of international law, while at the same time wanting the region to be understood as part of the community of civilized nations, and wanting themselves to be recognized as legitimate publicists by their European counterparts. In addition, international law served as a political source with which to legitimate modernizing discourses and practices in the region and in their newly created states.

Anne Orfènded,

*International Law and Its Others*


From ‘savages’ to ‘unlawful combatants’: a postcolonial look at international humanitarian law’s ‘other’

FRÉDÉRIC MÉGRE*  

Je crois que le droit de la guerre nous autorise à ravager le pays et que nous devons le faire soit en détruisant les moissons à l’époque de la récolte, soit dans tous les temps en faisant de ces incursions rapides qu’on nomme razzias et qui ont pour objectifs de s’emparer des hommes ou des troupeaux... J’ai souvent entendu en France des hommes que je respecte mais que je n’approuve pas trouver mauvais qu’on brûlât les moissons, qu’on vidât les silos et enfin qu’on s’emparât des hommes sans armes, des femmes et des enfants. Ce sont là, suivant moi, des nécessités fâcheuses, mais auxquelles tout peuple qui se voudra faire la guerre aux Arabes sera obligé de se soumettre.¹

If the goal of the laws of war is to protect all individuals in armed conflict, can one ever be on the ‘wrong’ side of the laws of war? The answer to that question from many international humanitarian lawyers is an emphatic ‘no’. The laws of war protect all; one is always protected under some guise or other. One can never, properly speaking, be considered ‘outside’ the laws of war. International humanitarian law (as the laws of war are interchangeably known) would strongly deny that it had an ‘other’, or that there is anyone that could not be brought within its protective, hyper-inclusive mantle – and one might well be tempted to take it at its word.

This vision of the laws of war, in turn, conditions a certain reading of international humanitarian law and its violations. If the law is all-inclusive, then any exclusion from its ambit can only be interpreted as a

¹ I would like to acknowledge the invaluable research assistance of Emmanuel Bagenda and thank Karen Knop, Antony Anghie and Anne Orford for very insightful and encouraging comments on earlier versions of this chapter. Florian Hoffmann helped me with the material in German, Luisa Vierucci with the sources in Italian and Berdal Aral indicated relevant material dealing with the Ottoman Empire. Vincent-Joël Proulx did a great job of locating some obscure sources for me. All translations from the French are my own.

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violation thereof, typically as an exercise of violence or power that crosses the boundaries set for it by the law. A good example of this type of reasoning is the various reactions to the fate of those apparently excluded from the protection of the laws of war in the context of the so-called ‘war against terror’. The dominant vision of the fate of the prisoners at Guantánamo, for example, is typically that their exclusion from prisoner of war status is a straightforward violation of the laws of war, a manifestation of an unacceptable and dangerous unilateralism in the face of international law’s otherwise clear instructions.

But what if the laws of war had a more complex relationship with violence than this simple image suggests? What if the laws of war were simultaneously inclusive and exclusive? What if the laws of war were and had always been in some special sense begging to exclude so that many perceived exclusions were in fact very much willed by the laws themselves?

This chapter, the first sketch in a larger effort to develop a comprehensive critical theory of the laws of war, seeks to lay the groundwork for a study of international humanitarian law’s exclusions. What I want to explore is the possibility that exclusions from the protection of the laws of war might in fact be very much legitimized by some of the founding ambiguities of the laws of war themselves. It may be true, for example, that international humanitarian law has a status for everyone (the combatant and the non-combatant; the fighting and the surrendering; the warrior and the civilian) so that no one is ever entirely without protection. But every protection under the laws of war, every status, might also be gained by denial of an ‘other’, so that the law is both inclusive and exclusive. Specifically, I want to show that international humanitarian law has always had an ‘other’ – an ‘other’ that is both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be.1

2 For a number of reasons, there has been scant critical work on the laws of war. Among the few examples is Chris af Jochnick and Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35 Harvard International Law Journal 49; see also ‘The Legitimation of Violence: A Critical Analysis of the Gulf War’ (1994) 35 Harvard International Law Journal 387. Apart from the fact that this critique would need to be updated, it pursues a very different line of argument from the one explored here. It is aimed at the idea that the laws of war have tended to regulate areas of warfare (particularly weapons) only by the time they cease to be meaningful for key international players. Al Jochnick and Normand, in other words, are interested in methodologies of legitimation of warfare, but not specifically interested in identifying the ‘other’ of the laws of war – the goal pursued in this chapter.

3 In this respect, I very much share Antony Anghie’s concern ‘with understanding the strategies by which international law rewrites its history, in different phases, and, in particular, how it seeks to suppress the colonial foundations of the discipline’: Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 Harvard International Law Journal 1 at 8; Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, 2005).

International humanitarian law has, of course, many potential ‘others’, and it is not my goal, by focusing on one, to deny the existence of other ‘others’. The ‘other’ of international humanitarian law is every individual, concrete or imagined, every state of affairs that the laws of war aim to keep at bay.4 However, the existence of the ‘constitutive other’ that I am about to introduce is peculiar in that I believe it was central to the emergence of the laws of war. This ‘other’ is none other than the colonial ‘other’. My hypothesis here, borrowing from the work of Antony Anghie and applying it to the specific matter at hand, will be that this colonial ‘other’ was not simply an epiphenomenal problem faced by already extant positive laws of war, but in fact very much part of the constitution of such laws – an ‘other’ at times barely mentioned, sometimes indirectly so, but which haunts the very beginnings and evolution of the laws of war. It is their dark alter ego, the ‘uncivilized’, ‘barbarian’, ‘savage’ from which the laws seek to distance themselves.5 Only a focus on this ‘constitutive other’ allows us to uncover the origins of the continuing reliance by the laws of war on patterns of exclusion.

In order to demonstrate this hypothesis, I propose to do seven things. First, I want to explore the genesis of the laws of war in Europe6 in

4 In this respect, women are also an obvious ‘other’ of the laws of war. Much feminist scholarship has been devoted to the issue of uncovering gender biases in international humanitarian law: see for example Judith Gardam, ‘A Feminist Analysis of Certain Aspects of International Humanitarian Law’ (1992) 12 Australian Year Book of International Law 265. However, women and gender issues were largely absent from the foundational debates of the laws of war in a way that the colonial ‘other’ was not.

5 In this essay I will use in quotation marks the terms used by international lawyers themselves at various periods to describe the colonial ‘other’. The terms ‘savages’, ‘barbarians’ and ‘uncivilized’ were part of the ordinary discourse of many of those participating in the humanitarian debate in the late nineteenth and twentieth century. They were used largely interchangeably and without much conceptual finesse, except perhaps that ‘savage’ was used more often in connection with tribes and Africa, while ‘barbarian’ pointed towards the East (but a ‘barbarian’ could be ‘savage’ and vice versa).

6 This chapter will begin by focusing on Europe because, despite the presence of a few non-European states at the Hague Conferences, these were by and large dominated by European states. It was these states, moreover, that were primarily involved in the colonizing process. By ‘Europe’ I mean less a geographical entity than a certain cultural and ideological ensemble. Later in the chapter, when I explore post-Second World War developments, I switch to using ‘the West’, since by then the laws of war had become a more distinctly global affair, and the role played by Europe in earlier times had moved beyond its confines to include the US, for example. I use ‘the West’ in opposition to ‘the South’ more than in opposition to ‘the East’, aware that this is not an ideally precise term, but confident that it is an acceptable usage.
the late nineteenth and early twentieth century to show how the laws of war, from their inception, were subtly designed to exclude non-European peoples from their protection. Secondly, I will highlight how that exclusion was justified and point to a specific 'anthropology of savagery' as the basis for considering 'uncivilized' peoples unworthy of the protection of the laws of war. Thirdly, I want to tell the conventional narrative of international humanitarian law since the Second World War, namely that, regardless of this 'original sin', it has shed its more racist overtones in favour of universal inclusion. Fourthly, I want to show how the 'war against terrorism', by using exactly the same arguments that were previously used to exclude 'savages', reveals the persistence, despite this shift, of profoundly exclusionary strands in the laws of war. Fifthly, I want to reflect on the significance of this 'return of the savage' and make the case that it is less a violation of the law, than a perspective based on a complex – but not indefensible – play with some of the law's own ambiguities. Sixthly, I try to offer an interpretation of how the laws of war can be both inclusive and exclusive in a way that may at first sight seem contradictory. Seventhly, in view of this, I seek to advance a theory of the impact of the laws of war as essentially a project of Western ideological expansion. In the conclusion, I reflect more normatively on how we should think about these developments critically.

Throughout this chapter, I seek to draw on insights from postcolonial theory, particularly as it impacts upon and draws on analysis of the law generally, and international law in particular. I am interested in the way postcolonial theory can emphasize the permanence and continuity, beyond formal decolonization, of patterns of colonial domination and power through the production of knowledge and the cultural constitution of 'otherness'. I am interested, in other words, in the way the colonial

There is a past that international humanitarian law would rather forget, but which is coming back to haunt it. This is a past that bears the shameful mark of racism and colonialism. It is a past that hardly ever gets more than a passing reference in the literature, probably because it is viewed as having largely transcended, but also partly because it does not fit the overwhelmingly progressist narrative of international humanitarian law. Although the above description may overstate the case, there is no doubt that this is a past that is very real – and maybe even very present.

It is a fact hardly ever stressed that the emergence of modern international humanitarian law coincided with the apotheosis of perhaps the most outrageous and voracious colonizing spree in world history since the conquista. The same year (1876) that the International Committee for the Relief of Military Wounded took the name by which it has been known ever since (the International Committee of the Red Cross), for example, King Leopold II of Belgium, the soon-to-be tormentor of the Congo, convened a conference in Brussels that is widely seen as the opening salvo of the 'Scramble for Africa'. The Hague Conventions, the first attempt at a comprehensive codification of the laws and usages of war, were adopted
in 1899, towards the end of a twenty-year period that saw the African continent pass from being largely self-governed to being almost entirely under the domination of European powers. Just as Europe was trying to grapple with the problem of violence in war, it seems, it was unleashing unprecedented violence outside its borders. Do the two phenomena coincide fortuitously or might they be related in some way?

The move to codify the laws of war was certainly not triggered by colonial wars. It was the Battle of Solferino, a very European battle, that prompted Henry Dunant to write the famous *souvenir* that led to the first attempts at organizing services for the wounded in war. The wars that all delegates had in mind at the Hague Conference were the Franco-Prussian and Crimean conflicts. These were the wars that had demonstrated that 'as between disciplined troops the nations of Europe had practically reached an accord as to the maximum of severity with which warfare could be carried on' — a consensus that now had to be ratified into law. The laws of war were, originally and superficially at least, part of a purely European story.

At the same time, there does seem to be something to the simultaneous proclamation of grand but abstract humanitarian principles and the sowing of devastation on the African continent — something like the well-rehearsed hypocrisy of a European-centric universalism that coexisted happily with, and was oblivious to, profound exclusions in the international system.

The question of the position of non-European peoples in relation to the laws of war is, in truth, one that arose historically over only a small period of time during the second half of the nineteenth century (and only episodically after that), in situations in which savage peoples could still be considered to be relatively autonomous. By the time the land-grabbing process was completed, colonizing powers would often successfully claim that they were merely maintaining order in territory effectively under their control (whether they exercised formal sovereignty or not). Thus the issue of the treatment of non-European peoples became confined to international law's darker recesses. Colonialism effectively defined the 'geography' of international law — a phenomenon brilliantly described by Nathaniel Berman. The question became one of law maintenance rather than actual armed conflict, and 'pacification' the euphemism under which massacres could be carried out with impunity. As late as 1945, while delegates assembled at Dumbarton Oaks in the wake of German capitulation to adopt the Charter of the United Nations, the French massacred tens of thousands of Algerians at Sétif under the pretence of 'maintaining order': for many, the Nuremberg trial, which was heralded as a turning point in the enforcement of the laws of war, would distinctly fail to introduce a new era.

During the relatively short interval of conquest, however, this was a question which, although not at the forefront of debates on the laws of war, could be said to constitute the implicit background against which these debates were carried out. It is to these founding moments that we must turn, for they disclose the original face of international humanitarian law, at a time when its implicit ideology was at its crudest, unmitigated by subsequent reformulations. Moreover, it is these founding moments that continue to inform and shape the constitution of international humanitarian law well into the twentieth century and possibly beyond.

