

# *International Lawyers' Failing: Outlawing Weapons as an Imperfect Project of the Classical Laws of War*

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Why are some weapons regarded as intrinsically evil and others are not? This article intends to supply a history of the stigmatization of weapons on land warfare in the era often labelled 'classical international law'. This era is packed with discourses not just about war but also treaties' restrictions on warfare technologies. Even if war itself was considered to be 'just', not every military strategy and not every weapon was seen as a legitimate tool. This article takes a multi-normative perspective to examine entanglements between legal norms, morality, and social custom (like military honour codes) and their impact on the project of outlawing particular methods of killing. Although this article's goal is to draw a detailed sketch of nineteenth-century international law, it will nonetheless go further back in time to include earlier writings because nineteenth-century discourse cannot be understood without references to pre-modern international law authorities such as Hugo Grotius, Emer de Vattel, or Immanuel Kant.

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This article seeks to analyse the issue from the perspective of a legal historian but in a broader normative framework. The moral, religious, ethical, technical, or legal narratives that were used to prohibit the use of certain weapons under international law before the First World War shall be laid out in detail. The eminent historian of international law, Martti Koskenniemi, emphasized the importance of that era for the regulation of warfare in his seminal work in 2001: '... the laws of war have perhaps never before nor since the period between 1870 and 1914 been studied with as much enthusiasm. Optimism in reason and the perfectibility of human nature laid the groundwork for the view that men could be educated to wage war in a civilized way'.<sup>2</sup>

It was 'the golden era of efforts to limit warfare through international law'.<sup>3</sup> Today, these international legal studies are as relevant as ever. Can any common pattern or structures of

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<sup>1</sup> Koskenniemi, 'Legacy of the nineteenth century', pp. 141-53.

<sup>2</sup> Koskenniemi, *The gentle civilizer of nations*, p. 87.

<sup>3</sup> Price, *The chemical weapons taboo*, p. 164.

argumentation be observed? What were the purposes behind such bans? Did such restrictions ‘humanize’ warfare and promote pacifism following the advent of the First World War? Or did these very restrictions help to legitimize war itself and were thus only a fig leaf for ferocious military acts?

To answer these questions, this article will consider legal, political and philosophical discourses from the mid-seventeenth century up until the aftermath of the First World War (including perspectives of the military) with a particular focus on developments in the ‘long’ nineteenth century. The historical sources are mostly writings from legal, political, and philosophical scholarship. Treaties play only a small role<sup>4</sup> due to their historical absence in the period before the Saint Petersburg Declaration and Hague Conventions and Declarations in this international legal discourse and are therefore not the main focus of this article. This article aims to include authors from and sources on a vast range of countries including Argentina, Austria-Hungary, Belgium, Chile, China, Denmark, France, Germany, Italy, the Netherlands, Japan, Russia, Spain, Switzerland, the United Kingdom (UK), and the United States of America (USA). However, it must be admitted that this article is almost entirely Eurocentric. The debate is overwhelmingly traced through the perspective of European doctrine (but through the eyes of different nationalities, assuming potential differences<sup>5</sup>) due to the author’s lack of language abilities necessary to read primary sources from Asian or African writers. At the same time, the historical international legal discourse was, in fact, being increasingly dominated by Europeans, and the spread of legal doctrines was supported by economic and military expansion as well as global trade between the early modern and nineteenth centuries.<sup>6</sup> Although this article’s goal is to draw a detailed sketch of nineteenth-century international law, it will nonetheless go further back in time to include earlier writings because nineteenth-century discourse cannot be understood without references to pre-modern international law authorities like Hugo Grotius, Emer de Vattel, or Immanuel Kant.<sup>7</sup>

## I. Pariah weapons in international legal history: A failed moralization of law?

‘Pariah’ is not a term from international legal historical sources, so the phrase rarely appears verbatim in any written record. Placing it as the epistemological centre and conceptual focus of this article carries the danger of producing anachronisms.

This article takes an approach based on the history of science (*Wissenschaftsgeschichte*) to the history of the law of war and explicitly excludes the debate on military strategies, which are not based on weapons in a material sense. The scope is limited to weapons as artifacts or means, defined as ‘a device, a munition, and implement, a substance, an object, or a piece of equipment.’<sup>8</sup> It is necessary to make this decision explicit because historical sources very often combine the discussion of outlawed weapons with that of potentially immoral or illegal strategies.<sup>9</sup>

<sup>4</sup> Roberts, ‘Against war’, p. 319.

<sup>5</sup> Roberts, *Is international law international?*

<sup>6</sup> Onuma, *International law in a transcivilizational world*, Chs. I and IV; Ballantyne and Burton, ‘Imperien und Globalität’, pp. 287-433; Burbank and Cooper, *Empires in world history*, pp. 287-331; Bayly, *Die Geburt der modernen Welt*, pp. 248-99; Darwin, *Der imperiale Traum*, pp. 283-346; Osterhammel, *Die Verwandlung der Welt*, pp. 674-736.

<sup>7</sup> Kadelbach, Kleinlein, and Roth-Isigkeit, eds., *System, order, and international law*.

<sup>8</sup> Haines, ‘The developing law of weapons’, p. 276.

<sup>9</sup> Heineccius, *A methodical system of universal law: Or, the laws of nature and nations*, II, Ch. IX, pp. 194-95.

A similar pattern of discourse and its inherent problems can be found in the concept of 'weapons of mass destruction' (WMD) that has been investigated by Oren and Solomon as well as by Bentley.<sup>10</sup> This notion played a crucial role during the 2003 invasion in Iraq by the Coalition forces led by the USA but can be terminologically traced back to the interwar period. Oren and Solomon warn us not to treat WMD 'as if it were a self-evident, fixed concept.'<sup>11</sup> They try to historicize the concept of WMD and want to 'dispel the illusion that it has a stable, unambiguous meaning'.<sup>12</sup> Transferring this important ambition to the field of pariah weapons therefore brings analogous methodological challenges of changing historical semantics and also of avoiding anachronisms of projecting the notion of pariah weapons onto epochs in which the word was unknown.

At the same time, functionally similar notions of 'pariah weapons' can be found in historical sources from the eighteenth to the twentieth century that discuss warfare and its limits. The multi-normative discourses around these terms and concepts have to be treated very carefully, given that the story of the law of war has often been told in a progress narrative focusing on the mitigation of war.<sup>13</sup> For most of the past, the use of force was considered legal in general; just-war doctrine provided a yardstick. International law's role in this scheme was to balance necessity and humanity<sup>14</sup> in warfare.

1. The real actors of the outlawing process: International lawyers and their stigmatizing terminology

The idea closest to the 'pariah' concept in international legal doctrine are so-called *intrinsically evil* ('mala in se'<sup>15</sup>) weapons. The notion stigmatizes certain types of weapons and methods in warfare. Many histories of international law that deal with the law of war focus on state interest,<sup>16</sup> military discipline,<sup>17</sup> and humanitarian principles<sup>18</sup> as driving forces to outlaw the use of certain weapons. However, the role and contribution of what Schachter called 'the invisible college of international lawyers'<sup>19</sup> in his article in 1977 are crucial for this process.

A shared professional moral and religious homogeneity among international lawyers was the central prerequisite to express outlawing demands in legal doctrine. At the same time, the articulation of such demands has to be contextualized within the colonial and imperial mindset of international lawyers.<sup>20</sup> It needs to be seen as a symbolic act of delegitimation by which jurists comforted and self-ensured their own supreme status of *civilization*. This perspective also explains why the project of moralizing international law and with it the 'pariahization' of war weapons failed in the long nineteenth century and often had merely a rhetorical character. In particular, the language of stigmatization provides evidence of this

<sup>10</sup> Oren and Solomon, 'WMD: historicizing the concept'; Bentley, *Weapons of mass destruction*.

<sup>11</sup> Oren and Solomon, 'WMD: historicizing the concept', p. 1.

<sup>12</sup> *ibid.*, p. 3.

<sup>13</sup> Neff, *War and the law of nations*, p. 163. Neff states 'In sum, the nineteenth century witnessed impressive progress in the codification and elaboration of the rules of war – and, in the process, towards a gradual limitation on the destruction and suffering of war'. *ibid.*, p. 191.

<sup>14</sup> Lingen, *Crimes against Humanity*, p. 15 (on the concept); Hayashi, 'Military necessity as normative indifference', pp. 675-782.

<sup>15</sup> Bolton and Minor, 'International campaign to abolish nuclear weapons' operationalizations', p. 385.

<sup>16</sup> af Jochnik and Normand, *The legitimization of violence*, pp. 49-95.

<sup>17</sup> Benvenisti and Cohen, 'War is governance', pp. 1363-416.

<sup>18</sup> Klose, 'Abolition and establishing humanity as an international norm', pp. 169-86; Lingen, *Crimes against humanity*, p. 588.

<sup>19</sup> Schachter, *The invisible college of international lawyers*, p. 217.

<sup>20</sup> Anghie, *Imperialism, sovereignty and the making of international law*.



Image 1: Sometimes, the ‘the invisible college of international lawyers’ was made visible, such as here on the title page of an 1874 Issue of ‘*Harper’s Weekly*’ from 14 November 1874.

Source: *Harper’s Weekly* (14 November 1874)

rhetorically loaded religious terminology and categories from moral theology, such as referring to a given category as ‘sacrosanct’<sup>21</sup> or threatening perpetrators with a ‘condamnation solennelle’<sup>22</sup> (solemn condemnation) if they did not comply with the existing moral and legal rules that imposed restrictions on the means of warfare among so-called civilized states. Furthermore, our transcivilizational standards are sometimes expressed by the reference to a ‘taboo’,<sup>23</sup> as laid out in a number of newer publications, some of which were published by members of this project group. Michelle Bentley reminded us that the taboo served ‘as strategic narrative’ in her 2018 article:<sup>24</sup>

... The taboo is a complex construction, which encompasses a range of ideas: from the idea that these weapons are inherently repulsive, to the idea that their use is immoral, to the idea that the nature of this weapons demand that they be eliminated, to the idea violators must be punished. [...] This paper does argue, however, that narrative construction is also a case in which the ideals of the taboo can be broken apart, and each part used selectively and manipulated to fit very specific political aims.<sup>25</sup>

Thus, the task for legal history would be to critically assess the justification narratives and rhetoric of the standards and criteria of outlawing weapons.

<sup>21</sup> Bentley, ‘Trump and the taboo’, p. 1.

<sup>22</sup> Fiore, *Nouveau Droit International Public*, II, p. 279.

<sup>23</sup> Price, *The chemical weapons taboo*.

<sup>24</sup> Bentley, ‘Trump and the taboo’, p. 9.

<sup>25</sup> *ibid*, p. 14.

## 2. The importance of normative entanglements

'Pariah' encompasses a moral verdict, referring to discriminatory practices. International legal provisions are entangled in multiple ways with other normative orders; in this case they refer – implicitly or explicitly – to morality when outlawing the use of particular types of weapons. Two normative contexts of such verdicts and their multi-faceted entanglements shall be highlighted in this regard.

### a) International law and domestic law

All histories of international law should take domestic legal provisions into account as they are typically the forerunners of regulations on an international level. This is the case for poison, which was and still is stigmatized by an overwhelming number of national criminal codes and as well as – as we will see later – by international law. In addition, the international law of war was often inspired by domestic military regulations as the (American) Lieber code (which also included prohibitions of the use of poison).<sup>26</sup> Domestic provisions also serve as an implicit reference point for jurists trained in a specific domestic legal system.

