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Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900

Christopher Szabla | ORCID: 0000-0001-8851-6594
Assistant Professor, Durham Law School, Durham University, Durham, UK
christopher.j.szabla@durham.ac.uk

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Abstract

What was the relationship between international law and colonial warfare in the period of both increasingly formal imperialism and international law's professionalisation and codification in the nineteenth-century's second half? Existing work may lead to assumptions that international law would not be seen to apply to colonial wars, or served to justify them alone. This article turns away from previous focuses on the intellectual history of international law, prescriptive sources such as military manuals, and approaches extending from criminal law and colonial policing to demonstrate how and why imperial officials, politicians, and activists believed international law applied to colonial wars. Examining the British Empire, it shows how arguments about the use of international law in this period initially varied in the service of imperial interests, how and why public activism increasingly encouraged a more consistent approach – and discusses implications for the history and present of the law of armed conflict.

Keywords

imperialism – colonial war – British Empire – laws of war – international humanitarian law

1 Introduction

By midday on 2 September 1898, the Battle of Omdurman – and, with it, the Mahdist revolt that had challenged British rule in Sudan – was over. Violence, however, continued in its aftermath. As the journalist Ernest Bennett described the scene:

> a large number [of Britain's] native servants were already busy amongst the … figures our shell fire … had struck … down. These looters had armed themselves … with rifles, spears, and even clubs, and made short work of any wounded man they came across. Poor wretches in their agony had crawled under the scanty shade of a rock or shrub were clubbed to death or riddled with bullets by the irresponsible brutality of these native servants, who … frequently fired several bullets into bodies already dead before they advanced to strip the corpse. The wholesale slaughter was not confined to Arab servants. It was stated that orders had been given to kill the wounded. Whether this was true I do not know, but certainly no protest was made when [British-allied] Soudanese despatched scores of wounded men who lay in their path . … It is simply scandalous that [they] should have been thus allowed to loot and massacre under the very eyes of a British general.[1]

Bennett's report ignited debate over how the international law of war applied to colonial conflicts. The nineteenth-century's second half had been filled with efforts to address the conduct of warfare. Businessman Henri Dunant, for example, witnessed a similarly disturbing landscape of untreated combatants during the Italian wars of unification. His appeals concerning the condition of soldiers in increasingly mechanised conflicts culminated in 1864 with the first Geneva Convention, 'for the Amelioration of the Condition of the Wounded in Armies in the Field' – one of the earliest modern codifications of the laws of war agreed by governments, including Britain's.[2]

1 Bennett, Ernest. 'After Omdurman'. *Contemporary Review* 75 (1899), 18–33, 20.

2 See Bugnion, François. 'Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)'. *International Review of the Red Cross* 94(888) (2012), 1299–1338, doi: 10.1017/S1816383113000088. On British accession see Schindler, Dietrich and Jiří Toman, eds. *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and other Documents* (Leiden: Martinus Nijhoff, 1988), 282.

Given this commitment, how could Britain permit or carry out the execution of maimed Mahdists? One common argument has been that international law exempted many non-European peoples. Yet, this article shows, the British government confirmed the Geneva Convention's application, not for the first time acknowledging international law's significance for conduct during a colonial conflict. The use of such legal standards during this period was not always meant to justify, legitimate, or 'apologise' for acts of colonial violence, either. It could also serve to condemn actions that did not conform with law, seeking to uphold the colonial 'civilising mission,' among other goals, whether in the minds of colonised peoples or in the court of European opinion.

Scholarship concerned with law and colonial war (defined here broadly, as conflict between societies of European origin and non-Europeans) often overlooked such uses of international law by focusing on dichotomies between 'civilised' and 'uncivilised' in academic treatises, military manuals, or local colonial law, sometimes leading to an understanding of colonialism itself a legal 'exception'. Building on scholarly trends that have begun examining 'vernacular' – or everyday social or political discussions – about international law instead, this article examines governmental and public debates concerning British colonial wars, demonstrating how different actors sought to influence international law's implementation. It focuses on controversies that reached the attention of Parliament, accounting for international law's significance across different levels of government and the public sphere.

Official discourse about international law, the article shows, could involve using it to balance tools essential for maintaining colonial rule: legitimacy and violence. Yet the latter part of the century witnessed growing public demands for a less utilitarian approach and for consistency with external legal standards – fueled by factors including the professionalisation of international law and new technology producing both asymmetrical warfare and an expanding media to document it – all helping to bring about acknowledgement of the Geneva Convention's application to Omdurman.

Part 1 below situates the article amid evolving approaches to the question of international law's application to 'uncivilised' peoples in this period. Part 2 describes British officials' mid-to-late nineteenth-century international legal arguments and how they balanced the perceived need to fight colonial wars distinctively with the perceived need to legitimate them. Part 3 charts how new forces sought to lead Britain toward conformity with external legal standards. Part 4 discusses how these forces led to the application of the Geneva Convention to Omdurman. The conclusion addresses how uncertainties about international law's application to colonial war nevertheless persisted into the recent War on Terror, and lessons that continue to be pertinent.

2 International Law and Colonial War: Existing Approaches

Scholarship's consideration of international law's role in colonial war has shifted along with its general perspective on international law's application in the non-European world. Mid-twentieth-century histories often described international law as only extending to non-European societies during decolonisation.[3] This view made international law appear irrelevant to colonial conflict.[4] Later scholarship better addressed precisely how international law had supposedly excluded non-European societies.[5] Before the nineteenth-century, it contended, Europeans often believed in universal laws – which could justify war on those who did not yield[6] – or different 'civilisational' forms of international law.[7] This scholarship then asserted that belief in a particularistic European international law as the sole legitimate standard then grew along with the divergence in material power between Europe and other regions.[8] Along with the rise of race science,[9] it argued, later nineteenth-century jurisprudence often presented 'two alternatives: "civilization" … where international law governed … and everywhere else'.[10]

3 See Anghie, Antony. 'The Evolution of International Law: Colonial and Postcolonial Realities'. *Third World Quarterly* 27(5) (2006), 739–740, doi: 10.1080/01436590600780011.

4 See, e.g., Best, Geoffrey. *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), 20.

5 See, e.g., Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 6; Fisch, Jörg. 'The Role of International Law in the Territorial Expansion of Europe, 16th–20th Centuries'. *ICCPL Review* 3(1) (2000), 4–13.

6 Anghie, Antony. 'Francisco de Vitoria and the Colonial Origins of International Law'. *Social & Legal Studies* 5(3) (1996), 321–336, doi: 10.1177%2F096466399600500303; Fisch, 'The Role of International Law' 2000 (n. 5), 6–7.

7 The latter has been associated with C. H. Alexandrowicz; see Armitage, David and Jennifer Pitts. 'This Modern Grotius': An Introduction to the Life and Thought of C. H. Alexandrowicz', in *C. H. Alexandrowicz*: *The Law of Nations in Global History*, eds. David Armitage and Jennifer Pitts (Oxford: Oxford University Press, 2017), 1–34, 23.

8 See, e.g., Armitage/Pitts, 'Modern Grotius' 2017 (n. 7), 18, 24.

9 Anghie, *Imperialism* 2005 (n. 6), 46–47; Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), 104.

10 Kennedy, David. 'International Law and the Nineteenth Century: History of an Illusion'. *Nordic Journal of International Law* 65(385) (1996), 385–420, 412, doi: 10.1163/157181096209202949 33; see also, e.g., Sylvest, Casper. '"Our Passion for Legality": International Law and Imperialism in Late Nineteenth-Century Britain'. *Review of International Studies* 34(3) (2008), 403–423, doi: 10.1017/S0260210508008097. An alternative was thinking through different degrees of civilization, see Koskenniemi, *Gentle Civilizer* 2004 (n. 9), 129.

Research on colonialism and international law has also emphasised territoriality and sovereignty.[11] This has made it more concerned with the *jus ad bellum* (legal justifications for going to war), more than the *jus in bello* (law governing conduct within war.) As a consequence, scholarship could argue that non-Europeans' 'lack of sovereignty' meant 'virtually no legal restrictions' on Europeans' use of 'violence … to pacify the natives'.[12] Works continue to view actions taken during internal colonial police and military actions as similarly 'extralegal.'[13] Some scholars did seek evidence of attitudes about the *jus in bello* in military manuals, which often asserted that 'uncivilised' peoples were exempt from legal protection.[14] Others allowed that jurists permitted 'uncivilised' peoples some 'ambiguous' or sublegal protections.[15]

Still other scholars, however, increasingly challenge these narratives. Some emphasise that jurists applied international legal protections to a wider array of peoples.[16] Some question whether research on law and colonial war overemphasised racial or civilizational dichotomies relative to inter-imperial

11 See, e.g., Belmessous, Saliha. *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford: Oxford University Press, 2011), 3; Belmessous. *Empire by Treaty: Negotiating European Expansion, 1600–1900* (Oxford: Oxford University Press, 2014), 5; Fitzmaurice, Andrew. *Sovereignty, Property, and Empire*, 1500–2000 (Cambridge: Cambridge University Press, 2014).

