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# International Law and the Transformation of War, 1899–1949: The Case of Military Occupation

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September 11, 2001, heralded a new age of war according to many Western security experts. Nonuniformed and non-state-sanctioned combatants attacked the World Trade Center to sow terror at the heart of the West. According to the Bush administration, the radically new nature of this war demanded indefinite detention and “enhanced” interrogation for those captured by the United States. Administration supporters vigorously defended these measures, often using the conflict’s novelty as a justification.<sup>1</sup>

International legal and human rights communities erupted in protest. Indefinitely detaining persons without civilian trial, denying them civilian legal counsel, brutally interrogating them, trying them in front of hastily constituted “military commissions,” and internment in a legal no-man’s land at Guantánamo Naval Base were attempts to fight this conflict outside international law’s reach. Criminal law provided methods to deal with Al-Qaeda. The Bush administration’s methods were unnecessary, counterproductive to US interests, and illegal. This new war could be fought within the confines of international law, administration opponents assured the world.<sup>2</sup>

This war’s novelty was the one area of agreement in this intense debate. Yet, some of these issues from the post-9/11 era hearkened back to discussions of military occupation from the late nineteenth century through the mid-twentieth

<sup>1</sup> See, e.g., Shannon D. Beebe and Mary H. Kaldor, *The Ultimate Weapon Is No Weapon: Human Security and the New Rules of War and Peace* (New York, 2010); Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford, CA, 2012).

<sup>2</sup> For examples from opposing sides, see John Yoo and James Ho, “The Status of Terrorists,” *Boalt Working Papers in Public Law*, <http://escholarship.org/uc/item/7kt6n5zf>; Ann-Marie Slaughter and William Burke-White, “An International Constitutional Moment,” *Harvard International Law Journal* 22 (2002): 1–22. The key legal texts for the Bush administration’s approach were Jay S. Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense,” January 22, 2002, and Alberto R. Gonzales, “Memorandum for the President,” January 25, 2002, in *The Torture Papers: The Road to Abu Ghraib*, ed. Karen L. Greenberg and Joshua L. Dratel (Cambridge, 2005), 81–117, 118–25.

century. Those discussions revolved around subjects such as the limits of resistance and the qualifications for belligerent status. The late nineteenth century witnessed the codification of military occupation in international law. But by 1949, the consensus on which this codification was built had disappeared. The Geneva Conventions of 1949 confirmed the transformation of the late nineteenth century's vision of occupation. They solidified the category of the resistance fighter in an occupation, inscribing it into the landscape of the legitimate in war. This was part of a broader change in the European conception of war, one that departed from what Carl Schmitt characterized as "contained war." Contained war accepted the right of states to prosecute wars, but it sought to reduce the possibility of escalation by controlling and limiting wars once they had begun. Such wars were always to have limited, discrete goals. Those who conducted war were to be European sovereign states, most notably European great powers; civilians were to be separated from the conflict, and any expansion of belligerent status was viewed with suspicion. The memory of the Napoleonic wars, as David A. Bell argues, played a critical role in shaping a commitment to contained war in the nineteenth century.<sup>3</sup> It was also a conception of war closely linked to the notion of "civilization" in nineteenth-century international politics insofar as it was geographically limited to Europe and a few other select regions in the world.<sup>4</sup> We know that outside this circle of civilization in the colonial world, European armies along with others, such as the US Army, pursued wars where violence was routinely and purposefully directed against civilians. One need only look to the US war in the Philippines, the actions of the French General Hubert Lyautey, or the writings of the British General Charles Calwell to find examples of how unrestricted warfare reared its head outside the charmed circle of "civilization."<sup>5</sup> Schmitt deployed his notion of

<sup>3</sup> David A. Bell, *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It* (New York, 2007), 308–9. For other historians and political scientists who make arguments relating to "contained conflict" in the nineteenth century, see Michael Geyer, "German Strategy in the Age of Machine Warfare, 1914–1945," in *Makers of Modern Strategy: From Machiavelli to the Nuclear Age*, ed. Peter Paret (Princeton, NJ, 1986), 535; Geyer, "The Past as Future: The German Officer Corps as Profession," in *The German Professions: 1800–1950*, ed. Geoffrey Cocks and Konrad Jarausch (Oxford, 1990), 197; Jörn Leonhard, *Die Büchse der Pandora: Geschichte des Ersten Weltkriegs* (Munich, 2014), 22.

<sup>4</sup> Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford, 1984).

<sup>5</sup> Douglas Porch, "Bugeaud, Galliéni, Lyautey: The Development of French Colonial Warfare," in *Makers of Modern Strategy: From Machiavelli to the Nuclear Age*, ed. Peter Paret (Princeton, NJ, 1986), 376–407; Daniel Whittingham, "'Savage Warfare': C. E. Callwell, the Roots of Counter-Insurgency, and the 19th Century Context," *Small Wars and Insurgencies* 23, nos. 4–5 (2012): 591–607; Brian McAllister Linn, *The Philippine War, 1899–1902* (Lawrence, KS, 2000).

contained war in an attack on the post–World War I Versailles order, but this does not diminish the concept’s usefulness as a characterization of the European approach to war in the nineteenth century. This article argues that contained war was the broader norm that rested behind military occupation as codified in international law. The road from the late nineteenth century’s vision of military occupation in international law to Geneva’s treatment of occupation was anything but straightforward, and this essay will trace the contingent process that led to occupation’s transformation at Geneva.

Various disciplines have examined military occupation. Historians have produced detailed studies, in particular for World War II. Yet, historians are less interested in occupation as a specifically international phenomenon whose historical construction is bound up with international law and norms.<sup>6</sup> Political scientists, by contrast, concentrate on assumptions within the international system that shape occupation. David Edelstein maintains that the international threat environment around an occupation decisively influences its success or failure.<sup>7</sup> Tanisha Fazal contends that a norm against conquest arose with American pre-eminence after 1945 and contributed to the absence of “state death” in the period afterward.<sup>8</sup> Yet, such arguments lend too much clarity to very muddled conceptions of postwar norms, especially insofar as we follow the works of historians such as Mark Mazower and Samuel Moyn.<sup>9</sup> Mazower’s and Moyn’s perspectives also challenge contemporary legal scholarship. Much of the current literature on the law of occupation is partially informed by the corpus of contemporary human rights law and legal developments after 1945. The assumptions embedded in that corpus unnecessarily limit a historical approach to the law of occupation. The standard contemporary legal argument emphasizes that prior to 1945, the laws of war afforded civilians few protections and overprivileged the state. The Second World War made clear the need for change, including a change in the law of occupation.<sup>10</sup> Some legal scholars por-

<sup>6</sup> An exception to this is Mark Mazower, who includes the National Socialist approach to international law in his analysis of National Socialist occupation. See Mark Mazower, *Hitler’s Empire: How the Nazis Ruled Europe* (New York, 2008), 354, 586–87.

<sup>7</sup> David M. Edelstein, *Occupational Hazards: Success and Failure in Military Occupation* (Ithaca, NY, 2008). See also the H-Diplo Roundtable on Edelstein’s book at <http://www.h-net.org/~diplo/roundtables/PDF/Roundtable-X-15.pdf>.

<sup>8</sup> Tanisha M. Fazal, *State Death: The Politics and Geography of Conquest, Occupation, and Annexation* (Princeton, NJ, 2007).

<sup>9</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, 2010), 47–48; Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ, 2009), 7–19.

<sup>10</sup> See, e.g., Jochen Abr. Frowein, “The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation,” *Israeli Yearbook on Human Rights* 28 (1998): 1–28.

tray occupation as unworkable, especially when it comes to the “conservationist principle” that prohibits the occupier from transforming an occupied society.<sup>11</sup> Others, most notably Eyal Benvenisti, have dealt with the origins of belligerent occupation, but their investigations have tended to be narrowly legal and have made little attempt to place occupation law in a deeper historical context. Finally, legal approaches have little room for the sharp breaks created by contingency.<sup>12</sup> Legal scholarship is certainly important to understanding the law of occupation, but the most important legal scholarship comes from the period from the late nineteenth century to the mid-1950s.

This article seeks to examine the law of occupation looking forward from its position within the late nineteenth-century European norm of contained war, not backward from contemporary international law. When it was codified, the law of military occupation was closely connected to the norm of war containment within the realm of “civilization,” but that connection was severed by 1949. Reaching this point requires the examination of four moments in occupation’s history from the late nineteenth century through 1949. The first arose with the codification of military occupation at the Hague Conference of 1899; the next came with the National Socialist assault on the codified law of occupation; the third came in the Hostages Trial of 1947–48, when high-ranking Wehrmacht defendants sought to reframe National Socialist occupation practices within the law of occupation codified at The Hague in 1899; and the fourth arrived with the Geneva Conference of 1949 and its preparatory conferences. In this last instance the American and British defense of the norm of contained war and the law of occupation faced a broad European reaction against occupation. That reaction transformed key elements of the law of occupation such as the status of resistance fighters, severing occupation’s links with the norm of contained war.

#### CODIFYING MILITARY OCCUPATION

Discussions of military occupation at The Hague were part of an attempt to codify a range of customary international law (CIL) in the late nineteenth century.

<sup>11</sup> See, e.g., Davis Goodman, “The Need for Fundamental Change in the Law of Belligerent Occupation,” *Stanford Law Review* 37, no. 6 (July 1985): 1573–1608. For Iraq, see Gregory H. Fox, “The Occupation of Iraq,” *Georgetown Journal of International Law* 36, no. 2 (Winter 2005): 195–297; David Scheffer, “Beyond Occupation Law,” *American Journal of International Law* 97, no. 4 (October 2003): 842–60; Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights,” *American Journal of International Law* 100, no. 3 (July 2006): 580–622; Ginesh Sitaraman, “Counterinsurgency, War on Terror, and the Laws of War,” *Virginia Law Review* 95, no. 7 (November 2009): 1748.

<sup>12</sup> Eyal Benvenisti, “The Origins of the Concept of Belligerent Occupation,” *Law and History Review* 26, no. 3 (Fall 2008): 621–48.

The developing profession of international law, Europe's recently professionalized officer corps, and, of course, diplomats were the most active participants in this process. Alongside treaty law, CIL is the main building block of international law. CIL is derived from international declarations, diplomatic correspondence, and legal scholarship. State practice proceeding out of an explicit sense of legal obligation also constitutes CIL, but proving this subjective sense of legal obligation is often very difficult. In a critique of CIL, Eric Posner and Jack Goldsmith argue that it lacks a "centralized lawmaker, a centralized executive enforcer, and a centralized authoritative decision maker."<sup>13</sup> Michael Byers describes CIL as part of the "normative structures that regulate the application of what international relations scholars call 'power.'"<sup>14</sup> The fact that elements of CIL are not clearly defined means that tensions appear in sharper relief once the codification of CIL begins. That is exactly what happened at The Hague in 1899 when it came to military occupation. The tensions surrounded three questions. First, when and how was an occupation established and maintained? Second, what was the relationship between the departed sovereign state, the municipal authorities, and the occupying power? Third, was resistance to an established military occupation legal?

Delegates at The Hague first focused on the establishment and maintenance of military occupation. The legal shorthand for this is "effectiveness." German and Russian military delegates expressed concern that an uprising could destabilize an occupation if it cut an occupying force's lines of communication. Colonel Gross von Schwarzhoff, the German military delegate, wanted a portion of the Brussels Declaration of 1874, the basis of the discussions at The Hague, stricken entirely. It read: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."<sup>15</sup> Schwarzhoff was concerned about the effort required to maintain an occupation and the implications of not "exercising" authority consistently. Édouard Rolin-Jacquemyns suggested they borrow from the 1880 Oxford Manual of the Laws of War on Land, which stated that an occupation was established once the invaded state "has actually ceased to exercise its ordinary authority therein." Others feared that striking a sentence that emphasized the "exercising" of an occupier's authority or referring to a loss of "authority"

<sup>13</sup> Jack L. Goldsmith and Eric Posner, "A Theory of Customary International Law," *University of Chicago Law Review* 66, no. 4 (Autumn 1999): 1114–15.

<sup>14</sup> Michael Byers, *Custom, Power, and the Power of Rule: International Relations and Customary International Law* (Cambridge, 1999), 4.

<sup>15</sup> "On Military Authority over a Hostile Territory," Article 1, International Declaration Concerning the Laws and Customs of War, Brussels, August 27, 1874, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=337371A4C94194E8C12563CD005154B1>.

would make it easy to declare an occupation in the midst of conducting an invasion. One could create “paper” occupations, much like “paper” blockades, turning a legal military defense against an invasion into an illegal uprising against an occupation. After much debate, the delegates decided to adopt without any alteration the first article of the Brussels Declaration of 1874 regarding the start of an occupation. The German and Russian delegates dropped their objections.<sup>16</sup>

Though the Brussels Declaration was a central element in CIL, the discussion over this article also revealed contrasting understandings of the legal basis for military occupation. Was military occupation grounded in the force of the occupier alone, and if so, did that force have to be exercised consistently across occupied territory? This had implications for the relationship between the occupier and the occupied population. If force was the basis of obedience, it increased demands on the occupier to “exercise” control over an occupied territory constantly. In turn, an occupier could more easily lose its claim to occupation, which would increase the possibilities for legitimate resistance to a de-established occupation. If, however, the occupier’s authority rested in international law, the need for a continuous “exercise” of control diminished and the occupier could make claims on the occupied population’s obedience with reference to international law.

