Part I: Historical Development

This Part gives an account of Russian feats and failures in the sphere of IHL. It will take the reader back to the middle of the 19th century, to the birth date of the laws of war of our modern age.[13] I beg the reader not to regard these historical accounts as mere anecdotes. They will demonstrate why IHL is not just *any* sub-domain of international law in Russia. They will set the stage for the upcoming analysis of the current discourse in IHL, its implementation, and military practice. Readers will rediscover many of the historical protagonists in academic articles published in modern-day law journals. They[14] will spot their names in speeches delivered 150 years later, and they will even find their legacy in the IHL treaties themselves. The historical accounts will enable us to compare how Russia treated IHL in its infancy and how it does today. We will discover patterns of congruency, but also striking differences.

The structure of this chapter follows the chronology of events starting in 1850. While travelling forward in time, I will introduce the reader to outstanding Russian figures who left their imprint on IHL. For law is not made in a void, but is crafted by humans. Retelling the history of law also means retracing the lives of those who have shaped it. I will, for example, follow the fascinating character of Fyodor Fyodorovich Martens (1845–1909). Born at the fringe of the Russian Empire in a small Estonian village, he became an orphan at an early age. Despite that, he would grow

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13 Most scholars place the origin of modern day IHL in the middle of the 19th century. Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' in Michael N Schmitt and Wolff Heintschel von Heinegg (eds), *The Development and Principles of International Humanitarian Law* (Routledge 2017) 62 et seq; Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 European Journal of International Law 109; Dietrich Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation' in Michael N Schmitt and Wolff Heintschel von Heinegg (eds), *The Development and Principles of International Humanitarian Law* (Routledge 2017); of course there are many earlier examples of codification e.g. Hugo Grotius, *De Iure Belli Ac Pacis – Libri Tres*, vol 3 (1625). One of the oldest sources that contains rules for warfare is the 'Code of Hammurabi' by the King of Babylon (1728–1686 BC).

14 For the sake of gender equality, the author will use pronouns in their plural form when referring to an undefined addressee.

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up to be an acclaimed law professor, a seasoned diplomat, and a passionate cosmopolitan that spoke six languages fluently. Above all, Martens would shape IHL like no other Russian before or after him.

Hence, it seems only just to end this introduction with one of his quotes. Martens was convinced that "even in times of war modern civilized nations recognize that they are bound by known custom and treaty law regulating their relations."[15] Advancing these laws of war became a project dear to him. In 1879 Martens expressed his dream of adopting the first comprehensive code of warfare:

> *"The country that successfully completes this matter […] will not only earn the gratitude of the people, whose suffering it has attenuated, but also the right to call herself the first nation among all the States who understand the essence of civilization and value the legitimate desire of civilized peoples."*[16]

Was this a general Russian attitude, or Martens' personal belief? And why should Russia have been interested in elaborating the laws of war at all?

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15 Ф.Ф. Мартенс [F.F. Martens], *Современное международное право цивилизованных народов [Contemporary International Law of Civilized Peoples]*, vol 1 (5th edn, Типография министерства путей сообщения [Printing House of the Ministry of Communication] 1904) 6–7.

16 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (Типография министерства путей сообщения [Printing House of the Ministry of Communication] 1879) 76.

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Chapter I: The Tsarist Era 1850–1917

1. *The Crimean War 1853–1856 – the opening salvo?*

In 1850 Russia seemed to be the dominant State of the European continent. Though under-industrialised, it possessed the largest land army.[17] The Empire had gradually expanded east- and southwards and it was virtually untouched by the revolts of 1848.[18] Then came what is sometimes called the "first modern war."[19] The Crimean War between Russia and a coalition of Britain, France, and the Ottoman Empire lasted from 1853–1856. It ended with a crushing defeat for the Tsar and temporarily halted Russian expansion into Ottoman lands. The conflict was fought with the latest deadly technology and claimed more than 250 000 casualties on either side.[20] However, it also brought about flickers of hope. On the British side, nurses like Florence Nightingale organised aid for wounded soldiers. In Russia Elena Pavlova, sister of Tsar Nicolas I, founded the Order of the *Сёстры Милосердия* [Sisters of Mercy] in 1854 and assisted the wounded on the battlefield.[21] Her compatriot Prince Anatoly Demidov, a Russian industrialist and philanthropist, organised humanitarian

17 For a detailed analysis of the Imperial Army see William C Fuller Jr, 'The Imperial Army' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 2 (Cambridge University Press 2006) 545. Already in 1825 Russia had the largest standing army in Europe with around 750 000 men.

18 David Schimmelpenninck van der Oye, 'Russian Foreign Policy: 1815–1917' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 2 (Cambridge University Press 2006) 558.

19 See e.g. Alexis S Troubetzkoy, *The Crimean War: The Causes and Consequences of a Medieval Conflict Fought in a Modern Age* (Carroll & Graf 2006).

20 Günther Stökl, *Russische Geschichte* (Kröner Verlag 1983) 505–507. See also Encyclopædia Britannica, 'Crimean War' <https://www.britannica.com/event/Crimean-War>.

21 М.Д. Беляева [M.D. Belyaeva], 'Сёстры милосердия Крымской войны – основатели культурных традиций сестринского дела в России [The Sisters of Mercy of the Crimean War – Founders of the Cultural Tradition of Nursing in Russia]' (2015) 94 Молодой Учёный Научный Журнал [Young Scientist's Journal] 390, 390.

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aid for French, English, and Italian soldiers held captive in Russia.[22] These admirable manifestations of humanity, however, were not backed up by any legal framework. There was no convention regulating the rights of wounded soldiers or protecting those who came to their aid. Mary Seacole, a British nurse, was even refused passage by her own government.[23] The need for a humanitarian treaty was repeatedly raised – including by the famous Russian surgeon Nikolay Pirogov[24] – but these efforts never gained enough momentum to culminate in a treaty-making process.

The Treaty of Paris (1856), that marked the end of the Crimean War, did little in this respect. Its main purpose was to re-establish an acceptable balance of power. Admittedly, the treaty also contained the so-called Paris Declaration, which laid down rules for naval warfare. It abolished privateering,[25] specified which goods could be seized in war, and defined the conditions for a legitimate naval blockade that are still valid today.[26] This was remarkable, because for the first time modern nations agreed on rules applicable in armed conflict. Some scholars therefore consider the Declaration the "opening salvo […] to codify the international law of warfare."[27] However, the Paris Declaration failed to address the central issue at stake in war: human suffering. The rules were not intended to relieve the hardship of those affected by armed conflict, but rather established a framework that limited economic warfare. In this sense, the Declaration was very different from the IHL to come. Not so much an opening salvo, but rather the faint sound of crackling fire.

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22 See Jacques Meurant, 'Anatole Demidoff: Pionnier de l'assistance aux prisonniers de guerre' in Jacques Meurant and Roger Durant (eds), *Préludes et pionniers: Les précurseurs de la Croix-Rouge* (1991).

23 Encyclopædia Britannica, 'Mary Seacole' <https://www.britannica.com/biography/Mary-Seacole>.

24 И.И. Котляров [I.I. Kotlyarov] (n 3) 63.

25 A privateer is "a vessel armed and equipped by a person or persons, to the captain of which the Sovereign of a State at war, upon application of the owner, has issued a commission letter of marque and reprisals empowering him to levy war upon the enemy by capturing his property." See Thomas Gibson Bowles, *The Declaration of Paris of 1856* (Sampson Low 1900) 98.

26 Paris Declaration Respecting Maritime Law, Paris (16 April 1856) available at <https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument>. For the current definition of blockade see ICRC Casebook, How Does Law Protect in War, 'Blockade' <https://casebook.icrc.org/glossary/blockade>.

27 Eric Myles, 'Humanity, Civilization and the International Community in the Late Imperial Russian Mirror – Three Ideas Topical for Our Days' (2002) 4 Journal of the History of International Law 310, 316–317.

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In any case, the significance of the Treaty of Paris lay elsewhere for Russia. It sealed the crushing defeat which the Tsar's Army had suffered in the Crimean War. Russia was forced to cede Moldavia and Wallachia, which became part of the Ottoman Empire. The Black Sea was demilitarised, preventing Russia from building up a naval fleet.[28] The issue of humanising war was left for another occasion.

2. *The First Geneva Convention 1864 – Russia, the sleeping giant*

> *"Dunant […] has always fascinated me most of all the Nobel laureates. Fascinated and annoyed me at the same time. For he is one of the most peculiar characters. […] An absent-minded Don Quichote."*[29]
>
> *Jaan Kross' fictitious F.F. Martens about Henry Dunant*

The occasion to negotiate a binding humanitarian treaty presented itself roughly a decade after the Paris Declaration. As often in world history, at the origin of a good idea stood someone who was in the right place at the right time. Or rather, in the wrong place at the wrong time.

The impact of the Geneva Convention can hardly be over-estimated. As François Bugnion puts it: "no other legal text had ever brought such influence to bear on the relations between opposing parties in wartime."[30] The treaty owes its existence to the exceptional commitment and perseverance of the Swiss businessman Henry Dunant, who was on his way to France when he passed by the battlefield of Solferino (1859).[31] The bloodiest battle in Europe since Waterloo had just ended. It left 6 000 men dead and more than 40 000 wounded. Dunant was utterly shocked as he witnessed how the wounded soldiers dragged themselves off the battle ground and slowly perished without medical assistance. He interrupted his journey for several days and cared for the survivors together with local volunteers.[32]

In the aftermath of these tragic events, Dunant explored ways to institutionalise aid for those wounded in war. He dreamt of an international con-

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28 Schimmelpenninck van der Oye (n 18) 560.

29 Jaan Kross, *Professor Martens Abreise: Roman* (Hanser 1992) 123–124. Henry Dunant, the founder of the International Committee of the Red Cross, received the Nobel Peace Prize in 1901 together with Frédéric Passy.

30 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Macmillan Education 2003) 22.

31 Henry Dunant, *Un souvenir de Solférino* (1862).

32 Bugnion (n 30) 75.

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vention and an organisation watching over its implementation. Together with four likeminded philanthropists, he founded the International Committee of the Red Cross (ICRC) in 1863. Thanks to their commitment and the support of the Swiss Confederacy, they accomplished an astonishing feat; only one year after its foundation, the International Committee managed to gather almost all central European powers in Geneva to discuss the fate of wounded soldiers. The conference culminated in the signature of the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[33] Art 6 of this Convention enshrined the principle that "wounded and sick combatants, to whatever nation they may belong, shall be collected and cared for." At the same time, the Convention protected those helping the wounded in various ways.[34] National Red Cross societies were founded to ensure its implementation.[35]

Russia played no role in this, since it chose not to take part in the conference. In a letter, the Russian Minister of War Dmitry Milyutin had expressed his "sympathy" for the proposals, but believed it "wiser to absolutely avoid any discussion of matters regarding international law and leave this aspect of the question to the initiative of the competent governmental bodies."[36] Nevertheless, Russia ratified the treaty fairly quickly in 1867.[37] In the same year the Tsar founded the Russian Red Cross Society and placed it under the aegis of his wife, Empress Maria Alexandrovna.[38] Soon, the society was to become highly active, well-organised, and it would play a crucial rule in the wars to come.[39]

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33 François Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law' (2004) 5 Chicago Journal of International Law 27, 191–193.

34 See e.g. Art 1–2 regulating the neutrality of medical aid, or Art 5 allowing for spontaneous individual help from the local population.

35 Bugnion (n 30) 23.

36 Société genevoise d'utilité publique, *Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863, pour étudier les moyens de pourvoir à l'insuffisance du service sanitaire dans les armées en campagne* (Imprimerie Fick 1863) 30.

37 For an overview of IHL treaties that Russia has ratified see ICRC, 'Russian Federation – Historical Documents' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByCountrySelected.xsp?xp_countrySelected=RU&nv=8>.

38 André Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross* (Henry Dunant Institute 1984) 79. See also Russian Red Cross, 'History' <http://www.redcross.ru/o-nas/istoriya>.

39 Bugnion (n 30) 38. Already in 1877, when war broke out between Russia and the Ottoman Empire the Russian Red Cross played a crucial role in treating and evacuating wounded and sick soldiers.

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The success story of the Geneva Conventions proved to the world that it was possible to regulate humanitarian affairs on an international level. A new discipline of law began to emerge that would later be called international humanitarian law;[40] a domain in which Russia would soon excel, starting in 1868.

3. St Petersburg Declaration 1868 – closing Pandora's box

Retelling the story of the St Petersburg Declaration[41] means providing an answer to two puzzling questions: firstly, why was a weapon that had never been used on the battlefield prohibited on the initiative of the very State that had developed it?[42] Secondly, why is it still worth telling the story of this treaty today – more than 150 years later – if it only banned *one specific* type of projectile?

After being a bit late to the Geneva Convention, Russia decided to take the initiative. Tsar Alexander II found himself in constant conflict with the British Empire. The quest for territorial expansion in Central Asia – the so-called Great Game – pushed both powers towards an all-out open war.[43] With such gloomy prospects lurking ahead, the Tsar was deeply concerned that the next conflict would be fought using the latest deadly technology. He was specifically worried by a recent invention made by his own countrymen. Russian scientists had discovered exploding bullets with the primary object of blowing up munition wagons.[44] In the following years, these bullets were perfected to explode even on softer surfaces, such as the human body.[45] Soon it became clear that this ammunition would

40 For the shift of terminology from "the laws and customs of war" to "international humanitarian law" see n 1922 and n 1923.

41 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (29 November (11 December) 1868) available at <https://ihl-databases.icrc.org/ihl/full/declaration1868>.

42 Joshua F Berry, 'Hollow Point Bullets: How History Has Hijacked Their Use in Combat and Why It Is Time to Reexamine the 1899 Hague Declaration Concerning Expanding Bullets' (2010) 206 Military Law Review 88, 101.

43 Milton Bearden, 'Afghanistan, Graveyard of Empires' (2001) 80 Foreign Affairs 17, 17; see also Stökl (n 20) 531; Schimmelpenninck van der Oye (n 18) 563.

44 Georg Friedrich von Martens, 'Protocole I des Conférences militaires tenues à Saint-Pétersbourg Mémoire sur la suppression de l'emploi des balles explosibles en temps de guerre', *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, vol XVIII (Scientia Verlag 1873) 458.

45 ibid 459.

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have horrific consequences for infantrymen, because the explosion could tear large wounds and cause great suffering.[46] Russia faced a dilemma. On the one hand it was at the forefront of the latest military technology. On the other hand, States such as Switzerland, Prussia, Austria, and Bavaria started to catch up and were testing similar projectiles.[47] It was only a matter of time before such bullets would become standard equipment in every European army. Therefore, any future war would expose Russian infantrymen to great suffering.

Hence Tsar Alexander II, known for his progressive thinking,[48] took a decision that seems quite remarkable from a modern-day perspective. In order to avoid an arms race, he strove to outlaw the use of these newly developed explosive projectiles. At the same time, his government worried about the decisive advantage that such bullets presented for other European armies. Hence, Russia pushed for the adoption of a multi-lateral treaty, banning the use of such weaponry altogether.[49] When consensus could not be reached in written negotiations,[50] the Tsar invited all European powers to his capital St Petersburg, where they were to hold three meetings.[51]

3.1 Proceedings at the conference and the final declaration

The Russian General and then Minister of War Dmitry Milyutin, who chaired the meeting, set the tone in his opening statement:

> *"Messieurs, nous sommes réunis pour délibérer sur la proposition […] d'exclure certains projectiles de l'armement des troupes en temps de guerre. Il y a là d'abord une question de principe sur laquelle nous sommes tous*

46 ibid.
47 ibid 458.
48 See e.g. Larisa Zakharova, 'The Reign of Alexander II: A Watershed?' in Ronald Grigor Suny and William C Fuller Jr (eds), *The Cambridge History of Russia*, vol 2 (Cambridge University Press 2006).
49 Bugnion (n 33) 198–199.
50 von Martens (n 44) 464; Emily Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (2019) 20 Journal of the History of International Law 544, 548.
51 Discussions were held on 28 October and (9 November) and 1 November (13 November). The Declaration was finally signed on 4 November (16 November) 1868.

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> *d'accord, un principe d'humanité qui consiste à limiter autant que possible les calamités de la guerre et à interdire l'emploi de certaines armes, dont l'effet est d'aggraver cruellement les souffrances causées par les blessures, sans utilité réelle pour le but de la guerre."*[52]

It is this spirit of humanisation that permeates the diplomatic discussions. All participants seemed to accept that, in war, a State's right to hurt the enemy is not unfettered. Despite this general consensus, the conference did not lack controversies. While Prussia suggested broadening the discussion to all weapons,[53] Britain feared that such an approach might hamper its military development.[54] Other participants, such as the Netherlands, were only willing to sign a unanimously adopted document.[55] Finally, for the sake of consensus the scope of the treaty was limited to projectiles weighing less than 400 grams, since those were most likely to be used against humans. Additionally, the States included the so-called *clausula si omnes* – a legal novelty – in the declaration, which meant that the rules only applied if *all* warring parties on *both* sides were signatories.[56]

Despite these caveats, the outcome of the conference marked a turning point in international law. Seventeen States – including the sceptical British Empire – signed the Declaration in St Petersburg. Two States joined shortly afterwards.[57]

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52 von Martens (n 44) 451.

53 ibid.

54 ibid 464, 466; see also Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (n 50) 548 et seq.

55 von Martens (n 44) 453.

56 The St Petersburg Declaration was the first recorded instance of the use of such a restriction. The clause was included in many of the subsequent IHL treaties such as the 1899 and 1907 Hague Conventions. It was not used any more after World War I, since it became apparent that in multi-party wars the clause could significantly hamper the application of the treaties. For example, Montenegro was not party to the 1906 Geneva Convention during World War I. Although the *si omnes* clause was never invoked during the war, technically it excluded the application of the treaty. Philippe Gautier, 'General Participation Clause (Clausula Si Omnes)', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006); Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross 1960) 21.

57 Brazil and the Grand Duchy of Baden. For a detailed list of ratifications see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=130>.

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3.2 Impact of the St Petersburg Declaration on IHL

The significance of the Declaration was twofold. Firstly, it banned the use of explosive bullets, averting the imminent danger of their use in battle. Secondly, it laid the foundation for the framework that governs the conduct of hostilities in general – a legacy that lives on in modern-day IHL.

The prohibition of explosive projectiles in the seventh paragraph of the Declaration may be called the obvious achievement of 1868. For the first time, States had agreed to ban a specific weapon, and successfully so. Despite occasional allegations that explosive bullets were used in the Franco-Prussian War (1870–1871) and the Boer War (1880–1881), there are no documented cases of their use.[58] The prohibition of exploding bullets has been reiterated in many other documents, such as the Brussels Declaration (1874),[59] the Oxford Manual (1880),[60] and the Oxford Manual of Naval War (1913).[61] By now, the rule is considered customary international law.[62] A violation of the rule may represent a war crime[63] which was already stated as early as 1919.[64]

Secondly, and far more importantly, the Declaration contained a subtle long-term achievement in its preamble. The introductory paragraphs planted the seed for today's framework governing the conduct of hostilities. It is for this reason that Robert Kolb and Momchil Milanov honour the Declaration as "establishing the very basis of IHL."[65] It is for the same

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58 Robert Kolb and Momchil Milanov, 'The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal' (2019) 20 Journal of the History of International Law 515, 537.

59 Art 13(e), Project of an International Declaration concerning the Laws and Customs of War (27 August 1874) available at <https://ihl-databases.icrc.org/ihl/INTRO/135>.

60 Art 9, The Laws of War on Land, Oxford (9 September 1880) available at <https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument>.

61 Art 17(2), Manual of the Laws of Naval War (9 August 1913) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/265?OpenDocument>.

62 ICRC, Customary IHL Database, Rule 78. The Customary IHL Database is available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

63 See Art 8 No 2(b)(xx) ICC Statute.

64 Preliminary Peace Conference, 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 American Journal of International Law 95, 115.

65 Kolb and Milanov (n 58) 515. See also at p 524: "[…] the detailed and loftily worded preamble set out the general philosophy underlying the specific prohibition and has survived by far the latter […]."

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reason that Gary Solis ranks the Declaration among the more important treaties relating to the law of war.[66] Scholars agree that the origins of the rules that regulate the conduct of hostilities today date back to the Declaration's preamble; the principle of military necessity, the principle of distinction, and the prohibition of causing unnecessary suffering or superfluous injury.[67] Hence, it is worth taking a look at the wording of the Preamble.

> *"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."*[68]

Each of these four paragraphs represents a central principle that still governs the conduct of hostilities today. The first paragraph lays down the principle of distinction by stating that the "*only* legitimate aim in war is to weaken the *military* forces of the enemy."[69] Thus, targeting civilians or civilian infrastructure is not permitted. The rule strikingly resembles Art 48 of Additional Protocol I (AP I) that was adopted in 1977 and enshrines the modern-day principle of distinction: "[…] the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives […]."

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66 Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2016) 53.

67 Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (n 50) 556; Kolb and Milanov (n 58) 529 et seq. See also Schindler (n 13) 249. For the codification of these principles in modern-day treaty law see e.g. Art 35 and Art 48–67 AP I.

68 Text of the Declaration is authentic only in its French version. For the purpose of discussion, however, I chose the English translation. The original reads: "Que le seul but légitime que les Etats doivent se proposer, durant la guerre, est l'affaiblissement des forces militaires de l'ennemi; Qu'à cet effet, il suffit de mettre hors de combat le plus grand nombre d'hommes possible; Que ce but serait dépassé par l'emploi d'armes qui aggraveraient inutilement les souffrances des hommes mis hors de combat ou voudraient leur mort inévitable; Que l'emploi de pareilles armes serait, dès lors, contraire aux lois de l'humanité."

69 Emphasis added.

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Although the St Petersburg Declaration does not explicitly mention such a juxtaposition of civilian and military objectives, in essence, the restriction to military objectives acts as a precursor to the current rule in AP I.

The second paragraph lays the groundwork for the principle of military necessity. This principle is the centrepiece of the entire framework of the conduct of hostilities.[70] It permits only measures that are necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.[71] This modern-day concept of necessity strikingly resembles the second paragraph of the Declaration which outlaws any belligerent action beyond those "sufficient to disable the greatest number of men." In other words: waging war is not prohibited. However, actions that are not aimed at subduing the enemy forces are illegal *per se*.

The third paragraph prohibits "uselessly" aggravating "the sufferings of disabled men." Thereby, it acts as a harbinger of the modern-day prohibition of inflicting unnecessary suffering or superfluous injury. This principle outlaws harm that is not justified by military considerations, either because it lacks even the slightest utility, or because the utility is consid-

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70 On the one hand, it can be argued that the principles of distinction, proportionality, the prohibition of indiscriminate attacks, and the prohibition of inflicting unnecessary harm or superfluous injury stem from the principle of necessity. Such attacks are not necessary in military terms. The ICRC Casebook, however, describes the principle of necessity as the counterpart of the humanitarianism: "Military necessity generally runs counter to humanitarian exigencies. Consequently, the purpose of humanitarian law is to strike a balance between military necessity and humanitarian exigencies." See ICRC Casebook, How Does Law Protect in War, 'Military Necessity' <https://casebook.icrc.org/glossary/military-necessity>. For a detailed analysis of the under-explored principle of military necessity see e.g. Burrus M Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 American Journal of International Law 213; GIAD Draper, 'Military Necessity and Humanitarian Imperatives Studies: Seminar on the Teaching of Humanitarian Law In Military Institutions, Sanremo, 6–18 November 1972' (1973) 12 Military Law and Law of War Review 129; Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities Forum: Direct Participation In Hostilities: Perspectives on the ICRC Interpretive Guidance' (2009) 42 New York University Journal of International Law and Politics 831.

71 See ICRC Casebook, How Does Law Protect in War, 'Military Necessity' <https://casebook.icrc.org/glossary/military-necessity>.

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erably outweighed by the suffering caused.[72] Today, the prohibition of unnecessary suffering or superfluous injury is considered as a stand-alone rule and found its way into Art 23(e) of the Hague Regulations of 1899 and 1907.[73] It was confirmed in Art 35(2) AP I and has led to the adaption of a number of Conventions on specific weapons,[74] such as the Declaration Concerning Expanding Bullets 1899;[75] and the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare 1925.[76]

Finally, the fourth paragraph introduces the notion of "humanity." More a vague idea than a concrete rule, this concept nevertheless set the tone for the future developments in IHL. The idea of humanity in war underpins the entire field of IHL and drives its development. Later treaties were to shape the contours of this vague concept, e.g. the so-called Martens Clause[77] in the Hague Regulations of 1899 and 1907, or the provisions relating to humane treatment in the Geneva Conventions of 1949.[78]

3.3 Russia's role – a pragmatic idealist?

In the light of all this, it is fair to say that the Declaration represented a milestone in IHL history. However, at this point I would like to take the reader back to the research question: what credit does Russia deserve for this?

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72 Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War?* (3rd edn, ICRC 2011) 284.

73 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (29 July 1899) available at <https://ihl-databases.icrc.org/ihl/INTRO/150>; Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) available at <https://ihl-databases.icrc.org/ihl/INTRO/195>.

74 Sassòli, Bouvier and Quintin (n 72) 284.

75 Hague Declaration (IV,3) concerning Expanding Bullets (29 July 1899) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D528A73B322398B5C12563CD002D6716&action=openDocument>.

76 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (17 June 1925) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/280?OpenDocument>.

77 For a detailed discussion of the Martens Clause see below at p 56.

78 Kolb and Milanov (n 58) 529. The relevant Provisions of the Geneva Conventions are Art 12 GC I, Art 12 GC II, Art 13 GC III, Art 27 GC IV.

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The obvious answer is that, without Russia, the Declaration would not exist. It was a Russian idea that led to the Russian initiative which culminated in a conference that was held in St Petersburg and was chaired by a Russian minister. When looking at these facts, Russia's role seems quite remarkable. Furthermore, the document breathes the Russian – and general European – *zeitgeist* of the 19th century.[79] The reader can discern the legacy of the French revolution, the spirit of disarmament and the rise of pacifism that permeated the era.[80] Since the 1860s progressive lawyers and scientists like Johann Kaspar Bluntschli promoted an idea of an ever-progressing civilisation, where peace was a precious good and the injuries of war should be reduced to a bare minimum.[81] In Russia especially, this vague idea of introducing humanity into international law had prospered.[82]

Having said that, the conference was not a purely humanitarian enterprise. We should clearly distinguish between the outcome of the Conference and the reasons for convening it in the first place. And we should be wary of romanticising the Tsar's reasons for inviting all major European powers to his capital. It would fall short of the harsh reality of international politics to narrow down Russia's motives to an indistinct love for humanity – an image that some contemporary Russian authors like to paint.[83]

On the contrary, the main motive to hold the conference in the first place was rather mundane. As pointed out above, the Tsar wanted to limit the damage done to his infantry in a future war. Scott Keefer argues that the Russian initiative was "as much a reaction to the revolutionary changes in technology as a truly humanitarian gesture."[84] Some authors have even

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79 ibid 516–517.

80 For the development of the international peace movement see Arthur Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* (Kluwer Law International 1999) 45 et seq.

81 Arthur Eyffinger, 'The 1907 Hague Peace Conference: The Conscience of the Civilized World' [2007] Netherlands International Law Review 197, 200.

82 Myles (n 27) 331.

83 See e.g. Vladislav Tolstykh, 'International Humanitarian Law in Russia (1850–1917) (Transl.)' [2004] Russian Law 67, 71 who quotes Milyutin and his desire to make war "less cruel" as the only reason for the Conference; see also И.И. Котляров [I.I. Kotlyarov] (n 3) 64, who portrays Russia as the fighter for humanity while the US and Great Britain have boycotted the Conference (the latter being factually untrue).

84 Scott Keefer, '"Explosive Missals": International Law, Technology, and Security in Nineteenth-Century Disarmament Conferences' (2014) 21 War in History 445, 450.

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argued that the Declaration was, in fact, drawn up as a document of military necessity rather than of humanity.[85] I believe this falls short of the truth, since the very concept of military necessity already contains an element of humanisation by limiting warfare to acts that have a military value. Furthermore, as shown above, the Declaration goes far beyond military necessity. In the end, it arguably comes down to a "strange mix of pure rationalism and humanitarian concerns that is hard to disentangle."[86]

In this context, we encounter a question that will resurface in many parts of this thesis: why would States sign *any* document that limits their sovereignty? In most cases the answer will be: the loss of sovereignty is compensated by a strategic advantage in the long run. This is a common pattern in international law. For example, many States ratified the European Convention of Human Rights after the Second World War, because they saw it as an insurance against the rise of a new dictatorial regime in other European countries. In addition, it was a way of making sure that your neighbour adhered to certain standards.[87]

Similarly, the Russian Empire decided to tackle its problems by means of international law. Leading politicians, such as Tsar Alexander II and Minister of War Milyutin recognised that promoting humanity was actually in the interest of the State. Banning exploding projectiles unilaterally would have done nothing to protect Russian infantrymen. Banning them only for others would have had no chance of success. What remained was banning them collectively. Hence, in 1868 the terms *realpolitik* and IHL were not contradictory – they were synonymous. Russia's true achievement lay in opening an alley where States could see the long-term benefit of limiting warfare. To a romantic this might sound disappointing. To a pragmatist this represents an outstanding achievement.

