, es decir, lo que es necesario para alcanzar el objeto de la guerra sin violar los derechos generales de la humanidad y los usos admitidos en la guerra por las naciones civilizadas").

humanidad) which is absent in Bluntschli's original. Lastly, and perhaps most noteworthy, note the change from *militärische Notwendigkeit* ("military necessity") to *operaciones militares* ("military operations"). Moreover, in his own personal annotation to Bluntschli's article 559, Covarrubias states that "[t]he character that civilisation has impressed on modern wars restricts them *to the achievement of the proposed object* and to use the means that are indispensable for it. In the wars of antiquity and the Middle Ages, the programme was *to cause all possible evils on the enemy,* and any means was licit to achieve it" (italics added).[490]

This last one is a noteworthy change. Traditionally, the Clausewitz-inspired paradigm of sharp war argued that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[491] Actions that helped states secure this end were deemed "admitted" by military necessity. Díaz Covarrubias' reference to a "*proposed* object" instead seems to speak not of an overarching object of the war but of the concrete purpose of a military operation. Arguably, thus, while in the European and US canon military necessity was understood as the measures necessary to bring about the defeat of the enemy, Díaz Covarrubias's translation opened the door for reading military necessity as the measures necessary to fulfil a much more reduced objective of the specific military operation under analysis.

In any case, Díaz Covarrubias' translation, with its particular linguistic context of dissemination of European thought among the young *Criollo* elites, proved to be highly influential in Latin America going forward. In 1879, a few years after Díaz Covarrubias' translation was published, Chile went to war against a Peruvian-Bolivian alliance in what Latin American historiography calls the War of the Pacific. In 1879, at the very outset of hostilities, the Chilean government commissioned a pamphlet called "The Law of War according to the Latest Progress of Civilisation".[492] The pamphlet translated key laws of war documents into Spanish, including the Lieber Code, the Geneva Convention of 1864, the Saint Petersburg Declaration of 1868 and the 1874 Brussels Declaration. The translation used for the Lieber Code was that of Diaz Covarrubias. From here on,

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[490] ibid 272.

[491] 1868 St Petersburg Declaration, published in: Schindler and Toman (n 340) 102..

[492] República de Chile, *El Derecho de La Guerra Según Los Últimos Progresos de La Civilización* (Imprenta Nacional 1879).

South American approaches to the laws of war would shift. Instead of following its own tradition, born out of its wars of independence, Latin America would look to the European and American tradition in search of international legitimacy albeit one that was slightly altered in translation as I have shown. In the next section I will explore the results of such an adoption.

2. The War of the Pacific[493]

Chile premised its war on the discourse of "civilisation" and "civilised war". Indeed, "Chile's northern borders with Bolivia and Peru were thought of as a space to be civilized, modernized and industrialized".[494] In the contemporaneous Chilean imagination, these barren lands had been improved by "the daring steps of Chilean explorers" that had managed to "eak out" the secrets of an otherwise "cursed land".[495] And yet this "honest labour" was wasted in "feeding the corrupting laziness of [Bolivian and Peruvian] rulers that spent their days in perpetual orgy of liquor and blood" staining the "good name of America and the advanced civilisation of the continent".[496] As Pérez Godoy notes, Peru and Bolivia were presented "as inferior, uncivilized, savage, barbaric, corrupt and irrational nations", while Chile was presumed to have a "racial advantage" given its smaller indigenous population.[497]

In fact, by adopting Diaz Covarrubias' translation of the Lieber Code as the rules of conduct for its armies (instead of an updated version of the Regularization Treaty of 1820, for instance) Chile signalled its full embrace of Lieberian sharp war. Take, for example, the initial naval campaign. Before beginning land operations, Chile needed to defeat the Peruvian fleet in order to secure safe supply lines across the Peruvian and Bolivian coasts. Chile had a superior navy and, as such, favoured an open encounter. The Peruvian fleet, in turn, alternated between protection in the heavily armed port of Callao and strategic incursions wherever it knew the odds were in its favour.[498] In order to draw the Peruvian

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[493] Parts of this section have been published in Gurmendi Dunkelberg (n 469).
[494] Pérez Godoy (n 473) 500.
[495] Carmen McEvoy, 'Civilización, masculinidad y superioridad racial: una aproximación al discurso republicano chileno durante la Guerra del Pacífico (1879-1884)' (2012) 20 Revista de Sociologia e Política 73, 78.
[496] ibid.
[497] Pérez Godoy (n 473) 501.
[498] Mariano Felipe Paz Soldán, *Narracion histórica de la guerra de Chile contra el Perú y Bolivia. Por Mariano Felipe Paz Soldán* (Impr y libr de Mayo 1884) 132.

Navy out, Admiral Juan Williams Rebolledo, Commander-in-Chief of the Chilean Navy, engaged in a series of incendiary bombardments of Peruvian ports. Admiral Williams bombarded the coastal towns of Huanillos, Pabellón de Pica, and Mollendo, taking special care to send detachments to the coast to set fire to port infrastructure.[499] Since the Peruvian Navy did not take the bait, Williams moved his ships to the port of Pisagua and sought to repeat the deed. However, his landing forces were repelled by a small garrison protecting the pier.[500] Williams decided to bombard the city in response.

Williams was well acquainted with the Sharp War Paradigm. In a letter to his superiors, he states:

> "The people of Peru, and perhaps even a portion of our own, have forgotten in the current contest that a war is all the more humanitarian when it is crueller, and that it is only by making the belligerents feel all the rigours of war is that we will promptly reach peace".[501]

Admiral Williams was not an isolated case. Soon after the naval campaign ended, in late 1879, Chilean forces took control of the provinces of Antofagasta and Tarapacá. The Chilean Minister in Campaign in Tarapacá, Rafael Sotomayor, wrote to his superiors to report on the situation on the ground. According to his intelligence reports, Peruvian forces were determined to engage in partisan warfare (*guerra de montoneros*) to defend Tarapacá. Sotomayor requests his superiors they notify the Peruvian governments of the consequences of such a course of action would carry:

> "Until today our hostilities have been distinguished by a perhaps excessive leniency. We have treated the enemy as the laws of civilisation and humanity demand, seeking, in this way, to temper (*atenuar)* wherever possible the evils of war. We have been humane with prisoners and generous with those defeated.
>
> "I do not believe the country will ever have to regret this noble behaviour of its army. However, leniency has its limits, and it is the enemy's conduct that is in charge of drawing them. If they exceed the paths authorised by the law of war, to attack us, resuscitating the odious proceedings of more backwards times, we must, on our

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[499] For a Peruvian perspective of these events see: ibid 141–142. For a Chilean perspective see: Benjamín Vicuña Mackenna, *Historia de La Campaña de Tarapacá: Desde La Ocupación de Antofagasta Hasta La Proclamación de La Dictadura En El Perú*, vol 1 (Rafael Jover 1880) 643.
[500] Paz Soldán (n 498) 144.
[501] Juan Williams Rebolledo, *Operaciones de La Escuadra Chilena Mientras Estuvo a Las Órdenes Del Contra-Almirante Williams Rebolledo* (Imprenta del Progreso 1882) 30.

> part, and in legitimate reprisal, make them feel the harshness and cruelness of war in its most extreme".[502]

The letter goes on, arguing that engagement in irregular warfare will warrant the "greatest severity possible" and that "any commoner [*paisano*] caught with weapons at hand will be immediately executed [*pasado por las armas*]".[503] Sotomayor ends by saying:

> "Proceeding in such a way [with guerrilla warfare] poisons war. On the contrary, prompt severity contributes to lessen [*amenguar*] its horrors, circumscribing the evils it causes to those strictly necessary to reduce the enemy to impotence and conduce him through that to the path of peace".[504]

Sotomayor's superiors agreed, stating:

> "In one word, our rule of conduct must be, hereinafter, to cause the enemy all possible harms, without sparing them any of those authorised by international rules, until they feel the need for peace. Otherwise, the war will be prolonged for an unlimited time and the sacrifices the country makes to sustain it will get larger and larger".[505]

The Peruvian response to Chile's sharp war was rather unexpected for the times. The bombing of Pisagua and the occupation of Tarapacá, were framed in terms of an inverted version of the standard of civilisation that reject the Sharp War Paradigm. Under this standard, it was Chile who was a "savage, barbarian and uncivilized nation"[506] that bombarded defenceless commercial ports.

Peruvian *Criollo* historian Mariano Felipe Paz Soldán, for instance, argued that through the bombardment of Pisagua "Chile showed the first signs of just how much respect it had for the sacred and humanitarian rules of international law, that reproaches the attack of defenceless and essentially commercial populations".[507] The problem, Paz Soldán says expressly, was ideological: Admiral Williams Rebolledo "professes, like the State Ministers of his nation, the absurd and brutal principle that 'a war is all the more humanitarian when it is

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[502] Letter of January 28, 1880, from Rafael Sotomayor to the Minister of War, quoted by Benjamín Vicuña Mackenna, *Historia de La Campaña de Tacna y Arica, 1879-1880,* (Santiago de Chile, 1881) 276.
[503] Letter of January 28, 1880, from Rafael Sotomayor to the Minister of War, quoted by ibid.
[504] Letter of January 28, 1880, from Rafael Sotomayor to the Minister of War, quoted by ibid 277.
[505] Letter of February 3rd, 1880, from the War Minister to Rafael Sotomayor, quoted by ibid 276.
[506] Pérez Godoy (n 473) 504.
[507] Paz Soldán (n 498) 146.

crueller, and that he waged war in the form in which he sought it was done to him', that is, by fire and blood [*a sangre y fuego*]".[508]

This is a weaponization of the language of civilisation, wielded as a means of resisting the Lieberian view of war. Slowly but steadily, an increasing number of South American sources began to see Lieber's "sharp wars are brief" principle as a barbaric way of conducting war and a rule unworthy of civilised times.

In 1881, for instance, Onésimo Leguizamón, an Argentinean scholar and associated member of the *Institut de Droit International,* published a 60-page pamphlet translating the Institute's Oxford Manual of 1880.[509] Leguizamón's pamphlet included an indictment of Chile's claim to civilisation through sharp war. In his words:

> "I have translated the present Manual, understanding that in a country like ours (…) it is indispensable to know and disseminate the principles of civilised war, so as to not suffer (when the time comes) the tremendous condemnation [*tremendo anatema*] that [public] opinion currently fulminates over the conduct of Chile's armies in the bloody tragedy of the Pacific".[510]

Like Paz Soldán, Leguizamón expressly rejects the "sharp war" tradition in its entirely. In his words:

> "We have just heard, with great surprise, that the Chilean parliament has stated that 'killing war [la guerra matadora] is the most human', as if modern war was, in the designs of Providence, that *necessary calamity* of other times, independent of the will of nations".[511]

Leguizamón is clear that he "does not partake" in that opinion, lamenting the fact that war is no longer the "just and merciful duel Hugo Grotius dreamed of" but a "monster whose sustenance is death and destruction".[512]

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[508] ibid 146–147.

[509] Onésimo Leguizamón, *Las leyes de la guerra continental: manual publicado por el Instituto de derecho internacional y sometido á la aprobación de todos los gobiernos* (Imprenta de Pablo E Coni 1881). The Oxford Manual was an instrument created by the Institute of International Law as a means to advance the codification of the laws of war. It was a non-binding, civil-society-led set of rules that generally followed the trend of the Brussels and Hague conferences.

[510] ibid 1.

[511] ibid 8. Curiously, though, at the same time as he sternly rejects the "sharp wars" paradigm, Leguizamón equally praises the Lieber Code, calling it the body of laws that "encapsulates the most liberal and humanitarian principles that any civilised nation can observe in its wars, be them foreign or civil".

[512] ibid 9.

Thus, unlike in the Euro/US-centric paradigm, where the sharp war dominated the war discourse for decades, eventually leading to German *Kriegsraison* and the attrocities of both World Wars[513], in Latin America, Chile's adherence to Lieber's sharp war gave birth to a "negative international *imaginaire"*[514] of Chile, not as a civilised state, but as a "barbarian and uncivilised nation", the "Barbarian of the Pacific", and the "American Prussia".[515] In essence, the sharp war tradition in Latin America faced resistance from its very beginnings, through a re-conceptualisation of what it means to be "civilised" in the 19th century – yet another conception of the many laws of war described above.

3. The Chilean Mixed Commissions and the Laws of War

At the end of the War of the Pacific, Chile received several complaints from European nationals living in the bombarded towns and ports of Peru. To address these claims, Chile signed arbitration agreements with France (November 2nd, 1882), Italy (December 7, 1883) and Great Britain (January 4 1883), setting up the corresponding Franco-Chilean, Italo-Chilean and Anglo-Chilean Mixed Commissions.[516] These commissions are interesting because unlike many commissions of their kind, they did not address issues of state responsibility for rebel activity during civil war (perhaps the most common topic at the time in Latin American arbitration)[517], but rather the conduct of hostilities in an international war.

These were richly discussed in uncommonly extensive awards and dissenting opinions, arising out of the controversial positions assumed by the first Brazilian chairman of the Commissions, *Conselheiro* Felippe Lopes Netto. In going against the established doctrines of the laws of war as enablers of "sharp", "civilised" war, Lopes Netto constitutes yet another approach to the laws of war, perhaps the most interesting to emerge out of Latin America. This section relies on my original archival research undertaken in the British Archives during the first half of 2021, particularly the correspondence of Francis Pakenham, the British arbitrator, as well as contemporaneous Brazilian journals.

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[513] See, generally: Hull (n 243). See also: Moyn (n 8). and Connolly (n 336) 463.
[514] See: Rubilar Luengo (n 239).
[515] Pérez Godoy (n 473) 504–505.
[516] Mario Barros Van Buren, *Historia diplomática de Chile (1541-1938)* (Andres Bello 1970) 481.
[517] See, generally: Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021).

a. The Lopes Netto Tenure[518]

Lopes Netto was a stern man. Pakenham described him as “vain and uncertain in temper”; someone who does “what he believes to be just, unless moved by some sudden and uncontrollable impulse”.[519] He was quick to anger and easily offended, prone to shouting “epithets of obloquy” even during hearings and meetings.[520]

Little is known of Lopes Netto’s legal views. As with his co-arbitrators, he did not have a background in the laws of war. What we do know is that, in the late 1840s, he had been a revolutionary, and one of the main leaders of the failed *Praiero* Revolution, in his native Pernambuco, in northern Brazil. The *praieros* were a group of reformist liberals seeking to replace Brazil’s Imperial absolutism for parliamentary monarchism.[521] Their nickname, *praiero* (“beacher”), came from the location of the liberal movement’s mouthpiece journal, *O Diario Novo*, in *Rua da Praia* (Beach St.), of which Lopes Netto was an editor.[522]

When the new Governor of Pernambuco, Mr. Herculano Ferreira Pena, began to expel liberals from government positions and persecute their leaders, the *praieros* took up arms against him. In an editorial, dated November 14, 1848, *O Diario Novo* stated “we will therefore see Pernambucans in the rigorous obligation to, in defence of their lives and property, take up arms and not depose them until our August Monarch puts an end to their grievances”.[523]

As these editorials suggest, 34-year-old Lopes Netto was openly supportive of the revolt. As a representative for Pernambuco, he could avoid excessive scrutiny. When his fellow liberals took to the jungles outside Recife, he stayed in his country house, known as *Casa Forte* (the “Strong House”), in the outskirts of

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518 Parts of this section have been published in: Gurmendi Dunkelberg (n 469).

519 Letter of June 23, 1884, from Francis Pakenham to Phillip W. Currie, Under-Secretary of State for Foreign Affairs at the UK Foreign Office, UK National Archives, FO 16/227.

520 Letter of September 14, 1884, from Francis Pakenham to George Leveson Gower, Earl Granville, UK Foreign Secretary, UK National Archives, FO 16/227. Pakenham speaks of the Brazilian Commissioner’s “violent, and sometimes apparently uncontrollable, temper”.

521 See: Suzana Cavani Rosas, ‘Da “constituinte soberana” a “conciliação política sobre as bases das reformas”: O Partido Liberal em Pernambuco e o gabinete Paraná de 1853’ (2014) 0 Revista de História 291.

522 Alfredo de Carvalho, *Annaes da imprensa periodica pernambucana de 1821-1908;* (Recife, Typographia do ‘Jornal do Recife’ 1908) 174.

523 O Diario Novo, Year VII, Number 247, November 14th, 1884. Original: “Teremos pois de ver os Pernambucanos, para defenderem suas vidas e propriedades, na rigorosa obrigação de empunharem as armas e não as depôrem, enquanto o nosso Augusto Monarcha não pozer um termo a seus males”

town[524], using it as a staging ground and headquarters for the *praiero* militias.[525] The *praieros* were eventually defeated, and Lopes Netto was tried as a rebel and sent to prison, where he spent four years, until his pardon.[526]

Lopes Netto's experience as an outgunned revolutionary certainly gave him a unique perspective in comparison to other scholars of his time, particularly with regards to the laws of war. In his proclamations as a rebel leader, Lopes Netto frequently complained about the abuses of government forces against the *praieros*, saying that their violent resistance was an expression of "the instinct of self-preservation".[527] *Diario Novo's* editorials spoke of insurrection as a "natural right"[528] and the government's practice of luring *praiero* rebels with false flags of surrender as "the darkest of perfidies" and a violation of the "rules of war".[529]

Lopes Netto was condemned and sent to jail. He was, however, pardoned shortly after. Lopes Netto was then sent to Bolivia, to negotiate the border with Brazil in the contested Acre region.[530] Part of his trip included visits to Santiago, were he made good friends in Chilean high society. In 1872, he donated a collection of books on the laws of Brazil to the National Library in Santiago and was appointed Honorary Member of the University of Chile.[531] In fact, upon hearing of his appointment as arbitrator for the Mixed Commissions, the Chilean Ministry of Foreign Relations noted it "cannot but look with sincere satisfaction the appointment of this distinguished public man".[532]

From the outset, the situation in the Mixed Commissions was tense. It was clear from the beginning that opinions between the commissioners differed widely, especially with regards to the interpretation of what each arbitrator understood by military necessity. On July 19th, 1884, the Anglo-Chilean tribunal issued its

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[524] O Liberal Pernambucano (October 13, 1852) Year 1, No. 29.
[525] Jerônimo Martiniano Figueira de Melo, *Chronica Da Rebellião Praieira Em 1848 e 1849 Por Jeronimo Martiniano Figueira de Mello* (Typographia do Brasil de JJ da Rocha 1850) 57.
[526] barão de Vasconcellos and barão Smith de Vasconcellos, *Archivo nobiliarchico brasileiro* (Lausanne : Imprimerie La Concorde 1918) 259.
[527] Aos Pernambucanos, O Diario Novo, November 27, 1848, Year VII, No. 258.
[528] O Diario Novo (November 24, 1848), Year VII, No. 256.
[529] O Diario Novo (November 20, 1848) Year VII, No. 252.
[530] Vasconcellos and Smith de Vasconcellos (n 526) 259.
[531] Universidad de Chile, *Anales de la Universidad de Chile* (Santiago 1872) 59 and 108.
[532] Note of August 6, 1883 from the Ministry of Foreign Relations, Luis Aldunante, to the Minister of Foreign Affairs of the Empire of Brazil, in: Francisco de Carvalho Soares Brandão and Ministério das Relações Exteriores do Brasil, *Relatorio Do Anno de 1883 Apresentado a Asamblea Geral Legislativa Na 4a Sessão Da 18a Legislatura* (Typographia Nacional 1884).

decision on Claim No. 8, *in re David Genno*. Genno owned five houses in Callao, Peru's main commercial port, which were damaged when the Chilean army demolished the *Santa Rosa* fort, adjacent to his property. Aldunate, the Chilean arbitrator, and Pakenham agreed that the destruction of a fortress was, by its own nature, an "eminently legitimate act authorised by the necessities of the belligerent".[533] According to them, any damages suffered by Genno "are not imputable to the responsibility of a belligerent".[534] Lopes Netto, however, dissented, without attaching a separate opinion, but noting that, in his opinion, "the claim should be accepted, given that the act that motivated it was not, in his judgment, based on a necessity of war".[535]

That same day, the Commission issued a decision on Claim No. 9, *in re John Farquharson*. Farquharson argued that Chile owed him £462.00.[536] According to Farquharson, as Peruvian partisans were closing in on the area, Chilean soldiers commandeered a civilian ship and began to throw its contents overboard, including a trunk that was of high value to him. The Chilean agent argued this was "an act justified by the necessity of war", since the Chilean platoon had every reason to try and secure its position with all resources available.[537] Lopes Netto and Aldunante agreed. Pakenham did not.

These disagreements ultimately exploded on November 19th, 1884, when the Italo-Chilean Commission decided *in re Cuneo.* Cuneo was an Italian resident of Pisagua at the time of its bombardment by Williams' fleet. The bombardment destroyed a building of his property and the landing party pillaged his assets in the port. Cuneo's claim was mostly sustained by witness testimony, including by a priest, an Italian sailor, and four other individuals.[538]

The *Cuneo* case rested on whether the bombardment of the port of Pisagua was justified by military necessity. The facts were mostly agreed upon. Williams had

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[533] Tribunal Arbitral Anglo-Chileno, *Sentencias pronunciadas por el Tribunal Anglo-Chileno en las reclamaciones deducidas por súbditos ingleses contra el Gobierno de Chile, 1884-1887* (Imprenta Nacional 1888) 38. Original: "un acto eminentemente lejítimo i autorizado por las necesidades del beligerante".
[534] ibid.
[535] ibid 40.
[536] ibid 41.
[537] ibid 43.
[538] Tribunal arbitral italo-chileno, *Sentencias pronunciadas por el Tribunal italo-chileno en las reclamaciones deducidas por subditos italianos contra el gobierno de Chile. 1884-1888* (Imprenta nacional 1891) 41.

sent a detachment to the coast in order to destroy small commercial boats in the port. They were met with resistance by a small Peruvian unit that forced the Chileans to retreat. In response, and without prior warning, Williams bombarded the city. After the city fell, Chilean troops pillaged it.

The Italian Agent argued that Pisagua was an "open plaza without fortification" that was only defended by a small battalion of national guards and military police.[539] In this situation, and especially by acting without prior warning, the bombing of Pisagua was an *unnecessary* bombing.[540] The Chilean Agent, instead, argued that Pisagua had been defended by armed troops, and that "cities that are militarily defended or in which the inhabitants resist by means of arms, can be attacked with riflery and artillery until surrender is achieved".[541] In any case, as to the claim of pillaging, "no responsibility affects the Government of the Republic of Chile for acts of undisciplined soldiers that were not ordered or authorised by the Chilean authorities".[542]

The *Cuneo* decision was entirely drafted by Lopes Netto.[543] Pakenham lamented this, as he felt he used "rather strong language in framing his awards against Chile".[544] Lopes Netto would later reveal to Pakenham that he had secretly stricken a deal with Aldunate, the Chilean arbitrator, "to the effect that the awards favorable to Chile should be drawn up by the latter, and those favorable to the claimants by himself".[545]

Lopes Netto's decision starts by determining the military objective sought by Williams – namely, the destruction of coastal commercial boats. If this was the

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[539] ibid 43.
[540] ibid 45. The Italian Agent based his argument, among others, in Articles 4, 32, 33, and 34 of the Oxford Code; Articles 22, 37, and 44 of the Lieber Code; and Articles 12, 13, 15 and 16 of the Brussels Declaration. Note the original language: "En derecho, que: son ilícitos, i por consiguiente se deben resarcir los perjuicios irrogados a las personas i bienes de los particulares sin absoluta necesidad de guerra; i que de consiguiente un bombardeo debe considerarse ilícito, i dar, por lo tanto, lugar al resarcimiento: 1° Cuando resulta no haber sido absolutamente necesario. 2° Cuando, aún en el caso en que aparezca justificado por una verdadera necesidad militar, resulta haber sido efectuado sin que se haya hecho uso de la diligencia debida".
[541] ibid 46.
[542] ibid 47.
[543] Letter of January 9, 1885, from Francis Pakenham to Phillip W. Currie, National Archives FO 16/236. Pakenham says that Lopes Netto "persists in drawing [the awards] up himself" and that "an effort of mine to assist in this direction while he was ill was very coldly received".
[544] Letter of January 9th, 1885, from Francis Pakenham to Currie, National Archives FO 16/236.
[545] Letter of July 10, 1885, from Francis Pakenham to Earl Granville, National Archives, FO 16/236.

case, Lopes Netto rationalised, then the decision to bomb the town was fully unnecessary: the boats, he says, "could have been easily secured though a few cannon shots against the vessels or through a similar intimation directed to local authorities".[546] Pisagua was, for legal purposes, an "open city", whose bombardment was forbidden except when faced with an "absolute necessity of war" [*absoluta necesidad de guerra*] that simply did not exist in the instant case.[547] The Peruvian detachment, composed of a few national guards and military police, "could not constitute a serious obstacle for the destruction or capture of the commercial vessels, the object of the military operation".[548]

Lopes Netto places emphasis on the fact that an hour into the bombardment, Williams redirected his ships to bomb the northern part of town – where the living quarters of the population were concentrated. Bombing a defenceless city, he says, can only be allowed when faced with an "absolute necessity of war" [*absoluta necesidad de guerra*].[549] For Lopes Netto, Chile had faced no actual necessity, but rather, simply engaged in the collective punishment of an "innocent, peaceful and harmless commercial and mostly neutral population".[550] Because of this, Lopes Netto ruled in favour of Cuneo and ordered Chile to pay eight thousand pounds sterling , plus interest.[551]

News of the Cuneo case spread like wildfire. Pakenham quickly notified the British Foreign Office that "the Italians" had "gained an important case" that "may prove a very formidable precedent".[552] The decision made Aldunate "very indignant" and, if Pakenham's second-hand recollection is to be believed, "[t]here was a rather angry scene" between Lopes Netto and Aldunate, where the Italian Commissioner had to intervene to "preserve the peace, which at one time is said to have been seriously threatened".[553] Aldunate's fury resulted in a three-hour-long session where he read his extremely long dissenting opinion.[554] While, for

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[546] Tribunal arbitral italo-chileno (n 538) 49.
[547] ibid 50.
[548] ibid 49.
[549] ibid 50.
[550] ibid.
[551] ibid 51.
[552] Letter of December 12, 1884, from Francis Pakenham to Phillip W. Currie, National Archives, FO 16/228.
[553] Letter of December 12, 1884, from Francis Pakenham to Phillip W. Currie, National Archives, FO 16/228.
[554] Letter of December 11, 1884, from Francis Pakenham to Earl Grainville, National Archives, FO 16/228.

reasons I have not been able to ascertain, this opinion did not make it into the official compilation of awards published by the Chilean government, it was published in the Chilean Official Gazette, on December 5th.[555]

Aldunate takes issue with Lopes Netto's focus on witness testimony.[556] He would rather look to the belligerent's official logs. "To this date", he argued, "no international mixed tribunal has contested the credibility [*la fe*] that must be granted to this kind of information".[557] For Aldunate, these are the "most serious and most authorised source that can be invoked to ascertain the truth".[558] After all, he says, it would be "inconceivable to suppose that the official log of Admiral Williams Rebolledo on April 19, 1879, the very next day of the military operation it retells, could incorporate voluntary inaccuracies destined to destroy the foundations of the present claims, tried five years after the fact, on the basis of international covenants that no one could have foreseen or suspected on the date the documents were submitted".[559]

Based on the information in Williams' log, Aldunate agreed that the object of the operation was the destruction of coastal boats. "It was a primordial necessity to prevent the supply of enemy ports by disturbing the arrival of groceries or war elements".[560] At the same time, he disagreed that the Peruvian detachment had been small. Williams, after all, had consigned in his log that Pisagua was defended "by a great number of troops".[561] This, stated Aldunate, made prior warning impossible. If Chilean troops could not disembark in the port, because of the Peruvian defence, then there was no chance for Williams to notify the population.[562] "One notifies the decision to bombard when that is the will and intention of a belligerent", he said, "[b]ut one does not notify, nor can one notify, the decision to defend against the unforeseen and surprising acts of hostility from the enemy".[563]

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[555] Ministerio de Relaciones Esteriores de Chile, 'Reclamo Arbitral Ítalo-Chileno, Reclamo Num. 4' *Diario Oficial de la República de Chile* (5 December 1884) 2067 2067.
[556] ibid 2069.
[557] ibid.
[558] ibid 2067.
[559] ibid.
[560] ibid.
[561] ibid.
[562] ibid 2068.
[563] ibid 2070.

In fact, Aldunate said, “if the Chilean warships did not have any weapons other than their cannons, then they can and must use them when, attacked by surprise by the enemy (…) they had no other recourse to repel the aggression they were victims of”.[564] Aldunate concludes that the destruction of the city was the fault of the Peruvian garrison, that had spread out all through the city’s beach-front, instead of concentrating in a specific location for Chile to attack. “If, therefore, the Chilean fleet set its cannons over diverse points of Pisagua beach, it was because the land troops that were attacking it were also located in all those points and in all those directions. (…) If a bullet misses its target and coincidently damages flammable constructions, must we decide because of that that the objective was to bombard and set fire to the entire population?”.[565]

Aldunate sustains these arguments by reference to Carlos Calvo, Johann Bluntschli, the Oxford Manual, and even the Lieber Code. Based on these sources, he says, “there are only three rules or principles defined and fixed enough to be sanctioned as the common conscience [*común sentir*] and based on the practical example of civilised nations”.[566] Principle one: “bombardments are a rigorous measure of hostility that can only be used in serious cases, in order to secure through them the legitimate object of the war”.[567] Principle two: “it is not licit to bombard open and defenceless plazas that constitute an agglomeration of peaceful inhabitants”. Principle three: “belligerents must give prior warning of their intention to bombard, so long as it is possible”.[568] These rules, he says, clearly authorised Williams to open fire, as Pisagua was not defenceless and prior warning was not possible.