Local law would continue to apply in an occupied territory because this helped maintain the assertion that the defeated government was still sovereign in that occupied territory. The occupier was only a trustee for the departed sovereign. The Brussels Declaration created a delicate balance. It allowed the local administration of a territory under military occupation to remain in place and restrained the occupier’s power to “modify, suspend, or replace” local laws “unless necessary.”<sup>17</sup> In her analysis of this discussion of the administration of occupied territory, Isabel V. Hull has focused on the insistence by Schwarzhoff and the Russian military delegate, Colonel J. Gilinsky, that local laws not take precedence over “order” and the military law of the occupant.<sup>18</sup> This issue was discussed, but Auguste Beernaert, a former Belgian prime minister and a Belgian delegate, instigated the most heated arguments on local administration. He wanted to drop all references to the occupier enforcing local laws and working with the local administration. Beernaert believed these articles granted the occupying power too many rights and thought it dangerous that such clauses

<sup>16</sup> See the discussion in Seventh Meeting, Second Subcommission, June 8, 1899, in James Scott, ed., *The Proceedings of The Hague Peace Conferences: The Conference of 1899* (New York, 1920), 509–12.

<sup>17</sup> Article 3, Brussels Declaration, <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

<sup>18</sup> Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca, NY, 2015), 97–98.



sought to anchor the relationship between occupier and occupied in international law. "We cannot," he declared, "transform fact into law." Yet, Beernaert failed to convince other delegates at The Hague. The articles that Beernaert opposed, several pointed out, were in the Brussels Declaration precisely to restrain the occupier, even if few at the time foresaw how the German Army would invoke a robust doctrine of military necessity to evade such restraints in World War I. Even Schwarzhoff spoke up for these articles, arguing that people needed their local officials to remain in place during occupation. Feodor Martens, the Russian delegate and one of the most respected jurists at the conference, objected to Beernaert's attempt to ground occupation in force alone. For Martens, occupation was situated within international law, and laying out the "rights and duties" of the occupier and the defeated government was essential. Leaving occupation as vague as possible in international law provided the occupied with little protection from the occupier.<sup>19</sup>

Most of the articles concerning local administration made it into the Hague Conventions of 1899, and Beernaert's attempt to push law forward, *de lege ferenda*, was largely resisted. Making the occupier a trustee for the departed sovereign government and requiring it to uphold local laws prevented the occupier from transforming the occupied territory through changes in its institutions and laws, maintaining the defeated state's sovereignty.<sup>20</sup> Keeping the local administration and laws intact distinguished occupation from conquest. The assurance of continued sovereignty and nontransformation also gave defeated governments an incentive not to fight past the point of defeat.<sup>21</sup> Thus, sovereignty and the norm of contained conflict were mutually reinforcing. Only a peace treaty could transfer sovereignty. Practically speaking, these measures also sought to restore a state of order and nonwar in an occupied territory.

With some minor modifications, the decisions on "effectiveness" in occupation and local administration remained largely within the bounds of CIL. They hewed closely to important international legal documents such as the Brussels Declaration while taking on additions from the Oxford Manual. State practice with regard to occupation was raised only in the abstract, in connection with

<sup>19</sup> See Speech of Auguste Beernaert, June 6, 1899, in Scott, *The Proceedings*, 503; Remark by Colonel Gross von Schwarzhoff, June 10, 1899, in Scott, *The Proceedings*, 521; Speech by Feodor Martens, June 6, 1899, in Scott, *The Proceedings*, 506.

<sup>20</sup> "Transformation" refers in a legal sense to the deliberate, long-term reworking of the institutions and laws of the occupied territory by the occupier, as opposed to what has been called a "trustee" occupation. See Nehal Bhuta, "The Antinomies of a Transformative Occupation," *European Journal of International Law* 16, no. 4 (2005): 721–40.

<sup>21</sup> This was the lesson of the Franco-Prussian War. See Michael Howard, *The Franco-Prussian War: The German Invasion of France, 1870–1871* (London, 1961), 371; Mark Stoneman, "The Bavarian Army and French Civilians in the War of 1870–1871: A Cultural Interpretation," *War in History* 8, no. 3 (July 2001): 271–93.



assumptions about what militaries, governments, and people might do in a hypothetical situation; references to military manuals or actual instances of state practice were absent. Moving in and out of these discussions, sometimes very obliquely, was the third and most volatile question: the legality of resistance. When the British military delegate, Sir John Ardagh, and the Swiss military delegate, Colonel Arnold Künzli, put forth proposals to legalize resistance to an established occupation, the discussion entered new and dangerous territory. As usual, the discussion was based on relevant articles from the Brussels Declaration. Those articles read:

Article 9: The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination "army."

Article 10: The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.<sup>22</sup>

These articles applied to resistance to an invading army, not resistance to an established occupation, but they offered an opening to discuss resistance to occupation. Earlier, Beernaert had wanted these articles abolished. "By undertaking to restrict war to States only, the citizens remaining to a certain extent only mere spectators," asked Beernaert, "would not the risk be run of reducing the factors of resistance by weakening the powerful mainspring of patriotism?" Discouraging civilians from fighting "either before or after occupation" encouraged "baneful indifference" among Europe's populace. Ardagh recommended a concrete amendment: "Nothing in this chapter shall be considered as tending to lessen or abolish the right belonging to the population of an invaded country to fulfill its duty of offering by all lawful means, the most energetic patriotic resistance against the invaders." Künzli suggested an addition: "No acts of retaliation shall be exercised against the population of the occupied territory for having openly taken up arms against the invader." Though the distinction between

<sup>22</sup> Articles 9 and 10, Brussels Declaration, <https://www.icrc.org/applic/ihl/ihl.nsf/ART/135-70009?OpenDocument>.

invasion and occupation is clear in the Hague Convention of 1899, the dividing line between the two was blurred at times in the discussions.<sup>23</sup> This further demonstrated the importance of “effective” occupation, since an occupation that was not “effective” slipped back into a more permissive set of regulations when it came to resistance.<sup>24</sup>

Suggestions that civilians could fight as legitimate combatants against established occupations provoked vigorous responses from Schwarzhoff and Gilinsky. Schwarzhoff declared that he could go no further than allowing for a *levée en masse* (general uprising of the population) against an invader, suggested that restrictions (carrying weapons openly and wearing a distinctive sign) might be placed on such resistance, but then, “in the spirit of conciliation,” offered no amendments along these lines. Schwarzhoff also wanted to know why Ardagh’s addition was necessary. Did it not repeat what was already in Articles 9 and 10? Was there some ulterior motive behind this, pointing in the direction of resistance to an established occupation? Gilinsky was even more direct. “The inhabitants who fight openly in an unoccupied territory,” Gilinsky maintained, “are recognized as belligerents.” But, he went on, “this right cannot be granted to the inhabitants of an occupied territory who attack the lines of communication [of an army].”<sup>25</sup>

That professional military delegates advanced these arguments was unsurprising. They were determined to isolate civilians from war, uphold clear lines between civilians and soldiers, and maintain stability during an occupation. Ardagh’s intervention remained an odd element in this context. Ardagh was the Director of Military Intelligence in the British Army and had fought in the Boer War. His preconference memorandum largely conformed to the norm of contained conflict. Occupation ended conflict. The power of contemporary armies already made civilian resistance to an invader “useless and futile.”<sup>26</sup> Concerned about smaller countries such as Belgium, he considered Beernaert’s proposal to confine occupation to the realm of “the law of nations” a misguided one.<sup>27</sup> At best, this

<sup>23</sup> This distinction is made very clear in the work of one of the leading Israeli legal scholars of occupation. See Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, 2009), 38.

<sup>24</sup> Speech of Auguste Beernaert, June 6, 1899, Proposals by Sir John Ardagh and the Swiss Delegation, June 20, 1899, in Scott, *The Proceedings*, 504, 550.

<sup>25</sup> Remarks by Colonel Gross von Schwarzhoff and Colonel J. Gilinsky, June 20, 1899, in Scott, *The Proceedings*, 552–53.

<sup>26</sup> Kew, Public Record Office (PRO), PRO 30/40/15, Personal Papers of Sir John Ardagh, Ardagh to Lansdowne, “Draft of Instructions for the Peace Conference, 1899,” undated.

<sup>27</sup> PRO, FO 881/7473, Pauncefoot to Salisbury, Enclosure: Sir John Ardagh, “Belgian Objections at the Conference to Articles IX and X of the Declaration of Brussels,” July 27, 1899.

would mean leaving occupation open to the differing interpretations of CIL that were now emerging at The Hague. Others could have argued that this simply meant confining occupation to the realm of war with minimal rules. Ardagh also worried about the growing size of European armies, and his preconference memorandum contained charts detailing the British Army's inferiority vis-à-vis its continental counterparts. He noted that without conscription Britain could never catch up to those armies. (Here it is worth remembering the British policy-making establishment's sense of broader strategic weakness at the turn of the century.) And while Ardagh offered support for the Belgian position on resistance to occupation, that support reflected Britain's approach to international law: it wanted to play along but also keep an exemption for itself in reserve.

But it was more than just the German and Russian delegates who found the ideas of Beernaert, Künzli, and Ardagh dangerous. Feodor Martens had tried to head off this confrontation several weeks earlier and now stepped in again. The centerpiece of his intervention became known as the Martens clause. It read: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the laws of humanity and the requirements of the public conscience."<sup>28</sup> This is the Martens we know, or at least want to know. It is the Martens of great foresight and humanity who deposits a clause inside the Hague Conventions that will later provide a legal basis for the post-1945 international legal order. Viewed through the lens of military occupation, however, the Martens who proposed this clause was someone quite different. Phrases such as "the public conscience," Antonio Cassese argues, were adopted precisely because their meaning was opaque. He calls the importance later attached to the Martens clause a "legal myth of the international community."<sup>29</sup> The Martens clause was certainly not an attempt to provide legitimacy for resistance movements in occupied territories, as some later argued.<sup>30</sup> Martens's intervention was directed toward ensuring that the Hague conference codified CIL in treaty form and went beyond the mere declaration that emerged from

<sup>28</sup> See "Preamble," Convention with Regard to the Laws and Customs of War on Land, July 29, 1899, <http://www.icrc.org/ihl.nsf/WebART/150-110001?OpenDocument>.

<sup>29</sup> Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?," *European Journal of International Law* 11, no. 1 (2000): 187–216. For a similar assessment, see Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (New York, 2012), 75. Even Geoffrey Best concedes that this might be the case. See Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After," *International Affairs* 75, no. 3 (1999): 627–28.

<sup>30</sup> Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of the Public Conscience," *American Journal of International Law* 94, no. 1 (January 2000): 79.

Brussels in 1874.<sup>31</sup> Martens also still maneuvered within the norm of contained war, and his interventions around the law of occupation demonstrated this.

In a more sophisticated and elegant manner than either Schwarzhoff or Gilinsky, Martens continually advocated linking military occupation with the norm of contained conflict and undermined arguments put forward by Beernaert, Ardagh, and Künzli. Drawing on CIL, Martens praised the portions of the Brussels Declaration and the Lieber Code that dealt with occupation.<sup>32</sup> Law undergirded occupation in Martens's argument, rather than force, as Beernaert maintained. If that law was not sufficiently codified at The Hague, the entire international legal project might be called into question. Law restricted the power of the occupier, ensuring the continued sovereignty of the defeated state, but it also demanded obedience from the occupied population. Martens sketched out an idea of reciprocal duties for occupier and occupied. The "duties" of both the "strong" and the "weak," Martens contended, had to be recognized. "It is impossible to compel the stronger to respect the rights of the weaker," Martens declared, "if the *duties* of the latter are not recognized." Ignoring this would end up "sacrificing the vital interests of peaceful, unarmed populations to the risk of reasons of war and the law of nations." Leaving occupation to the "law of nations," as Beernaert wanted to do, left too many decisions to military commanders in a frenzied and stressful wartime situation, with dreadful implications for the civilian population. Martens also argued that governments could not prosecute war past the point of defeat, as Beernaert had suggested. While the "population" had a right to "defend themselves," Martens believed that "no less sacred is the duty of Governments not to sacrifice useless victims in the interest of war."<sup>33</sup> Anchoring military occupation in codified treaty law created an incentive to stop fighting.

But what should we make of Martens's comment that the "population" had a right to take part in conflict? In the case of occupation, the practical and humanitarian elements of the international legal project seemed to argue against international sanction of such an uprising. Occupation forces would retaliate against rebels as well as the wider population and the line between soldier and civilian would blur. Yet, the commitment of Martens and others to a moderate nation-

<sup>31</sup> In this respect, see Baron Lambertmont's remark to the British Ambassador to Belgium during preconference planning, PRO, FO 881/7473, F. Plunkett to Salisbury, September 4, 1898.