It is not absolutely clear in this context, at least initially, whether the exclusion of 'non-civilized' peoples from the laws of war was something that happened despite or thanks to international humanitarian law, and the practice of states in this respect is ambiguous. For example, there are several episodes suggesting that states felt that certain humanitarian conventions would apply to colonial wars, if no specific indication of reservation to the contrary was made. The British, for example, refused to sign the 1899 declaration prohibiting expanding bullets on the ground that these were necessary against African and Asian tribes. As late as 1932, the British Government submitted a Draft to the General Commission of the Disarmament Conference which introduced an exception to the general prohibition that had been anticipated so far for police purposes in certain

12 The Battle of Solferino was fought on 21 June 1859 between the French and Sardinian armies on one side, and the Austrian army on the other. Involving 200,000 soldiers, it was the largest battle since the battle of Leipzig in 1813, and could be said to foreshadow some of the great military clashes to come. The battle was part of the struggle to unify Italy, long divided between France, Austria, Spain and the Papal States.


14 J. B. Atlay, 'Legitimate and Illegitimate Modes of Warfare' (1905) 6 Journal of the Society of Comparative Legislation 10 at 12.


16 This is quite clear in Quincy Wright's treatment of the issue following the bombing of Damascus by the French. The French clearly thought that the 'disorders' justified France in enforcing 'police measures outside of international law': Quincy Wright, 'The Bombardment of Damascus' (1926) 20 American Journal of International Law 263 at 265.


18 See Alex Ogston, 'Continental Criticism of English Rifle Bullets' (1899:1) British Medical Journal 752.
outlying regions’ — by which the British obviously meant the more turbulent outposts of the Empire. These declarations suggest *a contrario* that the laws of war would otherwise have been applicable. However, it may simply have been that the British were being over-cautious lawyers. There is also plenty of evidence that such reservations were in fact made easy by international humanitarian law itself, as a law that was remarkably ambiguous about its own application to ‘non-civilized’ peoples.

**The early international humanitarian lawyer as colonialist**

The laws of war, as an unmistakable product of late-nineteenth-century philanthropic reformism, were above all the brainchild of a few visionaries on a deliberate course to remedy what were perceived as some of the international system’s worst tendencies. It thus bears mentioning, to begin with, that the great ‘humanitarian’ lawyers of the second half of the nineteenth century were also very much *men of their time*. They may not have been the worst of their time — in fact they were probably quite generous, forward-looking individuals, imbued with a spirit of historical optimism. But they were certainly no better in that they would have taken as axiomatic such things as Europe’s civilizing mission and a more or less articulated discourse on the inequality of races.

There is perhaps no figure in the international humanitarian movement as ‘sacred’ as Henry Dunant. Yet it is often forgotten that Dunant, in his early years, was himself a colonialist and a colonizer, leading Jacques Pous to speak of his ‘rapport souvent ambigu et parfois obscur avec la réalité coloniale’. Dunant was involved in countless business endeavours in Algeria, exploiting at various times mills, mines and forests. His project for a Société Internationale Universelle pour la Rénovation de l’Orient, which he described as ‘une nouvelle croisade par la civilisation’, included the establishment of commercial *compaoros* in Constantinople, the construction of a harbour in Jaffa and a railway to Jerusalem. Indeed, when he encountered the wounded and dying on the Solferino battlefield, Henry Dunant was, according to at least some accounts, on his way to try to meet Emperor Napoleon III with a view to obtaining concessions in Algeria. International humanitarian law as a footnote to colonial business as usual: it is hard to think of more paradoxical auspices for the birth of the contemporary laws of war.

Nor was Henry Dunant an isolated instance. In fact, the overlap of the international philanthropist and the colonialist could almost be said to be part of a tradition. Gustave Moynier, for example, a Belgian jurist and humanitarian grandee who went on to represent the ICRC in the Hague, had previously excelled himself in promoting various schemes for the Congo before the Institut de droit international. But, perhaps most interestingly, Friedrich von Martens, a Russian diplomat, participant in the 1899 Hague Conference and Nobel Prize winner, reveals the profoundly dual nature of nineteenth-century humanitarianism. International humanitarian law scholarship has made much of the famous ‘Martens clause’ — a classic of abstract universalist-naturalism — and idolized the man himself as a ‘humanist of modern times’. That same scholarship, however, seems entirely oblivious to the fact that de Martens, a Professor at none other than the Imperial School of Law of the University of St Petersburg, was profoundly marked by the paternalistic and racist prejudices of his time, and an unashamed apologist for colonization. In a rarely quoted 1879 article published in the *Revue de droit international*, for example, we find de Martens arguing in favour of Britain and Russia ‘convincing themselves that the characteristic trait of civilization’ is the ‘spirit of cooperation’ in the pursuit of the ‘noble goal’ of their ‘domination of Asian people’. As de Martens puts it:

24 According to the Martens clause:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the provisions of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.


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The paradoxical nature of colonialism accounts for the fact that there was undeniably a long and respectable tradition of humanitarians arguing for the application of the laws of war to all, including in the context of colonial warfare. The humanitarian impulse must at times have seemed unstoppable and even revolutionary, so that, under the patronage of its most enlightened proponents, it was from the start awkward to try and reconcile its aspiring universalism with conscious efforts to carve out exceptions. Henry Dunant, in his later years, largely overturned his initial pro-colonization stance and condemned the way war had been waged against some non-European nations, specifically regretting the asphyxiating by smoke of Arab troops by Maréchal Pelissier in 1845. Quincy Wright, of the Board of Editors of the American Journal of International Law, wrote an article criticizing French violations of the laws of war in Syria. At the 1899 Hague Conference, Mr Raffalovich explained ‘that the ideas expressed by Sir John Ardagh [defending the use of dum-dum bullets in colonial contexts] are contrary to the humanitarian spirit which rules this end of the nineteenth century’ and that ‘it is imperative to make a distinction between a savage and a civilized enemy; both are men who deserve the same treatment.’ Colonel Gilinsky similarly stated ‘it is not proper to make distinction between civilized and savage tribes.’ The President of the Second Commission believed that:

he expressed the opinion of the assembly in saying that there can be no distinction established between the projectiles permitted and the projectiles prohibited according to the enemies against which they fight even in case of savages.

When the German Colonial Department heard of General Trotha’s infamous order threatening the Herero with extermination, some were horrified. Count von Bülow, the Imperial Chancellor, cabled the Kaiser requesting that the order be cancelled on the grounds, inter alia, that it would be a crime against humanity and ‘demeaning to our standing among the civilized nations of the world,’ upon which the General was asked to ‘show mercy’ to the Herero. Hearing of British intentions to use
dum-dum bullets in colonial wars, *La Semaine Médicale* ran an article, capping a study of these bullets’ impact, that deposed the existence of ‘two principles of philanthropy, two weights, and two measures, one applied to civilized peoples, the other to barbarian races and distant countries.’ The British proposal to allow dum-dum bullets in warfare against ‘savages’ was, revealingly, ultimately defeated by a majority of nineteen to one.

**Weakness of such appeals**

The sincerity of such appeals to a coherent universalism are not doubted. It is important, however, to understand their true significance by contextualizing them. First, the very existence of a vigorous debate on the application of the laws of war to ‘savage’ peoples testifies to the fact that this was still very much an open question. Universalist humanitarians disagreed with some of their colleagues’ colonial prejudices, but this was still in the nature of a relatively polite controversy about the scope of humanitarian obligations, rather than a straightforward denunciation of violations of the law, operating, as it were, from the safety of commonly accepted premises.

Secondly, all the evidence available to us suggests that this was very much a marginal, specialist’s debate. Whether the laws of war actually applied to non-European peoples was still a finer point of detail, something that could be discussed casually and openly. Even in the minds of those who defended the more generous understanding of the laws of war, it was a secondary issue in comparison with the momentous task of defending civilization in the ‘European world’ itself.

Thirdly, the defence of the universal application of the laws of war was rarely based on a critique of the basic anthropological conceits of colonization. Defence of the ‘uncivilized’ did not include any discussion of whether they were uncivilized, something which was ‘rarely questioned as a premise’. Even Wright’s fairly spirited defence of the applicability of the laws of war to the actions of the French in Damascus relied on superficial formalistic arguments, whilst almost obscenely dabbling in Lorimer’s pseudo-scientific distinctions between ‘civilized’, ‘barbarous’ and ‘savage’ humanity. Humanitarians and colonialists had different views about how to deal with ‘savages’, but little doubt that ‘savages’ they were.

Fourthly, for all the occasional passionate defences of humanitarianism, many of the arguments put forward by those who favoured including ‘savages’ within the ambit of humanitarian law reflected a sort of weak instrumentalism. One fear was that use of certain means or methods of combat in the colonies might be a prelude to their use on the European battlefield. As Edward M. Spiers puts it, concerns about uses of dum-dum bullets against the Afghis by the Tirah Expeditionary Force were fuelled by the possibility that future wars would become even more atrocious if all armies, especially the well-armed forces of Continental Europe, procured this kind of ammunition.

Another concern was the ‘ugly practice’ of using colonial troops from the ‘weaker races of Africa and Asia’ in a European context. US General Tasker H. Bliss insisted at the 1899 Hague Conference that the United States should demand as its right, the right of civilization, that millions of men of savage races shall not be trained to take part in possible wars of civilized nations.

Others were merely concerned about the practicality of using different types of weapons against different types of enemies. For Raffalovich, for example, being able to use explosive bullets against ‘savages’ but not against ‘civilized’ troops would necessarily induce complications of equipment.

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38 As quoted in Ogston, ‘Continental Criticism’, p. 755. It should be pointed out, however, that colonial rivalries might have played a role in this controversy, which came on the heels of the Fashoda incident. One author, for example, saw the whole episode at the Hague Peace Conference as part of an ‘attempt to place Great Britain at a disadvantage’; see Alex Ogston, ‘The Peace Conference and the Dum-Dum Bullet’ (1899) *British Medical Journal* 278 at 279.


40 Wright reminds us that ‘China, Japan, Liberia, Persia, Siam, and Turkey were members of the Hague Conferences’: *Bombardment of Damascus*, p. 267.

41 Wright considered that Arab Syrians typically fell in the second category on account of their immaturity: *ibid.*, pp. 265–6.


44 *Ibid.* General Bliss added the following rather extraordinarily insightful line to his plea: ‘If civilization wants to destroy itself it can do it without barbarian help.’ A related fear was that ‘now that natives had been trained and disciplined in army matters what was to prevent their turning this knowledge against their white neighbors?’

45 Scott, 1899 *Proceedings*, p. 287.
contemplate the case of soldiers stationed outside of Europe and armed with bullets for use against 'savages', who would be called upon to fight against the regular troops of a civilized nation. They would then have to have two kinds of cartridge belts. 46

The Ordnance Department of the British Army also thought that keeping a double stock of ammunition would 'pose immense problems', especially where a force was 'expected to quell disorder in lands coveted by another colonial power'. 47 Clearly, this would be a nuisance.

The relative weakness of the case put forward by advocates of the extension of the laws of war to 'savage' peoples, and their failure to engage critically the very concept of civilization, meant that the whole issue of the application of the laws of war remained shrouded in ambiguity. This was an ambiguity which was more effectively used by those who would have done without the laws of war than by their opponents.

The theoretical and effective exclusion of non-European peoples from the laws of war

The one thing that defences of the applicability of the laws of war beyond Europe may have managed to do is make it marginally harder explicitly and publicly to defend the idea that they were not so applicable. This probably explains why the question of the exact position of non-European peoples in the laws of war was avoided in international instruments themselves. The non-applicability of the laws of war beyond the European world, in this context, must be understood less as the product of an explicit authorization, than as a function of persistent structural ambiguities of the laws of war, occurring in the context of the very real international legal prejudices of the time and against the background of the colonial mindset.

