

## INTERNATIONAL LEGAL THEORY

# The Phoenix of Colonial War: Race, the Laws of War, and the ‘Horror on the Rhine’

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### Abstract

The article explores the demise of the ‘colonial war’ category through the employment of French colonial troops, under the 1918 armistice, to occupy the German Rhineland.

It traces the prevalence of – and the anxieties underpinning – *antebellum* doctrine on using ‘Barbarous Forces’ in ‘European’ war. It then records the silence of *postbellum* scholars on the ‘horror on the Rhine’ – orchestrated allegations of rape framed in racialized terms of humanity and the requirements of the law of civilized warfare. Among possible explanations for this silence, the article follows recent literature that considers this scandal as the embodiment of crises in masculinity, white domination, and European civilization.

These crises, like the scandal itself, expressed *antebellum* jurisprudential anxieties about the capacity – and implications – of black soldiers being ‘drilled white’. They also deprived *postbellum* lawyers of the vocabulary necessary to address what they signified: breakdown of the laws of war; evident, self-inflicted European barbarity; and the collapse of international law itself, embodied by the Versailles *Diktat* treating Germany – as Smuts warned, ‘as we would not treat a *kaffir* nation’ – as a colonial ‘object’, as Schmitt lamented.

Last, the article traces the resurgence of ‘colonial war’. It reveals how, at the moment of collapse, in the very instrument embodying it, the category found a new life. Article 22(5) of the League of Nations Covenant (the Covenant) reasserted control over the colonial object, furnishing international lawyers with a new vocabulary to address the employment of colonial troops – yet, now, as part of the ‘law of peace’. Reclassified, both rule and category re-emerged, were codified, and institutionalized imperial governance.

### Keywords

colonial war; humanity; laws of war; race; Rhine occupation

## I. AN ELUSIVE CATEGORY

When lawyers speak today of ‘colonial war’, they often do so to mark the laws of war’s progress, its transformation into international *humanitarian* law (IHL).<sup>1</sup> Mostly,

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<sup>1</sup> R. Giladi, ‘Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography’ (unpublished manuscript).

colonial war's echo in current IHL literature is a claim that law no longer engages such categories; that its reach and domain are truly humanitarian and universal.<sup>2</sup> Rendering the past inconsequential, as a means for overcoming it, remains a principal strategy 'by which international law rewrites its history'.<sup>3</sup> To historians, such triumphalism is suspect; and yet, awareness of the pitfalls of progressive history is not enough. Stephen Neff's history of the laws of war acknowledges 'sadly' that there was such a thing as 'colonial warfare ... quite distinct from conflict amongst developed (chiefly European) countries'; but informs the reader not to expect 'much about' it in the book.<sup>4</sup>

International law historians have crafted many of the tools required to reflect on colonial war,<sup>5</sup> even if they pay less attention to colonial war as a distinct topic of study. Critical engagements with the history of the laws of war remain few and far between: Wilde's account of the law of occupation as part of a continuum of international territorial governance, or Mégret's exploration of the equivalent 'otherness' of present-day 'unlawful combatants' and the savages of not-so-long-ago, remain exceptions confirming the rule.<sup>6</sup> IHL professionals, boasting pragmatic sensibilities, rarely note works on the *praxis* or theory of colonial warfare<sup>7</sup> or in-depth and broad critical analyses, such as Berman's exposé on the Riff war, or Kennedy's sustained theoretical engagement with law and war.<sup>8</sup> Last, the role of race – key determinant of colonial war – still awaits systematic exploration.<sup>9</sup>

When exactly did colonial war disappear from the international legal landscape? This ostensibly simple question immediately raises several preliminary epistemological issues. Thus, we need account, *first*, for the possibility that it never quite 'went away'.<sup>10</sup> Perhaps, the category may be found, repackaged, under other terminology, or through the operation of other doctrines, such as the principle of distinction, or the classification of armed conflicts. *Second*, even if 'colonial war' has disappeared from the laws of war landscape, it may have left traceable, if unacknowledged, marks on international law. Such enduring legacies may be found outside today's framework regulating warfare. The restructuring of international law's internal divisions – the erosion of the 'law of war'/'law of peace' distinction is just one example – tends to

<sup>2</sup> M. Sassòli, A. Bouvier and A. Quentin (eds.), *How Does Law Protect in War?* (2011), Vol. I, at 97 ('until the 1970s, IHL ... strongly influenced by Western culture and European Powers'); M.A. O'Connell, 'Historical Development and Legal Basis', in D. Fleck, (ed.), *Handbook of International Humanitarian Law* (2013), at 16 ('"Eurocentric" ... more a criticism ... than a reflection of historical fact').

<sup>3</sup> A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 *Harvard JIL* 3, at 7–8.

<sup>4</sup> S. Neff, *War and the Law of Nations: A General History* (2005), at 3.

<sup>5</sup> M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

<sup>6</sup> R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008); F. Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Law's Other', in A. Orford (ed.), *International Law and its Others* (2006), 265.

<sup>7</sup> I.V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Germany* (2004).

<sup>8</sup> N. Berman, "'The appeals of the Orient': Colonized Desire and the War of the Riff', in K. Knop (ed.), *Gender and Human Rights* (2004), 195; D. Kennedy, *Of War and Law* (2006).

<sup>9</sup> Survey in R. Knox, 'Civilizing interventions? Race, War and International Law', (2013) 26 *Cambridge Review of International Affairs* 111.

<sup>10</sup> Mégret, *supra* note 6 (combatant status codes past distinctions between civilized, savages).

obfuscate such imprints that, today, are classified as ‘intervention’, ‘human rights’, ‘international governance’, ‘law of treaties’, etc.<sup>11</sup>

*Third*, the question assumes that the phrase ‘colonial war’ had determinate boundaries and fixed contents in space and time. Although ‘colonial war’ could mean, minimally, war against the already – or would-be – colonized; as a legal category, colonial war proves elusive. For one thing, the question assumes that colonial and metropole, periphery and centre, and even colonized and colonizer were reasonably distinguishable in the sphere of warfare. But what makes war ‘colonial’? Is it defined by geography or patterns of political subordination? Or by the enemy’s ‘otherness’? Is identity itself constructed through power relations, culture, race, or religion? Was the South African War – or, to drive the point through terminology, the Boer War – ‘colonial’ and, if so, what made it so? Who, precisely, was the colonial object struggling against empire, for political standing and legal recognition? Recalling that struggle’s atrocities, we may ask whether what mattered were *a priori* categorizations or, rather, war’s actual conduct. Besides, how to account for the migration of colonial war’s agents, norms, practices and traditions – from Francis Lieber’s Prussia to the American South, thence to the Philippines and Guantanamo Bay?<sup>12</sup> From Imperial Germany to South-West Africa, then back to Nazi Germany? How can such violation of boundaries allow for a bounded biography of colonial war? All this implies that demise promises to be as elusive as the category itself.

*Fourth*, the question assumes that there had in fact once been such a legal category. Its elusiveness, partly, is rooted in the fact that we cannot be quite certain whether it comprised a distinct type of organized violence to which different rules applied; a distinct type to which the normal rules of warfare applied differently; or such a distinct type, as to which these rules simply did not apply. Was the category itself *hors les lois de la guerre*? It may well have had one life (or several) in conference rooms or scholarly *tomes*, yet quite another ‘out there’, in faraway lands.

Such compound indeterminacy can be treated like a challenge, driving a project to precisely define the category’s space, time, and subject-matter boundaries and analyze its operation in order to pronounce the precise moment of its demise, record its death throes, and identify, *post mortem*, its lingering legacies. This article aims at no such *nécrologie*. Rather, embracing the category’s elusiveness, it focuses on race – a single yet itself elusive aspect of colonial war – to explore the operation of continuity and change. Though by no means the only determinant of ‘colonial war’, the category’s decline has often, if implicitly, been associated with the decline of the racial construction of the laws of war, its humanization, and its universalization.<sup>13</sup> ‘Race’, then, may help stabilize the colonial war category or, alternatively, help find instruction in its elusiveness. The article deals, moreover, with a single episode involving the racial construction of the laws of war and of the notion of ‘humanity’ in war, in the immediate aftermath of the First World War.

<sup>11</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); Knox, *supra* note 9.

<sup>12</sup> P.A. Kramer, *The Blood of Government: Race, Empire, the United States and the Philippines* (2006); *ibid.*, ‘The Water Cure’, *The New Yorker*, 25 February 2008.

<sup>13</sup> *Supra* note 2; T. Meron, ‘The Humanization of Humanitarian Law’, (2000) 94 *AJIL* 239.

That episode presents evidence, in plain sight, of colonial war, its categorical elusiveness, prevalence – and its demise. The episode is, however, marked by silence and amnesia: entirely and thoroughly muted and forgotten. It represents a moment where the very (racialized) logic of colonial war met its own internal contradictions, threatening to collapse the category itself. And yet, precisely at the moment of collapse, the category found a new life. By recovering that episode and charting through it the course of colonial war's collapse, *oubliette*, and resurgence, I seek to demonstrate the resilient elusiveness of 'colonial war', and of race as one of its intellectual underpinnings. The argument, essentially, is that the Rhine occupation demonstrates how international law epistemologies render the search for the demise of the 'colonial war' category – the search for historical continuity and discontinuity in international law – elusive. The Rhine occupation also suggests, as I discuss in the conclusion, one path to eluding such elusiveness.

What follows first captures the terms of the scandal arising out of the employment of French colonial troops in the occupation of the German Rhine: orchestrated allegations of rape framed in racialized terms, and echoing legal doctrine on the requirements of the law of civilized warfare (Part 2). Next, I trace the prevalence of *antebellum* doctrine on using 'Barbarous Forces' in 'European' war, its ambivalence, and the anxieties underpinning it (Part 3). I then record amnesia: Part 4 demonstrates how that scandal left no mark on international law scholarship to-date – despite its legal salience, ubiquity, and consequences. Part 5 explores the silence of *postbellum* scholars on the 'horror on the Rhine'. Among possible explanations for this silence (Part 6), the article follows literature that considers this scandal as the embodiment of crises in masculinity, white domination, and European civilization. It argues that these crises, expressing *antebellum* jurisprudential anxieties the employment of colonial troops in European wars, in effect deprived *postbellum* lawyers of the vocabulary necessary to address what these crises signified. Part 7 records the resurgence of the rule on the use of colonial troops in European wars in Article 22 of the Covenant. That codification project, I argue, reasserted control over the colonial object and furnished international lawyers with a new vocabulary to address the employment of colonial troops – albeit, now, as part of the 'law of peace'. The conclusion reflects on the implications of this episode to the study of continuity and discontinuity in international law.

## 2. 'HORROR ON THE RHINE'

The episode in question concerns the Rhineland occupation, known to historians as the 'watch on the Rhine', 'black shame', 'horror on the Rhine', etc. It involved the employment of colonial troops in the German Rhineland following the First World War.<sup>14</sup> The 1918 armistice provided for the French occupation of the Rhine. The French deployed, among others, units of colonial troops on occupation duty.

<sup>14</sup> S. Jeannesson, 'French Policy in the Rhineland, 1918-1924', in C. Fischer and A. Sharp (eds.), *After the Versailles Treaty: Enforcement, Compliance, Contested Identities* (2008), 57 (useful discussion of French policy).