Aldunate brushes past his first principle rather quickly. He simply sees Williams’ objective as obvious: to win the war, the boats needed to be destroyed; to be destroyed the Peruvian garrison needed to be destroyed as well; to destroy the Peruvian garrison, the city needed to be bombed. Lopes Netto, in turn, saw things differently. For him, the destruction of the boats did not really require the bombardment of the city. Díaz Covarrubias, it is worth noting, would have likely agreed.

[564] ibid.
[565] ibid.
[566] ibid 2072.
[567] ibid.
[568] ibid.

There is no doubt whatsoever that it was Lopes Netto who was doing something different in his approach to the law. It was very uncommon for legal scholars to second guess the decisions of military commanders made in the heat of battle. A few years back, for instance, the United States had set up similar Mixed Commissions, addressing claims arising out of damage incurred during the US Civil War. In 1872, the Anglo-American Commissions had dismissed the case of a British subject, Mr. Cleworth, who had lost a house as a result of the Union bombardment of Vicksburg, without adding any justification. The United States defence had simply been that the claim was "too preposterous to need discussion"[569]. A similar case, this time before the Franco-American Commission of 1880, had summarily dismissed the *Virginie Dutrieux* case, on account of the fact that the destruction of her two Charleston homes were injuries resulting out of "the ordinary operations of war and the bombardment of an enemy town".[570] This had also been the conclusion of the Brussels Conference, in responding to the petition of the citizens of Antwerp mentioned above. Civilians were not protected from the incidental harm produced by city bombardments.

Lopes Netto was, therefore, swimming against a very strong current. One can only speculate the reasons behind Lopes Netto's rationale, but his time as an outgunned revolutionary may have played a role.

The decision on the Cuneo case sent shockwaves throughout Chilean society, including the government.[571] The Chilean press fumed against Lopes Netto and the Brazilian Empire, using racist insults and insinuating foul play.[572] "From here on", says one contemporaneous report, "all applause turned to an accumulation of intemperate phrases".[573] In fact, as protests erupted throughout Santiago,

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[569] Mixed Commission on British and American Claims, *British and American Claims: British Claims No. 1 to 478 Memorials, Demurrers, Briefs, and Decisions* (1873). See case No. 48.
[570] John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party: Together with Appendices Containing the Treaties Relating to Such Arbitrations, and Historical Legal Notes ...* (US Government Printing Office 1898) 3702. It should be noted that Lopes Netto does not distinguish these cases from the Cuneo case with any rigour. His decision simply states that cases before the Anglo American Commission could not be invoked before the Italo-Chilean Mixed Commission because those bombardments had been "justified by absolute military necessities" and cannot sustain any "analogies" to the bombardment of Pisagua. See: Ministerio de Relaciones Esteriores de Chile (n 555) 2068.
[571] Barros Van Buren (n 516) 483.
[572] Câmara dos Deputados do Parlamento do Brasil, *Session of May 25th, 1885, Annaes, Volume 1* (Tipographia do Imperial Instituto Artistico 1885) 78. According to Deputado Andrade Figueira, the Chilean press referred to Brazilians as "monkeys".
[573] Decimus Magnus Ausonius, *El arbitraje tribunal internacional chileno y 'la nacion,' periódico de Buenos Aires* (La Famiglia Italiana 1885) 21.

Chilean authorities offered Lopes Netto a security detail, which he refused.[574] The Chilean Executive even faced a censure procedure in Parliament over the *Cuneo* decision.[575] In it, the Chilean Foreign Minister revealed that the government had commissioned a study of the tribunals' decisions.[576] As such, the Chilean Government had "taken special note of those decisions where the application of a specific doctrine or the wrongful appreciation of some facts may have surprised it".[577]

At least publicly, Lopes Netto told reporters that he was not bothered by the bad coverage.[578] In fact, when an Argentinean correspondent asked Lopes Netto if he should not act as "Chile's friend" in the proceedings, alluding to his shared South Americanness and close contact with Chilean society, a "laconic" Lopes Netto responded that "[o]ne cannot be friends with he who must be your judge".[579]

Privately, however, Lopes Netto clearly "attache[d] great importance to these diatribes", forwarding them to the Brazilian Emperor himself.[580] He even expressed hopes that the Emperor would recall him to Brazil and break relations with Chile entirely.[581] Press speculation, however, also seemed to insinuate that Chile had also sent the Pisagua decision to the Emperor in the hopes that Lopes Netto would be fired.[582] The reports, however, indicated that the Emperor had rather approved of Lopes Netto's judgment, with many fearing that the tribunals would collapse.[583]

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[574] Diario de Pernambuco (January 30, 1885) Year LXI, No. 24.
[575] Jornal do Recife (January 28, 1885) Year XXVIII, No. 22.
[576] The session's transcript is not available from Chilean sources, but the key sections were transcribed during a similar hearing in the Brazilian Parliament. See: Câmara dos Deputados do Parlamento do Brasil (n 572) 78.
[577] ibid 78. "Original: el gobierno ha tomado particularmente nota de aquellas sentencias en que ha podido sorprenderle la aplicación de alguna doctrina o la apreciación equivocada de algunos hechos".
[578] Diario de Pernambuco (January 30, 1885) Year LXI, No. 24.
[579] The exchange was chronicled in: Ausonius (n 573) 20. Original: "No puede ser su amigo quien tiene que ser su juez".
[580] Letter of January 9, 1885, from Francis Pakenham to Earl Grainville, National Archives, FO 16/236.
[581] Letter of January 9, 1885, from Francis Pakenham to Earl Grainville, National Archives, FO 16/236.
[582] Gazeta de Noticias (Rio de Janeiro) (January 18, 1885), Year XI, No. 18.
[583] Gazeta de Noticias (Rio de Janeiro) (January 18, 1885), Year XI, No. 18.

Then, in January 1885, Aldunate mysteriously left Santiago without warning, leaving the tribunal's sessions at a standstill.[584] The Chilean Minister of Foreign Relations, Mr. Vergara Albano, would eventually reveal to Pakenham that Aldunate's departure "might safely be attributed to a refusal of that gentleman, and perhaps of his principals also, to have any further intercourse with the Commissioner on the part of Brazil".[585]

Eventually, on February 1st, 1885, less than two months after the publication of the *Cuneo* decision, Lopes Netto requested a license to travel back to Brazil for reasons of health, and refused to take part in any further proceedings.[586] Once in Rio de Janeiro, on March 26th, Lopes Netto informed the Ministry of his "impossibility" of returning to Chile without seriously compromising his health.[587] The timing was, of course, suspicious and there is much speculation as to the veracity of his "sickness". Pakenham does note a prior incident where Lopes Netto suffered from "a slight affection called here 'un aire', but which is said to partake somewhat of facial paralysis".[588] At the time, five months before the *Cuneo* decision, Pakenham worried that Lopes Netto "is very weak, and another attack may prove permanently disabling".[589] After Lopes Netto's departure, however, Pakenham seemed to suspect that the reasons for his departure were mostly related to the abuse he had suffered.[590]

Politicians in Rio de Janeiro were equally suspicious. In May, 1885, the Brazilian Parliament initiated censure proceedings against the Ministry of Foreign Affairs for their alleged acquiescence to what some parliamentarians considered an affront to Brazilian honour. According to Member of Parliament Andrade Figueira, Lopes Netto's sickness was nothing but a "*diplomatitis*", a ruse

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[584] Letter of February 19, 1885, from Francis Pakenham to Earl Granville, FO 16/236.
[585] Letter of July 10, 1885, from Francis Pakenham to Earl Granville, FO 16/236.
[586] According to the transcript of a Brazilian Parliament meeting, Lopes Netto requests a license to the Brazilian Ministry of Foreign Affairs on February 1. This is reported by Pakenham to London on the next day, and eventually notified to the Anglo-Italian Commission on February 7. See: Câmara dos Deputados do Parlamento do Brasil (n 572) 70. See also: Letter of February 2, 1885 from Francis Pakenham to Earl Granville, National Archives, FO 16/236. On Lopes Netto's refusal to participate in hearings, see Letter of February 19, 1885, from Francis Pakenham to Earl Granville, National Archives, FO 16/236.
[587] ibid 69.
[588] Letter of August 18, 1884, from Francis Pakenham to Phillip W. Currie, National Archives FO 16/228.
[589] Letter of August 18, 1884, from Francis Pakenham to Phillip W. Currie, National Archives FO 16/228.
[590] Letter of March 6, 1885, from Francis Pakenham to Earl Granville, National Archives, FO 16/236.

designed to allow him to return to Rio and confer with the Emperor without causing much commotion.

Suspicions in Rio ran high, particularly because of who the Emperor had appointed to replace Lopes Netto – his Chief of Staff, Counsellor Lafayette Rodrigues Pereyra.[591] Counsellor Pereira, or simply Lafayette, as he usually signed documents with his first name, was not a member of the diplomatic corps, but a Senator, and so would not need to request leave from the Brazilian Executive to return to Rio de Janeiro if things got complicated with the Chilean government once again. Counsellor Lafayette did not need to catch "diplomatitis" to be replaced.[592]

Because of all this drama, modern Chilean historiography frequently vilifies Lopes Netto as "a vain and obstinate old man, whose decisions were very criticised for not conforming to international law, a branch that he did not know very well".[593] For Barros Van Buren, for instance, he was "a man of normal intelligence, very bad temper, an almost sickening susceptibility, an indomitable pride, that paralleled the stubbornness of his age".[594]

However, some contemporaneous sources seem to give a much friendlier appraisal. Carlos Calvo stated that Lopes Netto's views were "liberal and conformable to the law of nations".[595] Likewise, an 1893 book by Italian jurist Alessandro Corsi, stated that "the commissions malfunctioned only because of the third sovereign arbitrator [meaning the Emperor of Brazil], who, during the trial, substituted his first delegate [Lopes Netto], for a second one, giving rise to suspicions of partiality and uncertainty in his decisions".[596]

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[591] Barão de Cotegipe and Ministério das Relações Exteriores do Brasil, *Relatorio Do Anno de 1885 Apresentado a Assamblea Geral Legislativa Na 1ra Sessão Da 20a Legislatura* (Imprensa Nacional 1886) 31.
[592] Câmara dos Deputados do Parlamento do Brasil (n 572) 73.
[593] Sergio Villalobos, *Chile y Perú: la historia que nos une y nos separa, 1535-1883* (Editorial Universitaria 2002) 260. Original: anciano vanidoso y porfiado, cuyas decisiones fueron muy criticadas por no conformarse al derecho internacional, una rama que no le era muy conocida.
[594] Barros Van Buren (n 516) 482. Original: "se trataba de un hombre de inteligencia normal, de muy mal genio, con una susceptibilidad casi enfermiza, un orgullo indomable, que corría parejas con la terquead propia de su edad".
[595]Quoted by Moore (n 570) 4930.
[596] Alessandro Corsi, *Arbitrati internazionali: note di critica dottrinale e storica* (Tip editrice Galileianadella Real casa 1893). Original: "le commissioni funziona- rono male soltanto per colpa del sovrano terzo arbitro, che durante il giudizio sostituì al suo primo delegato un secondo, dando luogo così al sospetto di parzialità e di incertezza nelle sue decisioni".

I would thus venture a parallel, contingent, reading of Lopes Netto's tenure as Chairman of the Mixed Commissions, as an interesting subversion of the dominant paradigm. Because of his particular personal story, his humanitarian approach to the laws of war was quite unique for his time. While he was not the only one disputing the Sharp War Paradigm of the time, his truly path-breaking innovation was the articulation of a limited version of the laws of war in humanitarian, instead of civilisational, terms. He read military necessity as a limitation on state conduct for the protection of the *quartiers de villes* of Pisaguans, not an enabler of sharp war for the subjugation of Antwerpians – an approach that would otherwise take more than a century to resurface in the mainstream debate over the laws of war.[597] Had he not been recalled, had he been allowed to stay all throughout his tenure, and had his decisions not been entirely dismissed by the nationalistic response of the Chilean press, perhaps his views may have had a more lasting legacy; one where protection of civilians, not military expediency or necessity, would have received heightened attention. Alas, Lopes Netto passed away little over a decade later, while in Italy, without ever again writing about the laws of war.

b. The Lafayette Tenure

Lafayette was a well-known civil law expert, whose works on Family Law (1869) and the Law of Things (1877) are used in Brazilian classrooms to this day. At the time of his appointment, though, like Lopes Netto before him, Lafayette had not published a single book on international law nor was this his main focus; let alone the laws of war. Despite this, he is still remembered much more fondly by Chilean historiography, which calls him "a man of laws, with a very likable personality"[598] and a "greater commitment to the law and a sense of equity".[599] From his own words, though, it seems Lafayette understood his mission in Chile quite well. In a letter to his brother, he says "[o]ur businesses in Chile have gotten complicated due to Lopes Netto's inability and foolishness [tolices]".[600]

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[597] See, e.g.: Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225. and Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press 2017).
[598] Barros Van Buren (n 516) 484.
[599] Villalobos (n 593) 260.
[600] Undated letter, referenced in Lafayette Rodrigues Pereira, *Princípios de Direito Internacional*, vol 2 (Asamblea Legislativa de Minas Gerais 2017) XI.

It is impossible to know the full breadth of Lafayette's ideas on the laws of war in 1885, other than knowing that he was the son of a colonel and the specific exchanges he shared with his co-arbitrators which are recorded in diplomatic correspondence.[601] In 1902, however, he wrote *Princípios de Direito Internacional*, a highly influential book, praised by Judge Antônio Augusto Cançado Trindade as "the defining oeuvre of the first period [of Brazilian international law]"[602], where he set out his views in extensive detail.

In Volume II of his *Princípios,* Lafayette addresses the law of war. For him, since there is no superior power among nations, war is the *right* they have to settle their disputes by force. "What is there between two nations at war but a dispute, a legal controversy?", he says.[603] This is a very pragmatic view of the law and of war. As he continues:

> "Force can give victory to the party that does not have a right. Certainly, in legal theory, a nation that does not have a right [to something], breaks and violates a principle of justice if it recourses to force – it does not use, but rather abuse, a right. In real life, though, there is no power to impose compliance with this principle. Each nation believes itself to have the right and fights to make itself succeed".[604]

In rather Clausewitzian fashion, Lafayette defines "war" as "the employment of physical force by a nation to coerce another to submit to a solution it considers just".[605] In fact, in a footnote to this phrase, Lafayette makes specific reference to Clausewitz, noting that he "defines war as it is de facto and received by international law".[606]

For Lafayette the "fundamental principles" of the laws of war are determined by the immediate object of war: "the reduction of the enemy to impotence, by physical coaction, in order to make it impossible for them to resist, ignore or

[601] Ernesto Leme, 'Lafayette Rodrigues Pereira' (1964) 59 Revista da Faculdade de Direito, Universidade de São Paulo 175, 176. See also, Letter of September 19, 1885, from Hugh Fraser to Lord Salisbury, National Archives FO 16/237.
[602] Augusto Cançado Trindade, *Princípios Do Direito Internacional Contemporâneo* (Fundação Alexandre de Gusmão 2017) 37.
[603] Rodrigues Pereira (n 600) 54.
[604] ibid. Original: E a força pode dar victoria á quem não tem o direito. Certamente na theoria juridica a nação que carece do direito, se appella para as armas, infringe e conculca um principo de justiça, - não usa, abusa de um direito. Na vida pratica, porem, não ha um poder para impor a observancia deste principio. Cada nação acredita ter o direito e lucta para faze-lo triumphar.
[605] ibid 55.
[606] ibid.

contest our right".[607] From this, he says, "derives the principle that in war only the means that are *necessary* to reduce the enemy to impotence are allowed".[608] This is a completely different understanding than that of Díaz Covarrubias and Lopes Netto, even if a much more mainstream one for the time.

A second principle, says Lafayette, is that all nations are subordinated to morality and the law in all their actions. Therefore, "in war, only the means that do not repel one or the other can be employed".[609] For him, "*unnecessary* violence or evils are illegitimate" but so are immoral or illegal necessary acts – this is why, he says, perfidy is prohibited, even if it may be effective.[610]

Despite this more humanitarian angle, Lafayette immediately turns to a section he calls "excusable infractions of the laws of war".[611] In this section, he takes a rather Moltkean view. He states the laws of war must be observed, except when "extraordinary circumstances of such a nature occur that observance of the rules would expose the belligerent forces to a grave and imminent anger or to an inevitable defeat". In these cases, he says, "the *reason of war* imposes silence on the laws".[612] The term in Portuguese, *razão de guerra,* is the direct translation of Lieber's *raison de guerre* and Moltke's *kriegsraison,* which puts Lafayette far away from the nascent Latin American anti-sharp-war tradition of Diaz Covarrubias, Leguizamón, Paz Soldán, and Lopes Netto. The Emperor of Brazil had replaced an arbitrator that believed damaging houses adjacent to a fortress was unnecessary, with a man who believed law yielded to *kriegsraison.*

Lafayette arrived in Santiago on July 30th, and by August 10th, the Commissions were up and running, after six months of pause.[613] On September 12th, the Anglo-Italian Commission tried *in re Dodero*, one of Lafayette's first cases, where he would set out his doctrine on the necessities of war.

Antonio Juan Bautista Dodero was an Italian living in Iquique, in southern Peru. Like Cuneo, he claimed a building and merchandise of his property in the port of Mejillones, further to the south, were damaged during Admiral Williams'

[607] ibid 69–70.
[608] ibid 70.
[609] ibid.
[610] ibid.
[611] ibid 73.
[612] ibid.
[613] Barão de Cotegipe and Ministério das Relações Exteriores do Brasil (n 591) 32.

bombardment in April 1879. As evidence, he provided an inventory of his own making, a valuation of his assets, and four testimonies stating the bombing was carried out without warning and without any hostile act from the Peruvian garrison. He later added testimonies warranting his commercial ties in the city.[614]

The Chilean agent counterargued that Dodero and his witnesses were lying when they said the bombardment had occurred without provocation. To settle the question, the Tribunal consulted the official logs of both parties. The Chilean disembarking party, in charge of destroying coastal vessels noted it suffered "heavy fire" from the crewmembers of coastal boats and that this forced the captain to "take energetic measures" and bombard the town.[615] The commander of the Peruvian garrison, in turn, logged that he had ordered "the five gendarmes under my command" and six "selfless patriots" (i.e. civilians) to defend the port from the Chilean advance.[616] In the Tribunal's view, therefore:

> "[T]he voluntary and deliberate resistance opposed by force by the military authorities of Peruvian ports against a legitimate hostile act by their enemy produced, as an inevitable consequence, that these ports lost their character as open and defenceless plazas, being thus subjected to every eventuality of the aggressions they provoked".[617]

The decision was signed by Lafayette and Aldunate, with arbitrator Carcano, of Italy, dissenting, without appending a separate opinion. The change in legal criteria was extremely noticeable and was quickly commented upon by the academic and diplomatic community.

On September 15th, Carcano visited Hugh Fraser, the new British arbitrator, to share the grim news.[618] Fraser shared his own concerns and requested instructions from London on that very day. Fraser worried that the standards set out by Lafayette would mean that no claimant would be able to win a case and therefore that the arbitral proceedings would no longer be worth pursuing for the British Government. "It seems that Senhor Lafayette", he said on September 19th, "had laid out three general principles in discussing claims for judgment a few days since".[619] The rules were: 1) "[e]very bombardment is permissible if the

[614] Tribunal arbitral italo-chileno (n 538) 78–79.
[615] ibid 81.
[616] ibid 82.
[617] ibid 84.
[618] Letter of September 15, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[619] Letter of September 19, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.

enemy has fired a single shot"; 2) "[a] government is not responsible for damage done by soldiers or individuals of its army separately and without superior orders"; and 3) "[e]vidence offered without cross-citation (or cross-examination) is null". Under these rules, Fraser noted, most cases would be dismissed. "The agents cannot put their evidence though cumbrous processes of counter-citation, or keep an army of witnesses from Peru ready for production in whatever court might be designated for the purpose".[620] He added that his French and Italian colleagues were of the opinion that "this rejection of all claims arising either out of intentional bombardment or chance pillage is contrary to the spirit and intention of the Treaty".[621]

Diplomatic correspondence, however, took most issue with evidentiary affairs rather than with the application of military necessity. As Fraser put it, Lafayette's decision "cuts all the ground from under the claimants. They have to face the broad principles of belligerent right, which are adverse to them, without the faculty of proving those circumstances which should make exception in their favour".[622] In the European mindset, it was reasonable to expect the law of war not to favour civilians – the real outrage was not letting these civilians contextualise their claim that there had not been, in effect, necessity of war.

The merits and scope of military necessity was discussed in the press and academic outlets. An anonymous pamphlet published in Buenos Aires under the pseudonym Ausonius Decimus Magnus, for instance, concluded that "there is no way to baptise the bombardment of Pisagua in the name of positive law".[623] The pamphlet was responding to an editorial by Argentinean newspaper "La Nación", that had considered the bombing legal, by comparison to that of Valparaíso in 1866, and criticising Lopes Netto's views as partial. According to Decimus, the new theories brought about by Lafayette were unacceptable, and summarised Chile's position with one simple statement: "Dear claimants: it is true that Chile's troops have committed the frauds and damages you charge me with, but a brand

[620] Letter of September 19, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[621] Letter of September 19, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[622] Letter of October 14, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[623] Ausonius (n 573) 15. Original: "de ninguna manera podrá bautizarse con el nombre de derecho positivo el bombardeo de Pisagua".

new set of laws absolves us, so, you can go to complain someplace else".[624] For Decimus, everything done by Lafayette and Aldunate is "infuriating [írrito] and null".[625]

The Italian and French arbitrators soon received instructions to not return to their commissions until an additional protocol to "reinforce or explain" the evidentiary standards was signed. Fraser, while more hesitant, ultimately joined them. The Chilean government's response was delivered "rather roughly", according to Fraser.[626] Chile's Minister of Foreign Affairs replied with a scathing letter. Chile complained that the Mixed Commissions were not "a diplomatic tribunal where the governments that establish it can give their representatives specific instructions in view of their personal or political views, but a judicial tribunal with its own statute, clearly and precisely defined prerogatives, well-known applicable laws and an independent reasoning".[627] Chile also complained about a supposed double standard. After all, the Minister said, Chile had not pursued a reform of the law when it was losing cases under Lopes Netto. So, now, under Lafayette, the European powers would simply have to accept the new rules in force.[628]

Amidst all of this chaos, nobody seemed to bother to tell the Imperial Ministry of Foreign Relations in Rio de Janeiro, which learned about the suspension through press reports.[629] In the words of the Foreign Ministry, "the absence of these gentlemen was motivated by the principles that their colleagues [meaning, Aldunate and Lafayette] had adopted in majority in some decisions".[630]

In an explanatory letter, towards the end of September, 1885, the French Charge d'Affaires in Rio told the Imperial Minister that France saw no point in going forward with the arbitration under the terms set by Lafayette. "If we exclude from this category of facts the damages caused by a bombardment and the acts of pillage and arson caused by soldiers acting out of orders, we cannot understand

[624] ibid 26. Original: "Señores reclamantes: es cierto que las tropas de Chile han cometido los fraudes y los daños de que me hacéis cargo, pero una legislación flamante me absuelve, así, que podéis iros con la música a otra parte".
[625] ibid 27.
[626] Letter of October 24, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[627] Letter of October 12, 1885, from Minister Zañartu to Hugh Fraser, TNA FO 16/237. (unofficial translation)
[628] Letter of October 12, 1885, from Minister Zañartu to Hugh Fraser, TNA FO 16/237. (unofficial translation)
[629] Barão de Cotegipe and Ministério das Relações Exteriores do Brasil (n 591) 32.
[630] ibid.

which are the acts of war against which claims could be raised".[631] The Italian government, for its part, also complained about the change in standards, particularly with regards to evidence. The note argued that Lafayette's doctrines "applied all the rigours of an ordinary process to admission of evidence" making it impossible to demonstrate that Italian subjects had suffered damages.[632]

After the Chilean refusal to negotiate a new evidentiary agreement, French agents approached the Imperial government privately asking them to nudge Lafayette to change his views.[633] Fraser himself seems to have become convinced that Lafayette was placed "simply at the pleasure of the Chilean government".[634] European anger was at its highest. The Brazilians, however, did not budge. Instead, the Imperial Ministry asked Lafayette for his views on what had happened to the tribunals. Lafayette responded through an extensive memorandum discussing the specific powers of an arbitral tribunal under international law.[635]

In this memorandum, Lafayette distinguished the Mixed Commissions from tribunals *ex aequo et bono*, that decide matters in equity, instead of in law. The Conventions themselves state, he said, that the tribunals would decide according to international law principles.[636] Lafayette noted that "only through a confusion of mental faculties could one affirm that it is licit for a tribunal to accept as true facts that have not been made certain by sufficient proof".[637] He then set out two possible evidentiary standards – one where the law defines what counts as evidence and assigns value to each kind ("one testimony is not evidence") and one where the judges are allowed to appreciate each piece of evidence by themselves, based on a sincere conviction.[638] Lafayette agrees that this latter

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[631] ibid 33–34. Original: "si l'on retranche de cette catégorie de faits les dommages occasionnés par un bombardement et les actes de pillage et d'incendie commis par des soldats en dehors des ordres de leurs chefs, on ne voit pas trop quels sont les actes de guerre contre lesquels des reclaations pourraient s'elever".
[632] ibid 35.
[633] ibid.
[634] Letter of October 26, 1885, from Hugh Fraser to Lord Salisbury, TNA FO 16/237.
[635] Barão de Cotegipe and Ministério das Relações Exteriores do Brasil (n 591) 38.
[636] ibid 39.
[637] ibid 43. Original: "Só por um desconcerto das faculdades mentais é que se poderia afirmar que é licito a um tribunal aceitar como verdaderiros factos, que perante elle não se fazem certos por prova sufficiente".
[638] ibid 43–44.

system is the one being applied for the mixed commissions, but, at the same time, he states:

> "One such system therefore does not create, could not create, the absolute free will of the judge, so that it would be licit for them, on their will alone, to accept or deny a fact as proven, being thus granted an extraordinary and incomprehensible power, that according to the canonists, pertains to the Roman Pontiff – of assuming that something is proven that has not been proven by human means".[639]

Lafayette thus assigns little value to testimonial evidence. "Indeed", he says, "if the witness does not know how to understand the fact on which they are called to testify, or is pressured by interests or fear, his testimony loses all right to be believed".[640] This is the case, he notes, with testimony certified before consular authorities, that have an interest in the case's resolution.

After this, Lafayette moves on to the merits, arguing that a principle of compensation is a new development in international law, based on the following maxim: "The belligerent is not responsible for the damages caused to private property by military operations that are necessary for the object of the war or that are in accordance with the practices and modern usages".[641] As evidence, he cites to Bluntschli's Code (arts 662 and 663) and Lieber's Code (art. 14).

Lafayette distinguishes theory from practice. In theory, he says, the principle is "of an admirable simplicity".[642] In practice, though, "serious difficulties arise".[643] Lafayette asks specifically: "what constitutes the necessary character of a military operation?"[644] He finds the answer in Lieber's Article 14, on the definition of military necessity, but, unlike other fellow Portuguese-speaking publicists, he used the original English text, not the alternative and more commonly-used French.[645] It is reasonable to speculate that Lafayette – whose father was an ardent enthusiast of the US revolution (hence the naming of his two children,

[639] ibid 44.
[640] ibid 45.
[641] ibid 47.
[642] ibid 48.
[643] ibid.
[644] ibid. Original: "o que é que constitue o caracter de necessidade de uma operação militar?"
[645] There is no evidence to indicate that there was a Portuguese translation of Bluntschli or Lieber available in 1885. Contemporary and well-known sources like Joaquim Nabuco's "O Abolicionismo", cite to the French translation of Bluntschli of M.C. Lardy. See: Joaquim Nabuco, *O abolicionismo* (Abraham Kingdon 1883) 112.

Lafayette and Washington Rodrigues Pereira)[646] – spoke English well. One can only wonder whether this skill influenced his approach to the laws of war, but, whatever the case, Lafayette thought that Lieber's definition "while lucid, does not supress the obstacle with regards to concrete cases".[647] For Lafayette, acts such as "the arson of homes, the devastation of cultural objects, the destruction of bridges and infrastructure practiced in mere revenge and evidently disconnected from the hostilities", are indeed unnecessary (and therefore illegal), but also uncommon.[648] Lafayette insists in the extreme difficulty of determining the necessity of acts committed in the heat of battle. In his words:

> "It often occurs that a general-in-chief takes certain measures that require the destruction of private property to guard against a danger that is anticipated as imminent and certain. Later, the danger disappears, because the enemy took a different direction. These measures were, absolutely, as demonstrated by the facts, unnecessary, but, as planned, and in accordance with his calculations, they were necessary. (…) These are evidently questions that require rigorous investigation and whose concrete solution presupposes knowledge of the military arts, strategy and tactics. In the course of a battle, a partial operation, that results in damage to private persons, can be a mistake by the general, born out of an impression and the distress [sobresalto] of the moment. It is, technically, an unnecessary operation, but who would consider it as such to grant a right to compensation?".[649]

Lafayette, therefore, represents a much more Moltkean view of war than his predecessor. In Lafayette's approach, basically any act of war not done specifically in revenge was legal. This, of course, made most of Chile's bombardment campaign necessary. This kind of rationalisation is, in essence, the main problem with nineteenth century laws of war – too many rules having too many exceptions based on the necessities of war.

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[646] Rodrigues Pereira (n 600) VI.
[647] Barão de Cotegipe and Ministério das Relações Exteriores do Brasil (n 591) 48.
[648] ibid. Original: "o incendio de habitações, as devastações de culturas, a destruição de pontes e obras praticados por mera vingança, e evidentemente desligados de um plano de hostilidades".
[649] ibid 49. A peculiar note is worth adding here, in that Lafayette sustains his views with a citation to Peruvian author José María de Pando ("el derecho a este o aquel acto de hostilidad depende de las circunstancias y un mismo acto puede ser lícito o no serlo a tenor de la variedad inmensa de los casos"). See: José María de Pando, *Elementos del derecho internacional: Obra póstuma* (Imprenta del Mercurio 1848) 207. That Lafayette had access to this book is in itself remarkable, as it was not a very widely-circulated book at the time. It was published posthumously by de Pando's wife, who found the manuscript among his husband's possessions, as a small tribute to him. She did not know, however, that de Pando's work was a plagiarised version of the much more popular book by Andrés Bello, Principios de Derecho Internacional. The same quotation can be found in Bello's book, in page 143. See: Andrés Bello, *Principios de derecho internacional* (Moreno y ca 1844) 143.