### b) Multi-normativity as an analytical framework

Specifying that not all weapons were considered equal by normative standards also implies the possibility of complex interactions and even contradictions between plural and different standards. This normative plurality might primarily affect law in that domestic legal provisions could collide with international law – whether founded in treaties or customary law. Yet, normative pluralism goes beyond such inter-legal relations. This article's argument is that extra-legal normative orders, such as ethics, morality, religion, social custom (like military conventions, 'chivalric codes of combat',<sup>27</sup> martial honour, 'military honour'<sup>28</sup>), or (with increasing relevance in the twenty-first century) technological standards need to be considered to understand the logic of outlawing pariah weapons. A mere legal perspective would not be sufficient to comprehend the stigmatization of certain types of weapons by statutory and international law. In contrast, only the close interactions and entanglements of moral and martial honour and (international) legal norms can sufficiently explain the aversion to such weapons. In addition, one might argue that the inherent structure/weakness of international law to enforce its regulations further enhances the necessity of moral arguments when outlawing certain practices.

Most social interactions are regulated by plural norms concurrently; thus 'multi-normativity'<sup>29</sup> is typical and not exceptional. One should not expect conformance of these various normative orders when assessing certain types of weapons. In other words, the fact that one normative order (e.g. morality) expresses uneasiness with a certain type of weapon does not necessarily imply that another normative order (e.g. international law) shares this view. These legal approaches stand in complex interaction with moral convictions and social conventions that crystallized in the writings of international lawyers. The interaction

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<sup>26</sup> Witt, *Lincoln's code*, p. 2, 4, 183; Price, *The chemical weapons taboo*, p. 20.

<sup>27</sup> Witt, *Lincoln's code*, p. 18.

<sup>28</sup> Bernard, 'Growth of laws and the usages of war', p. 89. See: Liivoja, 'Law and honor', pp. 143-65; Liivoja, 'Military honour and modern law of armed conflict', pp. 75-100.

<sup>29</sup> Vec, 'Multinormativität in der Rechtsgeschichte', pp. 155-66.

might be complex and particularly dependent on actors expressing their particular views in certain situations.

### 3. 'Pariah Weapons' as a neglected topic in international legal historiography

This topic of limiting war technologies is not only of historical relevance. In an epoch marked by accelerated technological innovations, new challenges and new threats to international human rights and world peace arise. 'Lethal autonomous weapons systems (LAWS)', 'unmanned aerial vehicles', 'military nanotechnology', and 'cyberwar',<sup>30</sup> 'hybrid conflicts' and 'New Wars'<sup>31</sup> question our traditional assumptions and legal instruments, as imposed by domestic and international law: 'In the twenty-first century, the pace of technological change in warfare has quickened.'<sup>32</sup> All the more, it should be our primordial interest to analyze legitimations and de-legitimizations of particular warfare technologies in past centuries. Often, international legal debates refer to *experience*, yet *experience* is a social construction of the past, which has always had its leeways. Therefore, there is a clear necessity to historicize ideas, concepts, and motives of normative restraints. Interestingly, the historical research on limitations of warfare technology still seems relatively scarce<sup>33</sup>, despite a number of publications<sup>34</sup>, and particularly compared to the vast amount of literature on just war doctrine or other legitimations of warfare that focus on the right to resort to war (*jus ad bellum*).<sup>35</sup> Historical case studies on the interdiction of certain types of weapons seem to be much rarer in comparison.<sup>36</sup>

## II. Before IHL was introduced: Vivid discussions and the danger of anachronisms

Today, the principal places for the debate on outlawing weapons would be *international humanitarian law* (IHL) and *disarmament law*. These particular fields of international law have their roots in the nineteenth and twentieth centuries. However, IHL is a neologism that had its breakthrough only recently, in the 1980s.<sup>37</sup> As a relatively modern concept, it shifted the focus in favour of particular interests. Those interests are not necessarily identical with historical regulations; therefore, the danger of anachronism arises. Historically, the debate to outlaw certain weapons was as argued in the context of the 'law of war' (*jus in bello*). Such shifts of concept matter and should not be underestimated in their impact. Historically, this issue was of vital relevance – probably even more than it is today. In other words, the nineteenth-century perspective on the issue was different than today's wording

<sup>30</sup> Laufer, 'War, weapons, and watchdogs', pp. 62-74.

<sup>31</sup> Kaldor and Chinkin, *International law and new wars*.

<sup>32</sup> Schmitt, 'War, technology and the law of armed conflict', p. 137.

<sup>33</sup> Neff, *War and the law of nations*, p. 1; Liivoja, 'Technological change and the evolution of the law of war', p. 1164.

<sup>34</sup> O'Connell, *Of arms and men*; Boot, *War made new*; Gillespie, *A history of the laws of war*; Keen, *Laws of war in the late Middle Ages*; Neff, *War and the law of nations*.

<sup>35</sup> See recently Simon, 'Myth of *Liberum Ius ad Bellum*', pp. 113-36; Bernstorff, 'Use of force in international law before World War I', pp. 233-60; Verdebout, 'Contemporary discourse on the use of force in the nineteenth century', pp. 223-46.

<sup>36</sup> See e.g. Tannenwald, 'Stigmatizing the bomb', *International Security* 29 (2005), pp. 5-49; Price, 'A genealogy of the chemical weapons taboo', *International Organization*, 49 (1995), pp. 73-103; *ibid.*, *The chemical weapons taboo*.

<sup>37</sup> Alexander, 'A short history of international humanitarian law', p. 110.

## International Lawyers' Failing



Figure 1: Emergence and conceptual rise of 'international humanitarian law', compared to 'law of war'.

Source: Google Books Ngram Viewer (<https://books.google.com/ngrams/>), 31 Jan 2019.

of IHL suggests,<sup>38</sup> which is why this article speaks of the modern *law of war* as the legal context of pariah weapons.

### 1. A scarce presence in international treaty law

When analysing pariah weapons in international law, today's international lawyers first examine international treaties and customary international law. However, this approach can hardly be used for historical analysis; combing through international treaties turned out to be a fruitless endeavour, since there are few major or important treaties for most of the period before the Hague Conferences. A recently published Swiss legal history dissertation on early modern peace treaties refers to a number of provisions on demilitarisation.<sup>39</sup> These early modern European bi- and multilateral peace treaties included regulations on limiting artillery and reducing fortresses on the side of the losers. But none of them aimed to ban the use of particular weapon technologies as a whole. Similar observations can be made with regards to the late nineteenth and early twentieth century Japanese and Chinese treaty collections or analysis, which also did not mention any restrictions of particular warfare technologies.<sup>40</sup>

Contemporary late eighteenth- and early nineteenth-century authors quoted some (isolated) provisions against certain weapons from treaties between European powers in premodern Europe. Yet, those treaties already were a historical phenomenon at that time. In 1821, German jurist Johann Ludwig Klüber referred to the existence of treaties explicitly regulating the manners of war and quoted an unnamed treaty of 1675 that prohibited the use of poisoned weapons.<sup>41</sup> German international lawyer Georg Friedrich von Martens

<sup>38</sup> Schäfer, 'The 150th anniversary of the St Petersburg Declaration', pp. 505, 508.

<sup>39</sup> Huwiler, *De Pace – De Bello*, pp. 320-40, 461, 479.

<sup>40</sup> Matsudaira, *Völkerrechtlichen Verträge des Kaiserthums Japan*; Takahashi, *Cases on international law during the Chino-Japanese war*; Takahashi, *International law applied to the Russo-Japanese War*; MacMurray, ed., *Treaties and agreements with and concerning China*, vols. 1 and 2.

<sup>41</sup> Klüber, *Europäisches Völkerrecht*, p. 398. Further references to such a treaty of 1675 can be found in various historical sources: Fleming, *Der Vollkommene Teutsche Soldat*, P. III, C.VI, § 18 (p. 199); Beust,

noted in 1795 that such sources had a highly isolated field of application and were thus of only limited value when it came to deriving general principles of international law:

The use of red hot shot [invented 1574, at the siege of Dantzick], of chain and bar shot, of carcasses filled with combustibles, boiling pitch, &c. have sometimes been proscribed by particular conventions between maritime powers. These conventions, however, extend no further than the war for which they are made; and, besides, they are never applicable except in engagements of vessel for vessel.<sup>42</sup>

For most of the nineteenth century, until its last decade in which the famous Hague conference took place and its eponymous treaty collection soon followed, it seems that not a single treaty prohibited the use of particular weapons except for the Saint Petersburg Declaration of 1868. This is highly interesting and also a slight surprise as the nineteenth century faced a so-called ‘treaty revolution’;<sup>43</sup> the number of bi- and multilateral treaties rose dramatically, and international legal doctrine discovered new types of treaties: the so-called ‘lawmaking treaties’.<sup>44</sup> With regards to international legal sources, the nineteenth century was marked by a landslide shift to treaties and customary international law. Still, this 19<sup>th</sup>-century treaty revolution came late in the field of weapons regulation; not many wars were fought between European powers before the Crimean War and the arms races among European countries in the late nineteenth century. Efforts for codification of the laws of war were therefore mainly undertaken at the very end of the century and concentrated on in the context of the two Hague conferences in 1899 and 1907 due to the Eurocentricity of the international lawyers. At these conferences, modern international treaty law came into focus, and along with the rhetorically impressive Martens Clause, these conferences’ legal outcome was a milestone in international treaty law that led the way for further codification projects. In the preceding years, treaty law’s diminished role had allowed other kinds of legal sources to develop, which brought particular customs and doctrines into focus. However, customary international law was obviously not the appropriate instrument for any reform projects.

## 2. Jurists replace a legislator

In fact, jurists were primarily the ones deliberating on restrictions, liaising international law with their moral convictions, and then finally formulating norms, thus establishing international legal standards. The debate mainly took place within the genre of dissertations and textbooks, which spread remarkably during the nineteenth century;<sup>45</sup> quite a number of them received further editions, attracted annotations by colleagues, or were translated into other languages<sup>46</sup> (in this article, English editions are referenced when available). Contemporary bibliographies on international legal writings appeared and listed publications by various jurists about forbidden weapons or prohibited methods of warfare

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*Observationes Militares*, V, C. III, Observatio CVIII, § 1, 12. (p. 236); Grotius, *Drey Bücher von Kriegs- und Friedens-Rechten*, L.III, C. IV, XVI.1 (p. 59) footnote 58. – A similar provision is said to be included in another treaty of 1702: Beust, *Observationes Militares*, I, C. II, Observatio XXI, § 1, 4. (p. 27); Rohr, *Einleitung zur Ceremoniel-Wissenschaft*, P.II, C.VII, § 29 (p. 489).

<sup>42</sup> Martens, *Summary of the law of nations*, VIII, p. 282.

<sup>43</sup> Keene, ‘Treaty-making revolution of the nineteenth century’, pp. 475-500.

<sup>44</sup> Vec, ‘Recht und Normierung in der Industriellen Revolution’, pp. 104-26.

<sup>45</sup> Macalister-Smith and Schwietzke, ‘Bibliography of textbooks and comprehensive treatises’, pp. 75-142.

<sup>46</sup> *ibid.*

written in distinct sections.<sup>47</sup> Interestingly, the most famous bibliography, published in Regensburg in 1785, only referred to poisonous weapons explicitly in this regard.<sup>48</sup> Later during that period, the first legal journals appeared that were only dedicated to the topic of international law.<sup>49</sup>

In a situation in which positive treaty law on pariah weapons was almost completely lacking in international relations apart from the St Petersburg Declaration and the Hague Conventions and Declarations, the writings of these jurists were an important source of nineteenth-century international law<sup>50</sup> (nonetheless, it was highly disputed how to classify these sources from a systematic standpoint). International lawyers were aware of that fact and sometimes listed the 'text-writers of authority, showing what is the approved usage of nations' first in the canon of the sources of international law.<sup>51</sup>

Interestingly, the statements of these text writers were sometimes presented in a very normative fashion, presumably to cover one's own moral convictions and attitudes. Nevertheless, some writers claimed explicitly in their arguments that they merely referred to generally accepted historical authorities and in particular to legal masterminds of the seventeenth and eighteenth century.<sup>52</sup> Some textbooks on the law of nature and of nations even presented their statements as legal codes in an attempt to have them appear neutral and of normative value. These textbooks' language and formal styles were deliberately designed to evoke an association with neutral legal codes. The books' contents were presented in paragraphs led by '§'-signs. Their alleged legal character served as a replacement for actual legal arguments; the author wrote as an authority and declared himself able to give mere opinions normative character and therefore did not need to justify his statements.