A vitriolic, partly official,<sup>15</sup> and carefully timed<sup>16</sup> German campaign against the stationing of ‘black’ soldiers over a white population followed. ‘[A]bductions ... rape, mutilation, murder and concealment of the bodies’<sup>17</sup> were alleged. Public protests followed – not just in defeated Germany but also in victorious Britain and the United States of America. European liberals and socialists were scandalized; women’s groups in the United States, Sweden, Norway, and Finland were aghast.<sup>18</sup> An American woman recommended time-tested methods to German men: ‘there still remains a rope and a tree. Take up the natural arms which our men in the South resort to: lynch! Hang every black who assaults a white person!’<sup>19</sup> In 1920, an aspiring British politician, E.D. Morel, published a pamphlet – ‘The Horror on the Rhine’ – soon translated into various languages. The eighth edition boasted that circulation in the occupied area was proscribed; ‘the truth’, the cover claimed, ‘will not be stifled’.<sup>20</sup> In the 1922 general elections, the author defeated Winston Churchill for the Dundee seat.

The grounds of Morel’s protest merit attention. His pamphlet decried ‘outrages committed by these African troops upon women and girls’ and ‘the erection of brothels for their use’:<sup>21</sup>

Danger lurks everywhere for women and girls in the French area of occupation. Women are afraid to walk alone after sunset. Strolling in the woods is no longer possible. Girls ... in the fields often need the protection of their men-folk. Girls and boys are molested on their way to and from school. The towns and villages and the roads ... are alike unsafe. In ones and twos, sometimes in parties, big, stalwart men from warmer climes, armed ... living unnatural lives of restraint, their fierce passions hot within them, roam the countryside. Woe to the girl returning to her village home ... Dark forms come leaping out from the shadows of the trees, appear unexpectedly among the vines and grasses, rise from the corn where they have lain concealed. Then – panic-stricken flight which often availeth not ... <sup>22</sup>

The pamphlet provided incident reports, furnished dates and places, and offered commentary:

among the more primitive – or the more natural, if that word be preferred – races inhabiting ... Africa, the sex-impulse is a more instinctive impulse, and precisely because it is so, a more spontaneous, fiercer, less controllable impulse than among European peoples hedged in by the complicated paraphernalia of convention and laws.<sup>23</sup>

<sup>15</sup> P. Collar, *The Propaganda War in the Rhineland: Weimar Germany, Race and Occupation* (2012), at 9 (‘sanctioned or encouraged from above’ – not ‘centrally coordinated or directed’); K. Nelson, ‘The “Black Horror on the Rhine”: Race as a Factor in Post-World War I Diplomacy’, (1970) 42 *Journal of Modern History* 606 (‘concerted’); I. Wigger, ‘“Black Shame”—The Campaign Against “Racial Degeneration” and Female Degradation in Interwar Europe’, (2010) 51 *Race and Class* 33 (government ‘initiated’).

<sup>16</sup> S. Marks, ‘Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience’, (1983) 13 *European Studies Review* 297, at 311 (‘correlation with reparation deadlines was evident’).

<sup>17</sup> ‘Finds Negro Troops Orderly on Rhine’, *New York Times*, 20 February 1921.

<sup>18</sup> Nelson, *supra* note 15, at 616.

<sup>19</sup> ‘Is the Black Horror on the Rhine Fact or Propaganda?’, *The Nation*, 13 July 1921, 44 at 45.

<sup>20</sup> E.D. Morel, *The Horror on the Rhine* (1921), at 5.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, at 13.

<sup>23</sup> *Ibid.*, at 10.

The ‘world-wide’<sup>24</sup> campaign produced pornographic imagery of black men lurking in the fields, hovering over a fainting or ravaged *fräulein* or, often, depicted as gorillas carrying her away. ‘The propaganda’, Sally Marks noted, ‘routinely portrayed 40,000 black savages roaming the Rhineland at will, raping the women, infecting the population, and polluting the blood.’<sup>25</sup> There were allegations of ‘ordinary’ atrocities but sexual violence took centre stage.<sup>26</sup> In 1920, Karl Goetz cast a bronze medal, bearing the inscriptions *Die schwarze Wacht am Rhein* and *Die schwarze Schande*. One face depicted a naked woman – the Rhenish *Lorelei* – hands tied behind her back to an erect, larger-than-life phallus crowned by a military helmet, the Eye of Providence watching her predicament. The other face presented a stereotypical depiction of a helmeted African – protruding lips, flat nose, etc. – next to the words ‘*Liberté, égalité, fraternité*’.<sup>27</sup> The *médailleur* gave visual expression to concerns voiced by Morel, who observed: in the state of affairs created by the French, ‘the sexual requirements of the ... African troops ... must be satisfied upon the bodies of white women’.<sup>28</sup>

The Rhineland occupation and the ensuing ‘horror’ debate were not obscure, momentary, or isolated.<sup>29</sup> The occupation, mandated by the armistice agreement, was later sanctioned by the Versailles Treaty. German allegations and public protests waxed and waned; the campaign was replicated in the French-held Saar basin and the Ruhr, invaded by France and Belgium in 1923. These sites gave rise to official protests and diplomatic correspondence, fuelled parliamentary debates, saw committees established and reports commissioned, inquiries launched and disciplinary proceedings instituted – not to mention meetings, rallies, resolutions, petitions,<sup>30</sup> newspaper caricatures, etc. A novel was published, translated, made into a movie, then a play.<sup>31</sup> French colonial soldiers came and went. The controversy echoed in League of Nations deliberations.<sup>32</sup> And historians have since thoroughly mined the episode, producing a rich corpus of data on dates and numbers, places and motives, grievances and responses, official records and popular culture, movements and agents etc.<sup>33</sup>

I will not reproduce here this data – or its many ironies<sup>34</sup> – except as pertinent to my argument. Some characteristics of the debate, however, are noteworthy. Allegations of rape and attributions of uncontrollable sexual impulse or depravity dominated the discourse. Health concerns – venereal disease taking pride of

<sup>24</sup> Marks, *supra* note 16, at 297.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, at 302 (most ‘propaganda centred on rape’).

<sup>27</sup> ‘The Black Watch on the Rhine’/‘The Black Shame’, available at [www.karlgoetz.com/galleries/WWI/pages/K-262.html](http://www.karlgoetz.com/galleries/WWI/pages/K-262.html).

<sup>28</sup> Morel, *supra* note 20, at 10 (emphasis in original).

<sup>29</sup> African contingents’ deployment was brief: Marks, *supra* note 16, at 298.

<sup>30</sup> A. Schüler, ‘The “Horror on the Rhine”: Rape, Racism, and the International Women’s Movement’, (1996) *John F. Kennedy-Institut für Nordamerikastudien Working Paper* 86, at 3.

<sup>31</sup> Marks, *supra* note 16, at 315–16.

<sup>32</sup> E.g., (1922) 3 LNOJ 44, at 1131.

<sup>33</sup> C. Koller, ‘The Recruitment of Colonial Troops in Africa and Asia and their Deployment in Europe during the First World War’, (2008) 26 *Immigrants and Minorities* 111.

<sup>34</sup> E.g., the construction of ‘black’: Marks, *supra* note 16, at 298 (few ‘actually black’); ‘An Indescretion’, *New York Times*, 19 June 1922 (most ‘Arabs, of oval face, aquiline nose and thin lips’); Wallace to Secretary of State, 25 June 1920, FRUS 1920 (1936), Vol. II, at 329.

place – were the subject of equally preposterous protest.<sup>35</sup> Public order and racial purity also played a role. Yet most often, the disapproval was framed in humanitarian terms. Specifically, the French policy – stationing troops of non-white races on European soil, to watch over white population – was portrayed as contrary to the principles of humanity, an offence against European morality and civilization.

Thus, Morel framed his objections as humanitarian concerns for ‘the African’, the ultimate victim of ‘French militarism’.<sup>36</sup> Versailles enabled this ‘outrage upon Europe as a whole’ – ‘a betrayal so stupendous and so overwhelming’ that ‘last faith in humanity [now] wither’.<sup>37</sup> The British government, he accused, was a party to a ‘breach of . . . international morality’. He appealed to ‘humanitarians . . . who have for years laboured for justice to the African’,<sup>38</sup> denouncing their enslavement to the cause of European empires: ‘Are the races of Africa to be militarily enslaved’, he asked, ‘and, as an eventual result, is war to rage all over Africa in order that the ambitions of European Imperialism . . . may be fulfilled?’<sup>39</sup>

Such humanitarianism was predicated on racial notions. He denounced the ‘occupation of German territory in time of peace by African troops, conscripted by their white masters . . . for the purpose of killing white men in Europe’. He warned against ‘inevitable local effects’ and ‘political consequences both in Europe and in Africa’ that would follow the very presence, in Germany, ‘of these African troops – many of them conscripted among races in a primitive stage of civilization’.<sup>40</sup> The consequence of the ‘sexual requirements’ of ‘African troops which French militarism has thrust upon the Rhineland’, he observed, already sow ‘the seeds of racial hatred and racial prejudice’ and ‘after-effects . . . in European-administered Africa.’ The alleged French practice of forcing German women to service black soldiers in brothels, he argued, was bound to lead to inter-racial ‘promiscuity’ in Africa. That, too, would ultimately disadvantage the native: ‘habitual sexual connection between African troops and European professional women in Europe’ compounded ‘the complexities of European administration in Africa in a hundred subtle ways.’<sup>41</sup>

The pamphlet’s cover reproduced a 1920 Reichstag speech by ‘Frau Rohl’ – a ‘socialist member’ – appealing to ‘women of the world’ to protest the ‘utterly unnatural occupation by coloured troops of German districts’. It reported a protest by Prince Max von Baden addressing ‘the whole civilised world . . . all right-thinking and chivalrous men and women, to use every effort in order that an end may be put to the occupation of a European country by coloured troops and the unavoidable consequences’. The preface quoted a Swedish officer, ‘well known in Stockholm’: the ‘[C]onscience of the whole civilised world has been outraged . . .’.<sup>42</sup>

<sup>35</sup> Marks, *supra* note 16, at 301, 316.

<sup>36</sup> Morel, *supra* note 20, at 8, 11.

<sup>37</sup> *Ibid.*, at 21, 6.

<sup>38</sup> *Ibid.*, at 6, 21.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, at 5.

<sup>41</sup> *Ibid.*, at 10.

<sup>42</sup> *Ibid.*, at 4.



These and other protests against the French ‘pernicious policy’<sup>43</sup> may be seen as implicit claims that the laws of war, governing how humane and civilized war should be fought, were contravened. The German Foreign Minister announced in the Reichstag that ‘the introduction of ... coloured troops in the centre of white Europe’ was ‘a crime against the whole of Europe’. Chancellor Ebert denounced their use as ‘injury to the laws of European civilization’.<sup>44</sup>

### 3. ANTEBELLUM AMBIVALENCE

Framing such grievances in terms resonating with legal notions of what was humane in civilized war was perfectly natural. If anything, it is surprising that no explicit recourse was made to law that was largely on the side of those aggrieved. International law literature up to the Great War regularly addressed the legality of using colonial troops in ‘European wars’.<sup>45</sup> The first edition of Oppenheim’s *International Law* (vol.ii: ‘War and Neutrality’), contained a section on ‘Barbarous Forces’:

§ 82. As International Law grew up amongst the States of Christendom, and as the circle of the members of the Family of Nations includes only civilised, although not necessarily Christian, States, all writers on International Law agree that in wars between themselves the members of the Family of Nations should not make use of barbarous forces—that is, troops consisting of individuals belonging to savage tribes and barbarous races. But it can hardly be maintained that a rule of this kind has grown up in practice, nor has it been stipulated by treaties, the Hague Regulations overlooking this point. This being the fact, it is difficult to say whether the members of such barbarous forces, if employed in a war between members of the Family of Nations, would enjoy the privileges due to members of armed forces generally. I see no reason why they should not, provided such barbarous forces would or could comply with the laws and usages of war prevalent according to International Law. But the very fact that they are barbarians makes it probable that they could or would not do so, and then it would be unreasonable to grant them the privileges generally due to members of armed forces, and it would be necessary to treat them according to discretion. But it must be specially observed that the employment of barbarous forces must not be confounded with the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers. There is no reason whatever why, for instance, the members of a regiment eventually formed by the United States of America out of negroes bred and educated in America, or why members of Indian regiments under English commanders, if employed in wars between members of the Family of Nations, should not enjoy the privileges due to the members of armed forces according to International Law.<sup>46</sup>

<sup>43</sup> *Ibid.*, at 2.