<sup>32</sup> The Lieber Code was a set of regulations developed by Francis Lieber in 1863, during the American Civil War, to govern the behavior of Union forces as they pressed deeper into the Confederacy. Among other things, it was concerned with the question of authority over enemy territory and property. See John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York, 2012), 231–49.

<sup>33</sup> Speeches of Feodor Martens, June 6, 10, and 20, 1899, in Scott, *The Proceedings*, 505–8, 518, 547–49.

alism led them to believe that an uprising against an occupation demonstrated a nation's vitality. "It is not our province . . . to set limits to patriotism," Martens noted; "our mission is simply to establish by common agreement among the States the rights of the population and the conditions to be fulfilled by those who desire legally to fight for their country." Such heroism, even if futile, Martens noted, could not be stopped by legal dictate. "A heroic nation," he explained, "is, like heroes, above codes, rules, and facts." Later, Martens stressed that one could not "in codifying the laws and customs of war, . . . accomplish an impossible task, namely: to codify the heroic acts of individuals or populations."<sup>34</sup> Such statements exemplified an almost Mazzinian approach to nationalist resistance to occupation, one that anticipated its failure. It constructed a heroic historical frame for potential resistance to occupation while denying it legal sanction.

Knit within the broader norm of contained war, the law of occupation as it emerged from The Hague found resonance among states, militaries, and the international legal community. Within the realm of "civilization," it stressed sovereignty in occupied territories and considered occupiers trustees for departed governments. The emphasis on sovereignty effectively cut out large portions of the colonial world from occupation. The occupied owed the occupier obedience, while the occupier was to maintain the institutions and laws of the defeated government. Occupation authorities could not introduce far-reaching legislation or extract economic resources beyond what the occupation forces required. If not explicitly illegal, resistance to an established occupation was risky in a broader legal framework that expected obedience from the occupied population and required the local government to continue to function under occupation. This was, in short, the notion of a nontransformative or trustee occupation, as it later became known in international law literature.<sup>35</sup> A range of international legal scholars and military manuals from the United States and the United Kingdom fixed the duty of obedience to an occupier under a military occupation within international law, while also emphasizing that the occupation had to remain nontransformative and maintain the defeated state's sovereignty.<sup>36</sup> Of course, this resonance was not found everywhere. At The Hague, the Germans appeared

<sup>34</sup> Speech of Feodor Martens, June 20, 1899, in Scott, *The Proceedings*, 547.

<sup>35</sup> Allan Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank," *Harvard Journal of International Law* 14 (1978): 1–49; Conor McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq," *Journal of Conflict and Security Law* 10, no. 1 (2005): 45–47.

<sup>36</sup> Antoine Pillet, *Les lois actuelles de la guerre* (Paris, 1898), 200–209; Albéric Rolin, *Le droit moderne de la guerre. Les principes. Les conventions. Les usages et les abus*, 2 vols. (Brussels, 1920), 1:429–30; US War Department, *Rules of Land Warfare*, FM 27-10 (Washington, DC, 1940), 78; United Kingdom, War Office, *Manual of Military Law* (London, 1936), 72.

to be committed defenders of a link between the law of occupation and the norm of contained war. But as Isabel V. Hull has shown, within the German Army an expansive notion of military necessity rooted in a growing existentialist sense of conflict held the seeds of a dismissive approach toward international law.<sup>37</sup> Other explosive issues closely tied to occupation, such as the use of hostages to secure an occupied population's obedience, were passed over at The Hague, but they continued to be debated and discussed in circles concerned with international law and military occupation.

#### NATIONAL SOCIALIST GERMANY AND OCCUPATION

The First World War buffeted the law of occupation and the norm of contained conflict in Europe. Yet, individual transgressions of the Hague rules did not equal wholesale repudiation of military occupation. The German Army pushed occupation's limits during its occupation of Belgium and Poland, but Germany did not declare international law null and void. German occupation administrations in places like Poland still cited the Hague Conventions, as Jesse Kauffman notes.<sup>38</sup> Though Austria-Hungary tested the boundaries of international law, later in the war it attempted to align its behavior with the Hague Conventions in the territories it occupied.<sup>39</sup> In 1916 the Austrian Interior Ministry directed officials and the population in Dalmatia, a territory threatened by Italian invasion, not to "carry on or organize any armed resistance" to potential Italian occupation.<sup>40</sup> The various occupations that spread across Russia as that country collapsed into civil war in late 1917, however, offered instances of occupations amidst the near total collapse of internal authority. The results were not promising. Germany's expansive aims in Eastern Europe, internal disorder in Russia, and the appearance of nationalist states led to heavy-handed interventions on behalf of allied states like Ukraine. But we should recognize that in the post-Brest-Litovsk world these were interventions, not occupations in the Hague

<sup>37</sup> Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, NY, 2005), 122–26, and Hull, *A Scrap of Paper*, 27, 45–47.

<sup>38</sup> Jesse Kauffman, *Elusive Alliance: The German Occupation during World War I* (Cambridge, MA, 2015), 61–62; Winson Chu, Jesse Kauffman, and Michael Meng, "A Sonderweg through Eastern Europe? The Varieties of German Rule in Poland during the Two World Wars," *German History* 31, no. 3 (September 2013): 318–44.

<sup>39</sup> Jonathan E. Gumz, *The Resurrection and Collapse of Empire in Habsburg Serbia, 1914–1918* (Cambridge, 2009), 105–41.

<sup>40</sup> Vienna, Österreichisches Staatsarchiv, Allgemeine Verwaltungsarchiv, Innenministerium—Präsidialreihe, k.k. Innenministerium to Statthaltereie in Dalmatien, "Direktive bezüglich des Verhaltens der Gemeinden und der Bevölkerung im Falle einer feindlichen Okkupation," March 8, 1916, Karton 1822.

sense.<sup>41</sup> General Wilhelm Groener, the commander of German forces in Ukraine, complained that the destruction of the local administration in the ongoing Civil War precluded a proper military occupation.<sup>42</sup> Groener's remarks revealed how the vision of military occupation codified at The Hague continued to shape visions of occupation.

If World War I shook but did not break the law of occupation, National Socialist Germany threatened to obliterate it completely. The National Socialist government was deeply hostile toward late nineteenth-century international law and the vision of military occupation codified at The Hague. It rejected the norm of contained war and the standard view of sovereignty that considered states theoretical equals. What follows will examine the National Socialist intellectual attack on late nineteenth-century international law, the consequences for military occupation, and the repercussions for National Socialist occupation regimes.

Initially, National Socialist Germany claimed that its aggressive foreign policy only represented an assertion of traditional sovereignty against the strictures of the Versailles Treaty. Yet, this cynical strategy should not lead us to look past how National Socialist legal thinkers such as Carl Schmitt, Werner Best, or Carl Bilfinger persistently attacked the ideal of interstate equality embedded in sovereignty and international law.<sup>43</sup> This attack grew stronger in the late 1930s. At its base, National Socialist legal thought contained a toxic brew of antagonism toward liberalism and international law, a commitment to racial thinking, and a belief in power as the determinant of international order. It could espouse racialized ideology and pose as hardheaded and realistic. Just as the domestic liberal legal order was brushed aside, its international counterpart met with deep skepticism. National Socialist legal thinkers viewed equality between sovereigns as similar to equality among individuals: they rejected both. "Sovereignty" and "equality" were concepts, according to one National Socialist legal theorist, connected to "liberalism."<sup>44</sup> Power and race made states unequal, and international law and its emphasis on sovereignty distorted reality. "The differences of the races, the foundation of the creation of the *Volksgemeinschaft* and the inter-

<sup>41</sup> Adam Tooze, *The Deluge: The Great War and the Remaking of Global Order, 1916–1931* (New York, 2014), 124–38.

<sup>42</sup> Wilhelm Groener, *Lebenserinnerungen: Jugend, Generalstab, Weltkrieg* (Göttingen, 1957), 383–98.

<sup>43</sup> On this argument and rearmament, see Gerhard L. Weinberg, *Hitler's Foreign Policy 1933–1939: The Road to World War II*, rev. and corrected ed. (New York, 2010), 34–35. Early analysis of National Socialist legal thought emphasized the centrality of sovereignty; see Lawrence Preuss, "National Socialist Conceptions of International Law," *American Political Science Review* 29, no. 4 (August 1935): 597.

<sup>44</sup> Norbert Gürke, "Grundzüge des Völkerrechts," in *Grundlagen, Aufbau, und Wirtschaftsordnung des nationalsozialistischen Staates* (1936), 7.



national legal order,” argued Gustav Adolf Walz, “was offered up to norm-based individual leveling.”<sup>45</sup> The bonds among states within “civilization,” a cornerstone of the nineteenth century’s approach to international law, were increasingly questioned. Another argument was that universal legal orders disguised the exercise of sovereignty by some, usually Great Britain and the United States, while suppressing others’ sovereignty. International law masked power in international affairs. In this sense, National Socialist legal thought foreshadowed postwar realist thought.<sup>46</sup>

International law would not hold back the reshaping of international order, Hans Frank argued.<sup>47</sup> Instead, international law required revision to match existing power relations and social conditions. Again, this conformed closely with the emphasis in National Socialist legal thought on “realism in international law and concrete orders.”<sup>48</sup> Even National Socialist legal thinkers such as Werner Best, who many within the SD (Sicherheitsdienst) considered overly legalistic, stressed the importance of pragmatism in approaching international law and occupation.<sup>49</sup> Not all occupation regimes in Europe should resemble the General Government of Poland, he argued.<sup>50</sup> Yet, Best’s pragmatism scarcely respected traditional notions of sovereignty. Sovereignty remained malleable; it could be scaled back in the direction of the “layered” sovereignty associated with extra-European empires. Best simply wanted practicality to guide occupation regimes. In 1941, he believed a *Grossraum-Ordnung* would supplant orders based on universalistic “international law.” Best seductively contended that late nineteenth-century international law was a relic from an irrelevant past. Equality among state sovereigns was part of a system of formalized legal thinking unconnected to reality, similar to abstract legal systems with free-floating norms such as Hans Kelsen’s *Pure Theory of Law*.<sup>51</sup>

<sup>45</sup> Gustav Adolf Walz, “Das Verhältnis von Völkerrecht und Staatliche Recht nach nationalsozialistischer Rechtsauffassung,” *Zeitschrift für Völkerrecht* 18 (1934): 147.

<sup>46</sup> On realism and Schmitt’s thought, especially with regard to Hans Morgenthau, see Jan Willem Honig, “Totalitarianism and Realism: Hans Morgenthau’s German Years,” in *The Roots of Realism*, ed. Benjamin Frankel (London, 1996), 283–313; Hans-Karl Pichler, “The Godfathers of ‘Truth’: Max Weber and Carl Schmitt in Morgenthau’s Theory of Power Politics,” *Review of International Studies* 24 (1997): 185–200.

<sup>47</sup> Hans Frank, “Das Recht im Kriege,” *Deutsches Recht* 11, nos. 19/20 (1941): 1027.

<sup>48</sup> Manfred Messerschmidt, “Revision, neue Ordnung, Krieg: Akzente der Völkerrechtswissenschaft in Deutschland,” *Militärgeschichtliche Mitteilungen* 1 (1971): 84.

<sup>49</sup> Best argued that lawyers without practical life experience became “Paragraphenmaschinen.” Werner Best, “Kritik und Apologie des ‘Juristen,’” *Deutsches Recht* 9, nos. 8/9 (1939): 198.

<sup>50</sup> Mazower, *Hitler’s Empire*, 235–38.

<sup>51</sup> Werner Best, “Grundfragen einer deutschen Grossraum-Verwaltung,” in *Festgabe für Heinrich Himmler* (Darmstadt, 1941), 36. From here, antisemitic National Socialist legal thinkers could link unmoored legal norms with similarly unconnected and cosmopolitan peoples, most notably Jews.

Carl Schmitt, National Socialist Germany's most sophisticated legal thinker, was enamored with the role of power and concepts of war in the international order. In 1939, Schmitt declared the norm of contained war irrelevant. While he criticized the League of Nations and its "discriminatory concept of war" for contained war's disappearance, he also linked its disappearance to a change in the European balance of power. Contained war, he maintained, required a balance of power with a weak Central Europe. "European international law of the 19th century, with its weak European middle and the Western world powers in the background," Schmitt contended, "appears to us a little world overshadowed by giants."<sup>52</sup> Like Best, Schmitt placed the state and sovereignty in the world of pre-World War I Europe. Pre-World War I international law had the state as its subject, and though power differences divided states, sovereign equality persisted. Schmitt believed the Versailles settlement undermined state sovereignty but did so from a "pacifistic-humanitarian direction."<sup>53</sup> In the future, Schmitt believed that contesting continental-based spaces (*Raum*), as opposed to nineteenth-century constructions of state, sovereignty, and international law, would be the basis of international order.