Yet, jurists were not the only ones engaged in these debates, and legal perspectives had no monopoly on the discourse on the law of war. Historically, there has been a broad range of contributions from writers with different scientific backgrounds: natural law, theology, political science, and moral philosophy. Practical philosophers Francis Hutcheson<sup>53</sup> and Johann Georg Heinrich Feder,<sup>54</sup> as well as the Lutheran theologian and philosopher Johann Franz Buddeus,<sup>55</sup> or the Catholic theologian Augustin Schelle<sup>56</sup> from Salzburg, discussed the use of poisoned weapons in the eighteenth century.

Sometimes justifications for interdictions were relatively unclear when it came to their exact normative foundation. The authors would claim that a certain weapon was 'illicit' or 'forbidden' without referencing the normative order that led them to that conclusion. The terms they used were not precisely defined but needed – and still need – to be interpreted by the reader. Others were using legal terminology and manners of war (as a social custom) almost interchangeably. Klüber used the French term *loi de guerre* and translated it as *Kriegsmanier* and *Kriegsgebrauch* ('manners of war') in 1819.<sup>57</sup> In German scholar and

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<sup>47</sup> Kamptz, *Neue Literatur des Völkerrechts*, p. 334f.

<sup>48</sup> Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, pp. 636-7.

<sup>49</sup> Hueck, 'Gründung völkerrechtlicher Zeitschriften in Deutschland im internationalen Vergleich', pp. 379-420.

<sup>50</sup> Vec, 'Sources in the 19th century European tradition', pp. 121-45.

<sup>51</sup> Wheaton/Dana, *Elements of international law*, p. 23.

<sup>52</sup> Martini, *Lehrbegriff des Natur= Staats= und Völkerrechts*, p. 122. Martini references Heineccius, Wolff, Gundling, Gunner.

<sup>53</sup> Hutcheson, *Short introduction to moral philosophy*, p. 335.

<sup>54</sup> Feder, *Lehrbuch der Praktischen Philosophie*, p. 163.

<sup>55</sup> Buddeus, *Lichts der Weisheit*, p. 494f.

<sup>56</sup> Schelle, *Praktische Philosophie*, pp. 61, 343.

<sup>57</sup> Klüber, *Droit des gens moderne de L'europe*, p. 384.

philosopher Friedrich Saalfeld's *Handbuch des positiven Völkerrechts* (*Handbook of Positive International Law*), which was published in 1833, terminology 'manners of war' were all common and legal practices during wartime.<sup>58</sup> Eighteenth century European jurist Johann Gottlieb Heineccius refers in 1738 to the 'mores gentium humaniorum', which was translated as 'the manners of more civilized nations' and then equated with 'the humanity of war'— two terms, oscillating between the social customs of civilized nations and the morality of warfare.<sup>59</sup>

### III. Limiting war? Fundamental disputes about what (not) to condemn in the Law of Nature and Nations

The relevance of these writings cannot be underestimated. Long-lasting traditions were established particularly by the seventeenth and eighteenth law of nature and of nations authors. Within these works, the usage of forbidden weapons during a just war was controversially discussed, opinions were expressed, and highly specialized tracts and dissertations were referenced.<sup>60</sup> The earlier assessments of Grotius, Vattel, and Kant on weapons were frequently quoted even during the nineteenth century, and it seems ultimately clear that those cross-references were more than historical footnotes but rather references to prevailing legal authorities in the field of international relations.

In 1866, American international lawyer Henry Wager Halleck made a strong and explicit reference to Vattel's book from 1758 at the end of a passage and quoted him as an undisputed authority.<sup>61</sup> In 1850, British international lawyer Richard Wildman discussed the conflict among legal textbook writers with regards to the means of lawful destructions in war and quoted Grotius, Cornelius van Bynckershoek, and Heineccius.<sup>62</sup> Such references, along with the general style of argumentation, underline once more that it would be a fundamental misunderstanding to believe that nineteenth-century international law was a merely positivist enterprise.<sup>63</sup> Instead, the law of nature was alive and influencing the law of nations in manifold ways.<sup>64</sup>

#### 1. The polyvalent justifications of outlawing perfidies (Grotius, Vattel, Kant)

To gain a better understanding of the legal authorities that were quoted during the nineteenth century, a short study of the work of Grotius, Vattel, and Kant seems valuable.<sup>65</sup> The most prominent classical doctrinal example for the polyvalent justifications of outlawing perfidies is Hugo Grotius' textbook, *De Jure belli ac Pacis libri tres*, which was first published in 1625. Famously, Grotius discussed the *ius in bello* according to the law of nature as well as to the law of nations (two different normative yardsticks) against the

<sup>58</sup> Saalfeld, *Handbuch des positiven Völkerrechts*, p. 197f.

<sup>59</sup> Heineccius, *A methodical system of universal law: Or, the laws of nature and nations*, II, C. IX, § 199, p. 194.

<sup>60</sup> See the bibliography at Höpfner, *Naturrecht des einzelnen Menschen, der Gesellschaften und der Völker*, p. 122f.

<sup>61</sup> Halleck, *Elements of international law and laws of war*, p. 179. On Lieber's code, poison and Vattel, see: Witt, *Lincoln's Code*, pp. 18, 183.

<sup>62</sup> Wildman, *Institutes of international law*, II, p. 23.

<sup>63</sup> Koskenniemi, 'Into positivism', pp. 189-207.

<sup>64</sup> Vec, 'Sources in the 19th century European tradition', pp. 121-45.

<sup>65</sup> Price, *The chemical weapons taboo*, p. 23ff.

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backdrop of the just-war doctrine.<sup>66</sup> In 1988, Swiss international lawyers Daniel Frei emphasized that arms control serves four objectives:

reducing the likelihood of war [...]; reducing suffering and damage in the event of war; reducing the expenditure of armaments and saving resources; and contributing to conflict management by providing a framework for negotiation between opposing sides, by reducing suspicion and by generally contributing to an atmosphere conducive to relaxation of tensions.<sup>67</sup>

According to this analytical lens, it seems that the limitations proposed by Grotius focused on reducing suffering and damage in the event of a just war. Additionally, mutual trust in international relations played a crucial role. Grotius explicitly imposed restrictions on the methods of warfare:

... the Law of Nations, if not of all, yet of the better part of them, allows not the taking the Life of any one, no not of an Enemy, by Poison; which Custom was introduced for a general Benefit, lest Dangers, which are very common in War, should be multiplied beyond Measure. And it is probable, that it was first made by Kings, whose Life being chiefly defended by Arms, is more in danger of Poison, than that of other Men, unless it were secured by the Severity of Law, and fear of Disgrace and Infamy.<sup>68</sup>

Such restrictions were not imposed by the law of nature according to Grotius; they could only be imposed by the law of nations: 'For if we respect the Law of Nature, if a Man has deserved Death, it signifies not much, whether we do it by the Sword or Poison.'<sup>69</sup>

Similarly, this line of argument against treacherous and cruel weapons can be found in many other early modern law books<sup>70</sup> and also factors prominently in the work of Swiss jurist Emer de Vattel first published in 1758, which can be seen as Grotius' successor in terms of transnational reception in the diplomatic and academic world.<sup>71</sup> Vattel also clearly spoke out against warfare with poison. After justifying the use of force, Vattel asked rhetorically:

Nations may do themselves justice sword in hand, when otherwise refused to them: shall it be indifferent to human society that they employ odious means, capable of spreading desolation over the whole face of the earth, and against which, the most just and equitable of sovereigns, even so supported by the majority of other princes, cannot guard himself?<sup>72</sup>

Here, an interesting argument against the use of poison is made explicit: it is – as Richard Price put it repeatedly – 'a potential equalizer in a battle'<sup>73</sup> and brings not only disorder to

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<sup>66</sup> Haggemacher, *Grotius et la doctrine de la guerre juste*.

<sup>67</sup> Frei, 'International humanitarian law and arms control', pp.493-494.

<sup>68</sup> Grotius, *Of the rights of war and peace*, 1715, L. III, C. IV, XV (p. 76), XV. 1.

<sup>69</sup> *ibid.*

<sup>70</sup> Beust, *Observationes Militares*, I, C. II, Observatio XXI, § 1, 2. (p. 26); Hasse, *Die Wahre Staats=Klugheit*, p. 455f.

<sup>71</sup> Fiocchi Malaspina, *L'eterno ritorno del Droit des gens di Emer de Vattel*.

<sup>72</sup> Vattel, *Law of nations*, p. 358.

<sup>73</sup> Price, 'A genealogy of the chemical weapons taboo', *International Organization* 49 (1995), p. 82; Price, *The chemical weapons taboo*, p. 25.

a contest of physical force but also makes monarchs and princes vulnerable as they are subject to unreasonable warfare. In other words, poison ‘also threatened to undermine the class structure of war, for a relative commoner could possess significant destructive capacity without the elaborate and expensive knightly accoutrements of horse, armor, and the like.’<sup>74</sup> Vattel’s conclusion was to outlaw two methods in particular:

Assassination and poisoning are therefore contrary to the laws of war, and equally condemned by the law of nature, and the consent of all civilized nations. The sovereign who has recourse to such execrable means, should be regarded as the enemy of the human race; and the common safety of mankind calls on all nations to unite against him, and join their forces to punish him.<sup>75</sup>

Again, the use of poison was the classic example and most discussed instrument when it came to concrete restrictions:

The use of poisoned weapons may be excused or defended with a little more plausibility. At least there is no treachery in the case, no clandestine machination. But the practice is nevertheless prohibited by the law of nature, which does not allow us to multiply the evils of war beyond all bounds. You must of course strike your enemy in order to get the better of his efforts: but if he is once disabled, is it necessary that he should inevitably die of his wounds? Besides, if you poison your weapons, the enemy will follow your example; and thus, without gaining any advantage on your side for the decision of the contest, you have only added to the cruelty and calamities of war.<sup>76</sup>

As previously laid out, Vattel used the same moral yardstick for judging weapons and imposing legal restrictions as that of Grotius; even the wording was partly identical.

The lasting legacy of these statements was not only the actual ban of the use of poison as an instrument of warfare. Probably even more important than this measure was the rationale and the criteria for this ban itself [see below III.4]. Grotius and Vattel supplied tools and instruments by which methods of warfare ought to be judged. Jurisprudence and moral philosophy went hand in hand to stigmatize certain types of weapons. The ongoing and explicit references to Grotius and Vattel illustrate that the discourse on the limitation of warfare in the nineteenth century was also dominated by categories and concepts regarding the moralization of weapons that were hardly new.

This theoretical contribution from the masterminds of the law of nature and of nations school was supplemented, discussed, and modified by many other writers across Europe who shall not be mentioned individually at this point for reasons of brevity. Yet, it would be an inexcusable shortcoming not to finally mention the international legal philosophy Immanuel Kant eminently formulated in his tract ‘*Zum ewigen Frieden*’ (Perpetual Peace, 1795). In his preliminary article No. 6, Kant repeated and underlined the assessments shared by the majority of his predecessors from the seventeenth and eighteenth century in their writings on the law of war. More clearly than the authors before him, Kant justified these restraints with an explicit purpose which was, in his opinion, trust in international relations:

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<sup>74</sup> Price, *The chemical weapons taboo*, p. 25.

<sup>75</sup> Vattel, *Law of nations*, pp. 360-1.

<sup>76</sup> *ibid.*, p. 361.

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Es soll sich kein Staat im Kriege mit einem andern solche Feindseligkeiten erlauben, welche das wechselseitige Zutrauen im künftigen Frieden unmöglich machen müssen: als da sind, Anstellung der *Meuchelmörder* (*percussores*), *Giftmischer* (*venefici*), *Brechung der Capitulation*, *Anstiftung des Verraths* (*perduellio*), in dem bekriegten Staat etc.

