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## **The Concept of the Standard of Civilization in International Law**

### **I. Introduction**

Article 38 (1) (a) of the Statute of the International Court of Justice lists as one of the sources applied by the Court ‘the general principles of law recognized by civilized nations’. This obscure reference to the standard of civilization today serves no more purpose, however, until the first half of the 20<sup>th</sup> century it functioned as one of the structural principles of international law. This short article aims at introducing the concept and its effects on international relations and its disappearance from the normative framework of international law.

### **II. The Standard of Civilization**

Until the 19<sup>th</sup> century international law was considered to be applicable to all interactions between states. Even in a discipline with a distinctly European origin<sup>1</sup> the natural law heritage necessitated the acceptance of the universal reach of the law of nations extending it to non-European civilizations.<sup>2</sup> Thus Alexandrowicz convincingly argued that between the 17<sup>th</sup> and the 18<sup>th</sup> centuries, East Indian and European sovereigns interacted on relatively equal footing

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<sup>1</sup> Neff represents the majority opinion in international legal scholarship when declares that ‘Like any man-made system, international law must inevitably bear traces of the historical context in which it was formed. That meant, specifically, that international law must be acknowledged to be, first and foremost, a product of European civilization.’ See Stephen C. NEFF, *Justice Among Nations – A History of International Law*, Cambridge: Massachusetts 2014, 310. For 19<sup>th</sup> and early 20<sup>th</sup> century legal scholars this was self-evident. One of the leading international law textbooks, Hall’s *International Law* correspondingly explained that ‘[I]t is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilization.’ William Edward HALL - James Beresford ATLAY, *A Treatise on International Law*, Oxford 1909, 39. See however recent attempts to trace the non-European lineage of international law. *Inter alia* Fatiha SAHLI - Abdelmalek El OUAZZANI, Africa North of the Sahara and Arab Countries, in: *The Oxford Handbook of the History of International Law*, Bardo FASSBENDER - Anne PETERS - Simone PETER - Daniel HÖGGER (eds.), Oxford 2013, 385-406; James Thuo GATHII, Africa, in: FASSBENDER – PETERS – PETER – HÖGGER (eds.), *Oxford Handbook*, 407-428.

<sup>2</sup> On the doctrinal approach see Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, in: *University of Toronto Law Journal*, 61, 2011, 1-36.

and concluded a series of treaties reflecting mutually agreed principles.<sup>3</sup> In this vein a British Admiralty Court ruling matter-of-factly stated that ‘African States... have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states...’<sup>4</sup> However, in the 19<sup>th</sup> century this approach based on legal equality ‘gave way to notions of European superiority’<sup>5</sup> and civilization became the most important concept to determine the applicability of international law outside a European context. This way ‘the doctrinal shift from naturalism to positivism transformed a universal law of peoples into a regional European international law.’<sup>6</sup>

The notion of civilization was based on an underlying belief in general progress and the conviction that European culture represents the pinnacle of development. It became firmly established in European scholarship that Europeans ‘were endowed with an advanced level of social complexity in opposition to 'barbarous' nations, who could possibly acquire civilization if they conformed to certain values, or 'savages', who were condemned to never access it.’<sup>7</sup> Consequently, only civilized countries could aspire to become members of family of nations.<sup>8</sup>

Hegel conveniently summarised this view by explaining that

‘Civilised Nations [are justified] in regarding and treating as barbarians those who lag behind them in institutions which are the essential moments of the State. Thus a pastoral people may treat hunters as barbarians and both of these are barbarians from the point of view of agriculturalists etc. The civilised nation is conscious that the rights of the barbarians are unequal to its own and treats their autonomy as only a formality.’<sup>9</sup>

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<sup>3</sup> Charles Henry ALEXANDROWICZ, *An Introduction to the History of the Law of Nations in the East Indies*, Oxford 1967.

<sup>4</sup> *The Helena* (1801) 4 C. Rob 4.

<sup>5</sup> Julius GOEBEL, *The Equality of States*, New York 1923, 5.

<sup>6</sup> Arnulf Becker LORCA, *Mestizo International Law – A Global Intellectual History 1842-1933*, Cambridge 2014, 47.

<sup>7</sup> Liliana OBREGÓN, The Civilized and the Uncivilized, in: *The Oxford Handbook of the History of International Law*, Bardo FASSBENDER - Anne PETERS - Simone PETER - Daniel HÖGGER (eds.), Oxford 2013, 917.