12 Anghie, *Imperialism* 2005 (n. 5), 103.

13 See Kolsky, Elizabeth. 'The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India'. *American Historical Review* 120(4) (2015), 1120–1121, doi: 10.1093/ahr/120.4.1218; Wagner, Kim. 'Expanding Bullets and Savage Warfare'. *History Workshop Journal* 88 (Autumn 2019), 281–287, 287 fn. 11, doi: 10.1093/hwj/dbz044.

14 See, e.g., Kleinschmidt, Harald. *Diskriminierung durch Vertrag und Krieg: Zwischenstaatliche Verträge und der Begriff des Kolonialkriegs im 19. und frühen 20. Jahrhundert* (Munich: Oldenbourg, 2013); Wagner, Kim. 'Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency'. *History Workshop Journal* 85 (Spring 2018), 217–237, 223, doi: 10.1093/hwj/dbx053.

15 Koskenniemi, *Gentle Civilizer* 2004 (n. 9), 128; see also Fisch, Jörg. 'Power or Weakness? On the Causes of the Worldwide Expansion of European International Law'. *Journal of the History of International Law* 6(1) (2004), 21–26, 21.

16 See, e.g., Fitzmaurice, Andrew. 'Equality of Non-European Nations in International Law', in *International Law in the Long Nineteenth Century (1776–1914): From the Public Law of Europe to Global International Law?*, eds. Inge Van Hulle and Randall Lesaffer (Leiden: Brill, 2019), 75–104, 75–76, 101; Fitzmaurice, Andrew. 'Liberalism and Empire in Nineteenth-Century International Law'. *American Historical Review* 117(1) (2012), 122–140, doi: 10.1086/ahr.117.1.122; Pitts, Jennifer. 'Boundaries of Victorian International Law', in *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, ed. Duncan Bell (Cambridge: Cambridge University Press, 2007), 67–88, 68.

rivalries or enemy tactics.[17] Others argue that 'state-centric' understandings of international legal history leave conduct within borders underexamined.[18] Seeing responses to colonial rebellions as extralegal 'exceptions,' one scholar observes, misses how these could constitute *approaches* to law.[19] Military manuals, others note, do not necessarily capture actual application of the *jus in bello*.[20] Still others critique gaps left by previous emphases on intellectual history, judicial decisions, or high diplomacy over 'vernacular' discussions of international law.[21]

These criticisms suggest that international law may have factored into colonial wars in underexamined ways. Scholars have begun confirming these suggestions by looking more closely at actual applications of international law in colonial wars and 'vernacular' discussions about them. Both concern with legality and the designation of combatants as 'uncivilised', US and German examples suggest, could carry over between colonial and non-colonial worlds.[22] And violence could actually be facilitated because of Britain actively

17 See Giladi, Rotem. 'The Phoenix of Colonial War: Race, the Laws of War, and the "Horror on the Rhine"'. *Leiden Journal of International Law* 30(4) (2017), 847–875, doi: 10.1017/S0922156517000395; Knox, Robert. 'Civilizing Interventions? Race, War and International Law'. *Cambridge Review of International Affairs* 26(1) (2013), 111–132, 117, 121–22, doi: 10.1080/09557571.2012.762899.

18 See, e.g., Koskenniemi, Martti. 'Expanding Histories of International Law'. *American Journal of Legal History* 56(1) (2016), 104–112, 106–107, doi: 10.1093/ajlh/njv011.

19 Reynolds, John. *Empire, Emergency, and International Law* (Cambridge: Cambridge University Press, 2017), 38.

20 See Bennett, Huw, Michael Finch, Andrei Mamolea and David Morgan-Owen. 'Studying Mars and Clio: Or How Not to Write about the Ethics of Military Conduct and Military History'. *History Workshop Journal* 88 (Autumn 2019), 274–280, 275–276, doi: 10.1093/hwj/dbz034.

21 On 'vernacular' international law, see Benton, Lauren and Lisa Ford. *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge: Harvard University Press, 2015), 20–21; Cogan, Jacob Katz. 'A History of International Law in the Vernacular', in *Politics and the Histories of International Law: The Quest for Knowledge and Justice*, eds. Raphael Schäfer and Anne Peters (Leiden: Brill, 2021), 479–491; Van Hulle, Inge. *Britain and International Law in West Africa: The Practice of Empire* (Oxford: Oxford University Press, 2020), 2–3, 8, 23, 25. See also Berman, Nathaniel. '"The Appeals of the Orient": Colonized Desire and the War of the Riff', in *Gender and Human Rights*, ed. Karen Knop (Oxford: Oxford University Press, 2004), 195–230, 202; Orakhelashvili, Alexander. 'The Idea of European International Law'. *European Journal of International Law* 17(2) (2006), 315–347, 346–347, doi: 10.1093/ejil/chl004.

22 See Hull, Isabel. *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005), 3, parts I and II; Scheipers, Sibylle. *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press, 2015), 32 and chapter 5; Smiley, Will. 'Lawless Wars of Empire? The International

entering into treaties with non-European societies, Inge Van Hulle has shown, upon an alleged breach.[23]

Yet questions remain: how was international law approached in general, with respect to colonial war worldwide? Was it usually employed to justify colonial atrocities, or condemn them?[24] How did European *societies* view the question of whether application should be consistent between European and non-European combatants? To begin an answer to these queries, this contribution focuses on intragovernmental and public debates across the nineteenth-century's largest empire in order to shed light on factors considered in 'vernacular' discussions about applying the *jus in bello* to colonial war.

In doing so, this article corroborates suggestions by Sibylle Scheipers that the laws of war could be used to facilitate colonial governance and by Van Hulle that this use could be balanced by humanitarian motives.[25] Yet it extends and complicates them by surveying different types of conflicts around the world, and examines the impact of public scrutiny. For British officials, it shows, law could legitimate conduct, or be a standard against which to hold it up – whichever served imperial rule. Outside actors, however – journalists, activists, and competing empires – increasingly intervened to make Britain's use of international law less consequentialist, and more consistent, influencing debate over colonial conduct. Increasing exposure to atrocities committed during the expansion of formal empire fueled these arguments, while codification allowed their articulation, eventually extracting acknowledgement of the Geneva Convention's application in a colonial war. In contrast to the British Empire before 1850, about which Lauren Benton and Lisa Ford write that international law was articulated by intra-imperial action,[26] these actors sought to make imperial activity conform to international law. Their doing so presaged the international Red Cross movement accepting that the laws of war applied

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Law of War in the Philippines, 1898–1903'. *Law and History Review* 36(3) (2018), 511–550; Witt, John Fabian. *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 225, 243–244.

23 Van Hulle, *West Africa* 2020 (n. 21), esp. chapter 4.

24 On these poles, see Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 1989).

25 Scheipers, *Unlawful Combatants* 2015 (n. 22), 182–183 (noting that the specificities of how different conflicts diverged were less easy to answer from her study alone); Van Hulle, *West Africa* 2020 (n. 21), 3.

26 Benton/Ford, *Rage* 2015 (n. 21), 18–24.

to non-state actors or treaty non-signatories decades later – and presaged such laws moving beyond reciprocal obligations to more universal commitments.[27]

3 Balancing Imperial Interests: British Officials and the Laws of War

Nineteenth-century British officials did not blanketly withhold legal protections from 'uncivilised' combatants. Conflict being internal to a colony was also no bar to the law of war's application.[28] The Admiralty Court awarded British soldiers booty captured during the 1857 Indian Rebellion on the basis of international law – which 'superseded [local] civil laws' on the basis of the conflict's scale, rather than India's sovereignty or civilisational status.[29] Such an argument applied to the US Civil War around the same time and governs today's 'non-international armed conflicts'.[30] It also demonstrates how colonial military campaigns could be distinguished from police actions. On the

27 On the international movement see Lowe, Kimberly. 'The Red Cross and the Laws of War, 1863–1949: International Rights Activism before Human Rights', in *The Routledge History of Human Rights*, eds. Jean Quataert and Lora Wildenthal (Abingdon: Routledge, 2019), 75–96, 78–82.