<sup>44</sup> Marks, *supra* note 16, at 311.

<sup>45</sup> Constructing war as ‘European’ was foundational for modernizing laws of war in the nineteenth century: F. Lieber, *Twenty-Seven Definitions and Elementary Positions Concerning the Law and Usages of War* (1861), Box 2, Folder 15, manuscript in M.S. Eisenhower Library, Johns Hopkins University, Baltimore, MD; War Department, *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100*, 24 April 1863 (hereafter ‘Lieber Code’).

<sup>46</sup> L. Oppenheim, *International Law* (1906), Vol. II, at 91–2. The second edition was shorter: Oppenheim, *International Law* (1912), Vol. II, at 98.



No footnote accompanied the text, yet Oppenheim's treatment disclosed ambivalence. It oscillated between scholarly consensus and the juxtaposition of the 'employment of barbarous forces' to 'the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers', 'bred and educated' in a civilized country or, at any rate, under white command.<sup>47</sup> Underlying ambivalence was anxiety: could they be disciplined and controlled? Could they be civilized? Such questions 'formed the crux' of the international law debate.<sup>48</sup> Anxiety was equally manifest in how Oppenheim's discussion shifted from *legality* of employment to speculations on the *status* and privileges attending such irregular combatants. Could they fit extant categories?

Other *antebellum* scholarship displayed similar ambivalence. Bordwell cited the opinion of 'Rolin-Jaequemyns, the most impartial commentator . . . [who] condemns in severe terms' the use of colonial troops in European wars. He also noted how Calvo was 'inclined to be favorable to the French', for it was doubtful they would allow 'any of the improper practices to which the Africans were accustomed in their own warfare' once 'commanded by French officers and subject to the same discipline as the rest of the army'.<sup>49</sup> Bordwell's own take on the 'Employment of savage troops' emphasized propriety, not strict legality: 'it has been recognized as improper to employ troops whose accustomed manner of warfare gives evidence that they will not live up to the standards of civilized life'.<sup>50</sup> But he also described a long-standing denunciation by 'publicists and statesmen' of employing 'peoples of a lower civilization whose manner of life makes it improbable that they will follow the rules of civilized warfare . . .'.<sup>51</sup> If of 'lower civilisation', marked by uncivilized 'manner of warfare', what evidence could overcome probability?

Spaight's 1911 *War Rights on Land*, written in Pretoria, also pondered propriety and control. His basic position on 'the employment of troops of a non-European race, or at least of a race of inferior civilisation to the belligerents, in a civilised war' seemed negative: 'To employ savage troops is clearly improper, for they are of their nature predisposed to fail in the fourth condition of Article I of the *Règlement*, and officers cannot be ubiquitous'.<sup>52</sup> Though willing to trust the civilizing effect of white command and discipline, Spaight remained sceptical:

Today . . . however, the Colonial indigenous troops of the European Powers are, for the most part, as highly disciplined and trained as any troops can be. Against such troops there is no law. The black man who has been "drilled white" is under no disability as a fighter in the eyes of International Law. There is nothing, save perhaps policy, to forbid Great Britain employing her Sikh or Gourkha regiments, or France employing her Algerian troops, against another European Power. Individual cases of irregular conduct are alleged against even highly disciplined white troops in every war . . . But even where

<sup>47</sup> War Office, *Manual of Military Law* (1914), at 242.

<sup>48</sup> D. van Galen Last, *Black Shame: African Soldiers in Africa 1914-1922* (2015), at 10.

<sup>49</sup> P. Bordwell, *The Law of War between Belligerents: A History and Commentary* (1908), at 90.

<sup>50</sup> *Ibid.*, at 232.

<sup>51</sup> *Ibid.*, at 51.

<sup>52</sup> J.M. Spaight, *War Rights on Land* (1911), at 65-6.

the conduct of troops of an inferior race is unimpeachable, their employment may be a mistake as a matter of policy.<sup>53</sup>

His misgivings persisted in the extensive survey of past incidents: on policy, he considered the ‘Mistake of employing black troops in Secession War’, implying that Confederacy soldiers – ‘civilised troops in a civilised land’ – were provoked into slaughtering black Union soldiers ‘because they were niggers’, the whites ‘because they were fighting with niggers’.<sup>54</sup>

German scholars displayed similar ambivalence. In an 1860 textbook, von Mohl – ‘Professor of State and Administrative Law from Tübingen (later Heidelberg)’<sup>55</sup> – enumerated among the ‘Methods of Warfare which Violate International Law’ the use of ‘barbaric warring people’ in ‘European wars and on European soil’. Acknowledging the scourge of European warfare, he argued there was no need to increase it:

It is in the nature of things, that such uncivilized troops ... their treatment of wounded and prisoners is horrible and you cannot expect them to refrain because of strict regulations ... such barbarians are a plague for the population of the countries, almost equally for friends and enemies. You cannot prevent killings, desecrations and plundering of the population ...

If even the troops of civilized nations spread scourge around the country, it is disgraceful to the sophistication of a European state to, through the use of savages, make misery reach an unbearable level.<sup>56</sup>

Mohl’s ambivalence was rooted in contrasting the ‘nature’ of savage warfare with evident savagery of European warfare. He nonetheless acknowledged the advantage of using uncivilized troops in their own lands.<sup>57</sup> He recommended the question to an international congress.

Some ambivalence remained in the work of later German scholars inclined towards prohibition – likely influenced by the Franco-Prussian War, where Bismarck absolved colonial troops of fault *and* agency when blaming French commanders for their cruelty and ‘gender bestiality’<sup>58</sup> – such as Heffter,<sup>59</sup> Lueder,<sup>60</sup> and (Austrian) Resch.<sup>61</sup>

German writers inclined to permit such employment entertained similar doubts. The first edition of von Liszt’s *Das Völkerrecht* (1898) – ‘the period’s most widely used German international law textbook’,<sup>62</sup> and referencing no scholarship or

<sup>53</sup> Ibid., at 66.

<sup>54</sup> Ibid., at 67.

<sup>55</sup> Koskenniemi, *supra* note 5, at 32.

<sup>56</sup> R. von Mohl, *Staatsrecht, Völkerrecht, und Politik* (1860), Vol. I, at 771.

<sup>57</sup> Ibid., at 770.

<sup>58</sup> *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungsausschusses der Verfassunggebenden Deutschen Nationalversammlung und des Deutschen Reichstages 1919-1928* (1927), at 98.

<sup>59</sup> A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1881), at 263.

<sup>60</sup> K.C.J. Lueder, ‘Das Landkriegsrecht im Besonderen’, in F. von Holtzendorff, *Handbuch des Völkerrechts, auf Grundlage europäischer Staatspraxis* (1889), at 394–8.

<sup>61</sup> P. Resch, *Das europäische Völkerrecht der Gegenwart: Für Studierende und Gebildete aller Stände* (1885), at 220.

<sup>62</sup> Koskenniemi, *supra* note 5, at 225.

practice – admitted the legality of employing troops ‘foreign to European civilization’; but insisted they be placed under civilized command.<sup>63</sup>

*Antebellum* Francophone scholars – generally predisposed to allow the use of colonial troops – were not immune to ambivalence. Le Fur, in an early *Revue* contribution on the Spanish-American War, first intimated the practice was ‘universally proscribed’, but conceded that ‘no agreement was yet established’. Though ‘generally rejected by the authors’, such method of war could be justified if one focused on the rules’ ‘spirit . . . not the letter’; if ‘indigenous troops’, that is, were ‘commanded by European officers’ and ‘respecting the laws of war’.<sup>64</sup> Still, he was concerned with US provision of arms to uncivilized insurgents.<sup>65</sup>

In 1907, the year of the second Hague Conference, Mérignhac published a critique of the positions presented by German General Staff at the 1899 Conference. He agreed with German criticism of ‘the employment of troops ignorant of the laws of civilized warfare, [who] therefore will commit all kinds of atrocities and inhumanities’. Mérignhac insisted, however, that this applied only to ‘savage auxiliaries’ ‘who did not even know about the Geneva Convention’, such as the Sublime Porte’s ‘Bashi-bazouks’ or Transvaal ‘Kaffirs, employed against the Boers by the English’.<sup>66</sup> By contrast, ‘indigenous troops from Algeria’ employed by the French in 1870–1871 were ‘regimented, registered, commanded by French officers’. Their only fault was fighting ‘une furia déconcertante pour le flegme teutonique’.<sup>67</sup>

Ambivalence persisted right until the outbreak of hostilities. In 1914, Fauchille’s seventh edition of Henri Bonfils’ *Manuel* – ‘perhaps the most widely used French textbook’<sup>68</sup> – noted that ‘nations of different civilisations cannot observe the same international law in wartime’.<sup>69</sup> Professing that ‘International Law prohibits civilized nations to enlist into their army savages’ to whom ‘the laws of war are unknown’, the author, however, implied that practice in Europe cast doubt on the rule’s ‘frequent application’ and utility.<sup>70</sup>

Such ambivalence was chronic and – if the word is apt – universal.<sup>71</sup> Whatever the position taken or the nuance employed, questions about ‘savage’ troops remained unanswered: could they be civilized enough to fight a civilized war? Were they humane enough to display humanity in battle? Could their manner of warfare – reflecting their customs, culture, and race – be undone by command, overcome by training? Could white control be maintained? These very doubts haunted members of the *Institut de Droit international* when called to discuss, on 11 September 1877, an appeal to the belligerents in the Russo-Turkish War. Rolin-Jaequemyns, the Secretary-General, saw need to discuss the ‘responsibility of the belligerents due to the use

<sup>63</sup> F. von Liszt, *Das Völkerrecht, systematisch dargestellt* (1898), at 222; in the same vein J.K. Bluntschli, *Das moderne Kriege recht der civilisirten Staaten* (1868), at 312.

<sup>64</sup> L. Le Fur, in ‘*Chronique des Faits Internationaux*’, (1898) RDI 749, at 753.

<sup>65</sup> *Ibid.*, at 754.

<sup>66</sup> A. Mérignhac, ‘*Sur Les Lois De La Guerre Continentale*’, (1907) RGDIP 197, at 210.

<sup>67</sup> *Ibid.*

<sup>68</sup> Koskenniemi, *supra* note 5, at 280.

<sup>69</sup> H. Bonfils, *Manuel de droit international public* (1914), at 722.

<sup>70</sup> *Ibid.*, at 764.

<sup>71</sup> A rare ambivalence-free position: P. Fiore, *Il Diritto Internazionale Codificato* (1898), at 436.

by them of savage hordes, unsuitable to comply' with the laws of war.<sup>72</sup> Den Beer Portugael – irked by the 'incontestable' brutality of '*les Bachi-Bouzouks, les Tscherkesses, les Cosaques nomades, les tribus asiatiques*' used by the Ottomans – preferred to ban the use of 'barbarian hordes' in 'wars between civilized peoples'. If not feasible, officers commanding 'wild creatures' should at least be trained in the laws of war – and take appropriate oaths.<sup>73</sup>

The ensuing debate's details were not reported, but the '*Observations et vœux*', drafted by Rolin-Jaequemyns and Moynier, the Red Cross President, were unanimously approved. The resolution noted, nonetheless, that there existed '*une question de responsabilité qui peut résulter soit de la négligence dans l'instruction des troupes, soit de l'emploi de hordes sauvages, non susceptibles de faire une guerre régulière*'. It implied that such troops might well be '*absolument incapables*' of fighting humanely, but detailed procedures and conditions for officers to follow. A government using such soldiers, if indeed incapable of fighting humanely, '*comme l'enseigne depuis longtemps l'unanimité des auteurs*,' commits '*une infraction grave aux lois de la guerre*'.<sup>74</sup> But it did not quite answer the question.