The idea that the laws of war did not apply to non-European peoples was simply the application to a specific field of the then dominant concept of international law. The notion that the law of nations did not apply, at least not in its entirety (but often not at all), to non-European peoples, was well accepted in the nineteenth century. As John Stuart Mill put it, with a tone of self-evidence:


This was an idea that was enthusiastically endorsed by many early humanitarians. It was in many ways a continuation of earlier ideas that the usages of war did not apply to non-Christian peoples. 49 The 1914 British military manual, co-authored by none other than a certain Oppenheim, noted that '[I]t must be emphasized that the rules of International Law apply only to warfare between civilized nations . . . They do not apply in wars with uncivilized States and tribes. 50

Humanitarian lawyers' ambiguous stance on these issues was all the authorization that colonial adventurers needed, and if one thing is certain it is that words were almost systematically followed by deeds. Throughout the non-European world, means and methods of warfare were used and new ones experienced that were increasingly considered despicable in European warfare, and which evidenced a flagrant disregard for other peoples. Although in Namibia, the Hereros 'at least were prepared to conduct war on civilised lines . . . [t]he Germans shrank from no acts of treachery or breaches of the laws of war', including the murder of 'Herero

48 'A Few Words on Non-Intervention' in Collected Works (ed. John M. Robson, 23 vols., Toronto, 1984), vol. XXI, p. 118. This was, interestingly, an idea which met with approval from De Martens, for example, who found it shockingly implausible that international law would apply vis-à-vis 'semi-savage nations' given the sheer differences between 'the populous countries of Europe and America' and the 'desert reaches of Asia'. Surely, given such differences, international law 'would not remain immutable and intact': De Martens, after reviewing what other authors had had to say on the issue, faulted the 'generous and enlightened cosmopolitanism' of those who would have had international law apply to the whole humanity, for 'taking away from international law any positive basis and depriving it of all practical reach'. De Martens concluded: 'It is necessary to make only one observation: virtually, international law is not applicable to the whole human genre.' De Martens, 'La Russie et l'Angleterre', pp. 234-6.

49 Denial of quarter to Muslims, for example, was largely accepted: see Ronald C. Finucane, Soldiers of the Faith: Crusaders and Moslems at War (London, 1983), Vitoria considered this to be a matter of military necessity; see Francisco de Vitoria, 'On the Law of War' in Anthony Pagden and Jeremy Lawrence (eds.), Vitoria: Political Writings (Cambridge, 1991), pp. 293-328 at §§ 44-8.

leaders who came to negotiate under promises of safe-conduct.\textsuperscript{51} The ‘Hun letters’ revealed to the world the atrocities committed by German soldiers under the orders of General Field Marshal Alfred von Waldersee against the Chinese, including the slaughter of civilians, women and children. The British decided to use dum-dum bullets (or bullets infected with smallpox) in colonial operations, as ‘ammunition more suitable to the conditions of savage warfare’,\textsuperscript{52} and inaugurated the practice of aerial bombardments of rebel tribes. The French resorted to extreme violence to subdue Algeria, Madagascar and Morocco.\textsuperscript{53} The Italians used gas against the Ethiopians at a time when such use had been all but abandoned in the European context.

In its proto-fascist variant, as expounded by Heinrich von Treitschke, a leading German intellectual of the turn of the nineteenth century, the case for non-applicability involved saying that:

\begin{quote}
{i}nternational law becomes phrases if its standards are also applied to barbaric peoples. To punish a Negro tribe, villages must be burned . . . If the German Reich in such cases applied international law, it would not be humanity or justice but shameful weakness.\textsuperscript{54}
\end{quote}

Even though this sort of explicit apology of ruthlessness was relatively exceptional, it may not have been so far removed from what many thought, even if they did not say so as clearly.\textsuperscript{55} One clue to the mood of the times is how open military men were about announcing their intentions. The opinion that ‘savages’ had to be treated ruthlessly was one that could clearly be held openly and few attempts were made to cover a paper trail. General von Trotha, for example, had no qualms about publicly proclaiming and signing as ‘the Great General of the Mighty Kaiser’ his infamous ‘extermination order’ (one

\textsuperscript{51} Albert Gray, 'The German Colonies of Africa' (1919) 1 Journal of Comparative Legislation and International Law 25 at 33.
\textsuperscript{52} Mr Arthur Lee (Hampshire Fareham) in Parl. Deb., vol. LIII, Ser. 4, p. 461, 8 February-24 February 1898.
\textsuperscript{53} See Sadek Sellam, Parler des camps, penser les génocides (Paris, 1999).
\textsuperscript{55} See Geoffrey Best, War and Law since 1945 (Oxford, 1994), p. 59 (‘A Briton would like to think that only fascism could have devised the ingenious spraying of liquid mustard gas over the semi-naked tribal warriors of Abyssinia, but there is plenty of evidence that some British imperial minds were attracted by the idea of doing something similar to troublesome Afghans and Somalis’).

which Pakenham points out had ‘few parallels in modern European history’).\textsuperscript{56}

I, the great general of the German troops, send this letter to the Herero people . . . All Hereros must leave this land . . . Any Herero found within the German borders with or without a gun, with or without cattle, will be shot. I shall no longer receive any women or children. I will drive them back to their people or I will shoot them. This is my decision for the Herero people.\textsuperscript{57}

The order turned out to be very much a statement of intention, which was implemented with vigorous Prussian efficiency.

The fact that using different tactics against the ‘civilized’ and ‘non-civilized’ might cause significant training or logistical problems was the end clearly not seen as an insurmountable problem. Lord Lansdowne, when confronted with suggestions that having two types of ammunition (ordinary and dum-dum) might actually be impractical, recommended to the Cabinet ‘that we must make and keep a stock of both kinds of ammunition, with the intention (which we can keep to ourselves) using the expanding bullet when we have to deal with savages’.\textsuperscript{58} Thus we created one of the most notable yet forgotten cases of double standard in the history of international law.\textsuperscript{59}

\textbf{The resulting purely voluntary character of application of the laws of war to non-European peoples}

Despite the non-applicability \textit{stricto sensu} of the laws of war, these might still be applied on other grounds—'[t]he discretion and the decency of the commander are also factors', as one author put it.\textsuperscript{60} If the laws of war were to be applied to ‘savages’ at all, and in accordance with a broad tradition of discretionary application of international law outside the
'civilized' heartland, it was to be merely as a result of charity or chivalry. The British war manual, for example, emphasized that the decision to apply the laws of war in colonial contexts "is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case." 63 'May these rules be observed . . . better observed than in the past, and even with regard to races who we have been accustomed to regard as inferior to our own,' 64 concluded the decent-minded M. Beernaert (a Nobel Prize winner under whose Prime Ministership the independent state of Congo was created) as the President of the Second Committee of the Hague Conference of 1907. 65 The application of humanitarian principles, in other words, would be a measure of the commander's charity, rather than the result of legal compulsion.

International humanitarian lawyers, of course, in the tradition of liberal humanistic optimism, seemed to have considerable faith in the humanitarian character of the colonial officer. For example, Westlake, after recognizing that targeting the civilian savage populations was acceptable in law, suggested that 'no humane officer will burn a village if he has any means of striking a sufficient blow that will be felt only by the fighting men.' 66 This was, of course, at a time when US officers (although obviously not the humane ones) were routinely torching villages in the Philippines. 67

Even when such humane treatment was exceptionally extended to the 'uncivilized', however, authors insisted that this should in no way be seen as a recognition or upgrading of the degree of civilization of the 'uncivilized'.

62 See L. Oppenheim, International Law: A Treatise (1st ed., 2 vols., 1905), vol. 1, p. 34; Amos S. Hershey, The Essentials of International Public Law and Organization (revised ed., New York, 1927), p. 166 ('The Law of Nations can be only partially applied to barbarians or half-civilized peoples, and still less to savages; but it should be applied to the greatest extent practicable' (citations omitted)).

63 A sense of paternalistic honour and civilizational pride seems to have been at the heart of various arguments in favour of moderating one's behaviour when it came to non-civilized peoples. See de Martens, 'La Russie et l'Angleterre', p. 240 ('Would it be fair, would it be worthy of European civilization to declare that its representatives, in their international relations, are free of all restraint . . .?').


65 It is noteworthy that Beernaert's relationship with Leopold soured specifically because Beernaert opposed the exploitation of Congo.


67 This is consonant with a general idea in international law, expressed by some humanitarians elsewhere in their writings. According to de Martens, for example, it is not because European nations are not bound by international law in their relations with 'barbarians' that 'Christian nations are obliged to follow no rule towards savage peoples.' It is natural law, not international law, which is applicable to the relations between civilized nations with the nations of Asia ... In Asia, international law transforms itself into natural law. de Martens, 'La Russie et l'Angleterre', pp. 240–1. Hall considered that 'European States will be obliged, partly by their sense of honour, partly by their interests, to be guided by their own artificial rules in dealing with semi-civilised states, when the latter have learned...
The rationale for excluding 'non-civilized' peoples from the protection of the laws of war

The fact that non-European peoples were excluded from the protection of the laws of war because international law did not apply in the relations of 'civilized' with 'non-civilized' nations does not by itself explain how that position was arrived at so uncritically, or what its foundations were, particularly when it came to the laws of war. In order to understand how that exclusionary stance might conceivably persist even in very different times, furthermore, it is necessary to understand its basis in a number of deeply held beliefs about the nature of international law, 'civilization' and 'savagery'. It is these structuring beliefs which, once incorporated deep into the law, would continue to condition its operation, even when the law would be formally purged of such biases.

It is hard to find a single dominant reason why the laws of war were effectively not applied to non-European peoples. It seems that, as a matter of fact, the non-application resulted from the convergence of several intertwined and mutually reinforcing trends. Each layer of argument was backed by further layers of prejudice, so that the more formal ideas (absence of treaty ratification) were in fact backed by a certain world vision (the opposition between 'civilization' and 'non-civilization') which was itself rooted in a certain anthropology (the savage as incapable of respecting the laws of war).

Absence of treaty ratification

At the most superficial level, the exclusion of non-European peoples from the laws of war was a direct function of the adoption by the nascent 'international community' of legal positivism, with its emphasis on the state as the sole source of law and thus as the methodological and substantive framework of international law. At a formal and explicit level, the laws of war were considered to apply only between states, and only to the extent that states were party to them. The great founding international humanitarian instruments reflect that consensus. According to the St Petersburg Declaration of 1868, '[t]he Contracting Parties engage mutually to renounce, in case of war among themselves, the employment ... of any projectile of a weight below 400 grammes.' Article 2 of the 1899 Hague Convention II anticipates that '[t]he provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.' The Preamble to the 1907 Convention respecting the Laws and Customs of War on Land describes its goal as averting 'armed conflicts between nations.'

If those that European powers were fighting were not parties to the relevant instruments, then there would be little scope for applying the laws of war (or any international law) to them: '[s]trictly speaking, and in a fine legal sense, [the commander] is not bound to observe the principles of international law against any nation that is not a co-signer of the conventions.' A fortiori, if enemies were not even nations, prospects for applying the laws of war would have been remote. At the 1899 Conference, we have specific evidence in the travaux préparatoires that delegates had no doubt that non-participation in the relevant treaties clearly excluded at least non-European peoples: 'It is evident that there is a gap in the St Petersburg Declaration, a gap which enables not only dum dum bullets but even explosives to be used against savages.' Non-European peoples' lack of participation in relevant treaties would prove a stumbling block much later for claims made by colonized peoples alleging violations of the laws of war.

The perversity of this whole situation is, of course, that the non-participation of 'non-civilized nations' in humanitarian treaties was not their choice, but simply a consequence of the fact that, since they were not considered sovereign (a quality from which they were excluded by 'civilized nations'), they could not possibly join these treaties even if the...
wanted to. An otherwise 'non-civilized nation' could not have elected to do the 'civilized' thing. 'Non-civilization' was both the cause and the consequence of not being party to international humanitarian instruments, a seemingly inescapable trap.

'Civilization' v. 'non-civilization'

In truth, however, the non-applicability of the laws of war to non-European peoples did not need such rationalizations, and European reluctance ran much deeper. More than simply a formal question of participation in treaties, what seems to have been at stake is a sense of distance, a distance that was of course geographic but also and mostly civilizational. If gases were used against the Somalis by the Italians, for example, it was because the 'war took place in a far away and isolated country and against populations that were considered an inferior race and culture'.