28 Unsurprisingly, given Benton and Ford's observation that international law could emerge from intra-imperial behavior. Benton/Ford, *Rage* 2015 (n. 21), 18–24.

29 See *The Banda and Kirwee Booty: Proceedings and Judgment Delivered by the Rt. Hon. Stephen Lushington, D. C. L., on the 30th of June 1866* (London: H. M. Stationery Office, 1866), 72; 'To the Right Honourable the Secretary of State for India in Council. The Memorial of Major General William Henry Miller, C. B., President of the Special Prize Committee of the late Saugor and Nerbudda Field Force' in 'East India (Banda and Kirwee prize money). Copy of all financial papers now in the India Office relating to the amounts realised on account of the Banda and Kirwee Prize Fund, including all documents relative to the Kirwee promissory notes, and all explanatory correspondence', PP Commons Papers ['Commons'] vol. 298 (1868–1869), 91. Even counterarguments focused on the scale of the conflict. See 'No. 326, From the Solicitor of the East India Company to Colonel R. J. H. Birch, C. B., Secretary to the Government of India, War Department', in 'East India (prize property). Copies of correspondence between the late Court of Directors of the East India Company and the Governor General, and other authorities in India, or between the Secretary of State for India and the same authorities, on the subject of prize property captured by the armies of the Crown or of the late East India Company, in warfare against the rebels and mutineers, during the years 1857, 1858, and 1859', PP Commons vol. 507 (1860), 125–126.

30 See Roberts, Adam. 'Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 Geneva Convention'. *Melbourne Journal of International Law* 20(1) (2019), 158–196, 168; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, art. 1.

other hand, statehood failed to grant non-European adversaries certain legal protection, particularly as racial and 'civilisational' prejudices hardened.

Instead, intragovernmental debates concerning the application of the laws of war in extra-European conflicts varied on the basis of other factors. Scholars have already noted how metropolitan officials often advocated more restraint than officials on the ground, who were often concerned with whether opponents reciprocally observed limits on conduct.[31] The latter often cast their enemy as 'savage' and 'uncivilised' and therefore unlikely to fight by the same rules. Yet their arguments were often overtly connected more with observations about specific behaviour rather than immutable characteristics like race or 'status' – although assumptions about connections between behaviour and status could undoubtedly underlie these claims. Officials also justified actions using precedents from *European* wars and still cited the often universally applicable writings of early modern jurists. They were, finally, concerned with what would be less likely to exacerbate conflict, and – mirroring some other empires' approaches[32] – could invoke the laws of war to exemplify 'civilised' behaviour.

This section examines these tendencies in three later mid-nineteenth-century cases. Different combinations of the above arguments were advanced in different theaters with different problems. On the Indian North-West Frontier, methods that would best pacify hostile tribes were key. New Zealand officials appealed to reciprocity and European precedents; their metropolitan superiors worried about escalation. Sierra Leone demonstrates how officials could believe that staying within legal standards upheld Britain's civilising mission. Overall, these examples point to discourse focused less on logics of difference, as some scholarship may suggest,[33] than on maintaining colonial rule by balancing seemingly necessary violence and legitimating behaviour. Concern with reciprocity may have reflected fears that restraint might put British armies at a disadvantage, according with suggestions that colonial wars needed to be fought by different standards of military necessity.[34] Yet invocations of universal principles or European precedent demonstrate that violence could be justified independent of distinctions between 'civilised' and 'uncivilised' peoples.

31 See Van Hulle, *West Africa* 2020 (n. 21), chapter 2; Scheipers, *Unlawful Combatants* 2015 (n. 22), 14.

32 See Smiley, 'Lawless Wars' 2018 (n. 22), 548–549.

33 See, e.g., Van Hulle, *West Africa* 2020 (n. 21), 192.

34 Ibid.

Arguments for restraint, moreover – to render conduct more defensible or exemplify 'civilised' behavior – aimed to validate imperial activity.

3.1 *The Indian North-West Frontier*

Amid debates on reforming the governance of the Indian North-West Frontier in 1878, Henry Bartle Frere composed a memo comparing different standards of conduct in Sind – where he had been Commissioner[35] – and Punjab, arguing for applying the Sind approach in both. The two districts were engaged in hostilities with Baluchi tribes, and Frere wrote that British troops pursued different approaches to the laws of war in each. In Sind

> the ordinary rules of war in civilized countries were ordered to be strictly observed: armed men resisting were to be attacked and defeated, made prisoners, or slain; unresisting or unarmed men were to be everywhere spared and protected; no plunder was permitted; no wanton destruction of houses, trees, crops, or other property was allowed; provisions taken from unarmed country people were to be duly paid for. The object aimed for was the individual punishment of the evil-doer … . Punishment of the culprit's clansmen, with a view, by coercing the innocent, to reach the guilty, was not allowed.[36]

Punjab, however, extended 'exceptions' prevalent in colonial Indian policing[37] to the frontier. There

> the great object seemed to be to strike terror into the enemy. For some years, prisoners were rarely made and quarter rarely given to armed men. Houses, trees, crops, &c. were destroyed. Tribal punishment was the object, and whatever inflicted loss or suffering on the tribe was permissible without reference to the chance of the punishment reaching the individual evil-doer. With a view to bring tribal pressure on the culprit, his whole tribe might be blockaded, or the culprit's tribesmen who could

35 See Aitkin, Edward Hamilton. *Gazetteer of the Province of Sind* (Karachi: Mercantile Steam Press, 1907), 146.

36 'Memorandum by Sir Bartle Frere: Sind and Punjab Frontier Systems' in 'Biluchistan, no. 3. Papers relating to the Re-Organization of the Western and North-Western Frontier of India', PP C1898 (1878), 18–19.

37 See Kolsky, 'Colonial Rule' 2015 (n. 13), 1120–1121; Condos, Mark and Gavin Rand. 'Coercion and Conciliation at the Edge of Empire: State-Building and Its Limits in Waziristan, 1849–1914'. *The Historical Journal* 61(3) (2018), 695–718, 698, doi: 10.1017/S0018246X1700028o.

> not possibly have shared his guilt might be imprisoned till he made restitution.[38]

A number of factors may explain these varied courses. Unlike the Indian Rebellion, the conflicts were small in scale but, Frere wrote, the tribes had no clear 'sovereign' status. 'We are neither [officially] at peace nor at war with them' he continued; there were no 'civilized forms of declaration of hostilities' and the tribes' relations with Britain were, therefore, 'hardly capable of definition'.[39] British 'men on the spot' also arguably had autonomy in the region,[40] including, possibly, to make decisions about applicable law. They may have exempted Punjab from legal restrictions because of views that its tribes were more ferocious.[41] Britain also had closer relations with the Khan of Khelat, the nominal overlord of Sind's tribes, than the Emir of Kabul, who claimed suzerainty over Punjab's.[42] Frere may have also exaggerated the relative benevolence of Sind given that it was his responsibility.[43]

Yet Frere neither believed that distinctions between the districts mattered nor that they should. It was 'both possible and desirable to carry on war against such barbarous frontier tribes on the same principles as against civilized mountaineers in Europe', he wrote.[44] Being in 'accordance with civilised useages [legal customs] in war' was 'simpler' and 'more … defensible according to European ideas'.[45] The desirability of this approach flowed most substantially, however, from its utility for imperial rule: the Sind system was what 'made the Khan and his tribes not only glad to have us as neighbours, but anxious to be submissive … [T]he result,' Frere concluded, 'was … freedom of the frontier districts from raids, … perfect security of life and property within our border,' and that '[t]he Khan and all his people were obedient to every demand of the British Government'.[46]

38 'Memorandum by Sir Bartle Frere' 1878 (n. 36), 18–19.
39 Ibid. 11–12, 17.
40 See Kolsky, 'Colonial Rule' 2015 (n. 13), 1219, 1221 n. 11.
41 Ibid. 1221–22.
42 'Memorandum by Sir Bartle Frere' 1878 (n. 36), 11.
43 Tripodi, Christian. '"Good for One but Not the Other": The "Sandeman System" of Pacification as Applied to Baluchistan and the North-West Frontier, 1877–1947'. *Journal of Military History* 73(3) (2009), 767–802, 775, doi: 10.1353/jmh.0.0298, suggests Punjab was less harsh in this period.
44 'Memorandum by Sir Bartle Frere' 1878 (n. 36), 11.
45 Ibid. 17.
46 Ibid. 16.