85 Raphael Schäfer, 'The 150th Anniversary of the St Petersburg Declaration: Introductory Reflections on a Janus-Faced Document' (2019) 20 Journal of the History of International Law 501, 507.

86 Kolb and Milanov (n 58) 517.

87 Angelika Nußberger, *The European Court of Human Rights* (Oxford University Press 2020) Chapter 1, page 8.

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4. The Brussels Conference 1874 – a stillborn phoenix

> *"Государство, которое с успехом доведёт до конца дело Брюссельской Конференции будет иметь право не только на признательность народов, страдание которых оно облегчит, но также на первое место в среде государств, понимающих действительные цели современной цивилизации."*[88]
>
> *["The country that successfully completes this matter of the Brussels Declaration will not only earn the gratitude of the people, whose suffering it has attenuated, but also the right to call herself the first nation among all the States who understand the essence of civilization and value the legitimate desire of civilized peoples."]*
>
> *F.F. Martens on the Brussels Declaration, 1879*

The St Petersburg Declaration having been a huge success, Russia seemed thereafter to take a more confident stance in international law. More and more scholarly works were published and many of them struck a pro-European and westernising tone.[89] In Lauri Mälksoo's words, Russia became an "integral part of the European tradition of international law."[90] Even internally, the giant Empire embarked on a path of transformation. Tsar "Liberator"[91] Alexander II pushed through important reforms.[92] He abolished serfdom, restructured the administrative and judicial system, reformed the Army, and abolished corporal punishment. While Alexander II changed course after a failed assassination attempt and took a more reactionary stance in internal matters, he continued his visionary politics in external affairs.[93]

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88 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конферения 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 76.

89 Mälksoo, *Russian Approaches to International Law* (n 6) 42. The most notable exception being Nikolay Yakovlevich Danilevsky. In 1869 he published his study "Russia and Europe" in which strongly rejected the idea that Russia should orient itself towards Europe.

90 Lauri Mälksoo, 'FF Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law' (2014) 25 European Journal of International Law 811.

91 He had earned this nickname by freeing the serfs in 1861.

92 See Zakharova (n 48) 599–608.

93 ibid 609 et seq.

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4.1 Thinking big – a comprehensive code of war

In 1874 the Russian Emperor called upon all European States to gather in neutral Belgium for a conference.[94] It might have been the success of the St Petersburg Declaration that prompted the Tsar to take the initiative yet again, or perhaps it was also the desire to distract from internal turbulences and ensure stability in a time of inner turmoil. Jean Huber-Saladin, a member of the Committee of the French Aid Society for the Care of the Wounded, wrote in a letter to Gustave Moynier, the future President of the ICRC:

> *"Change is in the air, with threats from below, anarchy in the middle and moral and political disorder more or less everywhere. Russia needs peace and the opportunity to strengthen herself institutionally."*[95]

On the other hand, it might have been a genuine quest for peace and for the humanisation of wars that led the Tsar to take the initiative. Baron Antoine-Henri Jomini, the Swiss officer in charge of the Russian delegation, declared: "Russia is a great power […] nevertheless she is sincerely committed to the interests of peace."[96]

Whatever was behind the initiative, the goal was audacious. In his invitation the Tsar referred to the need for solidarity and consensus among nations.[97] The news of such a conference produced genuine astonishment in Europe, which had barely emerged from the devastating Franco-Prussian War (1870–1871).[98] What could be discussed at such a venue, which would soon be nicknamed the Brussels Conference? In Russia an unknown, but ambitious 28-year-old lawyer named Fyodor Fyodorovich Martens submitted a draft convention on the laws of war. He had the backing of Minister

94 Danièle Bujard, 'The Geneva Convention of 1864 and the Brussels Conference of 1874' (1974) 14 International Review of the Red Cross 527, 528.

95 ibid 529.

96 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конферения 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 134.

97 Letter No 7 from Prince Gortchakow to Count Brunnow (11 May 1874) published in: Tracey Leigh Dowdeswell, 'The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification' (2017) 54 Oosgoode Hall Law Journal 805, 825.

98 Bujard (n 94) 529.

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of War Milyutin. Alexander II picked up on the idea and made it a subject for discussion at the Conference.[99]

Since this is Martens' first decisive moment in IHL history, it is worth taking a detailed look at this fascinating character. It is safe to say that no single person before or after has shaped the Russian image in international law like him. This is not only true with regards to IHL, but many other fields of international law.[100] Martens was born on 15 August 1845 in the small city of Pernov, which then belonged to the Russian Empire and is situated in today's Estonia. He became an orphan at an early age, but his teachers soon discovered the young boy's bright mind and enabled him to go to a German boarding school.[101] He went on to study law in St Petersburg,[102] joined the Ministry of Foreign Affairs at the age of 23,[103] and became a law professor at his *alma mater* at the age of 25.[104] He was fluent in Russian, Estonian, German, French, Italian, and English, and was the epitome of a cosmopolitan. He would become the author of numerous books, such as the *Recueil de Traités*[105] or his textbook *Contemporary International Law of Civilized Peoples*.[106] And he would become the diplomatic mastermind behind many of the international conferences from 1874 until the Second Hague Peace Conference in 1907.[107]

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99 VV Pustogarov, *Our Martens: FF Martens, International Lawyer and Architect of Peace* (William E Butler tr, Kluwer Law International 2000) 109.

100 For example, the Permanent Court of Arbitration was a dream long harboured by Martens that finally came true after the Hague Peace Conference of 1899. Even the building of the Peace Palace in The Hague only exists thanks to Martens. When the American entrepreneur Andrew Carnegie wanted to make a large donation in support of the idea of world peace he approached Martens, who suggested funding the building of the new Court. See ibid 328.

101 ibid 7.

102 ibid 14.

103 ibid 105.

104 ibid 23.

105 Ф.Ф. Мартенс [F.F. Martens], *Собрание трактатов и конвенций заключённых Россиею с иностранными державами [Collection of Treaties and Conventions Concluded by Russia with Foreign States)* (Типография министерства путей сообщения [Printing House of the Ministry of Communication] 1874).

106 Ф.Ф. Мартенс [F.F. Martens], *Современное международное право цивилизованных народов [Contemporary International Law of Civilized Peoples]* (1st edn, Типография министерства путей сообщения [Printing House of the Ministry of Communication] 1882). In the following, I will quote from the updated 1905 edition.

107 See below at pp 42, 51, 68.

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Martens had set himself an ambitious goal as he drew up the original proposal for the Brussels Conference that was circulated among States beforehand. He envisaged a universal code of land warfare that would be adopted and enforced by all nations and should be respected "in the interest of their country and to preserve the integrity of their people's honour."[108] Martens himself describes the conference as the "most significant attempt" to codify the laws of war.[109] However, prospects looked rather bleak. The hostile atmosphere after the Franco-Prussian War weighed on the discussions. In the run-up, rumours circulated that the Russian proposal was really a *code d'invasion* drafted in Berlin, to allow Otto von Bismarck to annihilate France in another war.[110]

Martens' draft convention comprised 71 articles, subdivided into four parts. Regulating the rights of combatants, the rights of civilians, relations between warring parties, and reprisals.[111] Such an unheard-of regulation of warfare met with sharp resistance, especially from the newly constituted German Empire. The participants of the Conference haggled over one issue especially: the status of irregular forces.[112] The origin of the dispute dated back to the Franco-Prussian war, where France used irregular troops such as the *francs-tireurs*. These French fighters, while authorised by the government, were not part of the regular French army. On these grounds the Prussians did not consider them as combatants but "unlawful" fighters and often executed them upon capture.[113]

The draft set out that the laws of war would not only apply and protect members of the regular armed forces, but also irregular fighters, as long as they met certain criteria. So-called partisans would have received rights and duties under IHL.[114] Germany strictly opposed such an approach and demanded that all irregular forces be outlawed.[115] After all, the German Empire possessed the most modern land army in Europe and the victories of Prussia and its allies against Austria-Hungary and France had been an impressive show of force to the world. Germany was not willing to limit

108 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конферения 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 89.
109 ibid 90.
110 ibid 118.
111 ibid 131.
112 Dowdeswell (n 97) 826.
113 ibid 808–809.
114 Pustogarov (n 99) 110.
115 Dowdeswell (n 97) 826.

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its military power, knowing that for smaller countries it was impossible to maintain a regular standing army of that kind.[116]

Martens always fought against such an absolute and unfettered principle of military necessity.[117] However, at Brussels he had to admit defeat. In the end the differences were too great to surmount. Although all States signed the final document, they did not accept it as a binding treaty and refused to ratify it.[118] Martens himself considered the Conference at Brussels a complete failure.[119] Even worse, the idea itself of codifying the laws of war by mutual agreement of States was seriously called into question.[120] Suddenly, the euphoria of St Petersburg seemed far away.

4.2 The aftermath of the failed convention

However, what might have looked like an immediate failure from Martens' perspective in 1874, greatly changed the course of IHL later on. Already by the Russo-Turkish War (1877–1878), many judged the behaviour of the warring parties by the standards laid down in the Brussels Declaration.[121] To measure the long-term impact of the conference one only needs to compare the texts of the Brussels Declaration of 1874 with the Hague Regulations of 1907. There is virtually no difference. The Hague Regulations mirrors the Brussels Articles almost word for word. Only occasionally has a word been added here or there, for example "absolutely" necessary in Art 43 Hague Regulations (respectively Art 3 of the Brussels Declaration). The definition of combatants and status of irregular troops

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116 ibid 833.

117 See Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 51–55 in response to articles published by the German General von Hartmann in the Deutsche Wochenschau, where von Hartmann argued that the "realism of war made it absolutely impossible to establish any rules or law for armed conflict whatsoever"; see also Peter Holquist, *The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874–1878* (National Council for Eurasian and East European Research 2004) 7 <https://www.ucis.pitt.edu/nceeer/2004_818-06g_Holquist.pdf>.

118 See Project of an International Declaration concerning the Laws and Customs of War (27 August 1874) available at <https://ihl-databases.icrc.org/ihl/INTRO/135>.

119 Pustogarov (n 99) 113.

120 Dowdeswell (n 97) 841.

121 Pustogarov (n 99) 114.

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– the most contentious issue in Brussels – was adopted in The Hague without any change of wording. The rules regarding the treatment of prisoners of war, the status of spies, sieges and bombardments, and prohibited methods of warfare read almost identically in both documents. In this sense, it is fair to say that the Brussels Declaration served as a blueprint for the much-hailed Hague Regulations of 1899 and 1907. Thus, Martens' vision of a comprehensive convention on warfare – his "beloved child" as he called it – was not stillborn, but only delayed.[122]

5. *The Russo-Turkish War 1877–1878 – the crucible*

The Russo-Turkish War, sometimes also called the Eastern War,[123] might be less known to the reader. It was no less cruel than other wars – quite on the contrary. With a death toll of 21 percent among soldiers it ranks among the deadliest of the 19th century.[124] The Ottoman Empire had crushed rebellions in Bulgaria and Bosnia-Herzegovina with an estimated death toll between 10 000 and 30 000.[125] The brutality with which the Turks quelled the uprising produced an outcry in the international community. Intellectuals, such as Victor Hugo, called upon Western governments to intervene:

> *"Il devient nécessaire d'appeler l'attention des gouvernements européens sur un fait tellement petit, à ce qu'il paraît, que les gouvernements semblent ne point l'apercevoir. Ce fait, le voici: on assassine un peuple. Où? En Europe."*[126]

But England and France were allies of the Ottoman Empire and thus kept a low profile. Finally, Serbia and its ally Russia decided to intervene.[127]

The Russo-Turkish War illustrates how the previous Declarations, Conventions, and negotiations at Geneva, Brussels, and St Petersburg had

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122 ibid 178.

123 See e.g. Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16).

124 Pierre Boissier, *Histoire du Comité International de la Croix-Rouge* (Institut Henry-Dunant 1978) 406.

125 Encyclopædia Britannica, 'Bulgaria, National Revival' <https://www.britannica.com/place/Bulgaria/The-national-revival#ref476500>.

126 Victor Hugo, *Actes et paroles – depuis l'exil 1876–1880* (J Hetzel 1880) 3.

127 Stökl (n 20) 518.

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changed Russia's attitude towards warfare. For Russia the Russo-Turkish War marked a watershed in the observance of international law. Peter Holquist argues that the conflict was an opportunity for Russia to show that a State could both win a war and simultaneously observe IHL.[128]

From the very beginning, Russia remained faithful to its IHL obligations.[129] It even went beyond: in order to "lessen the scourge of war" an official Senate Decree of 12 May 1877 unilaterally imposed the (non-binding) Brussels Declaration of 1874 as binding law on the Russian Army.[130] When the Ottomans adopted the Red Crescent due to religious and practical reasons, Russia was the first nation to recognise it as analogous to the emblem of the Red Cross.[131]

Furthermore, the Imperial Army went to great lengths to instruct their own troops in the laws of war. A military manual was issued and distributed among the soldiers. The Russian Red Cross even published a commentary to the Geneva Convention – a remarkable initiative at that time. It made very clear in its preamble that the new law should be respected: "Everyone, should in their own interest […] respect the rules mentioned hereafter. […] Terrible punishments – *in heaven and on earth* – await those who do not obey by them."[132] The efforts paid off. In practice, Ottoman soldiers who were *hors de combat* enjoyed the same treatment as Russians.[133]

This humanitarian fervour seems even more remarkable, since the Ottomans largely refused to comply with their obligations under the Geneva Convention. International newspaper correspondents who arrived on the battlefields sent back reports of terrible atrocities committed against captured and wounded Russian soldiers. They found evidence of mutilation,

128 Holquist (n 117) 15–16.
129 Boissier (n 124) 403.
130 The decree is reprinted in the annexes to Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 37; the reference to the Brussels Declaration can be found in para XII of the decree.
131 Holquist (n 117) 15.
132 Boissier (n 124) 404. The decree is originally in Russian. This translation is based on the author's French translation (emphasis added).
133 ibid 403–404.

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torture, and summary executions.[134] This was a clear violation of the Geneva Convention, which the Sultan had ratified in 1865.[135]

That being said, the Russians certainly committed cruelties as well, mostly against civilians. Cossacks and irregular Bulgarian troops especially tended to indiscriminate acts of violence.[136] The US historian Justin McCarthy claims that Russian soldiers, especially Cossacks together with Bulgarian revolutionaries carried out massacres against civilians.[137] Furthermore, the Russian Army caused a vast flow of refugees during its march on Constantinople which led to widespread starvation and disease among the civilian population.[138]

Yet, unlike the Turkish killings of wounded combatants, these acts did not constitute violations of IHL *stricto sensu* – however atrocious they may have been. It is important to recall, that the existing legal instruments, i.e. the Geneva Convention and the Declarations of St Petersburg and Brussels, only regulated the fate of combatants. The 1864 Geneva Convention applied to wounded *soldiers*. The St Petersburg Declaration prohibited using a certain bullet against *combatants*. The term "civilian" only features a single time in the entire Brussels Declaration.[139] Only the regime on occupation[140] – along with very few other provisions[141] – can be interpreted as *indirectly* protecting civilians. It was not until the Fourth Geneva Convention of 1949 that civilians as a group were explicitly and amply protected by the laws of war. Until then war was considered an affair between States in which civilians had no role to play and therefore enjoyed no protection. Hence, the Russians did not break the letter of the law when they displaced the civilian population on their way to Constantinople. Additionally, many cruelties were committed by irregular forces, for which Russia had no responsibility. The cruel acts did, however, contradict

134 ibid 405.

135 For a detailed list of ratifications see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=120>.

136 Holquist (n 117) 17.

137 Justin McCarthy, *The Ottoman Peoples and the End of Empire: Historical Endings* (Arnold 2001) 48.

138 Dowdeswell (n 97) 844.

139 Art 22 of the Declaration states that civilians, tasked with delivering dispatches openly, are not to be considered spies.

140 Art 1–8 of the Brussels Declaration.

141 The prohibition of bombarding undefended localities in Art 15 of the Brussels Declaration; the prohibition of pillage in Art 18 of the Brussels Declaration.

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the principle of humanity enshrined in the preamble of the St Petersburg Declaration.[142]

In other areas, Russia's efforts led to an improvement for civilians. As mentioned above, civilians did enjoy some form of protection under the rules applicable to occupied territory contained in the Brussels Declaration. While non-binding in nature, Russia had voluntarily accepted the Declaration as hard law for its soldiers at the outset of the war. When Russian troops occupied Bulgaria and parts of eastern Turkey these self-imposed obligations suddenly became extremely relevant. The Declaration's section on occupation contains rules on restoring public order and safety, tax collection, and basic rights of citizens.[143]

Did Russia respect these guarantees? In his textbook, Martens praises the behaviour of Russian troops in the occupied territories during the Eastern War and points out the stark contrast to the conduct of the Prussians in occupied France 1870–1871.[144] To a large extent, this corresponds to the truth. Admittedly, Russia changed Bulgarian laws and the administration in an attempt to groom Bulgaria for its nearing independence from the Ottoman Empire. This was formally prohibited under Art 3 and Art 4 of the Brussels Declaration. Furthermore, there are reports of Russian troops standing by while irregular units or civilian mobs took revenge against Muslims. However, in many instances Russian troops upheld law and order.[145] Looting was prohibited and punished, military courts were set up and delivered swift justice. In occupied eastern Turkey, the administration system was left intact.[146] Given the ethnically and religiously charged situation, this seems quite remarkable and was certainly much better than Russian behaviour in occupied Galicia during the First World War.[147]

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142 The spirit of humanity that was invoked in the St Petersburg Declaration as well as the narrow definition of military necessity were at odds with such conduct. The reader may remember from above, that the preamble to the St Petersburg Declaration only permitted acts aimed at weakening the force of the enemy army. In the light of this, deliberate massacres against civilians were contrary to the *spirit* of IHL even at the time. In this respect, Russia did not live up to its pledges, at least where its own troops (and not ethnic mobs) committed massacres against civilians.

143 See Art 1–8 Brussels Declaration as well as Art 36–39.

144 Ф.Ф. Мартенс [F.F. Martens], *Современное международное право цивилизованных народов [Contemporary International Law of Civilized Peoples]* (n 15) 557–560.

145 Holquist (n 117) 24.

146 ibid 25–26.

147 ibid 17, 25.

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In Adrianople (modern Edirne) Russia even took care of 45 000 Muslim refugees and repatriated them after the cessation of hostilities.[148] This was an act of humanity that went beyond any IHL convention in force.

Despite all this humanitarian commitment, the Russo-Turkish War did not pay off in political terms. The treaty of San Stephano ended the fighting on 3 March 1878 and seemed to mark a Russian victory. However, most of the Russian gains were undone in the same year by the Treaty of Berlin, where Russia found itself diplomatically isolated.[149] Politically speaking, the war had been a failure. But what is the legal legacy of the Russo-Turkish conflict? War itself can, of course, never be a humanitarian enterprise. However, Russia demonstrated in 1877–1878 that it was possible to win a war and at the same time respect IHL. Had it thereby become the "first among the civilized nations?"[150] That would go too far, but Russia felt the burden of a self-imposed responsibility and lived up to it. In order to remain a credible international actor, it had to practice what it preached. All the talk about humanity would have appeared hypocritical, if Russia had thrown overboard the rules it had solemnly proclaimed in St Petersburg and Brussels. In the long run, however, the war and its subsequent events forced Russia to lay aside any further diplomatic Conferences on IHL.[151] The next attempt to advance the laws of war through a convention would have to wait for more than 20 years.

6. *The Hague Peace Conference of 1899 – the Parliament of Man*

> *"The good seed is sown. Let the harvest come."*[152]
>
> *Conference Chairman Egor de Staal in his concluding remarks at The Hague, 1899*

In her speech delivered at a round table in 2018 Olga Glikman, lecturer at the prestigious Institute of International Relations in Moscow (MGIMO), argued that it is hard to "overstate the importance of the Hague Peace Conferences and as a consequence the role of Russia in in the development

148 ibid 24.
149 Schimmelpenninck van der Oye (n 18) 566.
150 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 76.
151 Dowdeswell (n 97) 841.
152 James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts*, vol 1 (Oxford University Press 1920) 225.

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of IHL."[153] What sets the Hague Conference apart from other diplomatic conferences? Why is it still praised as the "Parliament of Man?"[154] And why was it so significant for the development of IHL?

Interestingly, it was not the desire to further regulate the laws of war that sparked the idea for the Hague Conference. Rather, the original goal was to conclude a treaty on disarmament.[155] Europe found itself in troubled waters. The era of peace that followed the Congress of Vienna crumbled. In the last third of the 19th century, the balance of power in Europe began to shift. A decisive victory in the Franco-Prussian war had paved the way for the unification of Germany in 1871, thereby dramatically changing the map of Europe. France had been humiliated and plunged into political chaos. The 1878 Congress of Berlin asserted Germany's strong position and started the Scramble for Africa.[156] Among European powers, there reigned a general climate of distrust.[157] In addition, Russia faced internal strife. Severe unrest had shaken Russia and culminated in the assassination of Tsar Alexander II in 1881.

At the same time, Russia followed a path of industrialisation and had launched an ambitious railway programme.[158] In general, technological development continued at a breath-taking pace, especially in the military sector. Rather than sheer numbers, technology became increasingly decisive in wars.[159] New rifles, such as the needle gun, allowed for faster reloading. They were first issued to Prussian soldiers in 1848 and used extensively during the Austro-Prussian War 1866.[160] Thanks to the growing railway system, troops could be deployed much quicker than before. Field

153 The reader can find the full text of the speech (18 May 2018) at <https://www.icrc.org/ru/document/gaagskie-mirnye-konferencii-1899-i-1907-godov-rossiyskaya-iniciativa-i-dalneyshee-razvitie>.

154 Eyffinger (n 80).

155 The Tsar's circular that convened all countries to The Hague read: "The maintenance of general peace, and a possible reduction of excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world as the ideals towards which the endeavours of all Governments should be directed." Reprinted in Arthur Eyffinger, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World'* (Kluwer Law International 1999), 17.

156 Eyffinger (n 80) 10.

157 ibid 14.

158 ibid 7–8.

159 Fuller Jr (n 17) 539, 549.

160 Bastian Mehn, *Waffentechnische Innovationen in der ersten Hälfte des 19. Jahrhunderts und ihre Umsetzung in der bayerischen Armee (Master's Thesis)* (University of Würzburg 2011) 1, 54.

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guns equipped with a hydraulic recoil mechanism revolutionised artillery warfare by allowing targeted shelling at a fast rate of fire.[161]

Thus, the question to which Russia sought an answer was not primarily how to behave in wars. It was rather how to *prevent* wars altogether by means of alliances or disarmament. In this, they were not alone. Britain, too, feared soaring military expenses and made a first demarche to initiate a Conference as early as 1894, shortly before the Death of Alexander III.[162] The British Prime Minister wrote in a letter to the Russian ambassador:

> *"I am quite clear that there is one person who is preeminently fitted to summon such a gathering. The Emperor of Russia by his high, pure character, and his single-minded desire for peace is the Sovereign who appears to me to be marked out as the originator of such a meeting."*[163]

The Tsar declined, but the vague idea of a pan-European conference on disarmament remained.[164] On 1 November 1894, with the ascension of Tsar Nicholas II, a man rose to power who was not only the cousin of the British King George V and the German Emperor Wilhelm II, but who was also eager to fill the shoes of his father who had earned the nickname "*Миротворец*" [Peacemaker] by bringing peace to Europe.[165] Indeed, the entire dynasty of the Romanovs had a "curious missionary ambition."[166]

The trigger, however, for initiating a peace conference turned out to be rather mundane: reports suggested that Germany, France, and Austria had developed a new rapid-firing field gun that would have represented a considerable military advantage.[167] At the same time Nicholas II decided to invest 90 million Rubles in the Russian fleet.[168] The then Russian Minister of Finance, Sergey Witte, and the Minister of War, Aleksey Kuropatkin, faced the choice of investing a considerable sum in the development of similar arms or finding another solution for the emerging arms race. Russia, suffering from inner turmoil, was simply not able to cope with

161 HCB Rogers, *A History of Artillery* (Citadel Press 1975) 115 et seq.
162 Thomas K Ford, 'The Genesis of the First Hague Peace Conference' (1936) 51 Political Science Quarterly 354, 360.
163 Aleksandr Feliksovich Meyendorff, *Correspondance diplomatique de M de Staal (1884–1900)*, vol 2 (M Rivière 1929) year 1894, No 9.
164 Ford (n 162) 355–357.
165 ibid 382.
166 Eyffinger (n 80) 19.
167 Rogers (n 161) 115 et seq.
168 Ford (n 162) 363.

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the racing pace of technological development.[169] At the same time, it wanted to pursue its expansion in the east.[170] A conference on disarmament seemed like a good idea to free the necessary funds and bring prosperity to all the regions, as Witte put it:

> *"Suppose Europe could contrive to disband the bulk of her land forces, do with a mere nominal army, and confine her defences to warships, would she not thrive in an unprecedented way and guide the best part of the globe?"*[171]

At first, the idea of a disarmament deal only concerned Russia and Austria, but eventually the concept was broadened to achieve disarmament on a global scale.[172] Foreign Minister Nikolay Muravyov drew up a circular note that was handed to all foreign diplomats present in St Petersburg. All of them were taken by surprise.[173] No one had expected such a daring attempt to counter the arms race. Many governments, however, remained distrustful, and the agenda and the prospects of the conference remained murky.[174] Only one thing was clear from the outset: the conference would not take place in St Petersburg unlike its precursor of 1868. The Tsar deemed it more auspicious to hold it on neutral ground and chose a city that came as a surprise to many:[175] The Hague.

The conference would mark the beginning of the city's ascension as a popular international venue and "judicial capital of the world." Why Russia chose The Hague in the first place remains unclear. Most probably, it was the lack of a viable alternative. The Netherlands was a neutral power, and The Hague was easily accessible by rail and steamer. Other options like Berne and Geneva were ruled out due to "prevailing anarchy"

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169 ibid 362.
170 ibid 365.
171 Emile J Dillon, *The Eclipse of Russia* (George H Doran 1918) 276.
172 Ford (n 162) 368–370.
173 ibid 376.
174 Pustogarov (n 99) 157.
175 Ford (n 162) 361; see also Pustogarov (n 99) 163. According to Pustogarov, Martens later advocated to hold the Conference in St Petersburg but his proposal was rejected. Martens claimed that the Russian Foreign Minister Count Lamsdorf wanted to avert damage from Russian diplomacy. He was afraid that the Conference would not yield tangible results and that the Russian public and the press would begin to proclaim its downfall. He thus preferred to hold it abroad where a meagre declaration of intent could be sold better to his own people. In his diary Martens reacted bitterly to such defeatism: "And for this an international conference? – How ridiculous."

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in Switzerland. Finally, the governments of Denmark and Belgium had signalled no interest in holding a conference in their countries.[176]

You may wonder, why the name of Martens has not come up so far. The man who was to become the "soul of the Hague Conference"[177] had been completely left out of the loop until the circulation of the invitation. The reader should know that Martens could never penetrate the inner circles of the Russian government.[178] He was not of noble descent, neither was he ethnically Russian, but Estonian-born and of humble origins. Despite his undisputed brilliance and his professional achievements, the inner circles of power cultivated a certain degree of distrust towards him. He had not been consulted about The Hague and the news of a world-conference fell on him like "snow on the head."[179] When he returned to St Petersburg in September 1898, he found out that to his dismay there was no agenda for the conference whatsoever. So far, the Tsar's proposal was just hot air. And nobody in the Russian government was competent or experienced enough to fill this void, so it became his task. With amazing speed, Martens submitted a memorandum outlining the main objectives for the conference.[180] It was also Martens who had the idea to narrow down the scope of the conference in a certain respect and broaden it in another. On the one hand, he strictly excluded any kind of political questions, such as the status of Alsace-Lorraine and similar border disputes.[181] On the other hand, Martens added two new aspects to the agenda: instead of just focusing on disarmament he aimed to strengthen inter-State arbitration and mitigate the horrors of war by further advancing IHL.[182]

This broadened agenda was circulated, again to the great surprise of all States.[183] As a seasoned diplomat, Martens knew that a "quick success" regarding disarmament was utopian. Adding arbitration and IHL to the agenda was more likely to lead to a broad consensus among States.[184] There was already an extensive practice of arbitration and the codification

176 Eyffinger (n 80) 4, 39–40.
177 Pustogarov (n 99) 173.
178 See for this Kross (n 29). Kross describes Martens' humble origins in his book. Of course, this fictitious account should not be mistaken for an accurate historical source, but it nevertheless gives an impression of Martens' upbringing.
179 Pustogarov (n 99) 158 quoting from Martens' diary.
180 ibid 162.
181 ibid 164.
182 ibid 171, 164.
183 Second circular note reprinted in Eyffinger (n 80) 36.
184 Pustogarov (n 99) 164.