A contrario, a sense of civilizational commonality could easily substitute for lack of participation in a common treaty. As Sir Thomas Barclay noted:

The European operations in China consequent on the 'Boxer' rising showed how distance from European criticism tends to loosen that restraint [in waging war]. On the other hand, it was significant that both the United States and Spain, who were not parties to the Declaration of Paris, found themselves, in a war confined to them, under the necessity of observing provisions which the majority of civilized states have agreed to respect.

If the laws of war were not applied to colonial wars, it was in fact less for some principled legal reason than ultimately because of a hypertrophied distinction between the 'civilized' and the 'uncivilized' world. Behind the idea that it was states that were party to international humanitarian treaties, was also the idea that it was states who waged war, and that to be a state was to be 'civilized'. At heart, the underlying argument behind the promotion of the laws of war was that this was what 'civilized' nations did. As the Martens clause makes evident, 'the usages established between civilized nations' was the yardstick by which the behaviour of all should be judged. To uphold 'civilization' and 'civilized nations' as the benchmark, in turn, one necessarily had to point to the 'non-civilized', presumably to be found in the darker recesses of Asia and Africa. The unavoidable corollary was that 'non-civilized nations' were incapable of 'civilized' warfare.

In this, the colonialist and the humanitarian were of one mind. What made colonization possible was also in effect what made the exclusion of non-European peoples logical: these would be civilized by force if need be, while being denied the benefits of civilization, on account of their 'non-civilization'. The contrast between 'civilized nations' and 'barbarians' or 'savages', therefore, is a constant theme of the early modern literature on the laws of war. It is, in many ways, only a secularized version of the contrast between Christians and non-Christians in an earlier age of international law. Francis Lieber summed up a certain contemporary mood perfectly when, in the Lieber Code itself, he made the following contrast:

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized peoples, the exception.

25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

One theme that emerges often in this context is that 'civilized' nations will refrain from revenge in favour of a more modern doctrine of reprisal (retaliation for the purposes of making a violation cease). 'Civilized nations' in their dealings with each other should therefore avoid '[u]njust or inconsiderate retaliation [which] removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages'. According to General Halleck, '[a] savage enemy might kill alike old men, women and children, but no civilized power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation.

Indeed, arguing that '[t]here are some infringements which can never be met with reprisals in kind', Baty commented that '[n]oblesse oblige, and a

80 See Finucane, Soldiers of the Faith.
81 US War Department, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, General Orders No. 100 (24 April 1863) ('Lieber Code').
82 Ibid., Art. 28 (emphasis added).
self-respecting commander will not follow the example of an antagonist, should that example unfortunately be set, in reducing a civilized army to the rank of a band of massacring savages.\(^{84}\)

This constant contrasting of the 'civilized' and the 'non-civilized', and association of civilization with the laws of war, is what then made it easy to take the next step – to consider that the laws of war were not applicable to 'non-civilized' peoples. It is important to note that there is nothing automatic or absolute about this next step. The fact that 'civilized warfare' is what 'civilized nations' do does not by itself allow 'civilized nations' to wage indiscriminate warfare against 'non-civilized nations'. It might well be (and we have certainly come to understand it this way) that the measure of 'civilization' is precisely that one will wage 'civilized warfare' even against 'non-civilized peoples' (or 'civilized peoples' led momentarily astray).

But the fact that 'civilized warfare' becomes associated with a strong sense of identity and intra-European solidarity (the Hague Conference itself is often viewed as 'fortifying the sentiment of solidarity among civilized nations')\(^{85}\) is also what sets the stage psychologically for a releasing of constraints outside Europe. As one British colonel put it: '[i]n small wars against uncivilized nations, the form of warfare to be adopted must tone with the shade of culture existing in the land, by which I mean that, against peoples possessing a low civilization, war must be more brutal in type.'\(^{86}\) General Robert Hughes justified the murder of women and children in the Philippines on the ground that these were 'not civilized', while President Theodore Roosevelt described the war, one fought against 'Chinese half-breeds', as 'the most glorious ... in our nation's history'.\(^{87}\)

Essentially, the idea was one of a sliding scale; that standards in warfare should be dependent on whom one was fighting against.

Such was the belief that waging 'civilized warfare' was what European nations did between themselves, that there was little fear and in fact a quiet confidence that practices experimented in the colonies would not somehow spill over, and come back to haunt Europe.\(^{88}\)

The use of CW against Ethiopia led some to expect – and fear – that their employment would be a matter of course during World War II. For others, however, the assessment was different: war among the industrialized nations of Europe was a different matter than conflicts involving less technologically advanced areas, such as the colonies. The surprising lack of gas warfare during World War II can thus be understood as implicated in a process by which the conduct of war among 'civilized' nations was demarcated from that involving 'uncivilized' nations ... [CWs] were implicated in the process of the hierarchical ordering of international politics into the civilized and uncivilized arenas.\(^{89}\)

An anthropology of the 'savage' as incapable of respecting the laws of war

Apart from a general idea of racial inferiority, there was also something very specific about the 'savage' that made him unworthy of the benefit of international humanitarian law. It is this specific something to which we must pay attention in order to understand the constitution of the laws of war and some of its resulting vulnerabilities – vulnerabilities that may well resurface in very different contexts many years later. The central idea behind the non-applicability of the laws of war is the idea that the savage is an 'other' specifically in that he is incapable of showing restraint in warfare.\(^{89}\)

In order to show how prominent and central that idea is to the whole enterprise of 'excluding the savage', I want to draw principally on an article written by one Captain Elbridge Colby, a US army lawyer, in the wake of the bombing of Damascus by the French in 1925.\(^{90}\) Elbridge Colby is an interesting, contrasted character. Colby denounced the acquittal by an all-white jury of a man who had, in 1925, shot a black soldier for refusing to step off a sidewalk to let a white man pass, an event that was to have significant negative repercussions on Colby's career. He was also an early apologist for aerial warfare, arguing that, since bombardments from the air would lack the requisite precision, the laws of war should be reformed (rather than air warfare abandoned). One interesting thing about this article is that it was written at a time when the tides were beginning to turn and when those in favour of not applying the laws of war to 'saves'

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85 Scott, 1899 Proceedings, p. 314.
89 Note that an anthropology of savageness was also behind other attempts at excluding non-Western peoples from the benefit of the laws of nations. See for example G. C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartolome De Las Casas' (1990–1) 13 *Australian Year Book of International Law* 1 at 28 ('There is a vital connection between the question of the status of the indigenous inhabitants – their alleged "barbarism", "primitiveness", "backwardness", etc. and the territorial concept of terra nullius. By defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land to empty land – terra nullius – available for the first taker').
90 Colby, 'Savage Tribes'.

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were called upon to rationalize arguments that had until then been simply
the unquestioned assumptions of the field.

A word on the context is in order because of the subtle and not so
subtle similarities between these particular incidents and some current
events. After the First World War, an independent kingdom of Syria had
been briefly proclaimed in 1920. France, however, had reoccupied Syria
forcefully on the basis of the mandate it had been granted at Versailles,
'sacrificing herself' in defence of the civilizing mission, with a view to
bringing democracy, development and human rights. The Syrians, who
were unreceptive to the idea that the occupation was for their own good,
showed consistently in polls that a majority wanted the occupation to
end.94 Syrians sent petitions to the League of Nations complaining about
French exercise of power under the mandate. When these petitions went
unheeded, uprisings erupted. In 1925, a more significant uprising broke
out after the French high commissioner failed to handle properly Druze
complaints against Captain Carbillet, a French officer who – although
he also built roads, bridges and dams – tended to manipulate tribal fac­
tions in a way that threatened the feudal authority of Druze sheikhs. The
French repressed the insurgency brutally. Insurgents were designated
as 'brigands', villages that had harboured them were burned and the bodies
of twenty-four rebels were paraded in the streets on camel backs before
being exposed in a Damascus public square. After more fighting from the
Syrians, the counter-insurgency took a new dimension. The French sent
 tanks into the streets and systematically bombed Damascus from the hills.
Whole neighbourhoods were razed. Between 500 and 1,000 locals were
killed. Priceless Islamic cultural artifacts were lost.92

Following the bombing, a controversy unfolded in the columns of the
American Journal of International Law. The article by Colby is in fact a
response to an earlier article published by Quincy Wright in favour of
the applicability of the laws of war. The Colby article constitutes one of
the last systematic attempts at excluding 'non-civilized peoples' from the
laws of war, one which seeks to articulate, on the basis of existing sources,
precisely what it is that makes 'savages' unworthy of such protection.

Colby starts off his article by reaffirming the founding dichotomy:
there is 'one matter which must be faced', namely the fact that the dis­
tinction between 'civilized' and 'non-civilized' in warfare 'is existent'.93
According to Colby, the difference in treatment between 'civilized' and

'non-civilized' is 'based on a difference in methods of waging war and on
different doctrines of decency in war'.94

The first thing that 'savages' fail to do, according to Colby, is to have a
differentiated concept of combatant and non-combatant among their own
populations. Colby is thus an early critic of guerilla or 'unlawful' warfare.
According to Colby, 'among savages, war includes everyone. There is no
distinction between combatants and non-combatants. Whole tribes go
on campaign. This is the primitive method of applying armed force.95
This, for Colby, was the end of the law: 'When the distinction vanishes
in fact, it likewise vanishes in law. When the distinction is not readily
apparent to a field commander, that commander is perfectly justifiable in
cessing to observe it, for the safety of his own troops is his paramount
consideration.'96 Therefore '[a]gainst elusive savage or semi-savage people,
and against tribal units which wage war as complete tribes, the method
must be, as the British Colonel Fuller has said, “more brutal”97 because:

When combatants and non-combatants are practically identical among a
people, and savage or semi-savage peoples take advantage of this identity to
effect ruses, surprises, and massacres on the regular enemies, commanders
must attack their problems in entirely different ways from those in which
they proceed against Western peoples.98

This finding that 'savages' simply could not be relied on to distinguish
themselves from the rest of the population as combatants is also something
that one finds in justifications for not abiding by the laws of war in battles
with Indians in the US.99 As a result, Colby ends up justifying Kitchener's
suppression of the Boers by claiming that 'those who understand the
task imposed upon the British Army must realize that such was the only
available course, and cannot actually condemn such suppression of such
irregular resistance as contrary to international law'.100

Secondly, and apart from the issue of who wages war, the point is that
'savages' wage war in a way that is very different from 'civilized nations' –
in a way that is, in fact, more murderous, cruel and lawless. According to
Colby, 'we find many incidents in history to support the British theory

91 Wright, 'Bombardment of Damascus', p. 263.
92 Ibid., p. 264.
93 Colby, 'Savage Tribes', p. 279.
94 Ibid., p. 281.
95 Ibid., p. 282.
96 Ibid., p. 283.
97 Ibid., p. 279.
98 See Guenter Lewy, 'Were American Indians the Victims of Genocide?' (2004),
http://hnn.us/articles/7302.html (accessed 1 November 2005): '[R]ules were soon aban­
donned on the grounds that the Indians themselves, failing to adhere either to the laws of
war or to the law of nature, would “skulk” behind trees, rocks, and bushes rather than
appear openly to do "civilized" battle.'
99 Colby, 'Savage Tribes', p. 283.
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that when natives go to war, they do not observe the individual decencies of civilized regular soldiers. Colby draws heavily on the American experience to point out 'the almost universal brutality of the red-skinned fighters' and more generally the fact that 'devastation and annihilation is the principal method of warfare that savage tribes know.' In conclusion, according to Colby:

The fact simply is that when a tribe on the war-path measures its victories by the number of houses burned and the number of foes, combatant or non-combatant, cut up, you must use a different method of warfare. When Oriental peoples are accustomed to pillaging and being pillaged, accustomed to torturing and flaying alive distinguished prisoners, you are dealing with opponents to whom the laws of war mean nothing.

This is not an isolated justification. It is a kind of anthropology that one finds paving the way to other contexts of brutal repression as well. One leading German ethnologist of the early twentieth century, for example, noted that '[i]n war the Herero, when he gains the upper hand, becomes a wild animal.' An international law textbook written in the 1920s pointed out that '[a]mong savages, prisoners are often tortured and killed, sometimes sacrificed or eaten.' Similar ideas had been used by the British to justify total warfare against the Irish, and by American colonists to justify the brutal slaying of Indians.