Lafayette's views, while harsh, and perhaps even at the extreme of the ideological threshold, were not outside the bounds of the mainstream legal consensus of the time. As mentioned above, city bombardment was one of the few things that the delegates of the Brussels Conference agreed on.

Eventually, Lafayette would also request to be relieved of his position and would be replaced by yet another Brazilian arbitrator, and the tribunals would continue operating until 1888. Their ultimate fate, however, is immaterial. What matters most is the picture that these sections are able to paint regarding the outlook on the laws of war in the 19th century both in and beyond Latin America.

4. Latin America's Lesson

Latin America has often remained outside of the conventional history of the 19th century laws of war. No Latin American nation was invited to either the 1864 Geneva Conference or the 1874 Brussels Conference, and only Mexico participated in the 1899 Conference in The Hague, taking "no active part in the discussions".[650] In fact, as seen above, South American delegations were left stranded in Paris, completely and purposefully left out of the Brussels meeting, which was reserved for Europeans only.

In order to compensate for this absence, the traditional Latin American account imbues Latin American regional practice with the same humanitarian spirit as that of the conventional story of humanisation. José María Yepes, for instance, boasted in 1930 that "the states of Latin America have had, since their origin, the most humane and most generous conception" of the laws of war.[651] More recently, Ruda concluded that "[a]n analysis of Latin-American legal doctrine in the nineteenth century reveals great interest in the development of humanitarian law on the part of writers imbued with the doctrine of natural law, who sought to influence the leaders of the times by disseminating still recent humanitarian rules".[652]

This supposed Latin American mirroring of perceived European attitudes produces significant historiographical problems: first, it makes Latin American historiography engage in the same kind of self-congratulating narrative as the

[650] José María Ruda, 'The Latin American Concept of Humanitarian Law' (Henri Dunant Institute, UNESCO, Martinus Nijhoff 1988) 45.
[651] Yepes (n 443) 740.
[652] Ruda (n 650) 44.

conventional European historiographical tale. In this recollection, Latin American laws of war were meant to humanise war and had very little to do with sovereign and neo-colonial aggrandisement. As I have shown above, this was not the case, both in inter-state and intra-state war. Thus, Chile deployed sharp war principles against Peru and Bolivia, while almost every state in the region deployed disproportionate military violence against their own indigenous populations at one point or another.

Second, this mirroring approach is forced to address the history of the laws of war in Latin America as a history of absence and contribution. In other words, its analysis starts from the admission that Latin America was not an active participant in the great European conferences that defined the history of the laws of war and therefore tries to compensate for this exclusion by referring to other ways in which Latin America could have contributed to this otherwise European process.[653]

Rodiles, for instance, gives great value to the Protocol on Adherence signed by Latin America during the Second Pan-American Conference of 1901.[654] Through this Protocol, "[t]he American Republics (…) which have not subscribed to the three Conventions signed at The Hague on 29th of July 1899, hereby recognize as part of Public International American Law the principles set forth therein".[655] For Rodiles, this protocol is significant because it "portrays the image of a region that was willing and able to participate in the development of ius in bello even if it was not invited to take part in its original making"[656] and because through it they "were showing that they 'did not perceive international law as foreign and distant

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[653] Rodiles, for instance, tells the story of how Latin America was excluded from Brussels and Geneva, despite invitations being extended "to all civilized powers" and concludes that "[t]his [meaning exclusion] was to become the history of Latin American participation in 'universal' international humanitarian law-making from the early days of independence until the end of the nineteenth century, all the willingness expressed to honour the laws and customs of war according to the 'cultured nations' notwithstanding". See: Alejandro Rodiles, 'International Humanitarian Law-Making in Latin America: Between the International Community, Humanity, and Extreme Violence' in Heike Krieger (ed), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 285. Ruda, for his part, states that "[i]t took the Latin American States several decades following their independence to find their place in the organized international community; this was largely because of the long war of emancipation waged by the Spanish colonies – which lasted over a decade in South America – and because most of the colonies were caught up in endless civil wars. In fact, not until the early twentieth century were these countries invited to take part in conferences and meetings to approve legal standards and policies of a universal scope". See: Ruda (n 650) 45.

[654] Rodiles (n 653) 285–286.

[655] ibid 286.

[656] ibid.

model imposed by Europe', but as their own, or, better framed: as a universal body of law to which they felt connected – i.e., entitled to benefit from its virtues and to participate in its creation".[657] In this fashion, Rodiles frames the subsequent Latin American practice as an expression of the "inherent legitimacy that is ascribed to international humanitarian law as part of the broader project of the law of the international community to which Latin Americans, at that time, were eager to fully take part in".[658] Thus, Latin American processes were "complementary to the advancement of universal international law".[659]

The problem is that approaching Latin American practice from the perspective of European universalism forces Latin America to a "peripheral" or "supporting character" role. Latin America's relevance for the laws of war (and, beyond the 19th century, international humanitarian law in general) hinges on whether Latin American ideas were able to "influence", "contribute to", or "support" a European legal project. And yet, as I have shown above, describing the state of the laws of war in Europe as a single "project" is disingenuous. Rather, Europe boasted a varied array of different approaches to the laws of war, which was not at all a monolith one could "contribute to". Similarly, Latin American practice itself was not monolithic. It was a complex, contested, and legally indeterminate process whereby the dominant *Criollo* elites sought to simultaneously import European ideas as a means to signal a sufficient level of "civilisation" to the international community and address very particular and Latin American problems through Latin American sensibilities and mindsets.

Thus, Lieber and Bluntschli were widely consumed, but they were often read (or perhaps even misread?) through a Latin American lens. Díaz Covarrubias thought military necessity depended on the "proposed object" of a concrete military operation. Felipe Lopes Netto mostly agreed – Admiral Williams did not need to destroy Pisagua to achieve his objectives. Felipe Paz Soldán and Onésimo Leguizamón thought that promoting sharp, "killing wars" was cruel and uncivilised. And yet at the same time, Luis Aldunate and Lafayette Rodrigues Pereyra, alongside a great deal of Chile's high command, fully agreed with

[657] ibid.
[658] ibid 287.
[659] ibid. See footnote 51.

Lieber and even sometimes Möltke, that all acts that are necessary to subdue the enemy are legal in war.

Instead of deciding whether Lopes Netto's or Lafayette's ideas managed to influence European debates or not as a measure for their success, their richness, their contribution to a truly global history of the laws of war and international humanitarian law lies in the contested discourse in which they existed. Particularly significant is the fact that, when seen from the perspective of South America, Europe's "sharp war", as embraced by Chile in the War of the Pacific, was seen as inhumane and uncivilised, leading to a new "*imaginaire*" of the laws of war.

In sum, Latin American ideas are a part of what we call "the history of the laws of war" regardless of whether Europeans liked them or even read them. Seen as a linguistic context, international law in the 19th century was not a European project. It was all the places where ideas about international law were read, discussed, discoursed, embraced and rejected in the 19th century. And, as I have shown, many Latin American ideas about international law, expressed in the language of the laws of war, predated Europe's. The incorporation of European ideas into their discourse is only part of the history of the laws of war in Latin America. Moreover, unlike what happened in Europe, where these laws were embraced to the point of total war, Latin America's debate generated a powerful discussion on the legitimacy of total war – a debate I will return to in later chapters and that had a lasting impact in international law even to our days.

Understanding the history of the laws of war, thus, requires an understanding of this Latin American discourse, not as a "contribution" to a conventional European history of great conferences, but as a part of a global whole by its own merits. No matter how different or influential, the Latin American laws of war were as much a part of the 19th century international legal context as the European texts they intertwined with.

Chapter Five
Japan and the Just Law of All Nations

1. Meanwhile, in East Asia…

This Chapter explores the laws of war from the perspective of 19th century Japanese legal and political discourse. It shows how Japanese actors were aware of the standard of civilisation doctrine and that there was a constant risk that European military powers might deploy a sharp war against a "semi-civilised" state like Japan. In response, Japan sought to "civilise" and climb the ladder of civilisation through a demonstration of its proficiency in the laws of war. Thus, while the previous chapter dealt with the laws of war from the perspective of indeterminacy through rejection, this chapter addresses indeterminacy through embrace: how were the laws of war perceived by a state that wanted to fully embrace them?

Unlike Latin America, however, which had gone through a process of European colonisation and purported to claim "civilised" status through the interventions of its white European-descendant *Criollo* elites, early modern East Asia had existed in a context entirely of its own. This other community of nations, different from that of Europe, revolved around the status of and relations with the main regional superpower, China. Because of its geopolitically dominant position, early modern Chinese foreign policy was centred around the concept of tribute – "[t]he dogma asserts that national security could only be found in isolation and stipulates that whoever wished to enter into relations with China must do so as China's vassal, acknowledging the supremacy of the Chinese emperor and obeying his commands, thus ruling out all possibility of international intercourse on terms of equality".[660]

This system required certain assumptions. Chinese elites and the ruling class firmly believed in Chinese cultural superiority to the "barbarians", understood not as a geographical or military concept but in terms of "not adhering to the Chinese way of life".[661] To "participate in the benefits of (Chinese) civilization", these "barbarians" had to recognise the supreme position of the Chinese Emperor.[662]

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[660] JK Fairbank and SY Têng, 'On The Ch'ing Tributary System' (1941) 6 Harvard Journal of Asiatic Studies 135, 140.
[661] ibid 137.
[662] ibid.

To do this, non-Chinese political communities had to offer tribute – a symbol of their submission to the Emperor. In this Sinocentric tributary system of international politics, “barbarous non-Chinese regions were given their place in the all-embracing political, and therefore ethical, scheme of things”.[663]

The political communities of medieval Japan had traditionally been among China’s tributary states. Medieval Japan had been divided among several hundred *daimyos*, or feudal lords. In early modern times, one of these daimyos, Toyotomi Hideyoshi embarked on a full scale war to unify all the *daimyos* under his rule. Once he achieved this, he appointed himself *Daijō-daijin* (“Chancellor of the Realm”). Under his rule, Japan sought to subvert China’s tributary system and stake a claim of supremacy against the so-called Sinocentric world order.[664] In 1592, Totoyomi launched a full-scale invasion of Korea, another tributary state, which brought him in direct conflict with the Ming Chinese Empire. Toyotomi’s demands were simple: In addition to a renewal of trade and recognition of Japan’s possessions in southern Korea, China should also recognise his equal status with their Emperor.[665] Particularly, he rejected attempts to be recognised as “King of the Ming” (*Mingguo guowang*).[666] The term was linguistically ambiguous and could also be translated as “a king/prince of the Ming Empire”, where the Ming Emperor would hold precedence over him, while allowing him to save face back home.[667] Toyotomi, instead, “was less interested in playing a role within the Ming tributary system than in claiming recognition as the apex of a new system”.[668] In the end, however, Japanese victory proved impossible, and peace terms were agreed with Toyotomi begrudgingly remaining solely “King of Japan”.[669]

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[663] ibid.
[664] Matsui refers to an East Asian World Order, in opposition to a European World Order, while Arano describes a Sinocentric order, in opposition to a Japanocentric order. See, generally: Yoshiro Matsui, ‘Modern Japan, War and International Law’ in Nisuke Ando (ed), *Japan and International Law: Past, Present and Future* (Kluwer Law International 1999) and Arano Yasunori, ‘The Formation of a Japanocentric World Order’ (2005) 2 International Journal of Asian Studies 185.
[665] Kenneth M Swope, ‘Deceit, Disguise, and Dependence: China, Japan, and the Future of the Tributary System, 1592-1596’ (2002) 24 The International History Review 757, 766.
[666] ibid.
[667] ibid.
[668] ibid 767.
[669] ibid 778.

As a result of Toyotomi's invasion, the following two centuries, from 1609 to 1874, were characterised by a peculiar rehashing of the Sinocentric tributary system, whereby Japan, now under the rule of the Tokugawa Shogunate or *Bakufu*, could trade and engage with China and Korea, while evading the issue of Ming, and later Qing, Chinese hegemony through a complicated trade triangulation involving the Kingdom of Ryukyu (modern-day Okinawa). Ryukyu, which was under vassalage of both China and Japan, traded with China under tributary terms so it could then send these goods to Japan without Japan having to pay tribute to China.[670] This kind of complex ritual and diplomatic procedures were common. For example, Korean diplomats were expected to address the Japanese Shogun by the title of *Taikun,* or great lord, so that they could avoid using the title of "king", which, as seen above, was problematic for the Japanese worldview.[671] In essence, Japan was acting as an independent actor from China and slowly forging its own "Japanocentric" world order.[672] In fact, much of the history of international law in East Asia can be told through the story of *datsu-A nyu-Ou* – the process of how Japan sought to "leave Asia and enter Europe".[673]

It is into this contentious international scenario that Europeans arrived, in the mid-1500s. In the eyes of the Ming, however, they were nothing more than just another band of barbarians to be incorporated into the tributary system. The "Portuguese barbarians", therefore "already tributary in form, were made innocuous in fact by a sort of quarantine", known as the "Canton System".[674] Based in the city of Macao, they were walled off from mainland China and required to pay land rent to local Chinese authorities, travelling to the city of Canton only periodically to trade.[675] A similar system, known as *Sakoku*, or isolationism, existed in Tokugawa Japan, where, by 1616, all "strangers", except for Chinese foreigners, "were to be allowed to trade only in Nagasaki and Hirado".[676]

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[670] For a description of this system see: Matsui (n 664) 11.
[671] Mark Ravina, 'Japan in the Chinese Tribute System' in Tonio Andrade and Xing Hang (eds), *Sea Rovers, Silver, and Samurai* (University of Hawai'i Press 2016) 353. This is, in fact, where the English word "tycoon" comes from.
[672] Yasunori (n 664) 211.
[673] Matsui (n 664) 11.
[674] Fairbank and Têng (n 660) 178.
[675] ibid.
[676] Yasunori (n 664) 201.

Despite China's best efforts, the Canton System was incapable of controlling European influence in the region. By the early 19th century, European trade had become a veritable public health problem. The British East India Company ran an exceedingly profitable opium market from India to China, which led Qing dynasty officials to ban non-medical sale of opium in 1796 and eventually criminalise its cultivation, consumption, and distribution in 1796.[677] By 1838, China instituted an openly anti-opium policy, declaring it a "flowing poison" that had to be "fully eradicated".[678] In 1839, when Chinese officials required all foreign traders to surrender their opium and sign a pledge to quit opium smuggling, some British traders refused, leading to an increase in tensions between Beijing and London.[679] By September 1839, the First Opium War had begun.

The war had geopolitical undertones. It was clear, Chen says, that what the British had in mind "was not merely compensation for the destroyed opium but also a complete rearrangement of the Sino-British or even Sino-Western relationship on a system of international treaties".[680] Indeed, the British victory over China led to the signing of the 1842 Treaty of Nanking. Through this treaty, the tributary system whereby European traders could only conduct trade through the port of Canton was abolished and four additional ports were forcefully opened. Additionally, the UK gained the right to establish consular jurisdiction in the Chinese mainland, thus removing personal jurisdiction from Chinese courts over British subjects. Tellingly, legalisation of opium was never a British pre-condition for peace.[681]

Only a few years later, in 1853, a US fleet under the command of Commodore Matthew C. Perry arrived in Edo, the Japanese capital, with the express intention of ending *Sakoku*. His main demand: "to be treated on a footing of equality, thus destroying the presumed claim hitherto held forth by China and Japan, that all presents to the respective emperors have been tendered as tribute to superior powers".[682] Like China before it, Japan would be forced to open up its ports and

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[677] Li Chen, 'Law and Empire in the Making of the First Opium War', *Chinese Law in Imperial Eyes* (Columbia University Press 2016) 203.
[678] ibid 204.
[679] ibid 206.
[680] ibid 233.
[681] ibid 240.
[682] Hisashi Owada, 'Japan and the International Community' in Nisuke Ando (ed), *Japan and International Law: Past, Present and Future* (Kluwer Law International 1999) 350.

sign a treaty of Amity and Commerce in 1858. The rapid and violent Western incursion into the Sinocentric and Japanocentric orders of East Asia would fundamentally change the region's relationship with international law and, more specifically, with the laws of war.

2. China and International Law

While the nations of Europe gathered in Geneva to discuss the Geneva Convention of 1864, a 37-year-old American missionary by name of William Alexander Parsons Martins was hard at work in his Beijing home, translating Henry Wheaton's famous treaty *Elements of International Law*, into Chinese. Martin served as interpreter for the US minister in Beijing and was the official translator during the negotiations of the Treaty of Tientsin, an expanded version of Nanking. His task as Wheaton's translator was funded by both the Chinese and US governments and represented "China's first formal acceptance of Western international law".[683]

Much as had happened in Latin America and with Díaz Covarrubias' translation of Bluntschli in 1871, 1860s East Asia had learned that they too needed to stake their claim to civilisation in the eyes of the Europeans who now flooded their ports. The East Asian situation within the European worldview, however, was very particular. China and Japan were completely foreign lands, never having been colonised, and in effect, deeply convinced of their respective superiority, in competing Sinocentric and Japanocentric world orders.

In the case of China, while its own civilisation discourse "gradually collapsed in face of the ruthless struggle among modern sovereign states", the old Sinocentric world order "still haunted Chinese intellectuals, making the new and revised civilization hierarchy unacceptable to them".[684] This presented a particular challenge for Chinese authorities, who needed to simultaneously balance their domestic audiences in the elite with their foreign policy needs. To this end, translating Wheaton's work into Chinese seemed like the logical step. He was one of the US's top international scholars and a widely read source of international legal doctrine. Importantly, in the aftermath of the Opium War, Wheaton had revised his treatise to add that China "had recently been

[683] Junnan Lai, 'Sovereignty and "Civilization": International Law and East Asia in the Nineteenth Century' (2014) 40 Modern China 282, 291.
[684] ibid 292.

compelled to 'abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace'".[685]

Martin, however, was well aware of the potential for Chinese resistance. In order to make the text more palatable for its local readers, he "changed the positivist original texts of nineteenth-century international lawyers to a natural-law style".[686] In this way, "[t]he term *wanguo gongfa*, 'the just law of all nations', was used to translate 'international law', giving the impression that international law, as a legal system regulating the relations among all states in international society, was as unshakable as the natural order".[687] In fact, Martin applied Neo-Confucian concepts "such as *li* (principle), *xing* (nature) and *qing* (emotion), which were all compatible with Western ideas of natural law, to the description of international law", in an effort to "beautify" it.[688]

In consequence, Chinese intellectuals were under the impression that international law was redundant with the Chinese way of life and were thus reluctant to embrace it if it meant abandoning their own Sinocentric civilisational hierarchy. As a result, "the Western concept of civilization dissolved in the late Qing natural law discourse of international law, or was even lost in a state of ignorance", with dramatic consequences.[689]

3. The West's Best Student

Unlike China, whose Sinocentric world order made it reluctant to embrace Western international law, Japan's encounter with the US' Commodore Perry had the opposite effect. As Judge Owada notes, during the negotiations of the Treaty of Amity and Commerce with the United States in 1857, the US representative, Consul-General Harris, "invoked 'the law of nations' again and again" during his interventions.[690] The *Bakufu* officials negotiating with him were extremely surprised – they had never before encountered such an expression and yet, "it seemed as if the whole concept of the 'law of nations' were an essential prerequisite for a satisfactory conduct of intercourse with these

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[685] Chen (n 677) 241.
[686] Lai (n 683) 291.
[687] ibid.
[688] ibid.
[689] ibid 292.
[690] Owada (n 682) 350.

barbarian Westerners".[691] Instead of rejection, the concept garnered fascination. Japan wanted to learn how to play the game of the law of nations, and learn it fast, proving to be an arduous "student" of the West.

It would not take long for Japanese bureaucrats and scholars to become aware of Martin's translation of Wheaton. In fact, "[t]he work was received with so much favor in Japan that it was said that 'copies could not be sent on in time to supply the [Japanese] demands'".[692] A mere four years after publication, and after several Japanese reprintings of the Chinese original, Martin's book was translated into Japanese in 1868, the same year that the Tokugawa *Bakufu* formally ended, restoring Imperial rule in Japan.[693]

Of course, Martin's work was as risky to its new Japanese readers as it had been to Chinese ones. Japanese scholars quickly began to notice important similarities between "the law of nations" and the neo-Confucian traditions in which they had been trained. This meant that Meiji Japan's initial approach to international law was one of naïve embrace. On February 8, 1868, the Emperor issued a proclamation declaring that Japanese foreign policy would be "conducted henceforth in conformity with the public law of the universe (*udai no koho*)'".[694] Similarly, the Five Articles of Oath, Meiji's main political manifesto, established that "[t]he evil customs of the past shall be broken off and everything henceforth shall be based upon the 'public way of the universe' (*tenchi no kodo*)'".[695]

Meiji Japan was under the firm belief that if it played by the rules, it would soon be seen as a "civilised people" and gain acceptance in the "Family of Nations".[696] The main foreign policy goal of Meiji Japan would therefore be the revision of unequal treaties it had been forced to sign with the US and European powers after Perry's arrival. In order to accomplish this goal, Japan would pursue both domestic and international policies. On the domestic front, the government "aimed to establish a 'civilized nation' as required by international law" through a policy known as *Shokusan-kogyo, fukoku-kyohei*: "Foster industry and promote

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[691] ibid.
[692] ibid. See footnote 3.
[693] ibid. See footnote 3.
[694] ibid 351.
[695] ibid.
[696] Matsui (n 664) 9.

enterprise, enrich the country and strengthen the military".[697] Thus, in 1869, the Meiji government began the process of abolishing the Feudal *han* system where specific *daimyo*, similar to European feudal lords, managed a fiefdom on behalf of the Shogun. In its stead, a centralised government was established, where local *daimyo* were reappointed as non-hereditary prefects.

On the foreign policy front, in 1871, Japan sent Iwakura Totomi, a well-established nobleman, on a tour of the West with the main purpose of explaining to the Treaty Powers the views and wishes of the Meiji Government with regards to the renegotiation of unequal treaties. This mission would have a profound effect on Japan's attitudes towards international law going forward. Indeed, all Western powers were very dismissive of the idea of renegotiation. Japan had done everything that the public law of the universe had instructed it to do, and yet, access to civilisation was still denied. As Koskenniemi aptly puts it, "[h]owever much Japan insisted that by any reasonable measure it was at least as civilized as any European State, the way it was treated was a function of what European diplomacy saw useful".[698] This was a lesson Lord Iwakura learned in person, at the hands of the famous German Chancellor Otto von Bismarck, who received the mission himself as it visited Prussia. Bismarck, as transcribed by Judge Owada, said:

> "In today's world, it is said that every country interacts with other States on the basis of friendship, harmony, and courtesy (*reigi*). However, this is merely a superficial lip service, behind which lies actual practice, that is, insults to which the strong subject the weak, and scorn in which the big hold the small. When I was a child, my Prussia was poor and weak. [I perceived that] the so-called law of all nations argued for the profit of great powers. If the law of nations contained in it an advantage for them, the powerful would apply the law of nations to the letter, but when it lacked attraction, the law of nations was jettisoned and military might employed, regardless of the tactics".[699]

The experiences of Lord Iwakura opened the eyes of Japanese officials. No more would Japan abide by this "public law of the universe" with naivety and open arms. If "might makes right" were the rules of the game, then Japan would be mighty and impose its own rights, particularly in East Asia. In effect, Japan

[697] ibid 10.
[698] Koskenniemi, *The Gentle Civilizer of Nations* (n 2) 134.
[699] Owada (n 682) 354.

had to play it smart: “scrupulous observance of international law and a submissive attitude towards Western treaty Powers on the one hand, and a high-handed attitude and coercive measures toward neighbouring Asian States on the other.”[700]

This subservience was strategic. Japanese scholars were very aware of the fact that, as things were at the time of the Iwakura Mission, there was little Japan could do to challenge European supremacy in the region. In fact, in 1875, Fukuzawa Yukichi, a former Samurai in the last decades of the *Bakufu*, and a massively influential figure of Meiji Japan, published his famous *Bunmeiron no gairyaku* (An Outline of a Theory of Civilisation) to make exactly this point.[701] In *Bunmeiron,* Fukuzawa’s opening words express the transition from Tokugawa Shogunate to Meiji Constitutional Monarchy in terms of sacrifice and survival. “An old proverb says that ‘the belly must be saved at the cost of the back’”, he says.[702] “Abolishing the *han”*, Fukuzawa continues, “is the same as putting a greater premium on the stomach than on the back, and taking away the stipends of the daimyo and the samurai is like killing the loach to feed the crane”.[703] For Fukuzawa, the global game of civilisation was just that: a determination of what to sacrifice in order to survive.

For Fukuzawa, the rules of the game were clear. If Japan wanted to remain an independent state, it needed to scale up in the ladder of civilisation. “National independence is the goal”, he says, “and Japan’s present civilization is the means of attaining that goal”.[704] In this frantic race for survival, too much disquisition about how to civilise was immaterial. This was life or death. “The first order of the day”, he insists, “is to have the country of Japan and the people of Japan exist, and then and only then speak about civilization! There is no use talking about Japanese civilization if there is no country and no people”.[705]

Fukuzawa understood the world he lived in as a world “of commerce and warfare”.[706] As he summarises it: “when it comes to relations between one

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700 Matsui (n 664) 10.
701 Yukichi Fukuzawa, *An Outline of a Theory of Civilization* (David A Dilworth and G Cameron Hurst III trs, Keio University Press 2008).
702 ibid 7.
703 ibid.
704 ibid 256.
705 ibid 254.
706 ibid 234.

country and another only two things count: in time of peace, exchange goods and compete with one another for profit; in times of war, take up arms and kill each other".[707] In such a cut-throat world, Japan needed to be able to protect itself or suffer the fate of other, weaker, communities that had had the misfortune of running into a stronger West. "Is it not true", he asks, "that the Indians who owned the land were driven away by the white men and now the roles of master and guest are switched around? (…) What about in countries of the East and the islands of Oceania? In all places touched by the Europeans are there any which have developed their power, attained benefits and preserved their independence? What has been the outcome in Persia, India, Siam, Luzon, and Java?"[708] Fukuwaza knows the answer well: "Wherever the Europeans touch, the land withers up, as it were; the plants and the trees stop growing. Sometimes even whole populations have been wiped out. As soon as one learns such things and realizes that Japan is also a country in the East, then though we have as yet not been seriously harmed by foreign relations we might well fear the worst is to come".[709]

Fukuzawa thus frantically invokes his people to "civilise". But to "civilise" is not understood merely as external markers like the materials of buildings or the kind of food one eats, but as "a people's spiritual makeup".[710] So, Fukuzawa says, "we must not import only the outward forms of civilization, but must first make the spirit of civilization ours and only then adopt its external forms".[711] Fukuzawa's plea is one of nationhood: "in Japan there is a government but not nation".[712] Japanese people had to be empowered into attaining their full potential as a "civilised nation" or suffer the fate of those already colonised or subjugated at European hands.

In this world, the law of nations had only a limited role. As Fukuzawa himself noted a few years after the publication of *Bunmeiron,* respect of treaties and talk of peace and amity are "very beautiful words", but in the real world of international politics, "[a] hundred volumes of the just law of all nations will not be

[707] ibid.
[708] ibid 248.
[709] ibid.
[710] ibid 22.
[711] ibid 22–23.
[712] ibid 187.

equal to the power of a cannon".[713] The lesson that Japan learned after twenty-five years of dealing with the "just law of all nations" was simple: "international law was not so much a body of principles based on natural justice which the East could share in common with the West, as a bunch of technical rules to be manipulated. They might work to your advantage if you were sufficiently skillful".[714] W.A.P. Martin's image of international law was now fully, decidedly, abandoned. And in this brand-new world, "[w]ar was an indispensable tool for demonstrating national power, achieving national interests, and promoting civilization".[715] This meant that "a significant feature of the history of international law in Meiji Japan was a disproportionate focus on the law of war".[716]

Japan's broader military plan in the region required the final and complete destruction of the Sinocentric system and its replacement for another, with Japan on top.[717] Destroying the Sinocentric order meant removing China's tributary states from the picture. The first part of this plan, as Matsui explains, began with Ryukyu.[718] For centuries now the kingdom had acted as commercial waypoint between Tokugawa Japan and Ming China, allowing the former to simultaneously ignore and co-exist with the Sinocentric order. In 1874, a group of fifty shipwrecked Ryukyuans were massacred in Formosa. Seeing an opportunity for action, Japan pressured China to accept its right to intervene *in defence of Japanese subjects*. A year later, in 1875, Japan ordered Ryukyu to stop sending tributary missions to China and in 1879, it abolished the Ryukyu clan and established the Okinawa Prefecture in its stead.[719] Ryukyu was now out of the picture.

Next in line was Korea. The transition from *Bakufu* to Empire had soured relations between Korea and Japan, given Korea's refusal to engage with the central Tokyo government, instead of the traditional tributary Japanese clans in Tsushima.[720] By 1875, relations deteriorated to a point were Japan felt a forceful solution was the only way forward. Following Commodore Perry's example of

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[713] The original Japanese quotation has been translated in: Lai (n 683) 294.
[714] Owada (n 682) 356.
[715] Lai (n 683) 296.
[716] ibid 297.
[717] See, generally: Matsui (n 664).
[718] ibid 11.
[719] For an expanded discussion of the Ryukyu Disposition see: ibid 11–12.
[720] ibid 12.

decades past, Japan sent a gunboat – the *Unyo* – to Korea with the express intent of provoking an incident. Once attacked by Korean batteries, Japan "retaliated" and forced Korea to open its ports to foreign trade and accept Japanese consular jurisdiction through the Treaty of Peace and Friendship of 1876.[721] Key to this treaty was Article 1, which clearly stipulated that Korea was "an independent State" that "enjoys the same sovereign rights as does Japan" and abrogated "all rules and precedents that are apt to obstruct friendly intercourse" between them.[722] In other words, Korea could no longer be considered a tributary state of China.