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of the laws of war had enjoyed great success at Geneva and St Petersburg. Furthermore, regarding IHL, there was already a concrete proposal to be discussed: The Brussels Declaration. While it had never achieved the status of a binding treaty, Martens hoped that the Hague Conference could change that.[185] Thus, only thanks to Martens, the Hague Peace Conference of 1899 became what it would be remembered as by future generations: a milestone in the development of IHL.

6.1 Proceedings at the Conference

To Martens' bitter disappointment he was not appointed head of the Russian delegation. The Tsar chose Egor Staal, the Russian ambassador in London, a man who had never participated in an international conference in his life.[186]

The Conference was the largest international gathering of its kind so far: twenty-one European and six non-European States (China, Japan, Mexico, Persia, Siam, and the US) participated. An impressive number, given that the colonial powers still represented vast parts of Africa and Asia. Truly, it was a "Parliament of Man." The head of the Russian delegation Staal was elected as chairman, but it quickly became apparent that Martens pulled the strings. He assisted Staal in chairing the meetings, prepared drafts, and even directed the work in the different Commissions.[187]

The second Commission dealt exclusively with IHL issues. It deliberated on the adoption of a convention on the laws and customs of warfare. The Brussels Declaration with its 56 articles served as a starting point. Martens faced the difficulty of overcoming the scepticism of smaller States, who had opposed the Declaration in 1874 because it did not foresee the general right of the population to rise up against an occupant and withheld the combatant status from irregular *francs-tireurs*.[188] Rather, belligerent occupation was accepted as a given in modern wars. To satisfy the camp of smaller countries – who feared that this rule would leave them at the mercy of strongly militarised powers such as Germany – Martens suggested inserting a special clause in the preamble:

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185 ibid 166.
186 ibid 169.
187 ibid 172–173.
188 ICRC Casebook, How Does Law Protect in War, 'Martens Clause' <https://casebook.icrc.org/glossary/martens-clause>.

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> *"In instances not provided for by provisions adopted by them [i.e. the Convention States] the population and the belligerents remain under the protection and operation of the principles of international law insofar as they derive from customs established between civilized nations, from the laws of humanity, and the requirements of the public conscience."*[189]

The paragraph would later be known as "Martens-Clause" and was received with great enthusiasm by all delegations. It paved the way for the adoption of the first unified code of war.[190]

6.2 Influence of the Conference on IHL

Thanks to Martens efforts the Conference adopted five binding treaties with regards to IHL.

- The Hague Convention II with respect to the Laws and Customs of War on Land, which in its annex contained 60 Articles regulating many aspects of warfare. In the following this annex will be called the Hague Regulations (HR). The Hague Regulations represent the first comprehensive code of warfare in modern times.
- The Hague Convention III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864;
- The Hague Declaration IV,1 concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods;
- The Hague Declaration IV,2 concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases;
- The Hague Declaration IV,3 concerning the Prohibition of the Use of which can Easily Expand or Change their Form inside the Human Body Bullets [so-called dumdum bullets][191] such as Bullets with a Hard Covering which does not Completely Cover the Core, or Containing Indentations.

189 Pustogarov (n 99) 176.
190 ibid 177.
191 These were bullets designed to expand on impact thus causing horrible wounds. Their name is derived from the British Dum Dum Arsenal near Calcutta in India, where an early version of this bullet was produced.

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To the major disappointment of many, States did not reach consensus with regards to disarmament.[192] In terms of IHL, however, the conference was a clear success. It is telling that only one out of the six final documents did not concern the laws of war: the First Hague Convention of 1899 for the Pacific Settlement of International Disputes, which *inter alia* established the Permanent Court of Arbitration in The Hague.

While some regarded the creation of the Court as the most spectacular achievement of the conference,[193] the sheer number of IHL rules adopted is also impressive. Arthur Eyffinger agrees that the codification of IHL "was considered by many contemporary observers the most thorough and respectable result of the ten weeks of debate."[194] Each treaty represented an achievement of its kind. First and foremost, the Hague Convention II was a huge victory for Martens and all those who had aimed to advance and systematise IHL. It represents the first comprehensive treaty governing various aspects of warfare, such as occupation, sieges, conduct of hostilities, and spies. The Convention was ratified by all participants except China, the US, and Switzerland. Even the latter three were to accede later.[195] In addition, Hague Convention III extended the rules of the 1864 Geneva Convention to maritime warfare, providing better protection to wounded seamen. This had previously been attempted in 1868, but had failed.[196] Finally, the three Hague Declarations (IV 1–3) added certain projectiles to the list of prohibited weapons.

In a broader context, The Hague Conference laid the foundations of modern IHL. Before 1899, binding treaty law only consisted of provisions regarding wounded combatants and the isolated ban of certain projectiles of St Petersburg. The latter formulated some general principles in its preamble but did not elaborate on them. Now, The Hague Regulations

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192 Randall Lesaffer, 'Peace through Law: The Hague Peace Conferences and the Rise of the Ius Contra Bellum' in Maartje Abbenhuis, Christopher Ernest Barber and Annalise R Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907* (Routledge 2017) 31.

193 Eyffinger (n 80) 440; Lesaffer (n 192) 31.

194 Eyffinger (n 80) 439.

195 The US in 1909, Switzerland in 1910, and finally China in 1917, see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195>.

196 The Additional Articles were adopted at a Conference in 1868 but never entered into force, because they could not secure enough ratifications. See ICRC, 'Additional Articles relating to the Condition of the Wounded in War. (20 October 1868)' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=ECB39EA050F80A5DC12563CD002D6624&action=openDocument>.

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had codified rules on humanitarian aid, occupation, spies, flags of truce, capitulations, pillage, sieges, bombardments, and much more. Most importantly, it defined who qualified as a combatant and a prisoner of war.[197] The latter was hotly debated at the Conference of Brussels in 1874 and in the end prevented an agreement. While the issue was still contentious in 1899,[198] this time States managed to settle their differences. In return, smaller States overcame their misgivings about legalising belligerent occupation partly thanks to the Martens Clause.[199]

The Clause that immortalised Martens became one of the corner stones of IHL. It underlined that persons affected by armed conflict should never find themselves completely deprived of protection – even in cases not covered by IHL treaties *stricto sensu*. As a minimum they were protected by the principles of the law of nations, the laws of humanity, and the dictates of public conscience.[200] The reader may, for example, remember the events during the Russian advance on Constantinople 1878 that I have described in the previous section. While the forcible displacement of civilians was not illegal *per se*, the Martens Clause now provided the international community and lawyers with much better arguments to condemn such behaviour. Today, the Martens Clause is abundantly referenced in many of the IHL treaties, such as the 1949 Geneva Conventions,[201] their Additional Protocols,[202] and the UN Convention on Conventional Weapons of 1980.[203] It has found its way into the military manuals of

197 Art 1 and 4 of the Hague Regulations. The Hague Regulations still use both terms – "belligerents" and "combatants". Later States would settle for "combatant."

198 See e.g. Eyffinger (n 80) 305.

199 Pustogarov (n 99) 177.

200 For a detailed discussion of the significance of the Martens Clause and its development over time see Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78; Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 187.

201 Art 63 GC I, Art 62 GC II, Art 142 GC III, Art 158 GC IV.

202 Art 1(2) AP I and in the preamble of AP II in para 4.

203 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) 10 October 1980. The Clause is mentioned in the CCW preamble, para 5.

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many States, such as the US[204] and Germany.[205] Moreover, the Clause is part of customary law and thus binding on all States.[206]

In the field of naval warfare (Hague Convention III) Russia had scored a surprise victory. It is likely that Martens originally included naval warfare in the agenda, because he expected a quick consensus and thus a positive ripple effect regarding other more contentious issues.[207] Nevertheless, the issue was highly controversial in a time, when Germany and England found themselves engaged in a naval arms race. So far, the ICRC and Switzerland had failed to extend the Geneva Convention of 1864 to sea warfare.[208] Thus, Russia was not just "plucking low hanging fruit to fill The Hague's basket."[209]

In addition, Russia had challenged the role of Switzerland (and the ICRC) as the "humanitarian number one" by including the Geneva Conventions in the agenda of a Russian-led conference. The Russians had briefed neither ICRC nor the Swiss government beforehand.[210] Was this diplomatic cunning or simply uncouth? In any case, it placed pressure on the ICRC and its supporters to modernise a 25-year-old treaty. The competition between Russia and Switzerland that had been created by the success of this conference revived the fading Swiss interest in the Geneva Conventions and forced them to develop their *own* version of IHL that would set it apart from "the Hague law."[211]

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204 US Department of Defence, 'DoD Law of War Manual Updated Version 2016' (2015) 19.8.3.

205 Deutsches Bundesministerium der Verteidigung, 'Zentrale Dienstvorschrift (Dv) 15/2 Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch' (2016) para 140.

206 ICRC Casebook, How Does Law Protect in War, 'Martens Clause' <https://casebook.icrc.org/glossary/martens-clause>.

207 Neville Wylie, 'Muddied Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906' in Maartje Abbenhuis, Christopher Ernest Barber and Annalise R Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907* (Routledge 2017) 52.

208 See n 196.

209 Wylie (n 207) 56.

210 ibid 59.

211 ibid 52–53. Switzerland initiated a Conference in 1906 that led to an updated Geneva Convention, available at <https://ihl-databases.icrc.org/ihl/INTRO/180?OpenDocument>. The rivalry between the Hague and the Geneva branch of IHL existed for years to come. Only with the adoption of the 1949 Geneva Conventions and the 1977 Additional Protocols the distinction became obsolete, see

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7. Analysing the bigger picture – why Russia?

At this point we should ask ourselves two questions. First, did Martens act as a representative of Russia or as a self-employed agent of peace? And secondly, why did Russia display such strong interest in advancing IHL?

The first question may be answered more easily. It is undisputed that the humanisation of warfare reflected the personal tenets of Martens.[212] At the same time, Martens was not only a humanitarian. Despite all his ambition for peace, he remained a member of the Russian diplomatic corps. Martens managed to reconcile both roles, as Vladimir Pustogarov describes in his book *Our Martens*:

> *"The members of all delegations acted at the Conference as the representatives of their countries. Martens was no exception. But if in such statement there is an allusion that Martens' actions were determined by some sort of mercenary interest of Russia, this must be resolutely refuted. A study of the open and closed materials (…) discloses not a single instance when Martens singled out some sort of special interest of Russia at the Conference."*[213]

Martens inspired the discussions at The Hague with his diplomatic skills, his personal charisma, and his profound knowledge of international law. However, the Conference was not his personal crusade. He remained an agent of the State. Russia had identified a stable European peace as its vital interest and acted accordingly.[214] Hence, it would be a mistake to ascribe the successful outcome of the Peace Conference to Martens alone.

This brings us to our second question: why did *Russia* want to advance IHL in the first place? We have come a long way from Crimea to The Hague. As we are approaching the zenith of Russia's IHL patronage, we should take a step back and glance at the bigger picture. How can we explain Russia's fervour for advancing the laws of war? In the following, I will provide five reasons: idealism, diplomatic pride, military strategy, economic self-interest, and Russian ingenuity. I will explain each one in turn.

Idealism seems to be the obvious motivation behind advancing IHL. Eyffinger considers the initiative for The Hague "another token of that

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ICRC Casebook, How Does Law Protect in War, 'Law of The Hague' <https://casebook.icrc.org/glossary/law-hague>; see also below at p 67.

212 Eyffinger (n 80) 269.

213 Pustogarov (n 99) 191.

214 See Schimmelpenninck van der Oye (n 18) 554.

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curious missionary ambition of the Romanovs."[215] Their dynasty had freed the serfs, modernised Russia, and genuinely believed that providence imposed the honourable task on them to establish a lasting peace in Europe. This quest for peace also struck the *zeitgeist*. We have seen that the idea of advancing humanity was very much *en vogue* in 19th century Russia.[216] Even the writings of a level-headed jurist like Martens had a missionary touch, when they predicted that the State that establishes a comprehensive code of war would take the first place among all civilised nations.[217]

Secondly, promoting IHL had become a Russian trademark. It justified Russia's presence in international diplomacy. In humanitarian matters the Tsar excelled among his European peers. Russia suffered from an inferiority complex in this respect. For a long time, scholars debated whether Russia could boast an international law tradition that was as old as the central European legacy, or whether Russia was a *parvenu*.[218] Martens himself, for example, argued that Russia's foreign relations were merely factual before Peter the Great (1682–1725) turned westwards and downplayed earlier treaties that Russia had concluded with China and Persia.[219] Even though by now Russia had become an integral member of the concert of European powers, Napoleon's derogatory phrase lingered on: *"Grattez le russe et vous trouverez un tartare."*[220] In 1868, when Russia started its IHL-offensive, it had conquered vast territories stretching from today's Poland and Lithuania to the west, the Pamir mountains in Central Asia, and remote Siberia to the east.[221] Nevertheless the humiliating diplomatic defeat at Paris in 1856 had been etched in its memory. Expanding the Empire was not enough to compensate for the psychological wounds in-

215 Eyffinger (n 80) 35.
216 Myles (n 27) 331.
217 Ф.Ф. Мартенс [F.F. Martens], *Восточная Война и Брюсселская Конференция 1874–1878 г [The Eastern War and the Brussels Conference 1874–1878]* (n 16) 76.
218 Mälksoo, *Russian Approaches to International Law* (n 6) 36 et seq; see also Angelika Nußberger, 'Russia', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 77.
219 Mälksoo, *Russian Approaches to International Law* (n 6) 43–45 with further sources.
220 See e.g. Schimmelpenninck van der Oye (n 18) 572. He argues that Russians were occasionally branded as "Asiatic" in the West despite their scrupulous observance of diplomatic protocol. Furthermore, the European Powers were often bewildered by the concentration of authority in the hands of the Tsar and considered this trait of Russian governance somewhat archaic.
221 ibid 561–563.

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flicted in Crimea.[222] Even worse, at the Conference of Berlin (1878) Russia suffered another diplomatic setback, losing most of its territorial gains from the Russo-Turkish War.[223] The Tsars wanted their place *at the head* of the diplomatic table and IHL was their place card. The Hague Conference illustrates this well: the Russians included the Geneva Convention in the agenda without even consulting the Swiss or the ICRC.[224] Later they would attempt to subordinate the Geneva Convention to "their" Hague Convention.[225]

Thirdly, a limitation of the means and methods of warfare also served the military interest of the Tsar. With over 125 million inhabitants, Russia could boast the largest population on the European continent, by far exceeding its rivals Germany and France.[226] Thus, it is not surprising that Russia also possessed the largest land army. While other countries struggled to find fresh recruits, Russia had more men than they could train.[227] In 1881 the active army already comprised 84 400 soldiers. In addition, there was a large pool of reservists ever since Milyutin had reformed military service in 1874.[228] At the turn of the century, experts estimated that Russia could draw on the incredible number of 3.5 million professional soldiers and reservists.[229] To compare: even in 1914 the German Army only counted 800 000 men – and only after the Empire had invested huge sums in a military build-up.[230] The Russian Army had crossed this hallmark 30 years earlier. All these figures make one thing very clear: numerical superi-

222 See for this Dietrich Geyer, *Russian Imperialism: The Interaction of Domestic and Foreign Policy, 1860–1914* (Yale University Press 1987) 205.

223 See above and Schimmelpenninck van der Oye (n 18) 566.

224 Wylie (n 207) 59 et seq.

225 ibid 62. See also below at p 67.

226 The first and only census in the Russian Empire was carried out in 1897. Russia's total population amounted to 125 640 021 which by far exceeded the population of Germany, metropolitan France, or metropolitan Britain. The results of the census are available online at <https://archive.org/details/Statisticsofthe1897AllRussiaCensus>.

227 Gerhard von Pelet-Narbonne, 'Die neueren Tendenzen der Militärpolitik' (1909) 2 Zeitschrift für Politik 440, 442.

228 Fuller Jr (n 17) 545; see also 531: Already in 1825 Russia had the largest standing army in Europe with around 750 000 men.

229 Guido von Frobel, *Von Löbell's Jahresberichte über das Heer- und Kriegswesen XXXVI Jahrgang: 1909* (ES Mittler & Sohn 1910) 207. The report estimates that in 1909 the size of the standing Imperial Army amounts to 1 254 000 active soldiers. The rest is made up of reservists, Cossacks, and the Gendarmerie.

230 Karl-Volker Neugebauer, *Grundzüge der deutschen Militärgeschichte: Historischer Überblick*, vol 1 (Rombach Verlag 1993) 212.

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ority was the ace up the Tsar's sleeve. Therefore, it is only understandable that he wanted rules that conferred certain rights on his soldiers when they were in captivity or wounded. It was even more understandable that he feared the rapidly advancing development of weaponry that decreased the value of the individual infantryman and therefore sought to outlaw certain means of warfare.

Fourthly, the Tsarist government had strong economic motives to oppose an arms race, let alone an unfettered war against which IHL was considered a remedy. Russia was late to industrialisation and chronically under-developed. It had to pay for a railway system, a brand-new fleet, and the exploration of the eastern part of its territory – all while struggling with internal reforms.[231] Limiting military expenses and ensuring a stable peace in Europe was the best way of guaranteeing prosperity. Hence, after the Russo-Turkish War military expenditures continuously dropped and they remained below a 20 percent threshold until 1905.[232] Sergey Witte's statement that I have quoted above sums up this rationale. The Russian Minister of Finance dreamt of a de-mobilised Europe that would "thrive in an unprecedented way and guide the best part of the globe."[233] Witte was not a soldier, but an economist. To him war, especially a total war, must have seemed an utterly pointless investment. Historian Thomas Ford even argues that "the Russian move was primarily the result of economic necessity; only secondarily did the elements of altruism […] enter into it."[234]

While Ford is certainly right about Russia's economic motives, I disagree with his juxtaposition of self-interest and altruism as the two opposite ends of a spectrum. Rather, I believe that Russian ingenuity helped to overcome this contradiction. Imagine bending this straight-line spectrum into a circle so that the two opposite tips meet and welding them together. In essence, that is what Russia did, at the St Petersburg Conference, at Brussels, and at The Hague. Caught up in an arms race that was impossible to win, Russia managed to open up an alley, where all States could see the long-term benefit of limiting their sovereignty.

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231 Ford (n 162) 361 et seq; Fuller Jr (n 17) 551; see also William C Fuller Jr, *Civil-Military Conflict in Imperial Russia, 1881–1914* (Princeton University Press 2014).

232 Fuller Jr (n 17) 549–550.

233 Dillon (n 171) 276.

234 Ford (n 162) 381.

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Of course, we should be careful to ascribe the success of Russia's initiative to a "master plan" of the Tsar, the Russian government, or Martens. For example, the fact that there was no clear concept for the Hague Conference before Martens took over, shows that Russian leaders only harboured a vague hope that something would come of it. They took a shot in the dark.[235] In the end, however, the Conference *did* yield tangible results and represented a milestone in international legal history. It was a curious Russian mix of pragmatism, naïve foolhardiness, and idealism that made these achievements possible. The Hague Conference of 1899 especially represents a tremendous contribution to IHL; probably the single most significant contribution that Russia has ever made.

8. *The Russo-Japanese War 1904–1905 – a war waged by the books*

The Russo-Japanese war – a humane war? Is that a contradiction in terms? Does it not border cynicism to award this title to a war, whose final land battle at Mukden alone killed and maimed nearly 150 000 men on both sides?[236] Whilst the Russo-Japanese war seems on one level to have conformed to the new standards of "humane warfare", the immense number of casualties at the Battle of Mukden raises the question of how far IHL could ever be more than an exercise in mitigation. Nevertheless, the Russo-Japanese War illustrates how Russia's humanitarian initiatives impacted the reality on the battlefield.

In 1904, there were many IHL rules to be respected. The Hague Regulations were only five years old when the conflict erupted. The St Petersburg Declaration was in its late thirties, the Geneva Convention in its early forties. Together they formed an impressive compendium of rules in warfare. This time, unlike in the Russo-Turkish War, both sides – Japan and Russia – were eager to respect the new rules to gain credibility on the international stage.

At the outbreak of war Russia issued an updated IHL handbook to its soldiers, that *inter alia* reiterated the protection for the wounded, rights of

235 See e.g. Eyffinger (n 80) 35; see in general Jost Dülffer, *Regeln gegen den Krieg? die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (Ullstein 1981).

236 Encyclopædia Britannica, 'Russo-Japanese War' <https://www.britannica.com/event/Russo-Japanese-War>.

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POWs, and contained a general prohibition on targeting civilians.[237] The Russian Red Cross spent considerable funds that allowed it to maintain a chain of field hospitals reaching from St Petersburg to Harbin in China to evacuate and treat soldiers. It is striking that in this war both sides went to great lengths to respect IHL. A Times war correspondent reported that wounded and captured Russian soldiers were treated with utmost care. The same was true for Japanese soldiers.[238] Martens was personally in charge of the office that communicated lists with names and details of Japanese POWs to Tokyo – a procedure not even prescribed by law at the time. This good practice would soon be included in the 1906 Geneva Convention.[239] The Russian Red Cross furthermore sent two fully equipped hospital ships to accompany its battle fleet, in conformity with the Hague Convention III on Naval Warfare.[240] The following anecdote, taken from Martens diary, illustrates well how eager both sides were to respect IHL:

> *"In March 1905 he was invited to the General Headquarters of the Russian Army and informed that in Autumn 1904 when sending Japanese prisoners of war home who had been confined in the Far eastern village of Medved, one of the Japanese military servicemen gave to a Russian officer a petition in which he thanked Russia for humane treatment and requested a gift be accepted of 150 rubles which he had earned while imprisoned. The Japanese servicemen requested that the money be divided as follows: 50 rubles to the village of Medved, 50 rubles to the Russian Red Cross, and 50 rubles to the famous Professor Martens. The latter wish of the prisoner was based on the fact that thanks to international law and the labours of Martens in this domain the prisoners of war were treated humanely. In a conversation the prisoner of war explained that he had suited international law according to the cours of Martens."*[241]

237 'Наказ Русской армии о законах и обычаях сухопутной войны' ['Instruction of the Russian Army Concerning the Laws and Customs of Land Warfare'] 14 July 1904. The referenced rules can be found in 1.4), 1.5), and 2.1); the document is available at <http://lepassemilitaire.ru/istoricheskij-arxiv-111/>.

238 Boissier (n 124) 434–435.

239 ibid 436. Today, rules on the transfer of information can be found in Art 69 and 123 of the Third Geneva Convention of 1949.

240 ibid 437. See the Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (29 July 1899).

241 Archive of the Foreign Policy of Russia, opis 787, delo 9, ed khr 6, 1.85; cited in Pustogarov (n 99) 184.

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Russia lost the war due to severe strategic blunders and the inner turmoil that followed the revolution of 1905. The defeat demoralised the Imperial Army and made painfully clear that Russia was ill-prepared to confront a highly industrialised nation such as Japan.[242] It also ended Russian dreams of further expansion in the east. Russia only escaped harsh reparations thanks to the brilliant diplomacy of Sergey Witte, and the Treaty of Portsmouth (23 August 1905) imposed a relatively lenient penalty.[243] In terms of IHL, however, the Russo-Japanese war can be seen as a sequel to the Russo-Turkish War. Russia continued to hold IHL in high regard and applied it on the battlefield.

9. *The revision of the Geneva Convention 1906 – who is the better humanitarian?*

The Hague Peace Conference 1899 acted as a stimulus to the development of IHL. Russia had not consulted with anybody before convening States to The Hague. The fact that this impulse came from the Tsar took the guardians of the Geneva Convention – the ICRC and Switzerland – by surprise and forced them to articulate their ideas for developing IHL.[244] From 1899 onwards IHL developed in two separate branches: the "Hague branch" initiated by Russia and the "Geneva branch" based on the work of the ICRC.[245]

The ICRC and Switzerland entered this contest for humanity by launching a joint initiative to revise the 1864 Geneva Convention. Such a revision had already been agreed at the Hague Conference of 1899, but Russia attempted to delay or even prevent the conference.[246] This shows how competitive IHL had become. Russia had adopted IHL as its trademark and was not willing to share the brand. When the Swiss finally succeeded and managed to convene the conference, the Russian delegation attempted to "subordinate" the Geneva branch to the Hague branch by adding a reference to the rules of the Hague Regulations. However, this attempt

242 Fuller Jr (n 17) 542–543.
243 Schimmelpenninck van der Oye (n 18) 569.
244 See Wylie (n 207) 59 et seq.
245 See n 211.
246 Wylie (n 207) 61–62.

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to side-line the Swiss was unsuccessful.[247] On 6 July 1906, States agreed on a revised Geneva Convention, further expanding the protections of IHL.[248] For instance, Art 10 recognised voluntary aid societies for the first time and vested them with certain rights and prerogatives. Art 4 regulated the transmission of information on the wounded and dead according to the model of the Russian agency headed by Martens during the Russo-Japanese war.[249]

Aside from the substantial additions to IHL, this episode shows that developing the laws of war was more than a humanitarian enterprise to Russia. It was also a struggle for recognition, power, and influence in international circles.

10. The Second Hague Peace Conference of 1907 – the calm before the storm

> *"Often ignored and ridiculed, the Second Hague Peace Conference was a unique exchange of views at a moment of paramount interest for the history of Europe. […] 1907 proved the last stop of the nations on their headlong race for Verdun. At The Hague, the dice was cast."*[250]
>
> *Arthur Eyffinger on the Second Hague Peace Conference*

Martens had envisaged the Hague Conference 1899 as the opening salvo to a series of periodic gatherings. Unlike the first edition, the Second Hague Conference was originally an American initiative. The Russians, however, had asked for the conference to be postponed due to their war with Japan. After the end of the war the Tsar felt confident enough to take over the initiative and the Conference was scheduled for 1907.[251] By then, Martens was 62 years old and he might have expected that this was his last big appearance on the international stage. He had drafted the circular that was sent to all participating States laying down the objectives for the

247 ibid 62. Not all parties to the 1864 Geneva Convention had signed the Hague Regulations (or only with certain reservations). Hence, they did not support such a cross-reference.

248 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) available at <https://ihl-databases.icrc.org/ihl/INTRO/180>.

249 See above at p 65.

250 Eyffinger (n 81) 228.

251 ibid 204.

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gathering. The proposal foresaw *inter alia* additions to the conventions on land warfare, and a comprehensive convention on sea warfare.[252]

While it was clear that States wanted to discuss IHL at the Conference, opinions differed with regards to disarmament. Downsizing the bloated armies of all European nations had been the primary motive for convening the first Hague Conference. The idea had since won important supporters, such as Great Britain. On the other hand, powerful States, such as the German Empire still opposed the idea.[253] Even Russia itself – militarily crippled after the Russo-Japanese War – had turned its back on the project.[254] Hence the proposal only foresaw the discussion of measures to improve the peaceful settlement of disputes.

With regards to IHL, the task of this edition of the Hague Conference was to be both easier and harder than in 1899. Easier, because there was already a precedent. Bringing States together had worked once, why should it not work a second time? On the other hand, consensus seemed harder to reach in certain respects. Questions, such as the inviolability of private property in sea warfare, were left open in 1899 because they were especially controversial.[255] An easy success was far from likely, especially since the overall political climate in Europe had not improved in the past years; nationalism was on the rise.

44 States heeded the call of The Hague, including 19 States from Latin America as well as China, Japan, Persia, and Siam.[256] Participation was even more diverse than in 1899 and in this sense, Martens was right in calling the gathering a "truly International Parliament."[257] For the second time, the Tsar did not appoint Martens head of the Russian delegation, but the Russian diplomat Alexandr Nelidov. However, for the second time Martens played an enormously important role behind the scenes. In addition, he chaired the Maritime Commission which had the task of agreeing on more detailed IHL rules in sea warfare. Martens considered this to

252 The circular is reproduced in A Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War* (Cambridge University Press 1909) 53.
253 Pustogarov (n 99) 311, 316.
254 Eyffinger (n 81) 203.
255 Pustogarov (n 99) 304.
256 Betsy Baker, 'Hague Peace Conferences (1899 and 1907)', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 22.
257 Pustogarov (n 99) 315.

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be the "most difficult" task, especially due to the notorious reluctance of Great Britain.[258]

The Conference managed to advance IHL in numerous areas:[259]

- The Hague Convention II concerning land warfare was confirmed with slight modifications
- Conventions V–XIII contained elaborate rules on sea warfare. Most notably, the Geneva Convention of 1906 was extended to naval warfare, thus acting as a precursor of the Second Geneva Convention of 1949.
- Convention III laid down the need to declare war or provide some sort of "warning" before opening hostilities. Although strictly a *ius ad bellum* issue, this also had an effect on IHL[260]

Of course, the Second Hague Conference had its shortcomings. The Russians had proposed to draft a comprehensive convention on sea warfare. This initiative failed. Instead, the rules were scattered across various instruments.[261] Martens had furthermore envisaged the creation of an international prize court settling disputes about confiscated ships and cargo during naval warfare. This idea was torpedoed by his own government.[262] The Convention on a prize court was adopted, but it never achieved binding status, since it was only ratified by Nicaragua.[263]

Nevertheless, the Second Hague Conference advanced IHL in various ways. Art 3 of the Hague Regulations now foresaw that States were liable to pay compensation for IHL violations. The 1906 Geneva Convention henceforth applied to naval warfare. Means and methods of warfare, such as submarine contact mines, were regulated. And above all, the Hague Regulations were submitted to a much larger group of 44 States, which added to their universal acceptance.[264] Therefore, Martens was right in concluding that "all the same much has been done which will remain a

258 ibid 316–317.