3.2 *New Zealand*

In 1869, New Zealand's government declared two Maori commanders in their colony's Land Wars, Titokowáru and Te Kooti, wanted, 'dead or alive' – offering cash for their capture or execution. The Foreign Secretary, Lord Granville, wrote to Governor George Bowen, concerned that the move was 'at variance with the usual laws of war' because it was not clear that Maori tactics justified it.[47] The measure also 'appear[ed] … calculated to exasperate and extend hostilities'.[48]

Yet Bowen, New Zealand's Prime Minister Edward Stafford and Attorney General James Prendergast each pushed back with justifications for the wanted policy. The trio recognized, like the Admiralty Court, that international law could apply even to what they viewed as a domestic war on the basis of the conflict's scale.[49] Stafford argued, however, that 'the acts of Titoko Waru and Kooti are happily as exceptional as the course adopted with a view to their punishment'.[50] Bowen was less circumspect: the commanders had, 'owing to their own savage cruelties, forfeited, by the law of nations, all right to be treated according to the "usual laws of war"'.[51]

What were these 'cruelties'? Titokowáru had declared himself a cannibal – the 'pinnacle of barbarity to the Victorian imagination'[52] – and even claimed to have eaten a 'European trooper like a piece of beef'. At Titokowáru's camp, a visitor had discovered charred human remains – evidence that bodies, including a British officer's, had been burned and, he inferred, eaten there.[53] Bowen emphasised that such acts only exempted treatment of the commanders from the laws of war. He underscored 'a clear and broad distinction between [them] and those insurgents who … waged a comparatively honourable warfare'.[54]

Only Prendergast sought to exclude the Maori as a whole from legal protection. Yet he argued this less because he believed that the Maori were 'savage by nature', but principally because of their actions:

> The Maoris now in arms have put forward no grievance for which they seek redress. Their object, so far as it can be collected from their acts, is

47 'Memorandum by Mr. Stafford, Wellington, 21st May, 1869', in 'Further Papers Relative to the Affairs of New Zealand', PP C83 (1870), 13.

48 'Copy of a Despatch from Governor Sir GF Bowen GCMG to The Earl Granville, KG 7 July 1869', in 'Papers Relative to New Zealand' 1870 (n. 47), 54.

49 Ibid. 59.

50 'Memorandum by Stafford' 1869 (n. 47), 13.

51 'Despatch from Bowen' 1869 (n. 48), 54.

52 Van Hulle, *West Africa* 2020 (n. 21), 176.

53 'Despatch from Bowen' 1869 (n. 48), 55–56.

54 Ibid. 56.

> murder, cannibalism, and rapine. They form themselves into bands, and roam the country seeking a prey.
>
> In punishing the perpetrators of such crimes, is the Sovereign to be restrained by the rules which the laws of nature and of nations have declared applicable in the wars between civilized nations? Clearly not … the revolt has been carried on in full defiance of all the laws of nature, and there can be no doubt that all who have taken part in it have forfeited all claim for mercy.
>
> [Offering a dead or alive notice] does not seem open to any objection in the case of a Government engaged in the suppression of a revolt, accompanied as such a revolt has been, with all the unrelenting cruelty of savage nature.[55]

Prendergast also turned to general principles that could have applied outside the colonial context, noting that '[t]he object of the Government is self-preservation. The peaceful citizens must be protected at all costs. Even in the case of a foreign enemy who violates the laws of nature and the usages of war, the utmost severities are permitted as a punishment for his crimes.'[56] He found further support from Vattel, who permitted breaching the laws of war anytime observance had not been reciprocal – and employed 'savage' in a way that appeared to be defined as a description of behaviour:

> There is one case in which we may refuse to spare the life of an enemy who surrenders . … It is when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war . … When we are at war with a savage nation, who observe no rules, and never give quarter, we may punish them in the persons of any of their people whom we take … and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity.[57]

Consequently, Prendergast argued that the Maori forfeited 'all title to the observance toward them of the usages of war, if they ever had such a title'.[58]

The others, furthermore, argued that even 'civilised' peoples could lack protections in Britain's wars. '[O]ffers [for capture] are not without precedent,'

55 Ibid. 54.
56 Ibid.
57 Ibid. (quoting Vattel).
58 Ibid.

Stafford wrote, in 'even the Fenian [Irish] outrages within the heart of the United Kingdom'.[59] Bowen asked

> [w]hy should the Ministry of New Zealand be blamed for adopting, against Maori murderers and cannibals, measures far less stringent than those for which … Governors have been applauded for adopting in the suppression of the rebellions in Canada, Cephalonia [a British-ruled Greek island] … and Ireland? It is well known that, in all the rebellions alluded to, rewards were offered for the persons of the rebel leaders, and in some cases 'dead or alive' *totem verbis*; that Martial Law was proclaimed, the *Habeas Corpus* Act was suspended; numerous prisoners were executed for being merely taken in arms against the Crown; and other measures of repression were carried out much more severely than in New Zealand.[60]

Granville, nonetheless, rejected all these arguments: the 'Maori insurrection,' he wrote, 'requir[ed] the application of the laws of war, as these laws are applicable to rebels and savages,' making no distinction between the two. As such, he did 'not understand how you justify [a dead or alive] notice as a matter of law'.[61]

3.3 *Sierra Leone*

In an 1855 letter to his subordinate Stephan John Hill, the Governor of Sierra Leone, Colonial Secretary William Molesworth lambasted a punitive expedition that had taken place earlier that year. In retribution for nonpayment of sums, Hill's forces had sailed upriver to a native Moriah town, laid waste to it, and proceeded to the residence of a local ruler. Ignoring its 'flag of truce' – and failing to locate the ruler himself – Hill's troops took his principal advisor hostage.[62]

'I cannot repudiate too distinctly such a line of policy as this', Molesworth wrote, denouncing the 'unjustifiable' acts. 'By such conduct we never shall lay the foundations of civilization in Africa, and the native races there may justly

59 'Memorandum by Stafford' 1870 (n. 47), 13.

60 'Despatch from Bowen' 1870 (n. 48), 56.

61 'No. 27. Copy of a Despatch from the Earl Granville, K. G. to Governor Sir G. F. Bowen, G. C. M. G., 4 November 1869', in 'Papers Relative to New Zealand' 1870 (n. 56), 221–22 (emphasis added).

62 See generally 'Despatch from Right Honourable Sir Bart W. Molesworth to Governor Hill, September 22, 1855', in 'Further Correspondence Relative to the Recent Expeditions against the Moriah Chiefs in the Neighbourhood of Sierra Leone', PP Lords Paper vol. 2111 (1856), 26.

accuse us of imitating their uncivilized example'. Concern about reciprocity could, in this light, be counterproductive. 'In an expedition against uncivilized men, to punish them for an alleged breach of their engagements, it was more especially essential that the laws of war, so far as they are understood and practised amongst men, both civilized and uncivilized, should have been punctiliously observed toward them,' Molesworth continued. The expedition, he concluded, 'was dishonourable to the British power.'[63]

Hill defended his acts not on the basis of the 'civilisational' status of the Moriah or even their irregular behaviour, but cited passages by Vattel that he claimed justified them as self-defence.[64] Hill also claimed he had done no wrong because Vattel's lines were ambiguous, and because he had received no word on how to proceed.[65] His defence may have proven convincing; he continued to serve as governor and later governed two more colonies.[66]

Still, the contents of the exchange are illuminating. Neither party disagreed that the laws of war applied in the situation, with Molesworth even claiming that it was 'more especially essential' that they apply in colonial contexts, in order to *demonstrate* civilisation. Doing so could also help establish British superiority; after invading Egypt in 1882, Britain tried its deposed nationalist leader, Ahmed Urabi, for incorrect use of the white flag of surrender.[67] Given that the Moriah had used the flag correctly, Britain had even more need to have taken a legally justifiable approach in Sierra Leone.