With the status of Ryukyu and Korea redefined, Meiji Japan put its sights on China itself. Fukuzawa had, in fact, advocated in favour of this for years. He called the war "a struggle between civilization and barbarism", where Japan represented the former and China the latter.[723] "We must have the determination", he wrote, "to attack China and enlighten this uncultivated nation as long as is needed, until they truly repent and surrender at the door of civilization".[724]

If Japan was to be ready to assume its place among the civilised powers of the Earth, however, it would need to speak the language of war. It needed a modern army able to fight modern wars. In search of a good role model, this new Japan turned to Germany for help.[725] Japan "regarded the young, aspiring Imperial German Reich as the model of an orderly nation-state with a patriotic folk loyal to its monarch".[726] Japan thus embarked in a process of "Germanization", including a new German-inspired constitution.[727]

As part of this process, in January 1882, Army Minister Oyama Iwao was sent on a diplomatic mission to Europe in order to "engage an outstanding Prussian general staff officer for training Japan's highest military officers in leading large military operations".[728] The Japanese request was dealt with by Germany's then

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[721] ibid.
[722] ibid.
[723] Lai (n 683) 298.
[724] Ctied by: ibid.
[725] Bernd Martin and Peter Wetzler, 'The German Role in the Modernization of Japan — The Pitfall of Blind Acculturation' (1990) 33 Oriens Extremus 77.
[726] ibid 79.
[727] ibid 80–81.
[728] ibid 82.

Chief of Staff – none other than Helmut von Moltke himself, who recommended Major Klemens Wilhelm Jakob Meckel as the man for the job.[729]

Meckel, "the stereotypical Prussian officer martinet", arrived in Tokyo in March, 1885 to introduce Japanese officers to Prussia's sharp war.[730] Meckel "trained about 60 of Japan's senior officers in tactics, strategy, general staff duties, the historical dimensions of military science and Prussian military history".[731] In general, he fully recreated Japan's army to produce a well-polished Clausewitzian machine of frightening military efficiency. In a world of might makes right, Japan knew it would need a powerful army to obtain what it saw as its rightful place in the community of nations.

4. The Sino-Japanese War

In 1894, after both Japan and China sent troops to Korea to quell a peasant revolution, hostilities broke out between them. This was the moment Meiji Japan had been working towards for over two decades. This was the war in which Japan would demonstrate its "civilised status".

As Lai notes, "the language of international law existed everywhere".[732] Several Japanese-language books and manuals on the laws of war were written with expedited speed. Japan's declaration of war stated that hostilities would be carried out "consistently with the law of nations".[733] In general, "[t]he Japanese packaged nearly every aspect of the war and made the war a showcase of their knowledge of international law".[734] Critically, Japan embedded legal scholars into their land and sea forces who would record and evaluate its conduct of hostilities, specifically for the consumption of foreign audiences and written in English and French. The Imperial Navy appointed Takahashi Sakuye, Professor of the Imperial Navy Staff College and the Imperial Army, appointed Ariga Nagao, Professor of the Imperial Military Staff College.[735] These books give a

[729] Edward J Drea, 'The Army of Meiji', *Japan's Imperial Army* (University Press of Kansas 2009) 58.
[730] ibid 59.
[731] Martin and Wetzler (n 725) 82.
[732] Lai (n 683) 299.
[733] Susumu Yamauchi, 'Civilization and International Law in Japan During the Meiji Era (1868-1912)' (1996) 24 Hitotsubashi Journal of Law and Politics 10.
[734] Lai (n 683) 299.
[735] See: Sakuyé Takahashi, *Cases on International Law during the Chino-Japanese War,* (Cambridge, 1899) <http://hdl.handle.net/2027/umn.31951002498523f>. and Nagao Ariga, *La Guerre Sino-Japonaise Au Point de Vue Du Droit International* (Libraire de la Cour d'Appel et de

unique opportunity to understand the Japanese view of Europe's laws of war. Here I will focus on Ariga's book, *La Guerre Sino-Japonaise au point de vue du Droit International,* given its focus on land warfare.

Japan's war, as noted above, was welded in Prussian steel. In a Proclamation addressed to Japanese officers, the Emperor himself included the following exceedingly Clausewitzian phrase: "the objective of the army must be to achieve a complete victory through energetic fighting".[736] At the same time, Japan could not afford the kind of bad publicity Prussia had received at the end of the Franco-Prussian War. In order to meet both of these objectives simultaneously, Japan needed to be both mercilessly effective and very arrogantly merciful with its un-civilised enemy.

Thus, Ariga frames his study of the laws of war almost as a favour to European states – a lesson on how exactly to conduct a civilised war against an uncivilised opponent. He says: "From the point of view of the laws of war, the Chinese can be compared with the Turks, the Arabs, the Red Skins. This notwithstanding, in its war against such a nation, the Japanese Empire wished to follow the same rules it would have followed with regards to France, England or Germany, but without sacrificing its military interests".[737] For Ariga, there was "great scientific interest" in examining what means and methods it could actually employ in such a war.[738]

Ariga restated the "basic idea of the laws of war between civilised nations" as follows: "Any action necessary to defeat the enemy's fighting power is legitimate, while any action that is not necessary to achieve this objective is illegitimate".[739] At the same time, Ariga makes it clear that a civilised army must not direct attacks against the civilian population. He quotes the Commander-in-Chief of the Japanese Army, Marshal Ōyama Iwao, stating that the Japanese Army "moves in accordance with the principles of humanity and justice" and that "those who our army must consider its enemy are only the armed forces and not

l'Ordre des Avocats 1896) <https://gallica.bnf.fr/ark:/12148/bpt6k375426v> accessed 5 April 2021.

[736] Ariga (n 735) 39.

[737] ibid 9.

[738] ibid.

[739] ibid 34.

individuals".[740] For Ariga, therefore, the law of war is premised on two principles: necessity and humanity.[741]

Despite these efforts, Japanese hostilities received harsh criticism in Western media, accusing Ōyama's forces of violating the laws of war in their attack on Port Arthur, in late November, 1894.[742] In particular, criticism centred on Japan's alleged lack of distinction between civilians and combatants during its battle for control of the city, its killing of Chinese soldiers *hors de combat*, and subsequent pillaging by Japanese troops.[743] Ariga, devotes considerable time to try and explain Japan's actions.

Ariga starts by addressing a previous issue. Chinese soldiers, he says, had behaved barbarously against the Japanese throughout the military campaign, cutting the heads of defeated Japanese soldiers, gutting them and replacing their entrails with mud and stones.[744] "Japan cannot be demanded a greater and more onerous obligation towards China", Ariga notes, "than that which China had subjected to itself".[745] This was a reciprocity argument. Anything Japan did was not *really* a violation of the laws of war. Japan could not be held to a higher standard than China had chosen for its own behaviour and thus Japanese violations were rather only a violation of Japan's own promise to itself, arguing that it would have to answer to its "own conscience" alone.[746]

Having set out this proviso, Ariga summarises the memorandum submitted by Marshal Ōyama to the Emperor himself, explaining Japan's legal rationale.[747] As a military port city, Ōyama says, the "non-combatant population" of Port Arthur had to be equated to "all other non-combatants that form part of an expeditionary force".[748] This means, Ōyama coldly states, that "when military necessity requires it, directing attacks on the place where they are located is allowed".[749]

[740] ibid 42.
[741] ibid 71.
[742] ibid 77.
[743] ibid 86.
[744] ibid 78.
[745] ibid 86.
[746] ibid.
[747] ibid 88.
[748] ibid 90.
[749] ibid.

Ōyama makes a similar argument with regards to Japanese attacks on Chinese houses. According to Ariga, he states that “the resistance by enemy soldiers who took refuge in the inhabitants’ homes, forced the troops to direct their means of attack at the civilian population”.[750] This is especially so when, as Ariga notes, the assault was carried out at dusk, which made distinguishing civilians from soldiers wearing civilian clothes “difficult”.[751]

Whatever Ōyama’s arguments, Ariga ultimately disagrees with him. He argues that “the Japanese did not have a need to act with this much violence” and he “profoundly lamented” the Port Arthur incident “from the point of view of the laws of war”.[752] Ariga ultimately qualifies his evaluation though, noting that “one must recognise that this is more about military science than legal science” and that therefore he did not dare make “excessively categorical statements on the matter”.[753] In general terms, therefore, “[t]he excess at Port Arthur was demonstrably a momentary but excusable lapse from Japan’s stated commitment to international law”.[754]

Thus, despite the atrocities of Port Arthur, Western sources had positive things to say about Japanese conduct of hostilities. Thomas E. Holland, for instance, Professor of International Law and Diplomacy in the University of Oxford and one of the foremost voices in the study of international law at the time, argued that “[t]he great war in the extreme East” had “destroyed the reputation of one empire and made that of another”.[755]

Holland took strong issue with what he deemed China’s refusal to “assimilate the ethical ideas of the West”.[756] Thus, “she has negated to accede to the Geneva Convention for the treatment of the wounded, to which Japan long ago became a party; nor have her court and codes any pretension so to satisfy European requirements as to justify the Western powers in resigning as they are about to do in the case of Japan, the extra-territorial privileges enjoyed in the empire by

[750] ibid.
[751] ibid.
[752] ibid 92.
[753] ibid.
[754] Douglas Howland, ‘Japan’s Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894–1895)’ (2007) 9 Journal of the History of International Law / Revue d’histoire du droit international 179, 196.
[755] Thomas Holland, ‘International Law in the War Between Japan and China’ (1895) 3 The American Lawyer 387, 387.
[756] ibid.

foreigners”.[757] Japan was, therefore “admitted on probation” into the “family of nations”, while China “was only a candidate for admission”.[758]

China was blamed by Holland for engaging in denial of quarter, torture and mutilation of prisoners, and offering rewards for the assassination of Japanese generals. This was all lamentable, Holland said, particularly because “for more than thirty years past international law has been studied at Pekin [sic]”.[759] Holland highlighted the work of W.A.P. Martin in translating Wheaton, Martens, Woolsey, Bluntschli, and even the *Institut de Droit International’s* Oxford Manual. Despite this, he complained, “the Chinese have adopted only what I have already described as the rudimentary and inevitable conceptions of international law”, such as protocol and diplomatic practice, but “[t]o a respect for the laws of war they have not yet attained”.[760]

Holland’s dissatisfaction with China’s international legal practice stood in sharp contrast to his admiration of Japanese warfare. Holland praised Japan for taking “some precautions against the employment of savage auxiliaries, by prohibiting the enlistment of those two-handed swordmen the ‘Samuri’”.[761] He also praised Japan’s treatment of “peaceful inhabitants and foreigners” as well as provision of quarter, concluding that Japan “has conformed to the laws of war (…) in a manner worthy of the most civilized nations of Western Europe”.[762]

Not that he was unaware of the Port Arthur massacre, of course. In fact, he called the event “detestable” and a “lamentable outburst of savagery”.[763] But, for Holland, “[m]uch may be pardoned of what occurred”; after all, “[i]f a certain number of non-uniformed coolies [i.e. Chinese peasants], or of soldiers who had thrown off their uniforms received short shrift, when found with rifles in their hands, what was done was not without the sanction of recent European precedent”.[764] And while the subsequent massacre of civilians went “beyond what could be excused”, Holland did point out it could be “explained” by the

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[757] ibid.
[758] ibid.
[759] ibid 389.
[760] ibid 389.
[761] ibid 388.
[762] ibid.
[763] ibid.
[764] ibid.

madness occasioned by the sight of the torture and mutilation of Japanese prisoners displayed at the city gates.[765]

Instead of praise, China received stern criticism in European debates. Renowned international legal scholar, Georg Jellinek, for instance, took the view that international law did not apply with regards to China, because “it would be an entirely unproven assertion that China has accepted in every detail the Occidental international law”, given that “unlike Japan”, China “has only reluctantly, and yielding to outward pressure, broken through its ancient isolation from foreign nations and begun a limited intercourse with the civilized world”.[766]

The main problem, Jellinek said, was that China “still regards foreign nations, according to its official theory, as vassals and satellites”.[767] Thus, “[t]he comprehension of the sacredness of treaties, of the binding nature of an obligation of a State to its pledged word, does not exist in China”, he said.[768] This duplicitousness makes China unable to comply with the laws of war, Jellinek says: “[t]hose that have been used to massacre their own countrymen can hardly understand that they should spare prisoners of war. A command to that effect would not be taken seriously by them, especially as the Chinaman knows well the double-tongued policy of his superiors, which suits so well his national character, and he would interpret accordingly”.[769] Jellinek thus concludes that European states are not actually bound by international law in their relations to China, even in cases of war. In fact, he says, as regards to China, “[h]umanity should be exercised, not because China can demand it as a right, but because it keeps the nations, who feel themselves the upholders of civilization, from sullying themselves before the judgment of history”.[770]

5. Japan’s Lesson

The Japanese experience with the laws of war offers an incomparable window into the character of the 19th century laws of war. Despite the conventional history’s emphasis on progressive humanisation, Japan, as the West’s best student of war, was very well aware of the laws of war’s purpose. As Fukuzawa

[765] ibid 387–388.
[766] Georg Jellinek, ‘China and International Law’ (1901) 35 The American Lawyer 56, 56.
[767] ibid 56.
[768] ibid 60.
[769] ibid 61.
[770] ibid 62.

readily warned and admitted, international law, particularly the laws of war, were a means for domination of the weaker by the strong and a set of tools to be manipulated for national aggrandisement and strategic gain. In fact, whenever Japan sought to honestly comply with the "just law of all nations" it was rebuked. It was, in fact, only successful in revising the unfair treaties signed by the *Bakufu* as a result of its warmongering campaign in Ryukyu, Korea and China.

Once at war, "excesses" could be written off as understandable, yet sudden outbursts of madness and "humanity" was a strategic choice – a virtue signalling device that allowed Japan to appear humbled and honest in comparison to the West. Thus, the Japanese approach, seeking to appear more civilised than even the European powers themselves, heavily imbued concepts of humanity into the mix, for example, arguing that the excessive violence in Port Arthur was unnecessary but excusable – i.e. that Japan was *so civilised* that it knew when it had not been up to the standard it had set out for itself.

Seen from the perspective of Japan, therefore, there was no evidence of the laws of war being part of any kind of long genealogy or project for the humanisation of war. The laws of war were simply a tool at the disposal of states for the conduct of hostilities and political machinations.

Chapter Six
The Nama's Anti-Colonial War

1. Meanwhile, in Southern Africa…

This Chapter will continue exploring the indeterminacy of the laws of war, this time from the perspective of Black African actors resisting colonisation. Specifically, it will show how indigenous African actors were aware of the hypocrisy of the European "civilisation" discourse, by claiming to be superior and more "civilised" *because* of their adoption of "civilised" laws of war, but exclude application of these rules in their colonial projects in Africa. Thus, instead of a neutral set of rules meant to humanise war, the indigenous African perspective reveals these laws as a hypocritical project, that was designed to not disturb European colonial projects, even by turning a blind eye to massacres and brutal warfare.

This story starts in April, 1884, Germany's Chancellor, when Otto von Bismarck and French Foreign Minister Jules Ferry exchanged missives discussing their mutual concern for British expansionism in Africa.[771] This "nascent *entente*" eventually led to the famous Berlin Conference and the ultimate "Scramble" for Africa.[772] As a result, the colonial empires of Europe and the United States agreed to coordinate their new acquisitions in Africa.[773] According to Articles 34 and 35 of the Berlin General Act:

> "The Power which henceforth shall take possession of a territory upon the coast of the African continent situated outside of its present possessions, or which, not having had such possessions hitherto, shall come to acquire them, and likewise, the Power which shall assume a protectorate there, shall accompany the respective act with a notification addressed to the other signatory Powers of the present Act, in order to put them in a condition to make available, if there be occasion for it, their reclamation".
>
> "The signatory Powers of the present Act recognize the obligation to assure, in the territories occupied by them, upon the coasts of the African Continent, the existence of an authority sufficient to cause acquired rights to be respected and, the case occurring, the

[771] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3 London Review of International Law 31, 36.
[772] ibid.
[773] 'General Act of the Conference of Berlin Concerning the Congo' (1909) 3 The American Journal of International Law 7, 7.

> liberty of commerce and of transit in the conditions upon which it may be stipulated".[774]

This provision, and its emphasis on "occupation" and "protection", as Craven notes, "suggested a division between title that might be regarded as original (occupation) which had to be demonstrably 'effective', and title that was essentially derivative (protection) in which there existed only an obligation of notification".[775] These two pathways require some additional explanation.

Occupation had a longstanding definition under the law of nations, dating back to the time of Vitoria and the Spanish claims over the Americas, in the 16th century. It was defined at that time as title over the property of none.[776] The question was, even since Vitoria's times, whether so-called "savage people" could claim ownership of a territory. Vitoria had answered in the positive, but by the 19th century, the influence of positivist and Lockean ideas on property had begun to shift perceptions. Locke "transformed the meaning of occupying something from signifying a mere presence to the improvement of the thing which becomes property".[777] In other words, occupation required effective use that contributed to the "benefit of mankind". What counted as use was, therefore, key: could wandering tribes of nomads effectively "use" or "occupy" the lands they roamed or were these lands simply *territorium nullius* – territory of no one subject to appropriation through effective occupation?

The debate over occupation was intense. "*Territorium nullius* was the focus of scepticism about empire as much as it was a justification of empire".[778] Because of this, the protection treaties referred to in the Berlin General Act ended up being essential to how the discussion was understood. "Both sceptics and apologists for African expansion agreed that the occupation of African territory must be accompanied by treaties", which were "not perceived to be an alternative to the legal argument of occupation but an extension of it".[779] Thus,

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[774] ibid 24.

[775] Craven (n 771) 44. It should be noted that in this context, "occupation" should be distinguished from the laws of war concept of "military occupation". In legal discourse, the former is a mode of acquiring property, whereas the latter is the temporary administration of enemy territory in the conduct of hostilities.

[776] Andrew Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' in Bardo Fassbender and Peters Anne (eds), *Oxford Handbook of the History of International Law* (Oxford University Press 2012) 852.

[777] ibid 853.

[778] ibid 857.

[779] ibid.

for the apologists, “[w]hile a territory being occupied might be void of territorial sovereignty, it was not necessarily void of sovereignty or property and it was expected that treaties should be made with the sovereign powers and property holders in order to protect existing rights”.[780] For the sceptics, “treaties which were freely consented to and fully understood by both parties, were the only means in which it might possibly be just to occupy such territory”.[781]

Eventually, the apologists won, partly because of the work of the *Institut de Droit International*, which convened a meeting in Brussels, in September 1885, to discuss the concept of occupation of territories, with M. de Martitz as rapporteur.[782] De Martitz concluded that “it is an exaggeration to speak of sovereignty of savage peoples or semi-barbarians”.[783] According to him, treaties of cession could only be agreed between entities that recognise international law, and international law “does not recognise the ‘rights of independent tribes’”.[784] Agreements signed with these communities may be “indispensable” for the settlement of an occupied territory (after all, there is property there to be disposed that is not *res nullius*), but, insofar as these are *territorium nullius,* the “international possession title” over these communities is “not derivative, but remains original”.[785]

In other words, “the category of protection was arguably re-cast in new terms allowing the colonial power not merely to exercise rights in relation to the conduct of foreign relations”, as normally provided by protection treaties under international law, “but to claim territory as if it had effectively been ceded to the metropolitan power”.[786] Thus, in 1894, Westlake would restate the dominant position as follows: “Hence, while the sovereignty of a European state over an uncivilised region must find its justification, as it easily will, not in treaties with natives but in the nature of the case and compliance with conditions recognised by the civilised world, it is possible that a right of property may be derived from

[780] ibid 858.
[781] ibid.
[782] M de Martitz, ‘Examen de La Théorie de La Conférence de Berlin de 1885, Sur l’occupation Des Territoires’, *Annuaire de L’Institute de Droit International*, vol 9 (P Weissenbruch, Imp du Roi 1888) 247.
[783] ibid.
[784] ibid.
[785] ibid.
[786] Craven (n 771) 46.

treaties with natives, and this even before any European sovereignty has begun to exist over the spot".[787]

At the end of the day, these treaties were little more than a formality. As Drechsler notes, "[t]he very fact of their conclusion was more important than their substance".[788] These agreements were, in essence, lies. As noted by the (in)famous *Island of Palmas* case of 1928, an African treaty of protection was not "an agreement between equals", but rather "a form of internal organisation of a colonial territory, on the basis of the autonomy of the natives" where "suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations".[789] In other words, while these treaties were nominally about creating a protectorate that preserved indigenous independence and rights, they were, in practice, mere assertions of colonial possession over lands, meant for the consumption of European rivals, not the local Chiefs who signed them.

It is with this tumultuous background that, as a result of the Berlin Conference, Germany began its own colonial empire in Africa.

2. The Sharp War in Southern Africa

The colonial outlook of Southern Africa in the early 1880s was dominated by British interests. Great Britain took control of the Cape Colony, in modern-day South Africa, from the Dutch, between 1796 and 1814.[790] From very early on, it was clear that the British would use the Cape Colony for European settlement, often at the expense of the local amaXhosa people. In 1812, up to 20,000 amaXhosa were expelled in one single attack and hostilities continued for decades.[791]

The co-existing of Dutch and English-speaking subjects in the Cape Colony, however, led to frequent tension. The Boers – i.e. the descendants of the original Dutch colony – felt that the English government had different priorities to them.

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[787] John Westlake, *Chapters on the Principles of International Law* (University Press 1894) 145.
[788] Horst Drechsler, *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism (1884-1915)* (Zed Press 1980) 27.
[789] *Island of Palmas (Netherlands v. USA)* (n 74) 858–859.
[790] Carolyn Hamilton, Bernard K Mbenga and Robert Ross (eds), *The Cambridge History of South Africa: Volume 1: From Early Times to 1885*, vol 1 (Cambridge University Press 2009) 253.
[791] ibid 266.

By the 1830s, the abolition of slavery in the colony produced a strong reaction from the Boers, who started to leave the colony *en masse*.[792] Eventually, these Boer populations would establish the South African Republic and the Orange Free State, as two independent, white-ruled and Afrikaner-speaking states to the east of the British colonial area. While the politics to the east were getting increasingly complicated, the west continued mostly unexplored. This was because without any initiative from London, expansion beyond the deep-water port of Walvis Bay would need to be financed by the Cape Colony itself – an unpopular financial proposition, even if a long-term aspiration.[793]

Adolf Lüderitz, a tobacco merchant from Bremen, saw an opportunity amidst such British indecision. He had inherited his father's business in 1871 and owned a series of trading posts in the British possessions in the Gulf of Guinea. British taxes, however, were an inconvenience, and the prospects of overseeing a potentially profitable German colony all by himself proved quite attractive.[794] A few years back, the British had found diamond fields in the Griqualand, in South East Africa. Lüderitz was willing to bet that similar fields existed in South West Africa as well.[795] "I should be pleased", Lüderitz once said, "if it turned out that the entire soil is a colossal mineral deposit which, once it is mined, will leave the whole area one gaping hole".[796]

Thus, in 1883, Lüderitz signed a series of purchase agreements for control of *Angra Pequena* (Portuguese for "small cove") from the Bethuana Nama chief, Joseph Fredericks.[797] Without Fredericks's knowledge, the agreements were concluded using German miles (1.7 kilometres), instead of English miles (1.5 kilometres), "a fact exploited by Lüderitz and his agent Vogelsang, for their fraudulent manoeuvre".[798] After some awkward exchanges with the British, Bismarck granted Lüderitz's venture official status and instructed the German government to sign further protection treaties with the indigenous populations in the area.

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[792] ibid 285.
[793] Mads Bomholt Nielsen, *Britain, Germany and Colonial Violence in South-West Africa, 1884-1919* (Palgrave Macmillan 2022) 47.
[794] ibid 46.
[795] Drechsler (n 788) 22.
[796] ibid.
[797] Bomholt Nielsen (n 793) 46.
[798] Drechsler (n 788) 23.

Setting up the new colony would not be easy. There were still vast lands to the north and the east that needed to be acquired by Lüderitz and, more importantly, these purchases needed to be formally incorporated into the German Empire through protection treaties. At this point, in 1884, the German presence in South West Africa was very limited. In fact, "[b]etween 1885 and 1889 the official German presence amounted to three officials, established in a classroom in the mission school at Otjimbigwe".[799] Treaties were often negotiated by German missionaries, on behalf of the Kaiser.[800]

According to Drechsler, protection treaties "constituted the minimum colonial programme of the German Government".[801] Through them "[t]he Chief, as one party to the treaty, undertook not to enter into any treaties with other nations and not to cede his territory or portions thereof to any other nation or members thereof without the approval of the German Government".[802] By 1885, the Reich had signed treaties with most of the communities in the area, especially, the influential Herero. Eventually, Lüderitz would be bought off by his financers, thanks to pressure from the Imperial Chancellor, and the German South West Africa Company was established in his stead.[803]

The new German colony would face many difficulties. Lack of any mineral resource to exploit being the most important one. For the next five years, South West Africa existed as a "shadow protectorate", where the local communities "hardly took any notice" of it.[804] As the Germans sought to further establish their presence, local restlessness began to increase and the feeble German grasp over South West Africa began to crumble. Fearing loss of control, the response, predictably, took military shape.

Unlike in Europe, where the Sharp War Paradigm was encapsuled by the legal discourse of the laws of war, colonial military violence was encapsuled by the racist hierarchies of the standard of civilisation. As Wagner notes, "[t]he ideas of racial and cultural hierarchies prevalent in the West during the second part of the

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799 Hendrik Witbooi, *The Hendrik Witbooi Papers* (National Archives of Namibia 1996) x.
800 Drechsler (n 788) 27.
801 ibid.
802 ibid.
803 ibid 30.
804 ibid 33.

nineteenth century thus permeated military thinking and practice".[805] As so-called "savages", the Black African peoples living in Southern Africa were systematically excluded from the laws of war and rather subjected to what 19th century British Colonel, Charles E. Callwell (the "Clausewitz of colonial warfare"[806]) called "Small Wars".

According to Callwell, "[i]n a civilized country, the metropolis is not only the seat of government and of the legislature, but it is also generally the centre of communications and the main emporium of the nation's commerce".[807] Its occupation brings about the "complete dislocation of the executive system (…) a collapse of trade and (…) financial ruin".[808] But this is not the case with "savages", where "the chief town generally derives its sole importance from being the residence of the sovereign and his council, and its capture by a hostile army is in itself damaging rather to the prestige of the government than injurious to the people at large".[809] In such scenarios, "the regular troops [of the colonial power] are forced to resort to cattle lifting and village burning" with the war assuming "an aspect which may shock the humanitarian".[810]

At the 1899 Hague conference, for instance, delegates famously discussed the legality of so-called "dum dum bullets" – munitions "which expand or flatten easily when penetrating the human body".[811] The UK delegate, Sir John Ardagh, argued that these rules of "civilised war" could not be extended to "savages" in equal terms. "In civilized war", he argued, "a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further".[812] This was not the case with "savages", Ardagh noted. The "savage" warrior "[e]ven though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before

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[805] Wagner (n 3) 221.
[806] Daniel Whittingham, *Charles E. Callwell and the British Way in Warfare* (Cambridge University Press 2020) 7.
[807] Charles E Callwell, *Small Wars: Their Principles and Practice* (Third Edition, General Staff - War Office 1906) 34.
[808] ibid.
[809] ibid.
[810] ibid 39.
[811] Scott (n 431) 343.
[812] ibid.

anyone has time to explain to him that he is flagrantly violating the decisions of the Hague Conference, he cuts off your head".[813]

As Kim Wagner has influentially argued, war against a Black African foe followed a "rule of colonial difference" where acceptable behaviour in the conduct of hostilities depended on the "fundamental difference between 'civilized' and 'uncivilized'".[814] Thus, Callwell said, "[t]he conduct of small wars is in fact in certain respects an art by itself, diverging widely from what is adapted to the conditions of regular warfare".[815] In the Small Wars against the "savage" and "uncivilised" Black peoples of Africa "operations are sometimes limited to committing havoc which the laws of regular warfare do not sanction".[816]

This was not an exclusively British attitude. The first German Governor of South West Africa, Major Theodore Leutwein, said so explicitly, directly opposing the application of the Geneva Convention to Germany's colonial war and justifying brutality on account of the "natives'" difference:

> "As yet, I have only been accused of excessively humane treatment of the natives, which gives me the right to oppose such views", he said. "Peaceful natives must be treated humanely at all events. But to adopt the same approach towards rebellious natives is to be inhumane towards our own fellow countrymen. After all, any captive who escapes will fire on us again at the first opportunity that offers".[817]

While there is significant agreement in the literature that the laws of war, as applicable in Europe, where not applicable to colonial context, there is larger disagreement on whether the "rule of colonial difference" explained the level of unrestrained warfare and wanton cruelty displayed by European armies in colonial Africa. Thus, Bennett, et. al., criticise this thesis by arguing that "[a]ll Western militaries gravitated toward extreme practices if left unrestrained. What mattered and what distinguished the practices of one military from another were the sources of restraint in the development of a military organization's

[813] ibid.
[814] Wagner (n 3) 217. For more detail on the concept of the "Rule of Colonial Difference", see: Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories*, vol 4 (Princeton University Press 1993) 16–18.
[815] Callwell (n 807) 22.
[816] ibid 41.
[817] Drechsler (n 788) 94.

practices".[818] As they conclude, "[u]ndoubtedly there were many racists in the British Army, and Callwell's work was imbued with common racist assumptions, but this does not demonstrate the existence of a single 'colonial military doctrine' which condoned the use of excessive force solely on the grounds of race".[819]

This kind of explanation, away from an idea of colonial difference or of a standard of civilisation, is shared by Isabel Hull's highly influential study of 19th century German military culture. In it, she diverges from the idea that "'small wars' were of an entirely different character from 'real', European conflicts" and "one could learn nothing about one from looking at the other". In fact, she complains that "[t]oo many historians have accepted this point of view".[820] Instead, her exploration centres in the continuity between European and colonial military practices through the study of European military culture, arguing that "for Germany at least, colonial engagements were remarkably European in the operational assumptions about how wars should be fought and won".[821] In fact, for her:

> "The continuities between colonial and European warfare are not due, as I thought at the beginning of this project, to Europeans learning evil lessons in the colonies and then applying them at home (though many an evil lesson was doubtless learned). Rather, Germans approached colonial wars from inside the frames of their military culture as it had developed in Europe. The colonial situation merely provided the opportunity to practice on Africans or Chinese what the military experts took to be the immutable precepts of war".[822]

Thus, for Hull, rather than the racial hierarchies of the standard of civilisation, the explanation for extreme colonial violence lies in the way European militaries conceived war. Post-Napoleonic, late-nineteenth and early-twentieth-century western and central European armies, she states, shared a common military culture, whose most formative aspect was the "general task of exercising violence on a mass, systematic scale for national ends".[823] In fact, "[i]n the nineteenth century the exaltation of the violent solution was especially prevalent

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[818] Huw Bennett and others, 'Studying Mars and Clio: Or How Not to Write about the Ethics of Military Conduct and Military History' (2019) 88 History Workshop Journal 274, 276.
[819] ibid.
[820] Hull (n 243) 3.
[821] ibid.
[822] ibid.
[823] ibid 99.

and took many forms: for example, the ‘cult of the offensive’; the fixation on superior armament or numbers; on the demand for unconditional surrender”.[824] They “conceived of peace in terms of an ‘order’ so perfect that it required the disappearance of any potential enemy”, with this “type of thinking” leading to “the wish to exterminate”.[825]

Thus, European Small Wars were the result of applying this aggressive military culture in a territory where their armies faced no real technical competition from the locals. The colonial powers’ overwhelming technical superiority, she says, “was the very precondition of imperialism” and “[a]s a result, Western militaries fought very similar imperial campaigns guided by almost identical doctrines calling for the best exploitation of their superior firepower and the most impressive display of their material power generally”.[826] In other words, it was not the standard of civilisation or the rule of colonial difference that led European armies to conduct inhumane Small Wars in Africa, but the realisation of an already existing military culture, forged in the battlefields of Europe, put in practice in an uneven battlefield where no limitations existed.