No state at war with another shall countenance such modes of hostility as would make mutual confidence impossible in a subsequent state of peace: such are the employment of assassins (*percussores*) or of poisoners (*venefici*), breaches of capitulation, the instigating and making use of treachery (*perduellio*) in the hostile state.

Trust had the highest value because it was needed as a base for future peace agreements. The aforementioned weapons destroyed trust between warring parties and were therefore seen as dishonourable means:

Das sind ehrlose Stratagemen. Denn irgend ein Vertrauen auf die Denkungart des Feindes muß mitten im Kriege noch übrig bleiben, weil sonst auch kein Friede abgeschlossen werden könnte, und die Feindseligkeit in einen Ausrottungskrieg (*bellum internecinum*) ausschlagen würde.

These are dishonourable stratagems. For some kind of confidence in the disposition of the enemy must exist even in the midst of war, as otherwise peace could not be concluded, and the hostilities would pass into a war of extermination (*bellum internecinum*).

These weapons, methods, and strategies, such as treacherous murders, poisoning etc. were morally unacceptable. Belligerents had to treat the enemy in a manner – even in times of war – that allowed them to return to peaceful terms and uphold international relations.

### 2. Contra: The freedom to choose one's arms (Bynkershoek and Wolff)

On the issue of illegal warfare, the eighteenth-century international legal doctrine was complex and not just a story of straight progress. Even the outlawing of poison was contested by a small but vocal minority of scholars – and poison was the least controversial of all the pariah weapons. In contrast with what one may expect, premodern doctrine was not unanimous in banning the use of poison from warfare. Notoriously, German natural lawyer Christian Wolff argued for the use of poison to force an enemy to restore lawfulness.<sup>81</sup>

§ 877. – *Whether by nature it is allowable to destroy the enemy by poison.*

By nature it is allowable to destroy the enemy by poison. For as long as he is an enemy,

<sup>77</sup> Kant, *Zum ewigen Frieden*, p. 12 – *highlighting* in original.

<sup>78</sup> Kant, *Perpetual peace*, translated from German by M. Campbell Smith, p. 144.

<sup>79</sup> Kant, *Zum ewigen Frieden*, p. 12f – *highlighting* in original.

<sup>80</sup> Kant, *Perpetual peace*, translated from German by M. Campbell Smith, p. 144.

<sup>81</sup> Wolff, *Jus gentium methodo scientifica pertractatum*, p. 709; Wolff, *Grundsätze des Natur- und Völkerrechts*, p. 871.

he resists the restoration of our right, consequently so much force is allowable against his person as is sufficient to repel his force from us or our property. Therefore, if you are able to remove him from our midst, that is not illegal. But since it is just the same whether you kill him with a sword or with poison, as is self-evident, since forsooth in either case he is removed from our midst that he may no longer resist and injure us, by nature it is allowable to destroy an enemy by poison.

There is no reason why you should object that an enemy is killed secretly by poison, so that he cannot protect himself from that so easily as from open violence; for he is not always killed by open violence who is killed by a sword or the use of other arms. For let us suppose that you secretly enter a place where the leader of the hostile army is asleep, and kill him with a sword. No one surely will deny that this is allowable by the law of war and is just the same as if he should be pierced by a bullet when unexpectedly seen from a distance. Therefore, from the fact that by poison a secret attempt is made against the life of an enemy, the right to remove him from our midst, if a favourable opportunity occurs, is not changed.<sup>82</sup>

Dutch international lawyer Cornelius van Bynkershoek<sup>83</sup> took the same position and justified it with the nature of war:

War is a contest *by force*. I have not said by *lawful force*, for in my opinion, every force is lawful in war. Thus it is lawful to destroy an enemy, though he be unarmed and defenseless; it is lawful to make use against him of poison, of missile weapons, of firearms, though he may not be provided with any such means of attack or defense; in short every thing is lawful against an enemy.<sup>84</sup>

His treatise on the law of war, originally published in 1737, was translated into English and even reprinted in Philadelphia in 1810.

Interestingly, the set of criteria that these two and other authors<sup>85</sup> apply was not so fundamentally different from that of the seventeenth- and eighteenth-century writers who argued against the usage of certain weapons, such as poison. The main argument was deduced from war as a legal concept with distinct purposes.<sup>86</sup> But just *how* far can belligerents go? Which means can be used to overthrow the enemy, to break his will, and to force him to restore justice? Which means go too far? That was the pivotal question in the dispute. Necessity, an early precursor of today's concept of 'proportionality'<sup>87</sup> and mercy, provided a map for normative orientation. Still, Wolff reaffirmed belligerents' liberty within that dogmatic frame to choose any weapon.<sup>88</sup>

<sup>82</sup> Wolff, *Jus gentium methodo scientifica pertractatum: Vol. II: The translation*, p. 450.

<sup>83</sup> Akashi, *Cornelius van Bynkershoek*.

<sup>84</sup> Bynkershoek, *Treatise on the law of war*, p. 2.

<sup>85</sup> Buddeus, *Sitten=Lehre, das Natur= und Völker=Recht, wie auch die Staats=Klugheit*, p. 494f.

<sup>86</sup> Mohl, 'Ueber völkerrechtswidrige Kriegsmittel', p. 767.

<sup>87</sup> It should be noted at this point that the aforementioned early concept of 'proportionality' differed significantly from 'proportionality' as it is known today in international humanitarian law. However, for lack of a better word, 'proportionality' will be used in this paper, as nineteenth-century lawyers – overall – followed similar parameters as scholars do today.

<sup>88</sup> Wolff, *Jus gentium methodo scientifica pertractatum*, p. 636.

3. Continuity of the moral argumentation in the nineteenth century's 'positivist' legal doctrine (Georg Friedrich von Martens, Wheaton)

It is often argued that the late eighteenth century revolutionized international legal doctrine in methodological terms, which in return led to the field's shift to positivism. Regardless of this claim's overall accuracy, there are at least some indications of a palpable shift towards positivism in the titles of major legal textbooks of the era. 'Treaties and custom' became front and center legal sources of contemporary law of nations; first edition of Georg Friedrich von Martens' textbook from 1789 is a prominent example of this trend.<sup>89</sup> Along with this change came an orientation towards Europe as the main geographical and historical frame of reference for those treaties. A number of book titles referred to a 'European law of nations',<sup>90</sup> and they continued the debate on the law of war and the weapons to be used in that war that was reminiscent of earlier law of nature and of nations textbooks. The actual texts are not quoted in order to avoid seeming repetitive, but similar patterns of argumentation were also on display in legal writings around 1850 and later years. Ideas on how to confine warfare through moral principles continued to dominate international legal debates. A similar picture can be drawn for related fields, like military interventions.<sup>91</sup>

Martens balanced the principally unlimited liberty to choose the most effective means to fight an enemy with a set of other principles, in an effort to mitigate the 'horrors' of war:

The law of nations permits the use of all means, necessary to obtain the satisfaction sought by a lawful war. Circumstances alone, then, must determine on the means proper to be employed; and, therefore, war gives a nation an *unlimited* right of exercising violence, against its enemy. But, the civilized powers of Europe, animated by a desire of diminishing the horrors of war, now acknowledge certain violences which are as destructive to both parties as contrary to sound policy, as unlawful, though not entirely forbidden by the rigour of the law of nations. Hence those customs which are at present called *the laws of war*.<sup>92</sup>

In this passage, in contrast to Wolff and Bynkershoek, Martens insisted on the unlawfulness of excessive violence. Although this wording sounds very familiar to readers acquainted with earlier eighteenth-century treatises on law of nature and of nations, Martens' quote was nevertheless also typical in its slight shift in terms of justification, representing a new doctrinal approach at the end of the century. It represented a new approach which asserted that Europe as a political sphere was also home to certain types of moral and social customs that limited the legitimate exercise of warfare and will hopefully continue to limit it in the future. However, the overall patterns of argumentation appeared static, and no major changes could be identified in this regard by the author. Poison was still the classical and often the only example of a weapon considered to be forbidden by the law of nations. In a footnote, William B. Lawrence, who annotated *Elements of International Law* by American international lawyer Henry Wheaton, pointedly summed up Wheaton's arguments: 'Nations seem to concur in denouncing the use of poisoned

<sup>89</sup> Martens, G. F. von, *Précis du droit des gens moderne de l'Europe*.

<sup>90</sup> See e.g. Schmalz, *Das europäische Völker=Recht*; Schmelzing, *Systematischer Grundriß des praktischen Europäischen Völker=Rechtes*; Pradier-Fodéré, *Traité de Droit International Public Européen & Américain*.

<sup>91</sup> Vec, 'Intervention/ Nichtintervention', pp. 135-60.

<sup>92</sup> Martens, *Summary of the law of nations*, VIII, p. 279.

weapons, the poisoning of springs or food, and the introduction of infectious or contagious diseases. As to the nature of weapons not poisoned, there is, and perhaps can be, no rule.<sup>93</sup>

This stance presumably had to do with the overall continuity of the weapons discussed. Although some progress in weapon technology was made around 1800,<sup>94</sup> it was arguably not fundamental or challenging enough for international lawyers to discuss its impact. Therefore, it seems plausible for them to discuss the issue between the French Revolution and the *Vormärz* ('pre-march') without any reference to challenges brought by new inventions. This aspect was absent for the most part in those decades and in early and mid nineteenth-century debates and publications on contemporary manners of war.<sup>95</sup>

#### 4. A matter of conscience: The language of outlawing

In summary, international law regulating weapons was mainly based on legal, philosophical, and political scholarship from the seventeenth to the mid nineteenth century. A number of authors, often trained as jurists, argued whether just war should have restrictions in terms of the interdiction of certain weapons. It seems that although there was no unanimity, most writers were in favour of outlawing a number of weapons and strategies. The debate was very much conducted as a discussion about principles, not necessarily about rules. In this respect, the discussion was quite similar to contemporary debates on just war. Jurists tried to identify adequate criteria to judge political or military behaviour. They developed an understanding of war as a legal procedure that was fought for certain aims. These aims could serve as yardsticks to measure the legality of a certain type of warfare and its respective methods. Some examples of what not to do in times of war may seem trivial at first. Cruelty out of mere waggery<sup>96</sup> or '*la vengeance et la haine*' (the revenge and the hate)<sup>97</sup>, 'wanton destruction'<sup>98</sup> or 'wantonly increasing pain'<sup>99</sup> that had nothing to do with the overall objective of the war<sup>100</sup> should remain taboo according to jurists, even in times of war. It is fair to say that these clear-cut examples were aimed at a broader audience beyond academic circles; they were supposed to guide combatants in the midst of fighting and to 'suppress their desire to engage in "irrational" violence'.<sup>101</sup> These verdicts indicate the presence of moral consideration and determination and depict expressive acts of speech.

Furthermore, such an understanding of war potentially helped to apply the principles of utility, necessity, and – as mentioned above – an early concept of 'proportionality'. Actions motivated by such outlawed emotions violated these principles and could be labelled 'unnecessary' for military purposes, which made them illegitimate and therefore finally illegal. 'The necessities of war'<sup>102</sup> thus had a double function; they enabled the use of force and limited the methods of warfare at the same time.<sup>103</sup>

These criteria also helped to identify the real target of warfare and subsequently promoted excluding – and to a certain extent, protecting – non-combatants: men, women, and

<sup>93</sup> Wheaton/Dana, *Elements of international law*, p. 428, note (I).

<sup>94</sup> O'Connell, *Of arms and men*, p. 191f; Neff, *War and the law of nations*, p. 202.

<sup>95</sup> Rotteck, 'Ein Wort über die heutige Kriegsmanier', pp. 240-79.

<sup>96</sup> Moser, *Grund=Sätze des Europäischen Völker=Rechts in Kriegs=Zeiten*, p. 192.

<sup>97</sup> Nys, *Le droit international*, p. 148.

<sup>98</sup> Lorimer, *The institutes of the law of nations*, II, p. 79f.