One Italian officer who sought authorization to use gases in Somalia insisted that '[a]gainst barbarian hordes ready to commit any horror, such as those that are advancing, I believe that no weapon should be spared.' Closely related is the idea that, if 'savages' do not know any better, it is simply because they are too limited intellectually and therefore fail to see the sophisticated utilitarian rationale for respecting the laws of war.

This sort of opinion could count on a long tradition in which featured many prominent humanitarians. As Sir John Charles Ardagh put it, in an effort to justify his opposition to the ban on dum-dum bullets:

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. For this reason the English delegate demands the liberty of employing projectiles of sufficient efficacy against savage races.

Tribe warriors are therefore either too cruel or too imbecile or both to be able to respect the laws of war. These shortcomings among 'savages' - non-distinction, cruelty, imbecility - lead to a final unifying point (common to international law generally), which was that, in addition

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1. Ibid., p. 284.
2. Ibid., p. 285.
3. Ibid.
9. See Carl von Clausewitz, On War (ed. and trans. Michael Howard and Peter Paret, Princeton, 1976) ('if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods than was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct').
10. See de Martens, 'La Russie et l’Angleterre', pp. 237-9. De Martens argued that '[n]on-civilized peoples . . . are incapable of understanding the fundamental ideas, legal and moral, upon which the society of European or civilized nations was built'. Indeed, he noted that 'the life of barbarians knows of neither commerce, agriculture or professions'. Each individual being 'his own protector' and completely devoid of the 'intelligence of the need of mutual cooperation', not only can barbaric peoples not 'possibly understand the need for well established interaction' but it is 'impossible for them to recognize which legal rules they should bend their will to'.
11. Scott, 1899 Proceedings, p. 343. The idea that 'savages' could not be stopped by ordinary bullets was a very persistent one, as shown by later Parliamentary debates: see Parl. Deb., vol. LIII, ser. 4, p. 992, 8 February–24 February 1898 (ordinary bullets 'had very little effect upon savages' and were 'not sufficient to stop the Sudanese in their wild charges'. 'A savage could not be disabled by an ordinary bullet. Therefore, it was necessary to use greater forces').
12. The anthropology changed tone when dealing with the Far East, but this does not mean that the Chinese in particular fared better. Ideas of primitiveness and lack of sophistication were replaced by a depiction of Asians as characterized by 'scoundrelish behavior' as well as the 'trickiness and unreliability of the yellow race' (Admiral Otto von Diederichs, as quoted in George Steinmetz, 'The Devil’s Handwriting': Precolonial Discourse, Ethnographic Acuity, and Cross-Identification in German Colonialism (2003) 45 Comparative Studies in Society and History 41 at 67). Again, the idea was that the radical difference between 'us' and 'them' justified a releasing from the bonds of the laws of war. On 27 July 1900, Emperor William II delivered his infamous 'Hunnenrede' or 'Hun speech' (comparing the Chinese to the Huns), as he bid farewell to the first three navy vessels transporting the German East Asia Expeditionary Corps to repress the Boxer Rebellion in China. 'Be aware', warned Wilhelm, 'that you shall fight against a cunning, courageous and well armed, and cruel enemy. Once you arrive, keep in mind: no pardon shall be given, and no prisoners taken': Johannes Penzler (ed.), Die Reden Kaiser Wilhelms II (4 vols., Leipzig, undated), vol. 2, 1896-1900, pp. 209–12.
13. The absence of reciprocity is more generally one of the unifying themes behind the denial of the applicability of international law to savages: see Hershey, Essentials of International Public Law, pp. 165–6.
to the fact that they were of course not parties to the relevant treaties, no reciprocity could realistically be expected from them. Colby strongly comments 'the experience of the red-coated army that has fought perhaps in more corners of the globe with more uncivilized and savage peoples than any other military organization in modern times' for showing us that 'the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out'. This echoes the answer given by the air force when asked by the chief of India's Northwest Province, 'What are the rules for this kind of cricket?': international law does not apply 'against savage tribes who do not conform to codes of civilized warfare'.

Indeed, if the laws of war were respected scrupulously vis-à-vis the 'non-civilized', as one delegate put it during the 1899 Conference, is that 'civilized nations' might well be put 'in a disadvantageous position in time of war with less civilized nations or savage tribes'. Would it be reasonable to ask of 'our soldiers' to refrain from averting an impending disaster that would entail their annihilation, or even, it may be, lead to English men and women falling human sacrifices to some African Ju-Ju, in some African city of blood' by denying them the use of 'small-arm projectiles more efficient than they would employ against a civilized nation, kindred, perhaps, to ourselves in blood'?

The central point here seems to be that 'savages' do not wage 'civilized war', therefore 'civilized warfare' cannot be waged against them. According

Only States with a certain degree of civilization somewhat resembling that of Western Europe and America are held to be entitled to full recognition as members of the international community. This is because a certain amount of mutual understanding and reciprocity of interests is essential to advantageous and continued international intercourse, and the existence of States with the will and capacity to fulfill their international obligations is a necessary qualification for membership in the modern family of States.

115 This echoes a more general point often made in the international legal literature on relations with 'savages'. According to de Martens, for example, 'all relations between civilized nations rest on the idea of reciprocity', an idea that was 'incomprehensible to barbarian nations': de Martens, 'La Russie et l'Angleterre', p. 239.

116 Colby, 'Savage Tribes', p. 280.

117 British Military Manual of 1914, para. 7 (emphasis added); see also Lieber's reference to 'barbarous armies': Lieber Code, Art. 24.

118 As quoted in Lindqvist, 'Bombing the Savages', p. 52 (emphasis added).

119 See Scott, 1899 Proceedings, p. 293; see also Sir John Fisher, at p. 299: 'As regards wars with savage peoples, these restrictions will be solely to the detriment of civilized nations'; also p. 364.

120 Ogston, 'Continental Criticism', p. 756.

121 Colby, 'Savage Tribes', p. 287.


123 The behaviour of the Japanese inspired Sir John MacDonnell to note that 'a non-Christian State has set an example to Christian nations in the conduct of war (as far as it is possible on the lives of civilization ... International law cannot be quite what it was if it henceforth expresses the consent of powerful Asiatic non-Christian States as well as of European nations': quoted in Henry Dyer, Dai Nippon, The Britain of the East (London, 1905), p. 152.

states. These states could claim the benefits that their populations could not have claimed much earlier as the savage inhabitants of a terra nullius. In fact, Third World states ratified the Geneva Conventions with utmost speed, intent on obtaining this protection in some of the conflicts that might still oppose them to colonial powers. Thus was removed, from a strict legal point of view, one of the single most important obstacles to the international spread of the laws of war. But, more generally, it was deep changes in the conception of the laws of war, and how these related to humanity, that made it increasingly hard to deny their applicability beyond the West (the relevant actors had ceased to be mostly European and could by then be described as broadly 'Western'). One of the greatest conceptual influences behind this transformation was the rise of international human rights law, although the 'humanization' of the laws of war is also part of a dynamic that is endogenous to these laws.

The gradual abandonment of the requirement of reciprocity probably proved a crucial step in relaxing some of the conceptual apparatus that had made it so conveniently easy not to apply the laws of war to non-European peoples. This abandonment can be traced to a series of fundamental developments, beginning with the rejection of the si omnes clause. More importantly, the idea began to emerge that states should still be bound notwithstanding violations by the other party and therefore decreased prospects of reciprocity. The Vienna Convention would in due course codify what had by then become the accepted norm, namely that termination or suspension of a treaty was not an appropriate remedy in cases of ‘treaties of a humanitarian character’. The gradual decline and desuetude of the doctrine of reprisal is part of the same trend. It gradually became accepted that in their fundamental structure the laws of war were more like international human rights law than public international law: based on a fundamental obligation of the state owed to humanity or potential war victims, rather than on the execution of synallagmatic obligations. This in turn led to much speculation about the erga omnes or jus cogens nature of many norms of international humanitarian law. This abandonment of the requirement of reciprocity was a capital development because it meant at least that Western powers could not argue that the incapacity of ‘savages’ to reciprocate, justified their own refusal to apply the laws of war.

However, something more important was at hand in the decades following the Second World War. Non-European voices had already sought to deconstruct the notion of civilization as applied to warfare. A Japanese diplomat commented, following the end of the Russo-Japanese War, that ‘We show ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men’. By the end of the Second World War, a consensus was emerging that made any suggestion that different standards might apply beyond the Western or industrialized world than within it simply unacceptable. From an attribute of civilization, restrained warfare was fast on its way to being recognized as an attribute of humanity.

The great accomplishment of the post-Second World War period, therefore, is to have brought the whole of humanity, at least theoretically, into the fold of the laws of war. In fact, so successful was the Third World that it obtained significant additional benefits that went far beyond the merely mechanical application of equality. If one of the effects of the development of the international laws of war had been to put the emphasis on international violence, the increasingly developed regime of regulation of non-international armed conflict ensured that many conflicts occurring beyond Europe would henceforth fall under the protection of international humanitarian law. Strikingly, the Third World secured the ‘upgrading’ of wars of decolonization to the status of international


126 The si omnes clause, contained in earlier instruments, stipulated that international humanitarian law instruments would be applied only ‘between Contracting Powers and then only if all the belligerents are parties to the Convention’: Convention respecting the Rights and Duties of Neutral Persons in Case of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 36 Stat. 2310. It had gradually been abandoned in the inter-war period in such conventions as the Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, in force 19 June 1931, 118 LNTS 343. The 1949 Geneva Conventions, following Nuremberg, insisted that: ‘[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations’: Geneva Convention III, Art. 2.


conflicts. And, in an early, albeit contentious, recognition of the specificity of warfare in some areas beyond the West, due notice was taken of the specificity of guerilla warfare. 

Although in practice violations of the laws of war might have been rife, the one significant accomplishment was that, at least at the level of principle, it seemed to have become impossible to exclude the 'savages'. The laws of war were well on their way to redemption.

The ‘fall’: the return of the ‘savage’?

Given the momentous changes in the laws of war since 1945, one might think that the rhetoric of the 'savages' had disappeared altogether, at best remaining as a slightly embarrassing relic, to be mentioned only briefly in order to emphasize how the laws of war had since moved on. Yet I want to use the events surrounding the so-called 'war against terror' as a case study of the persistence of the exclusionary strand embedded within the laws of war, an attribute that remains latent or dormant but which is promptly reawakened in times of crisis.

Indeed, in the wake of the attacks launched on 11 September 2001, a rhetoric has surfaced which, in its structure and tone, bears striking similarities to that of earlier days. I want to argue that the rhetoric of the Bush Administration concerning 'unlawful combatants' mimics in every shade the arguments that I have highlighted as being typical of the earlier exclusion of non-Western peoples from the laws of war. Here, I seek to reconstruct briefly the Administration's standpoint on the applicability of the laws of war to members of both the Taliban and al Qaeda, in order to make that point. I will draw on the memorandum of 22 January 2002 by Jay S. Bybee, Assistant Attorney General, as well as various subsequent pronouncements in the press and academic publications by John C. Yoo, then Deputy Assistant Attorney General, and others.

Bybee and Yoo begin by sketching the conventional argument that the adversary, as was the case with savage tribes, is not a party to the relevant treaties: 'the conflict with al Qaeda is not governed by the Geneva Conventions, which applies [sic] only to international conflicts between states that have signed them. Al Qaeda is not a nation-state.' In addition, Bybee makes the point that Afghanistan, a country 'divided between different tribal and warning [sic] factions, rather than controlled by any central State' was at the time of the US invasion a 'failed state' and that US obligations towards it could be suspended, echoing the old idea that non-Western lands, being non-sovereign, are lands where no laws apply.

But as John Yoo puts it, 'even if al Qaeda were a nation-state and a party to the Geneva Conventions, its members would still qualify as illegal belligerents due to their very conduct.' In the same way that nineteenth-century military lawyers thought that, aside from the issue of treaty membership, there were good, fundamental policy reasons why one should not uphold the laws of war when fighting the 'non-civilized', John Yoo argues that '[t]he reasons to deny Geneva status to terrorists extend beyond pure legal obligation.'