The discussion about the Sharp War Paradigm seen in Chapter 3 can help explain the apparent contradiction between Wagner and his critics. The continuities between European and colonial military culture described by Hull are in fact real. They are the bedrock upon which the Sharp War Paradigm rested upon and the reason why I have argued above that the European laws of war, as the principal means of implementing this paradigm, had an incomplete concept of humanitarianism. Thus, when applied against a Black African enemy, the result was, to quote the title of Hull’s book, “absolute destruction”.

It would be a mistake, however, to fully shield the Sharp War Paradigm from the influence of the standard of civilisation (or Wagner’s rule of colonial difference). After all, while in Europe, this aggressive military culture was instrumentalised within the discourse of the laws of war in order to advance the national interest, in the colonial world, it was instrumentalised within the racist discourse of civilisation in order to enforce the aforementioned treaties of protection for the

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[824] ibid 100.
[825] ibid.
[826] ibid 102.

advancement of colonial policy. This is precisely what Major Leutwein maintained for German South West Africa:

> "Given that, a consistent colonial policy would require that all prisoners capable of bearing arms be killed. I, for one, would rather not resort to such a drastic method, but neither would I upbraid those who did. Any colonial policy is an inhumane affair because it can ultimately lead only to a curtailment of the rights of the indigenous population in favour of the invaders. Anyone who disagrees with this is bound to reject any colonial policy, which would at least be a logical standpoint. What one must not do is first deprive the natives of their land on the basis of doubtful treaties, putting at risk the lives and health of one's compatriots, and then indulge in humanitarian fantasies in the Reichstag as quite a few of our deputies there have done".[827]

Therefore, the colonial policy of extermination followed both the operational principles of the European Sharp War Paradigm (as hinted by Hull) and the rule of colonial difference (as explained by Wagner). These extremely violent and racist Small Wars were the means with which to enforce colonial policy and were inherently and inseparably connected with the idea of *territorium nullius* and the protection treaties that sustained it. As I will show in the next section, this dynamic between the laws of war, the Sharp War Paradigm and the rule of colonial difference / standard of civilisation was not lost on the people against whom they were deployed.

3. The War for the Namaland

In 1884, as the German colonial venture in South West Africa was only beginning to take form, Maharero kaTjamuaha, Paramount Chief of the Herero people, met with Hendrik Witbooi, son of Moses Witbooi, Chief of the influential Witbooi clan, of the Nama. Hendrik Witbooi was looking for safe passage from his village in Gibeon through Hereroland in order to settle his people further north. The meeting was, apparently, a success. A year later, however, as Witbooi and his clan rested in Herero territory, they were betrayed. Herero warriors wounded 20 Witboois and killed 24, including two of Hendrik Witbooi's sons.[828]

Hendrik Witbooi was one of the most talented military leaders in Namaland, and he had a long memory. After his father was deposed and eventually killed by

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[827] Drechsler (n 788) 94.
[828] Witbooi (n 799) vi–vii.

political rivals, Hendrik waged war against them in order to secure his rights as Paramount Chief of the Nama.[829] Once safe in his position, he sought revenge against Maharero and his betrayal, launching war against the Herero in 1888.

Maharero had seen this coming. In 1885, he requested assistance from Heinrich Göring, Reichkommissar of the German Empire in South West Africa and father of future Nazi leader Hermann Göring. This assistance came (of course) in the shape of a Protection Treaty with the Herero.[830] The Germans, though, proved to be useless allies. At the time, their "shadow protectorate" was close to collapsing and had no permanent military force.

By the time of Witbooi's attack, Maharero kaTjamuaha had had enough. In October 1888, he was approached by an English adventurer called Robert Lewis, who suggested a way out of his predicament: annul the German treaty and reinstate British treaties, signed long before the arrival of the Germans, instead.[831] Maharero agreed and summoned Göring to a meeting later that month.

The meeting was very aggressive. A "veritable barrage" of questions and grievances were thrown against Göring. "Where is your Protectorate?", one Herero said, "[w]e thought you would come to our aid in the event of an attack on us!"[832] Göring had little to offer to pacify the Herero. By the end of the meeting, Germany's Protectorate over the Hereroland was ended.

News of the collapse was not well taken in Berlin. However, since Germany was unable to wage a full invasion of the region, due to its limited capabilities at the time, Göring's orders were clear: "[send] a band of about 20 soldiers, disguised as explorers, to South West Africa with the aim of capturing Robert Lewis and removing him from there".[833]

Göring dispatched Captain Curt von François for the job. He had received "clear instruction from the German Foreign Office" that his mission "was to arrest or expel Roberto Lewis" but he was not to, under any circumstances, "turn his force

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[829] ibid viii–ix.
[830] Drechsler (n 788) 38.
[831] ibid.
[832] ibid 39.
[833] ibid 42.

against the Africans, least of all against the Herero".[834] Von François, however, had other plans. As a deeply racist man, he could not help but antagonise the Herero after any perceived slight. As one German official commented at the time, "[t]he Captain finds it difficult to subdue his anger about the Herero and, as set out in his instructions, to avoid any war with a tribe".[835]

The Herero, already strained by Witbooi's attacks, could not afford open war with a German force, no matter how small, and in 1890, renounced Lewis, and signed another Protection Treaty with Göring.[836] The German Protectorate received new life, and Hendrik Witbooi became Germany's next target.

Having secured the northern front, in May 1890, Göring sent Witbooi a letter informing him of Maharero's new treaty and demanding he returned to his old home in Gibeon.[837] "The German Government can no longer stand by and watch you harassing land and people – again and again – which are under German Protection" – he said.[838] Witbooi responded little over a week later, "astonished" at the letter's tone. "You have not approached me as an impartial peacemaker", Witbooi said, "but uttered abrupt orders as to what I should do".[839] "But my dear Sir!" Witbooi went on, "[w]hen I left Gibeon, no one had advised me to leave Gibeon (…) and since no one advised me to leave Gibeon, no one shall advise me to return to Gibeon".[840] In sum, Nama and German had equal rights, and the latter could not order the former to do anything they did not want.

Witbooi, however, reserved his best prose for his current enemy, Chief Maharero himself. "I learn", Witbooi started off, "that you have given yourself into German Protection, and that Dr. Göring has thus gained the power to tell you what to do and to dispose as he wills over our affairs".[841] In this letter, Witbooi set out his vision of African sovereignty in detail and chastised Maharero for allowing foreigners to intervene in their war. "This dry land is known by two names only", Witbooi said: Hereroland and Namaland. "Hereroland belongs to the Herero nation, and is an autonomous realm. And Namaland belongs to all the Red

[834] ibid 42.
[835] ibid 43.
[836] ibid 50.
[837] Witbooi (n 799) 41.
[838] ibid.
[839] ibid 42.
[840] ibid 43.
[841] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid 44.

Nations, and these too are autonomous realms – just as it is said of the White man's countries, Germany and England, and so on, whatever these countries are called".[842] Surrendering this freedom in the pursuit of military victory, Witbooi told his enemy, was a bad deal. "You may think that you will keep all these things as an independent captain after you have destroyed me", he says, "[b]ut my dear Captain! You will come to rue it bitterly".[843]

In Witbooi's mind, an African war was preferable to a European peace. "For", as he said in the letter, "this war between us is not nearly as heavy a burden as you seem to have thought when you did this momentous thing".[844] "It is a war", Witbooi continues, "arising from definite causes and on definite issues, which will in the fulness of time be brought to a proper peace when the Lord's ends have been accomplished through it. You know that this war is not lawless, and was not begun without a cause", he concluded.[845]

Witbooi warned Maharero about surrendering to German protection. "I doubt that you and your Herero nation will understand the rules and laws and methods of that government, and will accept them in peace and contentment for long", he said, presciently.[846] Göring, Witbooi told Maharero, "will not act according to your will, or traditional law, or customs".[847] As Drechsler puts it, "[t]he war between the Nama and the Herero (…) was of an entirely different nature than a war between Africans and Germans. There was always the possibility of peace between the Nama and the Herero".[848]

Maharero kaTjamuaha would die a few months after that, leaving his son Samuel Maharero, as Paramount Chief. Hostilities between the two African nations continued for two more years, until November 1892, when peace was finally brokered between the two. Ironically, despite all their claims of peace-making, it was precisely peace between the Nama and the Herero that "provoked a change of mood on South West Africa in Berlin".[849] Germany could

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[842] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid.
[843] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid 45.
[844] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid.
[845] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid.
[846] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid 46.
[847] Letter of 30 May 1890, from Witbooi to Maharero, in: ibid.
[848] Drechsler (n 788) 54.
[849] ibid 69.

no longer "play the game of the outsider biding his time".[850] Göring and von François would finally get the war of conquest they so desperately sought.

Witbooi had made his position clear to von François in a meeting they both held in June 1892, some five months before the peace.[851] Von François sought to convince Witbooi that he needed protection against "the Boers and other mighty nations" and that German protection was not truly an encumbrance on his rights as chief: "please understand, Captain, that a chief is not deprived of his rights. He keeps his privileges and laws and the jurisdiction over his own people", von François clarified.[852] For Witbooi, however, this was "incomprehensible and strange". Rather, "when one chief stands under the protection of another, the underling is no longer independent, and is no longer master of himself, or of his people and country".[853] Witbooi, thus, saw clearly through the ruse of the colonial treaty scheme.

Discovered in his deceit, von François tone turned darker: "Yes, that is right and true. I myself can't bear to be bossed", he admitted, while adding Witbooi was free to accept or refuse German protection.[854] "Yet Captain", he continued, threatening to cut Witbooi's supply lines through the British Cape Colony, "consider and calculate carefully: admittedly you have bold fighting men, but what use is that without guns and ammunition? Your opponents are plentifully armed. They will fire at you with bullets, while your men have to seize their rifle by the barrel and use the stock as a club. You don't want that".[855] Von François noted, instead, that Witbooi would do well to sign the German treaty and leave the Herero to them. "If the Herero misbehave again after you have made peace, the German Government will make it its business to put a stop to it".[856] And menacingly, he added, "[t]hat won't take as long as your wars, dear Captain: we'll finish the job in a fortnight".[857]

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[850] ibid.
[851] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: Witbooi (n 799) 74.
[852] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid 76.
[853] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid.
[854] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid.
[855] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid 77.
[856] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid 76.
[857] Meeting at Hoornkrans, between Witbooi and von François, 9 June 1892, in: ibid.

Witbooi saw the danger in von François, as he called on the British Magistrate at Walvis Bay, his former trade partners, for help, in August 1892. He explained of the suffering of those African peoples who had already submitted to German protection. “The Germans told them that they would protect them against the mighty invaders threatening to take our land by force, without permission from the chiefs. But from what I hear and see of the man, it now appears the the [sic] German himself is that man who he said was of another nation, and is doing exactly what he said we would be protected from”.[858] Witbooi saw the connection between war and colonisation, clearly. With the Germans, he told the magistrate, “[t]heir whole bearing is military; they have all the instruments of war; they have brought firearms and cannons; they build fortifications; they have soldiers: in a word, they have come to this country prepared for war”.[859]

Witbooi’s predictions of German war would come true in April 1893. Von François took a force of about 200 soldiers and assaulted his encampment at Hoornkranz in a surprise night raid, killing tens of sleeping Witbooi men, women and children, and taking several women and children captive, including Witbooi’s wife and daughter.[860]

For Witbooi, the attack came as a surprise. Von François, he said, “entered the camp and sacked it in so brutal a manner as I would never have thought a member of a White civilised nation capable of – a nation which knows the rules and ways of war”.[861] The contradiction of attacking him after he had made peace with the Herero, seemed too alien for Witbooi to understand – “[a]ll White men had agreed to stop my arms supply so that I should stop fighting”, he complained in one letter, “[a]nd I did stop fighting and made peace (…) I want to know my crime”.[862] Once again, Witbooi protested to the British magistrate asking him to “call the German Government to account” and “open my supply of arms so that I may defend myself”.[863] For Witbooi, British intervention was necessary because the German attack could not “be considered as justified or proper or honest by any civilised power”.[864] Witbooi’s pleas fell on deaf ears. Five days later, the

[858] Letter from Witbooi to the British Magistrate in Walvis Bay, 4 August 1892, in: ibid 89.
[859] Letter from Witbooi to the British Magistrate in Walvis Bay, 4 August 1892, in: ibid 92.
[860] Drechsler (n 788) 70.
[861] Letter from Witbooi to Captain Hermanus van Wyk, 18 April 1893, in: Witbooi (n 799) 115.
[862] Letter of Witbooi to Pastor Heidmann, undated, in: ibid 116.
[863] Letter of Witbooi to the British Magistrate at Walvis Bay, 20 April 1893, in: ibid 118.
[864] Letter of Witbooi to the British Magistrate at Walvis Bay, 20 April 1893, in: ibid.

British Magistrate, John J. Cleverly, responded: “I cannot understand how there could have been a killing of women and children such as you tell me of. European nations do not make war in that way”.[865] No help came.

Despite von François treacherous raid at Hoornkranz, it soon became evident to the Germans that they could not beat Witbooi in a guerrilla war in his own land. By late 1893, von François was replaced by Major Theodor Leutwein, a pragmatic leader who “[w]ithout renouncing the use of force, he showed a preference for diplomatic dealings”.[866] Leutwein engaged with Witbooi in a series of missives, painting a stark outlook for the Nama chief:

> “[S]hould you succeed in killing me and all my men, the war would by no means be at an end, for the Kaiser of Germany would, from his vast army, send double or treble the number of men, and many more field-guns, and you would have to start all over. (…) If the Germans were to do you the favour of withdrawing from Namaqualand, it would avail you nothing; for I know for certain that your dear friends of today, the British, would then take the country and demand your surrender exactly like us, and you would have to fight them as you are fighting us. Wherever you may look, you can only either fight to the death or surrender”.[867]

On September 15th, 1894, after much warring and extensive negotiations not afforded to any other Nama or Herero chief, Leutwein and Witbooi agreed to terms. Importantly, Witbooi would be left in possession of his weapons and ammunition under promise of not attacking the Germans. It was a compromise solution meant to bring an otherwise unwinnable war to an end.[868] It was also a controversial solution, as chauvinistic forces in Germany, including a resentful von François, saw it as a sign of weakness. “Unavoidably, the Witboois and all other Hottentot tribes will assert that they in the end gained the upper hand over the Germans”, he complained.[869] But Leutwein was not too concerned. In his report to the Kaiser, he noted: “If Your Grace does not subscribe to my view, nothing has been lost either (…) I should have no difficulty in finding a pretext that would put Kaptein Witbooi in the wrong”.[870] The treaty was eventually ratified

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[865] Letter from Cleverly to Witbooi, 25 April 1893, in: ibid 119.
[866] Drechsler (n 788) 75.
[867] Letter from Leutwein to Witbooi, 9 March 1894, in: Witbooi (n 799) 121.
[868] Drechsler (n 788) 77.
[869] ibid 78.
[870] ibid 79.

and, despite his brave resistance, Witbooi ended up yielding to the impossible odds of his situation.

The colonial situation in Hereroland and Namaland would worsen with every passing year, and by 1904, German mistreatment and abuse led to a full rebellion of the Herero, led by Samuel Maharero. Maharero sought to enlist the Nama in his struggle, writing to Witbooi in January 1904. He was in full knowledge of the impossible odds they faced: “Let us die fighting rather than die as a result of maltreatment, imprisonment or some other calamity”, he wrote to Witbooi.[871] This letter, however, never reached Witbooi, who did not join. The Nama would not rise until after the Herero were exterminated through genocide.

4. The Nama’s Lesson

As Henrik Witbooi’s correspondence shows, the Nama of South West Africa were patently aware of the hypocrisy of European military and colonial policy in their land. Witbooi was not only aware that he was being engaged through different standards than those reserved to Europeans (evidencing his awareness of the rule of colonial difference) but that those standards were meant to enable unfair treaties whose meaning was being manipulated to camouflage his colonial domination. There was no humanitarianism in the war for the Namaland, no lesson would be learned and no European conference would be called for the further “humanisation” of war. The situation, as has been plainly set out by his diary entries, was clear: the European protection treaties, enforced by European military means consistent with unrestrained Sharp War, were not meant to protect him or his people from colonisation; all to the contrary they were meant to enable German colonisation of the Namaland and Hereroland through lawless and unrestrained war. As seen above, Witbooi stated it plainly – it was Germany they needed “protection” from and it was Germany who was fighting outside the bounds of “civilised” war.

Witbooi’s testimony is of crucial importance. Because of the racist hierarchies that pervaded international law thinking at the time, Black African voices were at a significant disadvantage when it came to participation in the so-called “Family of Nations”. Deemed “savage” and “uncivilised”, they were not just excluded from the great European conferences but kept entirely from participating in the

[871] ibid 143.

discourse of the laws of war. There is no equivalent in 19th century Black Africa to the *Criollo* elites of Latin America or to the reformist Meiji bureaucrats of Japan. European colonialism excluded Black interventions from wedging themselves into the process of creating the laws of war in the same way that Ariga Nagao and José Díaz Covarrubias did. Thus, there is no – nor could there be – an "African contribution" to the 19th century laws of war, because Black African voices were excluded from it entirely. Instead, when modern sources discuss "the laws of war in Africa", they fall squarely into anachronistic and/or Eurocentric views. These sources place their focus on the traditional rules of war of the various indigenous nations of Africa and try to draw connections with modern-day international humanitarian law. This has been the position of the ICRC, for instance, that has tried to find common ground between the rules of international humanitarian law and traditional rules of combat that "existed long before the latter were formulated and adopted" and were "generally consistent" with it.[872] This invisibilises the hypocritical history of the long genealogy, that focuses on the progressive humanisation of the laws of war and their alleged transformation process into international humanitarian law, while simultaneously ignoring the reality of colonial Small Wars – the colonial iteration of Europe's Sharp War, unrestrained by the most basic principles of the laws of war and premised on the idea that the "savage" enemy deserved nothing but extermination.

The discovery of the Witbooi diaries, therefore, is a unique window into the mind of the contemporary 19th century African view of the European colonial project as an inherently unjust and hypocritical endeavour. Witbooi makes patently clear that he knew the laws of war were not being applied to him and that military violence was waged in order to enforce colonial treaties disguised as protectorates. Just like Witbooi, many other African chiefs and nations were conquered, even exterminated, through Small Wars – and their testimony has been lost both because of the limitation of the historical archive and/or purposeful erasure. The conventional history of the laws of war described in Chapter 1 is unanimous on ignoring this fundamental hypocrisy as part of its history – a history of how the laws of war were wilfully excluded from colonial

[872] Somalia ICRC Delegation, *Spared from the Spear: Traditional Somali Behaviour in Warfare* (International Committee of the Red Cross 1998).

spaces because of the standard of civilisation. In this regard, the inclusion of Witbooi's testimony into the history of the laws of war and international humanitarian law is an act of justice.

Section III
Change (1914-1977)

The histories studied in Section II, in the United States, Europe, South America, East Asia and Southern Africa, paint a very different picture from the conventional history of the laws of war. First, looking at the European and US linguistic context produces a different narrative from the idea of progress through humanisation that frequently characterises conventional accounts of the laws of war's history. Instead of a series of steppingstones, from Lieber to Brussels to The Hague to Geneva, the content of the laws of war appears contested, diverse, not geared towards the amelioration of war, and at times even unwanted.

In the case of the United States, the regulation of war aimed to enable a Union victory over the Confederacy, and its rules were carefully designed to address the problems that Confederate tactics had brought about. In Europe, humanisation was mostly restricted to the 1864 Geneva Convention and the Geneva Movement. While these provided a sense of urgency for states to embark in their own competing projects (lest the humanitarians take the initiative!), their influence before the 20th century was rather limited. Instead, fresh memories of Franco-Prussian total war, made states reluctant to restrict their freedom of action in the future by appeasing Czarist-led efforts to replace the "unwritten rules of war" with codified instruments. Once at Brussels and The Hague, it was clear that there were very different approaches to European war itself. Instead of a monolithic legal project that evolved through consensus and intelligent design, the laws of war were a contested field of disagreement between potential occupiers and occupied, military powers and *Petit États.*[873]

Second, in the case of Latin America, East Asia and Southern Africa, historical inquiry reveals that non-Western perspectives on the laws of war were frequently able to discern the political undertones of the laws of war project, and on occasion utilise or instrumentalise them. In South America, Chilean sharp war tactics were perceived as inhumane and barbaric, unsuited for deployment

[873] For more on the contested nature of the laws of war see, for example: Kinsella and Mantilla (n 6).

against civilised enemies, even while being uncontroversially deployed against indigenous peoples for political and sovereign gain. In Japan, influential scholars like Fukuzawa Yukichi clearly understood the colonial dynamic of war and the laws of war in this period, arguing that unless Japan adopted Western civilisation and warring tactics, it would suffer the same fate as the indigenous populations of the Americas. As a result, Japan launched its own colonial venture into Korea and Ryukyu and was rewarded for it. Lastly, the Nama people of South West Africa, in modern-day Namibia, were also perfectly aware of the laws of war's colonial blind spots, hypocrisy and gaps. They made a clear connection between their exclusion from the laws of war and the system of colonial domination enforced through sharp war.

The period between 1863 and 1899, therefore, was much more obfuscated for the laws of war than traditionally accounted for. This is not Gary Solis's "law of armed conflict watershed" where the Lieber Code "assembled [a] polyglot mass" of diverging codes, rules and regulations and "rationaliz[ed] the law of war on an international basis" into a "single government-sponsored document".[874] More than a watershed, it was a delta. The supposedly uniform unwritten rules of Clausewitzian sharp war were actually a cacophony of disagreement, where states' only way to reach any kind of weak consensus was through the escape valve of the "laws of humanity and the dictates of public conscience" – ironically, a euphemism meant to satisfy the German and Russian position that, under the unwritten rules of war, partisans could be summarily executed and reprisals could be directed at civilians.

In fact, agreement at the great European conferences tended to focus on matters related to military expediency, like the treatment of prisoners of war, the involvement of humanitarian societies, and prisoner exchanges. As Benvenisti and Lustig summarise it, Europe "graciously nodded toward the common soldier" while at the same time, "if not primarily", sought an "inter-elite endeavour aimed at enhancing the collective control of European governments over their respective societies".[875]

[874] Solis (n 21) 52.
[875] Benvenisti and Lustig (n 57) 43–44.

But the period between 1863-1899 was not the result of sudden, unpredictable change. It was the *denouement* of a longer and much slower process of social and political change that started, as noted in Chapter 3, with the establishment of large professional armies and the rise of nationalism and national wars, particularly during the Napoleonic Wars. It was these changes in the fabric of European society and conflict that led the Jominian paradigm to be replaced by a Clausewitzian alternative, where "sharp wars are brief" became the new mantra of military elites.

"Sharp wars are brief", however, is no longer a phrase that is often repeated in the conference rooms of international humanitarian law conventions. As before, something is changing (or has changed). The next sections will address this new process of change and what it means for modern-day debates on international humanitarian law and the laws of war.

Chapter Seven
The End of the Sharp War

1. A Few Years Later, in Europe…

I have so far shown how the laws of war were understood, discoursed, embraced and resisted during the second half of the 19th century in Europe, the United States, South America, East Asia and Southern Africa. This analysis has shown that the laws of war were often framed under a dominant Clausewitzian paradigm I've called the "Sharp War". In the context of the North Atlantic, this paradigm ensured that the laws of war ultimately could co-exist with, and often facilitate, political and military expansionism.

The Sharp War Paradigm was also discoursed, embraced and resisted by political and scholarly communities outside of the European world. In this thesis, I have focused on the linguistic contexts of South America, East Asia and Southern Africa. In all of these regions, the fundamental principles of the Sharp War were perceived as either a means of securing "civilizational pedigree" through the laws of war or a hypocritical discourse meant to not hamper colonial domination through small wars. South American scholars thought that the sharp war was unworthy of civilised times. Japanese bureaucrats decided to aggressively embrace sharp war as a means to guarantee national independence. Nama chiefs evidenced the hypocrisy of the colonial small war as the enforcement mechanism for colonial protection treaties, outside the cover of the so-called "civilised" laws of war. The study and analysis of all of these communities reveals that, outside the context of the Geneva Movement, in the world of European "sharp" and "civilised" war, the dominant view of the laws of war operated to enable a Clausewitz-inspired concept of war, that only incorporated a very limited notion of humanitarianism. In fact, as Samuel Moyn notes, the laws of war, as designed by the club of "civilised" states, "governed – and were developed to govern – the paradigm case of conventional battle among white people".[876] Rebellious civilians opposing occupation were exposed to the laws of war's most brutal rules, protected only by specious references to

[876] Moyn (n 8) 96.

the “dictates of public conscience” while racialised people resisting colonisation were simply left out of the rules entirely.

The turn of the century did not lessen the brutality of the Sharp War or its connections to the standard of civilisation. If anything, it accentuated them. The political tension and competition of the *Belle Epoque’s Paix Armée* led to the formation of conflicting worldviews among the European Powers; particularly France, Great Britain, and Germany. Thus, as Rutkevic notes, “[i]n the Germany of the late nineteenth, early twentieth centuries, the opposition between the German Kultur and the French and English civilisation had already acquired certain anti-Western traits”.[877]

The idea that European civilisation was undergoing a schism was a powerful one. Not long before, Germans, British and French diplomats could sit down in The Hague and Brussels to discuss the common usages of “civilised states”. The newfound competition between conceptions of European civilisation would cement the Sharp War’s connection to the discourse of civilisation not just as a manifestation of geopolitical angst in South America, East Asia or Southern Africa, but as an essential part of Europe’s geopolitical discourse and rivalries as well.

Thus, German generals such as Friedrich von Bernhardi made an explicit connection between Germany’s claim to superior civilizational status and its own – more extreme – conception of (sharp and civilised) war. Pacifism, Bernhardi thought, was a cause for civilizational decay. “War”, he insisted, “is a biological necessity of the first importance (…) without it an unhealthy development will follow, which excludes every advancement of the race, and therefore all real civilization”.[878] For Bernhardi, war allowed the superior “race” to achieve its political objectives over the inferior one. Without war, Bernhardi would stress, “inferior or decaying races would easily choke the growth of healthy budding elements, and a universal decadence would follow”.[879]

This was, Bernhardi notes, the case of Japan’s success. Having “rapidly risen to a high stage of civilization”, Japan “was entitled to claim to be the predominant

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[877] Aleksej M Rutkevič, ‘The Ideas of 1914’ (2014) 66 Studies in East European Thought 1, 6.
[878] Friedrich von Bernhardi, *Germany and the Next War* (Allen H Powles tr, Longmans, Green, and Co 1914) 21.
[879] ibid 23.

civilized power in Eastern Asia, and to repudiate the rivalry of Russia".[880] Their victory in the Russo-Japanese War of 1905 "created wider conditions of life for the Japanese people and State (…) and gave it a political importance which must undeniably lead to great material advancement".[881] Germany, instead, had arrived late to the table of colonial negotiations and was, perhaps worst of all, seeming to embrace a culture of pacifism. For Bernhardi, Germany had a necessity to use war for its own greater civilizational improvement and colonial gain.

