
The Law of Military Occupation from the 1907 Hague Peace Conference to the Outbreak of World War II: Was Further Codification Unnecessary or Impossible?

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Abstract

World War I is commonly perceived as having had a profound impact on international law. Such a general perception, be it justified or not, might in any event prove erroneous when looking at specific areas of this law. A focus on the law governing military occupation reveals a notable absence of change over the course of the war and the subsequent interwar period. In search of possible reasons, this article first looks at various opportunities that emerged – but were not ultimately seized – to adapt treaty law in the period between the two world wars. It then assesses whether changes had in fact occurred through other channels such as customary international law or treaty interpretation. Based on the observation that no meaningful change intervened, can it be concluded that, on the whole, the Hague regulations on military occupation met stakeholders' expectations and therefore were not altered? The author suggests, rather, that the equilibrium founded in The Hague in 1899 (and confirmed in 1907) on the lines of tension between the states involved remained operational throughout the period under scrutiny.

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In Europe, once it had become generally accepted that sovereignty was not to be acquired by force, the first treaty rules of modern international law relating to military occupation were drafted at the end of the 19th century.¹ In the beginning of the 21st century, they remain central to the body of norms governing the conduct of occupying troops and framing the occupant's responsibility in ensuring public order within the territory it controls.² For example, when presented with cases of military occupation, the United Nations (UN) Security Council as well as, in the course of their proceedings, both national and international courts still refer to the rules agreed upon in 1899 and marginally revised in 1907.³

Convention no. II with Respect to the Laws and Customs of War on Land of 1899 (Hague Convention II) and Convention no. IV Respecting the Laws and Customs of War on Land of 1907 (Hague Convention IV) were adopted within the framework of the International Peace Conferences held in The Hague with a view to codifying the laws and customs of war on land. A set of annexed regulations (Hague Regulations) was intended to form the basis for instruction to be given by contracting states to their armed forces.⁴ The final section of these regulations, section III (Articles 42–56), forms the basis of the law of military occupation to which one main addition was later made. Regarded as substantial by some authors, while depicted by others as more limited,⁵ this addition was a result of the adoption of the 1949 Geneva

¹ E. Benvenisti, *The International Law of Occupation* (2nd edn, 2012), at 1.

² Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 6; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (2009), at 5.

³ E.g., SC Res. 1483 (2003) in relation to the occupation of Iraq by forces from the USA and Great Britain; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at 167, 172, 185, 189, 192; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005), at 229–231, 242–244, 253; High Court of Justice (Israel), including, e.g., High Court of Justice (Israel) 7957/04, *Zaharan Yunis Muhammed Mara'abe et al. v. Prime Minister of Israel et al.*, HCJ 7957/04, at 9–36; High Court of Justice (Israel) 8414/05, *Ahmed Issa Abdallah Yassin, Bil'in Village Council Chairman v. Government of Israel et al.*, HCJ 8414/05, paras 27–28; High Court of Justice (Israel) 2150/07, *Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head, and 24 Others v. Minister of Defense et al.*, HCJ 2150/07, at 2, 5, 20–35. Decisions available online at <http://elyon1.court.gov.il/verdictssearch/english-verdictssearch.aspx>. References are occasionally made to these rules to the extent that they reflect the state of customary international law.

⁴ Convention (No. II) with Respect to the Laws and Customs of War on Land 1899, 1 AJIL Supp. (1907); Convention (No. IV) Respecting the Laws and Customs of War on Land 1907, 2 AJIL Supp. (1908). For the official records of the diplomatic conferences and the conventions adopted, see *Actes de la Conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre* (1874), at 61 (Declaration); Ministère des affaires étrangères (La Haye), *Conférence internationale de la Paix: La Haye 18 mai – 29 juillet 1899* (new edn, 1907), at 19 (Hague Convention II in First Part, Annexes); Ministère des affaires étrangères (La Haye), *Deuxième Conférence internationale de la Paix: La Haye 15 juin – 18 octobre 1907: Actes et documents*, 3 vols (1907), vol. 1, at 626 (Hague Convention IV). English translations of the original French texts of the declaration and conventions are available on the website of the International Committee of the Red Cross (Treaties, States Parties and Commentaries database), available at <https://ihl-databases.icrc.org/ihl>.

⁵ See, e.g., R. Kolb and S. Vité, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels* (2009), at 68 (substantial changes); A. Migliazza, *L'occupazione bellica* (1949), at 21, 23 (more limited impact); see also the discussion in Arai-Takahashi, *supra* note 2, at 59–62.