If *les auteurs* had shown any *unanimité*, it touched less the rule and more lingering anxieties. Still, the employment of colonial troops in the Rhine *did* raise a question of French compliance with the laws of war. There *was* room for debate whether French policy contravened 'usages established between civilized nations', 'laws of humanity', and 'requirements of the public conscience' alluded to in the Martens clause.<sup>75</sup>

#### 4. AMNESIA

Although ubiquitous – and raising the question of legality – the Rhine debate escaped the memory of international lawyers. While the Rhine occupation is referenced in today's literature<sup>76</sup> as the epitome of the 'armistice occupation' scenario, that literature contains not the slightest hint of the horror tale. The only mention of that tale in international law literature<sup>77</sup> seems to be a single paragraph in Schroer's 2013 reconstruction of the 1929 codification of racial segregation of prisoners of war.<sup>78</sup>

<sup>72</sup> *Annuaire de l'Institut de Droit international* (1878 (ii)), at 139.

<sup>73</sup> *Ibid.*, at 139–40.

<sup>74</sup> *Ibid.*, at 154–9.

<sup>75</sup> R. Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause', (2014) 25 *EJIL* 847.

<sup>76</sup> Mentioning Rhine occupation, not 'horror': G. vohn Glahn, *The Occupation of Enemy Territory* (1957), at 267–8; E. Benvenisti, *The International Law of the Occupation* (2012), at 122 et seq.; Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 36. Similarly, *Max Planck Encyclopedia of Public International Law* (2016), available at [opil.louplaw.com/home/EPIL](http://opil.louplaw.com/home/EPIL); E. Benvenisti, 'Occupation, Pacific'; Y. Dinstein, 'Armistice'. The Rhine occupation merited no separate entry, though J. Schwietzke, 'Saar Territory', *ibid.*, *did*; none references race, rape, etc.

<sup>77</sup> I cannot categorically establish that legal literature, in any language, since 1918, makes no single reference to the 'horror'; if any, such references are extremely rare: E. Fraenkel, *Military Government and the Rule of Law: Occupation Government in the Rhineland 1918–1923* (1944), at 159 et seq. (mentions '*Schwarze Schmach*' *apropos* jurisdiction of Rhine military tribunals; understates racial prejudice, allegations of sexual offenses; legality is not discussed).

<sup>78</sup> T.L. Schroer, 'The Emergence and Early Demise of Codified Racial Segregation of Prisoners of War under the Geneva Conventions of 1929 and 1949', (2013) 15 *JHIL* 53, at 62.

Other reasons should have entailed continuing familiarity with the scandal. Race had played a distinct role in wartime debates among belligerents about the laws of war. German detention of white and black captured soldiers together led to British protests, inviting Germany to imagine the fate awaiting captured German soldiers if ‘interned amongst large numbers of prisoners of alien race, say, for instance, with Ottoman troops’<sup>79</sup> – their own allies. The Germans relented.

In 1915 Germany’s Foreign Office published a two-page ‘Memorial’ (with 30 pages of appendices and testimonials) protesting the ‘Employment . . . of Colored Troops upon the European Arena of War by England and France’ ‘contrary to International Law’.<sup>80</sup> This was accompanied by ‘a variety’<sup>81</sup> of German pamphlets arguing that both scholarship and treaties prohibited the use of ‘yellow, brown and black fellows from remote parts of the world’.<sup>82</sup> The Memorial thus began:

In the present war England and France have not relied solely upon the strength of their own people, but are employing large numbers of colored troops from Africa and Asia in the European arena of war against Germany’s popular army. Gurkhas, Sikhs and Panthans, Sepoys, Turcos, Goums, Moroccans, and Senegalese fill the English and French lines from the North Sea to the Swiss frontier. These people, who grew up in countries where war is still conducted in its most savage forms, have brought to Europe the customs of their countries; and under the eyes of the highest commanders of England and France they have committed atrocities which set at defiance not only the recognized usages of warfare, but of all civilization and humanity.<sup>83</sup>

Legal arguments were presented, first moderately. They acknowledged that ‘[t]he laws of nations do not, indeed, expressly prohibit the employment of colored tribes in wars between civilized nations’,<sup>84</sup> but submitted that ‘[t]he presupposition for such employment, however, is that the colored troops . . . be kept under a discipline which *excludes* the possibility of the *violation of the customs of warfare among civilized peoples*’. England and France had failed to meet this requirement.<sup>85</sup> Next, however, came an appeal to greater normative force, political prevalence, historical pedigree, and the spirit animating the 1899 Hague Convention’s preamble:

the *German Government* sees itself compelled in the present war to enter a *most solemn protest* against England and France bringing into the field against Germany troops whose savagery and cruelty are a disgrace to the methods of warfare of the twentieth century. The Government bases its protest upon the spirit of the international agreements of the past few decades, which expressly make it a duty of civilized peoples ‘to lessen

<sup>79</sup> Ibid., at 59.

<sup>80</sup> Foreign Office, *Employment, Contrary to International Law, of Colored Troops upon the European Arena of War by England and France* (1915).

<sup>81</sup> J. Riesz, *Afrikanische Kriegsgefangene in deutschen Lagern während des Ersten Weltkriegs*, in M. Hofmann and R. Morrien (eds.), *Deutsch-afrikanische Diskurse in Geschichte und Gegenwart: Literatur- und kulturwissenschaftliche Perspektiven* (2012), at 74.

<sup>82</sup> H. Belius, *Die farbigen Hilfsvölker der Engländer und Franzosen* (1915).

<sup>83</sup> Foreign Office, *Employment*, *supra* note 80, at 1, signifying encounters between black man and white women: ‘the French military authorities . . . set these savages to guard *innocent women* . . . *expose* them to their *animal passions*’; *ibid.*, at 2 (emphases in original).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid. (emphasis in original).

the inherent evils of warfare,' and 'to serve the interests of humanity and the ever-progressing demands of civilization.'<sup>86</sup>

The Memorial concluded not with a call for the imposition of greater discipline but with a demand ('*most emphatically*') that '*colored troops be no longer used upon the European arena of war.*' Whatever the propaganda purpose of such appeals, they did reflect the prewar normative landscape.

Another reason to expect present-day familiarity with the 'horror on the Rhine' concerns its consequences. It left lasting, and patent, marks on Weimar society, politics, and interwar international relations. In *Mein Kampf*, published in 1925–1926, Hitler, for whom the Rhine had become '*the playground of black African hordes*', identified the culprits for Germany's racial humiliation and degradation: 'It was and is the Jews who bring the negro to the Rhine ... with ... the clear goal of destroying, by ... bastardization ... the white race which they hate.'<sup>87</sup> After the Nazis came to power, they subjected the progeny of mixed (often legal) unions of 'black' troops and white women to forced sterilization.<sup>88</sup> Official proposals to so treat 'Rhineland bastards' predated Nazi rule; they were rooted in *fin de siècle* German colonial 'science'.<sup>89</sup>

In various ways, the 'horror on the Rhine' had left its mark on international law itself. If 'intermixing prisoners of war of different nationalities and races' was followed by codification of racial segregation in the 1929 Geneva Prisoners of War Convention,<sup>90</sup> the Rhine employment of colonial troops produced another type of *postbellum* codification and a reworking of international law's theoretical postulates.

## 5. POSTBELLUM SILENCE

Can embarrassment explain why today's international lawyers are ignorant of the Rhine horror despite its prior legal salience, ubiquity, and consequence? The racialized past of international law is an awkward matter.<sup>91</sup> The skeleton of race is kept in the closet to demonstrate that international (humanitarian) law – following the Holocaust, or decolonization – has purged itself of such detestable notions to become truly universal and egalitarian; progressive histories do require amnesia.<sup>92</sup> Though persuasive, this explanation is nonetheless unsatisfactory. Amnesia could be achieved only by the silence of postwar lawyers: through that silence, the Rhine horror never entered the corpus of international law literature.

<sup>86</sup> Ibid. (emphasis in original).

<sup>87</sup> A. Hitler, *Mein Kampf* (1941), at 448–9, 917. C. Lusane, *Hitler's Black Victims* (2002), at 79–83; G. Mosse, *Towards the Final Solution: A History of European Racism* (1978), at 176: ('against blacks, not Jews ... ominous accusation of "Kulturschande" (rape of culture) was first raised').

<sup>88</sup> R. Pommerin, *Sterilisierung der Rheinlandbastarde: das Schicksal einer farbigen deutschen Minderheit* (1979); R. Pommerin, 'The Fate of Mixed Blood Children in Germany', (1982) 5 *German Studies Review* 315.

<sup>89</sup> M. Burleigh and W. Wippermann, *The Racial State: Germany 1933-1945* (1991), at 129; F.W. Carr, *Germany's Black Holocaust, 1890-1945* (2003); S. Kühl, *For the Betterment of the Race: The Rise and Fall of the International Movement for Eugenics and Racial Hygiene* (2013).

<sup>90</sup> Schroer, *supra* note 78, at 58.

<sup>91</sup> Anghie, *supra* note 3, at 65–6.

<sup>92</sup> Giladi, *supra* note 1.



Interwar international lawyers never responded to the Rhine scandal or to implied claims that the laws of war had been violated. No international law essay or textbook alluded to the ‘horror’ or weighed on the legality of the French employment of colonial soldiers in the Rhine. Again, consider Oppenheim. The ‘War’ volume of the third edition appeared in 1921. Section 82 was expanded to incorporate ‘new’ practice: the US ‘employed two coloured cavalry regiments in Cuba during her war with Spain’. Even the First World War merited a mention: ‘some Indian regiments were employed by Great Britain in France’.<sup>93</sup> The Rhine occupation – or horror – received no mention.

Oppenheim died in October 1919 – almost a year after the armistice. While the Rhine propaganda campaign had yet to reach its height, German protests and allegations had already been registered in late 1918.<sup>94</sup> The succeeding editor, Roxburgh, noted that Oppenheim ‘intended . . . to introduce the events of the war when they illustrated, extended, or challenged general principles hitherto accepted’; and that ‘for the history of the war’ Oppenheim relied on Garner’s book ‘which he had already read in manuscript’. Roxburgh also made ‘frequent references’ to Garner.<sup>95</sup>

In Germany, the source of the ‘horror’ campaign, silence also reigned.<sup>96</sup> Von Fleischmann – in the 1925 edition – admitted it was ‘hard to decide’ whether von Liszt’s text still held.<sup>97</sup> Notwithstanding jabs at the French, he did not mention the Rhine ‘horror’; nor did, apparently, the rich German literature on Versailles and the occupation.

French authors likewise avoided the issue. Pillet did publish ‘a few articles attacking the timidity of the peace and the weakness of the League’ – including 1920 lectures suggesting Versailles went too soft on Germany.<sup>98</sup> He did not comment on the ‘horror’ of the Rhine occupation. Le Fur – who had addressed the legal question in 1898 – published in 1922 ‘*Races, nationalités, états*’. Denouncing the ‘untenable’ German doctrine defending the nation as the subject of international law, he observed that this ‘race theory hardly met so far many supporters outside of Germany, where it is the basis for the pan-German doctrine of *Vollkulturstaat* of the German state superior to all others’.<sup>99</sup> Notwithstanding his anxiety with emergent scientific application of such notions – and his familiarity with doctrine – Le Fur did not enter the Rhine debate.