Bernhardi was not alone. In fact, "[a] decadent society in need of regeneration was a common theme in Wilhelmine cultural criticism".[882] As Werner Sombart's 1915 book *Merchants and Heroes* noted, "German thinking and German sentiment manifest themselves first and foremost as a decisive rejection of everything that even remotely resembles some English, or generally western European, thinking and sentiment".[883] Thus, as the book's title betrays, Germans are "heroes" while the English are "merchants"; and this "mercantile culture and the bourgeois mindset" were already "on their way to vanquishing the world with their lust for material goods and creature comforts".[884] Thus, viewed from Germany, World War I was premised as a battle of worldviews – the "ideas of 1789" in confrontation with the "ideas of 1914".[885]

This battle of worldviews – or what Horne and Kramer call the "war cultures" of 1914-15, expressed itself in the language of atrocity propaganda, where the British tried to paint the Germans as barbarians.[886] The famous German argument that the Treaty of London, guaranteeing Belgian neutrality, was nothing but a "scrap of paper" -which it used to legitimise its invasion and occupation of Belgium – became "the strapline for hard-hitting visual propaganda".[887] Thus "sensationalist press and popular books, as well as

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[880] ibid 46.
[881] ibid.
[882] Jeffrey Verhey, *The Spirit of 1914: Militarism, Myth, and Mobilization in Germany* (Cambridge University Press 2000) 127.
[883] Rutkevič (n 877) 9.
[884] ibid 10.
[885] ibid.
[886] John Horne and Alan Kramer, *German Atrocities 1914: A History of Denial* (Yale University Press 2009) 293.
[887] Jo Fox, 'Making Sense of the War' (*International Encyclopedia of the First World War (WW1)*) <https://encyclopedia.1914-1918-online.net/article/making_sense_of_the_war> accessed 12 November 2021.

cartoons and poscards, portrayed a dehumanized enemy".[888] According to the Belgian pamphlet *La Libre Belgique*, reporting from inside occupied Belgium, German "Kultur" had "nothing in common with French, Belgian, English, Spanish, Italian or American culture. It is not civilization; the way the German invaders have behaved in our country and in northern France since last August demonstrates this beyond all doubt".[889] In fact, references to the Hague Convention were common, to try to demonstrate the absolute disregard the German army had for international law.

This idea of international law actually played a relevant role in the culture wars. As Isabel Hull argues, the defence of international law was "central" to how contemporaries interpreted the war. British internal documents "summarized the 'principles at stake in the war' as the destruction of 'Prussian militarism'" and Louis Renault – one of the top international lawyers of the time, argued that "the goal of the present war must be to affirm the sanctity of treaties, the destruction of the German theory that necessity justifies the violation of all the laws of war, the guarantee of the existence of small states, the development of arbitration".[890]

But the connection to international law made the stakes even higher. This was, after all, the international law of "civilised" states. The war against German militarism was a battle for the very concept of "civilisation". The famous "Authors Declaration" of 1914, for instance, signed by the likes of Sir Arthur Conan Doyle, Rudyard Kipling and H.G. Wells, upon request from the British War Propaganda Bureau, made it clear: "even if Belgium had not been involved, it would have been impossible for Great Britain to stand aside while France was dragged into war and destroyed. To permit the ruin of France would be a crime against liberty and civilization".[891]

Up to this point, the connection between the laws of war and the standard of civilisation had been mostly implied with regard to conflicts in Europe. Throughout the second half of the 19th century, differences in appraisals of the laws of war – such as those between Germany and the *Petit Etats* in 1874 and 1899 – were not an impediment for conceiving these laws as the manifestation of

[888] Horne and Kramer (n 886) 295.
[889] ibid 314.
[890] Hull (n 395) 2.
[891] 'Famous British Authors Defend England's War' *The New York Times* (18 October 1914).

a single, common conscience of European "civilisation". The connection was instead more overt in non-European shores, as seen in the cases of Chile and Japan – where proof of "civilisational pedigree" *through war* was a natural part of discourse. World War I was perhaps the first time when the idea of sharp war was seen as a conduit for intra-European competition over whose definition of civilisation should prevail and as a measure for which states were truly 'civilized,' and even as grounds for expulsion from the European club of nations.

This connection fatefully tied the outcome of the war to the legitimacy of sharp war discourse in general. In fact, the ensuing horrors of four years of industrialised war brought about the first serious intra-European challenges to the Sharp War Paradigm – in particular its assumption that increased ruthlessness shortened war (sharp wars would be over quickly) and its justifications for harsh treatment of occupied civilians. After all, as seen before, the laws of war "left a highly selective and punitive legacy for those living under occupied rule" and "never strictly outlawed the use of reprisals, collective penalties, or hostage taking – despite continuing criticisms of these measures".[892] Given advances in communications, World War I was a much more public war than its predecessors, which allowed contemporary Europeans to "witness the effects of the law's coercive impulses"; in particular, "how civilians – a term which owes its origins to this period – were greatly affected on a global scale".[893]

Faced with the gruesomeness of the invading German army's 1914 Belgian Atrocities (often amplified by British propaganda efforts) and the ruthless occupations of Belgium and northern France, post-World-War-I Europe started to drift apart over Clausewitzian approaches to "vigorous war". British strategists, for instance, distanced themselves from Clausewitz's "bloodthirsty Prussianism", after the extremely costly Western Front strategy.[894] "Clausewitz", they wrote "had proclaimed the sovereign virtues of the will to conquer, the unique value of the offensive carried out with unlimited violence by a nation in arms and the power of military action to override everything else".[895] It was because of this

[892] Boyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 American Journal of International Law 553, 558.
[893] ibid 559.
[894] Howard (n 257) 39.
[895] ibid., quoting Liddel Hart.

"distorted notion of the offensive"[896], these scholars argued, that millions of young men were sent to their deaths in the fields of Europe where, in trench warfare, the defender had the constant advantage. The collapse of Germany's legitimacy among the nations of the "civilised world" thus marked the beginning of a slow end for the Sharp War Paradigm.

At the end of the war, and already weakened by its association with "Prussianism", the sharp war was in no condition to face any additional challenges to its legitimacy. And yet, this is exactly what happened. World War I, the "war to end all wars", had changed the world and the way it conceived armed violence. From here on, different, often unconnected forces would slowly chip at the edges of the Sharp War Paradigm, leading to its ultimate demise.

2. The Communist Challenge

One of the most Earth-shattering events of World War I was the success of the Russian Revolution in 1917, and the overthrowing of Tsar Nicholas II. Now in the spotlight, Lenin and the Bolsheviks were left with management of an unpopular war they did not start or want. The obvious question at the time was therefore what was the Communist view of war?

Lenin shared his early views on war in a lecture delivered in May 1917 – i.e. before the October Revolution and the Bolsheviks' ultimate rise to power. Lenin found himself in direct opposition to the predominant discourse of the time, that conceived the First World War as the battle between civilisations; between the ideas of 1789 and 1914. "We are constantly witnessing attempts", Lenin said, "especially on the part of the capitalist press whether monarchist or republican to read into the present war an historical meaning which it does not possess".[897] For him, capitalist propaganda sought to appropriate the ideas of the French Revolution in order to argue that "now, too, republican France is defending her liberty against the monarchy".[898] Lenin called this an attempt to "hoodwink" the European masses into supporting a war that bore no actual benefit to them.

In fact, Lenin concluded, a Socialist approach to war would do away with its connection to "civilised" uses and rules of war and instead frame it from the

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[896] ibid.
[897] Lenin, 'War and Revolution', *Lenin Collected Works*, vol 24 (Progress Publishers 1964) 401.
[898] ibid.

language of class and class warfare. "[T]he main issue in any discussion by socialists on how to assess war and what attitude to adopt towards it", he said, is to ask oneself "what is the war being waged for, and what classes staged and directed it".[899] This was, he argued, the logical conclusion of reading Clausewitz. Indeed, while most of the military actors of the European *Paix Armée* would read *On War* as a defence of sharp and vigorous war to the very end, Lenin focused instead on Clausewitz's – at that time – less popular dictum that "war is a continuation of policy by other means".

For Lenin, the main takeaway of Clausewitz's philosophy of war is a challenge to the "ignorant man-in-the-street conception of war as being a thing apart from the policies of the governments and classes concerned"; as if, he said, wars were "a simple attack that disturbs the peace, and is then followed by restoration of the peace disturbed, as much as to say: 'They had a fight, then they made up!'".[900] Lenin reconceives the Clausewitzian maxim in Marxist terms in order to conclude that "[a]ll wars are inseparable from the political system that engender them".[901] In other words, wars are the continuation of a given class's policy, through other means.

In Europe, this policy is the policy of capitalist colonial domination. In fact, European peace was premised on the domination "over hundreds of millions of people in the colonies by the European nations (…) through constant, incessant, interminable wars".[902] From this perspective, World War I was not a competition between two competing visions of civilisation, but the continuation of the *denouement* of two groups of capitalist powers pursuing a policy of "incessant economic rivalry aimed at achieving world supremacy, subjugating the small nations, and making threefold and tenfold profits on banking capital, which has caught the whole world in the net of its influence".[903]

Thus, for Lenin, World War I was a fight between declining capitalist powers (France and Great Britain) and another "even more predatory" group (the Central Powers) who "came to the capitalist banqueting table when all the seats were occupied, but who introduced into the struggle new methods for developing

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[899] ibid 398.
[900] ibid 399.
[901] ibid 400.
[902] ibid 401.
[903] ibid 402.

capitalist production".[904] These two groups, Lenin concludes, were "bound to clash", because of their incompatible policies of world domination, regardless of what concrete excuse they gave at the time for starting the war. This was not, therefore, a battle for civilisation (whether understood as German *Kultur* or British respect for international law). It was a battle for capital and colonies. "The present war", he said, "is a continuation of the policy of conquest, of the shooting down of whole nationalities, of unbelievable atrocities committed by the Germans and the British in Africa, and by the British and the Russians in Persia".[905]

Lenin's challenge therefore suggested the otherwise hidden connection between the Sharp War Paradigm, the laws of war and racist colonial wars. Where the Hague delegates discussed the rules of war in a dichotomy of civilised Europeans versus savage Africans and Asians, Lenin shed light in the fundamental unfairness of the rules which specifically sought to exclude these populations from protection in order to foster capitalist gains. Indeed, he said, "[i]f any savage country dares to disobey our civilised Capital, which sets up splendid banks in the colonies, in Africa and Persia, if any savage nation should disobey our civilised bank, we send troops out who restore culture, order, and civilisation, as Lyakhov did in Persia, and the French 'republican' troops did in Africa, where they exterminated peoples with equal ferocity".[906]

After the success of the October Revolution and the rise of Lenin to power, Communist international lawyers sought to translate his ideas into the language of international law.[907] This was a particularly challenging endeavour, considering the clear bourgeois origins of the discipline and the fact that the new USSR largely rejected the laws of war because it saw them as bourgeois. It refused to sign the 1929 Geneva Convention on the grounds that the laws of war were capitalist and bourgeois and had a contentious relationship with the International Committee of the Red Cross.[908] One such translation came at the hands of Evgeny Pashukanis, member of the Communist Academy, in Moscow. In a 1925

[904] ibid 403.
[905] ibid 406.
[906] ibid 412.
[907] James L Hildebrand, 'Soviet International Law: An Exemplar for Optimal Decision Theory Analysis' (1968) 20 Case Western Reserve Law Review 141.
[908] See: Kimberly A Lowe, 'Humanitarianism and National Sovereignty: Red Cross Intervention on Behalf of Political Prisoners in Soviet Russia, 1921-3' (2014) 49 Journal of Contemporary History 652.

essay, Pashukanis argues against a definition of international law as simply the rules that define the rights and duties of states. For Pashukanis, international law is instead “the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world”.[909] In fact, he argues, this is why “the better part of its norms refer to naval and land warfare”: international law “directly assumes a condition of open and armed conflict”.[910]

The only kind of “community” that international law represents, Pashukanis tells us, is that of the ruling classes. According to Pashukanis, in Feudal times, knights would follow the rules of war only with regards to other noblemen, but never in what he calls “interclass wars”, where they sought the “suppression of burghers and the peasantry”.[911] Now that the bourgeoisie has risen to power in every European state, Pashukanis continues, then the laws of war adapted to protect the interest of this new ruling class – mainly bourgeois property. “Here is the key to the modern law of war”, he concludes.[912]

Pashukanis, like Lenin, lays bare the connection between these laws of war and claims regarding civilisation and civilised standards. “While in feudal Europe the class struggle was reflected in the religious notion of a community of all Christians”, he says, “the capitalist world created its concept of ‘civilization’ for the same purposes”.[913] For Pashukanis, therefore, “[t]he division of states into civilized and ‘semicivilized’, integrated and ‘semiintegrated’ to the international community, explicitly reveals the second peculiarity of modern international law as the class law of the bourgeoisie”.[914]

Revealing the connection between war and colonial oppression (between war and the standard of civilisation) meant, as Lenin concludes, that a Marxist does not belong “to that category of people who are unqualified opponents of all war”.[915] In the process of eliminating class and exploitation, some wars will be necessary and just, particularly (and predictably) the revolutionary and communist kind, while others (i.e. the majority of wars in the world, such as

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[909] Evgeny Pashukanis, ‘International Law’, *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980) 169.
[910] ibid.
[911] ibid 172.
[912] ibid.
[913] ibid.
[914] ibid.
[915] Lenin (n 897) 398.

colonial wars of conquest and inter-state wars pursuing capitalist interests) would be unjust.

This is a radical, fundamental reframing of the concept of European war. In the almost one hundred years since Clausewitz, the Sharp War Paradigm had laboured intensely to keep partisans and revolutionaries away from the structure of the laws of war. The Communist understanding of war, instead, upended the established paradigm to counterargue that it is these partisans and revolutionaries that are the ones in need of protection by the laws of war, because it is their wars that are most likely to be just.

As I will show below, this Communist reframing of the laws of war would be incredibly influential in the design of international humanitarian law, as successor of the laws of war, in the mid-20th century.[916]

3. Latin American Disenchantment

World War I was one of the first Global wars, not just in the sense of the origin of the belligerents, but in the sense that it was the first war to be reported in almost real time by countless reporters and chroniclers in newspapers that were widely read by millions of people around the world. Latin America was not the exception. Reports of the war "overshadowed everything else and filled up the gazettes' columns".[917] This had a profound impact in the way in which Latin American states approached war and the laws of war.

As mentioned in the previous Section, many of Latin America's white *Criollo* elites had embraced the language of the Sharp War and the idea that conforming to the laws of war denoted civilisation as part of their claim to Whiteness and civilised status. At the same time, a nascent group of *Criollo* scholars had begun to reframe the laws of war's connection to the standard of civilisation, arguing instead that waging sharp wars was, in fact, *uncivilised*.

The turn of the century had only exacerbated Latin Americans' perceived civilisational difference with imperialist Europe and US. The first years of the 20th century had been characterised by the rise of *Arielismo*, a movement named in

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[916] See generally: Boyd van Dijk, '"The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37 Law and History Review 209.

[917] Stefan Rinke, *Latin America and the First World War* (Cambridge University Press 2017) 195–196.

honour of Uruguayan author, José Enrique Rodó's essay, *Ariel*, and that posited Latin America's civilisational superiority to the predominantly utilitarian Anglo-Saxon civilisation of the United States.[918] Now, the reports of "industrial killing" coming from the European trenches and consternation with widespread atrocities against civilians fractured Latin American society's belief in Europe as the "heart of civilization".[919] In fact, the war was seen as a "relapse into barbarism" where "Europe had quickly shed its cloak of civilization and now showed its true barbaric face".[920]

In the realm of international law, these ideas were eloquently put into words by Brazil's former delegate at the Hague Conference of 1907, Rui Barbosa. In a speech given at the University of Buenos Aires in 1916, Barbosa described the war as a catastrophe long in the making, long before weapons and bombs left the factories. He argued the war had "accumulated the fluids that would animate it in books, schools, academies, and laboratories of human thought".[921]

For Barbosa, it was evident that the war could trace its origins to the fact that European civilisation had embraced war as a way of life. He cites Bernhardi's ideas of war as arbiter between superior and inferior races as an example of Europe's "cult of war" ("Inferior races!", Barbosa complains, "which ones are those?").[922] He, similarly, complains of those who dismiss benevolence as a principle of war.[923]

Barbosa, a strong believer in arbitration as the ideal method of inter-state dispute resolution, calls Europe's cult of war an "absolute inversion of international law". It is because of this, therefore, that "the principle of necessity in war supersedes all other human and divine laws".[924] And yet, this is nothing but regression. A regression justified in the language of war's "civilising virtues".[925]

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[918] See generally: Bernardo Ricupero, 'Ariel na América: viagens de uma ideia' (2016) 18 Interseções: Revista de Estudos Interdisciplinares 372.
[919] Rinke (n 917) 208.
[920] ibid 215 and 218.
[921] Rui Barbosa, 'Conceptos Modernos del Derecho Internacional', *Obras Completas de Rui Barbosa*, vol XLIII (Ministerio de Educação e Saúde 1951) 48.
[922] ibid 51 and 70.
[923] ibid 51.
[924] ibid 53.
[925] ibid 55.

Instead, Barbosa argues for a defence of the duty of neutrality and calls for states to not simply "shrug" these issues away. In this process, he said, Latin America had to "take the initiative" and "contribute influentially to the constitution of a new system of international life, through the association or approximation of nations, through a regime that substitutes the laws of war for those of justice (…) *si vis pacem, para pacem*".[926]

This optimism about "Latin American civilisation" was a rather common one in the wake of the "catastrophe in Europe". In this regard, "countless observers agreed that the future of civilization now lay in the Americas".[927] Europe had simply "lost its exemplary status".[928]

Disenchantment with Europe left the region with few other options where to look for a sense of "civilised" identity. Thanks to the Monroe Doctrine, proclaimed a century earlier by the United States, incorporating the Western Hemisphere into its "sphere of influence", Latin America had been spared the kind of European scramble experienced by African nations in the late 19th century. Instead, Latin American states had seen increased tensions with US imperial designs for regional supremacy.

In fact, ever since the 1890s, the US had been slowly redefining the Monroe Doctrine, changing it from a call for Hemispheric solidarity between former colonies, to a policy of interventionism in the region's internal affairs.[929] After its victory over Spain in 1898, for instance, the US conditioned its withdrawal from Cuba with the approval of a constitutional amendment whereby "the Government of Cuba consent[ed] that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty".[930] Likewise, in his 1904 State of the Union Address, US President Theodore Roosevelt issued his famous "corollary" to the Monroe Doctrine, clarifying that it had, in fact,

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[926] ibid 89.
[927] Rinke (n 917) 222.
[928] ibid 224.
[929] See, generally: Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford University Press 2017).
[930] Treaty Between the United States and the Republic of Cuba Embodying Provisions Defining Their Future Relations as Contained in the Act of Congress Approved March 2, 1901, signed 22 May 1903 (US-Cuba Treaty of Relations), published in: *Papers Relating to the Foreign Relations of the United States with the Annual Message of the President Transmitted to Congress* (Government Printing Office 1905) 243.

become just another face of the standard of civilisation discourse, to be implemented through war. In Roosevelt's words:

> "Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United Sates to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power".[931]

Thus, when these disenchanted Latin American states travelled to Havana, for the VI Pan American Conference, in 1928, to discuss issues of international security with the United States, the resulting encounter was a tense one. The US and its allies, Cuba and Peru, arrived at the conference seeking to legitimise Monroe-type "civilised" interventionism in the region. The Peruvian draft submitted to the conference stated that "[e]very nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other".[932]

The idea that another state may have a right to interfere in another if it perceived its rights to be at risk was exactly the point of controversy. Given the political and military realities of 1920s Latin America, it was a view that could be used to justify qualified *US* interventionism that rested on the assumption of its higher "civilisational pedigree". As renowned Chilean jurist and long-time US-apologist, Alejandro Álvarez had written in 1909, US hegemony over the Western Hemisphere "was the fruit of the prodigious and rapid development attained by this country, outdistancing the other American republics".[933] It was an idea, Álvarez and his supporters maintained, that should not be seen as offensive to Latin American ears. In fact, the Monroe Doctrine should be seen, he said, as a "welcome innovation as compared with the protectorates exercised by the nations of Europe", since it "does not offend the dignity and national spirit" and

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[931] Theodore Roosevelt, State of the Union Address, 1904, published in: ibid XLI.

[932] United States and others (eds), *Report of the delegates of the United States of America to the Sixth International Conference of American States held at Habana, Cuba, January 16 to February 20, 1928: with appendices.* (1928) 10.

[933] Alejandro Alvarez, 'Latin America and International Law' (1909) 3 American Journal of International Law 269.

will “gradually disappear in proportion as the progress of the new states renders it unnecessary”.[934]

This language may have held some sway among the diplomats of the *Belle Epoque*, but not with the post-World War I anti-imperialists that arrived at Havana in 1928. The Argentinean representative, Honorio Pueyrredón, was quick to object: “This is the time for categorical and precise definitions. State sovereignty consists in the absolute right, the complete interior autonomy and full external independence. This right is guaranteed in strong nations by their strength, and in the weaker ones by its respect by the strong. If that right is not realized and put in practice in an absolute form, there will not be international juridical harmony”.[935]

The anti-interventionist caucus seemed in agreement that the Peruvian proposal risked opening the door to war. As the Representative of El Salvador put it, “let’s assume a State says which of its rights have been violated. Does that not bring forth consideration of possible intervention, by claiming its rights have been even slightly affected?”[936] This was unacceptable. The prohibition of armed intervention was a “conquest of civilization”.[937]

Despite repeated attempts to agree on a definition, no consensus formula was possible. The non-interventionist alternative text read instead that “[n]o State could intervene in the internal affairs of another”, period.[938] Given that agreement seemed impossible, the Salvadorean Representative attempted a last ditch effort: “I believe that we can solve this issue right now by means of a vote against intervention”, he said, “[n]o state has the right to intervene in the internal affairs of another”.[939]

The plenary erupted into disarray. The US Representative pleaded with his Latin American counterparts: “What are we to do when government breaks down and American citizens are in danger of their lives?”, he asked. “Are we to stand by and see them killed because a government in circumstances which it cannot

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[934] ibid 325.
[935] Secretaría de Relaciones Exteriores de México, *La participación de México en la Sexta Conferencia Internacional Americana: informe general de la Delegación de México* (Secretaría de Relaciones Exteriores 1928) 68.
[936] ibid 77.
[937] ibid 68.
[938] Scarfi (n 929) 116.
[939] Secretaría de Relaciones Exteriores de México (n 935) 106.

control and for which it may not be responsible can no longer afford reasonable protection?"[940] the Latin American anti-interventionists at Havana would have certainly answered "yes".

Agreement turned out to be impossible. The 1928 conference did not pass a resolution on non-intervention. Despite this, the Conference "redefined the balance of power and distribution of forces in the Americas".[941] By 1933, the US announced a new policy for Latin America, known as the "good neighbour", where it would refrain from intervening in Latin American regional affairs.

As a sign of its commitment to this new policy, in 1933, during the next Pan American Conference, the US signed the now famous Montevideo Convention on the Rights and Duties of States.[942] While this treaty is frequently celebrated for being the only instrument that effectively defines what a state is, its true merit lies in its re-conceptualisation of the concept of war in the collective Latin American mind. Article 8, for instance, accepts that "[n]o state has the right to intervene in the internal or external affairs of another", period. Article 4, states that "[t]he rights of each [State] do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law". Article 11, perhaps the most radical of all, not only forbids the recognition of territorial acquisitions or special advantages obtained by force, but also declares that "[t]he territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily".

Latin America's disenchantment with European sharp war *and* with US interventionism, both understood as failed or misconceived attributes of "civilisation" and "civilised status" thus made inter-war Latin America into the only region of the world where military occupation was effectively banned by positive rules. In sum, it was a complete and radical departure from the sharp war. Instead of focusing on war's regulation, Latin America sought to end it.

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[940] United States and others (n 932) 13.
[941] Scarfi (n 929) 148.
[942] Montevideo Convention on the Rights and Duties of States, opened for signature 26 December 1933, League of Nations Treaty Series Vol. CLXV, No. 3801-3824 (Montevideo Convention) 19.

4. Pan-African Anti-Colonialism

Unlike Chile or Japan, where the Sharp War Paradigm was appropriated in order to stake a claim to civilisational pedigree through the laws of war, African communities were mostly denied access to the laws of war by means of European colonialism. As seen in Chapter 6, in cases where the historical record has not been lost, like that of Namibia, Black Africans were aware of the connection between the standard of civilisation, colonialism, and the Sharp War Paradigm, and often resisted their imposition.

After World War I, many anti-imperialist African American and Afro-Caribbean voices began to participate in and develop their own views on international law and imperialism. In the United States, in 1915, W.E.B. Du Bois, one of the leading anti-imperialist African American voices of his time, penned an article called *The African Roots of War*.[943] There he "trac[ed] the origins of the World War to the 'desperate flames' that emerged from colonial aggrandizement after the Berlin Conference".[944]

For Du Bois, in order to sustain the wealth of the European bourgeoisie, the capitalist system in place demanded increased exploitation, which meant the world "began to invest in color prejudice" as a way to secure increased goods and riches.[945] "Never before was the average citizen of England, France, and Germany so rich", he says, and these riches "come primarily from the darker nations of the world – Asia and Africa, South and Central America, the West Indies and the islands of the South Seas".[946] In order to justify this inequitable method of wealth transfer, European nations turned "colour" into a "synonymous with inferiority" and "Africa" into "another name for bestiality and barbarism".[947] This is, Du Bois posits, the reason for the "astonishing doctrine of the inferiority of most men to the few".[948]

Du Bois thus joined the increasing list of 20th century thinkers to expose the structural scheme of European imperialism as a system that tied war, both

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[943] WEB Du Bois, 'The African Roots of War' [1915] *The Atlantic* <https://www.theatlantic.com/magazine/archive/1915/05/the-african-roots-of-war/528897/> accessed 16 November 2021.
[944] Adom Getachew, *Worldmaking after Empire* (Princeton University Press 2019) 38.
[945] Du Bois (n 943).
[946] ibid.
[947] ibid.
[948] ibid.

colonial and international, to claims and definitions about civilisation. In fact, Du Bois noted, this was so even for nations that had “apparently escaped the cordon of this color bar”, like Japan.[949] Du Bois predicted a future German or US confrontation with Japan, if the latter eventually refused (as it seemed likely to be the case) “a world governed mainly by white men”.[950]

Given this background, Du Bois said, World War I should be seen as “the result of jealousies engendered by the recent rise of armed national associations of labor and capital whose aim is the exploitation of the wealth of the world mainly outside the European circle of nations”.[951] In such a world, if the tragedy of war was to be avoided, then the “democratic ideal” should be extended not just to white nations and white classes, but to “yellow, brown, and black peoples”.[952] As Du Bois contends: “[w]e shall not drive war from this world until we treat them as free and equal citizens in a world-democracy of all races and nations”.

There is here, thus, a call for the self-determination of peoples who had been racialised as inferior/as other. Africa, Du Bois said, needed to get back its land and home rule from the hands of Europeans so that they too could become “civilized nations”.[953] “The domination of one people by another without the others consent, be the subject people black or white, must stop”, he concludes.[954]

Du Bois’ ideas resonated strongly a decade after Hendrik Witbooi’s death. “Critics of empire and pacifists in Europe and across the colonized world echoed Du Bois’s analysis of democratic empires and challenged the claims of Europe’s civilizational superiority”, sparking anticolonial protests in Egypt, India, China, and Korea.[955]

Just like Latin America’s White elites became disenchanted with the idea of Europe’s civilisational leadership, World War I also “generated profound challenges to the ideals and assumptions upon which the Europeans had for over a century based their (…) civilizing mission” and “demonstrated that

[949] ibid.
[950] ibid.
[951] ibid.
[952] ibid.
[953] ibid.
[954] ibid.
[955] Getachew (n 944) 39.

Europeans were at least as susceptible to instinctual, irrational responses and primeval drives as the people they colonized".[956] And while the Western European empires survived past 1919, the legitimacy of their claims to a higher form of civilisation was left in "shambles".[957]

Thus, at the end of the war, the main rallying cry for communities who had been racialised as inferior in Africa and Asia was one of self-determination – a claim that the new rising power, the United States, sought to control. Adom Getachew has convincingly argued that the Wilsonian ideal of self-determination that characterised the League of Nations years was rather the appropriation of this new political reality in order to rob it of its radical meaning.[958] Wilson, she argues, rather "recast self-determination in the service of empire" by "repurposing" it in ways that "supported unequal integration and preserved a structure of racial hierarchy within the league".[959] Thus, for example, Indian anti-colonialist, Aurobindo Ghose, "mocked Woodrow Wilson's version of a new world order with its betrayal of wartime promises of self-determination for the colonized peoples".[960]

As Getachew shows, this betrayal was particularly evident in the League's treatment of Ethiopia and Liberia – its only Black African member states. By 1922, the League approved a resolution on the "recrudescence of slavery in Africa"[961], targeting mostly the slave practices in force in both of these states. As Getachew maintains, "[i]n locating their abolitionist efforts in Liberia and Ethiopia, league officials and member states deflected from the broader question of labor exploitation in colonized territories".[962] Slavery was, instead, "cast as an atavistic holdover in backward societies" and thus, the League itself, as an "agent of emancipation".[963] Thus, "Ethiopia and Liberia were subject to an international oversight that was legitimized through their own consent".[964] Through these mechanisms, the very act of membership in the League – the club of so-called

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[956] Michael Adas, 'Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology' (2004) 15 Journal of World History 31, 41.
[957] ibid 42.
[958] Getachew (n 944) 39.
[959] ibid 40.
[960] Adas (n 956) 54.
[961] Getachew (n 944) 53.
[962] ibid.
[963] ibid.
[964] ibid 54.