129 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 7 December 1979, 1125 UNTS 3, Art. 1(4) ('Protocol I').

130 See ibid., Art. 44(3).

131 This is a point that has been noticed in passing by several authors. See, for instance, Dean P. McFadden, 'Why the Laws of Armed Conflict Are No Longer the Ties That Bind' (2003) (copy on file with author) (noting that the term uncivilized 'may assume renewed legal relevance with regard to the status and treatment of terrorists: namely, those who deliberately reject the civilizing principle of moderation in war, and who neither respect structures upon the targeting of civilians nor seem to expect legal protections for themselves'); Heather Anne Maddox, 'After the Dust Settles: Military Tribunal Justice for Terrorists after September 11, 2001' (2002–3) 28 North Carolina Journal of International Law and Commercial Regulation 421 at 426 (Just as the current administration characterizes al Qaeda, Taliban, and other extremist groups or sympathizers, early American leaders also characterized slaves and Native Americans, through simplification and distortion. If groups or individuals are systematically denied their humanity, then they can be denied their natural rights, or so the justification proceeds'); also Peter Maguire, Law and War: An American Story (New York, 2001), p. 20 ("Before there were "war criminals," there were "barbarians,", "heathens," and "savages" who did not qualify as equals in the arena of "civilized warfare").

132 I voluntarily put aside the issue of whether these individuals could also be qualified as 'terrorists', as this question, unlike the denial of combatant status, is not determined on the basis of the laws of war alone.
The reasons are, first, that unlawful combatants fail to distinguish themselves: ‘They operate covertly by intentionally concealing themselves among the civilian population; they deliberately attempt to blur the lines between civilians and combatants.’ Secondly, they have no intention of respecting the laws of war: ‘Al Qaeda violates the very core of the laws of war... Most importantly, they have attacked purely civilian targets with the aim of inflicting massive civilian casualties.’

Finally, the argument proceeds, as was the case with ‘non-civilized peoples’, that all these deficiencies point to the fact that unlawful combatants cannot benefit from the laws of war because they cannot possibly be expected to reciprocate:

The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda. It has never demonstrated any desire to provide humane treatment to captured Americans. If anything, the murders of Nicholas Berg and Daniel Pearl declare al Qaeda’s intentions to kill even innocent civilian prisoners. Without territory, it does not even have the resources to provide detention facilities for prisoners, even if it were interested in holding captured POWs.

According to Yoo, ‘a treaty like the Geneva Convention makes perfect sense when it binds genuine nations that can reciprocate humane treatment of prisoners... But the Geneva Convention makes little sense when applied to a terrorist group or a pseudo-state.’

If otherwise unlawful combatants are to be given the benefit of the laws of war, therefore, it is on a purely discretionary basis, in the same way that the sovereign or the military commander might occasionally have condescended to extend the protection of international humanitarian law to ‘savages’. Bybee makes it clear that:

[i]t is by no means to say that the President may suspend specific provisions of the Geneva Conventions as a legal requirement is by no means to say that the principles of the laws of armed conflict cannot be applied as a matter of U.S. Government policy.

And, indeed, as Secretary of Defense Donald H. Rumsfeld put it:

technically unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner reasonably consistent with the Geneva Conventions, to the extent they are appropriate.

‘Thanks to’ or ‘in violation of’ the laws of war?

The rhetoric of the Bush Administration therefore seems to resuscitate a lexicon that one might have thought had been long abandoned. The dominant response is simply to condemn this as a terribly regressive and morally contemptible move. To the extent that there are actually forces at work with an agenda profoundly to undermine or overturn the laws of war, the cries of alarm are welcome.

There are indeed some elements in the US authorities’ assessment that are highly questionable or downright shocking. When Yoo emphasizes the role of reciprocity as ‘the primary enforcer of the laws of war’, he cleverly confuses a common factual–sociological explanation for why the laws of war are ever actually respected with a legal–dogmatic justification for not respecting them. As I have shown, contemporary doctrine rejects the notion that failure by the one party to conform with the laws of war relieves the other from the duty to do so.

The idea propounded by Bybee and Yoo that even a state’s regular forces have to pass the test articulated for irregular troops (i.e. respect for the laws of war) to qualify as combatants is also plainly at odds with the clear meaning of the Geneva Conventions. This reasoning – which could in theory lead to an entire army losing combatant status simply because of violations of the laws of war committed by some in its midst – was specifically rejected after the Second World War. Protocol I also makes it clear that one does not lose morally contemptible move. To the extent that there are actually forces at work with an agenda profoundly to undermine or overturn the laws of war, the cries of alarm are welcome.

The significance of the resurgence of the ‘savage’, however, is at least ambiguous. Typically, the issue is formulated as the US simply refusing to grant certain individuals the status that they otherwise deserve.

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139 Yoo and Ho, ‘Status of Terrorists’, p. 10. 140 Ibid.
141 Yoo, ‘Terrorists Have No Geneva Rights’. See also Yoo and Ho, ‘Status of Terrorists’, p. 10: that the al Qaeda members ‘are not under the control of a nation-state’ means, crucially, that no one ‘will force them to obey the laws of war.’
humanitarian lawyers often fail to acknowledge as readily as they should that there is a strong legal case that the Geneva Conventions would simply not grant POW status to many of those caught in Afghanistan. In fact, it is important to acknowledge what many international humanitarian lawyers know but loathe to concede, which is that the rhetoric of the Bush Administration is often merely mimicking the law. Indeed, the US authorities’ case is often not a case simply to violate or do away with the law, as much as it is a characteristically strict, almost legalistic interpretation of the law – one that may simply not partake of the relatively benign background understanding of the ‘invisible college’ of international humanitarian lawyers.\(^{149}\)

Given the non-ratification by the US of Protocol I and its persistent opposition to some of its provisions concerning the status of combatants, it is quite clear that these do not apply in the present case. It is therefore the Hague Regulations and the Geneva Conventions which set the applicable legal framework.

The Geneva Conventions, however, only apply to ‘High Contracting Parties’, something that al Qaeda clearly is not. Nor are al Qaeda members part of the armed forces of a state. Members of al Qaeda might nonetheless be considered belligerents as a militia, volunteer corps or resistance movement under certain conditions. These requirements are that one has:

(a) to be commanded by a person responsible for his subordinates;
(b) to have a fixed distinctive emblem recognizable at a distance;
(c) to carry arms openly; and
(d) to conduct ... operations in accordance with the laws and customs of war.\(^{150}\)

There may be a strong case that many al Qaeda members do not fulfil these criteria.\(^{151}\) As Bybee puts it in his memo:

> example International Committee of the Red Cross, ‘Official Statement: The Relevance of International Humanitarian Law in the Context of Terrorism’, 21 July 2005. This argument rarely comes across in the public debate however (indeed, if the debate were only what constitutes a tribunal for the purpose of Art. 5, then it is unlikely that the issue would ever have attracted as much attention), and even if that is the debate then most humanitarian lawyers are hardly sanguine about spelling out the very real possibility that many unlawful combatants are being legitimately denied POW status.\(^ {149}\)


\(^{150}\) Hague Convention II, Annex: Regulations Respecting the Laws and Customs of War on Land, Art. 1; see also Geneva Convention III, Art. 4A(2).

\(^{151}\) I do not wish, here, to explore all the factual detail associated with this question; I merely note that such a case is plausible.

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Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly . . . and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat.\(^{152}\)

It bears emphasizing that stressing these points does not reflect a neo-conservative reading of the law; it is of course very much premised on what the law says and nothing more. The case that al Qaeda members should not be entitled to POW status is hard to defeat, and on that specific point one would have to be in bad faith not to agree with the likes of Bybee, Yoo and Rumsfeld (although what should be done with al Qaeda members as a result of this conclusion is a totally different issue which I will not address here). There are of course very good normative reasons why this should be so: failure by combatants to distinguish themselves, after all, is the single biggest risk to civilians in warfare.

### Change and continuity: how the laws of war both include and exclude

It seems, therefore, that one ends up with a paradox: although international humanitarian law is supposed to have shed its racist past, the laws of war nonetheless clearly end up excluding a category of individuals on exactly the same grounds that they previously excluded ‘savages’. How can the laws of war both include and exclude? At what discrete levels do these apparently irreconcilable operations occur?

What I want to do in this section is suggest an interpretation of what I call this body of law’s ‘natural propensity to exclude’. The role of the laws of war – or so goes the conventional narrative – is not to eliminate warfare but simply to take warfare as it is and seek to alleviate its consequences. But it is not hard to see the dizzyingly misleading character of such an apparently obvious proposition. There was never, nor is there any ‘taking warfare for what it is’: there has only ever been a constant process of defining by the laws of war what warfare – as the relatively improbable artifact of a culturally contingent tradition of violence – is. It is true, in this context, that since the Geneva Conventions there is no doubt that one cannot discriminate between different types of combatants. One of the great merits of the contemporary laws of war, as I hope to have shown, is to have removed a shameful and dangerous
ambiguity about this issue. But there is a huge blind spot to this assertion, which is that it presumes that we know what a combatant is. Of course, combatants do not exist in nature, any more than war exists as a natural condition waiting to be 'regulated' by the laws of war. What is and what is not a combatant is an elaborate normative and social construct. Although the laws of war tell us what to do with combatants, they also simultaneously, and perhaps more importantly, tell us what and who combatants are.153

The laws of war, thus, determine the legitimate participants in warfare. It is arguably at this stage that the discrimination that had been abolished at the level of the actual operational rules of warfare, sneaks back in and niches itself at the heart of the laws of war. From 'how should one deal with “savages” in war?', the question becomes 'who is a combatant?' (and the implicit answer, as will have become clear, is 'not a savage'). What we witness with the gradual codification of the laws of war is the recycling of the issue of what the applicable rules are (for example, whether obligations are owed on the basis of reciprocity), into the definition of who is entitled to their benefit (for example, capacity to reciprocate as a condition of combatant status).

The determination of who is a combatant is necessarily both inclusive and exclusive; more precisely, it is necessarily exclusive of something if it is to be inclusive of anything. The laws of war would cease to be a meaningful normative activity if they applied to any form of violence perpetrated by any actor. The laws of war, like a language, must assist us in recognizing war when we see it, and transform the perception of inchoate violence into a legally intelligible concept. In determining who the legitimate actors of warfare are, the laws of war necessarily promote a certain idea of what legitimate warfare is, as that warfare for the benefit of which the laws of war were invented. It is therefore not a surprise that the definition of what a combatant is, for instance, became such a bone of contention at the series of meetings that preceded the adoption of Protocol I.

As it happens, the contemporary laws of war, as the culmination of centuries of European thought expressed in the language of nineteenth-century positivism, are necessarily a by-product of the specific conditions that gave rise to them. In this context, the laws of war do not so much challenge the reality of statehood (as just possibly the cause of the violence) as they incorporate, legitimize and propagate the public/private distinction on which it thrives. International humanitarian law thus clearly expresses a preference for a strong monopoly of the use of legitimate international force by the state and therefore for the large, standing, organized and at least semi-professionalized armies which by the nineteenth century had become the hallmark of Western states. The laws of war in the nineteenth century are part of a reordering of war which leads the 'international community' to reaffirm, in face of the levée en masse, spontaneous resistance under occupation and use of guerrilla tactics from South Africa to Cuba, that the sovereign and its official military agents are the only ones that can be entrusted with the exercise of international violence.154 For the humanitarian, the laws of war are above all about regulating warfare; but for the realist, the underdog or the anti-colonialist might well all tell a different story, one in which the role of the laws of war is above all to reinforce the state's unshakeable stranglehold and express the dominant consensus about the state's incontrovertible legitimacy. The contemporary laws of war, therefore, are an integral part of the crystallization of the world into a world of states, part and parcel of the very constitution of that world.