One French work that promised an exception was a two-volume 1921 book co-authored by Mérignhac. It sought to establish – for public consumption rather than ‘the erudite’ – the ‘criminal conduct’ and the ‘horror of the . . . hypocritical outrage’ Germany committed ‘upon the civilized world’. The authors produced a ‘highly polemic réquisitoire’ characterized by ‘violence of . . . language’ and ‘indiscriminate

<sup>93</sup> L. Oppenheim, *International Law* (1921), Vol. II, at 108–9.

<sup>94</sup> Collar, *supra* note 15, at 82; Schüler, *supra* note 30, at 2.

<sup>95</sup> Oppenheim, *supra* note 93, at v; at vi–vii (Oppenheim revised many laws of war paragraphs). On Garner, *infra* note 107.

<sup>96</sup> H. Wehberg, *Le problème de la mise de la guerre hors la loi*, (1928) 24 RdC 151.

<sup>97</sup> F. von Liszt, *Das Völkerrecht Systematisch Dargestellt* (1925), at 476.

<sup>98</sup> Koskenniemi, *supra* note 5, at 292–3; A. Pillet, *Le traité de Versailles* (1920).

<sup>99</sup> L. Le Fur, *Races, Nationalités, États* (1922), at 61. Koskenniemi, *supra* note 5, at 321 et seq.



denunciation'.<sup>100</sup> A section on '*Les troupes exotiques*' reproduced familiar arguments about 'necessary conditions for the employment of exotic troops' ('regimented and controlled in a European way, and respect the principles of International Law'); reviled Bismarck's false 1871 accusations;<sup>101</sup> noted that 'Germany itself used exotic troops';<sup>102</sup> and denounced German 'abominable methods' and violations, directed 'mostly ... towards indigenous troops'.<sup>103</sup> All that demonstrated Germany's own savagery ('*on peut être plus sauvage*') 'despite the color of skin'. The recent war put an 'extraordinary spectacle of primitive races', recently civilized, 'crossing seas to defend the old European civilization against the new barbarians of the Western world ... well below their level'.<sup>104</sup> Even this work of international law pulp avoided the Rhine horror. It promised to examine German allegations with regard to the use of exotic troops – but only noted how Germany 'prosecuted' 'indigenous troops' with 'tenacious hatred'.<sup>105</sup>

The silence of international lawyers is resounding given that other scholars did address the question of race in the war.<sup>106</sup> Garner, whose manuscript Oppenheim had read in preparation of the 1921 edition, was an American political scientist with no legal training. That manuscript, published *before* Oppenheim's, comprised a comprehensive record of allegation and counter-allegation of wartime violations, under the title '*International Law and the World War*'. It almost certainly preceded the propaganda campaign. Still, unlike Oppenheim's or von Liszt's postwar editions, Garner did discuss *recent* record on the 'Employment of Uncivilized Troops', addressing the German 1915 protest. His analysis illustrated how salient the legal question was; it also explained the silence of treaty law. True, the rule prohibiting the use of 'savage troops' was not mentioned by the Hague Convention; there was no need to do so. It had for 'so long been a recognized rule of civilized warfare that it has never been deemed necessary to affirm it in express in the international conventions respecting the conduct of war'. Indeed, 'publicists and statesmen of all countries have condemned the use of troops of an inferior civilization, whose savage instincts and manner of life make it improbable that they will observe the rules of civilized warfare.'<sup>107</sup>

## 6. EXPLAINING SILENCE

How can the silence of postwar lawyers be explained? Here, the methodological constraints on any attempt to identify the causes of silence force

<sup>100</sup> J. W. Garner, (1922) 37 *Pol. Sci. Quarterly* 152.

<sup>101</sup> A. Mérignhac and E. Lémonon, *Le Droit des Gens et la Guerre de 1914-1918* (1921), Vol. I, at 136.

<sup>102</sup> *Ibid.*, at 139.

<sup>103</sup> *Ibid.*, at 138–9.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, at 136–8.

<sup>106</sup> E.g., Manifesto by German intellectuals: (1919) 210 *North American Review* 284, at 285 ('those who have allied themselves with Russians and Serbians ... inciting Mongolians and negroes against the white race, have no right whatever to call themselves upholders of civilization'); von Liszt was among the signers.

<sup>107</sup> J.W. Garner, *International Law and the Great War* (1920), at 293–7; B.T. Reynolds, 'A Review of the Occupation of the Rhineland', (1928) 7 *J. Royal Inst. Int'l Aff.* 153.

me to speculate; still, some evidence supports or militates against different hypotheses.

### 6.1. Race as embarrassment

To argue that postwar international lawyers became embarrassed over race makes little sense. They had no qualms with proposing the racial segregation of prisoners of war to the Grotius Society or, indeed, codifying segregation in the 1929 Prisoners of War Convention.<sup>108</sup> Racialized constructions of the law of war survived the First World War; if anything, race was now reasserted forcefully. Colby, challenging Wright's interpretation of the 'Bombardment of Damascus' in 1927,<sup>109</sup> made a point of asserting that '[t]he distinction' in 'the application of laws of war to people of a different civilization' 'is existent'.<sup>110</sup> Colby's 'How to Fight Savage Tribes' expressed orthodox doctrine. If – as Becker Lorca recently argued – the standard of civilization was on the decline, the laws of war, racially-constructed, proved immune.<sup>111</sup> The paragraph on 'Barbarous Forces' survived subsequent editions of Oppenheim by McNair, then Lauterpacht. None mentioned the Rhine horror. Only in 1944, in the (revised) sixth edition, did Lauterpacht start pondering the status of the rule: 'Writers used to discuss the question, which some tended to deny, whether it is permissible to employ troops consisting of individuals belonging to savage tribes and barbarous races. The question is now largely a theoretical one'. Ambivalence lingered: 'if it can be assumed that they would or could comply with the laws and usages of war . . .'<sup>112</sup> The paragraph concluded with the slightest hint of controversy: 'There has been no disposition to contest the legality of the employment of such forces in either of the two World Wars'.<sup>113</sup> The terminology, condition, and analysis perhaps indicated shifts in how race was read into law, but not that race had become irrelevant; Lauterpacht may have recorded late doctrinal shifts, but no embarrassment with race.

Significantly, both German protests and French practice were predicated on a racialized construction of humanity. Great Britain and France, clearly, had strategic interests in relying on highly trained colonial troops from the outset of the war. Practicalities of force deployment and demobilization were not the only considerations shaping French motives.<sup>114</sup> Yet sending colonial troops to the Rhine was preferred

<sup>108</sup> Schroer, *supra* note 78.

<sup>109</sup> Q. Wright, 'The Bombardment of Damascus', (1926) 20 AJIL 263. Ironically, 'black' units withdrawn from the Rhine were sent to Syria: Marks, *supra* note 16, at 299, 326; Nelson, *supra* note 15, at 616.

<sup>110</sup> E. Colby, 'How to Fight Savage Tribes', (1927) 21 AJIL 279. Colby's scholarship was not marginal, as implied by A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015), at 289 et seq.; see Colby's 'An Obsolete Law of War', (1923–1924) 8 *Minn. L. Rev.* 317; 'Aerial Law and War Targets', (1925) 19 AJIL 702; 'Occupation under the Laws of War', (1925) 25 *Colum. L. Rev.* 904; (1926) 26 *Colum. L. Rev.* 146 (pt.ii); 'The Occupation of Michigan an Incident in the History of Military Government', (1924) 22 *Mich. L. Rev.* 509; etc.

<sup>111</sup> Wright, *supra* note 109, at 267 actually acknowledged the orthodoxy: 'true, modern international law does not approve the use of "savage tribes or barbarous races" in civilized warfare . . . on the theory that such troops will not observe the law of war themselves'.

<sup>112</sup> L. Oppenheim, *International Law* (1944), Vol. II, at 206.

<sup>113</sup> *Ibid.*, at 207. The seventh edition essentially identical; *International Law* (1952), Vol. II, at 261.

<sup>114</sup> Marks, *supra* note 16, at 297 (no sinister French motives, but 'hard pressed' after demobilization, force reductions); Lusane, *supra* note 87, at 77 and Collar, *supra* note 15, at 80–1, offer nuanced assessments.

over stationing them in France;<sup>115</sup> though pure vindictiveness or calculated humiliation were not likely present, parts of the French decision-making apparatus were not averse to signifying French victory or showing off empire to Germans who had lost theirs.<sup>116</sup> Retorting to German allegations, France hoisted the racial equality flag of the '*patrie indivisible*'.<sup>117</sup> Yet notions of negritude and the *mission civilatrice* undergirded the very multiracial composition of French forces *and* their European deployment.

In 1910, a French Lieutenant-Colonel published a book advocating the use of *La Force noire* not only in the empire but – given dwindling birth-rates and demographic inferiority to Germany – also in defence of *la Patrie*.<sup>118</sup> For Charles Mangin, the very savagery of African troops was an advantage. He praised 'those primitives whose young blood flows so ardently, as if avid to be shed';<sup>119</sup> '[l]a race nègre', he declared, 'survives climates and hardship that no European endures'.<sup>120</sup> The combination of overdeveloped physique and underdeveloped 'nervous system'<sup>121</sup> made the 'black soldier' ideal for modern war.<sup>122</sup> Their presence spelled 'an incomparable power of shock. Their arrival on the battlefield would have a considerable moral effect on the adversary'.<sup>123</sup>

At the same time, Mangin saw the use of black soldiers in European war 'as the pinnacle of France's civilizing mission'; he insisted they would be 'recruited only from peoples who had undergone a certain degree of assimilation'.<sup>124</sup> His ambivalence – the tension between the savagery of colonial troops and their exposure to civilization<sup>125</sup> – was the same displayed by legal scholars. After the armistice, General Mangin – now known as the 'father of the black forces' – was placed in command in the Rhine.<sup>126</sup> Military practice and legal doctrine, rather than rejecting the relevance of race, embraced its logical-yet-uncertain conclusion.<sup>127</sup>

## 6.2. Disenchantment

Postwar disenchantment with international law itself could explain the silence of international lawyers. International law was framed by belligerents on both sides as what the war was all about. It was used and abused as a propaganda tool. The result,

<sup>115</sup> Nelson, *supra* note 15, at 612.

<sup>116</sup> Lusane, *supra* note 87, at 77; Collar, *supra* note 15, at 80-1; Nelson, *supra* note 15, at 611-13.

<sup>117</sup> Marks, *supra* note 16, at 318.

<sup>118</sup> C. Mangin, *La Force noire* (1910), at 47; C. Mangin, 'L'Utilisation des Troupes Noires', (1911) 2 *Bulletins et Mémoires de la Société d'Anthropologie de Paris* 89; R. Ginio, 'French Officers, African Officers, and the Violent Image of African Colonial Soldiers', (2010) 36 *Historical Reflections* 59.

<sup>119</sup> Mangin, *La Force noire*, *supra* note 118, at 258.

<sup>120</sup> *Ibid.*, at 248.

<sup>121</sup> J. Lunn, "'Les race guerrières": Racial Preconceptions in the French Military about West African Soldiers during the First World War', (1999) 34 *Journal of Contemporary History* 517, at 521.

<sup>122</sup> Mangin, *La Force noire*, *supra* note 118, at 252; 81 ('the sound of weapons would cover, as always, the protests of the law'). C. Koller, 'Military Colonialism in France and in the British Empire', in D. Dendooven and P. Chielens (eds.), *World War One: Five Continents in Flanders* (2008), 11 at 17.

<sup>123</sup> Quoted in Lunn, *supra* note 121, at 521.

<sup>124</sup> Ginio, *supra* note 118, at 62.

<sup>125</sup> *Ibid.* Ironically, French population similarly accused colonial troops: Koller, *supra* note 122, at 13.