This assault on international law and sovereignty had ominous implications for the law of occupation. As it was, the occupier's control over conquered territory was only temporary. The occupier acted as a trustee for the departed sovereign government, left the local administration in place, and could not alter, unless militarily necessary, the laws of the departed government. The sovereignty of the defeated state was left untouched until the conflict's settlement. Could anything be more artificial, more filled with abstract norms that belied reality, than the law of occupation? The theoretical assault on sovereignty helped create the intellectual space for a reordering of occupation as pursued not in law journals or university lecture halls, but on the ground. The rejection of nineteenth-century international law provided a wedge to argue that the codified international law that emerged from the Hague Conventions and Geneva Conventions was no longer applicable and that transformative occupations could be pursued. Occupation administrators, army officers, and security officials could ignore the law of occupation and reorder occupied states as they wished. Some National Socialist legal theorists, such as Werner Best and Hans Frank, went directly into the occupation apparatus, where they could put legal ideas straight into practice. Yet it was not as though army officers carried National Socialist international

<sup>52</sup> Carl Schmitt, "Der Reichsbegriff im Völkerrecht," *Deutsches Recht* 9, no. 11 (1939): 343.

<sup>53</sup> Carl Schmitt, "The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law (1939–1941)," in Carl Schmitt, *Writings on War*, trans. and ed. Timothy Nunan (Cambridge, 2011), 104.

law textbooks with them: in fact, international law concerning occupation, along with a range of *jus in bello* restraints concerning prisoners of war and the like, was rarely referred to. Prior to the invasion of the Soviet Union, isolated arguments against illegal orders such as the Commissar Order, which required that Soviet political commissars not be treated as prisoners of war but instead be executed on the spot, were framed with little reference to international law. Officers raised the issue of soldier discipline in this case, not legal objections, as Felix Römer has shown.<sup>54</sup> Helmuth James von Moltke, a lawyer with the legal section of the Wehrmacht High Command (OKW), rejected the National Socialist approach to international law. He faced incredible difficulty in getting legal arguments concerning occupation heard within the Wehrmacht and security apparatus. Moltke focused on the German practice of hostage taking and reprisal in response to resistance activity. This was a practice clearly regulated by CIL, which reserved it for a narrow set of circumstances—yet German occupation authorities across Europe quickly resorted to hostage taking and often executed these hostages in clear contravention of CIL on hostages and reprisal. When Moltke went to occupation governments in France, Belgium, and the Netherlands and intervened on this issue in 1942, he steered clear of legal arguments and focused on the practical negative repercussions of reprisals, precisely because he knew that legal arguments carried little weight.<sup>55</sup> International law was no longer a factor in the machinery of force: it had vacated the scene.

In Poland, Yugoslavia, and the Soviet Union, international law was almost entirely absent. Germany rejected the defeated states' claims to sovereignty, undermining the law of occupation. Albert Weh, a legal official in the General Government of Poland, laid this out in a speech in 1943. German arms had decided Poland's fate as a state. This was, for Weh, the dominant fact of German occupation in Poland. The occupier ceased to be the occupier in the classic Hague sense, because the situation was one of *debellatio*, where the enemy state had been completely destroyed and no longer functioned in any form, according to Weh.<sup>56</sup> He contended that the "effectiveness" of the Polish Republic had disappeared and the Polish state had ceased to exist, never to reappear. This

<sup>54</sup> Felix Römer, "Das Heeresgruppenkommando Mitte und der Vernichtungskrieg im Sommer 1941," *Vierteljahrshefte für Zeitgeschichte* 53 (2005): 455.

<sup>55</sup> Ger van Roon, "Graf Moltke als Völkerrechtler im OKW," *Vierteljahrshefte für Zeitgeschichte* 18, no. 1 (January 1970): 49–58; Rolf-Dieter Müller, "Kriegsrecht oder Willkür: Helmuth James Graf von Moltke und die Auffassungen im Generalstab des Heeres über die Aufgaben der Militärverwaltung vor Beginn des Rußlandkrieges," *Militärgeschichtliche Mitteilungen* 42 (1987): 134; Ger van Roon, "Helmuth James Graf von Moltke als Völkerrechtler, 1907–1945," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 47 (1987): 751.

<sup>56</sup> Arguments regarding *debellatio* also appeared in the planning for the occupation of Germany. Such arguments reveal how the National Socialist approach to occupation

verdict on the state's viability, he maintained, separated the Polish case from the Norwegian or Dutch cases. To support this assessment, Weh cited Hitler's declaration that the "Polish state of the Versailles Treaty would never rise again." Hence none of the Hague strictures on occupation applied to Poland, and it would experience a more "intense administration" than the Hague Conventions permitted.<sup>57</sup>

De-sovereignizing occupied areas and pushing aside the law of occupation created space for transformative German occupations in these countries. Recognizing the consequences of the German approach to international law does not seek to diminish arguments that emphasize how National Socialist racial ideology influenced occupations in Eastern Europe; it simply stresses that the development of this ideology also required international legal space. To dismiss the importance of the National Socialist campaign against the law of occupation discounts the influence of international law on state behavior, almost accepting National Socialist arguments about its irrelevance. National Socialist Germany's intellectual dismantling of the norms of contained war, sovereignty, and the law of occupation created a legal vacuum for National Socialist occupations. The absence of internationally sanctioned methods for controlling territory also meant that Germany found it difficult to exert effective control over occupied territories. A link existed between de-sovereignization at the hands of National Socialist Germany, transformative occupations, and the fragility of German control over Poland, Yugoslavia, and the Soviet Union. Such occupations provided no respite from war, but an intensification of it.

The National Socialist occupation in Eastern Europe immediately delegitimized existing local structures of power, sometimes through extremely violent means, such as the National Socialist AB program (*Ausserordentliche Befriedigungsaktion*) that targeted thousands of Polish elites for execution in 1939–40. In other cases, such as in the Independent State of Croatia, it involved turning over the state to a perceived "friendly" national group that then reworked the local administration.<sup>58</sup> In all cases, it was clear even at the lowest levels that the previous regime, including its legal system, was to be radically reworked. Those in occupied territories sensed that fundamental shifts in power

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further destabilized the situation in occupied countries. Even Hans Kelsen argued for *debellatio*. See Hans Kelsen, "The International Legal Status of Germany to Be Established Immediately Upon Termination of the War," *American Journal of International Law* 38, no. 4 (October 1944): 689–94.

<sup>57</sup> Albert Weh, "Die rechtliche Grundlagen des Generalgouvernements," in *Das Generalgouvernement: Seine Verwaltung und seine Wirtschaft*, ed. Josef Bühler (Cracow, 1943), 59–74.

<sup>58</sup> Emily Greble, *Sarajevo, 1941–1945: Muslims, Christians, and Jews in Hitler's Europe* (Ithaca, NY, 2011), 60–61.

were near, and various nationalist groups, in particular those who had previously been excluded, moved to assert power under National Socialist occupations. The murderous conflict between Poles and Ukrainians in Volhynia offers an example of how indigenous nationalist agendas drove conflict beneath German occupation and of the difficulty those regimes faced trying to control the consequences.<sup>59</sup>

In this world, conflict did not end with occupation. German security forces forced a strategic and operational logic over occupied areas that bound them to the war at the front and to German home-front needs. The contest with partisans in Belorussia became linked with labor and food drives whose brutal logic led to “dead zones” cleared of people and food with extraordinary force.<sup>60</sup> Timothy Snyder argues that it was precisely in these “stateless zones” that the Holocaust assumed its most murderous dimensions.<sup>61</sup> With utter disregard for the limited rights of occupied populations, Wehrmacht and security forces substituted a strategy of terror for effective control. Here we might return to Carl Schmitt, who believed that conceptions of war rested at the heart of every system of international law. The norm of contained conflict, linked to the law of occupation, had disappeared. National Socialism’s vision of war as a permanent elemental contest unfettered by international rules ravaged Eastern Europe.<sup>62</sup> Into this contest rushed all the other factors that we know only too well were responsible for the chaos and violence of National Socialist occupation, such as extreme racism, complete disrespect for property rights, and an often bewildering mix of cross-cutting administrative, security, and military jurisdictions.

Of course, in the West, occupation was different. Germany attempted to hew, at least partially, to the law of occupation in several respects. None of the occupied countries in the West experienced de-sovereignization similar to that in parts of Eastern Europe. Most local institutions kept functioning in occupied France, and in Denmark the entire government remained in place until 1943.<sup>63</sup> This is not to deny that German occupation forces committed quite clear transgressions

<sup>59</sup> Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569–1999* (New Haven, CT, 2003), 155–78, and Snyder, “The Causes of Ukrainian-Polish Ethnic Cleansing,” *Past and Present* 179 (2003): 197–234.

<sup>60</sup> Christian Gerlach, *Kalkulierte Morde: Die Deutsche Wirtschafts- und Vernichtungspolitik in Weissrussland 1941 bis 1944* (Hamburg, 2000), 1010–36.

<sup>61</sup> Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (London, 2015), 216–17.

<sup>62</sup> This escalatory, uncontrollable approach to war remains best elucidated in Michael Geyer, “Krieg als Gesellschaftspolitik: Anmerkungen zu neueren Arbeiten über das Dritte Reich im Zweiten Weltkrieg,” *Archiv für Sozialgeschichte* 20 (1986): 557–601.

<sup>63</sup> On Denmark, see Karem Gram-Skjoldager, “The Law of the Jungle?: Denmark’s International Legal Status during the Second World War,” *International History Review* 33, no. 2 (June 2011): 235–56.

of the law of occupation in the West, most obviously in the deportation and murder of Jews. Other policies, such as the large-scale forced labor drives beginning in mid-1942, also constituted obvious violations and fueled resistance movements. Yet, the war against resistance in the West never reached the level of systematized brutality present in the East. The Wehrmacht hedged when it came to placing occupied Western Europe into an international legal no-man's land. Peter Lieb demonstrates that according belligerent status to resistance members and limiting reprisals for resistance attacks were live issues for Wehrmacht leaders in France as the war began in earnest again there in 1944.<sup>64</sup> Stability in occupied areas of France or the Netherlands meant that German occupation authorities exerted far more control over these territories than in Belorussia or Croatia. At least until 1942, and in some places 1944, war's violence receded from large swaths of the occupied West. Nonetheless, central Italy experienced the brutality of Wehrmacht antipartisan warfare, and several units fighting in France in 1944 carried over their accustomed practices from Eastern to Western Europe.<sup>65</sup> Still, events such as the destruction of Oradour-sur-Glane by the 2nd SS Panzer Division remained controversial in the German occupation apparatus to a degree that similar events were not in the East.<sup>66</sup>

Yet, such internal controversies do not change the fundamental nature of National Socialist Germany's assault on the law of occupation. The intellectual assault was complicit in creating a devastating wartime reality for Eastern Europe. Even as postwar trials loomed, Wehrmacht officers could not extract themselves from language surrounding antipartisan warfare that bore no affinity with the law of occupation. In November 1945, Hans Röttger, a Wehrmacht general, attempted to explain his role in antipartisan warfare to his lawyer, but he let slip that antipartisan war allowed for "ruthless liquidation of the Jews and other undesirable

<sup>64</sup> Peter Lieb, *Konventioneller Krieg oder NS-Weltanschauungskrieg?: Kriegführung und Partisanenbekämpfung in Frankreich 1943/44* (Munich, 2007), 244–47.

<sup>65</sup> On Italy, see Lutz Klinkhammer, *Zwischen Bündnis und Besatzung: Das Nationalsozialistische Deutschland und die Republik von Salò 1943–1945* (Tübingen, 1993); Friedrich Andrae, *Auch gegen Frauen und Kinder: Der Krieg der Deutschen Wehrmacht gegen die Zivilbevölkerung in Italien 1943–1945* (Munich, 1995); Michael Wedekind, *Nationalsozialistische Besatzungs- und Annexionspolitik in Norditalien, 1943–1945* (Munich, 2003); Carlo Gentile, *Wehrmacht und Waffen-SS im Partisanenkrieg: Italien 1943–1945* (Paderborn, 2012). On Eastern front practices in France, see Peter Lieb, "Repercussions of Eastern Front Experiences on Anti-Partisan Warfare in France, 1943–1944," *Journal of Strategic Studies* 31, no. 5 (2008): 797–823.

<sup>66</sup> The Wehrmacht feared that soldiers' experiences in Eastern Europe meant they would not recognize that the "rules of the game" vis-à-vis the population meant to change once fighting started within the Reich. See Rolf-Dieter Müller, ed., *Das deutsche Reich und der Zweite Weltkrieg*, vol. 10, no. 1, *Der Zusammenbruch des deutschen Reiches: Die militärische Niederwerfung der Wehrmacht* (Munich, 2008), 625.



elements.”<sup>67</sup> The general consensus among the Allies was that German occupation practices departed radically from the law of occupation. Allied governments-in-exile, mostly from Western Europe, but also from places like Poland and Yugoslavia, encouraged this impression of lawlessness from their perches in London. The portrayal of National Socialist occupation flattened out differences within Europe and adopted a general “Europe under National Socialist lawlessness” argument. This argument portrayed occupation in Eastern Europe more accurately than occupation in the West.<sup>68</sup> For Western Europe, however, even the 1944–45 brush with German security forces using practices that had been routine in the East since 1941 cemented the perception of the occupation as a time of utter lawlessness and brutality. In turn, it brought the practices and experiences of military occupation within “civilized” Europe into disturbingly close proximity with those of nineteenth-century European colonial warfare.