As a result, the only persons to be unconditionally, ipso facto recognized as belligerents (even if they fail to respect the laws of war) are members of a state's armed forces. Partly in recognition of how things have changed and in response to Europe's own problem with irregular troops (much more, at least originally, than in deference to non-Western ways of waging war), the Hague Regulations and Geneva Conventions do define the conditions under which one may be considered a combatant even though one is not strictly a member of the state's armed forces. This is of course a significant improvement in itself: in the nineteenth and early twentieth centuries, the supposed inability of 'savages' to respect the laws of war was considered intrinsic and beyond redemption. There was no clear test (except that of the passing of time and the gradual incorporation into the family of nations) by which one might prove one's ability to be treated on a par with 'civilized' states. In the contemporary world, however, it is no longer

153 I intend to make this idea, which one might call the 'constitutive' idea of the laws of war, the centrepiece of a future monograph developing a comprehensive critical theory of the laws of war.

154 See for example the interesting resolution adopted by the Institut de droit international at its Zurich Session ("Application du Droit des Gens à la guerre de 1877 entre la Russie et la Turquie; Observations et voeux"), following the use of 'irregular troops, Bachi-Bozouks, Tscherkesses and Kurds' by Russia and Turkey in their 1877 war ('there is a question of responsibility, which may arise ... from the employment of savage hordes, incapable of conducting regular warfare. It is a duty incumbent upon states which call themselves civilized, and form part of the European concert, to reject the employment of such auxiliaries. A Government which should owe its victory to such means would place itself, by its own acts, outside the pale of international law').
possible (at least publicly) to simply assume that the 'uncivilized' are always 'uncivilized'—although it certainly remains possible to define the conditions of civilization.

The conditions laid out by international humanitarian law for the protection of persons involved in combat yet not members of a state's regular armed forces are the ones already mentioned which, in all likelihood, disqualify al Qaeda members caught in Afghanistan from benefiting from combatant status. As will have become evident, these conditions are precisely the elements that were supposed to be absent in 'savages'. One can no longer deny the benefit of the laws of war to one who has otherwise been determined a legitimate combatant; therefore, to be a legitimate combatant one must already have shown that one intends to wage war very much along Western lines.

The requirement that one be 'commanded by a person responsible for his subordinates', for example, refers to the defining characteristic of a modern European military: the existence of a hierarchy and of discipline.155 The requirements that one have a fixed distinctive emblem recognizable at a distance and that one 'carry arms openly' point to the distinguishability criterion (the uniform in particular, with its barely repressed homoerotic fetishism, having become since the Renaissance a focus of pride, esprit de corps and national identity).156 Unsurprisingly, this is the requirement that came under most assault as Protocol I was being negotiated, as one unduly privileging the regular armies of the West. Third World states obtained that the requirement be relaxed in situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself.157 Unsurprisingly as well, this has proved the single biggest stumbling block to ratification of the Protocol by countries such as the US. Moreover, even the added leeway thus granted is still more in the manner of a certain facility granted to the aspiring guerillero, than anything like a radical redefinition of what a combatant is.

The requirement that irregular troops 'conduct their operations in accordance with the laws and customs of war' is perhaps the most interesting of all. As we saw, reciprocity has clearly ceased to be a general condition for the applicability of the laws of war as between legitimate participants. For the state's regular armed forces, for example, protected combatant status inheres as of right and cannot be withdrawn as a result of momentary (or even ongoing) violations of the laws of war. For irregular troops, however, protected status is conditional upon respecting the laws of war, thus reinscribing into the law the fundamental concern about 'savages'—that one should only ever be obliged to afford them the protections of the laws of war to the extent that they can reciprocate.

As can be seen, these requirements merely incorporate into the law what had been the common prejudice at the time when the various instruments were adopted, namely that to be a combatant one must conform to what is essentially a Western stereotype about what waging war is. The laws of war, fundamentally, project a fantasy about soldiering that is ultimately a fantasy about sameness. They represent Western aspirations to have one's armies confronted by other, analogously constituted armies: adversaries rather than enemies, endowed with the same military ethos and mores, and who fundamentally situate their violence in the context of the exercise of sovereign prerogatives. It is against enemies of such calibre that one's losses can be mitigated,158 heroism validated and the ultimate respectability of warcraft upheld.159


157 Protocol I, Art. 44(3).

158 See Best, War and Law, p. 15 (noting that 'restraints enjoined, and even enforced, in dealing with a respected and culturally related foe have usually had nothing to do with what is expected in conflict with those perceived as barbarians, savages, infidels, subhuman, and so on').

159 This is a motivation clearly identified early on by the Institut de droit international which, upon introducing a manual on the laws of war, commented that: The Institut has not sought innovations in drawing up the 'Manual'; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable. By so doing, it believes it is rendering a service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts—which battle always awakens, as much as it awakens courage and manly virtues—it strengthens the discipline which is the strength of armies; it also ennobilizes their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.
Of course, the laws of war no longer exclude non-Western peoples from participating in that fantasy. But there is little doubt that this is the stereotype, and that only by conforming fully to it will one be accepted as a legitimate player in the game of war. It is in this way that the laws of war can be seen as continuously excluding that which does not conform to the image they project of legitimate warfare.

The laws of war as a project of Western imperialism

That the laws of war project a fantasy about what it means to make war should perhaps not be too much of a concern. On the face of it, it is clearly a good thing that combatants should distinguish themselves from non-combatants. Having a responsible command is better than not having one, and respect for the laws of war is something that should be encouraged.

Be that as it may, it is also important to understand how this regulation is only achieved at the price of promoting a certain model of violence. The inclusion of combatants within the confines of the laws of war only operates as a result of a larger exclusion of modes of warfare that do not fit the Western stereotype. In that respect, the laws of war are also and unmistakably a project of Western expansion and even imperialism, one that carries its own violence even as it seeks to regulate violence. To the extent that the laws of war project a fantasy about what it means to make war, they are also part of the dissemination and realization of that fantasy—one which, inevitably, is not initially shared universally.

The laws of war, in that respect, can be seen as having been historically one—in fact probably one of the foremost—instruments of forced socialization of non-Western nations into the international community, one whereby non-Western peoples have been called upon to wage war on the West's terms, by adopting Western military mores (thus almost inevitably reinforcing Western supremacy). To respect the laws of war or to be seen as capable of doing so became a sought-after badge, testifying to true membership of the family of nations. Thus Japan, for example, staked much of its bid to join the 'civilized world' on its ability to conform to the laws of war. After it had been sent stumbling down the ladder of civilization following the revelation of the Port Arthur massacre,162 its behaviour in helping quell the Boxer Rebellion, and in the Russo-Japanese war of 1904–5, was widely noted,163 eventually earning it the enviable nickname of the 'Britain of the East'. One commentator gushed that 'the assimilation, rapid and complete, of the best traditions, the courtesies and amenities of European warfare' was even more remarkable than Japan's newfound military might.164 Although '[h]ow far China might be held to have forfeited her position by the gross breach of law involved in the assault on the Pekin Legations in the summer of 1900 was for some time a matter of speculation', Hall thought that 'her inclusion among the Powers invited to the Hague in 1907 set the matter at rest.'165 Eric Myles has convincingly argued that Russia's role in the promotion of the laws of war in the second half of the nineteenth century can be explained in terms of an aspiration to prove its 'Western' credentials: 'may [Russia], accepting and proclaiming the need for these laws of war, give the example to all civilized


161 The universalization of the model implicit in the laws of war would arguably have played to Western strengths, giving the West a head start in all things military since it effectively had the original blueprint for warfare. In that respect, the 'power to define' or to 'name' appears crucial in the West's world domination, a little in the same way that from a military point of view the power to 'choose the battlefield' is considered significant.

162 As Creelman wrote in The New York World: 'The defenceless and unarmed inhabitants were butchered in their houses and their bodies unspeakably mutilated. There was an unrestrained reign of murder which continued for three days. The whole town was plundered with appalling atrocities. It was the first stain upon Japanese civilization. The Japanese in this instance relapsed into barbarism. All pretences that circumstances justified the atrocities are false. The civilized world will be horrified by the details' (emphasis added); The New York World, 12 December 1894, p. 1.

163 Creelman even emphasized that:

[whatever I may have written of that three days' slaughter at a time when Japan was seeking admission to the family of civilized nations, it is only just to say that the massacre at Port Arthur was the only lapse of the Japanese from the usages of humane warfare . . . The humanity and self-control of the Japanese soldiers during the historic march of the allied nations to Peking, seven years later—withstanding the cruelty and barbarism of some of the European troops—have redeemed Japan in the eyes of history. The Japanese have demonstrated to the world that their civilization is substantial.

James Creelman, On the Great Highway (Boston, 1901), p. 50 (emphasis added); see also Hall, Treatise on International Law, p. 49 ("The right of Japan to rank with the civilized communities for purposes of international law, so questionable when the first edition of this book was published, has long since been clearly established. . . . During the course of hostilities against China . . . she adhered to the recognised laws of war"); A. Berriedale Keith, Wheaton's Elements of International Law (6th ed., 2 vols., London, 1929), vol. I, p. 32.

164 As quoted in Dyer, Nippon, p. 417. 165 See Hall, Treatise on International Law, p. 49.
Europe. In fact, when Russia and Japan came head to head during the Russo-Japanese war, the issue was framed very much in terms of 'which is the civilized power?', based on how each was supposed to have respected the laws of war.

Later on, the idea that the laws of war were primarily designed to regulate international armed conflicts would be used effectively to exclude wars of national liberation from the ambit of most of the Geneva Conventions. So conspicuous was the victory of the West in making the laws of war the frame of reference, that even by the time the Third World sought to make its newfound presence felt and to reverse the tide, it would do so unmistakably in the language of the laws of war rather than by challenging them. Even such victories as were obtained in 1977, for example, such as the partial recognition of the fact that guerrilla warriors cannot be asked to distinguish themselves at all times, were firmly encased in the otherwise mainstream language of distinguishability.

Although conforming to the laws of war brought benefits, namely their protection, it is also clear that the worldwide expansion of the laws of war was a culturally violent, fundamentally imperialistic and essentially militaristic phenomenon. I would not go as far as saying that the Third World built up armies in order to conform to the fantasy implicit in the laws of war, but the suggestive power of these laws has certainly been one of the fundamental legitimizing ideological forces behind that shift. In most societies, war would not have been the specialized activity of a professionalized warrior class working for the sovereign. Taking up arms as the enemy approached was simply something that all able-bodied men would have done when the community was confronted with a danger. The promotion of hierarchy, distinguishability, and the ability to respect the laws of war, on the contrary, militated strongly in favour of the model of the modern, sizeable standing army, with all the well-known risks in terms of international but also domestic stability (from which, of course, the Third World has suffered most). Soon enough, military parades and grand uniforms would become part of the status symbols of statehood, and having big guns the sign that one was a true sovereign.

More importantly, the laws of war have exported and universalized a highly particular form of inter-state violence. In their contemporary international positivistic variant, the laws of war are a very specific response to a peculiarly Western problem. The emergence of the very idea of war is a result of medieval theologians' attempts at distinguishing between prohibited private violence and licit ('just') public violence. From the start, war is linked to the state, a uniquely Western construct: war is the specific form of violence of the state in its external relations. War is in fact so central to the Western state that it becomes, de facto, an essential part of its domestic coming into being. The French Revolution, the advent of conscription, the Napoleonic wars, the emergence of nationalism and liberalism as political forces profoundly transformed the conditions of warfare in the nineteenth century by pitting entire nations against each other, with potentially devastating consequences. These radical developments, largely unknown anywhere else, and extending as they did the theatre of operations to the territories of entire states, announced the total wars of the twentieth century. As such they threatened the very fabric of the nascent international community. It is in this context of breakdown of communal values and anxiety about the ravages of war that the need for enforcing positive restraints on warfare arose.

Specifically, the laws of war reaffirmed the need to entrust the conduct of warfare to a warrior class capable of enforcing restraint. International law provided the very culturally situated way in which these norms were to be enforced, 'in accord with both the progress of juridical science and the needs of civilized armies'. Thus the regulation of war took the specific form, in the West - and in the West only - of the standard machinery of international law-making, from solemn diplomatic conferences to sophisticated international treaties, and the various organizations entrusted with their enforcement.

Early international humanitarian lawyers, haunted perhaps by a forewarning of worse things to come in the twentieth century, were above all responding to a particular European challenge - but they formulated their prescriptions in the language of universalism, so convinced (and rightly so, as it turns out) were they that the model of European international relations was destined for global acceptance.