<sup>8</sup> 19<sup>th</sup> century legal documents are replete with references to the standard of civilization. For instance, the Declaration against the Slave Trade, signed at the Congress of Vienna in 1815, declared that slave trade is ‘repugnant to the principles of humanity and universal morality . . . the public voice, in all civilized countries, calls aloud for its prompt suppression.’ Final Act of the Congress of Vienna, Act No. XV., Declaration of the Powers on the Abolition of the Slave Trade, signed on 8 February 1815. [http://en.wikisource.org/wiki/Final\\_Act\\_of\\_the\\_Congress\\_of\\_Vienna/Act\\_XV](http://en.wikisource.org/wiki/Final_Act_of_the_Congress_of_Vienna/Act_XV) 50 years later, the first international treaty renouncing a particular means of warfare, the 1868 St. Petersburg Declaration enunciated that there is an ‘expediency of forbidding the use of certain projectiles in times of war between civilized nations’ since ‘the progress of civilization should have the effect of alleviating as much as possible the calamities of war’. 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, opened for signature 11 December 1868 (entry into force 11 December 1868).

<sup>9</sup> Georg Wilhelm Friedrich HEGEL, *Philosophy of Right*, Oxford 1979) Part 3: Ethical Life, (iii) The State (c) World History. Other philosophers concurred. In similar fashion, John Stuart Mill explained that ‘the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended

The requirements to be fulfilled for a country to meet the standard of civilization was never explicitly spelled out and Koskenniemi rightly points out that its existence was a ‘myth in the sense that there was never anything to gain. Every concession was a matter of negotiation, every status dependent on agreement, quid pro qua. But the existence of a language of a standard still gave the appearance of fair treatment and regular administration to what was ... a conjectural policy.... Without such language, it would have been impossible to... explain, let alone to justify, why non-European communities could be subjected to massive colonization.’<sup>10</sup> In other words, the standard of civilization was a convenient point of reference to justify unequal relationship between countries and to deny the recognition of statehood of certain political communities.

Still, contemporary international legal documents, judicial decisions and especially legal scholarship have elucidated what these requirements could be. Gong found five such criteria that ‘reflected the norms of the liberal European civilization which arose to replace, though it remained firmly rooted in, the mores of Christendom.’<sup>11</sup> These requirements were (1) guarantees for basic civil rights of liberty, dignity, property, freedom of travel, commerce, and religion, especially that of foreign nationals; (2) an efficient government; (3) compliance with international law; (4) adequate and permanent diplomatic relationship; and (5) conformity to the cultural norms and practices of the ‘civilized’ international society, i.e. the prohibition of *inter alia* slavery, polygamy or suttee.<sup>12</sup> More succinctly Schwarzenberger submitted that ‘it may be concluded without undue generalization that a civilised state must give protection to the life, liberty and property of foreigners more or less in accordance with the liberal traditions of the “bürgerliche Rechtsstaat”’.<sup>13</sup>

If a country fulfilled some of these requirements (or if due to political expediency it was deemed worthy to be treated as a European country)<sup>14</sup> it was recognized as a member of the

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on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives... The only moral laws for the relation between a civilized and a barbarous government are the universal rules of morality between man and man.’ John Stuart MILL, *A Few Words on Non-intervention*, in: John Stuart MILL, *Dissertations and Discussions: Political, Philosophical, and Historical*, Boston 1867, Vol. 4, 171-172.

<sup>10</sup> Martti KOSKENNIEMI, *The Gentle Civilizer of Nations - The Rise and Fall of International Law 1870–1960*, Cambridge 2004, 134-135.

<sup>11</sup> Gerrit W. GONG, *The Standard of ‘Civilization’ in International Society*, Oxford 1984, 14.

<sup>12</sup> GONG, 14-21.

<sup>13</sup> Georg SCHWARZENBERGER, *The Rule of Law and the Disintegration of the International Society*, in: *American Journal of International Law*, 33, 1939, 64.