<sup>126</sup> Nelson, *supra* note 15, at 611.

<sup>127</sup> Ginio, *supra* note 118, at 67.

Isabel Hull suggests, was a postwar fatigue with international law, caused by the collective European wartime trauma, disillusionment with law's failure to stop the war, despair of its inability to mitigate it, revelations of its propaganda abuse – and wariness of endless partisan claims and counterclaims on what was, in fact, legal, humane and civilized. In 1923, James Brown Scott lamented 'these days when it is heresy to speak of The Hague'.<sup>128</sup> Could postwar lawyers have somehow known that the allegations concerning atrocities and travesties committed by France's colonial soldiers were propaganda fabrications and refused, conscientiously, to partake in the further abuse of their profession? Perhaps. Yet if Versailles was the 'perfect icon' of international law – or, for its detractors, of 'all that ailed international law'<sup>129</sup> – then attacks on Versailles were attacks on international law. The stakes make it unlikely.

Still, disenchantment alone is not enough to explain silence. Some were disillusioned enough with international law to drift towards other disciplinary engagements.<sup>130</sup> Those who stayed, however, did write – on law in the Great War, on Versailles, and the occupation – without alluding to the scandal. They continued addressing the employment of 'Barbarous Forces'; and debated and reshaped the laws of war, based on First World War experience, as part of a larger project of international law renewal.<sup>131</sup> If renewal required that international law be forgotten,<sup>132</sup> what about the Rhine scandal required silence, then amnesia?

### 6.3. Patriotism

Patriotism, too, furnishes no decisive answer. Siding with Germany – whose own atrocities the Allied Powers propagated so effectively<sup>133</sup> – may have been too much for British, French, or American lawyers troubled by news coming from Germany. The cost of neglecting to address one recent example may not have been seen as too great.<sup>134</sup> It could not have helped that the 'horror' campaign touched – as it was designed to – imperial and American racial sensitivities and the very atrocity of the European war itself. Still, other academics and intellectuals of various disciplines and nationalities did make their voices heard on the Rhine scandal. And *antebellum* doctrine, as noted, was ambiguous enough to allow 'patriotic' engagements with the legality question by lawyers on all sides. If anything, patriotism required taking a stand.

<sup>128</sup> J.B. Scott, 'Introductory Note', in O. Nippold, *The Development of International Law After the Great War* (1923), at v.

<sup>129</sup> I.V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 6. The German propaganda campaign aimed at undoing Versailles, challenging German 'war guilt' thesis; J.E. Barker, 'The Colored French Troops in Germany', (1921) *Current History* 594, at 599.

<sup>130</sup> Koskenniemi, *supra* note 5, at 236 et seq., 291 et seq.

<sup>131</sup> Hull, *supra* note 129, at 328–9.

<sup>132</sup> *Ibid.*, at 3.

<sup>133</sup> G.S. Messinger, *British Propaganda and the State in the First World War* (1992).

<sup>134</sup> Allied governments, officials displayed discomfiture with the Rhine presence of French colonial troops: Nelson, *supra* note 15, at 609–10, 614; R. C. Reinders, 'Racialism on the Left: E.D. Morel and the "Black Horror on the Rhine"', (1968) 13 *International Review of Social History* 1, at 23; P.G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (1996), at 112 (British warning against using 'nigger' armies).

#### 6.4. *Dramatis personae*

Another reason why international lawyers had never entered the fray may concern the identity of the defender of Rhine morality who authored the ‘Horror on the Rhine’ pamphlet. He had impeccable liberal credentials, unmistakable socialist leanings, proven humanitarian record, and an expertise in matters African. Years before, as a shipping clerk, Morel had noted that ships leaving for the Congo carried only guns, ammunition, explosives, and chains. This revelation led him to wage a campaign that would eventually end Leopold’s genocidal exploitation of the Congo. For that campaign, Adam Hochschild credited Morel with paternity of ‘the first great international human rights movement of the twentieth Century’.<sup>135</sup>

Yet, the ‘Horror on the Rhine’ pamphlet was not Morel’s only engagement with the affair; rather, he had ‘obsessively led’, until his 1924 death, ‘one of the most racist political campaigns to be launched in the first half of the twentieth century’.<sup>136</sup> This was ‘a global effort, using some of the most racist propaganda, tactics, and arguments possible . . . against the presence of black French troops’ in Germany.<sup>137</sup> Through the Union of Democratic Control (UDC) platform and the media apparatus of the British socialist and liberal Left, Morel produced other pieces titled ‘Black Scourge in Europe, Sexual Horror Let Loose by France on Rhine, Disappearance of Young German Girls’;<sup>138</sup> ‘The Prostitution of the Rhineland’;<sup>139</sup> ‘The Employment of Black Troops’;<sup>140</sup> etc.

Morel’s Congo campaign had exposed the complicity of many of that generation’s leading lawyers with Leopold’s project, through *naiveté*, ideological susceptibility, or greed. ‘During the peak years of the Congo controversy’, Martti Koskenniemi writes, ‘the international law community stayed silent’.<sup>141</sup> By 1918, that generation had died; a new generation of international lawyers may have been too timid to confront – or align with – Morel.

#### 6.5. *Masculinity in crisis*

Another explanation for the silence of *postbellum* lawyers is a crisis of masculinity. The ‘horror’ campaign concentrated, after all, on the violation of German women through a construction of the inhumanity of black masculinity. Morel’s protest described the ‘tremendous sexual instincts’ of Africans.<sup>142</sup> It was their ‘instinctive’, ‘spontaneous, fiercer’, and less controllable ‘sex-impulse’ – not hedged ‘by the complicated paraphernalia of convention and laws’<sup>143</sup> – that was let loose upon ‘*the bodies of white women*’.<sup>144</sup>

<sup>135</sup> A. Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1998), at 274.

<sup>136</sup> Lusane, *supra* note 87, at 71; Reinders, *supra* note 134, at 26–8 (Morel’s motives).

<sup>137</sup> Lusane, *supra* note 87, at 71.

<sup>138</sup> *Daily Herald*, 9 April 1920.

<sup>139</sup> *Foreign Affairs*, II, June 1921, 196.

<sup>140</sup> *The Nation*, 26 (27 March 1920), 893. Hochschild addressed none: Lusane, *supra* note 87, at 70 (‘profound irony’); P. Campbell, ‘“Black Horror on the Rhine”: Idealism, Pacifism, and Racism in Feminism and the Left in the Aftermath of the First World War’, (2014) 47 *Social History* 471, at 476.

<sup>141</sup> Koskenniemi, *supra* note 5, at 163.

<sup>142</sup> In Reinders, *supra* note 134, at 4.

<sup>143</sup> *Supra* note 23.

<sup>144</sup> *Supra* note 28.

Morel furnished evidence for both the terms and the profundity of the crisis. France, he wrote, was ‘thrusting her black savages ... into the heart of Germany’.<sup>145</sup> He described the ‘barely restrainable bestiality’ of Africans, observing they are ‘the most developed sexually’ race. [F]or well-known physiological reasons’, he lectured, ‘the raping of a white woman by a negro is nearly always accompanied by serious injury and not infrequently has fatal results ...’.<sup>146</sup> To socialists, he agitated that ‘the manhood of these races, not so advanced in the forms of civilisation as ourselves’, may eventually be directed ‘*against the workers*’ at home.<sup>147</sup> The threat was to ‘manhood’, and so was the real victim: ‘Boys, *these men raped your mothers and sisters!*’<sup>148</sup> A recurrent propaganda theme was the Rhenish ‘fettered husband’.<sup>149</sup>

Such anxieties were driven by fabrication and exaggeration; this only serves to fathom their depth and the ‘receptive cultural terrain’.<sup>150</sup> These masculine anxieties were exacerbated by facts emanating from the occupied Rhine. Colonial troops were, in fact, harshly disciplined; unlike their French comrades, they harboured no *revanchism* and were, reportedly, better behaved than whites, so much so that German mayors protested when they left their towns.<sup>151</sup> French authorities thoroughly investigated and severely punished any suspected misconduct.

Since ‘the propagandists deemed it inconceivable that any woman born into German Kultur would voluntarily associate with “black savages”, all liaisons between such troops and German women were automatically termed rape.’<sup>152</sup> Yet American and German investigators reported from the Rhine that the culprits of interracial promiscuity were not colonial troops: ‘German women were chasing the non-European soldiers, who often complained to their officers of being pestered’.<sup>153</sup> One cited a German journalist: ‘German women were largely responsible for the mingling of colored and white blood’.<sup>154</sup> ‘The attitude of certain classes of German women toward the colored troops’, observed a State Department report, ‘has been such as to incite trouble’.<sup>155</sup> German Courts tried ‘bad women’ for ‘inciting to debauchery’.<sup>156</sup>

Given such framing and evidence, several historians have interpreted the *Schwarze Schmach* as a register of an ‘acute crisis of masculinity’,<sup>157</sup> a repository of ‘male anxieties and male sexual phantasies’.<sup>158</sup> An entire generation of young

<sup>145</sup> In Reinders, *supra* note 134, at 1.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, at 2.

<sup>148</sup> Morel, *supra* note 20, at 22 (italics in original).

<sup>149</sup> Marks, *supra* note 16, at 313, 315.

<sup>150</sup> S. Maß, ‘Das Trauma des weißen Mannes: Afrikanische Keolonialsoldaten propagandistischen Texten, 1914–1923’, (2001) 12 *L’Homme: Zeitschrift für feministische Geschichtswissenschaft* 11, at 13–14.

<sup>151</sup> *Ibid.*, at 300.

<sup>152</sup> *Ibid.*, at 302.

<sup>153</sup> *Ibid.* (‘German women married Annamese, Algerians, Malagasies, and Senegalese’).

<sup>154</sup> Barker, *supra* note 129, at 596; Lusane, *supra* note 87, at 74–5. Ginio, *supra* note 118, at 68 (French counter-propaganda).

<sup>155</sup> State Department, *Colored Troops in the French Army* (1921), at 12.

<sup>156</sup> Marks, *supra* note 16, at 302; Wigger, *supra* note 15, at 39 (‘lecherous traitors of the white race’).

<sup>157</sup> J. Roos, ‘Women’s Rights, Nationalist Anxiety, and the “Moral” Agenda in the Early Weimar Republic: Revisiting the “Black Horror” Campaign against France’s African Occupation Troops’, (2009) 42 *Central European History* 473, at 475.

<sup>158</sup> Schüler, *supra* note 30, at 2.



European men had just been emasculated.<sup>159</sup> Germany had been made to surrender, forced to disarm, stripped of its colonial possession and imperial position, then occupied. German humiliation,<sup>160</sup> so great that some architects of the postwar settlement decried it,<sup>161</sup> was compounded by the 'loose' behaviour of German women towards African troops whose constructed sexuality revealed how severe was the threat to white patriarchy.<sup>162</sup> In the Rhine campaign, the former became the symbols of German (white, male) victimhood;<sup>163</sup> the latter, the symbolic instruments of what Jan Smuts saw as a 'crusade of suicide' by European civilization.<sup>164</sup> Both groups suddenly proved not amenable to control.<sup>165</sup>

Such anxieties were not new. They were rooted in German colonial experience. The register of German anxiety with regard to racial mixture led one historian to comment on 'the seeming inability of Germans to stop copulating with African men and women'.<sup>166</sup> Neither were they limited to Germany. The campaign addressed European and global apprehensions: Morel, for one, had warned against conscripting black soldiers for the purpose of 'killing white men in Europe'.<sup>167</sup> '[W]hite domination' was threatened.<sup>168</sup>

The crisis touched the exposed nerve of the lawyers' prewar jurisprudential ambivalence on 'Barbarous Forces' in a European war – anxieties with the (in)humanity of colonial troops, their susceptibility to the effects of the civilizing mission, and the ability of white officers to control them. For the lawyers, evidently, at stake was far more than the violation of one rule, more or less accepted by prewar scholars, of the laws of war. In one sense, France introducing colonial troops to the theatres of European war and European peace represented no less than the strict application of the standard of civilization in warfare, the fulfilment of promise to civilize and humanize savage troops 'drilled white'.<sup>169</sup> At the same time, that very policy threatened to undo the entire legal and political order on which these notions were predicated. *First*, that policy undermined the very foundations of the modern

<sup>159</sup> Maß, *supra* note 150, at 15.