<sup>99</sup> Martens, *Summary of the law of nations*, VIII, p. 282.

<sup>100</sup> Tittel, *Erläuterungen der theoretischen und praktischen Philosophie*, p. 476f.

<sup>101</sup> Koskeniemi, *Gentle civilizer of nations*, p. 88.

<sup>102</sup> Twiss, *Law of nations considered as independent political communities*, p. 99f.

<sup>103</sup> Kolb, 'Main epochs of modern international humanitarian law', p. 29; Witt, *Lincoln's code*, p. 4.

children who were not the target but may have ended up in the crossfire nonetheless. Irish philosopher Francis Hutcheson, one of the founding fathers of the Scottish Enlightenment, wrote in 1747 that 'Violence is justifiable only against men in battle, or such as violently obstruct our obtaining our rights.'<sup>104</sup> Non-combatants are consequently perceived as a group worthy of specific protection by the law of war. This development led to the emergence of what came to be called IHL in the last decades of the twentieth century.<sup>105</sup> At the same time, all these principles and rules were far from absolute and could potentially be overturned in cases of 'extreme military necessity'.<sup>106</sup> The latter was a very 'elastic notion'<sup>107</sup> and was frequently (ab)used in dead-end situations when treaty obligations and the constraints of *Realpolitik* collided.<sup>108</sup> The concept functioned analogously to the Machiavellian idea of *necessitas* as an overruling principle that enabled politicians to justify violations of their legal and moral obligations in exceptional situations. The juridification of international relations and the mitigation of the atrocity of war could both essentially be revoked with it – on very uncertain premises.<sup>109</sup>

#### IV. Change and self-perception: Narratives of progress in the nineteenth century

Particularly the second half of the nineteenth century not only displayed multiple continuities but finally brought dramatic changes to the law of war. These changes were perceived not only by today's historians of international law but also by contemporaries as remarkable 'progresses' in the development of the law of war.<sup>110</sup> This late nineteenth-century mindset was based on enthusiasm about multiple scientific advances, finally enabling the second Industrial Revolution at this time. The idea of progress was routinely evoked in this regard, and the term was prominently displayed on a number of nineteenth-century book titles.<sup>111</sup> Interestingly, the idea of progress itself was never disputed; during the research for this article, not a single writer was found who even considered regress in contemporary developments of international law and particularly in the law of war. To understand that self-perception, historical treaty practice and the contemporary philosophy of history of international law need to be considered.<sup>112</sup> It appears that the rhetoric of progress was used to justify international lawyers' professional agenda and the young discipline as such.<sup>113</sup> In a time when international law's approach – which sometimes

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<sup>104</sup> Hutcheson, *Short introduction to moral philosophy*, p. 334.

<sup>105</sup> Goltermann, *Opfer*.

<sup>106</sup> Saalfeld, *Handbuch des positiven Völkerrechts*, p. 197f.; Klüber, *Droit des gens moderne de L'europe*, p. 384; Arntz, *Programme Du Cours Droit des Gens*, p. 151; Bulmerincq, *Völkerrecht oder internationales Recht*, p. 362; Westlake, *Chapters on the principles of international law*, p. 238; Endres, *Völkerrechtlichen Grundsätze der Kriegsführung zu Lande und zur See*, p. 12.

<sup>107</sup> Liivoja, 'Technological change and evolution of the law of war', p. 1165.

<sup>108</sup> Koskeniemi, *Gentle civilizer of nations*, p. 38.

<sup>109</sup> Vec, 'All's fair in love and war'.

<sup>110</sup> Duane, *Law of nations*, p. 101; Bernard, 'Growth of laws and the usages of war' p. 89; Taylor, *Treatise on international public law*, p. 470; Olivart, *Tratado de Derecho internacional público*, III, p. 87; Bonfils, *Manuel de droit international public*, p. 656; Martens, *Völkerrecht*, p. 489; Bordwell, *Law of war between belligerents*, pp. 2-6.

<sup>111</sup> Isambert, *Tableau des progrès du droit public et du droit des gens*; Wheaton, *Histoire des progrès du droit des gens*; Calvo, *Le droit international théorique et pratique*; Pradier-Fodéré, *Traité de Droit International Public Européen & Américain*; Pierantoni, *Die Fortschritte des Völkerrechts im XIX. Jahrhundert*.

<sup>112</sup> Hunter, 'About dialectical historiography of international law', pp. 1-32

<sup>113</sup> Koskeniemi, *Gentle civilizer of nations*, chs. 1 & 2.

seemed like less of an approach and more of a blind eye – was mostly indifferent to detrimental effects of empire and colonialism, a shared moral basis was needed to soothe one's conscience. This ambivalent dynamic can also be observed in the realm of outlawing weapons.

1. A late-nineteenth century increase in international treaty law; Martens' Clause

The most remarkable development of the last decades of the nineteenth century in the law of war regarding weapons is the increase of treaty law, which was fostered by documents which – though typically not legally binding – served as declarations and subsequent guidelines for states' practice. Nonetheless, there were exceptions when it came to their legal character. Among the treaties mentioned below, the St Petersburg Declaration of 1868 and the Hague Conventions and Declarations of 1899 and 1907 did gain the force of law. Three steps central to this overall development shall be mentioned in this context:<sup>114</sup>

a) The St Petersburg Declaration of 1868

The preamble of the Declaration of St Petersburg from 29 November /11 December 1868 reads as follows:

Considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would therefore be contrary to the laws of humanity; The contracting parties engage mutually to renounce in case of war among themselves the employment by their military or naval troops of any projectile of a weight less than 400 grammes [about 13 ½ ounces] which is either explosive or charged with fulminating or inflammable substances.<sup>115</sup>

Although a number of specific weapons singled out by the authors were explicitly outlawed, other weapons were still regarded legal. However any weapons could be condemned if their usage was deemed violating general principles ('laws of humanity') or the overall objective of the declaration. Explosive projectiles under a certain weight belonged to the few categories of weapons to be declared as *mala in se* at that time. These weapons were considered to not serve the main purpose of war and therefore fell outside the scope of military necessity.<sup>116</sup>

b) The Brussels Declaration on Land Warfare of 1874

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<sup>114</sup> In the following (IV.1 a-c), I refer to a section of a previously published article: Vec, 'Challenging the laws of war', pp. 108-10.

<sup>115</sup> Online: Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight. 29 November/11 December 1868. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C>. Accessed: 14 December 2016.

<sup>116</sup> Schäfer, 'The 150th anniversary of the St Petersburg Declaration: Introductory reflections on a janus-faced document', p. 507.

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The next step was the *Project of an International Declaration concerning the Laws and Customs of War* of 1874, which encompassed the following provision in Art. 13: 'According to this principle [means of injuring the enemy are not unlimited, MV] are especially 'forbidden': (a) Employment of poison or poisoned weapons.'<sup>117</sup>

The Declaration of 1874 never went into force, but in 1880, it led to corresponding resolutions by the Institut de Droit International, the '*Manuel des lois de la guerre sur terre*',<sup>118</sup> unofficially called the 'Oxford Manual'. This manual later served as a model for the provisions at the Hague Conferences of 1899 and 1907.<sup>119</sup>

- c) The Declaration on the Use of Projectiles with Asphyxiating or Deleterious Gases and the Hague Convention on Land Warfare of 1899

Finally, on 29 July 1899, Hague Declaration (IV, 2) concerning asphyxiating gases was adopted. The preamble explained that the declaration was 'inspired by the sentiments which found expression in the Declaration of St. Petersburg of 29 November (11 December) 1868.' The document itself briefly stated that 'The contracting powers agreed to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.'<sup>120</sup> One could argue that these phrases ultimately originate – at least in part – from Article 13 of the Brussels Declaration of 1874.

Additionally, the second convention 'respecting the laws and customs of war on land' was concluded in 1899.<sup>121</sup> Section II had the title 'On Hostilities'; Chapter 1 is 'On Means of Injuring the Enemy, Sieges, and Bombardments' and stated in Article 22: 'The right of belligerents to adopt means of injuring the enemy is not unlimited'. A list of specific prohibitions followed in Article 23:

### Article 23.

Besides the prohibitions provided by special conventions, it is especially prohibited: –

- (a) To employ poison or poisoned arms;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To employ arms, projectiles, or material of a nature to cause superfluous injury;<sup>122</sup>

It was also adopted (with minor changes to the 1899 version) in 1907.<sup>123</sup>

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<sup>117</sup> Online: Project of an international declaration concerning the laws and customs of war, Brussels, 27 August 1874, Means of injuring the enemy. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=31364F80ED69E269C12563CD00515549>. Accessed 14 December 2016.

<sup>118</sup> Schindler and Toman, eds., 'The laws of war on land', p. 29; Kassapis, *C-Waffen*, p. 10; Kunz, *Gaskrieg und Völkerrecht*, p. 13.

<sup>119</sup> Mérignhac, *La conférence internationale de la paix*, p. 197.

<sup>120</sup> Carnegie Endowment for International Peace: Pamphlet No. 8. The Hague declaration (IV, 2) of 1899 concerning asphyxiating gases, Carnegie Endowment, 1915, V. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2531E92D282B5436C12563CD00516149>. Accessed 14 December 2016.

<sup>121</sup> Kunz, *Gaskrieg und Völkerrecht*, p. 13.

<sup>122</sup> Online: Convention with respect to the laws and customs of war on land (HAGUE, II). 29 July 1899. [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp). Accessed 14 December 2016.

<sup>123</sup> Synopsis in: Carnegie Endowment for International Peace, Division of International Law: Pamphlet No. 5. The Hague Conventions of 1899 (II) and 1907 (IV) respecting the laws and customs of war on lands, Carnegie Endowment, 1915, p. 17.

## d) Martens' Clause

The preamble of the 1899 Hague Convention (II) on the laws and customs of war on land included a short clause in the ninth paragraph originally designed to 'overcome a diplomatic impasse in the drafting of rules of belligerent occupation and permissible resistance by the occupied thereto'<sup>124</sup>: 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, 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'.

The clause was slightly modified in 1907<sup>125</sup> and rose to prominence under the name of the Russian delegate at the Hague Conferences, eminent international lawyer Fedor Fedorovitch [=Frédéric/ Friedrich] Martens. Its wording has been taken up in a number of more recent treaties of IHL and remains a source for controversial legal debates of high practical relevance until today.<sup>126</sup> These debates are fuelled by the concepts and terms of the historical language, which was arguably ambiguous and ambitious at the same time. In the clause, the international legal language used evidently addresses 'the existence and import of the patently non-positivistic sources of IHL', according to many international lawyers.<sup>127</sup>

The clause is generally used as a reference for two assumptions: IHL is incomplete, and war is subordinate to law.<sup>128</sup> Both assumptions may be understood to be based on the idea that there is nothing above law, which inevitably regulates the conduct of war, and law may expand to fill present gaps in the future. The common interpretation of these two assumptions encompasses a certain hope about multi-normativity in this field. Not only should international lawyers see a legal link between positive international law and morality at this point, but the norms of morality should also serve as supplements for law in situations where the law itself remains incomplete. This idea is somewhat in line with international lawyers' writings from previous centuries. Historically, ideas about morality, natural law, and chivalry stand behind the ethical approach of the clause.<sup>129</sup> The invocation of 'principles' serves as a replacement for often lacking concrete legal rules.

This moralist intent tended to invoke 'public conscience', a fashionable idea and concept in the years around 1900, and the combination of both morality and public conscience was evaluated in an overwhelmingly positive light.<sup>130</sup> The provisions of international law are admittedly incomplete since potential future developments in the form of technological progress will change the framework and will alter the reality of what needs to be regulated by international law. However, the clause's importance should nonetheless not be underestimated; its preamble will remain relevant as a method to fill present and future gaps of international law, diffuse as it may be. Positive international law will have to keep pace with technological progress to slowly build a progressive normative order without falling behind.

Interestingly, this approach aims to include international morality and public conscience

<sup>124</sup> Bernstorff, 'Martens Clause', para. 14.