259 Advancements in other areas of international law included the Hague Convention I on the Pacific Settlement of International Disputes and Hague Convention II Respecting the Limitation of the Employment of Force for Recovery of Contract Debts (so-called Drago-Porter Convention). For a detailed list of all Conventions adopted in 1907 see Higgins (n 252) 63–64.

260 Baker (n 256) paras 23 et seq.

261 Pustogarov (n 99) 326.

262 ibid 318; for a detailed examination why the prize court never came into existence see Eyffinger (n 81) 210 et seq.

263 Hague Convention (XII) relative to the Creation of an International Prize Court (18 October 1907) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=235>.

264 Eyffinger (n 81) 205.

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forever precious contribution to the treasury of progress of the international community."[265]

The Second Hague Peace Conference was Martens last major appearance on the international stage. Being a visionary, he seemed to have a premonition of what lay ahead: "The Second Peace Conference has ended, and in all likelihood, there will not be a third."[266] Martens died on 7 June 1909 at the age of 64.[267] With his death, the sun also set on an era of peaceful cooperation between States. Within half a century international law had greatly progressed. While war was not absent from international relations, conflicts were fought with increasing respect for IHL as shown by the examples of the Russo-Turkish War and the Russo-Japanese War. This success story was about to change, starting with a tragic summer morning in Sarajevo.

11. The First World War 1914–1918 – the great seminal catastrophe

> *"Our disillusionment on account of the uncivilized behaviour of our fellow citizens of the world during the war were unjustified. They were based on an illusion to which we had given way. In reality our fellow-citizens have not sunk so low as we feared because they had never risen so high as we believed."*[268]
>
> *Sigmund Freud on the First World War, 1915*

Pointing out that the First World War brought terrible bloodshed and carnage would be stating the obvious. Modern technology led to the erosion of well-established standards of humanity. While the famous English poet Sir Henry Newbolt compared war to a rugby match, the reality could not be further from this romantic image of a chivalrous standoff:[269] soldiers

265 Pustogarov (n 99) 324; for a contemporary Russian perspective on the outcome of the Conference see Vladlen Vereshchetin, 'Some Reflections of a Russian Scholar on the Legacy of the Second Peace Conference' in Yves Daudet (ed), *Actualité de la Conférence de la Haye de 1907, deuxième Conférence de la Paix* (Martinus Nijhoff Publishers 2008).

266 Pustogarov (n 99) 327.

267 ibid 338.

268 Sigmund Freud, *Civilisation, War and Death: Selections from Three Works by Sigmund Freud* (Hogarth Press and the Institute of Psycho-analysis 1939) 11.

269 His famous war poem 'Vitai Lampada' finishes on the line "Play up! play up! and play the game!".

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crouched in the muddy trenches of Verdun searching for cover from endless artillery salvoes. While men were on the frontline, women and children were raped and killed in occupied territories, such as Galicia.[270] Destruction seemed omnipresent. Air warfare and submarines extended the battlefield to spheres that were unthinkable only a few years ago. The human cost was immense. Tragic peaks that continue to haunt our conscience even today include the Armenian Genocide and the first use of poisonous gas on the battlefields of Ypres. Nearly nine million dead combatants and probably as many dead civilians[271] – these figures truly stand for "*the* great seminal catastrophe" of the twentieth century.[272]

I would like to draw the spotlight to two specific issues during World War I that are of special relevance to Russia and IHL and will be the focus of the present investigation: the treatment of POWs and the use of chemical weapons. I have made this selection, because these issues have a special link to Russia and they were already regulated in IHL at the time, while other phenomena – such as the extremely high number of dead combatants and the suffering of civilians – fell outside of the protective scope of the laws of war. IHL remained incomplete, and the First World War was painfully suited to demonstrate this. There are some things from which IHL did not *yet* protect in 1914, and there are things from which even the most perfect IHL framework could *never* offer protection.

The first category, i.e. persons IHL did not *yet* protect, concerns civilians. At the outbreak of World War I, there was still no effective protection of civilians in wartime. It would take another 30 years for the 1949 Fourth Geneva Convention to see the light of day. Only then would the essential safeguards be extended to non-combatants. This, of course, does not mean that the First World War was less cruel on civilians. Although often ignored by history, civilians suffered greatly, especially in occupied territories where they were at the mercy of foreign troops. For example,

270 See for this Omer Bartov and Eric D Weitz, *Shatterzone of Empires: Coexistence and Violence in the German, Habsburg, Russian, and Ottoman Borderlands* (Indiana University Press 2013).

271 Encyclopædia Britannica, 'World War I – Killed, wounded, and missing' <https://www.britannica.com/event/World-War-I/Killed-wounded-and-missing>.

272 The expression was coined by George Frost Kennan, *The Decline of Bismarck's European Order: Franco-Russian Relations 1875–1890* (Princeton University Press 1979) 3.

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the Russian soldiers who invaded eastern Prussia and the Balkans initiated pogroms and committed atrocities.[273]

Some of these acts were already illegal under IHL, which provided some sort of minimal protection to civilians under occupation. Other indirect effects of conflict, such as starvation were still blank spots in IHL even though they were among the main death causes.[274] Some hardships, such as the systematic internment of civilians, had not even appeared on the radar of international lawyers before. Gustav Ador the then President of the ICRC stressed in one of his speeches: "Civilian internees are an innovation of this war; the international treaties did not foresee it."[275]

The second category, i.e. persons IHL could *never* protect, concerns the soldiers that fell at Verdun, Ypres, Tannenberg, and on many other battlegrounds. IHL was never *made* to protect these young men.[276] Since it accepts war as a given, it must accept the possibility of targeting soldiers.[277] This inherent pragmatism has rarely been questioned ever since the 1864 Geneva Convention.[278] So, even if it sounds cynical, most of the nine

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273 Annette Becker, 'The Great War: World War, Total War' (2015) 97 International Review of the Red Cross 1029, 1036–1038.

274 Encyclopædia Britannica, 'World War I – Killed, wounded, and missing' <https://www.britannica.com/event/World-War-I/Killed-wounded-and-missing>.

275 Gustav Ador, speech at the International Conference of the Red Cross on the issue of civilian prisoners: ICRC Archives, 411/10, "Introduction sommaire à la question concernant les civils" (September 1917) 1.

276 Lindsey Cameron, 'The ICRC in the First World War: Unwavering Belief in the Power of Law?' (2015) 97 International Review of the Red Cross 1099, 1100. According to Cameron "it seems astonishing that it was not somehow illegal to plan battles in which 10,000 casualties per day – for one's own side alone – were expected."

277 Of course, IHL imposes restrictions on *how* combatants can be targeted. The St Petersburg Declaration banning exploding bullets is a prime example for illegal means and methods or warfare. While there are other important restrictions on how combatants can be targeted, IHL still rests on the assumption that combatants represent legitimate targets in war.

278 One of the few instances in history, where the very existence of IHL was called into question, was after the Second World War. Art 2(4) of the UN Charter enshrined the prohibition of the use of force. Some authors argued that IHL had no place in a world that had outlawed war: Quincy Wright, 'The Outlawry of War and the Law of War' (1953) 47 American Journal of International Law 365, 370; Georges Scelle, 'Quelques réflexions sur l'abolition de la compétence de guerre' (1954) 25 Revue Générale de Droit International Public 18; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume II: The Law of Armed Conflict* (Stevens and Sons 1968); see also

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million dead soldiers in the First World War were killed in conformity with the law. They were combatants that became victims of conventional weapons such as artillery shells or machine guns.[279] Actually, overall IHL compliance during World War I can be considered "fairly good."[280] Hence, if we want to explore how Russia shaped IHL during the First World War, we should focus on the following two issues: poisonous gas and POWs.

11.1 Chlorine gas – a horror made in Germany

Did Russia violate the Hague law when its troops used poisonous gas? One thing is for sure: it was not Russia who used chemical weapons first. On the contrary, in 1914 Russia's chemical production was exclusively in the hands of German industrialists. When the war broke out, production sites were shut down for obvious reasons.[281] Contrary to the popular belief that poisonous gas was used for the first time on the Western Front, the weapon had its premiere against the Russian Empire. German troops deployed it in late January 1915 in Poland. However, the cold temperature greatly reduced its effect and made the attack go by almost unnoticed.[282] On 22 April 1915 Germany used Chlorine gas for the first time in a

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the letters exchanged between William C Chandler and Prof Glueck, reprinted in Jonathan A Bush, 'The Supreme Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War' (2002) 102 Columbia Law Review 2324, 2402; The ILC refused to codify IHL, because it would send the wrong political sign after the adoption of the UN-Charter, see ILC, *Yearbook of the International Law Commission 1949 – Summary Records and Documents of the First Session Including the Report of the Commission to the General Assembly* (United Nations 1956) 281.

279 Becker (n 273) 2034. The author speaks of "10 million dead in four and a half years. Unlike in previous wars, very few died of disease; almost all were killed in the fighting. The survivors did not fare much better. Nearly 50 percent of all those who fought were wounded, whether seriously or not, and often more than once. Shells were the main cause; poison gas, though a new terror, caused far fewer casualties."

280 Cameron (n 276) 1119.

281 Maria Grigoryan and Oleg Yegorov 'How Russia countered Germany's chemical weapons in WWI' (Russia Beyond, 8 August 2018) <https://www.rbth.com/history/328927-russia-chemical-weapon-wwi>.

282 Ulrich Trumpener, 'The Road to Ypres: The Beginnings of Gas Warfare in World War I' (1975) 47 The Journal of Modern History 460, 462–463; 469.

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large-scale operation in Ypres.[283] Later, its enemies – including Russia – would retaliate. Overall both sides used 110 000 tonnes of poisonous gas during the war, killing 91 000 and wounding 1.3 million more.[284]

However atrocious the consequences, the legal prohibition of poisonous gas was not as clear as many claimed at the time. The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases was only adopted in 1925 – and thus long after the war. At the time of the First World War the only existing framework was the Hague Declaration IV-2 of 1899 prohibiting "the use of *projectiles* the sole object of which is the diffusion of asphyxiating or deleterious gases."[285] The reader might notice that the provision does not ban gas itself, but only *projectiles* containing such gas. The second relevant norm was Art 23(a) and (e) of the Hague Regulations (1907). It prohibited the use of "poison" and arms that cause "unnecessary suffering." However, the wording remained very vague. None of the existing treaties contained a blanket and explicit ban of poisonous gas.

The Germans tried to use this ambiguity to their advantage. According to them the use of Chlorine at Ypres did not violate the letter of the law, because the gas was released from canisters and not fired by projectiles. The canisters were opened manually, and the wind then carried the gas towards the French positions. Moreover, so the Germans argued, the injuries caused by gas weren't any more "superfluous" than those inflicted by ordinary shrapnel.[286] Finally, gas was not "poison" in the sense of Art 23 Hague Regulations. While this question was discussed at the first Hague Peace Conference, the delegates did not reach consensus on it.[287]

Whether a violation of the strict letter of the law or a grey area case, the community of States unanimously condemned the German use of chlorine

283 M Girard Dorsey, 'More than Just a Taboo: The Legacy of the Chemical Warfare Prohibitions of the 1899 and 1907 Hague Conferences' in Maartje Abbenhuis, Christopher Ernest Barber and Annalise R Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907* (Routledge 2017) 86.

284 ibid 90.

285 Declaration (IV,2) concerning Asphyxiating Gases (29 July 1899, emphasis added), available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2531E92D282B5436C12563CD00516149>.

286 Dorsey (n 283) 90–91.

287 ibid 89.

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gas as a violation of international law.[288] Hence, MP Harold Tennant struck a point when he declared in the House of Commons in 1915:

> *"The actual terms of The Hague Declaration forbid only the use of projectiles the sole object of which is to diffuse asphyxiating or deleterious gases. Obviously, the diffusion of the gases was the object of the prohibition rather than the means by which they were diffused."*[289]

From today's perspective this position seems reasonable and in line with Art 31(1) of the Vienna Convention on the Law of Treaties (VCLT) which encourages us to interpret a treaty in the light of its "object and purpose." This also includes "subsequent practice."[290] After such a unanimous condemnation it was difficult to argue that the existing norms did not cover poisonous gas.

Condemning the German violation of IHL did not prevent Russia and its allies from resorting to the use of poisonous gas themselves.[291] Russia, for its part, managed to develop its own chemical weapons within a year's time. The Imperial Army used them for the first time in March 1916 during the offensive of Lake Naroch, in today's Belarus.[292] Was this a clear violation of IHL? Based on what has been said above, the reader might conclude that Russia's use of poisonous gas would equally violate Hague law.

The answer to this question, however, should not be rushed. You might remember your childhood days when you haggled with your siblings. When your parents intervened, you would defend yourself by resorting to the compelling argument: "But *they* started!". This intuitive defence also exists in international law in the form of reprisals. A belligerent reprisal describes a breach of IHL that would otherwise be unlawful, but in exceptional cases is considered lawful as an enforcement measure in response to a previous breach of IHL by the enemy.[293] Today, reprisals

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288 ibid 91.

289 H Tenant (18 May 1915) House of Commons Debates Hansard Millbanks Series 5 Vol 71cc, 2119–2120 (emphasis added), available at <https://api.parliament.uk/historic-hansard/commons/1915/may/18/asphyxiating-gases-hague-convention>.

290 See Art 31(3)(b) VCLT.

291 Dorsey (n 283) 92–93; Durand (n 38) 73.

292 Maria Grigoryan and Oleg Yegorov 'How Russia countered Germany's chemical weapons in WWI' (Russia Beyond, 8 August 2018) <https://www.rbth.com/history/328927-russia-chemical-weapon-wwi>.

293 ICRC Casebook, How Does Law Protect in War, 'Reprisals' <https://casebook.icrc.org/glossary/reprisals>.

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are only allowed under very strict conditions and there is a trend in IHL towards outlawing them completely.[294] However, in 1914–1918 countries were still free to retaliate – including by using poisonous gas. The Hague Conventions of 1899 and 1907 did not touch upon the issue of reprisals for fear of legitimising their use.[295] According to the (non-binding) Oxford Manual of 1880, belligerent reprisals were explicitly allowed "if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, [and] no other recourse than a resort to reprisals remains."[296] Even after the First World War, reprisals were far from illegal. When signing the 1925 Geneva Protocol, many States retained the right to use poisonous gas to retaliate against a breach of the protocol by the enemy. While many States have withdrawn their reservation today, certain countries – including the US, China, and Syria – have not.[297] Christopher Greenwood and Shane Darcy argue that the use of gas (against combatants) could even be one of the few remaining examples of legal belligerent reprisals today.[298]

In the light of this, the Russian use of poisonous gas could be justified as a reprisal. Of course, every instance would have had to be proportional and aimed at ending the enemy's violation.[299] This would require a detailed analysis of each and every attack and therefore falls outside of the scope of this thesis. However, it is safe to say that Russia did not commit a large-scale violation of IHL by using gas *per se*.

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294 ibid.

295 Frits Kalshoven, *Belligerent Reprisals* (A W Sijthoff 1971) 67.

296 Art 84 of the Oxford Manual on the Laws of War on Land.

297 Countries that maintain their reservation include: Algeria, Angola, Bahrain, Bangladesh, Cambodia, China, Fiji, India, Iraq, Israel, Jordan, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libya, Nigeria, Papua New Guinea, Serbia, Solomon Islands, Syria, Thailand, the US, and Vietnam. See <https://www.nti.org/learn/treaties-and-regimes/protocol-prohibition-use-war-asphyxiating-poisonous-or-other-gasses-and-bacteriological-methods-warfare-geneva-protocol/>.

298 Christopher Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 Netherlands Yearbook of International Law 35, 54; Shane Darcy, 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 Military Law Review 244, 212–213.

299 ICRC Casebook, How Does Law Protect in War, 'Reprisals' <https://casebook.icrc.org/glossary/reprisals>.

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11.2 Prisoners of war in Russia – lost in the taiga

By 1917 Russia had over two million prisoners of war in custody.[300] In theory, Russia had the necessary legal framework to cope with such an astronomical number of people. At the outbreak of the war, the government had published a voluminous code regarding the rights and the treatment of POWs.[301] In practice, however, the Russian Empire was ill-prepared for such an influx. Whenever they captured a large number of POWs, the detainment system failed, and they could neither provide for them in the combat zone nor transport them to the rear. This involuntary chaos resulted in many deaths.[302] Eventually, most surviving prisoners were sent to Siberia, where they lived in poor conditions and fell victims to diseases. During the early stages of the war, thousands died of epidemics.[303] The Russians themselves were short of food and winter apparel. Thus, they did not issue any to the POWs.[304] Overall more than 400 000 prisoners perished which constituted one of the highest death rates for detention powers in the First World War.[305]

The massive influx of POWs painfully showed the difference between law and reality. While the Hague Regulations *did* set out fundamental protections for POWs, they did not provide any guidance how to cope with the huge numbers the detention powers were facing. Nobody had any experience in dealing with millions of detainees. Well-intended initiatives, such as the communication through neutral States, were ineffective due to practical difficulties. For example, the US (during its period of neutrality) represented German and Austro-Hungarian interests in Russia. However, many of the consular staff spoke little Russian or German, thus greatly complicating any intervention.[306]

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300 Gerald H Davis, 'The Life of Prisoners of War in Russia 1914–1921' in Samuel R Jr Williamson and Peter Pastor (eds), *War and Society in East Central Europe Vol V – Essays on World War I: Origins and Prisoners of War* (Brooklyn College Press 1983) 163.

301 Durand (n 38) 70–75.

302 Davis (n 300) 165.

303 Reinhard Nachtigal, 'Seuchen unter militärischer Aufsicht in Rußland: Das Lager Tockoe als Beispiel für die Behandlung der Kriegsgefangenen 1915/16' (2000) 48 Jahrbücher für Geschichte Osteuropas 363, 367–368.

304 Davis (n 300) 168.

305 Reinhard Nachtigal and Lena Radauer, 'Prisoners of War (Russian Empire)', *International Encyclopedia of the First World War* 5.

306 Davis (n 300) 170.

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In addition, the Russians did not react well to criticism. When an American Red Cross officer denounced the appalling conditions in the Siberian camp of Sretensk, where countless POWs had succumbed to a Typhus epidemic, he was recalled under the pressure from the Russian military.[307] The refusal to improve the appalling conditions clearly violated Art 4 of the Hague Regulations, which guaranteed POWs humane treatment. Russia furthermore forced many POWs to work in connection with military operations, building fortifications or roads within occupied territories. This constituted a clear violation of Art 6 of the Hague Regulations.[308] The country that had done so much to protect prisoners during the Russo-Turkish and the Russo-Japanese War now failed to live up to its responsibility.

It is difficult to say whether Russia neglected its obligations due to incompetence or whether the shortage of food, medicine, clothes, and accommodation was intended. It makes little difference legally, since the Hague Regulations do not set out any subjective element. What counts is the objective violation of minimum guarantees. Most likely, however, the Russians were simply overwhelmed and ill-prepared, as the number of POWs exceeded the local population in some places of detention.[309] This theory also finds support in accounts of more fortunate POWs who managed to benefit from the chaotic conditions. The absence of a strong governmental authority brought about a degree of freedom to self-organise. POWs founded papers, theatre groups, schools, colleges, labour unions, elected their leaders and even held a nationwide all-Russian prisoner of war congress. Many of the prisoners worked on farms, integrated themselves into everyday life and even decided to stay after the war.[310] Such "success stories" would have been impossible if the Russian State had followed a regime of calculated deprivation.

In the turmoil of the October Revolution most POWs were freed and received full citizen rights of the Soviet Union. However, they were still stranded in remote areas of Siberia and Turkestan, and many of them depended on the government-funded camp system.[311] While the negotiations with Germany at Brest-Litovsk proceeded, the prisoners were stuck in the taiga. In the long run, the political chaos would greatly hamper

307 ibid 172.
308 ibid 174.
309 Nachtigal and Radauer (n 305) 4.
310 Davis (n 300) 175–181.
311 ibid 181–182.

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their homecoming.[312] While the repatriation of POWs had been one of the core tasks of the Red Cross, the 1917 revolution obliterated the old structures of the Russian Empire. This affected the work of the ICRC as well as of the Russian Red Cross. Even though the Bolsheviks vowed to honour the obligations under the Geneva Conventions in a decree signed by Lenin himself, relations with the ICRC gradually deteriorated.[313] It is emblematic that the position of the ICRC delegate in Russia remained vacant up to 1921.[314]

The delay in repatriations was aggravated by the decline of the Russian Red Cross. Founded in 1867, it had been an active and well-organised national society with good ties to the ruling circles. It will come as no surprise to the reader that the Bolsheviks completely changed, suspended, and finally tried to replace the national society.[315] A new Soviet Red Cross was created, while the old Imperial Red Cross re-founded itself in areas controlled by the "Whites"[316] and abroad.[317] This left the ICRC without a national counterpart which created an even worse situation: any sign of recognition of one society would be perceived as partial by the other. In addition, the allies opposed a quick exchange of POWs between Russia and Germany after the armistice in 1918 for fear of bolstering the Red Army in a crucial phase of the Russian Civil War.[318] Hence, Art 20 of the Hague Regulations that foresaw that "[a]fter the conclusion of a peace, repatriation of prisoners of war shall be carried out as quickly as possible" remained but an illusion. The last POWs only returned in 1922, four years after the armistice of 1918.[319]

312 Nachtigal and Radauer (n 305) 7–8.
313 The Decree can be found in Durand (n 38) 81.
314 ibid 87.
315 ibid 79, 85.
316 The term Белая Армия [White Army] describes a loose confederation of anti-communist forces that fought against the Red Army in the Russian Civil War (1917–1923).
317 Durand (n 38) 85.
318 Jean-François Fayet, 'Le CICR et la Russie: Un peu plus que de l'humanitaire' (2015) 1 Connexe: les espaces postcommunistes en question 55, 60.
319 Durand (n 38) 89.

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12. Conclusion

In terms of IHL, the First World War is a mixed bag. On the one hand, Russia still went to great lengths to respect IHL. For example, it agreed to return a certain percentage of medical personnel among Austro-Hungarian POWs.[320] In 1915 it supported the ICRC's appeal for a ceasefire, so that nurses could collect the wounded.[321] Furthermore, Russia did not violate the Hague law *per se* by using chemical weapons. On the other hand, the poor treatment of POWs taints the Russian IHL record.

Hence, World War I constitutes the first instance, where Russia disregarded IHL norms on a large scale. Admittedly, Russia was no worse than other European powers and most of the violations occurred because the country was overwhelmed and manifestly ill-prepared for war.[322] However, none of this can justify the suffering of many individuals that should have been protected by IHL.

In this sense, the First World War marks a watershed in Russia's attitude to IHL. The "golden age" of Russia's humanitarianism began to fade.[323] The War ended the most productive period of Russia's IHL patronage (1868–1914) during which the Empire promoted humanity in warfare. As is well known, the February Revolution (1917) also put an end to the Russian Empire altogether. While the poor treatment of POWs during the First World War foreshadowed violations in future conflicts, the most fundamental changes were of another kind. As the Bolsheviks took power in 1917, they vowed to break with the past. How would this radical change affect Russia's attitude towards IHL?

320 Cameron (n 276) 1116.

321 Rapport Général du Comité International de la Croix Rouge sur son activité de 1912 à 1920 (Geneva 1921) 75–76.

322 See for this Fayet (n 318) 58.

323 See ibid 56. Fayet uses the term to refer to the period of 1867–1917, but mainly with reference to the relations between Russia and the ICRC.

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Chapter II: The Soviet Era 1917–1991

1. *Introduction*

When the British historian Eric Hobsbawn coined the term of "the long 19th century" he referred to the period from the French Revolution up to the outbreak of the First World War.[324] This era that brought relative peace and prosperity to Europe found an abrupt end in 1914. For Russia, the turning point was more precisely 1917, when Tsar Nicolas II abdicated after the February Revolution. After nearly 200 years the Russian Empire, the third largest Empire in world history, ceased to exist. Shortly afterwards, three other long-standing European monarchies – the Austro-Hungarian, the German, and the Ottoman Empire – would also disappear. 1917 also marked the beginning of the first large-scale communist experiment on a State level. Ironically, it was not one of the highly industrialised nations of Western Europe, but a largely agrarian Russia that became the breeding ground for the workers' revolution. Ahead of us lies the "short twentieth century" spanning from 1914 to 1991, which Eric Hobsbawn also called "the age of the extremes."[325]

If the Soviet intermezzo were a picture, it would be framed by two events that took place in the Belarusian city of Brest. In 1918 Bolshevik Russia and the German Empire concluded the treaty of Brest-Litovsk ending the First World War and paving the way for the consolidation of Bolshevik rule. In 1991 it was again near Brest where three signatures put an end to another conflict. In the idyllic setting of Belovezhskaya Pushcha National Park, Russian, Ukrainian, and Belarusian representatives concluded the Belovezha Accords that started with the laconic phrase: "the Soviet Union ceases to exist as a subject of international law and as a geopolitical reality."[326] The Cold War was over.

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324 His analysis consists of three volumes: Eric Hobsbawm, *Age of Revolution: 1789–1848* (Hachette UK 2010); Eric Hobsbawm, *Age of Capital: 1848–1875* (Hachette UK 2010); Eric Hobsbawm, *Age of Empire: 1875–1914* (Hachette UK 2010).

325 Eric J Hobsbawm and Marion Cumming, *Age of Extremes: The Short Twentieth Century, 1914–1991* (Abacus London 1995).

326 Treaty on the Creation of the Commonwealth of Independent States (8 December 1991). The Russian original reads: "Мы, Республика Беларусь, Российская Федерация (РСФСР), Украина как государства – учредители Союза ССР,

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The following chapter will focus on the seven decades that lie in between these two historical events. Did the Soviet Union cherish IHL in the same way as Imperial Russia? How did the pragmatic field of IHL sit with Marxist ideology? And what convinced Stalin – one of the bloodiest tyrants of modern times – to sign the Geneva Conventions of 1949? I will structure my analysis of the Soviet reign thematically, rather than chronologically. In legal terms, IHL faced certain structural difficulties in Soviet times. There are four reasons why an overarching analysis is more suitable, than proceeding war by war, conference by conference.

Firstly, any account of the bloody 20th century risks escalating into an endless list of IHL violations. You might remember my enthusiastic accounts of how IHL was valued and implemented during the Russo-Turkish and Russo-Japanese war. You might remember my apologetic approach to Russia's violations during the First World War, which occurred to a large extent – especially with regards to POWs – due to incompetence and lack of resources rather due to bad faith. The Second World War was different. IHL violations were premeditated, endemic, and systematic – especially on the eastern front.[327] Both Stalin and Hitler waged an ideologically motivated total war which had a disastrous effect on IHL. I will not conceal these violations from the reader but examining them in detail would be a Sisyphean task.

Secondly, the Soviets did not attach as much value to IHL as imperial Russia had – or to law in general for that matter. Marxism-Leninism, the official State ideology of the USSR, saw its main priority as paving the way to a communist society. Law was never a central concern of Marxists. Their ideology rather focusses on the development of economic infrastructure and the organisation of power in a community. While law comes in as one sub-factor, it is doomed to remain merely tangential.[328] In addition, *international* law was the product of negotiations of bourgeois governments and thus always carried a counter-revolutionary smell.

Thirdly, after the end of World War II many of the conflicts with Soviet involvement were fought as proxy wars, the only notable exception being

подписавшие Союзный Договор 1922 года, далее именуемые Высокими Договаривающимися Сторонами, констатируем, что Союз ССР, как субъект международного права и геополитическая реальность, прекращает свое существование."

327 See below at pp 103 et seq.

328 Hugh Collins, *Marxism and Law* (Oxford University Press 1984) 9.

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the Afghan War (1979–1989).[329] While it was an open secret that the Soviet Union provided support to warring parties in Korea, Vietnam, and to various African and Latin American guerrilla movements, the Red Army avoided directly participating in hostilities.[330] This strategy of outsourcing warfare to proxy actors, makes it much harder to establish genuine Soviet practice. The phenomenon of delegating warfare is highly interesting and – as we shall see later – a tradition that lives on in modern-day Russia. However, a comprehensive analysis of such support would go beyond the scope of this thesis and would not yield much with regards to IHL.

Fourthly, the Soviets came up with several new legal concepts that were at odds with the established framework of international law. Can you imagine acceding to a treaty without signing it? Can you imagine a different *system* of international law that applies only to socialist States? Legally speaking, these were truly revolutionary concepts worthy of a State that had sworn to change all aspects of rotten capitalist society. We shall have a look at these concepts in the following section. However, when the Soviet Union was laid to rest near Brest in 1991, most of these revolutionary ideas were buried with it. Thus, they have less relevance for the upcoming analysis of Russia's present-day approach to IHL.