<sup>160</sup> Roos, *supra* note 157, at 475.

<sup>161</sup> A. Lentin, *General Smuts: South Africa* (2010).

<sup>162</sup> E. Kuhlman, *Reconstructing Patriarchy after the Great War: Women, Gender, and Postwar Reconciliation between Nations* (2008); Maß, *supra* note 150, at 15 ('Black Shame' as 'male traumata' of war and 'white man'); E. Kuhlman, 'American Doughboys and German *Fräuleins*: Sexuality, Patriarchy, and Privilege in the American-Occupied Rhineland, 1918–23', (2007) 71 *Journal of Military History* 1077, at 1093 ('race shame that threatens our destruction'); B. Bush, "'Britain's Conscience on Africa": White Women, Race and Imperial Politics in Interwar Britain', in C. Midgley (ed.), *Gender and Imperialism* (1998), 215.

<sup>163</sup> Wigger, *supra* note 15, at 38–9 (women's 'honour' equated with that 'of the nation', 'their ravaging symbolized German defeat and humiliation', 'allegory for a disarmed, figuratively raped (and thus emasculated) German people, bound by its enemies and ... Versailles').

<sup>164</sup> C. Koller, 'Von Wilden aller Rassen niedergemetzelt': Die Diskussion um die Verwendung von Kolonialtruppen in Europa zwischen Rassismus, Kolonial- und Militärpolitik (1914–1930), at 290; I. Wigger "'Against the laws of civilization": Race, Gender and Nation in the International Racist Campaign Against the "Black Shame"', (2002) 46 *Berkeley Journal of Sociology* 113.

<sup>165</sup> Wigger, *supra* note 15, at 40; Roos, *supra* note 157, at 488.

<sup>166</sup> Lusane, *supra* note 87, at 50.

<sup>167</sup> *Supra* note 40; Koller, *supra* note 33, at 124 (propaganda expressed concern for 'future of the colonial system', 'the supremacy of the "white race"' by raising the spectre of trained colonial troops turning 'their weapons against their own masters').

<sup>168</sup> Wigger, *supra* note 15, at 35.

<sup>169</sup> *Supra* note 53.



project to humanize war. The recent war supplied ample evidence of the capacity of European civilization to direct endless inhumanity at itself. The ‘relapses into barbarism’ trope of the modern laws of war, so prevalent since Francis Lieber<sup>170</sup> (but hitherto appearing as no more than a rhetorical device), had now materialized as a refutation of Europe’s capacity to restrain warfare or to conduct itself humanely on its own ‘civilized’ battlefields.<sup>171</sup> Colonial war, imported to Europe, forced Europeans to face a horrid mirror-image.<sup>172</sup> To either impeach or defend the conduct of colonial troops in Europe could only confirm the futility of the modern laws of war project. International lawyers elected to do neither.

*Second*, if patent evidence of Europe’s ‘internecine wars’ underscored global white anxiety with the looming ‘subjugation of white lands by colored armies’,<sup>173</sup> for lawyers it could have represented no less than the collapse of civilization as an organizing category and, with it, the very logic of international law geared to maintain and legitimize European colonialism and empire. The Rhine occupation, and the anxieties it let slip, exposed the internal contradictions in legal categories and threatened to undo the distinctions they so carefully constructed: barbarian/civilized, black/white, vanquished/victor, occupied/occupant, colonized/colonizer, subjugated/sovereign. Roles were reversed; subject became object. Critics of the occupation, a proxy for the entire Versailles settlement, ‘equated it with colonization, in which the German people had become colonial subjects. It was the world turned upside down . . .’<sup>174</sup> Smuts thought the Versailles *Diktat* treated Germany ‘as we would not treat a *kaffir* nation’.<sup>175</sup> The old international law vocabulary could not address any of this; the lawyers remained silent.

Reversal of roles and a sense of collapse reverberate in the silence of two postwar German international lawyers at opposite poles of Weimar politics. Both wrote on the Rhine occupation; both failed to mention its ‘horror’. One was Walther Schücking (1875–1935), the important-yet-marginal pacifist and liberal-internationalist.<sup>176</sup> ‘[F]undamentally opposed’ to Versailles, he had served as one of Germany’s delegates to the negotiations.<sup>177</sup> In 1929, he published a short tract supporting Germany’s right to demand French withdrawal from the Rhine. Schücking avoided any reference to race or rape; he did protest at Germans ‘still . . . being humiliated by the presence of many thousand soldiers on German soil!’.<sup>178</sup>

<sup>170</sup> Lieber Code, *supra* note 45, Art. 148; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1968), Vol. II, at 211.

<sup>171</sup> Koskenniemi, *supra* note 5, at 292 (Pillet).

<sup>172</sup> Evident in the quotes from Mérignhac and Lémonon, *supra* note 101; Roos, *supra* note 157, at 506 quotes 1922 radical feminist Helene Stöcker: ‘our much-praised “civilization” [Kultur] has proven itself only in one respect, namely in our superior ability to kill’.

<sup>173</sup> Campbell, *supra* note 140, at 482, quoting L. Stoddard, *The Rising Tide of Color against White World-Supremacy* (1920), at vi.

<sup>174</sup> Campbell, *supra* note 140, at 472; Collar, *supra* note 15, at 6 (‘No longer imperialist masters, Germans were now colonial subjects’) in reference to J. Poley, *Decolonization in Germany: Weimar Narratives of Colonial Loss and Foreign Occupation* (2005).

<sup>175</sup> Lentin, *supra* note 161, at 87.

<sup>176</sup> M. García-Salmones, ‘Walther Schücking and the Pacifist Traditions of International Law’, (2011) 22 EJIL 755.

<sup>177</sup> Koskenniemi, *supra* note 5, at 220–1; C. Tams, ‘Re-Introducing Walther Schücking’, (2011) 22 EJIL 725, at 727.

<sup>178</sup> W. Schücking, *Das Recht auf Rheinlandräumung* (1929), at 12–13.

Yet Schücking was familiar with the *Schwarze Schmach*. The instructions of the German delegation to Versailles ‘specified that “colored troops should not be made a part of the army of occupation”’; the delegation complained that Germany’s enemies ‘bombard us and then send in their black troops’.<sup>179</sup> Schücking was a member of the *Heidelberger Vereinigung*,<sup>180</sup> with whom Morel and the UDC ‘worked intimately’. It even ‘sponsored publication of *The Horror on the Rhine* and provided Morel with information about conditions in the occupied zone’.<sup>181</sup>

The other jurist was Carl Schmitt. His April 1925 lecture – under the telling title ‘The Rhinelands As An Object of International Politics’<sup>182</sup> – was silent on the ‘horror’. Schmitt did speak of a duty to ‘guard our countrymen against losing their moral bearings ... in an atmosphere of international promiscuity’.<sup>183</sup> He warned of a persisting danger that ‘the Rhine country should be reduced to a mere object of international politics and that the Rhenish people should be degraded into a mere appendage of an object’.<sup>184</sup> The thrust was that Versailles had affected the collapse of German sovereignty, and with it, of the old international legal system and vocabulary.<sup>185</sup> He wrote of ‘attempts to degrade the Rhinelands, by means of ... new methods, into an object of international politics’.<sup>186</sup> The treaty provisions on reparations, sanctions, investigation, and occupation ‘are able to convert all Germany into a political object. They concern most nearly the Rhinelands ...’.<sup>187</sup> Loss of political and legal subjecthood placed Germans ‘at the mercy of an impersonal political machine, thrown into gear by unknown hands, representing not a single foreigner, but an abstract relation between foreigners, and adding the foul practice of anonymity to the gall of foreign yoke’.<sup>188</sup> Germany, in short, was ‘lowered to a mere trifle and its population to a second rate thing’.<sup>189</sup> Turned into an ‘object’, it was in effect a colonial possession.<sup>190</sup> As Schmitt emphasized, civilization itself – not merely Germany – had collapsed:

an old political tradition is badly on the wane, which had, down to the last century, guided the international practice more than one commonly knows, namely the division of mankind into christian and heathen nations, the identification of Christianity and civilization, a principle withal, on which the esteem claimed for the European nations

<sup>179</sup> Nelson, *supra* note 15, at 609.

<sup>180</sup> ‘[E]rudite group that ... researched the question of the guilt for the ... War and the horror propaganda, but also financially supported Morel and violently protested ... deployment of colored troops’: van Galen Last, *supra* note 48, at 172.

<sup>181</sup> Reinders, *supra* note 134, at 13.

<sup>182</sup> C. Schmitt, *The Rhinelands As An Object of International Politics* (1925). Neither C. Schmitt, *The Nomos of the Earth* (1988); nor C. Schmitt, *Concept of the Political* (1996) mentioned the Rhine occupation.

<sup>183</sup> *Ibid.*, at 23.

<sup>184</sup> *Ibid.*, at 3.

<sup>185</sup> W. Rasch, ‘Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland’, (2008) 8 *New Centennial Review* 57, at 67 (traditional ‘distinction ... between Europe and the non-European world ... the representatives of civilization and the less- or uncivilized, began to collapse’).

<sup>186</sup> Schmitt, *supra* note 182, at 23.

<sup>187</sup> *Ibid.*, at 12.

<sup>188</sup> *Ibid.*, at 19.

<sup>189</sup> *Ibid.*, at 23.

<sup>190</sup> Rasch, *supra* note 185, at 67 (victors ‘introduced the asymmetrical distinction between the civilized and uncivilized into Europe itself, such that the vanquished Germans ... felt themselves ... pushed beyond the pale ... excluded from the realm of the “cultured” nations altogether’).

was based – all this has dwindled away. A gulf is fixed between our days and those good old times, where the manuals of international law used to speak of Christian International Law and the Right of Christian nations. The biggest stride towards this abdication of Europe was made by the Versailles Treaty.<sup>191</sup>

These observations concerned Article 22 of the League of Nations Covenant.

## 7. RESURGENCE: *POSTBELLUM* CODIFICATION

Through Schmitt's work, the collapse embodied by the Rhine occupation left permanent marks on international legal theory. That, however, did nothing to dispel anxieties with loss of control of 'real' colonial objects or reinstate legal categories and distinctions. While postwar editions of international law textbooks asserted (ambivalently and through selective mutism) the prohibition on employing colonial troops, that was not enough to reinstate control or revalidate old vernaculars.

The horror on the Rhine had caused the collapse of the rule on employment of savage troops and the colonial war category itself; yet out of the ashes, driven by the same anxieties, both rule and category re-emerged. The fourth edition of Oppenheim, edited by McNair, saw a new footnote added to the paragraph on 'Barbarous Forces', advising readers to 'note paragraph 5 of Article 22 of the Covenant'.<sup>192</sup> The very instrument, and provision, vilified by Schmitt as an abdication of the old 'Christian International Law' codified the rule on the recruitment of colonial troops. The Covenant's mandate system, famously, reasserted international law's civilizational categories in colonies lost by Germany and Turkey.<sup>193</sup> Its fifth paragraph, on 'B' mandates,<sup>194</sup> prohibited the 'military training of the natives':

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

This prohibition emanated, directly, from the Rhine scandal. In the armistice negotiations, France refused Germany's request 'that no black troops would be assigned to occupation duty'.<sup>195</sup> When the Peace Conference convened in Paris in January 1919, President Wilson used the occasion to ask Clemenceau, the French *Premier*, whether France really intended 'sending Senegalese into the left bank [of the Rhine]. Is this true?' Clemenceau's reported reply was that there was one 'battalion there now, but

<sup>191</sup> Schmitt, *supra* note 182, at 12.