"civilized" states – was used as a means to perpetuate colonial domination and to truncate the emergence of Black sovereignty.[965]

In fact, when Ethiopia called for League assistance to stave off an Italian "war of extermination"[966] in early September 1935, the League's response was to appoint a committee composed of representatives from Spain, the United Kingdom, France, Poland and Turkey, known as the "Committee of Five", to make "suggestions" to both parties.[967] The Committee received a report from fascist Italy that accused Ethiopia of not controlling its own borders; not fulfilling its League obligations to abolish slavery and prevent arms trafficking; and, in essence, not being civilised enough to fulfil its bilateral obligations with Italy.[968]

Ultimately, the Committee of Five concluded that Ethiopia needed Western guidance to overcome its dispute with Italy.[969] The Committee's Report noted that it was the "duty" of the League "to offer to extend to the Ethiopian Government collaboration and assistance on a collective international basis".[970] This so-called assistance would enable Ethiopia to "undertake wide measures of constructive action, not only to improve the lot of the Ethiopian people and to develop the natural resources of the country, but also to enable the Empire to live in harmony with its neighbours".[971] Thus, a mission of foreign specialists would travel to Ethiopia to "organize the police and gendarmerie, to participate in measures of economic development, (…) to draw up the Budget, supervise State expenditure and the collection of taxes, and to reorganize and preside over the law courts, the education system and other public services".[972] In essence, for the League, the solution to fascist Italian aggressiveness was subjecting Ethiopia to White tutelage.

For C.L.R. James, a Trinidadian Pan Africanist, this was an unacceptable bargain that once again exposed the fundamental unfairness and one-sidedness of the system of international law. In an essay written just ten days after the

[965] ibid.
[966] 'Report of the Council of the League of Nations' (1936) 30 The American Journal of International Law 1, 13.
[967] ibid.
[968] ibid 23.
[969] H L., 'Italy, Abyssinia, and the League Committee's Report' (1935) 12 Bulletin of International News 3, 3.
[970] ibid.
[971] ibid 3–4.
[972] ibid 4.

publication of the Committee's Report, as Italian planes already bombarded Ethiopian cities, he called the Committee's plan the "greatest swindle in all the living history of imperialism".[973] For James, this was just another moment in the long history of abuse brought about by the standard of civilisation. "First", he said, "the imperialists called the exploited areas colonies; next, protectorates; then, mandates. Now it is 'helping a sister nation'".[974] To him, the Italo-Ethiopian crisis was not a problem that could be solved within the system, but only by fighting against it – "Let us fight against not only Italian imperialism, but the other robbers and oppressors, French and British imperialism", he concludes.[975]

Thus, by the time war erupted between both nations, James, predictably, thought League sanctions were an insufficient remedy. The League's mild response to Italian actions was a "lesson" to both Africans and those of African-heritage on the "incredible savagery and duplicity of European imperialism in its quest for markets and raw materials".[976] In fact, Italy relied on the pretext of civilisation in its September memorandum to the Committee of Five to argue that its war effort in Ethiopia was not one against a fellow "civilised" state, but instead a colonial war against "savages", which meant Italy felt justified to exempt its conduct of hostilities from the limitations of "civilised" war. Membership of the League therefore meant very little for the protection of Ethiopian lives, proving James' and Du Bois' contention that race, not law, was still the dominating factor in the international system.[977] This was a lesson that Pan African anti-colonialists would not soon forget.

5. The Shift to Civilian Protection

For decades, the effort to codify European sharp war principles into binding treaties had been dominated by the so-called Law of The Hague – the rules on the conduct of hostilities, as negotiated by states – not the Law of Geneva – the rules on humanitarian treatment of combatants, led by the Red Cross. In fact, by 1914, the original Geneva Convention of 1864, and its 1906 "update", remained the sole examples of Geneva Law applicable to warfare. The debates

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[973] CLR James, 'Is This Worth a War? The League's Scheme to Rob Abyssinia of Its Independence', *At the Rendezvous of Victory: Selected Writings* (Allison & Busby 1984) 13.
[974] ibid 14.
[975] ibid 16.
[976] Getachew (n 944) 69.
[977] ibid 66.

surrounding the aftermath of World War I changed this dynamic fundamentally and irreversibly.

In 1921, the ICRC held its Tenth International Conference unanimously declaring that "all victims of conflict had the right to the kind of humanitarian aid and humane treatment guaranteed to prisoners of war".[978] In fact, in a clear break with the debates at Brussels and The Hague, "[i]t mattered not (…) whether they were deemed soldiers or revolutionary criminals, for the man who suffers had an indisputable right (…) to pity from another man".[979] The Tenth Conference set up a special committee to prepare a new prisoner's code. The Committee, however, also "endorsed a separate and fairly broad Civilian Convention that built upon states' acceptance during the war of civilian protection-related principles".[980] This openness for regulation of civilian protection was simply unprecedented.

The efforts to expand international protection for civilians moved slowly but steadily. By 1929, during the Geneva Convention of that year, gathered to discuss issues of prisoners of war, the ICRC suggested to "extend the treaty's scope for civilian internees".[981] While the proposal was rejected, "the drafters ultimately gave the Swiss a mandate to prepare a set of drafts for an alternative convention covering enemy civilians alone".[982]

This draft civilian convention would not be ready until 1934, during the Fifteenth ICRC Conference in Tokyo. It received the name of Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent, but is more widely known simply as the "Tokyo Draft".[983]

The Tokyo Draft was hardly comprehensive, "protecting only *some* enemy civilians in *some* armed conflicts against *some* counterinsurgency measures".[984] It "largely focused on the protection of enemy aliens in belligerent territory to complement the existing Hague Regulations (…) leaving many other important

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[978] Lowe (n 908) 659.
[979] ibid. Internal quotations omitted
[980] van Dijk (n 892) 561.
[981] ibid 563.
[982] ibid.
[983] Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent. Tokyo, 1934, available at: https://ihl-databases.icrc.org/ihl/INTRO/320?OpenDocument.
[984] van Dijk (n 892) 563.

categories of civilians excluded".[985] It also faced important hurdles in implementation, considering the Spanish Civil War and the Second Sino-Japanese War broke out not soon after. In the end, these practical difficulties, added to scepticism from the Great Powers, left the Tokyo Draft in limbo, never to be signed or ratified. At the same time, the influence of the Draft planted the seeds for a re-evaluation of the law of war's priorities.

In fact, in parallel to the Tokyo Draft, a group of French humanitarians produced a second instrument, known as the Monaco Draft. Boyd van Dijk describes this draft as an "often overlooked but truly extraordinary human rights text of the laws of war" that constituted "an early example of a later shift to fully prioritizing individual rights of civilians as part of a broader human rights thinking".[986] The draft was "more comprehensive than the 1949 Geneva Conventions would ever be" and protected the physical integrity and moral dignity of human persons, as well as "the civilian's freedom of worship, rights of property, 'droit de la vie', and rights in detention".[987] Like the Tokyo Draft, however, the Monaco Draft would never take binding form, fostering little interest from not just states, but also the ICRC itself.[988]

Just like humanitarianism was shifting to incorporate civilian protection, pacifism had also become a considerable political force in Western circles. Since the 1889 publication of Bertha von Suttner's *Lay Down Your Arms,* pacifism began to shift from a "crackpot and marginal call for an end to endless war into a mainstream cause".[989] These efforts eventually led to the 1928 Kellogg-Briand Pact, that condemned recourse to war for the solution of international controversies. Yet despite lofty intentions, unlike Latin America's disenchantment, European pacifism failed to secure lasting state support. In the 1890s, while Suttner's book was being bought off of every bookstore in Europe, European states where in the process of colonising all of Africa. And of course,

[985] ibid.
[986] ibid 564.
[987] ibid.
[988] ibid.
[989] Moyn (n 8) 52.

the 1928 treaty was followed by the Japanese invasion of Manchuria, the Italian invasion of Abyssinia, and World War II.[990]

While ultimately unsuccessful, these inter-war initiatives show a slow shift away from the fundamental Sharp War ideas that war was inevitable and that civilians were simple bystanders of war, that should remain hidden away in their houses, until an armed force had need to use (or worse, kill) them, in the pursuance of military advantage. After World War II, this process would eventually lead to a re-evaluation of the laws of war's priorities; a re-evaluation that would be spearheaded by key players within the post-World-War-II ICRC Legal Division, like the now famous Jean Pictet.

6. All Roads Lead to Geneva

The conventional history of international humanitarian law I described in the introduction tells the story of the 1949 Geneva Conventions solely as a reaction to the horrific events of World War II.[991] While historical research places increased importance on the cultural, legal, and political changes that emerged as a consequence of World War I, in international legal accounts, any potential impact of World War I and its aftermath in the drafting of the Geneva Conventions is usually ignored or downplayed. For Christopher Greenwood, for instance, "[t]he most important development of World War I, in so far as it affected humanitarian law, was the evolution of aerial warfare and other forms of long range bombardment".[992] I argue here that this is an incomplete assessment. In fact, I argue, the events of World War I (including, but certainly not limited to its wartime atrocities) were the initial catalyst for the various social and cultural processes of re-imagination and re-configuration of the world's approach to war and the laws that regulate it.

As Giovanni Mantilla argues, for instance, the advances brought about by the Geneva Conventions of 1949 were achieved *despite* European and American attitudes, not because of them.[993] Take, for example, Common Article 3 of the

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[990] But, compare with the argument in Scott J Shapiro and Oona Hathaway, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

[991] See, e.g. Meron (n 5) 94.

[992] Christopher Greenwood, 'Historical Development and Legal Basis', *The Handbook of Internatioal Humanitarian Law* (Oxford University Press 2008) 24.

[993] See, generally: Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press 2020).

Geneva Conventions – frequently described as a game-changer in the history of international humanitarian law. Through this article, for the first time in history, the laws of war would automatically apply to armed violence within a state's territory, in internal or civil warfare (i.e. between a state and rebel *civilians*). Such a concept would have been anathema to the negotiators of Brussels 1874 or The Hague 1899. One of the sharp war's main tenets was its stern opposition to partisan and guerrilla warfare. How could it possibly be that a mere 50 years later, the new Law of Geneva would showcase such a fundamental assault on the prevailing paradigm?

After World War II, during the 1946 Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross in Geneva, the ICRC – picking up where the Tokyo Draft left it – proposed, for the first time, the issue of regulating civil war.[994] Such a proposal would have simply been impossible without the groundwork carried out during the inter-war period. By 1948, during the Seventeenth International Conference of the Red Cross, which prepared the working text that would be the starting point for negotiations in Geneva – the famous Stockholm Draft – the ICRC had managed to extend the application of the laws of war to internal conflicts, "especially cases of civil war, colonial conflicts, or wars of religion".[995]

From here on, US, French and British opposition to the regulation of internal armed conflict only began to grow. The US and France supported removing references to colonial and civil wars, nominally under the rationale that less specificity would guarantee broader application of the rules, to all types of internal conflict. And yet, as Burra notes, the reality of the negotiations was that "the UK, along with a few other Western states, was not comfortable with the idea of civil wars being covered by the conventions" for reasons related to their own anxieties regarding the potential collapse of colonial empires.[996]

Indeed, while there had been some modicum of change among the attitudes of colonial empires towards partisan warfare, particularly France, the overarching fear continued to be the same as in Brussels: that "any loosening of the

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[994] ibid 65.

[995] ibid 75. See also: Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 25–61.

[996] Srinivas Burra, 'Four Geneva Conventions of 1949: A Third World View', *Revisiting the Geneva Conventions: 1949-2019* (Koninklijke Brill NV 2019) 203–204.

standards of organization, appearance, or conduct by which combatants were identified would unfairly benefit irregulars, jeopardize the safety of both regular combatants and civilians, and degrade the standards of conduct because it would make it yet more difficult to distinguish between combatants and civilians".[997] Likewise, the idea that civilians were deserving of protection was also suspect. "whereas one could reasonably assume that the wounded and sick and prisoners of war were identifiable through their military regalia or presence in specific formations of war, civilians were but an unorganized mass scattered over the whole of countries concerned".[998] In other words, the civilian was never really "hors de combat", they were a constant potential threat, which raised the question of why they should be protected at all.[999]

Thus, in preparation for the Geneva Conference, British government officials "fiercely rejected any possibility of applying the protections of the Civilians Convention to internal conflicts", noting that the issue was one "bristling with difficulties".[1000] British representatives "worried that the convention might protect and even give special treatment to civilian population supportive of a rebel group".[1001] For British diplomats the regulation of internal armed conflict was "at best a step in the dark" and sought to bury the clause entirely.[1002] Other powers, like the United States and France, shared similar reservations.[1003] Thus, in Geneva, the French representative famously stated:

> "[t]he Conference at Stockholm had been mainly concerned with the protection of the rights of the individual; but it was also necessary not to lose sight of the rights of the States. It [is] impossible to carry the protection of individuals to the point of sacrificing the rights of States".[1004]

And yet, despite their former glories and their condition as victors of the War, the British, French and Americans were simply unable to control the winds of change. Traditionally, any humanitarian proposal for the protection of civilians – like the petition from the citizens of Antwerp in 1874 – fell on deaf ears. The

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[997] Kinsella (n 8) 114.
[998] ibid 115.
[999] ibid.
[1000] Mantilla (n 993) 78.
[1001] ibid.
[1002] ibid.
[1003] Cullen (n 995) 29.
[1004] *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II-A (Federal Political Department - Berne 1949) 10.

hegemonic imperial powers of France, Germany, UK, and now also the US, possessed enough diplomatic and political power to stop such reforms in their tracks. Yet the changes discussed above, arising out of the two World Wars and their outcomes, had fundamentally changed the rules of the game.

Unlike what happened at Brussels and The Hague, for instance, the ICRC's paradigm-shifting humanitarian proposal would receive exactly the push it needed, at the very last second: two weeks before the start of the conference, the Soviet Union announced it would be sending a delegation.[1005] And to the Europeans' surprise, "the Soviets revealed to behave in exactly the opposite way most expected them to: instead of sabotaging the conference, they appeared thoughtful, well prepared, and more rhetorically humanitarian than any Western liberal state present".[1006] Indeed, the delegation had been instructed to "stick firmly" to the Stockholm Draft, radically changing the outcome of the conference.[1007]

Following the argument of the *Petit Etats* 75 years before, the Soviets wanted "to soften the law's strict conditions for partisans", arguing that "wartime summary execution of Soviet guerrillas had been a crime, instead of a lawful penalty for committing unlawful combatancy".[1008] Going beyond the *Petit Etats* positions, however, the Soviets also sought increased protection to guerrillas and irregulars who fought what they saw as "just wars". This contained an echo of Lenin's views that had argued in favour of revolutionary fighters acting in a just cause discussed earlier.[1009] This was an unprecedented step. In the entire history of the laws of war, no state had ever showed such an open degree of support of militia and insurgent groups. And, perhaps more importantly, no state before the USSR had ever had the sufficient diplomatic power to sway discussions in favour of insurgents, guerrilla groups and partisans. As General Sklyarov, from the Soviet delegation, noted, when discussing the British position:

> "[T]he United Kingdom proposal was restrictive and diminished the scope of the protection which the Convention afforded to irregular military organizations. (…) [M]embers of irregular military units, who did not belong to the regular armed forces but observed the said

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[1005] Mantilla (n 993) 82.
[1006] ibid.
[1007] van Dijk (n 916) 223.
[1008] ibid 225.
[1009] ibid.

> conditions, must be treated in the same way as the regular forces. [The UK's position] left it to the Occupying Power to decide quite arbitrarily whether the laws and customs of war were, or were not, to apply to irregular troops".[1010]

The Soviet delegation also attacked some basic assumptions of the Sharp War Paradigm. According to van Dijk, at Geneva, it created "an early version of a postcolonial forum in which Western imperial powers and their double standards could be criticized".[1011] Of course, this was mostly a self-serving move designed to assist Communist-inspired revolutions all over the world, while at the same time remaining silent on the USSR's own brutal suppression of anti-Soviet insurgencies in Eastern Europe.[1012] But regardless of the sincerity of its intent, the result was the introduction of a "far-reaching" Soviet amendment seeking that "virtually all the Conventions' provisions would have to be applied to a range of internal armed conflicts".[1013]

As Mantilla's excellent analysis of confidential correspondence between the British and French delegations shows, their reaction to the Soviet position at Geneva was one of full alarm. In one dispatch, a British delegate wrote that "[t]he whole of the fire of this subject is concentrated on our attitude to civilians and the Soviet Union is allying itself very strongly with the humanitarian school in pressing for the widest possible application of the Conventions to civil and colonial wars".[1014]

The Soviets were very successful in shaming Western delegations into modifying their positions in order to avoid finding themselves "in a minority of one".[1015] As one delegate put it, "nearly every nation of any importance, (including those who are in, or have recently experienced civil war,) have gone to the rostrum to adhere to this principle, the United Kingdom *being the solitary voice* raised in favour of not applying the Convention to civil war".[1016]

As a result, the British were "socially pressured into recalibrating their tactics with a view to the humanitarian pressures in the room".[1017] The British strategy,

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[1010] *Final Record of the Diplomatic Conference of Geneva of 1949* (n 1004) 242..
[1011] van Dijk (n 916) 228.
[1012] ibid 229.
[1013] ibid.
[1014] Mantilla (n 993) 85.
[1015] ibid.
[1016] ibid 85–86.
[1017] ibid 88.

therefore, pivoted into abandoning “any formula specifically leaving the decision in this matter to the Sovereign Power, and to seek rather some formula which, while not dotting the i’s, would in fact leave the last word to the Sovereign Power”.[1018] The result was the Common Article 3 that exists today, which is frequently described as a “[Geneva] Convention in miniature” and a “minimum yardstick” of international humanitarian law on account of its brevity and self-contained nature.[1019] This “guaranteed the application of some (selected) humanitarian principles that were not overtly threatening to an undefined class of internal conflicts (‘armed conflicts not of an international character’) without explicitly calling for conditional reciprocity but with the implicit understanding that lower-intensity rebellions were excluded”.[1020]

In the end, as van Dijk notes:

> “Through ‘forum isolation,’ the Soviets placed severe pressure on major Western powers to endorse—with reluctance— previously unacceptable plans, from outlawing reprisals, regulating internal wars, to stigmatizing ‘mental torture’ as a response to private United Kingdom discussions in favor of legalizing it”.[1021]

7. The Global South Rises

At the time of the Geneva Conference, most of what we now call the “Global South” was under colonial rule, and thus excluded from participation in the negotiations. While the Latin American states of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Peru, Uruguay, and Venezuela did constitute a sizeable block, their participation was not very significant. At the time, Latin American priorities still lay more with outlawing or restricting the use of war rather than with regulating warfare practices, as evidenced by their more intense participation in the 1945 San Francisco Conference[1022] and the 1947 Rio Conference.[1023]

[1018] ibid.

[1019] International Committee of the Red Cross, *Commentary on the Third Geneva Convention* (ICRC 2021) para 392.

[1020] Mantilla (n 993) 88.

[1021] van Dijk (n 916) 231.

[1022] See, e.g.: Adil Ahmad Haque, ‘“Clearly of Latin American Origin”: Armed Attack by Non-State Actors and the UN Charter’ (*Just Security*, 5 November 2019) <https://www.justsecurity.org/66956/clearly-of-latin-american-origin-armed-attack-by-non-state-actors-and-the-un-charter/> accessed 19 November 2021.

[1023] See, e.g.: Alonso Gurmendi Dunkelberg, ‘The Chapultepechian De-Grotianization of Jus Ad Bellum’ (*Opinio Juris*, 8 November 2019) <http://opiniojuris.org/2019/11/08/the-chapultepechian-de-grotianization-of-jus-ad-bellum/> accessed 19 November 2021.

Moreover, as Burra notes, some Third World nations, "having witnessed the decolonization process" rather rejected the idea of regulating internal conflict.[1024] According to the delegate of Burma, for instance: "We smaller nations, naturally feel much enthusiasm for Colonial wars, (…) but if you will refer to the number of conquered countries which have been given their independence, there is every hope (…) that in this highly enlightened age the remaining conquered countries of the world will also receive their independence without the loss of a single drop".[1025] Therefore, "the only help that the Article will give, if you adopt it, will be to those who desire loot, pillage, political power by undemocratic means, or those foreign ideologies seeking their own advancement by inciting the population of another country".[1026]

Despite this, the 1940s were a time when the ideas on African and Asian de-colonization, that had fermented in the regional imagination since the end of World War I, began to take practical form. In September, 1945, for instance, the Vietnamese Declaration of Independence, delivered by Ho Chi Minh, who had been a labourer in France during the First World War, hinged on the idea of French betrayal of the very essence of France's claim to European civilisation: "for more than eighty years", he said, "the French imperialists, abusing the standard of Liberty, Equality, and Fraternity, have violated our Fatherland and oppressed our fellow-citizens. They have acted contrary to the ideals of humanity and justice".[1027] Within a year of his proclamation, in December 1946, his nationalist Viet Minh forces were already at war with France, seeking full Vietnamese independence.

Similarly, in May, 1945, large demonstrations celebrating the end of the war in Europe, but also calling for a "free and independent Algeria", were violently repressed by French security forces, leading to a "spontaneous peasant insurrection".[1028] According to some estimates, between 6 and 8 thousand Algerians were killed as a result, including through use of "artillery, aerial

[1024] Burra (n 996) 204.
[1025] *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II-B (Federal Political Department - Berne 1949) 329.
[1026] ibid.
[1027] Ho Chi Minh, 'Declaration of Independence of the Democratic Republic of Vietnam', *Selected Works*, vol III (Foreign Languages Publishing House 1961) 17.
[1028] James McDougall (ed), *A History of Algeria* (Cambridge University Press 2017) 179–180.

bombing and strafing of villages, and naval bombardment".[1029] After 9 years of tensions and protests, the Algerian War of Independence finally broke out in 1954.

These were colonial wars of the most brutal kind. War in Vietnam broke out over a customs incident were French officers were specifically instructed to "give the Vietnamese '*une dure leçon*'" and bombard the town of Haiphong.[1030] In Algeria, "[t]he French also approached the war (…) as unbounded, one in which the demarcation of friend or foe no longer corresponded to set battles or clearly identified fronts".[1031] But unlike the colonial small wars of the past, the new national liberation movements had ideological cohesiveness and a much more active participation in world affairs. The Algerian National Liberation Front (FNL, in its French acronym), for instance, "decreed at various points in the conflict that civilians – by whom they meant women, children, and old people – were not to be killed, thus attempting in form (if not in function) to conform to the regulations they took to describe civilized warfare".[1032] It also "fought back (…) through a sophisticated political strategy" that sought to "internationalize all dimensions of its challenge to the French", establishing offices in New York, and "meticulously outlin[ing] its position regarding international law, specifically the laws of war".[1033] In fact, by 1960, the Algerian Provisional Government (a creation of the FLN) formally acceded to the 1949 Geneva Conventions, openly challenging France's contention that the situation was not a Common Article 3 conflict.[1034] The movement, in fact garnered some support within French civil society itself. Through these concerted strategic moves, "it became almost impossible for France to maintain its claim to be the foremost representative of the Rights of Man, engaged in nothing more than a 'civilizing mission' in Algeria".[1035]

The discussions and controversies arising from these wars of decolonisation between increasingly illegitimate European empires and increasingly legitimate

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[1029] ibid 180.
[1030] Stein Tønnesson, 'The Longest Wars: Indochina 1945-75' (1985) 22 Journal of Peace Research 9, 14.
[1031] Kinsella (n 8) 128.
[1032] ibid 129.
[1033] ibid.
[1034] ibid 130.
[1035] ibid 131.

national liberation movements ultimately paved the road for the ultimate demise of the Sharp War. Rebels, partisans and guerrilla fighters were no longer tainting an otherwise civilised engagement with their barbarous methods – they were instead the new torchbearers of a new understanding of war and civilisation.

By the 1970s, during the next process of reform at Geneva, “Western states opposing the legal legitimation of national liberation war were in the voting minority. They tried and failed to persuade the opposing Third World-led supermajority which held self-determination and the fight against racism and occupation as legitimate trump cards”.[1036] The resulting Additional Protocols to the Geneva Conventions of 1977 were unlike anything the laws of war had ever seen before, formally recognising national liberation movements as belligerent parties, able to benefit from the protections of the laws of war – Lambermont and Beernaert’s dream, realised a century after the Brussels Conference.

These fundamental changes to the laws of war – changes that effectively mutated it into an (at least nominally) humanitarian law, concerned with the wellbeing of civilians and peoples fighting oppression – would have been simply impossible without the prior societal and cultural changes brought about by the two world wars and the demise of “civilisation” as the ruling category in war and international law.

8. The End of the Sharp War

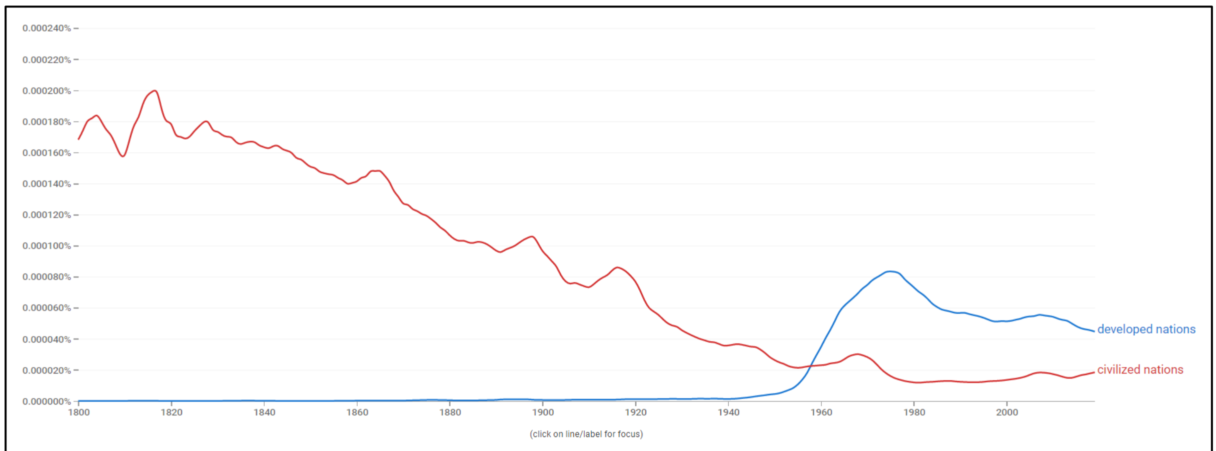
As I have shown throughout this chapter, the events of the two world wars triggered a re-configuration in the way the world conceived war, the laws of war, and the very idea of civilisation. These events and re-imaginations forced the prevailing sharp war narrative to its breaking point and delegitimised the idea that unlimited war was compatible with a modern concept of “civilisation”. In essence, these world-wide processes of reconfiguration that started with the reaction to the industrialised killing of World War I were building blocks with which a new paradigm was constructed, one that moved beyond the tenets and rules of the sharp war and thus, after the horrors of World War II, facilitated the shifting from the language of the “laws of war” to one centred in the idea of an “international humanitarian law”.

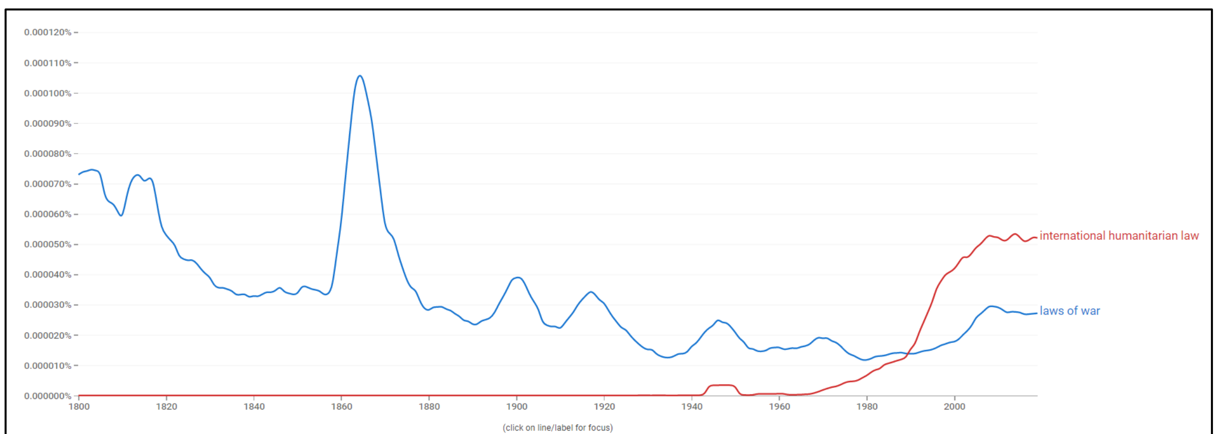
[1036] Mantilla (n 993) 132.

It is thus important to move beyond a simplistic conception of the Geneva Conventions of 1949 as the "last nails in the coffin of the doctrine of *Kriegsraison*"[1037] – the end of a Germanic deviation from otherwise humanitarian Western laws of war. *Kriegsraison*, instead, is but one aspect of a broader cultural and legal paradigm that dominated Western (and Westernised) military thought in almost every corner of the world. Thus, rather than a before-the-Geneva-Conventions and after-the-Geneva-Conventions conception of the history of international humanitarian law, where 1949 is conceived as a clear-cut divide, I argue in favour of a history that sees the period between 1914 and 1977, as a wider, gradual moment of paradigm shift, not that different from the way in which the Sharp War Paradigm emerged in the years between the Peninsular War (and Clausewitz's appreciation of it) and the Lieber Code. A period of fluxing discontinuity, rather than a specific moment in time.