<sup>14</sup> Koskenniemi brilliantly demonstrates the inherent problems with the standard of civilization. ‘Here was the paradox: if there was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approved, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove that they played by European rules, the

international community. Thus the Ottoman Empire became in 1856 the first non-European country admitted to ‘participate in the public law and concert in Europe’.<sup>15</sup> However, recognition as a sovereign did not automatically result in equal rights. Even though by the 19<sup>th</sup> century the formal sovereign equality was generally accepted as the fundamental rule of international law,<sup>16</sup> such countries were subjected to a different legal regime. Since they were thought incapable of ensuring adequate level of protection of civil rights they were deprived of certain sovereign rights and jurisdictional immunities in ‘unequal treaties’ and capitulations.<sup>17</sup> This approach in effect created a two-tiered international legal order. ‘At one level, were the full members of the society of states enjoying all the rights and benefits of such membership. At the other level, were the relations between these full members and other entities within the wider system... Statehood thus enabled a state to enjoy membership of the *system* but this did not guarantee membership of the *society* of states.’<sup>18</sup> These countries could have been functionally sufficiently similar to European countries (i.e. possessing effective government, bureaucracy etc.) but culturally they were still too different to be accepted as equals.<sup>19</sup>

However, the gap between Western “civilized” countries and non-Christian countries was not unbridgeable.<sup>20</sup> Japan’s example clearly demonstrates that Asian countries could be deemed to have reached the standard of civilization and thus become members with equal rights in the international community.

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more suspect they became: had not Bluntschli argued that only “non-Aryans” bowed down in front of their masters? In order to attain equality, the non-European community must accept Europe as its master – but to accept a master was proof that one was not equal.’ KOSKENNIEMI, *The Gentle Civilizer*, 135-136.

<sup>15</sup> Art. 7 of the Treaty of Paris (1856)

<sup>16</sup> In 1825, in the *Antelope Case*, Chief Justice Marshall of the United States Supreme Court affirmed that: ‘No principle of general law is more universally acknowledged than the perfect equality of nations... It results from this equality that no one can rightfully impose a rule on another.’ 10 Wheat 66, 122 (1825).

<sup>17</sup> The Ottoman Empire was also subject to repeated Western interventions partly due to its ‘semi-civilized’ state. See Davide RODOGNO, *Against Massacre: Humanitarian Interventions in the Ottoman Empire (1815–1914) – The Birth of a Concept and International Practice*, Princeton 2012.

<sup>18</sup> Gerry SIMPSON, *Great Powers and Unequal States – Unequal Sovereigns in the International Legal Order*, Cambridge 2004, 235. (emphasis in the original)

<sup>19</sup> In a manner characteristic to contemporary international legal scholarship Wheaton explained that ‘The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners of government, and other institutions, among every class of nations. Hence the international law of the civilised, Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing...’ Henry WHEATON, *Elements of International Law with a Sketch of the History of the Science*, Philadelphia 1836, 44-45.

<sup>20</sup> Though of course certain scholars viewed it that way. For Martens, interactions between civilized and uncivilized countries were simple *de facto* interactions outside the purview of international law and concluded that ‘[L]es conditions sociales et politiques dans lesquelles vivent les peuples musulmans et les peuplades païennes et sauvages, rendent impossible l’application de droit international aux rapports avec ces nations barbares ou à moitié civilises (the social and political conditions under which Muslim, heathen or savage peoples live, render impossible the application of international law with these barbarous or half civilized nations).’ Fedor Fedorovich MARTENS, *Traité de droit international*, Paris 1883, 238-239.

In 1853, an American warship forced Japan to end its two hundred years of seclusion by allowing foreign trade. Japan – just like China or Siam earlier – was forced to conclude unequal treaties with the Great Powers and accept consular jurisdiction over foreign citizens. International law was completely unknown and the American consul Townsend Harris, who had arrived in Shimoda in 1856, found Japan ‘undemocratic’ and ‘uncivilized’, making it his ‘personal mission’ to ‘bring the heathen country under the laws of nations.’<sup>21</sup>

One of strategic goals of Japan to remedy its subordinated position was the acceptance of international law as a regulatory framework. In 1865, one of the most widely used international law monographs, Henry Wheaton’s *Elements of International Law* was published in Japanese<sup>22</sup> and in 1868 Japan officially declared that it would conduct its foreign affairs in accordance with public international law.<sup>23</sup> The full embrace of the standard of civilization – along with the growing economic and military might of Japan – soon proved to be successful. In 1888, Japan concluded with Mexico its first treaty of amity, commerce and navigation under conditions of absolute equality and in 1894, Japan signed its first treaty with a Great Power, Great Britain, under equality. This was a clear sign that the Far-Eastern country had become acknowledged as a civilized nation and in quick succession all the unequal treaties signed the United States, France, Germany and other European states were also revised.<sup>24</sup>