### THE HOSTAGES TRIAL

National Socialist and Wehrmacht officials eviscerated the law of occupation and fought a war outside the norm of contained conflict. Yet in postwar trials those same officials often argued that their wartime conduct was in accordance with the law of occupation and the norm of contained conflict. While some historians of human rights maintain these years provided moments of clarity on international law, the law of occupation remained highly conflicted.<sup>69</sup> The world of the Hague Conference of 1899 had not quite left the scene. This makes the sympathetic hearing that some German defense arguments garnered unsurprising. Nowhere was this clearer than in the so-called Hostages Trial of 1947–48, which confirmed Hague approaches to the law of occupation and reaffirmed the dangerous position of armed resistance to an established occupation.

Reprisals and hostages were not innovations of National Socialist Germany: they were issues with which international law was long familiar, though the Hague

<sup>67</sup> Manfred Messerschmidt, “Vorwärtsverteidigung: Die ‘Denkschrift der Generäle’ für den Nürnberger Gerichtshof,” in Manfred Messerschmidt, *Militarismus, Vernichtungskrieg, Geschichtspolitik: Zur deutschen Militär- und Rechtsgeschichte* (Paderborn, 2006), 316.

<sup>68</sup> See, e.g., John Armitage, ed., *Europe in Bondage: Reports of the London General Assembly* (London, 1942). This lack of differentiation between occupation in Western and Eastern Europe was particularly strong in London, an “intellectual hub” of the Allied effort on war crimes. See Kim Christian Priemel, “‘A Story of Betrayal’: Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials,” *Journal of Modern History* 85, no. 1 (March 2013): 75.

<sup>69</sup> Elizabeth Borgwardt argues that the Nuremberg Trials created a norm on crimes against humanity, but she examines only the trials of major war criminals. See Elizabeth Borgwardt, “A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms,” *Law and History Review* 26, no. 3 (October 2008): 679–705.



Conventions largely bypassed them.<sup>70</sup> Reprisals are actions carried out in response to a perceived violation of international law by an opponent. The object of a reprisal should be another state, and its goal is to return that state to lawful behavior. The content of a reprisal is something that by prevailing standards would “normally be unlawful,” according to Christopher Greenwood.<sup>71</sup> The 1929 Geneva Conventions forbade reprisals against prisoners of war, but it did not touch reprisals in occupation. Prominent texts from CIL, the Lieber Code from the US Civil War, and the Oxford Code of 1880 allowed for reprisals. By the prevailing standards of CIL in the Second World War, reprisals and hostage taking were considered legal. British and American military manuals allowed for reprisals against hostages in military occupation.<sup>72</sup> In the context of military occupation, reprisals were usually carried out against hostages taken from the occupied population. Hostages, the argument went, could be taken from the civilian population as a guarantee for its peaceful behavior. If that behavior became unlawful, reprisals would be carried out against the hostages. Yet reprisals, according to CIL, existed under a tight set of restrictions. They were a very last, not a first, resort. They had to be proportionate to the offense they attempted to redress, could be authorized only by the highest authority, and were not for purposes of revenge, but to return the offending state back to lawful behavior.

Reprisals and hostages came together in the Hostages Trial, one of the post-war trials to which historians have paid little attention.<sup>73</sup> It concerned less important fronts in Yugoslavia, Greece, and Norway, and it came late in the series of American-run trials. It focused on high-ranking Wehrmacht commanders who ordered reprisals against hostages in retaliation for partisan attacks. Taking hostages to guarantee the safety of its forces in occupied areas was not new for the

<sup>70</sup> Fritz Kalshoven argues that despite prohibiting collective punishment in Article 50, the delegates at The Hague in 1899 still believed “that an occupant could resort to reprisals in situations where collective punishment would be out of the question.” See Fritz Kalshoven, “Human Rights, the Law of Armed Conflict, and Reprisals,” *International Review of the Red Cross* 11, no. 121 (April 1971): 183–84. See also Edward Kwakwa, “Belligerent Reprisals in the Law of Armed Conflict,” *Stanford Journal of International Law* 49 (1990–91): 49–54.

<sup>71</sup> Christopher Greenwood, “The Twilight of the Law of Belligerent Reprisals,” *Netherlands Yearbook of International Law* 20 (December 1989): 37–38.

<sup>72</sup> For turn-of-the-century discussions of hostages, see J. M. Spaight, *War Rights on Land* (London, 1911), 468–69; Lassa Oppenheim, *International Law: A Treatise*, vol. 2, *War and Neutrality* (London, 1906), 41, 271–73. On the discussion of hostages and reprisals in the American and British legal literature during and after World War II, see Arthur K. Kuhn, “The Execution of Hostages,” *American Journal of International Law* 36, no. 2 (April 1942): 271–74; Ellen Hammer and Marina Salvin, “The Taking of Hostages in Theory and Practice,” *American Journal of International Law* 38, no. 1 (January 1944): 20–33.

<sup>73</sup> One little-noticed exception is Richard Cavell Fattig, “Reprisal: The German Army and the Execution of Hostages during the Second World War” (PhD diss., University of California, San Diego, 1980).

German military. The German Imperial Army had also taken hostages, along with other European armies, but the Wehrmacht radically expanded this practice.<sup>74</sup> Field Marshal Wilhelm Keitel's order of September 16, 1941, demanding that fifty to one hundred hostages be executed for every German soldier wounded or killed is exemplary in this respect.<sup>75</sup> Under the guise of reprisals, the Wehrmacht murdered Jewish "hostages" as part of the Final Solution in Serbia.<sup>76</sup> In the Hostages Trial, the defendants' lawyers knew what approaches had failed in earlier trials, and they avoided arguments based on the orders of superiors and, to some degree, the *tu quoque* or "you too" argument, which asserted that other countries had pursued policies similar to Germany's in comparable circumstances. Instead, they chose to rely on a strategy that repositioned the Wehrmacht's actions within the Hague Conventions.<sup>77</sup>

During the trial, three lines of questioning became prominent. The first centered on whether an effective occupation existed in Yugoslavia and Greece. The second related to the excessive nature of reprisals and the lack of an ordered process for selecting hostages. The third focused on the Wehrmacht's denial of belligerent status for resistance members in Yugoslavia and Greece. Through hostages, reprisals, and resistance to occupation, the trial delved into issues associated with military occupation that had nearly derailed the 1899 Hague Conference.

The prosecution first contended that Germany had never instituted an "effective occupation" in Yugoslavia and could not claim status as an occupying power. "No doubt," Telford Taylor declared in his opening statement, "the Germans, had they so chosen, could have left sufficient troops in Yugoslavia to establish their authority throughout the country." An effective military occupation, Taylor argued, required a constant, consistent presence throughout the occupied country. But Germany never had this presence in Yugoslavia, choosing instead to withdraw most of its occupation force for the coming invasion of the Soviet Union.

<sup>74</sup> Fattig, "Reprisal," 1–23.

<sup>75</sup> Wilhelm Keitel, "Concerning the Suppression of Insurgents in Occupied Territories," September 16, 1941, in *Trial of War Criminals before the Nuernberg Military Tribunals*, vol. 11, "The High Command Case"; "The Hostage Case" (Washington, DC, 1950), 971.

<sup>76</sup> See Christopher Browning, "Wehrmacht Reprisal Policy and the Murder of Male Jews in Serbia," in *Fateful Months: Essays on the Emergence of the Final Solution* (New York, 1985), 39–56; Walter Manoschek, "Serbien ist Judenfrei": *Militärische Besatzungspolitik und Judenvernichtung in Serbien, 1941/42* (Munich, 1993), 86–102.

<sup>77</sup> The lead defense attorney in the Hostages case, Hans Latenser, represented Albert Kesselring before a British military tribunal in Italy in 1947, where he discovered that claiming ignorance of subordinate actions was not persuasive. Kerstin von Lingen, *Kesselring's Last Battle: War Crimes Trials and Cold War Politics, 1945–1960* (Lawrence, KS, 2009), 126. Latenser would go on to represent defendants at the Frankfurt Auschwitz Trial. See Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, MA, 2005), 189, 206–7.

Coupled with the absence of an effective occupation, Germany instituted a “criminal regime of terror.” “If the occupying forces inaugurate a systematic program of criminal terror,” Taylor asserted, “they cannot thereafter call the inhabitants to account for taking measures for self-defense.” The prosecution conceded that nothing like this “appears in so many words in The Hague Conventions.”<sup>78</sup> Therefore, Taylor invoked the Martens clause for support, maintaining “that this is the only conclusion which is possible in accordance with ‘the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’”<sup>79</sup> Through the Martens clause, Taylor sought to blunt the duty of obedience placed on an occupied population.

The defense, by contrast, portrayed the Wehrmacht as the defender of the law of occupation and the norm of contained conflict. The resistance movements, it argued, were illegal. Hans Laternser, the lead attorney, vigorously pressed this argument. The Wehrmacht always adhered to Hague Convention strictures concerning occupation, Laternser maintained. He skipped over inconvenient facts, such as the illegal dismemberment of Yugoslavia prior to capitulation or the creation of the Independent State of Croatia, both violations of Yugoslavian sovereignty. Laternser also turned to the *tu quoque* argument, noting that reprisals against hostages for attacks on occupation forces were established practices in numerous armies.<sup>80</sup> But his main argument centered on the existence of an established occupation in Yugoslavia and Greece that made reprisals against hostages permissible and resistance illegal. “Four facts are of importance in the evaluation of the legality of the resistance forces,” Laternser asserted: “1. That a war can be waged between states or governments only; 2. That an actual state of war is terminated by capitulation or by the cessation of organized resistance after the destruction of the main forces; 3. The actual occupation; and 4. The rights and duties of the population in the occupied territory.” Deploying these criteria, Laternser sought to deny that resistance members were entitled to belligerent status. He claimed that “an individual does not become a lawful belligerent by wearing a uniform, carrying weapons openly, and being under the command of a person responsible for his subordinates.”<sup>81</sup> The defendants, Laternser contended, understood war within the norm of contained conflict. “War is a fight between

<sup>78</sup> NARA, Hostages Trial, Opening Statement of the Prosecution, July 18, 1947, roll 2, frame 664.

<sup>79</sup> NARA, Hostages Trial, Opening Statement of the Prosecution, July 18, 1947, roll 2, frame 668.

<sup>80</sup> NARA, Hostages Trial, Statement of Dr. Hans Laternser, September 15, 1947, roll 5, frame 23.

<sup>81</sup> NARA, Hostages Trial, Statement of Dr. Hans Laternser, September 15, 1947, roll 5, frame 62.

governments,” Laternser stressed, “which the fighting forces serve and with which they have to be identified, so that one can speak of war in the strictest sense of the word.”<sup>82</sup> The armistice agreements with the Yugoslav and Greek armies and the established occupation made resistance illegal and justified the Wehrmacht’s denial of belligerent status to resistance members as well as its reprisals against hostages. This emphasis on Yugoslavian and Greek capitulation as establishing occupation was a shift from Taylor’s stress on “effective” occupation.

In defending the Wehrmacht’s reprisals and its denial of belligerent status to resistance fighters, General Hermann Foertsch, chief of staff to successive German commands in the Balkans from mid-1941 to mid-1944, based his arguments on the existence of an established, “effective” occupation. Foertsch had a historical bent, having published military historical works as well as contemporary works on the military and a general study of war in 1939.<sup>83</sup> Another Wehrmacht general, Edmund Glaise von Horstenau, claimed Foertsch was the force behind the Wehrmacht’s dramatic escalations of force in the Balkans.<sup>84</sup> Foertsch was a formidable opponent who, unlike others, grasped the degree to which German defenses rested on convincing the court that an established military occupation existed in Yugoslavia and Greece. Foertsch’s defense lawyer asked him for his opinion on the legality of resistance in Yugoslavia and Greece. Foertsch replied: “To me it was always clear and it has always remained clear that the illegality of all these actions could never be doubted for two essential reasons: firstly, Yugoslavia and the Greek armies had capitulated. Secondly, the countries were properly occupied. Therefore, every armed action irrespective of what kind, was a breach of the capitulation conditions and thus a violation of the duties of the population of an occupied country.”<sup>85</sup> Like Laternser, Foertsch stressed capitulation as one of the central elements in establishing occupation. In this focus on capitulation, one senses that older arguments of “war treason” prevalent within the German Army prior to the First World War and some of the international law literature lurked in the background. The capitulation of the country was almost construed as an oath on the part of the population, so that their resistance was a willful

<sup>82</sup> NARA, Hostages Trial, Statement of Dr. Hans Laternser, September 15, 1947, roll 5, frame 44.

<sup>83</sup> Hermann Foertsch, *Kriegskunst Heute und Morgen* (Berlin, 1939); Foertsch, *Die Wehrmacht im Nationalsozialistischen Staat* (Hamburg, 1935); Foertsch, *Reichsheer im Dritten Reich* (Berlin, 1935). Foertsch was active in conservative circles in West Germany and worked at the Institut für Zeitgeschichte in Munich after the war. See Astrid M. Eckert, “The Transnational Beginnings of West German Zeitgeschichte in the 1950s,” *Central European History* 40, no. 1 (March 2007): 74.