According to Art. 44(3) of Protocol I, the rule characteristically remains that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.'

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166 Prince N. M. Romanovsky at the spring 1881 meeting of the Imperial Russian Technical Society, as quoted in Eric Myles, "Humanity", "Civilization" and "the International Community" in the Late Imperial Russian Mirror: Three Ideas "Topical for Our Days" (2002) 4 Journal of the History of International Law 310 at 316.
167 George Kennan, 'Which Is the Civilized Power?' (1904) 78 Outlook 515.
168 According to Art. 44(3) of Protocol I, the rule characteristically remains that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.'
169 See M. H. Keen, The Laws of War in the Late Middle Ages (London, 1965).
171 Institut de droit international Law, Laws of War on Land, preface.
Conclusion: the legacy of exclusion and expansion

Far from being merely a perversion, I have sought to show how exclusion and the creation of an 'other' may have been at the very foundation of international humanitarian law, a phenomenon bound to re-emerge in times of strain. I have tried to show how the laws of war have always stood for a particular vision of what legitimate warfare is which is almost entirely informed by the European experience. Although the laws of war have accomplished something of a Copernican anthropological revolution over the last fifty years, there is more to practices such as Guantánamo than the mere onslaught of power and violence against the Law: something like the discreet exclusionary work of law itself.

It is this model—putatively universal but profoundly exclusive—that has been expanded the world over, to the point of saturating legal and moral public discourse about war. It is this model that exercises a monopoly over our imaginations about state violence and what can be done about it. In the process of expansion of the laws of war, warfare the world over has become something very much like (if not much worse than) what nineteenth-century humanitarians had sought to avert. In that respect, humanitarian lawyers rightly prophesized the danger, but that prophecy also ended up being a startlingly self-realizing one. In many ways, international humanitarian law was the solution to the problem it simultaneously crystallized (something that could be said of much of international law).

It may be that such is the price to pay if one is ever to achieve a modicum of regulation in warfare. It is also important, however, to assess what has been lost in embracing a regulatory model that is so tainted with the ideology that gave rise to it, and so committed to the entrenchment of state power. In the nineteenth century, one of the aforementioned fathers of international humanitarian law, de Martens, felt it was axiomatic that 'the mission of European nations is precisely to inculcate oriental tribes and peoples ideas about the law, and to initiate them to the eternal and benevolent principles that have placed Europe at the head of civilization and humanity'.

The question international humanitarian lawyers should be asking themselves as a matter of some urgency is: how have the laws of war been instrumental in reinforcing the very categories from which they supposedly withdrew and, with the benefit of hindsight, what is the balance sheet of international humanitarian law's mediation of the colonial encounter?

172 De Martens, 'La Russie et l'Angleterre', p. 234.

Through colonization, did the non-Western world at least get the benefits of forms of regulation which were either unknown to them or need of being updated for the purposes of international interaction? The laws of war beyond the West have been simultaneously embraced as part of the standard baggage of civilization, and roundly trampled. They have often proved far less effective than had been hoped at protecting the victims of armed conflict. The improbability of their transplants is partly to blame. The laws of war presuppose a number of social ideal-types—the responsible commander, the chivalrous officer, the reliable NCO, the disciplined foot-soldier—that cannot be recreated at a moment's notice once the laws of war have been cut off from their cultural base. Much of the sustainability of the laws of war relies on these assumptions about role-playing to make sense of otherwise enigmatic legal injunctions. By transferring only the thinnest of superstructure, the risk is that non-Western militaries will have inherited legal frameworks uninhabited by social purpose. The irony, of course, is that by the time the non-Western world had committed to some of the archetypes implied in the laws of war, international humanitarian law turned out to not be very good at restraining warfare at all and, in fact, particularly hopeless in regulating warfare among or within the recent converts.

But perhaps more attention should be paid to what the laws of war have excluded or obscured, instead of simply to what the laws of war have failed to or succeeded in doing. Much international humanitarian scholarship of the past thirty years has been devoted to the worthy task of showing how traditions of restraint in warfare have existed in many non-Western cultures.173 This is undeniably a welcome (re)discovery that was long overdue. Maybe the laws of war were indeed merely giving a universal expression to what was otherwise an extremely widespread aspiration which case no culture could be said to have been specifically disposed of anything.

But typically this scholarship may well end up overemphasizing similarities between such traditions, at the expense of what was said about the development of the contemporary laws of war. That tradition of restraint in the use of violence by social entities against each other have existed almost universally is quite clear. The modern version of laws of war, however, that which became globalized, is clearly, as I have

to have demonstrated, about more than a simple intuition that not all is permitted in times of war. The particular way that fundamental idea was expressed (through international law, through the language of statehood), for example, will often have been as important as the message (the disincarnated idea that restraint in warfare is an obligation).

One fruitful and so far hardly pursued avenue of research, therefore, would try to assess the extent to which the contemporary laws of war ended up displacing existing, richly situated traditions for the benefit of a relatively decontextualized universalism. A history of how the laws of war have consequently impoverished cultural registers to deal with organized violence is still to be written, but it might shed light on the devastating consequences of conflicts in places like Africa.

In the meantime, it is tempting to think that the universalization of the laws of war has often left the non-Western world in the worst of places: one where existing traditions have been sufficiently destabilized to be discredited, but where the promise of ‘civilization’, hailed as the prize for massive societal transformation along Western lines, has failed to materialize.

The (missed) encounter between colonialism and the laws of war has also had implications for the ‘civilized world’ itself and our understanding of the emergence and development of international law. The exclusion of the non-civilized was obviously a consequence of international law’s prescriptions. But it was also a cause of the tonality of these prescriptions, part of a complex dialectical process of constitution (in the sense of ‘coming into being’) of international law, which conferred its particular civilizational hue. The relation of public international law to the problem of war was never, needless to say, that of an already constituted set of norms to be applied to a novel and, to a degree, extraneous social problem. Instead, international law became what it eventually became by upholding itself as a vision of ‘civilization’ against the simultaneously constituted ‘savagery’, fantasized or not, of the non-Western warrior, so that this contrast, recast as the West against itself, whether it be in the repression of resistance, the experimental blueprint for ‘civilized savagery’. These tactics, honed in the streets of Damascus or the Ethiopian desert, would one day be turned by the West against itself, whether it be in the repression of resistance, the waging of total war, or the planning of the Holocaust. In the end, it was less the ‘savages’ who were ‘civilized’, than the ‘civilized’ who ‘savaged’ themselves, through no responsibility other than their own.

But there is a deeper point at stake that has implications for both the West and the rest of the world. The West’s denial of the applicability of the laws of war to non-Western peoples was firmly grounded in the supposed ‘civilization’ of the ‘civilized’ and the ‘savagery’ of savages as the founding and structuring dichotomy of the attempt to regulate warfare. Whatever humanitarians of the nineteenth century may have thought, this is a dichotomy that must surely appear under a very different light in our era.

The perceived ‘savagery’ of savages, perhaps even more than Europe’s self-perception as ‘civilized’, was the initial moment of the laws of war, 

"barbarians” and ‘supplied the sense that there was such a thing as international law. Indeed, because of the centrality of the problem of war to international relations, the laws of war became central to international law’s self-image and still retain a unique place in the framing of a distinct reformist sensibility, not to mention the discipline’s relatively good conscience.

It is in this light that the curious and tragic unravelling of the war-humanizing project in its very place of birth must be analyzed. Ironically, what came to haunt European nations was not the warfare of ‘savages’, as had been feared. Rather, it was the West’s own savageness, revealed to itself in the process of repressing the colonial ‘other’. Wars of colonization kept alive the savagery within that which the laws of war were supposed to have expunged. This is so in the sense that the violence of colonization (both symbolic and actual) inexorably set the stage for wars of liberation that would be mimetically violent in their desire for enfranchisement, turning the violence of the colonizer against it — and in turn triggering an ever-more violent response by the colonizer himself, a legacy that would come back to haunt many newly independent states. But it is also more crucially in the sense that colonial wars constituted a testing ground for the denial of the ‘other’ at home, the transformation of warfare into genocide, the symbolic and actual) inexorably set the stage for wars of liberation that would be mimetically violent in their desire for enfranchisement, turning the violence of the colonizer against it — and in turn triggering an ever-more violent response by the colonizer himself, a legacy that would come back to haunt many newly independent states. But it is also more crucially in the sense that colonial wars constituted a testing ground for the denial of the ‘other’ at home, the transformation of warfare into genocide, the experimental blueprint for ‘civilized savagery’. These tactics, honed in the streets of Damascus or the Ethiopian desert, would one day be turned by the West against itself, whether it be in the repression of resistance, the waging of total war, or the planning of the Holocaust. In the end, it was less the ‘savages’ who were ‘civilized’, than the ‘civilized’ who ‘savaged’ themselves, through no responsibility other than their own.

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See for example de Martens’ rationalization of international law: ‘Nations, in recognizing the compulsory force of certain juridical principles, ratify by the same token their awareness of a community existing between themselves’: ‘La Russie et l’Angleterre’, p. 237 (emphasis added).


the instant glimpse of 'otherness' that allowed the constitution of the 'civilized' self. It is far from clear, however, as has emerged from various contemporary anthropological and historical debates, that 'savage' warfare was ever that 'savage'.

It is not my purpose to comment on these debates in detail but suffice it to say that, at the very least, the image that can be garnered from specialized discussions on the relative 'savagery' of 'civilized' and 'savage' warfare challenges any stark contrast between the two. It would of course be dangerous to fall into the trap of idealizing the 'noble savage': the evidence of 'barbarous' conduct in non-Western warfare is simply too obvious to be denied. But there is consistent evidence that, although they may have been proportionally more violent, primitive conflicts were also much less destructive. This is partly because of the ritualized nature of much internecine violence, and partly, more relevantly, because the weak logistical base of primitive non-statal entities ensured that campaigns were short-lived.

The state, on the contrary — and this is arguably what nineteenth-century humanitarians saw before everyone else — introduced the prospect of wars that would draw on the massive economies of scale brought about by greater territory and modern technology. It should be fairly clear, in this context, that even the most violent of 'tribal' skirmishes paled in comparison to the systematic onslaught of the state's war machinery.

Whatever the case may be, even as we rediscover the relativity of 'savagery', we are inexorably led to find the claim of 'civilization' increasingly indefensible on its own terms. The 'civilization' of 'civilized' warfare was already a dubious claim when it was first made. The 'modern European wars' that Lieber mentions would presumably have included various Napoleonic wars, wars that were rife with cities set ablaze, mass killing, and rape of civilians. When it comes to their 'descendants in other portions of the globe', it is worth reminding ourselves that the Lieber Code was promulgated at the outset of the US Civil War, a conflict in which irregulars committed countless atrocities and where thousands died in dismal conditions in prisoners' camps. Moreover, it is a contention that

must seem almost obscene with the benefit of hindsight, two World War and the Holocaust. Paradoxically, the formalization of the laws of war turned out to be the prelude to a deluge of violence, as if the rules had only been formulated to be broken.

It may well be, therefore, that the spread of the West's own mode of centralized, industrialized violence — essentially the fabrication of a dehumanized war machinery — to the rest of the world, manifested itself in an exponential increase in the overall amount of violence experienced by humankind.

The crumbling of the founding dichotomy between 'civilization' and 'savagery', moreover, can only send the laws of war stumbling down into a spiral of decomposition, and inaugurate the crisis that we may now be witnessing; it may also explain why, paradoxically, the laws of war need their 'savages', whether they be war criminals, terrorists or unlawful combatants, and go through periodic 'crises of otherness' that lead them to reassert, almost spasmodically, their foundational counter-image.

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177 This is an intensely debated issue among specialists. I merely note that this is highly contentious: see Lawrence H. Keeley, War before Civilization: The Myth of the Peaceful Savage (New York, 1996); Martin L. van Creveld, The Transformation of War (New York, 1990).

178 This is a point I cannot explore in any depth here, but an interesting lead is the idea that the transformation of warfare in the West from the nineteenth century onwards involved above all a 'de-ritualization' of violence, from the joust-inspired wars of the Middle Ages for example. The state system, in other words, could be faulted for 'taking war seriously' and losing sight of its symbolic-regulatory function.