4 'Savages are Men': Public Arguments for Uniform Standards

Contemporaries were hardly convinced that the first Geneva Convention would end the state of affairs in which application of the laws of war in colonial conflict was possible, yet not guaranteed. An 1865 editorial following the adoption of the treaty lamented that 'numerous wars which are waged with savage or semi-barbarous nations will still unavoidably follow the earlier precedents . … Few prisoners are taken in Indian or Algerian campaigns'.[68] Still,

63 Ibid. 27–28 (emphasis added).
64 Ibid. 35.
65 Ibid. 44.
66 Carlyle, Edward Irving. 'Hill, Sir Stephen John (1809–1891)', in *Oxford Dictionary of National Biography*, revised by Lynn Milne (Oxford: Oxford University Press, 2004).
67 Cryer, Robert. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), 30.
68 'The Laws of War'. *Saturday Review of Politics, Literature, Science and Art* (26 August 1865), 261–262, 262.

acknowledging that Britain applied international law in some colonial wars led the editors to believe that the Convention, too, could be employed beyond Europe – if opponents acted reciprocally. 'Turkey has of late years conformed to European doctrine and practice', they noted, while 'precocious natives of New Zealand' practiced principles akin to the Convention. Still, China showed no intention of ratifying the document – a sign for the editors that it would also not conform its practices, and that Convention protections could not therefore be extended to it.[69] Even after acceding to the Convention, another publication argued in 1895, Japan was not in Europe's 'charmed circle,' but 'on probation'. 'That … States [outside Europe] possess … qualifications' to be full members of the community of international law, it continued, 'is not to be presumed, but needs to be established'.[70]

Yet if the Convention only reaffirmed existing standards of reciprocity, it would hardly serve as a tool to restrain much more colonial military activity. Only by being read to impose an absolute standard on signatories, independent of opponent or behaviour, might it lead to a more consistent approach. For British society, viewing international law in this light required a broader public shift in thinking. In the later decades of the nineteenth-century, this section shows, debates in Parliament and the press increasingly asserted that even 'savages' ought to benefit from unwavering limits on their treatment – eventually impacting on government thinking as well.

4.1 *The Kagoshima Debate*

An early version of these arguments surfaced in 1864, when Liberal MP Charles Buxton stood in Parliament to condemn Britain's bombardment of Kagoshima, Japan. The controversy was a consequence of the execution of British merchants who had refused to comply with laws mandating a show of respect for passing samurai.[71] Japan apologised for this violation of Britons' extraterritorial exemption from local laws, but the local government of Satsuma, where the incident occurred, showed no remorse. In response, Royal Navy vessels entered the harbour of Kagoshima, Satsuma's capital, intending to take merchant ships hostage for ransom. The British fleet, however, came under fire, and responded by shelling the city, incinerating many wood-and-paper homes.[72]

69 Ibid.

70 'International Law in the War between Japan and China'. *Fortnightly Review* (June 1895), 913–914.

71 Denney, John. *Respect and Consideration: Britain in Japan 1853–1868 and beyond* (Leicester: Radiance, 2011), 84.

72 Ibid. 191.

Buxton demanded a resolution 'regret[ting] the burning of the town … as being contrary to those usages of war which prevail among civilised nations'.[73]

Foreign Minister John Russell defended the bombardment. The attack, he suggested, was meant to send a message, not terrorise Kagoshima's population. Shells had focused on the city's military defenses, he noted; only because of high winds did they spark fire in civilian precincts. Prepared for that eventuality, the navy had warned Kagoshima's citizens to flee. Russell argued, effectively, that Britain had made a precision strike and minimised collateral damage. Yet he also positioned Japan as a non-European country whose laws offered insufficient protection to British subjects, leaving Britain within its rights to intervene. If it had not, he exclaimed, 'how unsafe would have been the life of every Englishman in Japan!'[74]

Such comments undergirded Buxton's earlier fears 'that what influenced many in defending these proceedings was the feeling that the Japanese were beyond the pale of civilization, and that in dealing with nations in that condition it is justifiable to use measures from which we should, of course, refrain in dealing with our equals'. Indeed, the British fleet's commander had allegedly addressed his Japanese adversaries as the 'first of nations' – among 'barbarians'.[75]

Yet international law, Buxton argued, ought to protect civilians regardless of their level of civilisation – or, he implied, behaviour. He also went beyond the utilitarian argument that 'civilised' Britain should set an example. In 'nations … whether barbarous or civilized', he argued, 'we should … declare our *unfailing adhesion* to those usages of war by which its cruelties are held in check, and to make our officers understand beyond the possibility of a mistake, what were the bounds over which their zeal must *in no case* carry them'.[76] Buxton substantiated his arguments not only with interpretations of Vattel, but more recent treatises by 'Twiss, Heffter, Wheaton, Klüber, [and] Phillimore' among others, and cited for consistency the precedent of outrage over Britain's 1856 bombardment of Canton during the Second Opium War.[77]

Buxton's reasoning proved unconvincing, but not necessarily because of civilisational distinctions. Earlier destruction of towns in 'civilised' places and beyond, other members asserted, indicated that doing so was permitted under

73 House of Commons [HC] Debate on the Bombardment of Kagoshima, 9 February 1864, vol. 173, col. 335.

74 House of Lords Debate on Japan Resolutions, 1 July 1864, vol. 176, cols. 593–596.

75 HC Debate on Kagoshima 1864 (n. 73), col. 336.

76 Ibid. (emphasis added).

77 Ibid. col. 341–342.

the 'usages of civilized war'.[78] Both admirals and the Attorney General testified that the action was militarily necessary.[79] Similar arguments were invoked in response to Buxton more frequently than points like Russell's concerning 'uncivilised' behaviour. Buxton's resolution did not pass, yet the debate remained on terms that did not inherently exempt the 'uncivilised' from international law.[80]

4.2 *Later Nineteenth-Century Contexts for the Growth of 'Unfailing Adhesion'*

The Kagoshima debate nonetheless pointed to growing public oversight of war and advocacy for 'unfailing' adhesion to law in Britain's extra-European conflicts. This advocacy grew even during the later nineteenth-century period when the logic of 'civilisational difference' was intensifying as a product of race science and liberal pessimism in the wake of several significant colonial rebellions.[81] A number of factors – which can only be recounted here briefly – fueled it. Growing religious and socialist movements increasingly pushed against empire or its excesses.[82] Imperial competition led to intensified monitoring of foreign empires' actions.[83] Technological change also fueled humanitarian consciousness.

Weapons became deadlier: Maxim guns could lay waste to larger armies, producing asymmetrical results.[84] Gunboats were even more powerful tools.[85] Exploding 'dum-dum' bullets similarly leveled the playing field for outnumbered European armies.[86] An 1899 poem channeled the new security that the technology helped European imperialists feel in observing that '[w]hatever happens we have got / The Maxim gun, and they have not.'[87] Arguments for reciprocity were less pressing when combat increasingly favored Europeans by default.

78 Ibid. cols. 363–364, 390–391.
79 For the Attorney General's opinion see ibid. cols. 403–404.
80 Ibid. cols. 423–424.
81 See Mantena, Karuna. *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010).
82 On these movements see Claeys, Gregory. 'The "Left" and the Critique of Empire c. 1865–1900: Three Roots of Humanitarian Foreign Policy', in *Victorian Visions of Global Order* 2007 (n. 16), 239–266, 240.
83 See infra part 3.3.
84 Chivers, Christopher John. *The Gun* (New York: Simon and Schuster, 2010), 68–106.
85 Van Hulle, *West Africa* 2020 (n. 21), 172–73.
86 See Wagner, 'Savage Warfare' 2018 (n. 14), 223–230.
87 Belloc, Hilaire. *Complete Verse* (London: Pimlico, 1991 [1954]), 184.

A growing mass media – fueled by innovations including portable cameras – also brought the realities of battle home to the public.[88] Period photography still could not capture the motion of combat – so images tended instead to depict the brutality of its aftermath.[89] In what Stephen Kern characterises as the period's folding of space-time, the telegraph also allowed metropolitan observers to read about distant conflicts not long after they unfolded, increasing the immediacy of bloody accounts.[90] States acceding to the first Geneva Convention had been responding to the increased civilian scrutiny of war that came along with recent growth of democracy and journalism.[91] With the extension of media coverage to increasingly mechanized colonial campaigns – the 1873–74 Anglo-Ashanti War, for example, the first to employ a machine gun in Africa, attracted public criticism[92] – similar forces drove movements to apply international law to those conflicts.

Finally, international law's professionalisation accelerated during this period. The press assailed Britain's lack of international legal education in 1854[93] and Parliament picked up on the need for more formal training.[94] There was a 'radical … break' between earlier decades 'and the emergence … of a new professional self-awareness and enthusiasm between 1869 and 1885'.[95] This shift increased the number of codifications and treatises produced and meant they were more responsive to current events.