<sup>84</sup> Edmund Glaise von Horstenau, *Ein General im Zwielficht: Die Erinnerungen Edmund Glaises von Horstenau*, vol. 3, ed. Peter Broucek (Vienna, 1988), 240.

<sup>85</sup> NARA, Hostages Trial, Cross-Examination of Hermann Foertsch, October 10, 1947, roll 6, frames 338–39.

betrayal of this oath.<sup>86</sup> In the context of reprisal, this emphasis on capitulation seemed to shift the target away from the enemy state and directly onto the occupied population. The prosecution also focused on the way in which Tito's partisans appeared to fulfill conditions for belligerent status through their level of organization, uniforms, and tendency to carry weapons openly. Foertsch refused to engage with this assertion, as had other German defendants. The partisans might have fulfilled these conditions, he admitted, but that was beside the point because those conditions did not apply in an occupation. Occupation foreclosed the possibility of legal belligerent status for resistance fighters. As a result, "we never had any doubt that a legal or international claim of our so-called enemy could exist."<sup>87</sup>

In his cross-examination of Foertsch, the assistant prosecutor, Theodore Fenstermacher, wanted Foertsch to admit that resistance fighters were legal belligerents. Fenstermacher pointed to high-level discussions among Wehrmacht commanders in the Balkans in mid-1943 concerning potential recognition of partisans as belligerents. General Alexander Löhr, later convicted and executed in Belgrade in 1947, raised the possibility of extending belligerent status to the partisans in internal deliberations in 1942. This, Fenstermacher contended, proved the Wehrmacht did not consider Tito's partisans illegal belligerents. Foertsch countered that expediency, not an attempt to legalize the partisans, motivated these deliberations. They stemmed from a "feeling of responsibility to put this nauseating struggle on a more human basis in the interest of our own troops and in the interest of the long-suffering population of the Southeast." Turning to the Hague qualifications for belligerent status in an invasion, Fenstermacher tried to get Foertsch to concede that the partisans wore a recognizable insignia and thus deserved belligerent status. Fenstermacher asked, "You treated the partisans, who wore insignia, just as if they had not worn any insignia?" In response, Foertsch quipped "Yes, of course. A robber remains a robber even if he appears in a tuxedo." An exasperated Fenstermacher declared it mattered little if the partisans wore insignia, were under unified command, or carried weapons openly; the Germans always considered them illegal. Foertsch shot back, "concerning this subject I believe I have repeatedly stated on direct examination, and we thought at the time, we could *de jure* not regard these Partisan organizations as compatible with International Law."<sup>88</sup>

<sup>86</sup> Hull, *A Scrap of Paper*, 105–6; Lassa Oppenheim, "On War Treason," *Law Quarterly Review* 33 (1917): 266–86.

<sup>87</sup> NARA, Hostages Trial, Cross-Examination of Hermann Foertsch, October 10, 1947, roll 6, frames 339–40.

<sup>88</sup> NARA, Hostages Trial, Cross-Examination of Hermann Foertsch, October 20, 1947, roll 6, frames 839–41.

Fenstermacher also addressed the issue of effective occupation. In response, Foertsch stressed that the German occupation apparatus and its combat forces could exert power wherever they chose. Thus, partisan control of territory was a mirage.<sup>89</sup> Foertsch also focused on the occupied population's duty of obedience. It had a duty "to keep peace and order, and here it does not make any difference for the partisan Meier or franc-tireur Mueller whether there are 20 divisions in the area or four divisions located in the same area. He has to turn in his rifle, that is all there is to it."<sup>90</sup> Fenstermacher finally invoked Germany's "illegal war" against Yugoslavia and Greece, contending that this invalidated German claims to legal occupation in these countries. Foertsch invoked the norm of contained conflict in his response to Fenstermacher. "That the armies were in Yugoslavia illegally is not the point at all," he explained, "and I don't even know whether you can put it that in war, that an army can be somewhere illegally. A war is waged in the manner that an army invades the country against which war is waged, and if then the army is in that country it is there because of the events of the war. That is not a function of legality or illegality."<sup>91</sup>

The case came before three judges: Charles Wennerstrum from Iowa, George J. Burke from Michigan, and Edward Carter from Nebraska. The court dismissed the defense's arguments that referenced "superior orders" or *tu quoque* with regard to British and American military manuals.<sup>92</sup> It found all defendants with the exception of Foertsch guilty. The court found that as they were instituted, Wehrmacht reprisals were murder, not conforming with CIL. They lacked proportionality, there was no ordered process regulating them, and there was usually no connection between where the attacks on German soldiers took place and the hostages killed in reprisal for these attacks. There was no deterrent function to Wehrmacht reprisals that attempted in a clear manner to return a specific part of the population to obedience as CIL required. Moreover, reprisals hardly constituted acts of "last resort" for German occupation forces, who immediately availed themselves of them whenever attacked. They were revenge, which was precisely what they could not be under CIL.

<sup>89</sup> Later assessments of effective occupation seem to offer support to Foertsch's argument. See United Nations, Judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Prosecutor vs. Mladen Naletilic and Vinko Martinovic, March 31, 2003, 73–74, [http://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf).

<sup>90</sup> NARA, Hostages Trial, Cross-Examination of Hermann Foertsch, October 17, 1947, roll 6, frame 783.

<sup>91</sup> NARA, Hostages Trial, Cross-Examination of Hermann Foertsch, October 20, 1947, roll 6, frame 836.

<sup>92</sup> On the conflict between Wennerstrum and Fenstermacher, see *New York Times*, March 6, 1948.



At the same time, the court confirmed the acceptability of hostage taking in a military occupation as a practice sanctioned by CIL. The court conceded the practice was a “barbarous relic of ancient times,” but it accepted its legality, declaring “it is not our province to write international law as we would have it, we must apply it as we find it.” The examination of the practice “convinces us,” the court declared, “that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories, and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot.”<sup>93</sup> “Peaceful conduct” was a veiled reference to the duty of obedience that Martens had invoked forty-eight years earlier at the Hague conference.

Alongside the court’s review of hostages and reprisals came an assessment of the legality of resistance to occupation. The court rewarded the defense’s effort to reposition German actions within the law of occupation. This was less a misinterpretation of international law or a proof of the weakness of nineteenth-century international law than a testimony to its persistence and strength after 1945. The court believed that the question of whether or not an occupation existed in fact in Yugoslavia, Greece, and Norway was critical. “The question of criminality,” the court maintained, “may well hinge on whether an invasion was in progress or an occupation accomplished.” For the court, Yugoslavia and Greece were effectively occupied by June 1941. Agreeing further with German defense, the court also cited the capitulation of the Yugoslav and Greek armies as helping to establish occupation. Finally, the court accepted Foertsch’s assertion that the Wehrmacht could assert control if it so chose and denied the prosecution’s contention that partisan control of territory invalidated claims to “effective occupation.”<sup>94</sup>

Once the court accepted that Yugoslavia and Greece were effectively occupied, resistance fighters stood on shaky ground. While the partisans, Chetniks, and National Greek Republican League (EDES) in Greece may have fulfilled the requirements for belligerent status, the court declared: “No crime can properly be charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.” The court compared resistance fighters to “spies” within existing international law. Belligerents used spies, but if spies were captured, they were not entitled to POW status. “Just as the spy

<sup>93</sup> NARA, Hostages Trial, Court Judgment, February 19, 1948, roll 12, frame 1074. This conclusion later raised opposition among some legal scholars. Lord Wright cited, among other texts, the Martens clause in support of his position; see Lord Wright, “The Killing of Hostages as a War Crime,” *British Yearbook of International Law* 25 (1948): 302. For a later view that accepts the possibility of reprisals against civilians in occupied territories and restates the CIL argument in favor of reprisals, see A. R. Albrecht, “War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949,” *American Journal of International Law* 47, no. 4 (October 1953): 590–614.

<sup>94</sup> NARA, Hostages Trial, Court Judgment, February 19, 1948, roll 12, frame 1068.



may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even," the court claimed, yet "still they remain war criminals in the eyes of the enemy and may be treated as such." This mirrored the defense's arguments regarding resistance movements' legal status and rejected prosecution arguments. The court also echoed Latenser's arguments regarding contained conflict and limiting belligerent status to those fighting for existing states. "A resistance not supported by an organized government," the court argued, "is criminal and deprives participants of belligerent status."<sup>95</sup> Not without foundation in the international legal literature from the period, the court vigorously reasserted late nineteenth-century international law on occupation and guerrillas.<sup>96</sup> The court did this to the benefit, at least to some degree, of the very people who thoroughly disavowed the law of occupation during the war. Like Martens in his arguments on occupation, the court stressed the occupied population's duty of obedience, and this led it to deny legal protection to resistance against an established occupation. In spite of the war, the legal legitimacy of resistance to occupation suffered a massive reversal.

#### THE GENEVA CONVENTIONS, RESISTANCE, AND THE NEW STATE OF WAR

Undermining the legitimacy of resistance struck at the foundation of postwar European politics. For Western Europe, wartime resistance remained an unquestioned good. Yet, occupation also caused deep cleavages within occupied societies. Who was a collaborator? Was a mayor in France who worked with German occupation officials a traitor or someone discharging his functions in accordance with the Hague Conventions? What about the obvious connections between those in postwar governments and collaborators in countries such as Greece? Where did ordinary criminality end and resistance to occupation begin?<sup>97</sup> The potential

<sup>95</sup> NARA, Hostages Trial, Court Judgment, February 19, 1948, roll 12, frames 1068–71.

<sup>96</sup> See, e.g., Lassa Oppenheim, *International Law: A Treatise*, vol. 2, *War and Neutrality* (London, 1906), 70–71; Lester Nurick and Roger W. Barrett, "Legality of Guerilla Forces Under the Laws of War," *American Journal of International Law* 40, no. 3 (July 1946): 582. See also the following contemporary assessments from the legal literature, in Kalshoven, "Human Rights, the Law of Armed Conflict, and Reprisals," 184; Jörn Axel Kämmerer, "Kriegsrepressalie oder Kriegsverbrechen?: Zur rechtlichen Beurteilung der Massenexekutionen von Zivilisten durch die deutsche Besatzungsmacht im Zweiten Weltkrieg," *Archiv des Völkerrechts* 37, nos. 3/4 (September 1999): 288.

<sup>97</sup> See, e.g., Pieter LaGrou, *The Legacy of Nazi Occupation: Patriotic Memory and National Recovery in Western Europe, 1945–1965* (Cambridge, 2000), 19–78; LaGrou, "Regaining the Monopoly of Force: Agents of the State Shooting Fugitives In and Around Belgium," *Past and Present*, suppl. 6 (2011): 178–95; Tony Judt, *Postwar: A History of Europe since 1945* (New York, 2005), 64–66; Mark Mazower, "The Cold War and the Ap-

explosiveness of these questions made securing international legitimacy for resistance to occupation attractive. The clean categories of international law provided a risk-free setting to bury occupation's complicated memories, at least in terms of domestic European politics.

As such, international law and norms for future wars helped confirm public European memories of World War II, and they did so by securing legal legitimacy for resistance to occupation. Some postwar national courts in Europe were testing the waters in this direction. In 1948 and 1949, Dutch national courts trying the Wehrmacht commander in the occupied Netherlands, General Friedrich Christiansen, and the leader of the security forces there, Hans Rauter, rejected capitulation's role in establishing occupation. The Dutch court in the Christiansen case denied that an occupied population had a duty of obedience as long as international law refused to distinguish "between a legitimate and illegitimate occupation."<sup>98</sup> Such contentions, which took a *jus ad bellum* argument that concentrated on the legitimacy of a state's decision for conflict and linked it to occupation, resembled those put forth by the prosecution in the Hostages Trial and rejected by the court at that trial.

Whatever its basis, the possibility of legal resistance to occupation encountered American and British opposition from 1945 onward. American diplomats did not even anticipate the need for a wholesale reworking of the rules of war. In September 1945, a State Department official skeptically noted that "it is not, I believe, seriously contended that any major changes are necessary in the Geneva Convention." "Non-humanitarian treatment of prisoners of war," he explained, "was not due to defects in the Convention but failure to adhere to its terms."<sup>99</sup> Even American diplomats sympathetic to revisions believed they would be minor ones.<sup>100</sup> Issues the Americans wanted addressed included salutes between guards and prisoners, transfers of prisoners between countries, and paying prisoners of war for work.<sup>101</sup> Later State Department planning for preparatory conferences envisioned new standards of treatment for civilian internees.<sup>102</sup> Another

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appropriation of Memory: Greece after Liberation," in *The Politics of Retribution in Europe: World War II and Its Aftermath*, ed. István Deák, Jan T. Gross, and Tony Judt (Princeton, NJ, 2000), 212–31.

<sup>98</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 14, *Trial of Hans Albin Rauter* (London, 1949), 124–38.

<sup>99</sup> National Archives and Record Administration (NARA), Department of State, Internal Memorandum (Bancroft), 514.2 Geneva/12-1945, box 2386, November 16, 1945.

<sup>100</sup> NARA, Department of State, Albert Clattenburg (Special Projects Division) to Bancroft, 514.2 Geneva/12-1945, box 2386, December 19, 1945.