What *can* we say about seven decades of Soviet reign? In the first part, I will tackle the idiosyncrasies of the Soviets' mindset with regards to international law and how they affected IHL. In the second part, I would like to highlight certain moments when the USSR managed to "shine" with regards to IHL, notably the International Military Tribunal at Nuremberg and the 1949 Diplomatic Conference for the revision of the Geneva Conventions. However, I will also point out Soviet misconduct, notably during the Second World War (1941–1945) and the Afghan War (1979–1989).

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329 See below at p 131. Also, we shall briefly consider the rare instances in which the Soviet troops overtly engaged in combat outside Soviet territory. There are only five cases: The invasions in East Germany (1953), Hungary (1956), and Czechoslovakia (1968); the Sino-Soviet Border Conflict (1969); and the Afghan War (1979–1989). All of them – with the exception of Hungary and Afghanistan – resulted in little casualties, see below at p 128.

330 A notable exception is the participation of Soviet pilots in aerial combat during the Korean War and in the Middle East. However, their participation was not openly acknowledged until many years later, see Mark Kramer, 'Russia, Chechnya, and the Geneva Conventions, 1994–2006' in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017) 179.

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Finally, the overall impact of the Soviet Union on the structures of IHL will be examined.

2. *Soviet peculiarities – breaking with the past*

The October Revolution drastically changed Russia's approach to international law.[331] When the Bolsheviks emerged as the winner from the struggle for power, legal scholars began to rethink the very foundations of the international legal order. In particular, IHL came under fire from three sides. First, the traditional concept of universality in international law was shaken to the core as the idea of a separate legal order – "socialist international law" – emerged. The Soviet Union claimed that international relations of socialist States should be governed by a separate body of international law. What did this fragmentation mean for IHL (see 2.1)?

Secondly, the Soviets displayed a tendency to cast aside any legal rule, if it furthered their ideological aims. If such an ideological mindset extended to the rules of warfare it would not sit well with the pragmatic foundations of IHL that rests on the equality of belligerents. Was anything permitted in a war that served the creation of a communist society (see 2.2)?

Thirdly, the IHL treaties themselves faced a technical difficulty: was the Soviet Union bound by the treaties that the Russian Empire had signed at The Hague and Geneva? Or was the USSR a new subject of international law? The latter would imply a fresh start, a clean slate with no inherited obligations (see 2.3).

2.1 "Socialist international law" – the fragmentation of international law

Is international law a universal order for all humankind? In the 19th century we often find the restriction to "civilized nations", for example in Martens' textbook *Contemporary International Law of Civilized Peoples*.[332] In the early 20th century, however, we note a trend towards the universalisation of international law.[333] This is not to say that all States were bound

331 Mälksoo, *Russian Approaches to International Law* (n 6) 3 et seq.

332 Ф.Ф. Мартенс [F.F. Martens], *Современное международное право цивилизованных народов [Contemporary International Law of Civilized Peoples]* (n 15).

333 Mälksoo, *Russian Approaches to International Law* (n 6) 5.

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by the same rules. Treaty obligations are restricted to the signatories and take effect *inter partes*. A State only carries the obligations which it has chosen to impose on itself.[334] However, according to the classic logic of the 20th century, States were like the stars of the Milky Way. While treaties sculpted them into different constellations, they all remained part of the same galaxy ("universal international law").

Today, the myth of absolute universality has crumbled. There is more than one galaxy. Certain scholars provide proof of a fragmented regime[335] and concepts like regional international law have gained acceptance.[336] However, the opposition to universality in international law is not all that recent. Shortly after the October Revolution the Soviets started to ask themselves: is there a regime of socialist international law that exists in complete separation from "universal international law?"[337]

This idea was first advanced by Andrey Sabanin, then director of the Soviet Foreign Ministry, in 1922. According to him, universal international law continued to regulate relations between Socialist and bourgeois States. In this respect, Soviet Russia would continue to shape universal international law as a global order. In addition, however, he envisaged a new legal order between socialist States.[338] In essence, Sabanin argued in favour of a fragmentation of international law, a division based on a State's political system. Other scholars, such as Evgeny Korovin came to a similar conclusion: international law was fragmented from now on. Korovin called his book *International Law of the Transitional Period* and argued that there were three distinct legal orders for inter-State relations: socialist–socialist relations, bourgeois–bourgeois relations, as well as mixed relations between bourgeois and socialist States.[339]

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334 At least according to the doctrine of positivism, see James Leslie Brierly and Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press 2012) 49. See also Permanent Court of International Justice, *France v Turkey (Lotus Case)*, 7 September 1927, 1927 PCIJ (Ser A) No 10, para 46.

335 See e.g. Anthea Roberts, *Is International Law International?* (Oxford University Press 2017).

336 Mathias Forteau, 'Regional International Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006).

337 For an in-depth analysis see Theodor Schweisfurth, *Sozialistisches Völkerrecht? Darstellung, Analyse, Wertung der sowjetmarxistischen Theorie vom Völkerrecht 'neuen Typs'* (Springer 1979).

338 ibid 183–184.

339 Е.А. Коровин [E.A. Korovin], *Международное право переходного времени [International Law of the Transitional Time]* (1971) 6.

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In the interwar period these ideas never really made it beyond the walls of the ivory tower. Soviet Russia was a war-torn country and isolated in international relations. When the Soviet Union was created in 1922, there were no socialist brethren to which the new body of socialist international law could be applied apart from underdeveloped Mongolia.[340] Consequently, the idea of a body of socialist international law only became relevant after the Second World War, when States like Yugoslavia, Poland, or Czechoslovakia became or were made socialist.[341] Around twenty years later it had found general acceptance by many leading scholars like Igor Blishchenko,[342] Grigory Tunkin,[343] and Gennady Ignatenko[344] and was referenced abundantly by the Soviet authorities.[345]

What was the importance of this new legal order between socialist States for IHL? For this, we have to distinguish two scenarios: socialist-socialist relations and socialist-bourgeois relations. Between socialist States, socialist international law introduced a new set of rules.[346] They regulated the question of military cooperation in case of attack,[347] an obligation of mutual help,[348] and a principle of fraternal friendship.[349] IHL – previously Russia's favourite child – did not feature among them. Certain authors

340 Schweisfurth (n 337) 182.

341 ibid 198–200. It was above all the conflict between Stalin and the free-minded Yugoslavian leader Tito that created the urge to formalise the relations between the USSR and other socialist States. The need to bring rebellious Tito back in line and give the USSR the last say in matters regarding the community of socialist States sped up the development of a separate concept of socialist international law.

342 И.П. Блищенко [I.P. Blishchenko], *Антисоветизм и международное право [Antisovietism and International Law]* (Международные отношения 1968) 62.

343 Г.И. Тункин [G.I. Tunkin], 'XXII съезд КПСС и международное право [XXII Congress of the Communist Party of the Soviet Union]' [1961] Советский ежегодник международного права [Soviet Yearbook of International Law] 15, 27.

344 Г.В. Игнатенко [G.I. Ignatenko], *Международное право и общественный прогресс [International Law and the Progress of Society]* (Международные отношения [International Relations] 1972) 99.

345 See e.g. UN General Assembly Resolution, UN Doc A/PV 1679 (3 October 1968) 7. Foreign Minister Gromyko invoked the "own socialist principles" to justify the Soviet invasion of the ČSSR after the Prague Spring 1968.

346 Admittedly, the new socialist principles had a much greater influence on *ius ad bellum* than *ius in bello*. See e.g. Edgar Tomson, *Kriegsbegriff und Kriegsrecht der Sowjetunion* (Berlin-Verlag 1979).

347 Schweisfurth (n 337) 402.

348 ibid 414.

349 ibid 420.

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such as Fyodor Kozhevnikov even argued that the laws of war had no place in socialist international law at all:[350]

> *"It is evident that the concepts of bourgeois international law that relate to the domain of coercion, inequality, the use of armed force etc. do not exist in this system. Thus, for example, all norms that are directly related to the 'laws of war' are completely excluded from the socialist system of international legal relations."*[351]

Thus, IHL became a tainted field of international law and its universalism, once a ground-breaking asset, suffered a serious setback. In simple terms: in case of a war between socialist States IHL would not apply, because war between two like-minded socialist States seemed inconceivable.

Secondly and to a lesser extent, socialist international law also affected socialist-bourgeois relations, in the sense that it could serve as an excuse to disregard traditional (universal) international law. Well-known Soviet authors such as Grigory Tunkin argued that in case of collision, the socialist principles should take precedence over general international law.[352] Not all scholars agreed with this radical reading pointing out that universal international law was not inferior to the socialist order.[353] However, even if socialist international law were on equal footing with universal international law (and thus IHL), this would mean that the latter loses importance, because it receives a rival.

The legal debate simmered on throughout seven decades of Soviet rule.[354] The Soviets readily used their new socialist principles when accused of violating universal international law. Mostly, however, this concerned *ius ad bellum* issues, such as the concept of sovereignty during interventions.[355] Soviet Foreign Minister Andrey Gromyko, for example, tried to justify the Soviet invasion of the ČSSR – which under normal circumstances amounted to a breach of Art 2(4) UN Charter – by resorting

350 See also Jiří Toman, *L'Union Soviétique et le droit des conflits armés* (PhD 1997) 7.

351 Ф.И. Кожевников [F.I. Kozhevnikov], 'Вопросы международного права в свете новых трудов И.В. Сталина [Issues Regarding International Law in the Light of the Latest Works of I.V. Stalin]' (1951) 6 Советское Государство и Право [Soviet State and Law] 25, 30.

352 Г.И. Тункин [G.I. Tunkin], *Теория международного права [Theory of International Law]* (Международные отношения [International Relations] 1970) 25.

353 For a detailed analysis see Schweisfurth (n 337) 438–443.

354 For a concise description of the development see Nußberger, 'Russia' (n 218) paras 110–119.

355 ibid para 120.

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to the socialist principle of "brotherly assistance." In 1968 he declared in the UN General Assembly that "socialist countries have their own vital interests, their own obligations […] and their own socialist principles of mutual relations based on brotherly assistance."[356]

With regards to IHL, however, the fragmentation of international law turned out to have little practical impact. Firstly, a large-scale war between socialist States never occurred. Hence, the deletion of IHL from socialist international law never became relevant.[357] Secondly, with regards to socialist-bourgeois relations, the Soviets continued business as usual. In practice, they developed and used universal international law without modifications, despite the vivid theoretic debate that socialist international law could take precedence.[358] When Jiří Toman published his PhD *L'Union Sovietique et le droit des conflits armés* in 1981 he still saw the need to start off with a lengthy disclaimer explaining the concept of socialist international law. However, he concluded that it does not "change the reality of the facts" that the USSR stuck to universal international law in socialist-bourgeois relations.[359] Thus, IHL was spared. The hot revolutionary rhetoric cooled off in practice. As Angelika Nußberger puts it:

> *"The main characteristic of the socialist doctrine of international law was its ideological underpinning, although, after a comparatively short truly revolutionary period many questions continued to be solved in a rather pragmatic way."*[360]

356 UN General Assembly Resolution, UN Doc A/PV 1679 (3 October 1968) 7.

357 Of course, the USSR intervened in the GDR, Hungary, and the ČSSR. IHL, however, was of limited relevance in these cases, since the actual problem revolved around the issue of sovereignty. For the IHL-related issues of these invasions see pp 128 et seq.

358 see Toman (n 350) 10.

359 ibid 7–10. The PhD thesis is among the few works written on this topic and I will repeatedly refer to Toman's findings. Toman argues that the official Soviet doctrine refused to recognise that the USSR applied universal international law in socialist-bourgeois relations, because this would have limited the influence of socialist international law in this sphere. In practice, however, the Soviets did apply universal international law in socialist-bourgeois relations.

360 Nußberger, 'Russia' (n 218) para 110.

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2.2 Political justifications – renaissance of the just war theory?

> *"By 'defensive' war Socialists always meant a 'just' war in this sense. […] For example, if tomorrow, Morocco were to declare war on France, India on England, Persia or China on Russia, and so forth, those would be 'just', 'defensive' wars, irrespective of who attacked first; and every Socialist would sympathize with the victory of the oppressed, dependent, unequal States against the oppressing, slaveowning, predatory 'great' powers."*[361]
>
> *Lenin on war, 1915*

Lenin wrote these lines during the First World War. According to him all wars against the "oppressor" were just.[362] And Marxism defined who was an oppressor and who was not. Thus, Lenin revived a theory long believed dead. A theory that may be called the sworn enemy of IHL: the idea of a "just war."[363]

In Roman times the idea of a *bellum iustum* allowed the Empire to resort to all necessary means once the cause of war was considered just.[364] A just war meant doing the will of the gods and could not be waged unjustly. With an increasing secularisation of law and the recognition that war can be perceived as just on both sides the importance of a strong

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361 Vladimir Ilich Lenin, *Collected Works*, vol 21 (Progress Publishers Reprint 2011) 300. The original full quote in Russian reads: "Социалисты всегда понимали под 'оборонительной' войной 'справедливую' в этом смысле войну (В. Либкнехт однажды так и выразился). Только в этом смысле социалисты признавали и признают сейчас законность, прогрессивность, справедливость 'защиты отечества' или 'оборонительной' войны. Например, если бы завтра Марокко объявило войну Франции, Индия – Англии, Персия или Китай – России и т. п., это были бы 'справедливые', 'оборонительные' войны, независимо от того, кто первый напал, и всякий социалист сочувствовал бы победе угнетаемых, зависимых, неполноправных государств против угнетательских, рабовладельческих, грабительских 'великих' держав."

362 See e.g. Tomson (n 346) 19–22; Boris Meissner, *Sowjetunion und HLKO – Hektographierte Veröffentlichungen der Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg* (1950) 28–29.

363 For a detailed analysis of the Soviet just war doctrine see Johannes Socher, 'Lenin, (Just) Wars of National Liberation, and the Soviet Doctrine on the Use of Force' (2017) 19 Journal of the History of International Law 219.

364 Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1947) 9 et seq.

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and independent *ius in bello* grew.[365] In the Westphalian system, the right to wage war became an expression of State sovereignty.[366] At the same time, this made *ius in bello* indispensable.[367] If everyone has the right to wage war, certain rules must regulate the conduct of belligerents. In other words: "It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[368] This separation of *ius ad bellum* and *ius in bello* remains a fundamental principle of international law up to this day.

Just war theories, however, display a tendency of mixing the fields *ius ad bellum* and *ius in bello.* This often represents the first step towards a complete abrogation of IHL. "When fighting the bad guys everything should be allowed!" Even today, politicians and lawyers yield to the temptation of justifying IHL violations for a good cause. We find this sledgehammer approach in the words of Pavel Leptev the Russian representative at the Council of Europe reacting to the *Kononov* judgement of the European Court of Human Rights (ECtHR):[369] Leptev deemed it legal to strip the aggressor (in this case the Nazis and their supporters) of their protection under IHL.[370] We also find it in the concept of "unlawful combatants" that the Bush administration devised in the aftermath of 9/11. It deprived "terrorist" fighters of IHL protection by creating a third category between civilians and combatants.[371] As is well known, this concept led straight to the isolation cells of Guantanamo. Finally, we can find the approach in Donald Trump's bold statement that the Geneva Conventions are "the

365 Theodor Meron, 'Common Rights of Mankind in Gentili, Grotius and Suarez' in Theodor Meron (ed), *War Crimes Law Comes of Age: Essays* (Oxford University Press 1998) 122.

366 Sassòli, Bouvier and Quintin (n 72) 114.

367 Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War' (2009) 34 Yale Journal of International Law 47, 59.

368 Michael Walzer, *Just and Unjust Wars*, vol 158 (Basic Books 2003) 21.

369 ECtHR, *Kononov v Latvia*, No 36376/04, 17 May 2010.

370 'Павел Лаптев: срок жизни Европейского суда может быть сокращен [Pavel Laptev: The Days of the European Court May Be Numbered]' (Kommersant, 31 May 2010) <https://www.kommersant.ru/doc/1378599>.

371 ICRC Casebook, How Does Law Protect in War, 'Unlawful Combatants' <https://casebook.icrc.org/glossary/unlawful-combatants>.

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problem" when fighting the Islamic State, because "we can't waterboard, but they can chop off heads."[372]

IHL's very basis, however, remains reciprocity which presupposes that both belligerents are equal, no matter what they fight for. It is this spirit that permeates the treaties, and it is understood that reciprocity offers the best chance for the effective implementation of IHL. At times, this means "fighting with one hand tied behind [your] back", even if you are convinced to fight for the right cause.[373]

If many States continue to conflate *ius in bello* and *ius ad bellum*, why was there a special danger of undermining IHL in the Soviet Union? Simply, because Lenin's just war theory had the potential to become the official State doctrine, and thus leading to an abrogation of IHL as a whole. Indeed, the just war doctrine was not confined to Lenin's short rule 1917–1924, but was taken up by subsequent leaders, especially by Khrushchev and Brezhnev with regards to national liberation movements.[374] Did this render the laws of war superfluous?

According to some authors this could well have been the fate of IHL. Evgeny Korovin suggested that there were two different legal regimes in IHL – one for the aggressor and one for the aggressed State. Even if the aggressor were to respect IHL, the conduct could not be seen as legal, for the aggressor's aims were illegitimate. Killing an enemy combatant would not be justified by military necessity but constitute murder.[375] It is needless to say that, according to Lenin, the Soviet Union could *never* be the aggressor, when fighting against an "oppressing, slave-owning, bourgeois State."[376]

In the long run, however, this is not the development that we have seen. Let us interrogate Korovin's argument that IHL does not protect the aggressor. Other Soviet authors were not as quick to ring the death knell of

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372 Ben Schreckinger, 'Trump Calls Geneva Conventions the Problem' (Politico, 3 March 2016) <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394>.

373 In allusion to the dictum of Aharon Barak, former President of the Israeli Supreme Court, who used this wonderful metaphor in HCJ 5100/94, *The Public Committee Against Torture v The Government of Israel*, 6 September 1999, para 39 and in the famous "targeted killing judgment" HCJ 769/02, *The Public Committee against Torture in Israel et al v The Government of Israel et al*, 13 December 2006, para 64.

374 Socher (n 363) 228–229.

375 Е.А. Коровин [E.A. Korovin], 'Международное право на современном этапе [International Law at a Current Stage]' (1961) 7 Международная жизнь [International Life] 2.

376 See again Lenin (n 361) 300.

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IHL. In their 1976 textbook, Poltorak and Savinskiy rejected this reasoning because it would end any effective implementation of IHL.[377] The official Soviet Doctrine also rejected Korovin's approach.[378] Even Korovin himself was not completely consistent. In his 1944 textbook, he had claimed that the Soviet Union was bound by the Hague Regulations, albeit with certain reservations. He argued that the Soviet Union can and *must* apply IHL in order to minimise the suffering of workers in war.[379]

Remarkably, the Soviet Union even tried to reconcile its just war theory with existing IHL by granting "national liberation wars" a special status. At the International Conference drafting the Additional Protocols of 1977, the Soviet Union managed to insert Art 1(4) AP I.[380] The provision qualified *internal* "armed conflicts in which peoples are fighting against colonial domination, and alien occupation and against racist régimes in the exercise of their right of self-determination" as *international* armed conflicts. The rationale behind this was that international armed conflicts attracted more political attention and fighters and civilians enjoyed better protection: freedom fighters were now considered lawful combatants and enjoyed POW status when captured. Soviet scholars had long argued along these lines.[381]

Once again things were not as revolutionary as they seemed at first glance. Occasionally, scholars like Korovin argued in favour of a complete abrogation of IHL. Lenin's just war doctrine could have supported such an approach. In the end, however, none of this happened. The Soviet Union continued to regard IHL as a valuable field of law that continued to apply between socialist and bourgeois States. It even managed to embed their

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377 А.И. Полторак [A.I. Poltorak] and Л.И. Савинский [L.I. Savinskiy], *Вооружённые конфликты и международное право [Armed Conflicts and International Law]* (Наука 1976) 81 et seq.

378 Toman (n 350) 20.

379 Е.А. Коровин [E.A. Korovin], *Краткий курс международного права – часть II [Brief Course on International Law – Part II]* (Военно-юридическая академия РККА [Military-legal Academy of the Red Army] 1944) 10 et seq.

380 Toman (n 350) 74; for a detailed account of this very contentious issue at the Conference see Giovanni Mantilla, 'The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols' in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017) 57–58.

381 А.И. Полторак [A.I. Poltorak] and Л.И. Савинский [L.I. Savinskiy] (n 377) 150 et seq, especially at 160–161; see also Г.И. Тункин [G.I. Tunkin], *Вопросы теории международного права [Questions Regarding the Theory of International Law]* (Gosyurisdat 1962) 47; Л.А. Моджорян [L.A. Modzhoryan], *Субъекты международного права [Subjects of International Law]* (Gosyurisdat 1958) 14.

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"just war" concept in the existing framework of IHL. Instead of abrogating IHL as a whole the Soviets chose to develop it in their interest.

Yet, this brings us to our third issue: we have established that IHL applies *in principle*. But what treaties were binding on the Soviet Union? Let's not forget that when the USSR was founded many IHL treaties were already advanced in age. The Soviet Union, however, had just been born. Was it born free, or "into the chains" of the IHL treaties?

2.3 The Soviet Union and the Russian Empire – continuity or reset button?

What *was* the Soviet Union? This question plunges us deep into one of the most obscure fields of international law: State succession. The term describes the process by which one State replaces another with regards to its rights and the responsibilities.[382] What sounds easy at first, is murky water for international lawyers. State practice is scarce, it lacks uniformity, and it is heavily influenced by political considerations given that examples of State succession often occur in a conflict-ridden environment.[383] In a nutshell, succession regulates the entirety of obligations and rights that are passed on from one State to another. The details, however, are very controversial. Are all debts passed on? Even so-called "odious debts" that were imposed by illegitimate rulers in contradiction to State interest?[384] Does the successor inherit the membership status in international organisations? If a State disintegrates completely, which of the new sub-States becomes the "heir" to the previous State? Contentious examples include the breakup of Yugoslavia in the 1990s and the succession of the Ottoman Empire.

Amidst all this legal mist, it comes as no surprise that there is no easy answer to the following question: was the Soviet Union the legal successor

382 Art 2(1)(b) Vienna Convention on Succession of States in Respect of Treaties (23 August 1978).

383 Andreas Zimmermann, 'State Succession in Treaties', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015).

384 Robert Howse, 'The Concept of Odious Debts in Public International Law (UNCTAD/OSG/DP/2007/4)' (United Nations Conference on Trade and Development 2007) which on page 11 also details the Soviet attitude towards Tsarist debts.

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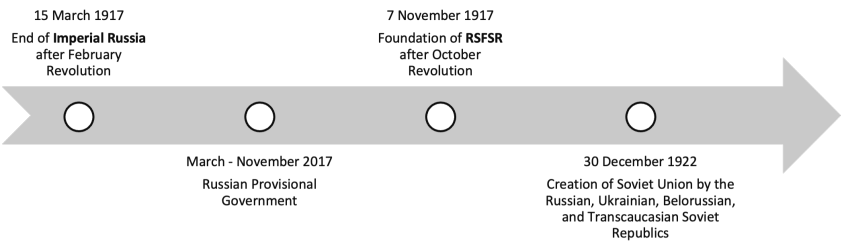
of the Russian Empire? Things were far from obvious.[385] But before we wade out into the murky waters of legal theory, I would like to quickly run the reader through the turbulent events in Russia from 1917 to 1922. On 15 March 1917, the February Revolution toppled Tsar Nicolas II. A provisional government was established, but it never managed to restore order. Finally, the Bolsheviks took over in the October Revolution and founded the Russian Soviet Federative Socialist Republic (RSFSR) in November 1917. On 20 December 1922, the RSFSR joined up with the Ukrainian, Belorussian, and Transcaucasian Soviet Republics to form the Union of Soviet Socialist Republics (USSR) – the Soviet Union was born.[386] This leaves us with the following picture:



When the Bolsheviks came to power in 1917, they broke with the imperial heritage. In his 'Decree on Courts No 1' Lenin ordered the dissolution

385 For a Russian perspective on the issue see e.g. Исаев М.А. [Isaev M.A.], *История Российского государства и права: Учебник [The History of the Russian State and Law: A Textbook]* (Statut 2012) chapter X, § 3; Г.М. Вельяминов. [G.M. Velyaminov], *Международное право: опыты [International Law: Essays]* (Statut 2015). Isaev writes that the chaotic 20th century was bound to lead to confusion with regards to the issue of State succession. He discusses the question of succession in detail under the subheading "Российская Федерация – продолжатель СССР и правопреемник Российской империи" [The Russian Federation – Continuator State of the USSR and Successor of the Russian Empire] (*nota bene*: e-book does not contain page numbers).

386 For a detailed account of events see Stephen Anthony Smith, 'The Revolutions of 1917–1918' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006); Alan Ball, 'Building a New State and Society: 1921–1928' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006); Donald J Raleigh, 'The Russian Civil War, 1917–1922' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006).

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of all Tsarist courts.[387] They annulled all debts.[388] The Bolsheviks deemed that the proletariat had no nation and certainly no affiliation with the Russian Empire.[389] Art 1(2) of the RSFSR Constitution adopted in 1918 reads like a fresh start: "The Russian Soviet Republic is established on the basis of the *voluntary union* of *free nations* as a federation of Soviet National Republics."[390] Despite this revolutionary rhetoric the RSFSR remained the legal successor of its Imperial ancestor.[391] Russia as a subject of international law did not cease to exist. Most Imperial treaties with non-Western countries stayed in force.[392]

Things changed more radically in 1922, when the Soviet Union was founded by the RSFSR and three other Soviet States – the Ukrainian, Belorussian, and Transcaucasian Republic. They did so to found a new subject of international law that did not exist before.[393] After an initial

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387 Декрет 'О суде' [Decree 'On the Court'] 22 November 1917 (5 December 1917); available at <http://law.edu.ru/norm/norm.asp?normID=1119194>.

388 Декрет 'Об аннулировании государственных займов' [Decree 'On the Annulment of State Loans'] 21 January 1918 (3 February 1918) declares: "Все государственные займы, заключенные правительствами российских помещиков и российской буржуазии […] аннулируются (уничтожаются) с декабря 1917 г." [All governmental loans that were taken out by the governments made up of Russian landowners and the Bourgeoisie are annulled effective as of December 1917.]; available at <http://www.hist.msu.ru/ER/Etext/DEKRET/borrow.htm>.

389 Исаев М.А. [Isaev M.A.] (n 385) chapter X, § 3. Isaev argues that the Bolsheviks initially claimed that the proletariat had no fatherland and could thus not be confined to a State. Hence, they rejected all Imperial obligations.

390 Конституция (Основой Закон) РСФСР [Constitution (Fundamental Law) of the RSFSR], 10 July 1918. Art 1(2) reads: "Российская Советская Республика учреждается на основе свободного *союза свободных* наций как федерация Советских национальных республик" (emphasis added). Full text available at <http://www.hist.msu.ru/ER/Etext/cnst1918.htm>.

391 Nußberger, 'Russia' (n 218) para 78.

392 Г.М. Вельяминов. [G.M. Velyaminov] (n 385) 247–248. The author argues that border treaties with Turkey, Iran, Afghanistan, and Japan stayed in force.

393 The treaty text emphasises that the USSR represents a new union of three independent States, see Договор об образовании СССР [Treaty on the Creation of the USSR] 30 December 1922. The first paragraph reads: "Российская Социалистическая Федеративная Советская Республика (РСФСР), Украинская Социалистическая Советская Республика (УССР), Белорусская Социалистическая Советская Республика (БССР) и Закавказская Социалистическая Федеративная Советская Республика (ЗСФСР – Грузия, Азербайджан и Армения) заключают настоящий Союзный договор об объединении в одно союзное государство – Союз Советских Социалистических Республик – на следующих основаниях." [The RSFSR,

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reluctance, the major European nations gradually started to recognise this new union. Germany and Poland did so in 1923, France in 1924.[394] Finally, in 1933, even the US established diplomatic relations.[395] Delicate questions such as the fate of the Tsarist debts were resolved bilaterally.[396] The Soviet Union had stressed from the beginning that it was not the legal successor of the Russian Empire. Notable jurists like Evgeny Korovin and Evgeny Pashukanis argued that the question of succession into the treaties signed by the Tsar could not be answered – as usual – collectively, but had to be solved on a case-by-case basis.[397] The statement of the USSR to the *Institut Intermédiare International* on 2 April 1924 illustrates this well:

> *"La rupture extraordinairement prolongée des relations politiques avec tous les Etats du monde, qui suivit la révolution de 1917, et les changements survenus entre le temps dans tout l'ensemble des engagements internationaux, ne permettraient certainement pas une reconstitution pure et simple de l'ensemble de traités des anciens gouvernements russes. Peu d'entre eux pourraient, en effet, être mis en exécution sans qu'il s'en suivit une collision avec le règlement ultérieur des mêmes questions qui survint après 1917 sans la participation de l'une des parties engagées dans ces traités. (…) C'est donc une question à résoudre dans chaque cas séparé. (…) Une abrogation générale de tous les traités de tous les traités conclus par la Russie sous l'ancien régime et sous le gouvernement provisoire n'eut jamais eu lieu. Mais il ne s'ensuit pas que tous les traités soient susceptibles d'être reconfirmés, et*

USSR (Ukrainian Socialist Soviet Republic), and ZSFSR (Transcaucasian Socialist Federal Soviet Republic) conclude the following union treaty about the unification into one single, united State – the Union of Soviet Socialist Republics – on the following grounds].