New legal scholarship added heft to anti-imperial voices like that of William Scawen Blunt, who employed international law in his advocacy.[96] Yet advocates of restraint in extra-European wars, including Bennett, Buxton, Queen Victoria's chaplain J. Llewelyn Davies, and Liberal MP C. P. Scott, editor of the *Manchester Guardian*, also increasingly cited legal materials, 'vernacularising' them. As intellectual histories have shown, these treatises did not always

88 Gordon, Michelle. 'Viewing Violence in the British Empire: Images of Atrocity from the Battle of Omdurman, 1898'. *Journal of Perpetrator Research* 2(2) (2019),65–100, 67, doi: 10.21039/jpr.2.2.10.

89 Ibid. 72.

90 Kern, Stephen. *The Culture of Time and Space, 1880–1918* (Cambridge: Harvard University Press, 1983), xii.

91 Barnett, Michael. *Empire of Humanity: A History of Humanitarianism* (Ithaca: Cornell University Press, 2013), 80.

92 Van Hulle, *West Africa* 2020 (n. 21), 202–4.

93 'International Law'. *Fraser's Magazine for Town and Country* (April 1854), 479.

94 HC Debates on the Inns of Court – Legal Education, 1 March 1854, vol. 131, cols. 147–69, and the Oxford University Bill, 19 June 1854, vol. 134, cols. 339–61.

95 Koskenniemi, *Gentle Civilizer* 2004 (n. 9), 3–4.

96 Claeys, 'The Left' 2007 (n. 82), 246.

extend international law proper to non-Europeans.[97] They could also cut against arguments for restraint, as the Attorney General reminded Buxton, using interpretations of Martens.[98] Yet, following these scholars, advocates could at least argue that 'principles' should govern British behavior in colonial contexts *regardless* of colonial subjects' behaviour.

4.3 *Codifications of International Law and Early 'Human Rights'*

Public voices, therefore, used evidence from the new journalism and international legal scholarship to advocate for more consistent application of international law as a restraint on increasingly objectionable colonial activities. In 1880, for example, Davies argued in the prominent *Contemporary Review* that recent colonial conflicts had failed to adhere to Swiss jurist Johann Caspar Bluntschli's recent codification:

> [I]t is charged against our country that it has in certain instances shown a special disregard of justice and humanity in Asia and in Africa . … In a work of high authority, 'International Law Codified,' Professor Bluntschli protests against the reckless treatment to which savage races have been subjected. 'Savages are men,' he says; 'they ought to be treated with humanity, and none of the rights of men ought to be refused to them . … It can no longer be tolerated in these days that any one who pleases should fall upon savages as if they were wild beasts.' (Bluntschli, § 535).
>
> I cannot doubt that this author would condemn with severity such an act as the burning of Coomassie [modern Kumasi, Ghana] in the Ashantee war. The Germans would not have dared to set a French town on fire. But our general, after occupying the enemy's capital, deliberately set fire to it, as an act of vengeance, or to teach them a lesson . … We have heard of villages and stores of grain being similarly destroyed in Afghanistan . … The Zulu war … [involved] the destruction of a native power against which we had no real complaint except that we were alarmed by it.[99]

Like many period jurists, Bluntschli did not necessarily consider non-Europeans subjects of international law.[100] Yet his work accorded them some of the protections that he termed *Menschenrechte* ('rights of men' in Davies' translation

97 See supra part 2.

98 HC Debate on Kagoshima 1864 (n. 73), col. 404.

99 Davies, J. Llewelyn. 'International Christianity'. *Contemporary Review* (1880), 231–232, 227.

100 Bluntschli, Johann Caspar. *Das moderne Völkerrecht der civilisirten Staten* (Nördlingen: C. H. Beck, 3rd ed. 1878), e.g. 68, art. 20.

but often 'human rights' in modern German). Bluntschli argued, in ways akin to some British officials, that unrestrained war was itself 'uncivilised': '[t]he war of destruction against the godless peoples of Palestine, which the ancient Jews held to be holy, is considered barbarous in the humane legal thinking of today's world,' he wrote, 'and should no longer be vaunted as an imitable example'. Excluding non-Europeans and foregrounding reciprocity also held the law back, he believed:

> [M]odern legal thinking about savages is still weak. International law does not protect them, because we assume they do not belong to the greater family of peoples of civilized humanity, because they do not actively participate in the working of international law [themselves]. I see in this a deficiency in contemporary international law.[101]

Not unlike Bluntschli, Davies described Afghans and Zulus as 'races which can claim no rights in the forum of international law'.[102] Yet he still held up *Menschenrechte* as a minimum standard by which to judge colonial atrocities – popularizing the scholar's concept as an 'unfailing' protection for the colonised.

Reciprocity and necessity should not come into consideration, Davies believed. It was 'better that we should perish in serving mankind than save ourselves by hardening our hearts against our fellow-men'.[103] Such sentiment was, nonetheless, wrapped in Davies' religiosity and belief in a more 'humane' version of the colonial project. 'What sort of teaching is it that we Christians thus give to the heathen?' he asked, of colonial abuses.[104] This, again, was a form of the formula invoked by officials. Yet Davies also invoked 'progress' as a rationale reaching beyond 'civilisation'. 'Unfailing' protection ought to be pursued, he suggested, for its own sake.

Other period movements embraced a similar use of lesser legal or quasi-legal standards against colonial abuses – a context in which Davies' arguments might be well received. An official justification for the 1884–1885 Berlin Conference associated with the partition of Africa was suppression of slavery; the conference's General Act contained a clause against abusive treatment.[105]

101 Ibid. 299–300, art. 535 (mislabeled as art. 533), 299–300.

102 Davies, 'International Christianity' 1880 (n. 99), 227.

103 Ibid. 224.

104 Ibid. 227.

105 The General Act of the Berlin Conference on West Africa, 26 February 1885, 165 CTS 485, art. 6, required parties 'watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being'.

Some scholars argue that these rules were meaningless, or a fig leaf for conquest.[106] Their significance here lies, however, in how activists against colonial exploitation rallied around them.[107] The Congo Reform Association, for example, lobbied the British government to pressure Belgium's King Leopold to uphold the General Act in his African colony – eventually succeeding.[108] The group 'did not treat human rights as contingent upon civilized development or dutiful recognition by Europeans'. To them, '[t]hese rights were intrinsic'.[109] Minimum standards also, increasingly, extended to South Asian indentured laborers.[110] This wave could be considered a rearticulation of abolitionism or ideas of 'trusteeship' that had long anchored a liberal conception of empire.[111] Now, however, activists employed new legal texts, and drew on an expanding media.

As the growth of formal empire drew colonial boundaries and entanglements closer together, interimperial competition also led state actors to monitor one another on the basis of minimum standards. In 1892, France's ambassador in London, William Waddington, protested 'massacres' of Catholics that accompanied the British East Africa Company's conquest of Uganda, a site of French missionary activity. His arguments echoed activist humanitarians' in invoking, if not formal code, then 'principles of international law' derived from the Berlin Conference General Act and the 1874 Act of the Brussels Conference on the laws of war. 'I know that it has never entered into the thoughts of Her Majesty's Government to evade from the[se] obligations', he wrote. Britain answered that it could only apply the standards 'in the largest *possible* manner'.[112] But clearer sources of authority gave Waddington a more forceful platform and Britain less room for flexibility.

106 For a summary of these perspectives see Craven, Matthew. 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade'. *London Review of International Law* 3(1) (2015), 31–59, 32–34, doi: 10.1093/lril/lrv002.

107 See generally Grant, Kevin. *A Civilised Savagery: Britain and the New Slaveries in Africa, 1884–1926* (Abingdon: Routledge, 2005).

108 See Grant, Kevin. 'The British Empire, International Government, and Human Rights'. *History Compass* 11(8) (2013), 573–583, 574, doi: 10.1111/hic3.12069.

109 Ibid.

110 See ibid.; Sturman, Rachel. 'Indian Indentured Labor and the History of International Rights Regimes'. *American Historical Review* 119(5) (2014), 1439–1465, doi: 10.1093/ahr/119.5.1439.

111 See Porter, Andrew. 'Trusteeship, Anti-Slavery, and Humanitarianism', in *The Oxford History of the British Empire*, vol. III, ed. Andrew Porter (Oxford: Oxford University Press, 1999), 198–221.

112 M. Waddington to Earl of Rosebery (30 August 1892) in 'Africa. No. 1 (1893). Further Papers Relating to Uganda', PP C6847 (1893–1894), 22.

Interimperial monitoring was not, however, restricted to minimum standards. In 1889, Foreign Secretary Salisbury noted that German commanders had sworn that they would only suppress East Africa's Abushiri revolt – which threatened nearby British Indian subjects trading in Zanzibar – using means within international law.[113] This assurance may have only reflected Germany's particular understanding of such law.[114] Yet the need to report such observance reflected both its significance and utility for British officials as a standard applying to extra-European colonies as much as Europe.