<sup>101</sup> NARA, Special Projects Division, "Observations with Regard to Amendments to the Geneva Prisoners of War Convention," 514.2 Geneva/12-1945, box 2386, December 4, 1945.

<sup>102</sup> NARA, Office of the State Department Legal Advisor to Albert Clattenburg, 514.2 Geneva/1-1946, box 2386, January 18, 1946.

diplomat believed that “general principles” should be established for the treatment of civilian populations in occupied territories. This meant restricting forced labor, prohibiting deportation, and guaranteeing a “minimum level of subsistence and public health in an occupied country.”<sup>103</sup> For the State Department’s legal advisor, Alwyn Freeman, such principles “duplicate or repeat, if not the text, the spirit of Articles 42 to 53, inclusive, of the Regulations annexed to Hague Convention IV of 1907.”<sup>104</sup> None of the Americans, however, foresaw how resistance to occupation would become so important.

The so-called European “resistance” countries placed this issue at center stage. At the Conference of Government Experts in Geneva in 1946, POW status for resistance fighters caused the “bitterest argument,” according to one official.<sup>105</sup> According resistance fighters POW status radically reduced the risk of resistance to occupation, transformed resisters into legal belligerents, and made continued conflict in an occupied territory a legitimate sphere of war. At Geneva, delegations from Western and Eastern Europe were gripped by fear of occupation. Many assumed, according to American observers, that future occupations would replicate those of World War II. Resistance fighters needed legal protection. The resistance countries, according to American representatives, “were unwilling to accept any further limitation intended to establish a differentiation between sporadic assassins and saboteurs against whom an occupant must exercise his police powers.” Already, these types of distinctions drawn between legitimate resistance to occupation and “saboteurs” demonstrated the extent to which arguments over resistance to occupation had shifted in comparison to those at The Hague fifty years earlier. The United States sought a highly restrictive definition of resistance. By contrast, France balked at the suggestion, in line with Hague Convention regulations for belligerent status, that resistance fighters carry weapons openly. The American delegation felt pressed by the resistance countries, but it insisted that a resistance movement must have “effective control of territory” in order to accord its fighters POW status. This line prevailed at the Stockholm conference in 1947, but many bitterly resented it.<sup>106</sup> The French wanted no requirement for territorial control.<sup>107</sup> Going even further, the Polish delegate sought

<sup>103</sup> NARA, Albert Clattenburg to the Legal Advisor, “Civilian Population of Occupied Countries,” 514.2 Geneva/5-246, box 2386, May 2, 1946.

<sup>104</sup> NARA, State Department Legal Advisor to Special Projects Division, 514.2 Geneva/5-216, box 2386, May 10, 1946.

<sup>105</sup> NARA, Telegram from US Delegation at Geneva to the Secretary of State, 514.2 Geneva/4-2847, box 2387, April 28, 1947.

<sup>106</sup> NARA, Confidential Report from Albert Clattenburg to the Secretary of State, 514.2 Geneva/8-2647, box 2387, August 26, 1947.

<sup>107</sup> NARA, International Committee of the Red Cross, “Summary Report of the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims,” 514.2 Geneva/8-2647, box 2387, August 1947.

to secure international legal cover for resistance fighters operating outside occupied territory. In his report to the Secretary of State, Freeman claimed that delegates from once-occupied countries looked past the practical implications of their positions.<sup>108</sup> This emphasis on practicality placed American perspectives very much in line with the perspectives of those such as Martens at the Hague conferences. Americans still could conceive of an occupier who accepted the norm of contained war. For many Europeans, however, the Second World War had made this a fantasy. Yet for some colonial powers at the conference already embroiled in a range of wars with colonial resistance movements, such as France, another fiction had to be maintained. That fiction was that the nineteenth-century civilizational distinction between rules for colonial wars and wars within the realm of “civilization” could be continued in spite of the experience of the Second World War within Europe.

Another preparatory conference in 1948 in Stockholm saw similar conflicts over resistance. The US delegation suggested that all fighters who surrendered after hostilities ended, including resistance fighters, would not be considered POWs.<sup>109</sup> In contrast, countries such as Denmark wanted resistance fighters accorded official POW status with few restrictions. Denmark’s demands in this respect underscored the degree to which even countries with a comparatively sparse history of resistance were swept forward by a resistance myth to advocate for the rights of resistance to occupation. Conservative Danish newspapers complained that the great powers at Stockholm failed to grasp how war had changed. These powers showed “ingratitude” for resistance movements’ contributions to the war through their insistence that resistance movements fulfill a range of requirements for belligerent status.<sup>110</sup>

At Geneva in 1949, these conflict lines resurfaced. Britain insisted that resistance fighters wanting POW status had to fulfill stringent requirements. It demanded that resistance movements maintain control of territory, keep in constant communications with outside powers as well as governments-in-exile, and have a fixed headquarters. The last requirement surpassed what the Americans envisioned as necessary.<sup>111</sup> The British vision of resistance hardly accorded with

<sup>108</sup> NARA, Confidential Report from Albert Clattenburg to the Secretary of State, 514.2 Geneva/8-2647, box 2387, August 26, 1947.

<sup>109</sup> NARA, “Report of the United States Delegation to the Seventeenth International Red Cross Conference at Stockholm,” 514.2 Stockholm/8-3486, box 2390, August 1948.

<sup>110</sup> NARA, Telegram from the American Embassy in Copenhagen to the Department of State, 514.2 Stockholm/9-948, box 2390, September 9, 1948.

<sup>111</sup> NARA, Office of the Legal Advisor, Records Relating to the Red Cross and Geneva Conventions, 1941–67, British Embassy in Washington to the Department of State, “Geneva Conference for the Protection of War Victims: Record of a Discussion between Sir Robert Craigie, Messrs. Harrison, Yingling, and McMahon,” February 28, 1949, box 6.

the conditions of resistance in most occupied countries, but it fit with British visions of wartime resistance in Europe. The British delegate, William Gardner, maintained that for resistance fighters to qualify as POWs, a resistance movement needed to exert “effective control” over a portion of occupied territory. In the war, according to Gardner, “French and other resistance movements were in communications with London, and the adverse belligerents could be contacted through the Protecting Powers.”<sup>112</sup> Behind British demands were visions of war and occupation that drew on the norm of contained conflict. In wartime Italy, for example, the British Army had been leery of wartime resistance movements, considering many partisan groups no better than armed “thugs.”<sup>113</sup> Prior to the Geneva Conference, British diplomats such as Sir Robert Craigie and the War Office emphasized the importance of clear divisions between civilians and combatants. Resistance groups had to be “regularized” to receive POW status. The War Office explicitly distinguished soldiers from the “peaceful population.”<sup>114</sup> Finally, the British were concerned about the potential spillover effects of legalizing resistance to occupation for their counterinsurgency efforts in Malaya.<sup>115</sup>

At Geneva, the United States and United Kingdom also wanted the death penalty retained as an option for an occupation facing a resistance movement. Craigie maintained that the death penalty was necessary for severe sabotage because “it is the duty of the Occupying Power under international law to maintain law and order in the occupied territory.”<sup>116</sup> This was a clear reference to the duties of the occupying power in Article 42 of the Hague Conventions. The American delegate, Leland Harrison, explained that the death penalty would “be limited to truly serious crimes.”<sup>117</sup> If an insurgent who “murdered” occupation soldiers was released, Harrison remarked, violence would escalate as occupation soldiers sought “retaliation” for their comrades’ deaths.<sup>118</sup> This demonstrated fear of how war could escalate in a practical sense and a willingness to contain such escalation with violence. Yet, it also underscored the difficulty of classifying attacks on occupation forces. Where was the line between murder and resistance?

<sup>112</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. A (Bern, 1949), 241.

<sup>113</sup> Julie Le Gac, “From Suspicious Observation to Ambiguous Collaboration: The Allies and Italian Partisans, 1943–1944,” *Journal of Strategic Studies* 31 (October 2008): 725.

<sup>114</sup> PRO, WO 163/327, “Interdepartmental Committee on the Revision of the Geneva Conventions: Report of the Sub-Committee on the Definition of Partisans,” undated.

<sup>115</sup> Huw Bennett, “The Other Side of COIN: Minimum and Exemplary Force in British Army Counterinsurgency in Kenya,” *Small Wars and Insurgencies* 18, no. 4 (December 2007): 642.

<sup>116</sup> *Final Record*, vol. 2, pt. B, 425.

<sup>117</sup> *Final Record*, vol. 2, pt. B, 425.

<sup>118</sup> *Final Record*, vol. 2, pt. B, 426.

The British and American arguments were put forth in an environment suffused with the memory of the Second World War. Even Britain admitted that “the decision to recognize the existence of irregular forces and the fighting partisan represented a very great advance.”<sup>119</sup> Similarly, the Americans conceded that resistance groups required some protection. In addition, the Americans approached the question of future war and occupation differently than the British, at least in a military sense. The Geneva Conventions and regulations for occupation remained a side issue for the United States given that it still confidently relied on its nuclear weapons monopoly. Even after that monopoly disappeared in August 1949, nuclear weapons and air power dominated the US approach to war.<sup>120</sup> By contrast, a dramatically weakened Britain faced a range of insurgencies bubbling across its overextended empire after 1945 whose similarity to resistance movements in Europe was difficult to deny.

The baseline assumption of most European delegations at Geneva was that war would be uncontained. Carving out categories of protection within an uncontained conflict was the only way to make war humane. The overwhelming majority of European delegates, from France to Greece to the Soviet Union, felt that any attempts to restrict POW status for resistance fighters were veiled efforts to place them in legal no-man’s land, deny them international legal protections, and expose them to the violence of occupation forces.

This made it essential that resistance fighters be accorded POW status at Geneva with few restrictions. The French delegate, Albert Lamarle, condemned British insistence that resistance movements maintain communications with a governmental body outside an occupied territory. That would allow the occupier to cut communications and “declare . . . the partisans . . . outside the scope of the Convention.”<sup>121</sup> The Belgian and Danish delegates “emphasized the importance of affording effective protections to members of resistance movements.”<sup>122</sup> The Italian delegate explained that “it might happen . . . that while actually under enemy occupation, a population would rise against the Occupying Power without

<sup>119</sup> *Final Record*, vol. 2, pt. A, 242. Another British delegate admitted that “persons belonging to organized resistance movements must be protected.” See *Final Record*, vol. 2, pt. B, 428. Mexico, untouched by the war, felt the need to voice its understanding of “suffering endured by the civilian populations in the occupied territories.” See *Final Record*, vol. 2, pt. B, 306.

<sup>120</sup> Ingo Trauschweizer, *The Cold War U.S. Army: Building Deterrence for Limited War*, Modern War Studies (Lawrence, KS, 2008), 18–20; Marc Trachtenberg, “A ‘Wasting Asset’: American Strategy and the Shifting Nuclear Balance, 1949–1954,” *International Security* 13, no. 3 (December 1988): 5–49.

<sup>121</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. A (Bern, 1949), 241.

<sup>122</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. A (Bern, 1949), 242.



being organized as a resistance movement.” Such a case occurred in Naples in 1944, the Italian delegate maintained, and the Geneva Conventions of 1949 could not exclude such a population from its purview. As individuals they might satisfy the conditions for belligerent status, but the requirements for the organizations they belonged to might deny them such status.<sup>123</sup>

The experience of occupation transcended Cold War boundaries. France, the Soviet Union, and Greece, to name just a few, were countries with highly conflicted experiences of resistance. Despite their ideological differences, together they helped ensure POW status for resistance members with minimal restrictions. Thus, the Soviet Union expressed its concern about British attempts to limit Geneva protections soon after Western European countries raised similar issues. The British attempt, the Soviet delegate contended, “could not but weaken the legal protection given to organizations which had out of patriotism taken up arms to defend the honor and the independence of their country.”<sup>124</sup> Eventually, any qualifications for resistance movements were dropped with the exception of the four pre-occupation qualifications for belligerents in the 1899 Hague Conventions. The Geneva Conventions contained no mention of the Stockholm Draft Convention requirement that a resistance movement be attached to a belligerent in the conflict and notify the occupying power of its participation. While draft conventions explicitly noted the need for a resistance movement to direct its activities against the occupying power, the 1949 Geneva Conventions omitted this. Just who a resistance movement might direct its activities against, the occupying forces or the local government that remained in place during an occupation, was left open. British and American efforts came to naught. The key article in this respect was Article 4 of the Treatment Relative to Prisoners of War. It extended prisoner of war status to: “members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied.”<sup>125</sup>

Geneva completed the turn against the norm of contained war and with it the law of occupation. For postwar Europe, the international legal realm was the perfect arena in which to seal memories of resistance and its legitimacy. The broad, abstract legal categories that many argued were unpractical on the ground skirted past the complicated histories of resistance movements while retroactively legit-

<sup>123</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. A (Bern, 1949), 239.

<sup>124</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. A (Bern, 1949), 242.