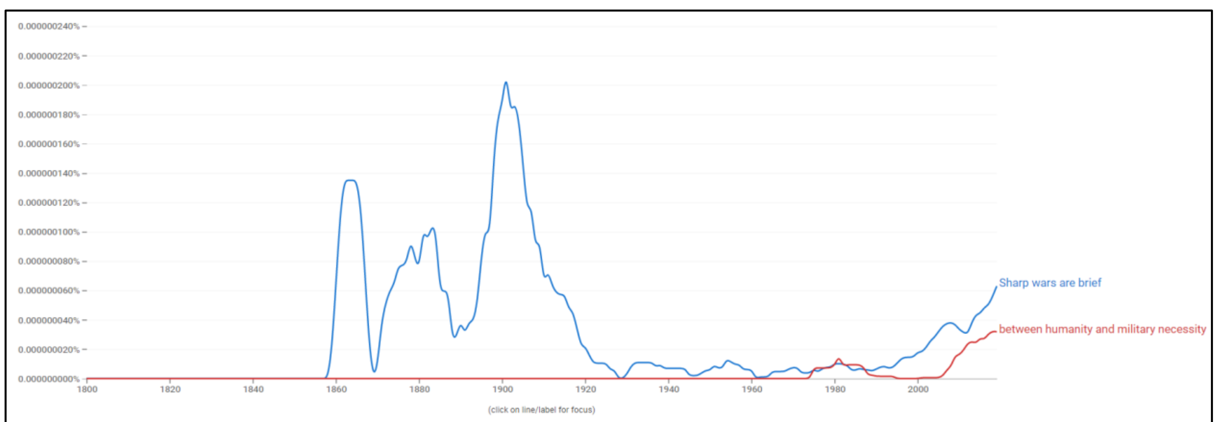
The transition from the laws of war into humanitarian international law was thus a process of paradigm shift. This process is evidenced by the modern-day changes in language that better reflect the modern zeitgeist and the end of the Sharp War Paradigm. As the following Google Ngrams show, there is a clear change in the way that the English-speaking world talks about war, abandoning sharp and civilised war language, in favour of other more familiar terms in today's international law literature. Thus, at around the time of the Geneva Conventions, there is an uptake in the recurrence of the phrase "developed nations" that increasingly replaces that of "civilised nations" in the modern jargon. Something similarly has happened with the replacement of the term "laws of war" for that of "international humanitarian law".

[1037] Horton (n 29) 589.





Use of the phrase “sharp wars are brief”, in fact, saw significant decline *after* World War I. Today, international humanitarian law is frequently conceived as a “carefully thought out balance between the principles of military necessity and humanity” and this idea has replaced the notion that sharp wars are brief.[1038] Many modern-day mentions of the term “sharp war” are often reserved for historical sections of textbooks, rather than being employed as a justification of why today’s wars should be sharp.



[1038] Schmitt (n 406) 92.

This reformulation of the law as “balance” can be traced back to a 1955 lecture by then-Harvard Professor and former US Army Colonel, Richard Baxter. Baxter started his presentation by repeating the predominant paradigm dictum that “sharp wars are brief”. “I ventured to suggest”, he went on, “that this express statement (…) continues to be one of the implied assumptions of the modern law of war”.[1039] And yet, he immediately went on, “[t]he law of war is itself a compromise between unbridled license on the one hand and, on the other, the absolute demands of humanity, which, if carried to a logical extreme, would proscribe war altogether”.[1040] These two sentences are, of course, contradictory – if wars must still be fought as sharply as possible, then no compromise with humanity would be possible. This kind of reasoning shows the paradox in which sharp war proponents found themselves after the Geneva Conventions and the need for a new rationale for the laws of war.

The sharp war doctrine was therefore unable to resist an all-out assault by those who wanted to construct new structures for international law to be based upon – whether as a result of humanitarian sensibilities, like in the case of the ICRC; ideological and geopolitical concerns, as in the case of the USSR and Latin America; or a desire to replace its existing racist and exclusionary colonial blueprints, as in the case of the Pan-African World. The laws of war, as the language in which the old structure was premised, thus became the vehicle through which the new stakeholders in the Global South, the ICRC and the Communist world, pursued their agendas of change, and facilitated the emergence of a new paradigm through which to understand war and the laws of war.

[1039] Richard Baxter, ‘The Geneva Conventions of 1949’ (2018) 9 Naval War College Review 59. It is true that the St. Petersburg Declaration of 1868, banning explosive bullets, had mentioned, in its preamble, that the signatories had “fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity”, but, as seen in previous chapters, these mentions of humanity were not prescriptive. In fact, even this expression only started to gain popularity in the 20th century, particularly during World War I.

[1040] ibid 59.

Chapter Eight
What It All Means

1. Revisiting the Conventional History of the Laws of War

This Chapter brings the thesis' argument to a close. Building upon the findings of previous chapters, it will offer a vision for a modern-day analysis of the history of international humanitarian law. The Chapter starts by revisiting what I have deemed the "conventional" history of how the laws of war became international humanitarian law. It will then explore how to use the analysis of previous chapters in order to achieve a better understanding of these historical processes, understood not as a long genealogy of humanisation but as a shift in paradigms of war. In so doing, the Chapter will explore the possibilities for approaching, interpreting and contextualising international humanitarian law today, through both law and history.

Chapter 1 set out the historiography of the laws of war in the 19th century, both from the point of view of a conventional history of the laws of war and its postcolonial critique. In this conventional history, the laws of war are the result of a linear and standardised process of evolution that starts with the Lieber Code in 1863. From then, this history becomes a tale of how Great White Men inspired each other to produce ever more perfect iterations of their predecessors' work. Thus, Lieber's Code inspired the Brussels Declaration, which inspired the Hague Conventions which inspired the Geneva Conventions. There also is a sense of synergy, rather than competition, between the Hague and Geneva traditions, with historical accounts frequently juxtaposing both as different strands of a single project – one focused on prisoners of war, the other on the means and methods of war. In this history, German *Kriegsraison* is a deviation from an otherwise more advanced and humanitarian Western approach to war that encompasses both Geneva and The Hague, that ultimately spread to every corner of the world, because of its superior and universalizable character. My analysis of the linguistic context of the laws of war language between 1863 and 1899 has shown that these characteristics should be approached with suspicion.

The original codification moment of 1863 and the Lieber Code responded not to a supposed *discovery* of the universal rules of war, but to their *invention* as a response to very US-specific facts, during that country's Civil War. The way

Lieber designed his laws of war was functional to the needs of the Union and the questions that plagued Union leadership at the time of the Code's commission. Similarly, while it is undeniable that the Code exerted some influence in future codification efforts, especially Bluntschli's *Das Moderne Völkerrecht* and Martens' original draft for the Brussels Conference, these connections are less influential than usually advanced by conventional histories.

Take, for instance, the case of the Brussels Conference. While it is true that Martens relied on the Lieber Code to produce his original draft, it is also true that the Draft reflected different approaches to the same underlying ideas. As discussed in Chapter 3, Lieber's approach to military necessity is generally permissive: "military necessity allows X, unless prohibited"; Martens' is generally prohibitive: "X is prohibited unless justified by military necessity". While both drafters would have agreed with the Clausewitzian argument that war should be fought vigorously, their specific approaches to the same idea should not be easily dismissed. Especially not when, as I will address below, modern international humanitarian law is precisely entangled in a nuanced and complicated debate about whether it is "permissive" or "prohibitive" in the first place.

The negotiations at Brussels themselves are also evidence of the tenuous connections between the Lieber Code and the Brussels Declaration. Contemporaneous diplomatic correspondence is clear: most European states were not eager to adopt a Code-like system for Europe (or even less, the world). Rather than excitement at the possibility of replicating Francis Lieber's efforts, most foreign ministers were annoyed at being dragged into complicated debates at the personal request of the Russian monarch. Many in fact only agreed to participate under the understanding that the conference would fail to reach any kind of meaningful agreement.

Once in Brussels, it was clear that the laws of war in 1874 were far from a set of universalizable rules – agreement was not possible even among allegedly like-minded Europeans. Just like Lieber before them, European diplomats approached the laws of war in functional ways, responding to their specific geopolitical interests. Potential occupier states wanted rules that prevented civilians from endangering their occupations while potential occupied states wanted rules that allowed civilians to defend their territory from occupation.

Instead of offering clarity, the Brussels Declaration kept the issue of civilian participation in hostilities unregulated; not out of a desire to humanise warfare through the "rules of humanity and the dictates of public conscience", as the conventional history purports, but as an escape clause that allowed each state to maintain resort to their preferred unwritten rules of war. This way, the occupied would be able to call their population to arms in partisan warfare against an occupier, while occupiers would be able to resort to armed reprisals against civilians, the taking of hostages and the summary execution of partisans (so long, of course, as they did it "humanely" and in a "civilised" manner, in whatever fashion these terms were instrumentalised and reduced to).

And, in fact, all of these developments happened while states sought to contain the Geneva Movement – boycotting the 1868 Geneva Conference and the 1874 Paris Conference. Thus, instead of two strands of a single project, the Geneva and Hague projects competed with each other. It was not until the increased attention given to civilian protection after World War I that both the Geneva and Hague strands were able to speak to each other, in instruments such as the Tokyo and Monaco Draft and, of course, ultimately, the Geneva Conventions of 1949.

The 19th century European laws of war were therefore unable (or perhaps more accurately, unwilling) to address the issue of civilian protection and adopt a complete concept of humanitarianism. The idea of a completely *humanitarian* law (i.e. a law that protects all those not participating in hostilities, including civilians and not just combatants rendered hors de combat) is therefore not a 19th century legacy, but a 20th century innovation. Before it, there was no real effort to create one, so the conception of the "steppingstones" of progress from 1863 (or 1864) to 1949 is a disingenuous one. There is no thread connecting the evolution of the laws of war with the emergence of international humanitarian law. Instead, the latter emerged out of the collapse of the latter's fundamental assumptions about war.

2. On Post-Colonial Critique

This thesis is, of course, not the first one to articulate a critique of conventional and celebratory histories of international humanitarian law. As discussed in Chapter 1, postcolonial and critical scholarship have done so in the past as well.

However, the methodological choices of most of these critiques make it so that they are framed from the perspective of the North Atlantic world. Frequently, critical analysis of the laws of war centres on the imperialist and/or colonialist actions of Western states throughout history, signalling their hypocrisy and atrocities as evidence that international law is not a neutral legal project, but in fact, an enabler of empire. This thesis has taken a different methodological approach to demonstrate a similar conclusion.

As addressed in Chapter 2, my exploration of international humanitarian law's history constructs a linguistic context in which to operate. The linguistic context of the laws of war is constituted by those interventions and utterances that sought to engage with the Western (or Westernised) discourse of war and its regulation. Thus, obviously, the Lieber Code, the Brussels Declaration, the Hague and Geneva Conventions; but also their *travaux preparatoires* and the writings of the European and US scholars, diplomats, commentators that discussed the phenomenon of war, even beyond its legal regulation as well as non-European voices. By weaving this network of ideas, old and well-known texts and utterances can obtain new and unexpected meaning when seen from the perspective of their illocutionary intent – what issues where they addressing, who were they talking to, why did they frame their utterances in that way, etc. This way, instead of a monolithic conception of a single "European law of war", this approached reveals a cacophony of indeterminate interventions within a European *discourse* of the laws of war.

This discourse, of course, is not geographically bound. Eurocentric focuses – understood as the study of international law only in the North Atlantic or only through White points of view – erase, by necessity, the histories of other parts of the world and the perspectives of peoples who had been racialised as inferior. Constructing this linguistic context requires following the utterances that compose this discourse as they travel through time but also through space. As noted in Chapters 4 through 6, in this thesis, I followed the laws of war discourse to South America, East Asia and Southern Africa. In all of these regions, the discourse of the laws of war was appraised, discussed, embraced, and/or rejected in various non-Western interventions. This, of course, does not mean that they are the only regions of the world where this happened; merely the ones

I have focused on. These regional appraisals then become relevant for our understanding of the whole.

In all of these regions, the laws of war were consumed not in neutral legal terms, but as part of a larger cultural and geopolitical phenomenon, whereby political communities that inhabited beyond the North Atlantic were assorted into varying categories depending on their alleged level of “civilisation”. In all three of the extra-European regions covered, the laws of war were transparently understood either as a means to achieve this civilisational pedigree or as a tool used by Europeans to achieve imperial or colonial policies of domination.

In South America, the autochthonous law of war discourse that existed in the region was entirely replaced by the arrival of the Lieber Code and the Brussels Declaration through the Díaz Covarrubias translation of 1871. The adoption of these new rules by Chile in 1879, during the War of the Pacific, was not perceived by several contemporary sources as an effort in the humanisation of war, but, instead, as evidence of Chilean militarism or, even worse, lack of civilisation. The standard of civilisation itself was inverted and weaponised to resist what was seen as practices unworthy of the civilised (South American) world. In East Asia, Western civilisation was purposefully adopted as a means of national survival. Scholars like Fukuzawa Yukichi were crystal clear about the future that awaited non-Western civilisations that did not do so. In this world, a “conquer, lest ye be conquered” mentality led Japan to deploy the laws of war, understood as enablers of empire, against their regional geopolitical rival – China. At no point did Japan conceive these rules as honest attempts at humanisation but rather as geopolitical tools to be manipulated through the language of humanisation and civilisation. In Southern Africa, Nama chief, Hendrik Witbooi, expressed his frustration at the difference between the colonial small war he was subjected to and the allegedly more humanitarian standards of civilised war that Europeans boasted about.

These are all non-Western critiques of the Western law of war and the idea of Western war – critiques that are often left out of the modern critical understanding of the laws of war as a tool of Empire. In other words, one can conclude that the laws of war were a product of European imperialism by looking at what European and US actors did to Global South actors, or one can do so by looking at what those Global South actors were saying about European

imperialism. In many cases some extra-European actors participated in these discourses – like in Chile's deployment of a sharp war against Peru and Bolivia or like in Japan's own imperial project in Korea and South East Asia; but in many others they were not. These interventions are as much a part of the history of the laws of war as those of Europe. In fact, I argue, it is impossible to understand the history of modern international humanitarian law without them.

3. From the Laws of War to Humanitarian Law

As noted in Chapter 7, the change from the laws of war to international humanitarian law was not accomplished overnight. It is a long process of paradigm shift that started in the aftermath of World War I and consolidated after the end of World War II. The Communist Revolution pushed Russia away from the traditional Eurocentric understanding of the world in civilised-uncivilised dynamics and allowed for political capital to accumulate behind anti-colonial positions, leading to the success of the 1949 Civilians Convention and Common Article 3. Latin America's disenchantment with the civilisational paradigms coming out of Europe and the US cemented an anti-war status quo that fundamentally changed their perception of how wars should be fought – or rather, whether wars should be fought at all. African and African diaspora actors also shifted away from civilisational discourses, which bore the fundamental unfairness of the colonial system of exploitation, leading to the rise of the national liberation movement as a legitimate actor in international humanitarian law.

Bereft of its civilisational bedrock, the laws of war had to abandon their sharp/civilised war trappings and adapt to a new paradigm that, at least nominally, would be concerned with the wellbeing of civilians and the promotion of humanitarianism in war.[1041] This shift in paradigms, however, is far from being categorical. As noted in Chapter 7, Western military powers worked hard to

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[1041] This is not to say, of course, that the legal rules produced under the humanitarian paradigm are no longer contested or subjected to legal indeterminacy. The rule of proportionality, that requires incidental civilian damage to not exceed the expected military advantage, for instance, remains potentially problematic and difficult to define, both legally and morally. Armies may still overestimate the value of their military concerns over civilian protection under the Humanitarian Paradigm just as 19th century legal actors could resist the underlying logic of the Sharp War Paradigm to favour more civilian-oriented interpretations. Paradigm shift does not mean a solution for the problem of the hardship and cruelty of war nor does it mean that war has now finally been humanised in practice, it rather suggests the kind of *ratio legis* behind each rule, which can in turn help guide decision-making processes in time of war. Determining exactly how humanitarian is this new paradigm in practice is beyond the scope of this thesis.

leave wording ambiguous enough to protect their interests; and as seen in Chapter 1, the conventional narrative still heavily relies on its ties to the past to explain the content of today's laws. In other words, the risk that this new Humanitarian Paradigm will be relegated to empty words and good intentions, particularly by the world's current military powers, is very real. This has, in fact, been one of the main challenges faced by humanitarian international law in the 21st century, particularly since the September 11 attacks against the United States.

The laws of war existed in a specific cultural and legal paradigm, heavily influenced by Clausewitzian ideas about vigorous war and its capacity to improve a civilisation. International humanitarian law, instead, responds to the break-down of those assumptions and the emergence of new cultural values and norms. Readings of international humanitarian law that insist on a long continuity from the Lieber Code to the present are not actually understanding it in accordance with its own historical context or its object and purpose. The Sharp War Paradigm that gave rise to the laws of war and colonial small wars sought to enable national, imperial and/or colonial political projects. The Humanitarian Paradigm that gave birth to international humanitarian law seeks to protect, even if imperfectly, those who do not participate in the hostilities or have been disarmed and rendered hors de combat. It is also, a product of decolonisation. These are relevant distinctions that should lead to concrete interpretive results.

Modern international humanitarian law is at a crossroads. To some, particularly those associated with the military circles of the great military powers, it is under assault by those that forget its 19th century roots and the importance of military necessity. To others, especially those in the world of humanitarian action, it has evolved beyond this 19th century realism through a slow process of humanisation. This thesis, instead, argues that the connection between humanitarian law and the laws of war is not one of fluid continuity, and that modern international law is not defined by its 19th century predecessors. As Benvenisti and Lustig argue, the history of the laws of war "exposes the turn to international law as a countermajoritarian project, and this arguably authorizes – in fact, requires – the judicious interpreter (…) to adopt a critical attitude towards

existing treaties and to take into account the interests of the underrepresented in the process of construing it".[1042]

The transition between the 19th century laws of war and the 20th century international humanitarian law is the reason why there seems to be "two cultures" coexisting at the heart of the discipline, one concerned with promoting humanitarian values and one concerned with the preservation of military necessity.[1043] They co-exist through their allegiances to two different paradigms of war. The latter, invested in the continuity of Sharp War principles into the future; the former, in their discontinuity. This is why, for instance, contemporary and influential authors like Michael Schmitt can argue that international humanitarian law should never "unduly restrict" a state's "freedom of action on the battlefield, such that national interests might be affected"[1044], while, at the same time, Adil Haque can claim that "we should indeed interpret imprecise legal norms so as to legally protect civilians"[1045] and that "we should presume that the substantive rules protecting persons and objects apply to all persons and objects unless they clearly fall within an exceptional category or clearly engage in an exceptional activity".[1046] My findings herein suggest that in addition to the legal reasons for protective interpretation, historical reasons are also at play.

4. The Role of History in International Humanitarian Law

On May 15, 2021, the Israeli Defence Forces (IDF) informed residents of the al-Jalaa Tower, in Gaza, that they had 60 minutes to leave the building before it was destroyed. The al-Jalaa Tower had 11 floors, 60 residential apartments and several offices, including the local headquarters of news organisations al-Jazeera and the Associated Press.[1047] The IDF claimed that the building "contained military assets belonging to the intelligence offices of the Hamas

[1042] See: Eyal Benvenisti and Doreen Lustig, 'Beyond the "Sham" Critique and the Narrative of Humanitarianism: A Rejoinder to Jochen von Bernstorff' (2020) 31 European Journal of International Law 721, 726.
[1043] See: David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 Leiden Journal of International Law 315.
[1044] Schmitt (n 406) 92.
[1045] Haque, *Law and Morality at War* (n 597) 52.
[1046] Adil Ahmad Haque, 'Indeterminacy in the Law of Armed Conflict' (2019) 95 International Law Studies 155.
[1047] Adil Ahmad Haque, 'The IDF's Unlawful Attack on Al Jalaa Tower' (*Just Security*, 27 May 2021) <https://www.justsecurity.org/76657/the-idfs-unlawful-attack-on-al-jalaa-tower/> accessed 7 June 2022.

terror organization".[1048] No official report has been produced on the attack and so the IDF's allegations remain unsubstantiated.

Modern international humanitarian law prohibits attacks on civilian objects. Additional Protocol I of the Geneva Conventions provides that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".[1049] Likewise, "[a]ttacks shall be limited strictly to military objectives", a concept that is "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[1050] In any event, even in cases when a civilian object becomes a valid military target on account of its use, attacking forces must "refrain from deciding to launch any 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".[1051] All of these rules are key to modern international humanitarian law and scholarship.

The (at least textual) protections in place are noteworthy when compared to the rules applicable to the same scenario under the 19th century laws of war. Remember, for instance, Aldunate's argument in the Chilean Mixed Commissions regarding the validity of bombarding the residential quarters of Pisagua or the response to the Antwerpian citizens at the Brussels Conference. The rules available in Gaza are, arguably, more protective. And yet, at the time of the attack, the IDF argument was that "[w]hen Hamas uses a tall building for military purpose, it becomes a military target".[1052]

[1048] IDF Editorial Team, 'IDF Strikes Multi-Story Building Which Contained Military Assets Belonging to Hamas Military Intelligence' (*IDF*) <https://www.idf.il/en/minisites/wars-and-operations/operation-guardian-of-the-walls/idf-strikes-multi-story-building-which-contained-military-assets-belonging-to-hamas-military-intelligence/> accessed 7 June 2022.

[1049] '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' 1125 UNTS 3, art 48.

[1050] ibid 52(2).

[1051] ibid 57(2)(a)(iii).

[1052] Israeli Defence Forces [2021] *Twitter* <https://twitter.com/IDF/status/1393553534218604552?s=20>.

This short assertion sparked considerable debate among international humanitarian law experts regarding its legality. For some authors, the attack had been perfectly valid. The building was being used by a non-state armed group engaged in an armed conflict against Israel. The use of that building made an effective contribution to Hamas' war effort and the building's destruction offered Israel a definite military advantage. The requirements are met even if the contribution is "tactically misconceived, strategically futile, and ultimately unsuccessful"; they are also met even if the military advantage lacks "wider significance".[1053] In other words, military use, any military use, justifies levelling an entire building, so long as precautions are taken to lessen disproportionate damage (such as calling to give residents advance notice).

For other authors, the Israeli justification is "grotesque".[1054] "The value of a civilian apartment to the civilians who live there does not suddenly disappear because members of an armed group use some other part of a large apartment building for military activities".[1055] Instead, "civilian apartments retain their legal protection under the proportionality rule even if opposing forces put other parts of the building to military use".[1056]

As noted above, these two radically different positions reflect allegiances to two different paradigms of war and are an expression of the indeterminacy of legal discourse. The first one, tries to balance considerations of humanity with military necessity – Israel is at war, and in war one needs to defeat their enemies; humanitarian concerns cannot unduly balance the need for victory. The indeterminacy of the proportionality rule, seen from the perspective of a long genealogy, opens the door for "sharper" views of war. The second one makes a protective argument: the damage is disproportionate from the perspective of the affected civilians. The indeterminacy of the proportionality rule, seen from the *ratio legis* of a humanitarian paradigm, closes the door to sharp war.

There are many moral and legal reasons that warrant solving the indeterminacy of proportionality through the favouring of a protective interpretation over a balancing one, but there is one where the historical argument I have made in this

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[1053] Aurel Sari, 'Israeli Attacks on Gaza's Tower Blocks' (*Lieber Institute West Point*, 17 May 2021) <https://lieber.westpoint.edu/israeli-attacks-gazas-tower-blocks/> accessed 7 June 2022.
[1054] Haque, 'The IDF's Unlawful Attack on Al Jalaa Tower' (n 1047).
[1055] ibid.
[1056] ibid.

thesis carries further weight: international rules must be interpreted “in their context and in the light of its object and purpose”.[1057] Thus, that international humanitarian law evolved as a reaction to the sharp war principles of the 19th century is a relevant factor in defence of its protective interpretation – exceptions should be constructed narrowly and protective rules should be interpreted broadly. Accepting a short, 20th century history of international humanitarian law, instead of a long genealogy dating back to the 19th century, means legal operators should distance themselves from conceptions that favour military expedience and necessity over humanity.

Understanding the role of history in international humanitarian law in such a way also offers valuable lessons for some of today’s more controversial debates. The argument that “Lieber’s conception of military necessity survives to this day and is by no means a relic of American history”[1058] is thus anachronistic. Approaching international humanitarian law with the knowledge of its much shorter 20th century genealogy, confirms this. The evolution of international humanitarian law from the laws of war consists in more than simply a process of humanising Lieber’s laws of war by increasing the number of treaty prohibitions, while leaving his concept of military necessity intact.[1059]

For many contemporary authors, military necessity is a “principle of authority”[1060] that imbues IHL with an “implied authorization” for states to conduct hostilities.[1061] These views frequently require historical explorations that heavily rely on long genealogy arguments, stating that military necessity, as originally conceived in the 19th century, particularly by Lieber, *admits, authorises,* or *allows* states to conduct hostilities because in war the ultimate object is the defeat of the enemy. In these recollections, the harsh discourse of Lieber is no longer a risk, because the long genealogy has now added sufficient additional prohibitions to humanise it.

[1057] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, art 31.
[1058] Ohlin and May (n 396) 106.
[1059] For an expanded version of this argument see: ibid.
[1060] Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer Law & Business 2018) 115.
[1061] Aurel Sari and Sean Aughey, ‘Sorry Sir, We’re All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC’ (*EJIL: Talk!*) <https://www.ejiltalk.org/sorry-sir-were-all-non-state-actors-now-a-reply-to-hill-cawthorne-and-akande-on-the-authority-to-kill-and-detain-in-niac/> accessed 17 October 2019.

As I have shown, however, the legal discourse of the 19th century laws of war did not have one single definition of military necessity. For Lieber, it was indeed a principle that admitted specific behaviour (and thus could "authorise" conduct in the abstract, as a background principle). For others, like Martens and other drafters of the Brussels Declaration, it was more often conceived as an exception that could "authorise" only a limited number of conducts; military necessity having already been accounted for during negotiation and drafting. In essence, the meaning of military necessity was inevitably contested.[1062] It did not respond to an organised plan to set out a single "law of 1863" but rather to a discourse. Which utterance from within this discourse is projected into the future ends up being an arbitrary choice by present-day scholars, not an exercise in historiography.

Moreover, the transition to an international humanitarian law, particularly after the signing of the Additional Protocols, did more than simply "add specific prohibitions". For instance, regulation of the principles of distinction (attacks cannot be directed at civilian targets) and proportionality (attacks directed at military targets cannot create disproportionate civilian harm) are not simply limits to an overarching, Lieberian, principle of military necessity, but a reconceptualization of how the law itself works. Attacks like the bombing of Pisagua and its rationalisation by Aldunate (if the Chilean navy only had cannons and the Peruvian forces were located next to residential targets, then any incidental damage is necessary and legal, regardless of how disproportionate) is no longer possible in modern times. At least not, as seen in the example of the al-Jalaa Tower above, without significant backlash. Unlike 1884, today, Lopes Netto's views would no longer be controversial. They would be a fundamental part of the humanitarian discourse. The way the law works has changed, or at least is changing, through the writings and instruments of those who are advancing the underlying ideas of a new Humanitarian Paradigm of war and the laws that regulate it.

In reality, therefore, discussions about international humanitarian law's permissive or prohibitive nature cannot be solved by tracing back history. Adil

[1062] See, generally: Kinsella and Mantilla (n 6).

Haque, for instance, argues against the permissive view of international humanitarian law by reading Lieber's Code restrictively. He says:

> "The Lieber Code states that 'Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.' However, these acts are not lawful because they are 'admitted' by military necessity. On the contrary, military necessity 'admits' these acts because they are lawful (that is, not prohibited) according to the law and usages of war. Similarly, the Lieber Code states that military necessity 'does not admit' of cruelty, unnecessary suffering, torture, poison, or perfidy. However, these tactics are not unlawful because military necessity does not 'admit' them. On the contrary, military necessity 'does not admit' of these tactics because these tactics are not 'lawful according to the modern law and usages of war.' Each of these tactics is specifically prohibited in other articles of the Code, by reference to the laws of war rather than to military necessity".[1063]

The idea, therefore, is that legal operators should read military necessity restrictively both "then" and "now", because of a sense of continuity between the laws of war and humanitarian law. While this is sound *legal* reasoning, in the sense that Lieber's words can (also) be read in this way, it is not *historically* reasonable, considering Lieber's context and illocutionary intent. As a student of Clausewitz, Lieber did consider that whatever actions that were necessary for the defeat of the enemy should be legal, and that the only limit was unnecessary cruelty unconnected to the objective of subjugating the enemy.

This, of course, does not mean that the permissive camp is in the right. In the Brussels Declaration the laws of war are often drafted in prohibitive terms: "State A cannot do X, unless justified by the necessities of war". Military necessity does not allow conduct in the abstract, nor does it fill gaps in regulation with a principle of authority. It offers an escape valve from certain general prohibitions. In fact, gap-filling roles were left for the "unwritten rules of war", as guided by the intentionally specious "laws of humanity and the dictates of public conscience" concept.

Instead of trying to find authority and legitimacy for modern-day international humanitarian law in the long ago of history, by reading Lieber or Martens or Bluntschli in ways that sustain or contest 21st century theories, international legal scholars should understand instead that these debates are constructed from

[1063] Haque, *Law and Morality at War* (n 597) 33.

much more present concerns. Nobody in the 19th century wondered whether the laws of war were prohibitive or permissive. This is a new debate, brought about not by the natural evolution of a long genealogy, but by the challenges implied by the paradigm-shattering events of the 20th century. Whether states should have a background authorisation to use force is a late 20th century concern. Not a 19th century one. History, simply put, does not have the answers for today's legal debates. Or at least not to the degree that the modern legal debate implies.

As I have shown throughout this thesis, the history of international humanitarian law cannot be summarised as either a neutral humanitarian legal project or a long continuity of conferences, from the 19th century to today. Instead, the history of international humanitarian law exists in a transition between two paradigms: the 19th century Sharp War Paradigm and the 20th century Humanitarian Paradigm, both with roots that far exceed the 19th century European codification process. How the international legal community constructs the resulting output of modern international humanitarian law is, thus, very much a choice – how much will we allow the Humanitarian Paradigm to drift apart from the Sharp War one and how much influence will it have over the meaning and understanding of today's rules of war. Depending on this choice, the cultural, legal and historical processes at play between 1914 and 1977 will have been more or less revolutionary. Will international humanitarian law live up to the promise of its 20th century birth? Or will it yield under the weight of its 19th century legacy? These remain very much open questions, and it will be 21st century arguments in 21st century discussions, that answer them.

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