394 Germany had previously entered into relations with the RSFSR by concluding the treaty of Rapallo (16 April 1922). English text available at <https://avalon.law.yale.edu/20th_century/rapallo_001.asp>.

395 US Department of State, Office of the Historian, 'Recognition of the Soviet Union' <https://history.state.gov/milestones/1921-1936/ussr>.

396 Исаев М.А. [Isaev M.A.] (n 385) chapter X, § 3. Isaev explains that the issue was gradually resolved bilaterally. In 1922 the Bolsheviks signed the Treaty of Rapallo with Germany which annulled all Russian debts with regards to Germany. In 1924 the Soviet Union signed a treaty with Great Britain on the same issue. Certain aspects, however, were not regulated until very late in history. Only in 1996, for example, Russia concluded a treaty with France on its remaining Tsarist debts.

397 As quoted in Meissner (n 362) 7.

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> *il y aurait lieu d'examiner cette question du point de vue de la clause 'rebus sic stantibus' pour chaque Etat et chaque traité séparément."*[398]

According to this reasoning, the Soviet Union *did* start with a clean slate.[399] The idea of universal succession with regards to all obligations – "*une reconstitution pure et simple de l'ensemble de traités des anciens gouvernements russes*"– was rejected outright. However, the Soviets did not slam the door of succession completely. Whenever they wished, they could confirm a treaty: *"[…] examiner cette question […] pour chaque Etat et chaque traité séparément."* This "cherry-picking approach" was to decide the fate of the IHL treaties signed in St Petersburg, The Hague, and Geneva. The Soviet Union could confirm them on a case-by-case basis. It should be noted that confirming a treaty did not necessarily mean signing it, as will be explained below. Confirmation could also be the expression of approval through a competent organ, e.g. the Council of People's Commissars.[400]

Initially, the USSR only decided to confirm some less important IHL treaties, such as the Hague Convention for the adaptation of the principles of the Geneva Convention to maritime warfare[401] or the Hague Convention on hospital ships.[402] It did not, however, confirm the two major treaties: The Hague Convention IV of 1907, which contained a comprehensive code on land warfare (Hague Regulations) and the Geneva Convention in its updated 1906 version.[403] Maybe the Soviets were reluctant to sign due to their general scepticism towards international law that I have outlined above or perhaps they simply did not see the need to sign in the interwar period. Whatever the reason, at the eve of the Second World War, it was still unclear whether the Soviet Union was bound by the two most important IHL treaties.

Today, most argue that these treaties did in fact bind the Soviets. Scholars arrive at this conclusion in two ways. First, by resorting to customary international law. If treaty rules have crystallised into custom, it does not matter whether a State has signed the treaty itself. Customary law

398 Bulletin de l'Institut Intermédiaire International, Vol XI (1925) 155.
399 If we leave aside the issue of customary international law, see below at n 404.
400 For a discussion which Soviet organ had the authority to confirm a treaty see Meissner (n 362) 13; Tomson (n 346) 197.
401 George Ginsburgs, 'Laws of War and War Crimes on the Russian Front during World War II: The Soviet View' (1960) 11 Soviet Studies 253, 254.
402 Confirmed through a decree of the Sovnarkom (16 June 1925).
403 The Soviets did not sign the 1929 Geneva Convention. For an accession through verbal "approval" see below at n 417.

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binds all States – new or old.[404] Boris Meissner, one of the leading experts in this field, argues that the Soviets had a concept – albeit a strange one[405] – of international customary law and that the Hague Regulations would have fallen under it.[406] Even high-ranking Soviet officials stressed that Hague Conventions represent universally recognised rules that were binding on all nations irrespective whether they had signed them or not.[407] The same would be true for the Geneva Convention, which was by then also customary law.

The second line of argument claims that the Soviet Union was in fact bound by IHL treaties themselves, because they had verbally "confirmed" them. Does accession not presuppose written ratification? Generally, the answer would be yes, as stated in Art 30 of the 1906 Geneva Convention and in Art 7 Hague Convention IV 1907.[408] It seems, however, that the USSR did not deem the act of ratification necessary to accede to treaties signed by Imperial Russia. This is in line with their "cherry-picking" approach mentioned above. A statement by Foreign Minister Vyacheslav Molotov on 25 November 1941 – i.e. shortly after Germany attacked Russia – illustrates this well. He declared that the Soviet Union does not intend to use reprisals against German POWS, because it remains faithful to the obligations "which the Soviet Union *assumed* under the Hague Conventions of 1907."[409] Scholars like Boris Meissner and Edgar Tomson

404 With the exception of persistent objectors, see Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015).

405 According to Western scholars custom and treaty law are on the same level, while the Soviets gave absolute precedence to treaty law, see Meissner (n 362) 18.

406 ibid 6, 17–18.

407 Ginsburgs (n 401) 255.

408 It is worth noting that the Hague Convention IV (1907) foresees adherence without formal ratification, see Art 6. "Non-Signatory Powers may adhere to the present Convention. The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government. This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification." The Soviet Union, however, did not follow this procedure.

409 Vyacheslav Molotov, *Soviet Government Statements on Nazi Atrocities* (Hutchinson 1946) 50 (emphasis added); see also Meissner (n 362) 6.

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argue that this could be seen as a formal recognition of the Regulations.[410] This finds support in subsequent statements by Soviet leaders.[411] With regards to the Geneva Convention, we can turn to a decree signed by Lenin himself declaring that the Soviets vowed to honour the obligations under the Geneva Conventions.[412] In a similar manner the Soviet government also recognised the Geneva Convention of 1906 in 1925.[413]

So, why did the Soviet Union not formally ratify the treaties? With regards to the treaties "inherited" from Imperial times, the Soviet Union may have been too isolated or focussed on interior reforms to do so.[414] At the same time, this attitude also reflects an experimental approach to international law as a whole. The Bolsheviks argued that the proletariat was not confined to a State.[415] Treaties express the will of the ruling class – which in the case of the Soviet Union is the people in its entirety.[416] If the people have already consented, why bother with ratification? Take the following example of the updated 1929 Geneva Convention. When it was negotiated, the Soviet Union already existed as a subject of international law. Hence, we are not dealing with a problem of State succession, but accession to a treaty that should follow the usual rules. The 1929 Convention foresees ratification as the only means of accession in Art 92, which means: ratify to be in, or stay out. The USSR refused to ratify. However, in 1931 the Soviet Foreign Minister Maxim Litvinov issued the following decree:

410 Meissner (n 362) 13; Tomson (n 346) 197. Tomson points out that Foreign Minister Molotov was not necessarily the competent organ for such recognition. Meissner, however, describes this counterargument as "*formaljuristisch*" [formalistic]. In the same vein, Tomson argues that high-ranking persons generally had the authority to confirm or assume obligations in the name of the Soviet Union. Personally, I think that subsequent practice has shown that Foreign Ministers are generally authorised to conclude (or recognise) a treaty. Art 7(2)(a) VCLT, for example, explicitly mentions Foreign Ministers.

411 When Molotov accused the Germans of committing war crimes, he explicitly referred to the Hague Regulations. This argument only makes sense, if the Soviet Union regarded itself as bound, see Ginsburgs (n 401) 257–258.

412 Durand (n 38) 81.

413 Meissner (n 362) 11.

414 Исаев М.А. [Isaev M.A.] (n 385) chapter X, § 3, penultimate para.

415 ibid chapter X, § 3. See also n 389.

416 Toman (n 350) 7.

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> *"The People's Commissar for foreign Affairs of the USSR declares that the USSR accedes to the [Geneva] Convention […] the accession is final and does not require further ratification."*[417]

This verbal "accession" was reaffirmed on various occasions, for example in a note by the People's Commissariat for foreign affairs to the German Foreign Office on 9 August 1941:

> *"The Soviet Government will respect in the course of the War […] the Geneva Convention of 27 July 1929 […]." They stressed however, that they regarded themselves bound only "insofar as Germany herself respects [the rules]."*[418]

To conclude, Soviet practice was novel and improvised. The underlying question of who succeeded the Russian Empire remains a subject of debate even today.[419] For the narrow purpose of IHL, however, things are clearer. Russian law professor Igor Isaev argues that the IHL treaties – unlike treaties of a "political" nature – were undoubtedly confirmed.[420] It seems fair to agree with George Ginsburgs, who argues that the USSR was bound in *some way* by IHL, even if it is hard to understand why they did

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417 ЦГАОР СССР [State Archive of the USSR] fond 9501, opis 5, ed khran 7 list dela 22. The full decree reads: "Нижеподписавшийся народный комиссар по иностранным делам Союза Советских Социалистических Республик настоящим объявляет, что Союз Советских Социалистических Республик присоединяется к конвенции об улучшении участи военнопленных, раненых и больных в действующих армиях, заключенной в Женеве 27 июля 1929г. В удостоверение чего народный комиссар по иностранным делам Союза Советских Социалистических Республик должным образом уполномоченный для этой цели подписал настоящую декларацию о присоединении. Согласно постановлению Центрального исполнительного комитета Союза Советских Социалистических Республик от 12 мая 1930 года настоящее присоединение является окончательным и не нуждается в дальнейшей ратификации."

418 Diplomatic note from USSR to the German Foreign Office transmitted through the Protecting Power Bulgaria (9 August 1941) cited in Durand (n 38) 437.

419 See e.g. a letter from the Russian Ministry of Interior (6 April 2006) No 3/5862, para 1(e). It answers a question posed by the Member of the State Duma A. N. Saveleva about State succession. The letter arrives at the cautious conclusion that "one can claim that the Russian Federation really is the successor State of the Russian Empire in a strictly legal sense. However, this legal fact warrants further explanation […]." Available at <https://ru.wikisource.org/wiki/%D0%9F%D0%B8%D1%81%D1%8C%D0%BC%D0%BE_%D0%9C%D0%92%D0%94_%D0%A0%D0%BE%D1%81%D1%81%D0%B8%D0%B8_%D0%BE%D1%82_6.04.2006_%E2%84%96_3/5862>.

420 Исаев М.А. [Isaev M.A.] (n 385) chapter X, § 3.

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not simply follow the usual process of ratification.[421] Sadly, the peculiar practice of verbal confirmation created a certain degree of uncertainty.[422] This circumstance was later exploited by Nazi jurists, who argued that IHL did not apply to the Soviet Union.[423] In reality, however, judging by the comments of Foreign Minister Molotov and the People's Commissariat, there can be no doubt than the Soviets regarded the essential rules of IHL as binding.

2.4 Conclusion – IHL through a Soviet lens

The Soviet mindset permeated all parts of society including international legal scholarship and doctrine. The peculiarities above show that the Bolsheviks wanted to break with old traditions. This also included breaking with the high value that the Imperial Russia attached to the law of war. IHL suffered numerous blows. It ceased to be Russia's "favourite child." Furthermore, the strange policy of verbally confirming treaties created a degree of uncertainty, hampering IHL implementation during World War II. The emergence of socialist international law created a rivalling regime of rules, and Lenin's renaissance of the just war concept could have eradicated IHL completely.

However, IHL was able to recover from these attacks. The early Soviet years were also a laboratory for new ideas. Many radical concepts turned out to be more moderate in practice. In the end the Soviets made it clear that they accepted the major IHL treaties as binding norms. As we shall see below, they would even ratify the updated version of the Geneva Conventions 1949, thus ending any discussion about their *de jure* applicability to the USSR. Furthermore, the argument that a just socialist war prevailed over IHL never became the mainstream narrative in the Soviet Union. Rather, the Soviets managed to insert their ideas into the framework of

421 Ginsburgs (n 401) 257.

422 Some authors, for example, still argue that the Soviet Union was not "formally" bound by the Geneva Convention, because it has never ratified the treaty. See e.g. Catherine Rey-Schyrr, *From Yalta to Dien Bien Phu – History of the International Committee of the Red Cross, 1945 to 1955* (ICRC 2007) 209; Durand (n 38) 448.

423 The Nazis argued that IHL did not protect Soviet POWs because the USSR had not ratified the treaties. Bearing in mind the above arguments, this was overly formalistic and also completely disregarded the question of customary international law, see for this Ginsburgs (n 401) 254.

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IHL. Finally, socialist international law turned out to have little effect on the relations between bourgeois and socialist States.

Nevertheless, IHL had lost one of its major advocates. For decades Russia had been the spokesman of humanity in war. Now, the USSR was a country like many others in this respect. As we proceed to the major events of the 20th century, we shall see that the Soviet IHL record is a mixed bag with both high and low points. And we shall start with rock bottom – the Second World War.

3. The Second World War on the eastern front – obliteration of IHL

> *"La guerre n'est donc point une relation d'homme à homme, mais une relation d'Etat à Etat, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens mais comme soldats."*[424]
>
> *Jean-Jacques Rousseau on war, 1782*

> *"Войну с фашистской Германией нельзя считать войной обычной. Она является не только войной между двумя армиями. Она является вместе с тем великой войной всего советского народа против немецко-фашистских войск."*[425]
>
> *[The war between fascist Germany cannot be considered an ordinary war. It is not only a war between two armies. It is a great war of the entire Soviet people against the Germano-fascist troops.]*
>
> *Stalin, speech after the beginning of the German invasion, 3 July 1941*

> *"Die Frage ist also nicht die, ob die Methoden, die wir anwenden, gut oder schlecht sind, sondern ob sie zum Erfolge führen. […] Ich frage euch: Wollt ihr den totalen Krieg? Wollt ihr ihn, wenn nötig, totaler und radikaler, als wir ihn uns heute überhaupt noch vorstellen können?"*[426]

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424 Jean-Jacques Rousseau, *Collection complète des œuvres*, vol 1 (1782) 198.

425 Stalin's speech (3 July 1941) is available in the English translation at <https://www.jewishvirtuallibrary.org/stalin-speaks-to-the-people-of-the-soviet-union-on-german-invasion-july-1941>.

426 Joseph Goebbels' speech at the Sportpalast (18 February 1943) is available in the English translation at <https://research.calvin.edu/german-propaganda-archive/goeb36.htm>.

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> *[The question is not, whether the methods that we apply are good or bad, but whether they help us to succeed. […] I ask you: Do you want total war? Do you want a war, if necessary, more total and radical than we could even imagine today?]*
>
> *Joseph Goebbels, speech at the Sportpalast, 18 February 1943*

The development of IHL is closely related to Jean Jacques Rousseau's idea that war is *"une relation d'Etat à Etat."* The two quotes by Stalin and Goebbels, however, make painfully clear why the rules of IHL were doomed to fail in the Second World War, at least on the eastern front. In Stalin's words this was no "ordinary" war between armies, but a war between two peoples. A war in which according to Goebbels the ends could justify all means. The Nazis considered the Slavs sub-humans and propagated a total war. Both sides threw Rousseau's civilising idea overboard that war was not an affair between individuals or peoples. This ideological thrust had a huge impact on IHL observance on the eastern front. Violations occurred on a massive scale – both against combatants and civilians.

As noted above, most of the victims of the First World War fell in line with IHL: they were combatants that died in battle. This fact may serve to draw a comparison to the Second World War. Especially on the eastern front (1941–1945), the victims were mainly civilians or soldiers *hors de combat*. The US historian Timothy Snyder speaks of the "Bloodlands" referring to the area between Berlin and Moscow that today comprises Poland, Belarus, the Baltic States, Ukraine and Western Russia. This region was the site of the most gruesome killings in the 20th century. Snyder estimates that Hitler and Stalin murdered fourteen million people in this area. *Not a single one* of them was killed in combat.[427] Many of the victims were Jewish. Over six million were gassed, shot, or perished in concentration camps. However, it is less well known that Soviet POWs also made up a large share of the victims. 5.7 million Red Army soldiers fell into German captivity. Two thirds of them – more than three million – were executed, beaten to death, or starved in the miserable conditions of the German camps.[428]

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427 Timothy Snyder, *Bloodlands: Europe between Hitler and Stalin* (Vintage Books 2011) viii.

428 Christian Streit, *Keine Kameraden: Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941–1945* (Dietz 1991) 130–131; Snyder (n 427) x.

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3.1 IHL violations by Nazi Germany on the eastern front

Were most of these heinous crimes not committed by the Nazis? The systematic extermination of the Jews? The calculated starvation of Soviet POWs, sometimes called "one of the greatest crimes of the Second World War and surpassed only by the murder of the Jews?"[429] Was it not Hitler that had a "*Hunger-Plan*" that foresaw the death by starvation of tens of thousands of Slavs and Jews in the winter of 1941–1942?[430]

Indeed, the Nazis seem to have acquired a darker record during World War II. However, we have to consider that the Soviet Union had committed a large share of its killing *before* the war even started. Stalin set out to modernise the Soviet Union by force, which included the collectivisation of farming land as foreseen in his first Five Year Plan. He eliminated whomever stood in his way – or was suspected of standing in his way. First, he targeted prosperous peasants, so-called *Kulaks*, who allegedly resisted collectivisation.[431] Nearly two million were deported to Siberia.[432] When farmers in Ukraine and elsewhere still failed to meet grain quotas, the Soviets ruthlessly confiscated their remaining grain and livestock. The result was the *Holodomor*, an artificial famine that killed around 3.3 million in Soviet Ukraine.[433] Later, during the "Great Terror", Stalin liquidated hundreds of thousands of his own citizens in paranoia.[434] Those who

429 Bob Moore, 'Prisoners of War' in Evan Mawdsley and John Ferris (eds), *The Cambridge History of the Second World War – Fighting the War*, vol 1 (Cambridge University Press 2015) 681.

430 Snyder (n 427) xiv.

431 Stalin believed that the rich *Kulaks* formed a homogenous group that posed a serious threat to the Soviet Union, see David R Shearer, 'Stalinism, 1928–1940' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006) 194–195; Snyder, however, shows that this was an illusion: "The attempt to 'liquidate the kulaks' during the first Five-Year Plan had killed a tremendous number of people, but it created rather than destroyed a class: those who had been stigmatized and repressed, but who had survived. The millions of people who were deported or who fled during collectivization were forever after regarded as kulaks, and sometimes accepted the classification." Snyder (n 427) 79.

432 Shearer (n 431) 195–196.

433 The exact number of deaths is still disputed. Official Soviet records speak of 2.4 million, while a demographic calculation carried out on behalf of the authorities of independent Ukraine suggests 3.9 million, Snyder (n 427) 53; Shearer even mentions 5 million casualties, but he refers to the whole of Ukraine, North Caucasus, and central Russia, Shearer (n 431) 196.

434 Shearer (n 431) 212–216; Snyder (n 427) 49 et seq.

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were not executed were sentenced in sham trials and left to rot in Siberian Gulags. Minorities were systematically deported. Forcible resettlement of Poles, Germans, Fins, Koreans and later Chechens and Crimean Tatars started as early as 1932 and continued throughout Stalin's rule.[435] Overall, the death toll of Stalinism was immense. It was, however, not a concern of IHL, because the indiscriminate killing concerned Stalin's *own* people and happened in peacetime.

The Germans, in turn, committed most of their crimes in war or during belligerent occupation. Of course, the Nazis started to persecute the Jews, other minorities, and political opponents in Germany from the day Hitler came into power in 1933. Yet, in terms of sheer numbers this despicable internal persecution was dwarfed by Stalin's purges.[436] The scale of Nazi crimes, however, exploded abruptly on 1 September 1939, when the Wehrmacht invaded Poland. Soldiers that surrendered were stripped of their uniform, branded as partisans, and shot on the spot. First aid stations treating wounded combatants were targeted.[437] Bloodshed completely escalated after 22 June 1941, when the Nazis attacked the USSR. The POWs who were not shot upon their capture were deliberately starved to death or died from hard labour.[438] In total, Hitler's ruthless policy killed more than three million Soviet POWs making them the second largest group of victims during World War II, only to be surpassed by the Holocaust.[439] The high death toll was not due to negligence or mismanagement; it was cold-blooded murder. This becomes clear when we compare it with the fate of POWs on the western front. As many Soviet POWs died on a *single* day in autumn 1941 as did British and American POWs during the entire war.[440] Torture and summary executions were not only widely practiced, but explicitly ordered. Hitler's *Kommissarbefehl* [Order regarding Commissars] prescribed in dehumanising language that all Soviet political commissars – formally part of the Red Army and thus entitled to POW

435 Shearer (n 431) 202. Stalin deported the entire Chechen and Crimean Tatar people during the Second World War fearing that they might side with the Nazis.
436 Snyder (n 427) x.
437 ibid 121.
438 For a detailed account see Moore (n 429) 674 et seq.
439 ibid 681; Snyder (n 427). Exact numbers are controversial: Moore speaks of 2.5 million, Snyder of more than 3 million deaths.
440 Snyder (n 427) 182.

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status – should be separated and liquidated: "*Sie sind nach durchgeführter Absonderung zu erledigen.*"[441]

The Nazis were equally merciless towards civilians. In occupied[442] Poland Hitler's secret police showed for the first time what it was truly capable of: *Einsatzgruppen* hunted down and killed Jews, Polish intellectuals, and other groups.[443] They would later continue their murderous work in the occupied parts of the USSR. Needless to say, many of these acts constituted flagrant violations of IHL, which by now foresaw detailed rights for POWs, wounded soldiers, and civilians in occupied territory. The International Military Tribunal at Nuremberg would later state that the Nazis committed barbaric acts on a "vast scale, never before seen in the history of war."[444]

3.2 IHL violations by the Soviet Union on the eastern front

Even if the record of the Nazis was far worse during the war, we should not ascribe this to a humane streak in the Soviets. While Hitler's racial ideology pushed the Germans eastwards, Stalin simply saw the urgent need to purge his State from the inside. Furthermore, Soviet war crimes *did* happen on a large scale. Addressing this question remains a taboo in Russia up until today. The victory against fascist Germany became the unifying myth of Soviet and post-Soviet society.[445] Thus, mentioning, let alone condemning Soviet war crimes means humanising the Nazis and risks belittling the 25 million people the Soviet Union lost in defeating fascism.[446] In

441 Befehl vom 6 Juni 1941 WFST/Abt L (IV/Qu) Nr 44822/41, available at <https://www.ns-archiv.de/krieg/1941/kommissarbefehl.php>.

442 Poland could be legally considered occupied even though parts of the country (e.g. Wartheland and Danzig-Westpreußen) were officially incorporated into the German Reich according to German domestic law. The International Military Tribunal, however, explicitly rejected the defence that the regime of occupation ceased to apply after these territories were "incorporated", see S Paul A Joosten (ed), *Trial of the Major War Criminals before the International Military Tribunal*, vol 22 (IMT 1948) 497.

443 Snyder (n 427) 126.

444 Joosten (n 442) 469.

445 David R Stone, 'Operations on the Eastern Front 1941–1945' in Evan Mawdsley and John Ferris (eds), *The Cambridge History of the Second World War – Fighting the War*, vol 1 (Cambridge University Press 2015) 356–357.

446 25 million is only a rough estimate. The exact number remains unclear, since most of the fatalities went unreported. Hence, scholars are forced to estimate

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2017, for example, the Russian schoolboy Nikolay Desyatnichenko was hit by a wave of indignation from the Russian media when he spoke in the German *Bundestag* and equated the fate of German POWs in Siberia to the hardships of Soviet internees in German camps.[447]

Desyatnichenko was right. Only half of the around 3.2 million Germans that fell into captivity returned after the war. The incredible number of 1.3 million is still missing.[448]The high death toll suggests flagrant disregard for the Hague Convention. While with POWs, much of the discussion revolves around the question of whether such a high death rate was intentional or due to mismanagement,[449] there are instances where Soviet IHL violations were clearly intended. The most obvious example is the massacre of Katyn, where 20 000 Polish officers were executed between April and May 1940.[450] The mass killing represented a war crime against protected POWs, because the Polish officers were protected under the

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the total number of deaths by comparing it to normal peacetime mortality. In any case, the Soviet death toll was huge. In comparison, the United States suffered 400 000 war deaths, Britain 350 000, see John Barber and Mark Harrison, 'Patriotic War, 1941–1945' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006) 225; see also Michael Ellman and Sergei Maksudov, 'Soviet Deaths in the Great Patriotic War: A Note' (1994) 46 Europe-Asia Studies 671.

447 'Russian School Director Reprimanded for Student's Anti-War Speech in Germany' (The Moscow Times, 12 December 2017) <https://www.themoscowtimes.com/2017/12/12/russian-school-director-reprimanded-for-students-anti-war-speech-in-germany-a59911>; 'Russian boy's WW2 speech to German MPs stirs web anger' (BBC, 21 November 2017) <https://www.bbc.com/news/world-europe-42066335>.

448 Moore (n 429) 681; for a more detailed examination of the fate of German POWs see Klaus-Dieter Müller, Konstantin Nikischkin and Günther Wagenlehner, *Die Tragödie der Gefangenschaft in Deutschland und in der Sowjetunion 1941–1956* (Bohlau Verlag 1998).

449 Legally, the issue of intent only makes a difference with regards to the *mens rea* of a potential war crime. The unintentional starvation of POWs would still constitute a violation of the Hague Regulations, since they set out objective criteria and do not formulate a subjective requirement.

450 For a detailed historical account see Wojciech Materski, *Katyn: A Crime Without Punishment* (Anna Cienciala and Natalia Lebedeva eds, Yale University Press 2007); Gerhard Kaiser, *Katyn: das Staatsverbrechen, das Staatsgeheimnis* (Aufbau Taschenbuch 2002); Franz Kadell, *Katyn: das zweifache Trauma der Polen* (Herbig 2011); Victor Zaslavsky, *Klassensäuberung: Das Massaker von Katyn* (Rita Seuß tr, 2nd edn, Wagenbach 2008).

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Hague Convention.[451] Nevertheless, they were separated from the other internees, handed over to the NKVD,[452] and shot on the direct order of Stalin.[453]

The massacre represented such an obvious and flagrant violation of IHL that the Soviets made a substantive effort to cover it up. The situation became especially awkward, when Germany invaded the Soviet Union in summer 1941 and the Polish government in exile suddenly became a Soviet ally. They, too, noticed that their entire officer corps was missing.[454] As the Nazis advanced eastwards they discovered the Soviet mass graves and hastily shot a propaganda film to show how barbaric their enemy truly was.[455] The Soviets, in turn, tried to blame the massacre on the Nazis. At the International Military Tribunal at Nuremberg, Roman Rudenko, the chief prosecutor for the USSR, accused the Nazis of the very crime that his own State had committed. When the Soviets could not produce sufficient evidence to convince the Western allies, every mention of Katyn was deleted from the final verdict.[456] Nevertheless, it left a bitter aftertaste that at Nuremberg the murderers became judges of their own crime.[457]

This is but one tragic episode where Soviet disregard for IHL came at the cost of human lives. There were many others: the deportation of civilians that had fled Nazi-occupied Poland to the part occupied by the USSR;[458] the sacking of cities like Mukden (modern Shenyang, China),

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451 More specifically, it constituted a violation of Art 4(1) HR. The Regulations applied ever since the eastern part of Poland had been invaded by Soviet Union following the Molotov-Ribbentrop Pact. For the question, whether the Soviet Union was bound by the Hague Regulations see above at pp 94 et seq. The violation of Art 4(1) HR also constituted a war crime at the time as Art 6(b) of the 1945 IMT Statute points out ("murder or ill-treatment of prisoners of war").

452 The *Народный комиссариат внутренних дел* [People's Commissariat for Internal Affairs] was the Interior Ministry of the Soviet Union.

453 Kaiser (n 450) 49 et seq. The official orders are reprinted on pp 252 et seq. Many controversial legal questions remain, e.g. whether Katyn represented an act of genocide or whether the insufficient investigations by the Russian Federation violated the ECHR. It is, however, generally accepted that the killings at Katyn violated IHL.

454 Snyder (n 427) 151.

455 The film is available at <https://www.youtube.com/watch?v=U_02PrLPYaE>.

456 Kaiser (n 450) 228–229.

457 Of course, the IMT as a whole represented a milestone in legal history – also in terms of IHL. It established an effective accountability mechanism for IHL violations. See below at pp 115 et seq.

458 Snyder (n 427) 126.

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that sparked orgies of rape, murder, and pillaging;[459] the widespread rape of millions of women and children as the Red Army advanced onto Berlin;[460] the havoc that Soviet partisan groups wreaked in the Baltic States.[461] This list could go on and on, but for the purpose of this thesis there is little value in establishing every detail of the gruesome crimes both the Nazis and the Soviets committed during the Second World War. This important task is better left to historians. Already by now it is clear that not only did Hitler and Stalin violate IHL, they did so deliberately, systematically, and on a scale never seen before or after.[462] It is safe to say that on the eastern front, IHL was helpless, worthless, and superfluous.