<sup>125</sup> Geneva Convention, Convention III Relative to the Treatment of Prisoners of War, Article 4, August 12, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument>.



imating the memory of “resistance.” Abstract categories, as Sarah Farmer noted in her study of the German destruction of Oradour-sur-Glane, were effective in eliding the conflicted politics of resistance in France.<sup>126</sup> Legalizing resistance to occupation in the international legal arena also exported tension-fraught internal political issues to a similarly abstract and safe realm.<sup>127</sup> Yet, the ease with which such internal issues were exported to the international legal realm was also indicative of the way in which the experience of the war had fractured some of the shared assumptions of that realm from the nineteenth century. For the memory of the war with regard to occupation could also be read as something that broke down the distinction between “civilization,” with its world of contained conflict, and the world outside “civilization” that had been exposed to the uncontained warfare of European armies. As Devin Pendas has argued, World War II made Europeans both the purveyors of uncontained violence that they normally attributed to barbarians outside the realm of civilization and the victims of the very same untrammelled violence that had once been confined to the world outside civilization.<sup>128</sup> That artificial distinction dividing the world into two parts became unsustainable, and as a result some of the classical assumptions of nineteenth-century international law were undermined.

The ground had shifted from an acceptance of a norm of contained war and, with it, a law of occupation that reinforced that norm. In this sense, it is interesting to note the silences of the Geneva Conference compared with the outcomes of the Hague Conference fifty years earlier. The role of the local administration in a country under military occupation was not mentioned. Gone were the Hague debates about the moment of “effective occupation” as well as the “duty of obedience” on the part of the occupied population.<sup>129</sup> Such debates had figured prominently at The Hague because the notions of contained war that delegates shared demanded that fighting cease with the moment of occupation. The careful

<sup>126</sup> Sarah Farmer, *Martyred Village: Commemorating the 1944 Massacre at Oradour-sur-Glane* (Berkeley, CA, 1999), 57–58.

<sup>127</sup> Martin Conway, *The Sorrows of Belgium: Liberation and Political Reconstruction, 1944–1947* (Oxford, 2012), 223, 384.

<sup>128</sup> Devin Pendas, “‘The Magical Scent of the Savage’: Colonial Violence and the Origins of the Legalist Paradigm of War,” *Boston College International and Comparative Law Review* 30 (Winter 2007): 29–53.

<sup>129</sup> In a post-Geneva article, Richard Baxter argued that the “duty of obedience” was no longer applicable to occupation and was not lodged in international law. See Richard R. Baxter, “The Duty of Obedience to the Belligerent Occupant,” *British Yearbook of International Law* 27 (1950): 266. Others argued that the “duty of obedience” still rested in international law. See Pertti Joenniemi and Adam Roberts, “Civil Resistance and the Law of Military Occupations,” *Instant Research on Peace and Violence* 4, no. 1 (1974): 42; Sibylle Scheipers, *Unlawful Combatants: The Genealogy of the Irregular Fighter* (Oxford, 2015), 101.

balance between the maintenance of sovereignty, an occupation based on the continued functioning of the local administration, and the requirement that war and resistance cease in return for the occupier maintaining law and order was no longer an object of concern. War, the Geneva Conventions of 1949 confirmed, would continue with occupation and receive international legal sanction. The Geneva Conventions certainly did not legalize uncontained conflict, but they accepted the near certainty of such conflict and worked to create islands of protection within it. As a result, resistance to occupation was legally anchored in this new condition of war, thus legitimating a realm of conflict that had dominated the Second World War in Europe.

## CONCLUSION

The transformation of the law of occupation shows that international law should be framed within a broad historical context. Military occupation is not a timeless category that can be equated with conquest.<sup>130</sup> This examination of how occupation was shaped and reshaped offers insights into not only narratives of international law in the 1940s but also how international law and memory intersect and Europe's role in the international construction of war.

Examining occupation reveals a different trajectory for international law in the 1940s. Recent treatments of the 1940s split it into a decade whose "lawless" first half was supplanted by a "lawful" second half. That lawful second half stems from a human rights-centered reading of late nineteenth-century international legal projects or documents such as the Atlantic Charter.<sup>131</sup> The Hostages Trial and the American or British positions at Geneva and its preparatory conferences revealed that late nineteenth-century international law and the norm of contained war continued to hold sway in spite of National Socialist Germany's assault on both. In this sense, we can connect these continued attachments to a longing among some to return to the prewar certainties that the war had so badly damaged. This moving back to the past even encompassed turns toward human rights. Samuel Moyn has maintained, for example, that the German historian Gerhard Ritter's interest in human rights derived from Ritter's belief in their historic Christian frame as opposed to a belief in human rights as part of a progressive, Enlightenment-centered vision for the future.<sup>132</sup>

<sup>130</sup> See, e.g., David Day, *Conquest: How Societies Overwhelm Others* (New York, 2008).

<sup>131</sup> This would be one way to read Elizabeth Borgwardt's work on the Roosevelt administration and international law. See Elizabeth Borgwardt, *A New Deal for the World: America's Vision of Human Rights* (Cambridge, MA, 2005).

<sup>132</sup> Samuel Moyn, "The First Historian of Human Rights," *American Historical Review* 116, no. 1 (February 2011): 58–79.

The history of memory is rarely brought into the same frame as the history of international law. Yet, in this article we see how a powerful memory of the Second World War helped undermine the norm of contained conflict and, by extension, the law of occupation. Frequently, international legal scholars describe the Geneva Conventions as a logical consequence of the Second World War. Yet, the European resistance countries at Geneva were driven forward by a particular memory of the war experience, not a simple reflection of that experience. As Tony Judt and Henry Rousso argued, that memory emphasized mass resistance to occupation along with a reluctance to excavate conflicted histories of societies under National Socialist occupation.<sup>133</sup> In neither Western nor Eastern Europe was the Holocaust central to this memory. The continued postwar assertion of occupation law as codified at The Hague with its hostility toward resistance jeopardized the European memory of resistance. In this sense, the Geneva Conventions should be considered not only another step in international law's progressive codification but also something that definitively sealed Europe's memory of the Second World War.

But Geneva no longer existed in the restricted world of European international law. The Eurocentric world of the Hague Conference of 1899 had passed. Geneva was part of an international legal project that now covered the entire globe, while the "civilizational" distinctions of the late nineteenth century were shredded by the experience of the Second World War itself. The irony was that the memory of a very European part of the Second World War was the basis for remaking the law of war for the world. The similarity between resistance in the Second World War and colonial insurgencies could hardly escape anyone at Geneva. To legalize resistance to occupation in Europe and then turn against colonial resistance movements went too far because of the essential military similarity between the two. Moreover, the civilizational distinction that had divided the nineteenth-century world and separated the assumptions of military occupation from colonial warfare had collapsed. It turn, this helped create a different context for postcolonial wars, as weakened European states attempted to retain far-flung colonies. Great Britain slowed its ratification of the Geneva Conventions believing this would place its brutal repression of the Mau Mau revolt in Kenya in a legal netherworld, and it also studiously avoided any mention of war in Kenya, preferring to call it an emergency.<sup>134</sup> It had earlier hoped, explained a British Army

<sup>133</sup> Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (Cambridge, MA, 1991); Tony Judt, *Postwar: A History of Europe Since 1945* (New York, 2005), 808–9.

<sup>134</sup> Bennett, "The Other Side of COIN," 641–44; Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London, 2005), 126–29. Recent studies question the iconic status of the British response to the Malayan Emergency as a model for a "minimal force" approach to counterinsurgency. See David French, *The British Way in Counter-Insurgency, 1945–1967* (Oxford, 2011); Paul Dixon, "'Hearts and Minds'? British Counter-

official, "that no endeavor would be made to argue that the Convention should apply to the operations now in progress in Malaya."<sup>135</sup> Yet, the legal legitimacy conferred upon resistance to occupation in interstate war inevitably bestowed legitimacy on internal "insurgencies." This also threatened newly decolonized countries. Burma vehemently opposed the application of the general articles of the Geneva Conventions to internal conflicts. Applying the Geneva Conventions to "armed conflicts not of an international character," the Burmese delegate in Geneva explained, would "give legal status to insurgents who sought by undemocratic methods, to overthrow a legally constituted government by force of arms." This was "a very serious danger to sovereignty."<sup>136</sup> This reflected how "sovereignty," not necessarily "rights," became the dominant concern of decolonized countries, as Samuel Moyn has argued.<sup>137</sup>

The nineteenth-century European construction of war emphasized contained conflict with a corresponding stress on legitimating conflict between uniformed armies acting as representatives of states. But Geneva gave legal sanction to a type of war that cut against the norm of contained conflict in the nineteenth-century sense. It is no accident that insurgency and counterinsurgency came to the fore after 1949. Counterinsurgency moved increasingly into the institutional center of the American Army by the early 1960s.<sup>138</sup> At the same time, the exemplary terror of the nineteenth-century European colonial variety was no longer acceptable, though the British escaped the stain of this in Malaya through hiding the violence of their counterinsurgency effort from the broader Cold War public.<sup>139</sup> The perception that the British fought counterinsurgencies through a "hearts and minds" approach was reinforced through the contrast with the massive American conventional military effort in Vietnam.<sup>140</sup> France had its own set of problems. The old civilizational distinctions no longer applied, and efforts to argue that

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Insurgency from Malaya to Iraq," *Journal of Strategic Studies* 32, no. 3 (June 2009): 353–81; Karl Hack, "The Malayan Emergency as Counter-Insurgency Paradigm," *Journal of Strategic Studies* 32, no. 3 (June 2009): 383–414.

<sup>135</sup> PRO, WO 32/13616, Cabinet Meeting Minutes, "Revision of the Geneva Conventions of War Victims," December 2, 1949.

<sup>136</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, pt. B (Bern, 1949), 15.

<sup>137</sup> Moyn, *The Last Utopia*, 84–119.

<sup>138</sup> The army emphasized counterinsurgency, in spite of arguments that the army misunderstood it. See Andrew Krepenivich, *The Army in Vietnam* (Baltimore, MD, 1988), 53–55.

<sup>139</sup> On this exemplary terror in northwest India, see, e.g., Mark Condos and Gavin Rand, "Coercion and Conciliation at the Edge of Empire: State-Building and Its Limits in Waziristan, 1849–1914," *Historical Journal* (October 2017): 7.

<sup>140</sup> Thompson posed the two cases against one another in his classic work on insurgency. See Robert Grainger Ker Thompson, *Defeating Communist Insurgency: The Lessons of Malaya and Vietnam*, Studies in International Security, vol. 10 (New York, 1966).

postcolonial conflicts in places like Indochina and Algeria were internal ones to which the Geneva Conventions did not apply seemed increasingly fraught.<sup>141</sup> Insurgents were now legitimate combatants, framed their conflicts partially within the terms of Geneva as “resistance” to foreign occupation, and engaged in sophisticated public media efforts for a Cold War international public, as Matthew Connelly has shown in the case of Algeria.<sup>142</sup> For the French Army, this necessitated a new, not necessarily less violent form of war, to face what it called *guerre révolutionnaire*. Wars fought under the influence of such theories demanded a sophisticated mixture of coercion, development programs, and public relations efforts. A focus on schools, women’s rights, and health care was embedded in such an approach to war, but it was usually overwhelmed by its more punitive elements, as the institutionalized torture that the French Army practiced in Algeria showed.<sup>143</sup> In contrast to occupation’s concern with sealing war off from the populace, French advocates of *guerre révolutionnaire* explicitly constructed war as taking place within the population.

The United States looked dubiously at European efforts to twin development programs with counterinsurgency, as shown by skeptical American attitudes toward French efforts to repackage their war in Indochina from this perspective.<sup>144</sup> Only the United States and the Soviet Union, countries with the capacity and power to interweave expansive “development” programs with counterinsurgency, could commit to insurgency-centered conflicts—although, as the Vietnam War showed, the success of such superpower-driven efforts was hardly guaranteed.

That new landscape of global conflict was not the product of an inevitable process, nor was it the result of a new “chosen” form of war on the part of global powers or new movements of colonial liberation. It was not a product of a shift in military strategies or tactics. It was a consequence of the new condition of war brought about by the contingency-filled collapse of the norm of contained war and the transformation of occupation law at Geneva. The law of military occupation as codified in the Hague Conventions was definitively undermined. A future of uncontained conflict beckoned.

<sup>141</sup> Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, trans. Dona Geyer (Philadelphia, 2013), 120–25.

<sup>142</sup> Matthew James Connelly, *A Diplomatic Revolution: Algeria’s Fight for Independence and the Origins of the Post–Cold War Era* (Oxford, 2002), 230.

<sup>143</sup> Christopher Craddock and M. L. R. Smith, “‘No Fixed Values’: A Reinterpretation of the Theory of *Guerre Révolutionnaire* and the Battle of Algiers, 1956–1957,” *Journal of Cold War Studies* 9, no. 4 (Fall 2007): 68–105; Moritz Feichtinger and Stephan Malinkowski, “Konstruktive Kriege?: Rezeption und Adaption der Dekolonisationskriege in westlichen Demokratien,” *Geschichte und Gesellschaft* 37, no. 2 (April–June 2011): 275–90.

<sup>144</sup> Fredrik Logevall, *Embers of War: The Fall of an Empire and the Making of America’s Vietnam* (New York, 2012).