<sup>125</sup> Meron, 'Martens Clause', p. 79.

<sup>126</sup> Kahn, 'Protection and empire', p. 26.

<sup>127</sup> Giladi, 'Enactment of irony', p. 849.

<sup>128</sup> *ibid.*, p. 862.

<sup>129</sup> Meron, 'Martens Clause', p. 79.

<sup>130</sup> Lingen, 'Fulfilling the Martens Clause', p. 193.

into its interpretation of legal provisions on unlawful weapons.<sup>131</sup> It is based 'on the continuing intuition that restraint in warfare is an intrinsic part of European conscience.'<sup>132</sup> The historical reality of militarism and the imperialism that followed, along with conflicting normative orders, is less prominently addressed<sup>133</sup> – if at all. International lawyers' optimistic self-assessment in the late nineteenth century found its rhetorical soundboard here; their belief in strong ethical foundations of the modern European law of nations, which is on the edge of becoming a true global order, was based on Christianity, progress, and civilization. The preamble codified uncodified principles and was therefore a somewhat paradoxical norm. Due to its openness for future developments and interpretations and unabashed promise to humanize the law of war, Martens' Clause has remained a dynamic normative factor despite changing interpretations and needs of international law and international politics.

2. Continuing condemnation: Differentiation of criteria and a partial change in justifying norms

All these provisions of the Hague Conventions and Declarations were in line with the opinions of the aforementioned majority of writers on international legal doctrine from the seventeenth to nineteenth century. Put differently, in the end, the Hague Conventions and Declarations and their predecessors merely codified international customary law without creating new provisions in this field.<sup>134</sup> The standards of humanitarian warfare that had crystallized from intense international legal debates were finally put on paper in Article 22, which laid out general principles, and Article 23, which detailed special provisions and examples.

Many lines of argumentation were in full continuity with the aforementioned legal authorities and their moral convictions. The interdiction of poison is probably the most evident indicator of those continuities. Numerous late eighteenth-century and nineteenth-century authors and their textbooks on the law of nations condemned poisoned weapons, including philosophers Francis Hutcheson<sup>135</sup> and Adam Ferguson,<sup>136</sup> theologian Thomas Rutherford,<sup>137</sup> international lawyers like the Germans Klüber, Schmalz,<sup>138</sup> Schmelzing,<sup>139</sup> Saalfeld,<sup>140</sup> the Italian Fiore,<sup>141</sup> the English Richard Wildman, the Danish Kolderup-Rosenvinge<sup>142</sup>, the American Bowen<sup>143</sup> and Halleck<sup>144</sup>, the French Villiaumé<sup>145</sup> and Mariotti<sup>146</sup>, the Dutch Poortugael<sup>147</sup>, the Venezolan-Chilean Bello,<sup>148</sup> and the Argentinean

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<sup>131</sup> Bernstorff, 'Martens Clause', para. 12.

<sup>132</sup> Koskenniemi, *Gentle civilizer of nations*, p. 87.

<sup>133</sup> Meron, 'Martens Clause', p. 85.

<sup>134</sup> Nys, *Le droit international*, p. 141.

<sup>135</sup> Hutcheson, *Short introduction to moral philosophy*, p. 335.

<sup>136</sup> Ferguson, *Principles of moral and political science*, p. 307.

<sup>137</sup> Rutherford, *Institutes of natural law*, p. 528.

<sup>138</sup> Schmalz, *Das europäische Völker=Recht*, p. 247.

<sup>139</sup> Schmelzing, *Systematischer Grundriß des praktischen Europäischen Völker=Rechtes*, III, p. 157f.

<sup>140</sup> Saalfeld, *Handbuch des positiven Völkerrechts*, p. 208.

<sup>141</sup> Fiore, *Nouveau Droit International Public*, II, p. 279.

<sup>142</sup> Kolderup=Rosenvinge, *Grundriß af den positive Folkeret*, p. 106f.

<sup>143</sup> Bowen, *International law*, p. 113.

<sup>144</sup> Halleck, *Elements of international law and laws of war*, p. 179.

<sup>145</sup> Villiaumé, *L'esprit de la guerre*, p. 60.

<sup>146</sup> Mariotti, *Du Droit des Gens en temps de guerre*, p. 71.

<sup>147</sup> Poortugael, *Het oorlogsrecht of het recht en de gebruiken in den oorlog*, p. 163.

<sup>148</sup> Bello, *Principios de Derecho de Jentes*, p. 125f.

Calvo,<sup>149</sup> etc. This unanimous rejection was now (re-)framed in new declarations and their principles. The American international lawyer George Davis stated in 1887, ‘The decision as to whether a particular instrument may, or may not, be employed in war will depend upon the wound or injury caused by its use. If the wound produced by it causes unnecessary suffering, or needless injury, it is to be rejected, otherwise not. This rule applies to all instruments of whatever character, whether weapons or projectiles, which may be used in war. The application of this rule forbids the use of cutting or thrusting weapons which have been poisoned, or which are so constructed as to inflict a merely painful wound’.<sup>150</sup>

Additionally, it seems that as the catalogue of criteria for pariah weapons was constantly being diversified, it became more precise and elaborate. The yardsticks of military utility and its moral counterpart, humanity, were defined more precisely. Moral and legal duties were defined, and the two normativities of law and morality closely interacted. Terms, labels, and concepts such as ‘civilization chrétienne’ (Christian civilization),<sup>151</sup> honour, clandestinely, ‘infamous’ (means of poison),<sup>152</sup> ‘torture’,<sup>153</sup> ‘violence inutile’,<sup>154</sup> ‘cruautés inutiles’<sup>155</sup>/Cruelties/*Gräuelthaten*,<sup>156</sup> meuchlerisch<sup>157</sup>/treacherous, *entehrend*/discreditable;<sup>158</sup> honesty, ‘*unmenschliche Grausamkeiten*’<sup>159</sup>/‘*unmenschlich*’,<sup>160</sup> *unehrenhaft*,<sup>161</sup> odious/*odieuse/odieux*,<sup>162</sup> ‘*infructuosamente cruel y funesto*’,<sup>163</sup> actions ‘*barbare*’<sup>164</sup>, ‘*rigueurs inutiles*’<sup>165</sup> popped up and provided means to describe what to forbid. This vocabulary was moralizing, first and foremost. Yet, it also supplied yardsticks on how to measure and judge war technologies from a legal standpoint, how to apply legal judgment and how to outlaw excess. Unlawful weapons were being singled out rhetorically – in a negative sense – instead of disdaining them for their function and their trail of destruction. This strong language had a decisive impact on lawmaking due to a distinct factor: public opinion.<sup>166</sup> The rise of the public sphere at the end of the late nineteenth century and the interests of the many political movements (among them the peace societies) at the time and public opinion in general both affected international law.<sup>167</sup> International lawyers started using arguments from public debates to justify their projects and normative claims. At the same time, public opinion had an impact on political projects and demanded reforms in current international law and future projects of codification.<sup>168</sup> These requests were more likely to be heard when they were formulated in clear language with a moralizing punch.

<sup>149</sup> Calvo, *Le droit international théorique et pratique*, p. 134.

<sup>150</sup> Davis, *Elements of international law*, p. 224.

<sup>151</sup> Fiore, *Nouveau Droit International Public*, II, p. 279.

<sup>152</sup> Ward, *Enquiry into the foundation and history of the law of nations*, II, p. 199.

<sup>153</sup> Bowen, *International law*, p. 113.

<sup>154</sup> Acollas, *Le droit de la guerre*, p. 53.

<sup>155</sup> Arntz, *Programme Du Cours Droit des Gens*, p. 151.

<sup>156</sup> Bulmerincq, ‘Nothwendigkeit eines allgemein verbindlichen Kriegsrechts’, pp. 21, 23, 26.

<sup>157</sup> Lentner, *Das Recht im Kriege*, p. 81.

<sup>158</sup> *ibid.*, p. 82.

<sup>159</sup> Lueder, ‘Landkriegsrecht im Besonderen’, p. 391.

<sup>160</sup> Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, p. 271.

<sup>161</sup> Mohl, ‘Ueber völkerrechtswidrige Kriegsmittel’, p. 777.

<sup>162</sup> Calvo, *Le droit international théorique et pratique*, p. 134; Schmalz, *Le droit des gens européen*, p. 247.

<sup>163</sup> Bello, *Principios de Derecho de Jentes*, p. 125f.

<sup>164</sup> Foignet, *Manuel élémentaire de droit international public*, p. 267.

<sup>165</sup> Bex, *Essai sur L’Evolution du Droit des Gens*, p. 150.

<sup>166</sup> Gillespie, *History of the laws of war*, III, p. 22.

<sup>167</sup> Roberts, ‘Against war’, p. 331.

<sup>168</sup> Wheaton/Dana, p. 17; Wheaton/Lawrence, p. 16; Gardner, *A treatise on international law*, pp. 177, 239; Hull, *The two Hague Conferences*, p. 21ff.

However, it also appears that the canon of *topoi* was not only growing; some *topoi* also vanished. Perfidy is an interesting example in this regard. While it did not vanish *per se*, the authors did try to address a different audience. Whereas some early modern authors warn that military personnel, political leaders, and monarchs ('the commander in chief or any other enemy of distinction')<sup>169</sup> could secretly be assassinated using clandestine, treacherous weapons, this line of argumentation against poison seemed to have all but vanished in the nineteenth century. Authors now primarily addressed combatants and non-combatants; the fear that poison could be an equalizer, undermining the class structure of war,<sup>170</sup> was no longer mentioned as a rationale of its prohibition. The norm's justification had shifted, and as a result, former arguments were dropped silently (however, it might have still contributed tacitly as an ideological undercurrent to the maintenance of the norm). The argumentation instead focuses on regular combatants or innocent noncombatants. Therefore, 'the enemy of distinction' and his particular endangerment through poisonous weapons and treacherous killings went out of focus.

### 3. Against 'barbarism' and the 'uncivilized': Eurocentrism, colonialism, and exclusion

The process of issuing early, non legally binding declarations as well as concluding treaties can be seen as a juridification of international relations in the field of the law of war. This shift was observed and commented on by all international lawyers of the time, who saw it as clear proof of a 'period of humanitarian progress and voluntary codification'.<sup>171</sup> They emphasized the progress that international law had made and analysed the scope, structures, and content of the juridifications that were taking place. A community of states emerged that was guided by international legal consciousness. The notion of 'civilization' was frequently attached to states' self-perception. Their lawyers became protagonists in formulating doctrines and supporting diplomatic relations. It was the concept of 'civilization'<sup>172</sup>/Christian civilization<sup>173</sup> that encouraged a certain number of states to conclude those treaties and to issue these non legally binding declarations, and it was a touchstone for others. The states understood themselves as being European and civilized states, which justified discriminating and subordinating the outside world in manifold ways and means. International law was one of them.

In the field of the law of war, this civilizing mission of international law<sup>174</sup> was expressed in frequent references to and in the rejection of 'barbarism.' Stigmatizing certain types of war methods and weapons was a proof of culture<sup>175</sup> and civilization,<sup>176</sup> and by adhering to these new standards, states seemingly overcame earlier stages of historical warfare that were considered 'barbarian.'<sup>177</sup> Often, the spheres of action of these methods were not only

<sup>169</sup> Martens, *Summary of the law of nations*, VIII, p. 281.

<sup>170</sup> Price, *The chemical weapons taboo*, p. 43.

<sup>171</sup> Maine, *International law*, p. 142.

<sup>172</sup> Rutherford, *Institutes of natural law*, p. 528 (against poison); Rodriguez Saráchaga, *El derecho internacional público*, p. 380.

<sup>173</sup> Fiore, *Nouveau Droit International Public*, II, p. 279.

<sup>174</sup> Pauka, *Kultur, Fortschritt und Reziprozität*; Gong, *Standard of 'civilization' in international society*; Lingen, *Crimes against humanity*, pp. 17, 40ff; Yanagihara, *Significance of the history of the law of nations in Europe and East Asia*, pp. 310-1, 343ff.