The final proof of Japan’s ascendance to the rank of civilized states was its victory in the 1904-5 Russo-Japanese war. Not only did Japan manage to defeat Russia, one of the supreme military powers of the world but it did so by strict adherence to the laws of war. It confirmed that ‘Japan could articulate its sovereignty with the full approval of its allies and the grudging respect of its enemies.’<sup>25</sup>

This rapid rise was duly reflected in contemporary international legal scholarship as well. Westlake, for instance, in 1894 affirmed that ‘[O]ur international society exercises the

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<sup>21</sup> Masao MIYOSHI, *As We Saw Them, The First Japanese Embassy to the United States (1860)*, Berkeley 1979, 16.

<sup>22</sup> Interestingly, the Japanese edition was translated from the Chinese edition of the book. See more in detail Lydia H. Liu, *Legislating the Universal: The Circulation of International Law in the Nineteenth Century*, in: *Tokens of Exchange: The Problem of Translation in Global Circulations*, Lydia H. Liu (ed.), Durham & London 1999, 127-164.

<sup>23</sup> Klaus SCHLICHTMANN, *Japan, Germany and the Idea of the Hague Peace Conferences*, in: *Journal of Peace Research*, 40, 2003, 386. In the same year the first international law treatise written by a Japanese author, Nishi Amane, was published. See Urs Matthias ZACHMANN, *Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945*, in: *Rechtsgesichte – Legal History*, 22, 2014, 230.

<sup>24</sup> LORCA, 114-115. Howland, on the other hand, argues that the concept of civilization never had an actual effect on Japan’s international relations and served only as ‘a point of political rhetoric which the Western powers used to maintain their privileges in Japan’. Douglas HOWLAND, *International Law and Japanese Sovereignty – The Emerging Global Order in the 19<sup>th</sup> Century*, Palgrave 2016, 4.

<sup>25</sup> Douglas HOWLAND, *Sovereignty and the Laws of War: International Consequences of Japan’s 1905 Victory over Russia*, in: *Law and History Review*, 29, 2011, 53-97.

right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it. Thus a large part of the relations between the European and American states on the one hand, and China and Japan on the other hand, is conducted on the footing of ordinary international law; but the former enjoy in the latter a consular jurisdiction, substituted for the rules of jurisdiction belonging to ordinary international law'<sup>26</sup> In 1904 he retained his view concerning other Asian countries<sup>27</sup> but declared that 'Japan has recently been raised from this class of states to the full community of international law. The consular jurisdiction there having been given up in pursuance of treaties with the European and American powers concluded with that empire, and which came into force in 1899'.<sup>28</sup> Other influential authors, such as Holland followed suit.<sup>29</sup>

However, there was general agreement that not all non-Christian people could become civilized in the foreseeable future. Indeed, many contemporary authors were adamant that "non-civilized", "barbarous" or "savage" people were biologically incapable of complying with the normative regulation of international law.<sup>30</sup> Thus, in the 19<sup>th</sup> century 'the superhuman entered history with its hostile twin: the subhuman'<sup>31</sup> The imperative of *mission civilizatrice*, the need of bringing the wonders of European civilization became the standard justification for colonization<sup>32</sup> and if this civilizing mission resulted in the exploitation and death of thousands, well, that was still an acceptable price in the eyes of contemporary international lawyers.

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<sup>26</sup> John WESTLAKE, *Chapters on the Principles of International Law*, Cambridge 1894, 82.

<sup>27</sup> 'Beyond the above limits the international society exercises the right of admitting states to parts of its law without admitting them to the whole of it. Such is the case with Morocco, Turkey, Muscat, Persia, Siam and China. The European and American states maintain diplomatic intercourse and conclude treaties with them, they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves. But the civilisation of those countries differs from that of the Christian world in such important particulars, especially in the family relations and in the criminal law and its administration, that it is deemed necessary for Europeans and Americans among them to be protected by the enjoyment of a more or less separate system of law under their consuls.' John WESTLAKE, *International Law: Part I Peace*, Cambridge 1904, 40.