5 The Omdurman Debate

Omdurman provided a serious challenge for advocacy of 'unfailing adhesion' to the laws of war. Mahdists were hardly known for restraint in warfare; contemporaries viewed their form of *jihad* as well outside legal norms.[115] When their army entered Khartoum in 1885, it slaughtered ranking General Charles Gordon and around 10,000 civilians.[116] Mahdist rule also imposed a political Islam that many Britons viewed as a regressive threat to their empire; Gordon had claimed that, left unchecked, Mahdism would spark a pan-Islamic revolt.[117] The expedition to crush it was, consequently, a popular, emotionally-charged effort deemed necessary to recover Sudan, ensure imperial survival, and exact revenge for Gordon's demise.[118]

Yet the factors encouraging 'unfailing adhesion' were also in place by the time of the battle. Omdurman was a wildly asymmetrical fight. Arguments that Mahdists' lack of reciprocity made limits on British conduct dangerous had to confront Britain's lethal wielding of Maxims loaded with exploding bullets.[119] Victory was decisive despite Mahdist troops outnumbering Britain's by 14–30,000.[120] 11,000 Madhists were killed and 16,000 wounded; fewer than

113 The Marquess of Salisbury to Mr. Beauclerc (9 Mar. 1889) in 'Africa. No. 1 (1889). Further Correspondence Respecting Germany and Zanzibar,' PP C5822 (1889), 53.

114 See Hull, *Absolute Destruction* 2005 (n. 22).

115 Alexandrowicz, *Law of Nations* 2017 (n. 7), 300.

116 Pakenham, Thomas. *The Scramble for Africa, 1876–1912* (New York: Random House, 1991), 272.

117 Baker, Samuel White and Charles George Gordon. 'The Egyptian Crisis'. *The Times* (14 January 1884), 10.

118 Gordon, 'Viewing Violence' 2019 (n. 88), 69.

119 On the exploding bullets see Wagner, 'Savage Warfare' 2018 (n. 14), 228.

120 Figures for pro-British forces: Featherstone, Donald. *Omdurman 1898: Kitchener's Victory in Sudan* (Oxford: Osprey, 1993), 61; for Mahdists: Clark, Peter. 'The Battle of Omdurman'. *Army Quarterly and Defence Journal* 107(3) (1977), 320–334, 320–324.

fifty British and allied fighters died.[121] British soldiers even pitied their Mahdist victims.[122] 'The dervish [Mahdist] army has been killed out as hardly an army has been killed out in the history of war', one observer put it.[123] Another called Omdurman one of the safest battles ever fought'.[124]

The campaign also received all forms of available media coverage. Thirty journalists accompanied British commander Horatio Kitchener's army, including artists and photographers. Three claimed to have filmed the battle.[125] Representations – including special newspaper issues, panorama paintings, a wax display at Madame Tussaud's, and circus reenactments – remained effusive even after correspondents returned and could pen uncensored accounts.[126] Yet the number of journalists present also meant that they hardly all spoke with one voice.

Finally, the British public had become more primed to hear international legal arguments. Bennett's account opened by framing application of the *laws* of war to colonial conflicts as possible, yet unsettled by jurists. 'One would have supposed', he wrote, 'that some attempt would have been made to indicate the relations which exist between civilised and uncivilised nations in a state of war. But as a matter of fact the question of how far or with what modifications European public law can be applied to the case of semi-barbarous peoples has attracted little attention'. Minimum standards therefore appeared more reasonable. While the Geneva Convention's 'rules' might not be applied to Mahdists – they were 'uncivilized', and not reciprocal signatories – 'every international lawyer would admit,' Bennett wrote, that Geneva 'principles' applied everywhere.[127] Such principles could not permit poor treatment after battle. 'To assert that because Dervishes or Zulus never signed the Geneva Convention … we are at liberty to pillage their villages after surrender or kill their unarmed wounded', Bennett concluded, 'is simply monstrous'.[128]

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121 Kiernan, Victor Gordon. *European Empires from Conquest to Collapse: 1815–1960* (Leicester: Leicester University Press, 1982), 80.

122 Martin, Ernest J., ed. 'The Lincolnshires at Omdurman, September 1898 Diary of Lieutenant Hamilton Hodgson'. *Journal of the Society for Army Historical Research* 21(82) (1942), 70–82.

123 Steevens, George Warrington. *With Kitchener to Khartum* (Edinburgh: Blackwood, 1898), 285.

124 Meredith, John, ed. *Omdurman Diaries, 1898: Eyewitness Accounts of the Legendary Campaign* (South Yorkshire: Leo Cooper, 1998), 189.

125 Bottomore, Stephen. *Filming, Faking and Propaganda: The Origins of the War Film, 1897–1902* (Utrecht University, PhD Dissertation 2007), chapters 4–6.

126 Ibid. 18.

127 Bennett, 'After Omdurman' 1899 (n. 1) 18.

128 Ibid. 19.

Yet he also strongly hinted that international law should apply *as* law. Although Mahdists were 'uncivilised', Bennett wrote, they still 'satisfied all the requirements for recognition as an armed force,' implicitly comparing them with regular European armies which unquestionably enjoyed legal protections, unlike less organized rebel groups.[129] More tellingly, he dismissed the argument of one 'Lieutenant Winston Churchill', who claimed that 'the laws of war do not admit the right of a beaten enemy to quarter'. 'It is almost superfluous to quote authorities against this monstrous assertion', Bennett replied – yet excerpted a treatise contradicting Churchill's claim in response.[130] In doing so, he implied that the laws of war – not just principles – applied in a colonial conflict.

Bennett, finally, systematically analysed each article of the Geneva Convention and other instruments in relation to all behaviour the aftermath of the battle – including 'pillaging food from local peasants by British soldiers, the looting of [the city of] Omdurman, the slaying of women, the bombardment of [Mahdist leader] the Mahdi's tomb and the contemptuous treatment of the Mahdi's bones'[131] – arguing that each illustrated a violation. Even if not an explicit call to apply the Convention as law, Bennett's direct citation and analysis left little room between minimum standards and such a call.

Even if Bennett meant only to present an argument for minimum standards, reception of his reporting hardly stayed so nuanced. Discussion in the British Empire *became* about applying international law to colonial war. In light of Bennett's revelations, for example, a New Zealand newspaper called for 'a *definite code* of international law which will put a stop to atrocities that injure the cause of both civilisation and Christianity in the eyes of the barbarous and semi-barbarous and pagan nations'.[132] It also deemed Churchill's claim that international law was inapplicable an 'astonishing' defence of 'barbarities which must for ever prevent British subjects … looking at the facts of the battle of Omdurman squarely in the face without feeling ashamed'.[133]

By staking out a position seemingly in favour of applying international law, moreover, Bennett's arguments pushed opponents of doing so to embrace at least minimum standards as an alternative. Bennet Burleigh – the *Daily Telegraph*'s correspondent at Omdurman – inveighed in his book on the

129 Ibid. 26–27.

130 Ibid. 23.

131 Cecil, Hugh. 'British Correspondents and the Sudan Campaign of 1896–8', in *Sudan: The Reconquest Reappraised*, ed. Edward M. Spiers (Abingdon: Frank Cass, 2013 [1998]), 102–127, 121.

132 'It Was a Famous Victory'. *New Zealand Tablet* (16 February 1899), 17 (emphasis added).

133 Ibid.

battle that 'Mr Bennett's allegations [were] untrue, stupid, and wantonly mischievous'. Burleigh at first appealed to the Mahdists' behaviour: it was not that international law was *necessarily* inapplicable to them. Their misdeeds, instead, excluded them from protection:

> Cheap maudlin sentiment may profess a pity for those 'dervish homes ruined' by the successes of British arms[, yet Mahdists] made honest profession that their mission was to destroy other people's . … For unredeemed devilishness, the dervishes have had no equals … the Mahdists made it a constant practice to ruthlessly slaughter all prisoners in battle, wounded or unwounded; to enslave, torture, or murder their enemies, active or passive; to loot and to burn; to slay children and debauch women. To set up a pretext that such monsters are entitled to the grace and consideration of the most humane laws, is to beggar commonsense and yap intolerable humbug.[134]

Still, Burleigh pled that minimum standards *were* applied: 'Mr Bennett to the contrary notwithstanding', he continued, 'the dervishes were treated as men, and not as wild beasts'.[135] In this, he acknowledged the value of Bluntschli's formula: that 'savages' ought to be dealt with as 'men'.