<sup>175</sup> Saalfeld, *Handbuch des positiven Völkerrechts*, p. 197f.; Bluntschli, 'Kriegsvölkerrecht und Kriegsgebrauch', p. 256; Martens, *Völkerrecht*, II, p. 489; Bulmerincq, 'Die Nothwendigkeit eines allgemein verbindlichen Kriegsrechts', II, p. 27.

<sup>176</sup> Howland, *International law and Japanese sovereignty*, p. 24, 99-126.

<sup>177</sup> Duane, *Law of nations*, p. 101; Mohl, 'Ueber völkerrechtswidrige Kriegsmittel', p. 777; Bluntschli, *Das moderne Völkerrecht der civilisirten Staten*, p. 312; Bonfils, *Manuel de droit international public*, p. 657.

located in the European past but also the global present. But authors of nineteenth-century international law textbooks spotted inhuman warfare practices almost exclusively outside of Europe. References to interdictions of such weapons existing outside of Europe in the past or present were made (Islamic law of war<sup>178</sup>; Manusmriti, also called the Mānava-Dharmaśāstra or Laws of Manu<sup>179</sup>), but these footnotes were much rarer. Austrian lawyer Ferdinand Lentner wrote in 1880 that the use of poison or poisonous weapons was still a custom of wild hordes.<sup>180</sup> In other words, the barbarians were always the others (in 1908, Percy Bordwell mentions ‘the Jews’<sup>181</sup> in this regard), and one’s own moral supremacy was carefully constructed in opposition to this ‘barbarian’ other that needed to be suppressed. This characteristic could be found in many textbooks and international lawyers’ argumentation at that time.

It was of no coincidence that some international lawyers from the second half of the nineteenth century explicitly discussed not only poison or assassination but also another regulatory challenge to civilized warfare: the use of colonial troops.<sup>182</sup> They perceived such an ‘Employment of Savage Allies’<sup>183</sup> as a violation of moral standards due to the well-known ‘barbarism’ of these ‘semi’- or ‘uncivilized’ troops and claimed that such use was illegal<sup>184</sup> or demanded reforms to forbid it in the future.<sup>185</sup> However, it should be noted that these voices mainly came from states without colonial empires and therefore had strong political undertones.

In summary, colonialism, imperialism, and Eurocentrism all left their traces on the field of the nineteenth-century law of war.<sup>186</sup> Overall, the celebrated progress in the doctrine of the law of war was not shared with ‘barbarians’ outside of Europe’s geographical realm and its moral foundation, the ‘Christianity, education, an enlightened self-interest’.<sup>187</sup> There is a consensus among today’s international legal historians that international law contributed to the colonial rule of European states.<sup>188</sup> However, it is disputed to which degree international law as such was an imperialist and colonialist enterprise from its beginning in the early modern period. This debate is ongoing and is enriched by the so-called Third World Approaches to International Law, which highlighted doctrinal discriminations in the European law of nations and also in the field of the law of war. Non-Europeans were excluded in two ways. First, they were stigmatized for supposedly practicing barbarian methods of warfare. In addition, the doctrine of the European law of nations did not attribute statehood to many of these non-European political actors, so they were again excluded from new interstate treaties in this field. The celebrated European law of war and

<sup>178</sup> Heffter, *Das Europäische Völkerrecht der Gegenwart*, p. 272, N. 2; Lueder, ‘Das Landkriegsrecht im Besonderen’, pp. 393, N. 9.

<sup>179</sup> Taylor, *Treatise on international public law*, p. 480; Bluntschli, *Das moderne Völkerrecht der civilisirten Staten*, p. 312; Lueder, ‘Landkriegsrecht im Besonderen’, pp. 393, N. 9.

<sup>180</sup> Lentner, *Recht im Kriege*, p. 80.

<sup>181</sup> Bordwell, *Law of war between belligerents*, p. 8.

<sup>182</sup> Koller, *Von Wilden aller Rassen niedergemetzelt*; Lueder, ‘Das Landkriegsrecht im Besonderen’, p. 395.

<sup>183</sup> Wheaton/Dana, *Elements of international law*, p. 428, n. II; Bordwell, *Law of war between belligerents*, p. 232.

<sup>184</sup> Acollas, *Le droit de la guerre*, p. 55; Bluntschli, *Das moderne Völkerrecht der civilisirten Staten*, p. 314; Martens, *Völkerrecht*, p. 485f.

<sup>185</sup> Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, p. 272, n. 4 by Geffcken.

<sup>186</sup> For late nineteenth-century examples in the field of arms transfer, see Enomoto, ‘Controlling arms transfers to non-state actors’, pp. 5f, 17; see further: Anghie, *Imperialism, sovereignty, and the making of international law*, p. 55f.

<sup>187</sup> Gardner, *Institutes of international law*, p. 595.

<sup>188</sup> Anghie, *Imperialism, sovereignty, and the making of international law*.

its progress was only supposed to benefit states belonging to the 'family of nations.' Henry Wheaton once rhetorically asked in a famous passage, 'Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists'.<sup>189</sup>

Other political entities did not benefit from the constraint of warfare. Accordingly, the warfare against 'non-civilized' peoples/'savages' was unlimited. It was marked by discriminatory standards (their forms of political organization were not recognized as states),<sup>190</sup> and racist beliefs in international law led to unbelievably cruel and merciless practices.<sup>191</sup>

#### 4. New technologies challenging old standards

International lawyers of the second half of the nineteenth century, particularly around the year 1900, faced manifold regulatory challenges that were mostly due to changing technology. Industrialization and militarization introduced new weapons to interstate warfare. Nineteenth-century international law textbooks mentioned Congreve rockets,<sup>192</sup> (submarine contact) mines,<sup>193</sup> chemical compounds,<sup>194</sup> and torpedoes;<sup>195</sup> the early twentieth century added flamethrowers, submarines, machine guns, aerial bombardment, and tanks.<sup>196</sup>

This progress added new chapters to the theory<sup>197</sup> and history<sup>198</sup> of the law of technology. From a normative point of view, some passages in older international law textbooks were now outdated. Late nineteenth- and early twentieth-century international lawyers criticized their colleagues' earlier writings as being irrelevant due to subsequent technological developments.<sup>199</sup> One of their preferred targets for criticism was Klüber's still widely popular textbook in its 1861 edition, which contained a passage on the interdiction of:

the usage of chain bullets or rod bullets, shooting cannons with iron, glass, nails or similar items. [...] Against the manners of war are in addition: loading the musket with two bullets, or with two halved bullets, or with jagged bullets, or with bullets mixed with glass or lime [...]<sup>200</sup>

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<sup>189</sup> Wheaton/Lawrence, *Elements of international law*, p. 16f; Wheaton/Dana, p. 17f. Similar: Leseur, *Introduction à un cours de Droit International Public*, pp. 97-102.

<sup>190</sup> Kleinschmidt, *Diskriminierung durch Vertrag und Krieg*; Bernstorff, 'Use of force in international law before World War I', pp. 243, 247.

<sup>191</sup> Witt, 'Dismal history of the laws of war', p. 903; Balfour, 'Secret wars in forgotten Africa', p. 128.

<sup>192</sup> Schmelzing, *Systematischer Grundriß des praktischen Europäischen Völker=Rechtes*, III, p. 160f.

<sup>193</sup> Wheaton/Dana, *Elements of international law*, p. 428; Rodriguez Saráchaga, *El derecho internacional público*, p. 383; Bordwell, *Law of war between belligerents*, pp. 278-80.

<sup>194</sup> Wheaton/Dana, *Elements of international law*, p. 428.

<sup>195</sup> Wheaton/Dana, *Elements of international law*, p. 428; Lentner, *Das Recht im Kriege*, p. 83f; Lorimer, *Institutes of the law of nations*, II, p. 79f; Rodriguez Saráchaga, *El derecho internacional público*, p. 382; Olivart, *Tratado de Derecho internacional público*, III, p. 103.

<sup>196</sup> Hull, *Breaking and making international law*, pp. 211-316; Neff, *War and the law of nations*, p. 165.

<sup>197</sup> Eisenberger, *Innovation im Recht*.

<sup>198</sup> Vec, 'Kurze Geschichte des Technikrechts', pp. 3-92.

<sup>199</sup> Lentner, *Das Recht im Kriege*, p. 82; Lueder, 'Das Landkriegsrecht im Besonderen', p. 391; Heffter, *Europäische Völkerrecht der Gegenwart*, p. 271; Bonfils, *Manuel de droit international public*, p. 657f.

<sup>200</sup> Klüber, *Droit des gens moderne de L'europe*, p. 315.



Image 2: Battle of Grochow 1831, painting by Bogdana Willewalde ca. 1850; the painting shows how Polish Congreve rockets exploded over the soldiers.

Source: Wikimedia Commons.

The technologies these authors described as illegal did not exist anymore on the battlefields. These examples now belonged to the history of the law of war.

##### 5. Peace through weapons: The promise of advanced technology

Furthermore, international lawyers were completely in line with their contemporaries, particularly politicians and the military, and also considered the usage of these new weapons to be progress. Future inventions, as stated by earlier authors as well, were not regulated or forbidden by the law of war. Interestingly, international lawyers also projected hope on the technological progress of the day. The military made a similar assessment; new weapons would be more effective and thus would shorten military conflicts, which would then mitigate the horrors of war. More destructive weapons would lead to fewer future wars.<sup>201</sup> Belligerents would be more inclined to agree on a ceasefire and to conclude peace treaties. Abomination against new weapons would be outbalanced by the millions of lives that would be saved in the long run.<sup>202</sup> In addition, war itself was sometimes seen by international lawyers as an expression of ‘belligerent spirit’,<sup>203</sup> a Darwinist struggle about the survival of the fittest. It was a new kind of morality of armed conflicts that was on the verge of late nineteenth century international legal doctrine.

Thus, the law of war perceived advanced technology as a promise and not only as a threat to humanity. Additionally, many writers refrained from suggesting restrictions on the new weapons as they were patriots: supportive of their fatherlands and their military powers. They shared the hopes of the military that developments of new weapons would make give their country advantage in competition for European dominance and global hegemony (e.g. by disciplining the ‘uncivilized’ with superior technological innovations).<sup>204</sup> It does not come as a surprise that the great powers in particular opposed limitations here.<sup>205</sup> As a

<sup>201</sup> Gillespie, *A history of the laws of war*, p. 23; Dülffer, *Regeln gegen den Krieg?*, p. 149f.

<sup>202</sup> Schmalz, *Das europäische Völker=Recht; in acht Büchern*, p. 247.

<sup>203</sup> Koskeniemi, *Gentle civilizer of nations*, p. 38.

<sup>204</sup> Price, *The chemical weapons taboo*, p. 42.

<sup>205</sup> Bordwell, *Law of war between belligerents*, p. 131.

consequence, new means of destruction, technological progress, and military improvements were welcomed in principle and scarcely regulated. International lawyers often acted in line with politicians' and the military's interests. Restrictions enforced through the international law of war were therefore seen critically in general. Innovations should be principally enabled, not curbed by law.

6. Isolated restrictions as comprehensive legitimations of warfare?

The historical role of restrictions on certain weapons before the First World War has been discussed critically and controversially in legal historiography. A famous thesis proposed that the restrictions were, in fact, legitimizing warfare.<sup>206</sup> Some restrictions worked as fig leaves for ferocious military acts in the era of imperialism, militarism, and colonialism. Did the language of 'humanity' and the narrative of the 'humanization' of warfare along with the proscription of pariah weapons serve as a justification narrative for a warfare and state practice that was anything but respectful of human life?