The absurd culmination of this ideological war was that neither Hitler nor Stalin wanted their *own* troops to be protected under IHL, because it could make surrender a tempting option. For example, the initiative of the ICRC to give out typhus shots to their own soldiers was boycotted from both the German and the Soviet side for this very reason. They had essentially written off their troops as soon as they were captured.[463] Stalin issued his famous order No 270 as early as 16 August 1941, only two months into the war. It stigmatised the soldiers who fell into German captivity as traitors and imposed penalties on their families. In 1942, Stalin's order No 227 proclaimed a "not one step back" policy and sent out special units to

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459 Francis Clifford Jones, *Manchuria since 1931* (Royal Institute of International Affairs 1949) 224–225.

460 Miriam Gebhardt, *Als die Soldaten kamen: Die Vergewaltigung deutscher Frauen am Ende des Zweiten Weltkriegs* (DVA 2015). The author claims, however, that contrary to popular belief rape was a common phenomenon not only in the Soviet sector. Both in the French and in the US sector rape occurred on a comparable scale (data from the British sector is not available).

461 See e.g. Rain Liivoja, 'Competing Histories: Soviet War Crimes in the Baltic States' in Kevin Jon Heller and Gerry J Simpson (eds), *The Hidden Histories of War Crimes Trials* (First edition, Oxford University Press 2013) 260. Especially the case of *Kononov*, a Soviet partisan commander in 1944, became known to a wider public when the defendants appealed to the European Court of Human Rights. The facts of the case go back to an incident in 1944, when Soviet partisans entered a Latvian village, shot a number of civilians, and burned down several farmhouses thereby killing the people remaining inside. See ECtHR, *Kononov v Latvia*, No 36376/04, 17 May 2010.

462 Generally speaking, the Soviet Union could not justify its violations as reprisals for the atrocities committed by the Nazis. While reprisals against civilians were still lawful at that time, it is hard to argue that the above mentioned violations acted as an enforcement measure aimed at ending this unlawful behaviour. For the concept of reprisals, see n 293.

463 Moore (n 429) 675.

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shoot retreating officers.[464] In such a war IHL – whose implementation at that time essentially depended on reciprocity and the good will of the parties – was doomed to fail. It was simply crushed amidst the onslaught. The ICRC was equally powerless, since from the outset of the war the USSR refused to cooperate with the Swiss-based organisation, and from 1943 onwards even boycotted it completely.[465] After a golden age in the 19th century, the development of IHL had hit rock bottom.

4. *The Soviets at Nuremberg – third wheel or driving force?*

After night comes day. While half of Europe lay in ruins, the year of 1945 ended with what can be considered one of the greatest steps ahead in IHL implementation: the International Military Tribunals (IMT) of Nuremberg[466] and Tokyo.[467] Already after World War I, Russia had pushed to prosecute German war criminals. A special commission of inquiry concluded that German soldiers had violated IHL and that they should be punished for it.[468] This approach was reflected in the Treaty of Versailles, which foresaw an international tribunal for German Emperor Wilhelm

464 Barber and Harrison (n 446) 231.

465 Fayet (n 318) 65, 69; Durand (n 38) 450; even after the war ended the ICRC had very limited access to the POWs that remained in the USSR, see Rey-Schyrr (n 422) 121; things were better in the other theatres of the war. For a detailed account of the ICRC's efforts to mitigate suffering during and after the Second World War see Durand (n 38) 336 et seq; Rey-Schyrr (n 422) 113 et seq.

466 On the importance of the IMT at Nuremberg see Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 257–258; Matthew Lippman, 'Nuremberg: Forty Five Years Later' (1991) 7 Conneticut Journal of International Law 1, 37 et seq.

467 For reasons of continuity, I will focus on the Nuremberg Tribunal rather than on the Tokyo Tribunal, because the former addresses the crimes committed by the Nazis on the eastern front that I have discussed above; also history's verdict of the Tokyo Tribunal was less favourable, see Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 European Journal of International Law 1085, 1093; for more details on the Tokyo Tribunal see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008); for more information how the Tribunal was received in Japan see Philipp Osten, *Der Tokioter Kriegsverbrecherprozeß und die japanische Rechtswissenschaft* (BWV 2003).

468 Toman (n 350) 644–645.

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II as well as the right to try German soldiers before military tribunals.[469] However, the outcome was rather bleak. The provisions of the Treaty of Versailles remained largely a dead letter.[470]

4.1 Run-up to Nuremberg – trial or execution?

This time the stakes were even higher. The Nazi atrocities were too egregious to go unpunished. The prevailing opinion was that those who were responsible should be made to pay, but the world's leaders disagreed on what exactly that entailed. Initially, Britain and the US favoured a swift execution of the Nazi leaders without trial.[471] Stalin, too, had expressed a desire for executing not only the German high command, but also 50 000 officers.[472] In the end, this option was discarded, although Britain only changed its approach very late, in April 1945.[473] The second possibility was an international tribunal that would try the leading figures – military and civilian – of the Third Reich.

Considerable preparatory work had been done during the war, especially by the Soviets. Eminent Soviet jurists such as Aron Traynin wrote a book on the *Hitlerite Responsibility under Criminal Law* (1944).[474] His work was translated into English, German, French, and received great attention worldwide. It contributed significantly to the development of international legal doctrine.[475] In his work, Traynin called for a criminal prosecution

469 Treaty of Peace between the Allied and Associated Forces and Germany (28 June 1919) Art 227–230.

470 Cassese and Gaeta (n 466) 64. See also Claus Kreß, 'The Peacemaking Process After the Great War and the Origins of International Criminal Law Stricto Sensu' (2021) 62 German Yearbook of International Law 163.

471 Bradley F Smith, *The Road to Nuremberg* (Basic Books 1981) 46–47.

472 At the Conference of Teheran, Stalin allegedly proposed a swift liquidation of 50 000 German officers and the entire German higher command through summary executions. The other Allies opposed this radical project, see Toman (n 350) 649–650.

473 Lippman (n 466) 20–21.

474 Aron Traynin, *Hitlerite Responsibility under Criminal Law*, (Hutchinson & Co, Ltd 1945); The original Russian edition was called A.H. Трайнин [A.N. Traynin], *Уголовное ответственность гитлеровцев [The Criminal Responsibility of the Hitlerites]* (Юридическое Издательство НКЮ СССР [Legal Publishing House NKYu USSR] 1944).

475 Francine Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order' (2008) 113 The American Historical Review 701, 705–708.

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of Nazi leaders *inter alia* for war crimes.[476] Furthermore, high-ranking Soviet officials, such as Foreign Minister Molotov, had denounced German war crimes throughout the war and left no doubt that the Nazis leaders were responsible for them.[477] His call for justice was heeded. At the Conference of St James, 13 January 1942, the Allies recognised criminal justice as one of their main war aims.[478] Molotov made clear that the Soviet Union wanted to place the Nazi leaders before an international tribunal and try lesser war criminals before national courts.[479] In theory, the Allies agreed with this approach, but they wanted to wait until the end of the war.[480]

The Soviets, however, did not wish to sit idle until the war was over. As early as April 1943, they issued a decree that allowed for the prosecution of war criminals before national courts.[481] In July 1943 the first trial was held in Krasnodar District.[482] Even though the defendants were all Soviet citi-

476 Besides the obvious charge of war crimes, Traynin also advocated to prosecute the Nazis for crimes against peace, see А.Н. Трайнин [A.N. Traynin] (n 474) 41.

477 Ginsburgs (n 401) 257–258 who cites a declaration by Foreign Minister Molotov. Molotov spoke of violations of the Hague Conventions of 1907 by the Nazis, particularly of Art 7 Hague Regulations which were "recognized both by the Soviet Union and Germany." He also accused the German authorities of mass executions of prisoners of war, of the use of captive Red Army-men for military work in violation of the Hague principles, of looting their personal belongings, of torturing them and systematically starving them to death. Already at this point, the Soviet leadership made clear that it laid "all the responsibility for these inhuman actions of the German military and civil authorities on the criminal Hitlerite Government."

478 ibid 260–261.

479 ibid 261–262.

480 At the conference of Moscow in autumn 1943 the Allies agreed to postpone such trials to the moment of an "armistice to any government which may be set up in Germany." Thus, the trials were only envisaged after the end of the war. The Moscow Declaration is available at <http://avalon.law.yale.edu/wwii/moscow.asp>.

481 Ginsburgs (n 401) 263; the decree was never officially published, but is mentioned in А.Н. Трайнин [A.N. Traynin] (n 474) 90. Furthermore, on page 87 Traynin cites a decree (11 May 1943) by Molotov which stresses that German "private individuals carry the responsibility for the immeasurable hardship and suffering of Soviet citizens caused by them."

482 Судебный процесс по делу о зверствах немецкого-фашистских захвачиков и их пособников на территории города Краснодара и Краснодарского края в период их временной оккупации [Proceedings concerning the cruelties of the German-fascist invaders and their helpers on the territory of the city of Krasnodar and the Krasnodar District in the period of the temporary occupation], available at <https://www.e-reading.club/chapter.php/1019465/82/Sbornik

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zens and stood trial for treason and not for war crimes, the Soviets showed the world that they took the issue delivering justice for Nazi crimes very seriously. The Krasnodar trials also made clear that the Soviets would not content themselves with collaborators and small fish, but intended to go after the German superiors who had given the orders.[483] The first Germans were tried in Kremenchug and Kharkov as early as December 1943.[484] This time, the accused were convicted for war crimes and sentenced to death by hanging.[485]In the beginning, the trial was publicly hailed as a monumental step towards criminal justice. A propaganda movie was produced.[486] Later in the war the Soviets stopped mentioning the incident, probably for the fear of inciting German reprisals against their POWs.[487] Trials resumed shortly after the German capitulation with tribunals in Kyiv, Minsk, Riga, Leningrad (modern St Petersburg), Smolensk, Bryansk, Velikiye Luki, and Nikolayev.[488] The atmosphere of the trials was of course ideologically charged and the proceedings did not to correspond to current standards of criminal procedure. Nevertheless, they were not mere sham trials, but conducted in accordance with existing Soviet legal norms of the period.[489]

_materialov_Chrezvychaynoy_Gosudarstvennoy_Komissii_po_ustanovleniyu_i_rassledovaniyu_zlodeyaniy_nemecko-fashistskih_zahvatchikov_i_ih_soobschnikov.html>.

483 Ginsburgs (n 401) 265.

484 Судебный процесс по делу о зверствах немецкого-фашистских захвачиков на территории города Харькова и Харьковской края в период их временной оккупации [Proceedings concerning the cruelties of the German-fascist invaders on the territory of the city of Kharkov and the Kharkov District in the period of the temporary occupation], available at <https://www.e-reading.club/chapter.php/1019465/83/Sbornik_materialov_Chrezvychaynoy_Gosudarstvennoy_Komissii_po_ustanovleniyu_i_rassledovaniyu_zlodeyaniy_nemecko-fashistskih_zahvatchikov_i_ih_soobschnikov.html>.

485 Ginsburgs (n 401) 267.

486 The film was entitled 'Суд идёт' ['The Court is in session'] and is available at <https://www.youtube.com/watch?v=XZRE1CrByOo>.

487 Ginsburgs (n 401) 270.

488 ibid; see also Alexander Victor Prusin, '"Fascist Criminals to the Gallows!": The Holocaust and Soviet War Crimes Trials, December 1945–February 1946' (2003) 17 Holocaust and Genocide Studies 1; Tanja Penter, 'Local Collaborators on Trial. Soviet War Crimes Trials under Stalin (1943–1953)' (2008) 49 Cahiers du monde russe 341.

489 Prusin (n 488) 1.

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4.2 The work of the Nuremberg Tribunal

The IMT represented the first joint effort of the Allies to render justice. The Tribunal took up its work in November 1945 and delivered its judgements in October 1946. Three defendants were acquitted,[490] seven sentenced to prison terms ranging from ten years to life,[491] and twelve were sentenced to death by hanging.[492] The count of war crimes made up the backbone of the charges. Today – at least in Western literature[493] – the trials are often remembered as an "Anglo-American tale of liberal triumph" while the role of the Soviet Union is often downplayed as "regrettable but unavoidable."[494] This account falls short of the truth. Admittedly, the Soviets had enormous problems matching the American PR machine. They never managed to control the flow of information or shape international public opinion.[495] In substantial terms, however, the Soviets contributed a lot to the success of the Nuremberg trials.

First of all, the USSR had supported the idea of prosecuting the leaders while States like Britain were still opposed to it. This allowed the "Big Four" to find common ground and create the political momentum to

490 Hans Fritzsche, Hjalmar Schacht, and Franz von Papen were acquitted, see Lippman (n 466) 27.

491 Rudolf Hess, Walther Funk, and Erich Raeder were sentenced to life in prison. Albert Speer and Baldur von Schirach were sentenced to 20 years, Konstantin von Neurath to 15 years, and Karl Dönitz to 10 years, see ibid.

492 Herrmann Göring, Martin Bormann, Hans Frank, Wilhelm Frick, Alfred Jodl, Ernst Kaltenbrunner, Wilhelm Keitel, Joachim von Ribbentrop, Alfred Rosenberg, Fritz Sauckel, Arthur Seyss-Inquart, and Julius Streicher were sentenced to death by hanging, see ibid.

493 The current Russian narrative is quite different. It praises the role of the USSR and insists that criminal prosecution was only possible, because the Soviets insisted on it, see Mälksoo, *Russian Approaches to International Law* (n 6) 139.

494 For this see Hirsch (n 475) 701. Hirsch herself challenges this view and argues that the Soviets made significant contributions to the IMT at Nuremberg, see also her recently published book Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II (Oxford University Press 2020).

495 ibid 722–726. While the Soviets sent many journalists, cartoonists, writers, and filmmakers to Nuremberg they failed to seize the opportunity to shape public opinion. A senior official complained that Soviet personnel left a bad impression, that the Soviet interpreters were incompetent and the "clothing of our female personnel is so bad and looks so poor that the Americans and English make fun of them." The Russian documentary on Nuremberg called 'Суд народов' ['Tribunal of the Peoples'] and it is available at <https://www.youtube.com/watch?v=vShbwjnqG94>.

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tackle such a historic task.[496] Secondly, the work of their scholars such as Traynin – who also worked as an adviser to the Soviet prosecution at Nuremberg – greatly influenced the legal work of the tribunal.[497] Finally, we should not forget that the Soviets could also draw on their own experience of war crime trials during the war. These foundations were a valuable test run for Nuremberg and parts of the Soviet practice was later picked up by the criminal provisions of the Geneva Conventions of 1949.[498]

Critics often denigrate the IMT as victor's justice.[499] This is not entirely wrong, since no Allied leader had to answer for his crimes at Nuremberg. This misbalance became painfully apparent, when the Soviets accused the Nazis of organizing the Katyn massacre which they had committed themselves.[500] The tendency to overlook their own wrongdoings was, however, not a Soviet phenomenon. In this respect the Soviets were no worse than their Western Allies. The latter simply managed to keep the delicate questions, such as the obliteration of Hiroshima and Nagasaki or the carpet bombing of German cities, out of the courtroom. The Soviets, again, failed at this PR campaign.[501]

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496 ibid 730.

497 ibid 708, 727.

498 See Ginsburgs (n 401) 280. He writes that it "should be noted, in closing, that in many respects Soviet views expressed during World War II subsequently found general acceptance and were embodied in the Geneva Conventions of 1949. In addition, the Soviet attitude with regard to the applicability of the 1949 Geneva rules to war criminals is more consonant with the precedents established in the post-war trials of war criminals than the revised stipulations finally inserted into the Conventions themselves. In some instances, therefore, Soviet views have clearly exceeded the bounds of generally recognized international law, in some others they seem to be a more correct interpretation of norms developed during World War II than the versions presently expounded by some non-Communist Governments and jurists, and, finally, in a third category of cases the formerly novel Soviet contentions have since found international recognition."

499 See e.g. Sellars (n 467) 1089–1090; Herbert Wechsler, 'The Issues of the Nuremberg Trial' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 319; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Bantam Books 1971) 82; Bernard D Meltzer, 'Note on Some Aspects of the Nuremberg Debate, A' (1946) 14 University of Chicago Law Review 455, 469.

500 See above at n 450.

501 Hirsch (n 475) 717–719, 725. There even existed a "gentlemen's agreement" between the Soviets and the Western allies to keep certain questions, such as the Molotov-Ribbentrop pact and "Soviet-Polish" relations, out of the courtroom. In the end, this could not prevent these issues from surfacing.

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Despite this justified criticism, Nuremberg is widely recognised as a crucial turning point in international law.[502] When IHL's traditional implementation mechanisms – reciprocity and *bona fide* – broke down, the international community created another: effective criminal prosecution of military and civilian individuals. If we accept that Nuremberg was a giant leap ahead, we must also accept that the Soviets contributed to it. It is not easy to resist the Cold-War-reflex of downplaying their role as the "Achilles' heel" of the trials.[503] Yet, Soviet legal theory and practice has shaped international criminal law in many respects.[504] The fault of Nuremberg and Tokyo was rather, that all efforts of international criminal justice were discontinued during the Cold War. Only in 1993 did the world witness the sequel to Nuremberg, when the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Resolution 827.[505] The spectacular eruption of international criminal justice in 1945 catapulted IHL into the 20th century – only to remain dormant for over 40 years.[506]

5. *The Geneva Conventions of 1949 – the Soviet Union as "scum of the earth" or "great humanitarian?"*[507]

The gruesome events during the Second World War made it very clear that the Geneva Conventions had to be updated. The civilian population

502 Cassese and Gaeta (n 466) 64.

503 Quote from Christopher J Dodd, *Letters from Nuremberg: My Father's Narrative of a Quest for Justice* (Three Rivers Press 2008) 341.

504 Ginsburgs (n 401) 280.

505 UN Security Council Resolution 827, UN Doc S/RES/827 (25 May 1993): "The Security Council […] decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report."

506 Admittedly, the prosecution of Nazi criminals did not end in Nuremberg. Under the 'Control Council Law No 10' many more Nazis criminals were prosecuted in Germany before domestic courts. However, it would take more than 45 years for another international court to rule on war crimes.

507 "Scum of the earth" is an allusion to the famous caricature by David Low published in the Evening Standard on 20 September 1939 after the partition of Poland, available at <https://archive.cartoons.ac.uk/record.aspx?src=CalmView.Catalog&id=LSE2692>. The expression "great humanitarian" is borrowed

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especially needed more effective protection. Previous attempts of the ICRC to enhance civilian protection in the inter-war period had failed. For example, the 15th Conference of the Red Cross (1934) produced the so-called Tokyo Draft which could have become the first comprehensive convention protecting civilians. However, by the time States agreed to discuss the proposal, it was too late: war had already broken out in Europe.[508]

5.1 A Soviet boycott

After the end of the Second World War, most States saw the need for an enhanced IHL Convention. However, they had to overcome a monumental stumbling stone: The Soviets categorically refused to participate and boycotted the preparatory Conference of Government Experts and all preliminary meetings that worked on the so-called Stockholm Draft.[509] The latter was to serve as a basis for discussion at the Diplomatic Conference scheduled for 1949.[510]

The Soviets were sceptical for two reasons: first of all, they were unhappy to see fascist States, such as Spain, at the negotiating table.[511] Secondly – and more importantly – the Soviets refused to engage with the ICRC after the Second World War. The difficult relationship dates back to the days of the October Revolution. The Bolsheviks mistrusted the Swiss-led Committee. While the ICRC and Soviet Russia still cooperated in the early 1920s amidst a bloody civil war and the ongoing repatriation of POWs,[512]

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from the very insightful article by the historian Boyd van Dijk, '"The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37 Law and History Review 209.

508 Rey-Schyrr (n 422) 210–211.

509 ibid 218.

510 van Dijk (n 507) 213.

511 ibid.

512 The reader may remember that the Bolsheviks had created their own Soviet Red Cross, while the old Imperial Red Cross was re-founded in counter-revolutionary circles in areas controlled by the "Whites" and abroad. The ICRC faced the dilemma that the recognition of one would antagonise the other. The ICRC therefore avoided the *de jure* recognition of any society, *de facto* cooperating with both. This approach, however, failed at international conferences, because the Soviet Red Cross refused to participate if representatives of the Tsarist organisation were equally invited. Hence, relations were always tense, and it is telling that the position of the ICRC delegate in Russia remained vacant

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the Soviets quickly lost interest in the organisation after that. The ICRC's reputation was further damaged when Swiss-Soviet relations hit an all-time low after the assassination of the Soviet diplomat Vatslav Vorovsky in Lausanne in 1923.[513] In addition, Stalin was notoriously paranoid about anything foreign. To him the ICRC – an association under Swiss law with a directorate of "capitalist" businessmen – must have been the epitome of a bourgeois, foreign, and thus a suspicious actor.[514] The last straw that broke the camel's back, however, was the abominable condition in which Russian POWs were kept by the Nazis during the Second World War. As mentioned above, more than three million POWs perished behind German barbed wire fences. The Soviets held the ICRC responsible for failing to prevent these crimes against Red Army soldiers.[515]

States tried hard to overcome this obstacle. Several options were on the table. Some of them included internationalising the ICRC, subordinating it to another body, or completely eliminating it from the revision process of IHL. It was suggested that the future Conference could be held on neutral ground – in Prague or Paris. In the long run, this would have dramatically changed the role of the ICRC. We would probably speak of the First Prague or Paris Convention now. But in the end, the Soviets did not take the bait and rejected all *démarches*.[516]

In 1949, as the beginning of the Conference neared, prospects looked rather bleak. The Soviet Union was not just any State. It was one of the four victorious powers of the Second World War; it was a colossal country stretching from Lviv to Vladivostok; and it exerted significant

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up to 1921, see above at pp 78 et seq. Even before the Revolution, however, relations were not always easy. Already in 1887 the Russians proposed to change the composition of the ICRC in order to make it an international instead of a Swiss-led organisation, see Bugnion (n 30) 70; for a detailed account of the relations between the ICRC and Russia see Fayet (n 318).

513 Alfred Erich Senn, 'The Soviet Union's Road to Geneva, 1924–1927' [1979] Jahrbücher für Geschichte Osteuropas 69, 69. Interestingly, Switzerland only recognised the Soviet Union after the Second World War, long after the US who did so in 1933.

514 For a detailed account of the decline of relations between Russia and the ICRC see van Dijk (n 507) 213–215.

515 Catherine Rey-Schyrr, 'Les Conventions de Genève de 1949 : une percée décisive – première partie' (1999) 833 Revue internationale de la Croix-Rouge 209, at n 59; for the ICRC's effort to improve the conditions of Soviet prisoners see Durand (n 38) 439 et seq. The ICRC made several attempts to provide assistance to Soviet prisoners of war, but the German authorities did not grant the organisation access.

516 van Dijk (n 507) 216–220.

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influence on its proxies. The absence of the USSR would have completely undermined the acceptance of an updated Geneva Convention. Many diplomats believed that any revision process without Soviet participation was not even worth the effort.[517] To everyone's surprise, however, the USSR *did* confirm its participation on 15 April 1949, only days before the Conference started.[518] Finally, the Soviets were on board.

What does this interlude to the 1949 Conference tell us? On the one hand, it shows us how divided the Soviet Union was on IHL. While Tsarist Russia used to initiate conferences on the laws of war, now a landmark conference almost failed due to a potential Soviet boycott. On the other hand, the Soviets had not completely given up on IHL and finally chose to participate in the Conference. There was no apparent reason for the USSR's sudden change of heart. In the end it simply opted for a "rather-in-than-out" approach, because IHL could offer certain advantages. The Soviets saw IHL as a means of winning the global struggle for "hearts and minds."[519] Furthermore, they also welcomed the idea of imposing binding restrictions on the highly militarised West which could turn into a battlefield advantage in a future war that already loomed on the horizon.[520] In short, the Soviet Union still attached importance to this field of law. Shortly after confirming its participation in the Conference, the Soviet delegate in the International Law Commission stressed that the "laws of war should be retained as a necessary or desirable subject for codification."[521]

However, the episode also illustrates how deeply sceptical the Soviets were of all international organisations in general, and the ICRC in particular. David Forsythe, author of the comprehensive analysis of the ICRC's work over time, wrote: "the Soviets never cooperated with the ICRC in meaningful ways on humanitarian protection during the Cold War proper."[522] Indeed, this scepticism towards international interference is

517 ibid 222.
518 Telegram of the Swiss delegation in Moscow (15 April 1949) E2001E#1967/113#16123/BD874, SFA.
519 Mantilla (n 380) 42.
520 ibid 42–43.
521 ILC, *Yearbook of the International Law Commission 1949 – Summary Records and Documents of the First Session Including the Report of the Commission to the General Assembly* (n 278) 51.
522 David P Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press 2005) 53.

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characteristic for this chapter and it continues to exist in modern day Russia as we shall see below.[523]

5.2 Soviet contributions to the Conference

After such a nerve-racking lead-up, it comes as no surprise that the discussions at the Conference were controversial. The Soviet Delegates did not mince their words and used the Geneva Conference as a forum to advance communism as the truly humanitarian and anti-colonialist ideology.[524] Furthermore, they wanted to embarrass States like the US and the UK by exposing their questionable behaviour during the Second World War, such as carpet bombing or the nuclear destruction of Hiroshima and Nagasaki.[525] Ironically, this meant that they supported the progressive Stockholm Draft to which they had not contributed due to their absence in previous meetings. Even more ironically, this brought the Soviet position in line with the position of the ICRC.[526]

Concerning legal substance, the Soviets contributed immensely to the protection of civilians in occupied territory. Furthermore, they pushed for an Article that would become *the* single most important provision of the Geneva Conventions: Common Article 3. In the following, I will explain the significance of these two aspects.

The reason why the USSR advocated for better protection of civilians during occupations is evident. The Soviets were still influenced by the Nazi atrocities in occupied Eastern Europe. The Stockholm Draft foresaw a convention entirely dedicated to civilian protection.[527] Even though largely forgotten today, it was thanks to the Soviets that this audacious project bore fruit.[528] Claude Pilloud, the then director of the ICRC responsible for law and policy, admitted that he "hardly dared to think what would have

523 For today's relationship between Russia and the ICRC see p 160. For Russia's general resistance to any external compliance mechanism see pp 153 et seq.
524 Mantilla (n 380) 42.
525 van Dijk (n 507) 227–228.
526 ibid 223, 227.
527 ICRC, 'Draft Revised or New Conventions for the Protection of War Victims [Stockholm Draft]' (Geneva 1948) 153 et seq. This would later become the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War (GC IV).
528 van Dijk (n 507) 229.

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become of the Civilian Convention without the presence of [the Soviet] delegation."[529]

Thanks to the Soviet support the delegates finally adopted the Fourth Geneva Convention[530] which is still in force today. It explicitly prohibits rape,[531] extermination, murder, torture, mutilation, scientific experiments,[532] racial discrimination,[533] collective penalties or terrorism[534] as well as reprisals against protected civilians or their property.[535] The latter especially was crucial. The reader may remember the issue of reprisals from the discussion of the use of poisonous gas during the First World War.[536] During the Second World War the Germans tried to justify the extermination of entire villages as "reprisals" for partisan attacks.[537] Thus the explicit prohibition of reprisals against protected civilians in 1949 was a major step ahead.[538] The Soviets used their considerable voting power to push for these changes that also went against Western interests.[539] The USSR would have envisaged an even more ample protection of civilians that included limitations for the conduct of hostilities, but in this respect they did not get their way.[540] Hence, when signing the Fourth Convention, the Soviet Union declared that it did so even though "the present

529 Rapport Spécial Etabli par Claude Pilloud (16 September 1949) No CR-254–1, AICRC.
530 Fourth Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Times of War.
531 Art 27(2) GC IV.
532 Art 32 GC IV.
533 Art 13.
534 Art 33(1).
535 Art 33(3).
536 See above at n 293.
537 See e.g. Christopher Neumaier, 'The Escalation of German Reprisal Policy in Occupied France, 1941–42' (2006) 41 Journal of Contemporary History 113.
538 Please note, however, that Art 33(3) GC IV only concerns protected persons, i.e. persons "who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals" (see Art 4 GC IV). Reprisals against "other" civilians, such as bombing and destroying a city from the air (e.g. Dresden in 1945) could still be justified as reprisals even after the 1949 Convention. Reprisals against civilians were only outlawed completely by Art 52 No 1 AP I (1977). The Soviet Union was pushing for a complete ban of reprisals at the 1949 Conference, but it could not break the resistance of its former Western allies that had practiced "carpet bombing" throughout the Second World War, see Mantilla (n 380) 46.
539 van Dijk (n 507) 231.
540 Mantilla (n 380) 46.