<sup>192</sup> L. Oppenheim, *International Law* (1926), Vol. II, at 162; similarly, the postwar edition of von Liszt, *supra* note 97.

<sup>193</sup> M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2008), Chapter 1.

<sup>194</sup> Art. 22(6) applied these 'safeguards' to 'C' mandates.

<sup>195</sup> Pommerin, 'The Fate', *supra* note 88, at 316.

I plan to retire them, for I believe as you do that it would be a grave error to occupy the left bank with black troops'.<sup>196</sup> On 24 January, possibly 'with German pleas in mind',<sup>197</sup> Lloyd George raised the issue in discussions on the fate of Germany's colonies:

In many cases the Germans had treated the native populations very badly ... In other parts of Africa ... they had raised native troops and encouraged these troops to behave in a manner that would even disgrace the Bolsheviks. The French and British, doubtless, had also raised native troops but they had controlled them better.<sup>198</sup>

Germany's militarist designs in Africa were a cause of wartime concern.<sup>199</sup> In early 1918, Smuts wrote that:

With German East Africa restored to the Kaiser at the end of the war, and a large Askari army recruited and trained from its 8,000,000 natives, the conquest or forced acquisition [of further African territories by Germany] ... may be only a matter of time.

For Germany, these 'almost unlimited economic and military possibilities ... might yet become an important milestone on the road to World-Empire'.<sup>200</sup> At Versailles, these concerns drove the move to strip Germany of its colonial possessions.

Wilson, too, had apprehensions about Germany's future designs and use of colonial troops. His draft of 10 January 1919, presented to the American delegation, contained a rudimentary limitation on the 'mandatary' forming military forces going beyond 'internal police'.<sup>201</sup> A more developed text was contained in Lloyd George's draft resolution on the mandate system, discussed on 30 January. It now included '[a]ctual and definite prohibitions' on 'armaments of natives'.<sup>202</sup>

What transpired next was reported by the *New York Times*, under the heading 'Savages in Modern War'. The subheading exposed 'Debates at Secret Sessions of the Paris Peace Conference on the Question of Using Uncivilized or Half Civilized Troops ...'.<sup>203</sup> The piece started with a quotation of General Bliss, former Army Chief of Staff, now the American Permanent Military Representative to the Supreme War Council and a conference Plenipotentiary:

The United States ... should demand as its right, the right of civilization ... that millions of men of savage races should not be trained to take part in possible wars of civilized nations. If civilization wants to destroy itself, it can do it without barbarian help.<sup>204</sup>

The *New York Times* proceeded to report how the conference dealt with the 'ugly practice' and 'a profound menace to future civilization' embodied in 'the right of the

<sup>196</sup> Nelson, *supra* note 15, at 610.

<sup>197</sup> *Ibid.*, at 609.

<sup>198</sup> R.S. Baker, *Woodrow Wilson and World Settlement* (1923), Vol. II, at 425–6.

<sup>199</sup> Germany employed c. 12,000 colonial troops in Africa: Lusane, *supra* note 87, at 71. Hitler argued they 'served only for the defense of the colony itself; strengthening the *Reich* 'through black blood' would have been 'criminal': *Mein Kampf*, *supra* note 87, at 938.

<sup>200</sup> G.L. Beer, *African questions at the Paris Peace Conference* (1923), at 276.

<sup>201</sup> Baker, *supra* note 198, at 425.

<sup>202</sup> *Ibid.*, at 426; D.H. Miller, *The Drafting of the Covenant* (1928), Vol. I, at 110.

<sup>203</sup> R.S. Baker, 'Savages in Modern War', *New York Times*, 12 February 1922; republished Baker, *supra* note 198.

<sup>204</sup> Baker, *supra* note 203.

great nations of the world, which have in tutelage the weaker races of Africa and Asia, to arm these natives and use them as soldiers in fighting their own wars':<sup>205</sup>

There were those at Paris ... profoundly concerned over the growth of this ugly practice; who saw in the use in the great war of hundreds of thousands of Chinese, Siamese, Senegalese, Arabs, and Sikhs, a profound menace to future civilization. Easy and cheap transportation ... made it possible to employ these troops, under the command of white officers, as never before. What was to prevent the spread of this practice? And now that natives had been trained and disciplined ... what was to prevent their turning this knowledge against their white neighbours? The use by the French of coloured troops in Germany after the war closed – which the Germans resented as the 'black horror on the Rhine' – caused great bitterness ...

Morel, we saw, shared these apprehensions. As did Smuts. In 1917 he warned that the military training of natives 'could become a menace not only to Africa, but perhaps to Europe itself; and hoped that some postwar 'arrangement or convention' prohibiting 'the military training of natives' could prevent 'a danger to civilisation itself'.<sup>206</sup> The peace conference – and Germany's early protests over French Rhine deployment policies – presented an opportunity for such an arrangement.

Lloyd George's proposal attracted French objections. France wanted to annex 'part of Togo and the Cameroons in pursuance of her black army policy',<sup>207</sup> arguing it 'could not renounce the right of raising volunteers in the countries under her administration, whatever they might be'.<sup>208</sup> An exchange among Clemenceau, Lloyd George, and Wilson followed. Time and again, Lloyd George assured Clemenceau that the provision, though phrased in general terms, did not prevent the French from 'doing exactly the same thing as they have done before. What it did prevent was the kind of thing the Germans were likely to do, namely, organize great black armies in Africa'. He added that 'so long as M. Clemenceau did not train big "nigger" armies, for the purpose of aggression, that was all the clause was intended to guard against.' Only after recording his understanding 'that Mr. Lloyd George's interpretation was adopted', which Wilson confirmed, was Clemenceau 'quite satisfied'.<sup>209</sup>

As Germany was to no longer possess colonies – let alone serve as mandatory – the 'understanding' effectively tailored an all-encompassing French exception.<sup>210</sup> That was not the end of the matter. Later, France again tried to eliminate the language on colonial recruitment.<sup>211</sup> Having failed, Clemenceau – without consulting anyone – 'on his own authority ordered insertion of words permitting recruiting of natives for "defense of the territory of the mother country"' when 'the document ... was already in press'.<sup>212</sup> A 'considerable commotion'<sup>213</sup> ensued; urgent memoranda comparing versions were drawn. Wilson, who 'strenuously objected to the addition of *'et du*

<sup>205</sup> Baker, *supra* note 198, at 422.

<sup>206</sup> J.C. Smuts, *War-Time Speeches* (1917), at 82.

<sup>207</sup> Q. Wright, *Mandates under the League of Nations* (1930), at 36.

<sup>208</sup> Baker, *supra* note 198, at 426.

<sup>209</sup> Miller, *supra* note 202, at 218.

<sup>210</sup> *Ibid.*, at 115–16.

<sup>211</sup> Wright, *supra* note 207, at 43.

<sup>212</sup> *Ibid.*; Miller, *supra* note 202, at 501; Baker, *supra* note 198, at 429.

<sup>213</sup> *Ibid.*, at 430.

*territoire metropolitan*, took ‘prompt measures’ to trump Clemenceau’s unauthorized alteration.<sup>214</sup> France, persistent, finally got the express language it wanted when individual instruments were approved for her African mandates.<sup>215</sup>

With that, control of the colonial object was reasserted; Article 22, for all the ambivalence that the French exception reintroduced into its interpretation, presented renewed vocabulary with which to address the employment of colonial troops – and, at last, address the Rhineland occupation. Postwar editions of Oppenheim referring to Article 22(5) did mention the Rhine occupation; it was discussed, however, not in the ‘Barbarous Forces’ section, but rather in the context of mandates, in the volume dealing with ‘Peace’.<sup>216</sup> The horror on the Rhine – and the anxieties it had exposed – had driven both collapse and resurgence of the rule on employment of savage troops and colonial war category itself. All it took was reclassification: if, until 1914, control of the colonial object had been the task of the laws of war, it now became the task of the law of peace. Control was codified; codification internationalized and institutionalized imperial governance – but it could neither resolve ambivalence nor, I suspect, dispel anxiety.<sup>217</sup>

## 8. BEYOND THE RHINE

What are we to learn from the ‘horror on the Rhine’, or from the fall and rise of ‘colonial war’ it had brought about? What may it tell us about the persistence of the category or on the endurance of ‘race’ as a pertinent, if now obscured, organizing principle of the laws of war? One lesson is that these are not safely buried in international law’s past; and it is quite likely, therefore, that they continue to lurk just beneath the surface of its normative landscape. To understand the scope, operation, and the forces driving the laws of war today, we need a history that does not relegate race and colonial war to a dead, irrelevant past. The Rhine episode, specifically, warns that the universality or humanity of the laws of war have much in common with the ‘overpowering spell’ of Heine’s Rhenish Lorelei.<sup>218</sup> Both claims require an in-depth critical assessment.

Another lesson, surely, concerns the elusiveness of rules and categories – and how it renders the search for continuity and discontinuity itself elusive. If demise is, as it was here, affected through silence, then amnesia; if it could be achieved through such a facile sleight-of-hand reclassification – one moment a rule of the laws of war, the next a rule governing peace – then how can demise be authoritatively pronounced? And if resurgence entails such a radical metamorphosis in the taxonomy, form, and scope of application of the rule, how can legacies be traced and how authentic can continuity be?

<sup>214</sup> Miller, *supra* note 202, at 503.

<sup>215</sup> *Ibid.*, at 116.

<sup>216</sup> L. Oppenheim, *International Law* (1928), Vol. I, at 442 (‘performance of treaty of peace’), 652, 670, 682, 748.

<sup>217</sup> The Spanish civil war replicated the Rhine scandal with allegations of sexual violence by ‘Moros’: see A.G. Morcillo (ed.), *Memory and Cultural History of the Spanish Civil War: Realms of Oblivion* (2014); these anxieties were not gone by the next World War: E. Storm and A.A. Tuma (eds.), *Colonial Soldiers in Europe, 1914-1945: ‘Aliens in Uniform’ in Wartime Societies* (2016).

<sup>218</sup> H. Heine, *Die Lorelei* (1824).

The Rhine occupation suggests, however, one path to eluding such elusiveness. There, it was anxiety that drove both collapse and resurgence. No matter what appearance the rule had, no matter its placement in scholarly tomes, no matter its substantive content, intended function or actual use – what remained constant before and after 1918 were the anxieties besetting lawyers, lawmakers, and those, like Morel, who perceived themselves to be the law's privileged beneficiaries. Mapping anxiety, as the preceding analysis illustrates, helps charting a course that cuts through the elusiveness of rules and categories. Could it be that following anxiety may serve the historian with a touchstone to test international legal history or, at least, furnish her with a stabilizing heuristic device through which to tell it?

To suggest that anxiety attends the international legal profession is, of course, not new; neither is the suggestion that various instantiations of anxiety can be found at key junctures of international law's past.<sup>219</sup> I am, however, suggesting something more: that the history of the laws of war, and international law, may usefully be written as a record of anxiety. What this might entail deserves separate elaboration; but the advantage of such an approach can be demonstrated by its capacity to explain why the path of the history of international law is littered with so many 'beginnings' and 'renewal' projects – and why it is, therefore, also strewn with so much amnesia.

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<sup>219</sup> Koskenniemi, *supra* note 5; M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 553; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).