From the perspective of sources, it is difficult to approve of this thesis. It is true that efforts to prevent or humanize warfare had little outcome<sup>207</sup> and that state practice was dominated by military imperatives.<sup>208</sup> In 1884, Scottish international lawyer James Lorimer criticized the lack of a system and rationale behind proscriptions by authors of 19th century textbooks as well as of international conventions which restricted means and methods of warfare:

Apart from the consideration of neutral interests, and the prevention of needless cruelty, no principle appears to have guided the attempts which have been made to distinguish between lawful and unlawful weapons; and it is with great truth that Bluntschli has said, 'On autorise, on defend, sans savoir précisément pourquoi.' The enumerations contained in the books, and the proposals of the International Military Commission at St. Petersburg in 1868, to prohibit the use of all explosive projectiles weighing less than 400 grams, are really of no value. They certainly would not be respected in anything approaching an embittered war. But the science of destruction is probably only in its infancy; and if war is to continue, the subject of regulating the use of the terrible weapons which it may place in the hands of combatants, is one which may force itself on their attention. All that can be done in the meantime is to confine warfare, as far as possible, to States in their public capacity, and to induce them to abandon, by common agreement, the ruinous race of preparation in which they are at present engaged — a race rendered specially costly by the rapidity with which discovery follows discovery, and invention supersedes invention.<sup>209</sup>

This is a remarkably critical assessment of Lorimer's colleagues' tedious efforts to outlaw certain weapons: 'really of no value'.

The percentage of outlawed weapons in relation to all available warfare technology were relatively low. Few weapons were outlawed by international treaties and customs as well as through international legal doctrine before 1914. However, these restrictions were at least not intentionally imposed to justify warfare as a whole. At the same time, international

<sup>206</sup> af Jochnik and Normand, *Legitimation of violence*, pp. 49-95.

<sup>207</sup> Alexander, 'Short history of international humanitarian law', p. 115.

<sup>208</sup> *ibid.*, p. 130.

<sup>209</sup> Lorimer, *Institutes of the law of nations*, II, pp. 79-80.

lawyers participated not only in the promotion of peaceful international relations and arms limitations but also in legitimizing warfare: international law and its scholars were actively justifying violence. Several authors have recently laid out how international law in fact contributed to the escalation of conflicts in the years leading up to 1914, since it normalized and legitimized the use of force.<sup>210</sup> Regulations of warfare were imposed to professionalize war and sometimes also to protect combatants from civilians' illegal methods.<sup>211</sup> Therefore, it is possible to claim that they were mainly imposed in favor of the often quoted aim of a "mitigation of atrocity of war". But it is also not fully convincing to claim that the opposite is true and that these restrictions were only a fig leaf. On the contrary: Restricting some weapons may have also brought palpable advantages to those who were supposed to benefit from the restrictions.

A practical benefit would only occur if provisions on pariah weapons in non legally binding declarations, treaties, and international legal doctrine were spread on the battlefield and amongst political, particularly military decision-makers. Yet, the issue of norm implementation has often been neglected in international legal history, and it is of course hard to evaluate by using textbook sources alone. Some remarks in studies from military history suggest that norm implementation was relatively poor.<sup>212</sup>

## V. The memory and presence of disappointment: The doomsday of the First World War

In the last years before the beginning of the First World War, the mood among international lawyers was optimistic overall. Their discipline was flourishing; international treaty making continued, and challenges stemming from economy, technology, and international relations promised to turn into interesting fields of future research for them. International lawyers still held the optimistic view of the progress of the international law. However, when it came to the law of war, some international lawyers knew that all these proscriptions would not persist against the doctrine of 'military necessity'.<sup>213</sup> Eminent international lawyer Lassa Francis Lawrence Oppenheim wrote in 1906:

The fact is that many legal rules of warfare are so framed that they do not apply to a case of necessity; but there are, on the other hand, many rules which know nothing of any exemption in case of necessity. Thus, for instance, the rules that poison and poisoned arms are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if the escape from extreme danger or the realization of the purpose of war could depend upon an act of such kind. It may, however, correctly be maintained that all mere usages, in contradistinction to laws, of war may be ignored in case of necessity.<sup>214</sup>

Again, the proscription of poison and poisoned arms served as the ultimate example for

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<sup>210</sup> Diggelmann, 'Beyond the myth of a non-relationship' pp. 93-120; Bernstorff, 'Use of force in international law before World War I', p. 260.

<sup>211</sup> Benvenisti and Lustig, 'Taming democracy'.

<sup>212</sup> Toppe, *Militär und Kriegsvölkerrecht*, pp. 28, 30, 105.

<sup>213</sup> Vec, 'All's fair in love and war'; Price, *The chemical weapons taboo*, pp. 16, 20, 22, 49.

<sup>214</sup> Oppenheim, *International law*, II, p. 79.

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outlawed weapons,<sup>215</sup> and Oppenheim reinforced the binding force of these proscriptions even in the event of 'military necessity': The most important elements of the law of war would always remain valid independently of massive military and political interests.

The First World War made clear that this had been a vain hope and made Oppenheim's statement in retrospect sound like whistling in the dark. The international lawyers' mantra that poisonous weapons had to be the first weapons whose use to be outlawed and banned was simply ignored when push came to shove. In the German attack at Ypres on 22 April 1915, new technological methods were used – far beyond the imagination of the treaty drafters at the Hague conferences. Although, it is disputed whether the Hague Declaration concerning asphyxiating gases did explicitly forbid the release of chlorine gas from canisters in the legal sense, this practice violated everything the declaration morally stood for and everything its drafters had tried to prevent. The poison's effect on the fields of Flanders was gruesome, and it was much different from earlier uses at the eastern front near Bolimów, where Germans attacked the Russians in January 1915 with gas shells that contained strong teargas.<sup>216</sup> Nonetheless, the use of poison – the ultimate pariah – did not end at Ypres. Scientists from other European countries that were involved in the First World War and similarly interested in developing poison gas stepped in and supplied belligerents with knowledge and material.<sup>217</sup> Although international law was still a justification narrative for political and military actions,<sup>218</sup> in the case of poison gas, this narrative was hardly ever heard during the war. According to the author's theory,<sup>219</sup> even the militaries that used poison gas tried to avoid public debates about this pariah weapon. Poison gas also violated fundamental moral principles and ideas of military honour/martial honour. As Richard Price put it in 1995, it was regarded to be associated 'with womanly deception and the ignominy of the death by poison (in contrast to the glory of a death achieved during an open contest of brute physical strength among men)',<sup>220</sup>



Image 3: John Singer Sargent, 'Gassed', oil painting (1919), recently evaluated as 'one of the masterpieces of Western art and one of the most disturbing humanistic commentaries on war'.<sup>221</sup>

Source: Wikimedia Commons.

<sup>215</sup> Same moral argument from Bordwell, *Law of war between belligerents*, p. 6.

<sup>216</sup> Borodziej/ Górny, *Der vergessene Weltkrieg. Europas Osten 1912–1923*, I, p. 86f.

<sup>217</sup> Schmidt, 'Justifying chemical warfare', pp. 129-58.

<sup>218</sup> af Jochnik and Normand, 'Legitimation of violence', p. 77.

<sup>219</sup> Vec, 'Challenging the laws of war by technology', pp. 105-34.

<sup>220</sup> Price, 'A genealogy of the chemical weapons taboo', *International Organization*, 49 (1995), p. 81; Price, *The chemical weapons taboo*, p. 23.

<sup>221</sup> Brigham, 'Foreward', p. 8. See further Lubin, 'American artists in the crucible of war', pp. 35-7 on 'Gassed'.

Although the debate in international law on the proscription of weapons went on during and after the First World War and even intensified due to a number of disputed cases (for example, regarding submarines), the general tone in publications changed remarkably after August 1914.<sup>222</sup> International legal writing was politicized, nationalistic, and militarized. Lines of conflict that had previously been covered by the surface of a ‘shared civilization’ could not be denied anymore. Instead of celebrating the moral and legal progress that their discipline had achieved worldwide, many international lawyers now blamed their colleagues in hostile countries for destructing international law. The mood changed. Pessimistic, fatalistic, and defeatist undercurrents became more prominent.<sup>223</sup> The discipline’s positive self-perception ceased, and international lawyers were confronted with the widespread denial of international law to a greater degree than they had ever experienced during wartime. The pre-1914 self-assessment that international relations were subject to contributions of the most important cast of international lawyers looked like a ‘legal autosuggestion’.<sup>224</sup>

The explicit provisions in non legally binding declarations and treaties against the use of poisonous weapons read – due to their ineffectiveness in WW I – somewhat bitter in retrospect, particularly the reference to ‘public conscience’ in the Martens’ Clause, and their inherent limits in times of war became evident. All of these measures ‘provided little restraint in the First World War.’<sup>225</sup> The basic principle of the classic law of war that even a just war does not justify all means was belied on the battlefields. Military measures were being justified as ‘reprisals’, as part of a ‘circle of justifying, scandalizing and reproducing violence’.<sup>226</sup> In the end, military necessity was used to justify the means instead of mobilizing international law to restrain their use and excesses. The practice of outlawing only certain ways of warfare failed at preventing war overall and, ironically, the use of some of the criticized weapons in particular. The terminological, moral, and legal delegitimation of ‘intrinsically evil’ weapons was not able to persist against technological, military, and power narratives. The moral double standards of international lawyers not only in the context of general warfare but also in that of imperialism and exploitation explain why the project of moralizing international law failed. Late nineteenth-century international law and moral understanding had always excluded ‘barbarians’ from celebrated progress of the restraint of war. Now, as the European countries fought each other, they mutually blamed and labelled each other as ‘barbarians’ and subjected their opponents to merciless warfare beyond international legal provisions. The moralizing language and discriminating categories had promoted tools and justifications that seemed like a backlash within a narrative of progressiveness and peacefulness<sup>227</sup> – but in fact were not. They referred to justification narratives that enabled merciless warfare of European nations against the “other” – and othering was quite a popular political and moral strategy.

The First World War left not only public but also international lawyers with a ‘memory of disappointment’.<sup>228</sup> Still, the legacy was not all bad. It offered and still offers the chance to reassess fundamental principles and beliefs of nineteenth-century classical international law, to critically revisit its axioms and methods, and to measure them by their outcome. The 1925 Geneva Protocol on Poison Gas provided a new positivized norm that banned

<sup>222</sup> Onuma, *International law in a transcivilizational world*, p. 539; Weinke, *Gewalt, Geschichte, Gerechtigkeit*.

<sup>223</sup> Lammasch, *Das Völkerrecht nach dem Kriege*, p. 3f: The idea of humanizing war was a vain hope.

<sup>224</sup> Payk, *Frieden durch Recht?*, p. 62.

<sup>225</sup> Gillespie, *History of the Laws of War*, 3, p. 23.

<sup>226</sup> Brock, ‘Between sovereign judgment and the international rule of law’, p. 88.

<sup>227</sup> Payk, *Frieden durch Recht?*, p. 78.

<sup>228</sup> Alexander, ‘Good war’, p. 26.

chemical warfare; in fact, it was seen as a self-reassurance and affirmation of the content of treaties and of customary law that had been valid prior to the First World War but had often been breached in praxis between states during the war.<sup>229</sup> Furthermore, the Kellogg-Briand Pact created during the Interwar Period finally indicated a paradigmatic change<sup>230</sup> in international (legal) thinking: in addition to certain weapons or strategies, the act of war itself should be outlawed. Even excelling former notions of civilization and humanity, the pact was eventually ignored on a grand scale. Nevertheless, these historical experiences might help us – even today – to impose better laws and to more effectively enforce them after critically assessing our common past. Methodologically, the fact that today's international law has an inclination to historicize normative issues should be seen as yet another sign that it is possible to critically assess our common past. Twenty-first century challenges of international law and international relations through new technologies or methods of warfare or new actors of international law can be all addressed from a critical-historical perspective. Thankfully, the past is not merely the past in today's academia. Past failures can serve as references for how to deal with today's challenges, since the simple question of which weapons one may and may not use remains as urgent as ever.

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<sup>229</sup> Vec, 'Challenging the laws of war', p. 128.

<sup>230</sup> Hathaway and Shapiro, *The Internationalists*.

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