<sup>28</sup> *Ibid*, 41.

<sup>29</sup> See more in detail LORCA, 111-115.

<sup>30</sup> Contemporary scholarship often resorted to biological and anthropological arguments. Analysing the works of Cambridge law professor Thomas J. Lawrence, Riles observes that 'texts are replete with references to the crude biological nature of the "race of savages" and the "dwarfs of the Central African forest," for example. The thrill of the racialized savage – the thrill of racism – is the thrill of categorizing, of ordering, of controlling; and Lawrence's use of this imagery in his treatise imputed this thrill to international law...' Annelise RILES, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, in: *Harvard Law Review*, 106, 1993, 729.

<sup>31</sup> Carl SCHMITT, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York 2003, 104.

<sup>32</sup> In the opening speech of the 1884-85 Africa Conference for instance Prince Bismarck noted that 'all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce...' See Anthony ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2005, 97. Orford insightfully remarks that '[T]he hero's journey is about civilisation, progress or development of that colonised subject. Intervention by white men is justified in order first to civilise the natives of subject colonies, and later, in the era of decolonisation, to assist the development of those

Still, international law could apply to a limited extent even to the ‘savages’. Even though they did not possess sovereignty they had the right to transfer ownership of their land to the colonizing powers.<sup>33</sup> As put pithily by Anghie: ‘[T]he basic point is that the development of the idea of sovereignty in relation to the non-European world occurs in terms of dispossession, its ability to alienate its lands and rights... the native is granted personality in order to be bound’.<sup>34</sup>

To sum up, utilising the concept of civilization, 19<sup>th</sup> century international legal practice and scholarship has created an elaborate system of inequality while simultaneously honouring sovereign equality as the basic principle of international law.<sup>35</sup> This approach reached its pinnacle but also its inevitably demise at the 1899 and 1907 Hague Peace Conferences.

### **III. The Pinnacle and Decline of the Concept of Civilization at the 1899 and 1907 Hague Peace Conferences**

In 1898, Tsar Nicholas II of Russia convened an unusual peace conference aimed not at concluding a war between nations but preventing its possible outbreak by establishing arms reduction, drafting legal regulation for the conduct of hostilities and creating means for the peaceful settlement of disputes. The first Peace Conference was held in 1899, hosted by the Kingdom of Netherlands in the Hague.<sup>36</sup>

The influence of the standard of civilization was palpable at the Conference. Already in the proposal for the convocation of the conference the Tsar emphasized that ‘In the course of the last twenty years the longings for a general appeasement have become especially pronounced in the consciences of civilized nations.’<sup>37</sup> Unsurprisingly, out of 26 participating delegations 20 were European powers and since the United States and Mexico attended the con-

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former colonies.’ Anne ORFORD, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge 2003, 171.

<sup>33</sup> Lorimer for instance emphasized that the international lawyer ‘is not bound to apply the positive law of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition.’ James LORIMER, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, Edinburgh 1883, Vol. I., 102.

<sup>34</sup> ANGHIE, 105.

<sup>35</sup> It must be pointed out, however, that not only non-Christian countries but semi-peripheral states such as Latin-American countries and Russia also had to struggle to prove that they had met the criteria of the standard of civilization. See more in detail LORCA, *Mestizo International Law*.

<sup>36</sup> For further background see Betsy BAKER, *Hague Peace Conferences (1899 and 1907)*, in: Max Planck Encyclopaedia of Public International Law, Rudiger WOLFRUM (ed), <http://opil.ouplaw.com/home/EPIL>

<sup>37</sup> Handed to diplomatic representatives by Count Mouravieff, Russian Foreign Minister, at weekly reception in the Foreign Office, St. Petersburg, August 24, 1898. [http://avalon.law.yale.edu/19th\\_century/hag99-01.asp](http://avalon.law.yale.edu/19th_century/hag99-01.asp)

ference, only 4 non-Christian countries were represented: China, Japan, Persia and Siam. Besides the selective invitation, creative seating also ensured the dominance of great powers – French alphabetical arrangement resulted in all the major powers being seated in the front row.<sup>38</sup>

The standard of civilization was repeatedly referred to during discussions at the Conference and in adopted treaty as well. The preamble to the 1899 Hague Convention (II) asserted that:

Until a more complete code of the laws of war has been issued, the High Contracting Parties think deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized nations, from the laws of humanity, and the dictates of the public conscience.”<sup>39</sup>

This formulation, widely known as “Martens Clause”, named after the famous Russian jurist Fyodor Fyodorovich Martens, who suggested the inclusion of a general reference to unwritten principles to resolve a diplomatic deadlock during the negotiations,<sup>40</sup> was restated in the preamble of the 1907 Hague Convention IV, which emphasized that it was paramount to ‘serve, even in this extreme case, the interest of humanity and the ever progressive needs of civilization’,<sup>41</sup> while a slightly modified version appeared in Additional Protocol I to the 1949 Geneva

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<sup>38</sup> Hull explains that ‘ In arranging the seats of the delegates, the alphabetical list of the countries, according to their names in the French language, was followed; and this arrangement brought all of the great powers to the front, — the Russians, as initiators of the conference, being seated around the president, who was also a Russian. The French name for the United States {Etats Unis d’Amerique) would have placed its representatives seventh on the list; but either because this arrangement would have seated its delegates next to those of Spain (Espagne), with whom it had recently been at war, or because of its commanding position in the New World, it was classed as Amerique, second on the list, and just after Germany (Allemagne).’ William I. HULL, *The Two Hague Peace Conferences and Their Contributions to International Law*, Boston 1908, 12.

<sup>39</sup> 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, opened for signature 29 July 1899 (entry into force 4 September 1900). <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D> (last visited: 13 December 2014).

<sup>40</sup> See more in detail Antonio CASSESE, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, in: *European Journal of International Law*, 11, 2000, 193-198.

<sup>41</sup> Convention (IV) Respecting the Laws and Customs of War on Land, opened for signature 18 October 1907 (entry into force 26 January 1910). Roberts/Guelff: *Documents on the Laws of War*, p. 69.

Conventions,<sup>42</sup> and it was incorporated into numerous other conventions regulating the means and methods of warfare.<sup>43</sup>

Yet, the most conspicuous example of the differentiation between civilized and uncivilized emerged during the debates concerning the prohibition of expanding (dum-dum) bullets. Even though Great Britain supported the proposed ban, it made a case for an exception in colonial conflicts. The British representative, Sir John Ardagh scornfully argued that:

In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the decision of the Hague Conference, he cuts off your head.<sup>44</sup>

Ultimately, the British proposal was defeated, yet, in practice dum-dum bullets could still be used during colonial warfare since these conflicts did not amount to proper wars as these were only conducted between sovereign countries.<sup>45</sup>

The 1907 Second Peace Conference partially improved the representation of non-European states since this time 19 Latin-American countries participated. The increased number of participation fundamentally changed the dynamic of the conference. The Latin-American countries, led by the head of the Brazilian delegation, Ruy Barbosa, fought for the actual recognition

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<sup>42</sup>Art. 1 (2) declares that "[I]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 U.N.T.S 3 (entry into force 7 December 1979).

<sup>43</sup> See inter alia, the reference to 'the role of public conscience in furthering the principles of humanity' in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), opened for signature 18 September 1997, 2056 U.N.T.S 2041 (entry into force 1 March 1999); or the affirmation that "the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law", Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature 26 March 1999, 2253 U.N.T.S. 212 (entry into force 9 March 2004).

<sup>44</sup> James B. SCOTT, *The Hague Peace Conferences of 1899 and 1907*, Baltimore: Johns Hopkins Press, 1909, Vol. I., 343.

<sup>45</sup> See Tamás HOFFMANN, An Eternal Promise? – Three Sketches on the Universality of International Humanitarian Law, in: Enikő DÁCZ, Christina GRIESSLER and Henriett KOVÁCS (eds.) *Der Traum vom Frieden? – Utopie oder Realität?*, Berlin 2015, 250-257. In this vein, Holls emphasized that 'The Peace Conference certainly did not condemn the struggles which must necessarily precede the triumph of a higher civilization over that of a lower type which advancing standards of conduct may soften, but can never wholly prevent.' Frederick W. HOLLS, *The Peace Conference at the Hague and Its Bearings on International Law and Policy*, London 1900, 362-363.