The Omdurman debate did not play out solely among journalists. Kitchener 'was obliged' to write to Queen Victoria explaining his actions.[136] Scott promoted Bennett's article, hoping it would breed scandal in the Tory government. Yet neither Scott nor Bennett was initially successful in pressing most of their claims. Ironically, they were vindicated by Churchill, whose book *The River War* eventually acknowledged that wounded Mahdists were killed – and was a widely accepted account.[137] Churchill's work was, however, not published until later that year.

The only argument on which Scott was able to capitalise before then concerned the lack of care given to wounded Mahdists. He raised it in Parliament, asking

> how it came to pass that organised assistance was not rendered by [Kitchener's] Army to the wounded on the battlefield; and whether [the

134 'Postscript' (February 1899), in Burleigh, Bennet, *Khartoum Campaign 1898, Or the Re-Conquest of the Soudan* (London: Chapman & Hall, 1899), 335, 339–40.

135 Ibid.

136 Gordon, 'Viewing Violence' 2019 (n. 88), 68.

137 Cecil, 'British Correspondents' 1998 (n. 131), 121–22.

> government] regards Article VI. of the Geneva Convention of 1864, which provides that wounded or sick soldiers shall be brought in and cared for to whatever nation they belong, as binding in all cases, or as applicable only in the case of civilised enemies?[138]

Scott made no qualification as to whether he meant lesser, nonlegal 'principles'. William Brodrick, Under-Secretary of State for Foreign Affairs, may have been too preoccupied parrying the factual assertions of the question to consider the legal implications of his answer, that

> Her Majesty's Government are confident that all possible assistance was given to the wounded dervishes out of the resources at [Kitchener's] command … staff available for the purpose was, however, limited, and it is clearly impossible … to guarantee that wounded men, who probably hid themselves to the best of their ability, shall not for a time escape notice . … *The Article of the Geneva Convention which is referred to is no doubt applicable in all cases so far as it can possibly be carried out.*[139]

Did 'as far as it can possibly be carried out' mean that there was more flexibility with regard to the application of the Convention to non-Europeans? 'Civilisation' played no role in Brodrick's answer, despite being raised by Scott. Brodrick concentrated, instead, on the lack of resources. A government investigation the next month concerning Bennett's allegations focused on the same.[140]

6 Conclusion

Later that year, delegates from around the world gathered to discuss the laws of war in The Hague. Most favoured outlawing exploding 'dum-dum' bullets, but Britain's sought to permit their use against 'savages'.[141] The previous year,

138 HC Debate on the Treatment of the Wounded at Omdurman, 17 February 1899, vol. 66, col. 1279.

139 Ibid. col. 1281 (emphasis added).

140 See 'Egypt. No. 1 (1899). Despatches from Her Majesty's agent and Consul-General in Egypt Respecting the Conduct of the British and Egyptian Troops after the Battle of Omdurman', PP C9133 (1899).

141 See 'Inclosure in No. 37. Conférence Internationale de la Paix. Première Commission. Rapport présenté au nom de la première sous-commission par le Général Den Beer Poortugael' in 'Miscellaneous. No. 1 (1899). Correspondence Respecting the Peace Conference held at The Hague in 1899', PP C9534 (1899), 64.

the British government had argued that such bullets were necessary to fight the Mahdi.[142] Irish MPs' concerns had led the government to justify their use under the 1868 St. Petersburg Declaration.[143] Yet the Hague proposal made such apologetics impossible. Did Britain's previous concern for international law in colonial combat inform its desire to exempt 'savages' from it? Or was Britain laying the groundwork for a lower *universal* standard, as some have suggested?[144] Understanding the extent to which Britain was previously concerned with international law in colonial conflicts provides new perspectives on this decision, lending support for both possibilities. In any case, Britain eventually acquiesced, at least formally acceding to another international legal standard with respect to treatment of non-Europeans.[145]

Yet Britain also continued engaging in acts of colonial violence, raising objections regarding its treatment of even European civilians during the Boer War.[146] Questions about how and to whom the laws of war apply have not gone away. British imperial officials, scholars have suggested, would have found many of the controversies of the recent War on Terror familiar.[147] Questions about the applicability of international law and its interpretation stalked both. After Omdurman, 'hundreds of [Mahdists] died' in rough Egyptian jails.[148] In 2002, Amir Yagoub, a Mahdist leader's great-grandson, was rendered from Pakistan to Guantanamo Bay, where inmates remain in conditions that have been decried despite the development of new protections for prisoners.[149] In 2009, an American drone killed Pakistani Taliban leader Baitulluh Mehsud, despite CIA operatives reportedly seeing him 'receiv[e] an intravenous transfusion'. Echoing arguments about maimed Mahdists, one scholar contended that the strike violated 'the very first Geneva Convention of 1864' by 'targeting of the sick and wounded'.[150]

142 Spiers, Edward M. 'The Use of the Dum Dum Bullet in Colonial Warfare'. *Journal of Imperial and Commonwealth History* 4(1) (1975), 3–14, 6, doi: 10.1080/03086537508582445.

143 Ibid. 5.

144 Bennett et al., 'Mars and Clio' 2019 (n. 20), 274–275.

145 Wagner, 'Bullets' 2019 (n. 13), 281–283.

146 Scheipers, *Unlawful Combatants* 2015 (n. 22), 162–163.

147 See, e.g., Mégret, Frédéric. 'From "Savages" to "Unlawful Combatants": A Post-Colonial Look at International Humanitarian Law's "Other"', in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006), 265–317, 298–317.

148 Featherstone, *Omdurman* 1993 (n. 120), 90.

149 See Smith, Clive Stafford. 'The Circle of Rendition'. *The New Statesman* (23 April 2007), available at: http://www.newstatesman.com/human-rights/2007/04/held-sudan-british-guantanamo (last accessed on 27 October 2022).

150 O'Connell, Mary Ellen. 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', Notre Dame Law School Legal Research Paper No. 09–43 (2010).

Despite further developments in the law of armed conflict, it is worth asking how much more effective legal protections have become. Minimum standards of 'humane treatment', such as those noted in the Geneva Conventions' Common Article 3, remain essential protections,[151] while the Obama administration governed drone misuse with mere 'guidelines' permitting 'flexibility, given … fluid threats'.[152] Still, the way lesser protections for 'uncivilised' combatants helped supply a basis for more concrete legal claims may provide a model for making restraints more uniform and binding in the future. 'Soft law' – such as codes of conduct or pronouncements of principles – can ease the acceptance of harder commitments.[153] Yet, as in the Victorian period, improved treatment will depend on heightened public attention to those standards.

Such efforts have, however, faced critique from scholars such as Samuel Moyn for making conflict itself more palatable.[154] Nineteenth-century imperial history indicates that there is also a potential precedent for Moyn's claims. Like earlier scholars, Moyn sees colonial war as having been ignored by nineteenth-century movements to humanise armed conflict.[155] Yet as this article shows, calls to humanise colonial warfare did exist. Proponents of this humanisation, moreover, did not always criticise the pursuit of those wars or empire itself. In this, their critiques may have paralleled attempts to address 'scandals of empire', in which reform of specific aspects of colonial rule bolstered the image and justification of the broader colonial project.[156] This was not only true of officials' claims that upholding law would demonstrate the value of the 'civilising mission'. Humanitarian demands that the British Empire assert itself lawfully *regardless* of an opponent's nature or conduct could render domination even more seemingly ethical. As much as history suggests means to advocate for humanising war, therefore, it also raises questions as to why such advocacy was not necessarily accompanied by calls to stop such conflicts, and whether a focus on humanisation helped colonial warfare – and empire – persist.

151 See, e.g., *Hamdan v. Rumsfeld*, 548 US 557 (2006).

152 Pace, Julie. 'Obama's Drone Rules Leave Unanswered Questions'. Associated Press (25 May 2013), available at: http://news.yahoo.com/obamas-drone-rules-leave-unanswered-questions-200203154.html (last accessed on 27 October 2022).

153 See Abbott, Kenneth and Snidal, Duncan. 'Hard and Soft Law in International Governance'. *International Organization* 54(3) (2000), 421–456, 434–436, doi: 10.1162/002081800551280.

154 See Moyn, Samuel. *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Strauss, & Giroux, 2021).

155 Ibid. 91–97.

156 See Dirks, Nicholas. *The Scandal of Empire: India and the Creation of Imperial Britain* (Cambridge: Harvard University Press, 2006).

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