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Convention does not cover the civilian population in territory not occupied by the enemy and does not, therefore, completely meet humanitarian requirements."[541]

Secondly, the Soviets pushed for an even more revolutionary change in IHL by widening its scope of application. Up to 1949, IHL only applied to clashes between States, i.e. international armed conflicts (IAC). Its application required one State army facing another. The 1949 Conventions broke with this dogma. The four Conventions (GC I–IV) start with three identical Articles, the so-called Common Articles (CAs). While CA 1 outlines the obligation to respect and ensure respect, CA 2 defines the field of application in armed conflicts between two States. CA 3, however, introduced an absolute novelty: it extends the application of IHL to armed conflicts "not of an international character" (NIAC), i.e. wars between a State and an armed group (or two or more such groups).[542] It protected all persons not taking part in hostilities. This includes members of the armed forces that have laid down their arms as well as guerrilla fighters that have surrendered and ordinary civilians. CA 3 lays down certain minimum standards, such as the prohibition of torture and the obligation to care for the wounded and sick. In a way, it represents a little "condensed" convention of its own.[543]

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541 Final Record of the Diplomatic Conference of Geneva of 1949 (Vol I) Federal Political Department, Berne, 355–356. The declaration is also available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=48D358FE7D15CA77C1256402003F9795>.

542 For details on the distinction between IACs and NIACs and the relevance of conflict classification, see below at pp 263 et seq.

543 Due to its fundamental importance literature on CA 3 is abundant, see e.g. Jelena Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 International Review of the Red Cross 189; Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions – A Commentary* (Oxford University Press 2015) Part I, subsection 3; Knut Dörmann and others (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) 351 et seq; Michael A Newton, 'Contorting Common Article 3: Reflections on the Revised ICRC Commentary' (2016) 45 Georgia Journal of International and Comparative Law 513. Of course, many legal questions regarding CA 3 were only solved long after the provision was drafted. For example, CA 3 defines a non-international armed conflict by the absence of the characteristics that would make it an IAC, which means that every armed conflict that is not international is non-international. It does, however, not provide any guidance how to distinguish a non-international armed conflict from situations of mere unrest. The definition of NIAC in use today dates back

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Today, 90 percent of conflicts are non-international in character.[544] Classic wars between two State armies, such as the Falklands War and the First Gulf War have become a rare event. Despite this sharp increase in non-international armed conflicts, treaty rules regulating this type of war remain scarce. This underlines the tremendous and continuing importance of CA 3. For many States, such as the US, Syria, Iraq, Iran, and Israel, who have not ratified Additional Protocol II of 1977,[545] CA 3 remains the *only* treaty rule applicable to NIACs.

Whether the Soviets foresaw this development when they pushed for CA 3 or not, their contribution turned out to be extremely significant for modern day IHL. Initially, the US, France, Britain, and China opposed CA 3. Only smaller States such as Switzerland and Norway favoured the proposal. The unremitting support of the Soviet Union was crucial in bringing around the other big powers.[546] One cannot help but agree with the historian Boyd van Dijk:

> *"It remains ironic that the Soviets, as one of the major violators of civil rights in the twentieth century, played such a prominent role in the effort to push for greater civilian protection and rights in times of armed conflict."*[547]

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to a decision of the ICTY in 1995. The Court ruled that a NIAC exists if there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." (ICTY, *The Prosecutor v Duško Tadić* (IT-94–1-T), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70).

544 The 2018 War Report identifies seven active international armed conflicts and 69 non-international armed conflicts. In addition, there are 18 scenarios of ongoing occupation, which according to CA 2(2) count as international armed conflicts, see Annyssa Bellal, 'The War Report – Armed Conflicts in 2018' (Geneva Academy of International Humanitarian Law and Human Rights 2019). For even more detailed figures on current armed conflicts see the Uppsala Conflict Data Program <https://ucdp.uu.se/>.

545 In addition, AP II has a higher threshold of application than CA 3, see Art 1 No 1 AP II. It only applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under *responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*" (emphasis added).

546 Mantilla (n 380) 43–45. States opposed the proposal for different reasons. France and Britain feared unrest in their colonies, China had just emerged from a bloody civil war, and the US generally had a conservative attitude towards IHL.

547 van Dijk (n 507) 231.

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At the same time, the 1949 Geneva Conference revealed a domain where the Soviets categorically refused to advance IHL. They had an almost fetishistic obsession with State sovereignty.[548] Hence, the USSR put up sharp resistance against a strong implementation mechanism for IHL. The Soviet delegates displayed little sympathy for proposals to give the ICRC a mandate to visit prisons where captured insurgents were held; they rejected a proposal to strengthen the role of the Protecting Powers;[549] they opposed the creation of a criminal court for war crimes; and they deleted a reference to better implementation in CA 3.[550] It seems that they "understood, better than most other imperial powers, that they could accept virtually any text as long as it did not infringe upon their sovereign discretion to refuse outside supervision when waging war against anti-Soviet insurgents."[551] As we shall see later this Soviet tradition lives on in today's Russia.[552]

This fierce resistance to any sort of effective oversight dealt a serious blow to IHL. As we have seen above, the Second World War called the traditional implementation mechanisms into question. The principle of reciprocity and good faith fails to work, if an ideological abyss gapes between the warring parties. If you truly hate your enemies and believe them inferior or evil, why should you respect IHL? If you don't care about the well-being of your own troops, why should you care about your enemy's soldiers? Humanitarian law was in dire need of a new, more robust implementation tool. Nuremberg was an attempt to answer this call, but the spark of the IMT was put out by the Cold War. None of the allied

548 Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013) 83. Bowring explains the Soviets' "rigid insistence" on sovereignty as well as the most prominent exception in favour of peoples fighting for national liberation.

549 A Protecting Power is a neutral State or a State not a party to the conflict which has been designated by a party to the conflict and accepted by the enemy party and has agreed to carry out the functions assigned to a Protecting Power under international humanitarian law. During the Second World War, Sweden and Switzerland represented many warring States in matters of IHL, see ICRC Casebook, How Does Law Protect in War, 'Protecting Powers' <https://casebook.icrc.org/glossary/protecting-powers>. See also below at p 157.

550 van Dijk (n 507) 233; Mantilla (n 380) 47.

551 van Dijk (n 507) 234.

552 See below at pp 153 et seq. In 2015, Russia successfully boycotted the introduction of a new implementation mechanism for the Geneva Conventions and its Additional Protocols at the 32nd International Conference of the Red Cross and the Red Crescent.

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powers – neither the Soviet Union nor the US, nor the UK, nor France – wanted to see their own people in the dock. IHL's best chance for effective implementation during the Cold War and after was missed in 1949. It could have taken the form of a robust right of oversight of the ICRC or another international organisation; an effective fact-finding commission;[553] or a similar inter-State tool. Yet, the Soviets were not willing to go down this route.

The USSR signed the Convention in 1949. It ratified it in 1954[554] after the end of the Korean War that broke out in summer 1950 just months after the international delegates had left Geneva. While it declared certain reservations,[555] none of them challenged any fundamental provisions of the Convention.[556]

In conclusion, the role of the Soviet Union at the 1949 Conference remains ambiguous. On the one hand we have seen a super-power that wanted to participate in the process of shaping international law. To this end, the USSR was ready to forget its differences with the ICRC and even forged a strategic alliance with the organisation. It greatly advanced the cause of a civilian convention and it pushed to extend IHL to the realm of non-international armed conflicts. On the other hand, the Soviet Union

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553 Such fact-finding commission (the International Humanitarian Fact-Finding Commission – IHFFC) was later established pursuant to Art 90 AP I, see below at p 157.

554 For a complete list of all ratifications see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380>.

555 Final Record of the Diplomatic Conference of Geneva of 1949 (Vol I) Federal Political Department, Berne, 355–356. The declaration is also available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=48D358FE7D15CA77C1256402003F9795>.

556 One of the most significant reservations was that the Soviet Union refused to extend the rights of the Third Convention (concerning POWs) to soldiers that had committed war crimes. According to the Soviet view, these soldiers should rather be subjected to the domestic law of the State, where they had committed their crimes. Hence, the USSR made a reservation to Art 85 GC III: "The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Art 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment." Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=48D358FE7D15CA77C1256402003F9795>.

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strongly opposed any effective implementation mechanism other than reciprocity. This remains one of the major faults of IHL that continues to exist even today.[557]

In hindsight, however, it is staggering that Stalin's USSR made a significant contribution to IHL *at all*: a notoriously paranoid, cruel, and unpredictable dictator agreeing to such an ample protection of fundamental values in armed conflict at a time where tensions ran high. One should not forget the tense circumstances of the time. The Cold War had begun. During the negotiations in Geneva, the Soviets continued the Berlin Blockade, forcing the Allies to re-supply civilians in the German capital via airplanes. Shortly after the Conference, the Korean War broke out. The newly created UN Security Council found itself paralysed and the General Assembly had to resort to desperate measures adopting its "Uniting for Peace" Resolution.[558]

Despite this deepening divide between East and West, there was little evidence of such "block-mentality" at the Conference. The American delegation even occasionally voted for Soviet proposals and vice versa. In addition, the Western Europeans frequently voted against their Anglo-American allies. Van Dijk ascribes these patterns to the effective Soviet-ICRC cooperation and the initially close cooperation between Eastern and Western powers at the conference.[559] In the end, States that had little in common managed to agree on new limits of warfare. The Soviets could have thwarted the entire project. They chose to advance it instead.

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557 Stefan Oeter, 'Civil War, Humanitarian Law and the United Nations' (1997) 1 Max Planck Yearbook of United Nations Law 195, 215. The author argues that the decline of reciprocity needs to be compensated by a strong compliance mechanism.

558 See UN General Assembly Resolution 377, UN Doc A/RES/377(V) A (3 November 1950): "The General Assembly […] [r]esolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

559 van Dijk (n 507) 232.

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6. *Overt military operations during the Cold War – the denial of IHL*

While the Tsarist period provided us with ample examples to study the impact of IHL on Russian military operations, such practice is scarce in Cold War era. A series of swift invasions and short-lived skirmishes aside, the Red Army only fought one overt campaign abroad: the Afghan War (1979–1989). Conflicts were increasingly delegated to proxies, e.g. in Vietnam, Korea, or various Latin American and African countries. The rare instances in which the USSR used armed force openly, however, share a common feature: the Soviets stubbornly denied the applicability of IHL.

6.1 From Berlin to Zhenbao

Between 1945 and 1979, the Red Army engaged in overt military operations abroad in only four instances: The interventions in East Germany (1953), Hungary (1956), Czechoslovakia (1968); and the Sino-Soviet Border Conflict (1969). These hostilities broke out in different countries, at different times, for different reasons. However, they all had something in common. The period of hostilities was short, the level of violence rather limited; fighting occurred between socialist States; and above all, the Soviets simply chose to ignore the applicability of IHL.

The clash with China over the disputed Damansky Island [*Zhenbao*] was mostly limited to skirmishes on the border. Nevertheless, more than 50 Soviet soldiers died in the main battle, when Chinese troops ambushed Soviet border guards in March 1969.[560] China had ratified the Geneva Conventions in 1956,[561] which meant that the situation represented an international armed conflict under CA 2(1). However, due to its brevity the application of IHL was never discussed – neither in the Soviet Union nor abroad.[562] The incident did not even make it into the ICRC's annual report.[563]

560 Kramer (n 330) 182.
561 For a complete list of ratifications see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380>.
562 Kramer (n 330) 182.
563 ICRC, 'Annual Report 1969' (1969).

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Similarly, IHL was given little attention during the interventions in East Germany (1953) and Czechoslovakia (1968).[564] While these operations involved a large number of Soviet troops, casualties remained low and overall the soldiers behaved in a rather disciplined manner.[565] If the world's leaders were in shock, it was not out of concern for IHL. Both socialist and Western States heavily criticised the violation of Czechoslovakia's sovereignty.[566] The Soviets replied by invoking socialist international law and stressed that they considered the invasion as assistance against antisocialist forces.[567]

Crushing the Hungarian Revolution in 1956, however, was a somewhat different story. It was by far the bloodiest of all interventions. More than 100 000 Soviet troops participated in the operation nicknamed "Whirlwind." It killed 2 500, wounded 19 000, and displaced 200 000."[568] The images broadcast from the streets of Budapest brought to mind memories of the battle for Berlin. This time the ICRC reminded the warring parties of "fundamental principles of the Geneva Conventions by which all the peoples are bound."[569] The Red Cross delivered large amounts of medicine, blood plasma, and blankets to besieged Budapest via airplanes. The UN Security Council noted the "grave situation has been created by the use of Soviet military forces" but remained paralysed because of the Soviet Union's veto right.[570]

Mark Kramer argues that the "invasion of Hungary was notable mostly for the USSR's failure to comply with key provisions of the Geneva Conventions."[571] The General Assembly deplored in an emergency session

564 ICRC, 'Annual Report 1968' (1968) 44. The report briefly mentions the "events which took place in Czechoslovakia," but only to state that the "the ICRC made contact with the country's National Society to ask it whether it had any need of aid."

565 Kramer (n 330) 179–181.

566 See e.g. Gerhard Hafner, 'The Intervention in Czechoslovakia – 1968' (2019) 21 Austrian Review of International and European Law Online 27.

567 Schweisfurth (n 337) 1–12.

568 György Dalos and Elsbeth Zylla, *1956: Der Aufstand in Ungarn* (Bundeszentrale für politische Bildung 2006) 184–186. The Soviet Union lost 669 soldiers, which was the highest loss in a military operation between 1945 and 1979.

569 ICRC, 'Annual Report 1956' (1956) 5–6. The ICRC dedicated almost 20 pages to the Hungarian crisis.

570 UN Security Council Resolution 120, UN Doc S/RES/120 (4 November 1956) was adopted with 10 votes to 1. The Soviet Union voted against the resolution which convened an emergency session of the General Assembly that was held on the same day.

571 Kramer (n 330) 180.

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that the "intervention of Soviet forces has resulted in grave loss of life."[572] Yet, it could do nothing to end the invasion.[573] Later the UN set up a Special Committee[574] that, *inter alia*, criticised flagrant IHL violations. It spoke of indiscriminate shooting, deliberate targeting of civilians and aid workers, and wanton destruction of private property. Furthermore, it reminded the Soviet Union that these acts amounted to violations of the Geneva Conventions.[575] The Soviets, however, adopted a strategy of absolute denial. They refused to answer to the allegations in the General Assembly and finally the matter was removed from the agenda.[576]

Things were to be solved under the radar of international humanitarian law. As I have outlined in my section on socialist international law, Moscow categorically opposed the application of IHL in a socialist-on-socialist war. Moscow wanted to avoid the impression that it was waging war against ideological brethren. This resulted in the negation of IHL. The non-application had little practical consequences in the cases of Germany, Czechoslovakia, and China. The invasion in Hungary, however, claimed numerous victims. Even if the fighting only lasted a week, IHL should have protected the civilian population and wounded combatants. The situation showed that the USSR was not willing to follow the rules to which it had recently agreed in 1949. On the contrary, Moscow chose to cast the veil of silence over IHL and completely ignored its application. It is worth bearing in mind this strategy of denial. We will encounter it again in the following section on the Afghan War and – in a more sophisticated manner – in Part II of this thesis dealing with Russia's current military practice.

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572 UN General Assembly Resolution 1004 (ES-II), UN Doc A/RES/1004(ES-II) (4 November 1956).

573 The fighting lasted from 4–10 November 1956. For a timeline of the events see György Dalos, 238.

574 UN General Assembly Resolution 1132/XI, UN Doc A/RES/1132/XI (10 January 1957). The UN Special Committee on the Problem of Hungary consisted of five member States (Australia, Denmark, Ceylon, Tunisia, and Uruguay). It collected evidence by conducting witness hearings, following media coverage, and drawing upon official diplomatic correspondence. The material is available at <http://www.osaarchivum.org/digital-repository/osa:693f36ae-56a5-4564-89ee-0bc7b20eb414>.

575 UN General Assembly, 'Report of the Special Committee on the Problem of Hungary: General Assembly Official Records, 11th Session, Supplement No 18 (A3592)' (UN 1957) 231–232.

576 Kramer (n 330) 181.

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6.2 Afghanistan 1979–1989 – the Russian Vietnam

The Cold War seemed to have frozen the enthusiasm for IHL that the Soviet Union had displayed at Geneva in 1949. This was illustrated by the proceedings at the Diplomatic Conference (1974–1977) which was tasked with adopting Additional Protocols to the Geneva Conventions. Again, Moscow strongly opposed the idea of external monitoring by the ICRC or any other organisation.[577] It suggested inserting a clause in the Protocol's preamble establishing an exception to IHL in "aggressive" wars. This plan was thwarted by the US, but it demonstrated the lurking danger of the Soviet Union's just war theory.[578] Finally, when States adopted the Protocols in 1977, the Soviets refused to sign.[579] Was this because the Soviet leaders did not see the need? Indeed, since 1945 the USSR had not been involved in a full-scale war. Apart from several proxy wars and the limited interventions described in the previous section, Moscow had no reason to draw upon IHL. This, however, was about to change in 1979.

In the Afghan War the USSR underwent a tragic transformation. The tables had turned. The Soviets had always claimed to defend the rights of the colonised peoples against their oppressors. Now, they would become colonisers themselves.[580] Moscow had long advocated the legalisation of partisan warfare.[581] Now, it would find itself entangled in a bloody confrontation with Mujahideen guerrillas.

Historically, the USSR maintained friendly relations with Afghanistan.[582] A simple glance at the map reveals the strategic importance of the country. It bordered the Soviet Republics of Turkmenistan, Uzbekistan, and Tajikistan and for a long time acted as a buffer zone between British India and the Soviet Union. In the 1970s, Afghanistan underwent a period of instability with leftist parties and Islamic movements competing for influence. In 1978, the leftist People's Democratic Party of Afghanistan (PDPA) seized power in a coup d'état. Despite the lack of popular support, the regime pushed ahead with ambitious reforms to modernise Afghan

577 Mantilla (n 380) 61.
578 ibid 63.
579 They acceded much later, in 1989. For a complete list of ratifications see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475>.
580 See Stephen E Hanson, 'The Brezhnev Era' in Ronald Grigor Suny (ed), *The Cambridge History of Russia*, vol 3 (Cambridge University Press 2006) 312.
581 Toman (n 350) 506 et seq.
582 Hanson (n 580) 311.

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society. Soon, however, the government met with fierce resistance from conservative circles in the Afghan society and increasingly lost control as the country descended into civil war.[583]

Initially, the Soviets were unwilling to send troops into Afghanistan: Aleksey Kosygin, Chairman of the Council of Ministers, turned down an invitation by the PDPA in a friendly, but determined way:

> *"The deployment of our forces in the territory of Afghanistan would immediately arouse the international community […] One cannot deny that our troops would have to fight not only with foreign aggressors, but also with a certain number of your people. And people do not forgive such things."*[584]

In hindsight these words sound almost prophetic. The Soviet officials changed their mind as they gradually lost trust in the unpredictable PDPA leader Hafizullah Amin.[585] On Christmas Eve 1979, they decided to invade. The Soviets met with the resistance of loyal Afghan troops, but quickly overpowered them. Only three days after the beginning of the invasion, the Red Army took the palace where Amin was holding out and killed the PDPA leader. They then installed a puppet government under Babrak Karmal.[586]

The reaction of the West was swift. Jimmy Carter identified the intervention as the "most serious threat to world peace since the Second World War"[587] and annulled a number of agreements with the Soviet Union. Most Western countries boycotted the Olympic Summer Games 1980 in Moscow.[588] Most importantly, the CIA started to covertly support the Afghan mujahedeen in their fight against the Soviet occupants.[589] Instead

583 For a detailed account of the events leading up to the war see Odd Arne Westad, 'Prelude to Invasion: The Soviet Union and the Afghan Communists, 1978–1979' (1994) 16 The International History Review 49; William Maley, 'Afghanistan: An Historical and Geographical Appraisal' (2010) 92 International Review of the Red Cross 859, 859–865.

584 James G Hershberg, 'New Evidence on the Soviet Intervention in Afghanistan' (1996) 8 Cold War International History Bulletin 128, 147.

585 Hanson (n 580) 311.

586 W Michael Reisman and James Silk, 'Which Law Applies to the Afghan Conflict?' (1988) 82 American Journal of International Law 459, 466–474.

587 Gabriella Grasselli, *British and American Responses to the Soviet Invasion of Afghanistan* (Dartmouth Publishing Group 1996) 121.

588 Nicholas Evan Sarantakes, 'Jimmy Carter's Disastrous Olympic Boycott' (Politico, 9 February 2014) <https://www.politico.com/magazine/story/2014/02/carter-olympic-boycott-1980-103308>.

589 Bearden (n 43) 19–20.

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of a quick expeditionary campaign, the Soviets were sucked into an all-out war. By 1985, 120 000 Red Army soldiers opposed 250 000 mujahedeen backed and equipped by the West. In the beginning they received rifles, later also mortars and Stinger anti-aircraft missiles.[590] The mujahedeen were never able to hold major cities, but they harried the Red Army very effectively throughout most of the countryside.[591]

The conflict came at a great cost. Even though the Afghan government continuously downplayed involvement of a "small contingent of Soviet forces" it was clear who actually did the fighting.[592] Overall, more than one million Soviet men would serve in Afghanistan.[593] Tens of thousands of Soviet soldiers would die.[594] Above all, however, it was the civilian population that suffered. Experts estimate that the war killed between one and two million civilians.[595] To compare, a recent report estimated that the US-led wars in Afghanistan, Iraq, and Pakistan *combined* produced a civilian death toll of 500 000.[596] Even by conservative estimates this amounts only to half of the casualties of the Soviet campaign. In the beginning of 1990, almost half of Afghanistan's pre-war population was living abroad as refugees.[597]

Given these figures it will not surprise the reader that the Soviet IHL performance in Afghanistan was very poor. Among scholars and practitioners there was a legal debate about whether the conflict was of an international or non-international character.[598] This largely depended on whether the new puppet government under Babrak Karmal could "invite" the Soviets to stay.[599] Given the political delicacy of this issue, it is not

590 ibid 21.
591 Maley (n 583) 866.
592 Quote from Felix Ermacora, 'Report on the Situation of Human Rights in Afghanistan Prepared in Accordance with Commission on Human Rights Resolution 1985/38 (UN Doc E/CN.4/1986/24)' (1986) 5.
593 Rafael Reuveny and Aseem Prakash, 'The Afghanistan War and the Breakdown of the Soviet Union' (1999) 25 Review of International Studies 693, 696.
594 Bearden (n 43) 21.
595 Noor Ahmad Khalidi, 'Afghanistan: Demographic Consequences of War, 1978–1987' (1991) 10 Central Asian Survey 101, 101.
596 Neta C Crawford, 'Human Cost of the Post-9/11 Wars: Lethality and the Need for Transparency' (Watson Institute for International & Public Affairs 2018) 1.
597 Maley (n 583) 868.
598 See e.g. Reisman and Silk (n 586).
599 If it could do so, we should classify the Afghan War as a non-international armed conflict between Afghan/Russian State forces and several armed groups. If Karmal's invitation was null and void, we would face an international armed conflict, see ibid 481.

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surprising that the neutral ICRC did not want to position itself, but simply reminded the USSR of its obligations under the Geneva Conventions.[600] Similarly, the UN special rapporteur Felix Ermacora considered that "at least" CA 3 applied.[601] Ironically, the Soviet had shot themselves in the foot by pushing for CA 3 that extended minimum guarantees to people in non-international armed conflicts. In any case, the debate about the correct classification of the conflict had little relevance for assessing Soviet IHL violations, because most acts were clearly illegal under both regimes.

There were many such violations. The NGO Helsinki Watch documented that "Russians systematically entered all the houses executing the inhabitants including women and children often by shooting them in the head."[602] Rape and murder of civilians occurred on a large scale.[603] The ICRC had immense difficulties in carrying out its protection activities and received virtually no support from the Soviets.[604] The UN Commission on Human Rights, Human Rights Watch, and the UN Special Rapporteur Ermacora denounced grave violations of IHL and human rights,[605] for example bombardments with heavy civilian losses, indiscriminate high-altitude bombings, and the use of certain incendiary weapons.[606] Ermacora's report furthermore reveals that Soviet troops massacred entire villages and went as far as using trained dogs to kill civilians.[607]

It is interesting to note that the Soviet Union never engaged in any legal dialogue on its IHL obligations. Moscow simply chose to ignore all allegations. During an entire decade of war Moscow denied all charges. When the ICRC reminded Moscow of its obligations under IHL a spokesman of the Foreign Ministry replied that these problems should rather be

600 Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon Conference: The American Red Cross-Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts (12–13 April 1983)' (1983) 33 American University Law Review 145, 150–151.

601 Ermacora (n 592) 16.

602 Quoted in Reuveny and Prakash (n 593) 702.

603 Elaine Sciolino, '4 Soviet Deserters Tell of Cruel Afghanistan War' (The New York Times, 3 August 1984) <https://www.nytimes.com/1984/08/03/world/4-soviet-deserters-tell-of-cruel-afghanistan-war.html>.

604 ICRC Annual Report 1980, 44.

605 See e.g. Commission on Human Rights Resolution 1985/38 (13 May 1985); Ermacora (n 592); Amnesty International, 'Annual Report 1982 (POL 10/0004/1982)' (1983) 181.

606 Ermacora (n 592) 17–18.

607 ibid 19.

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discussed with the Afghan authorities, because the USSR does not participate in combat.[608] Even under Gorbachev, the Kremlin did not formally respond to the charges.[609] Just like in Hungary in 1956, but on a much larger scale, we see a strategy of absolute denial, not just of the violations, but of the very application of IHL.

This strategy, however, backfired as the rumours of atrocities slowly but surely discredited the Red Army. Not only had it lost its moral credibility. It also lost the nimbus of invincibility: the army that had once defeated Nazi Germany could not quell an insurgency of ragtag guerrilla fighters. War weariness spread especially through many of the non-Russian Soviet Republics.[610] When Soviet forces withdrew in 1989, they left a war-torn country that became the breeding ground for many more conflicts to come.

608 ICRC, 'Annual Report 1980' (1980) 45; see also ICRC, 'Annual Report 1981' (1981) 37.
609 Kramer (n 330) 183.
610 Reuveny and Prakash (n 593) 698.

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Conclusion Part I: Russia's Long Way from the "Golden Age" to the "Grey Age"

We have come a long way from Crimea to the Afghanistan, and we are at the verge of crossing the threshold into modern-day Russia. In what respect did the Soviet Union treat IHL differently than Imperial Russia? In a nutshell, we can distinguish three different ages: the "golden age", the "dark age", and the "grey age."

The contributions of Imperial Russia to IHL described in Part I were truly remarkable and probably only rivalled by one other State: Switzerland. There is no doubt that this period represented the "golden age" of Russian contributions to IHL.[611]

When the Bolsheviks rose to power, a period of insecurity ensued. The interwar years resembled a giant experiment. Anything seemed possible, even the total abrogation of IHL through novel legal concepts such as Lenin's just war theory. IHL was not only under attack from legal scholars. During the Second World War, its practical implementation hit an all-time low on the eastern front. While many crimes were committed by the Nazis, the Soviets also catapulted their IHL record back into a "dark age."

Around 1945, we see the beginning of what can be described as the "grey age." The Soviet Union continued to influence IHL, especially at the Nuremberg Tribunal and at the 1949 Geneva Conference. However, at no point did it assume the role of a driving force that the Tsars had cherished so much. In terms of IHL, the Soviet Union had become a State like any other. While it was both powerful and influential, it did not initiate change, it *reacted* to change. The USSR lacked the visionary character of the Russian Empire which associated advances in IHL with the progress of humanity itself. In addition, the Soviets developed a dangerous tendency of denying uncomfortable facts and even the very applicability of IHL. In light of the foregoing, I would like to return to Jiři Toman who concludes his voluminous study on the USSR's impact on IHL as follows:

> *"In my opinion, the application of IHL by the USSR and its proxies depends – more than it is the case for any other country – on the evaluation of its*

611 See Fayet (n 318) 56 who uses this term to refer to the period of 1867–1917. He, however, mainly focusses on the relations between Russia and the ICRC.

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> *political interest. If the application of IHL can serve the 'final cause' of the USSR […] it will develop, affirm, and apply the law. However, it will not hesitate to abandon it, if the application of IHL constitutes an obstacle to achieving its objectives."*[612]

In 1991, the Cold War had been simmering for more than 40 years. Most Western scholars had long forgotten about the respectable contributions to IHL of the Russian Empire. They ignored the merits the Soviets had earned in Nuremberg and Geneva. Russia was now associated with Stalin, the *Gulag Archipelago*, and Chernobyl. Now, it was Russia, that had to learn Western lessons of liberalism.[613] In light of this, who would have thought in 1991 that roughly one hundred years before, the English Prime Minister Archibald Primrose suggested the Tsar as the obvious choice for the host of an international peace conference?

> *"I am quite clear that there is one person who is preeminently fitted to summon such a gathering. The Emperor of Russia by his high, pure character, and his single-minded desire for peace is the Sovereign who appears to me to be marked out as the originator of such a meeting."*[614]

In 1991, modern-day Russia faced an uncertain future and had little time to contemplate its past. The following chapters analyse how the continuator State[615] of the Soviet Union re-oriented itself with regards to IHL. Did it see itself as the torchbearer of an Imperial IHL tradition? Did it continue to play the mediocre role of the Soviet Union? Or is its role perhaps even worse?

612 Toman (n 350) 736.
613 See Mälksoo, *Russian Approaches to International Law* (n 6) 8.
614 Meyendorff (n 163) 1894, No 11.
615 See for this n 616.

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