of sovereign equality of states and managed to maintain in effect unanimity in decision-making which – although formalistic in nature – ensured the influence of even the smaller nations.<sup>46</sup>

In the end, the focus on the principle of sovereign equality inevitably resulted in the steady abandonment of the concept of standard of civilization. Even though a Japanese proposal at the Versailles Peace Conference to include a racial equality clause into the Covenant of the League of Nations was defeated<sup>47</sup> and the rhetoric of civilization was still employed in the interwar period to justify violence in colonial territories<sup>48</sup>, the legal discourse has slowly but irrevocably changed. Already in 1927 the renowned German international lawyer Walter Schücking referred to the concept as an ‘arrogant distinction’ between civilized and uncivilized<sup>49</sup> and by 1944 the last unequal treaty concluded with China was withdrawn, thus fully abolishing the concept.

#### IV. Conclusion

The standard of civilization was never a fixed concept yet ‘it remained a gatekeeper to admission in the international order spawned by the European state system well into the early twentieth century’.<sup>50</sup> It served as a useful instrument for European powers to determine the terms of engagement with non-European countries, constantly changing the applicable legal framework but at the same time maintaining moral superiority.

The idea of Western superiority has lost all intellectual currency by the end of World War II and Art. 1 (3) Charter of the United Nations explicitly prescribed ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as

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<sup>46</sup> Gerry SIMPSON, *Great Powers and Unequal States – Unequal Sovereigns in the International Legal Order*, Cambridge 2004, 134-140.

<sup>47</sup> See Kenneth KEITH, *100 Years of International Arbitration and Adjudication*, in: *Melbourne Journal of International Law*, 15, 2014, 5-7.

<sup>48</sup> The most egregious example was the defence of the 1926 French bombing of Damascus by the prominent British military lawyer, Elbridge Colby, who argued that Colby held that ‘If a few “non-combatants” – if there be any such in native folk of this character – are killed, the loss of life is probably far less than might have been sustained in prolonged operations of a more polite character. The inhuman act thus becomes actually humane, for it shortens the conflict and prevents the shedding of more excessive quantities of blood.’ Elbridge COLBY, *How to Fight Savage Tribes*, in: *American Journal of International Law*, 21, 1927, 287.

<sup>49</sup> 1927 expert opinion concerning the question of the termination of the Chinese-Belgian Treaty of 1865, cited in Robert Hauser, *China and Developments in International Law: Wang Tieya as a Contemporary*, in: *Journal of the History of International Law*, 4, 2002, 145. It must be pointed out that the 3<sup>rd</sup> edition of the influential international law treatise, Oppenheim’s *International Law*, already in 1920 emphasized that ‘The equality before International Law of all member States of the Family of Nations is an invariable equality derived from their international personality. Whatever inequality may exist between states as regards their size, power, degree of civilisation, wealth and other qualities, they are nevertheless equals as international persons.’ Lassa OPPENHEIM – Hersch LAUTERPACHT, *International Law, A Treatise*, London 1920, vol.I., 15.

<sup>50</sup> Umut ÖZSU, *Agency, Universality, and the Politics of International Legal History*, in: *Harvard International Law Journal*, 52, 2010, 61.

to race, sex, language, or religion' as one of the purposes of the United Nations.<sup>51</sup> The uncivilized or savage may no longer 'provided the symbolic counterpoint to... [the] ordering functions of international law'<sup>52</sup> yet there are unceasing attempts to reinvent the standard of civilization.<sup>53</sup> Still, even if the normative regulation of public international law is constantly and often justifiably criticised, the history of the standard of civilisation cautions against introducing gradations in legal regulation as it seems to inevitably lead to exclusion and abuse.

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<sup>51</sup> Charter of the United Nations, opened for signature 26 June 1945, 1 U.N.T.S. 16 (entry into force 24 October 1945). Although the vestiges of the idea of distinction between civilized and non-civilized nations remained in the Statute of the International Court of Justice with the reference to 'general principles of law recognized by civilized nations' as a source of international law in Art. 38 (1) (c). Statute of the International Court of Justice, opened for signature 26 June 1945, 33 U.N.T.S. 993 (entry into force 24 October 1945).

<sup>52</sup> RILES, 730.

<sup>53</sup> See Brett BOWDEN, *The Empire of Civilization: The Evolution of an Imperial Idea*, Chicago 2009, 161-188.

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