Convention IV.⁶ Since then, '[o]nly relatively minor modifications have been made (in a non-systematic fashion)'.⁷

The fates of occupied populations during World War II eventuated provisions adopted at the 1949 codification event.⁸ Several provisions were then drafted into Geneva Convention IV to improve the protection of the civilian population in times of military occupation, and the scope of application of relevant provisions was widened to also cover cases of military occupation that meets with no armed resistance (non-belligerent occupation).⁹ No change in treaty law intervened after World War I, however, to account for the sufferings endured by populations in occupied territories such as northern France, Belgium, Poland, Lithuania and Serbia.¹⁰ While the adaptations made in 1949 have been widely discussed in literature,¹¹ this article proposes to look at the reasons why states did not adopt new treaty provisions in the interwar period to further regulate such situations.

Four hypotheses will be tested in turn, questioning the need for adapting treaty law and opportunities to do so. We will begin with the postulate – which the recounting of the horrors of the war would vindicate *a priori* – that such a need existed, then go on to challenge this assumption on two different grounds and, lastly, consider a more refined possible explanation. Answers to the following questions will be proposed: did treaty law remain unaltered at the outbreak of World War II due only to a lack of time or opportunity to adapt this law during the interwar period; did sufficient adaptation occur outside of treaty law or within the framework of existing treaty law (within the realm of customary law or through interpretation), averting the need for adapting treaty law; was there no actual need to do so given that the Hague Regulations on military occupation essentially met the expectations of warring states or had it simply been impossible to find a better equilibrium for the tensions inherent in the law of occupation (as revealed through the range of positions expressed at the codification conferences and as resolved, at least provisionally, through the adoption of the Hague Regulations)?

Proposed responses to these questions will be illustrated through the examination of select cases of military occupation linked with World War I, taken as potential reference points for the attitudes of international lawmakers towards the law of military occupation in the interwar period. Emphasis will be placed on the Belgian experience, which was amongst the richest and most documented in terms of legal discussion on

⁶ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

⁷ Dinstein, *supra* note 2, at 287. These minor modifications include: Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, 1125 UNTS 3, Art. 14, 15, 69; Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UNTS 215, Art. 5.

⁸ J. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 5.

⁹ See, in particular, Geneva Convention IV, *supra* note 6, Arts 2, 27–34, 47–78.

¹⁰ Pictet, *supra* note 8, at 273.

¹¹ See, e.g., the references in note 5 above.

military occupation, with particular regard to the war period itself.¹² Belgium, from the moment it was dragged into the war as a consequence of the violation of treaties, positioned itself as a figurehead of international law and continually appealed to it.¹³ Although not so dissimilar in terms of severity for the occupied populations, exemplified by their dramatic excesses of harsh requisition and forced labour, it seems that other instances of military occupation, particularly on the Eastern Front, never triggered such a heightened level of legal discussion.¹⁴ Where there may remain a need for further archival research, admittedly, recent works by authors who have contributed to the filling of a regrettable gap in historical knowledge of occupations on the Eastern Front reveal no substantial occurrences of discussion relating to the law of military occupation (including the provisions of the Hague Regulations) within the framework of the respective contexts under examination.

Rather, they point to factors that might explain such a limited, if not completely absent, legal debate both during and after World War I. Depending on the area occupied and the period under contemplation, these explanatory elements, whether operating alone or jointly, may include: the relatively short life of occupation (Romania, for example, and Russian Ukraine even more so);¹⁵ the fact that military occupation was lived, in several cases, as an ordeal on the path to independence,¹⁶ whereas the law of military occupation is geared towards maintaining pre-war *status quo*; the profound transformation, if not disappearance, of the pre-war sovereign, adding uncertainty about legitimate sovereignty (Russian Ukraine, for instance);¹⁷ for a time, the benevolent attitudes of significant parts of the local populations towards the occupants (most notably Romania and also Russian Poland and Lithuania);¹⁸ the integration into the relationship between occupier and occupied of lessons learned in other contexts (in Belgium, for example, in the case of Romania);¹⁹ a focus set during occupation on nation building and efforts of the occupier, to some extent, to win the hearts and minds of the local population (Russian Poland);²⁰ the persistent warlike dynamic,

¹² I. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2015), at 96, 128; Benvenisti, *supra* note 1, at 108. In addition, Belgium was particularly active during the codification discussions in Brussels and The Hague, trying its best to limit the scope of such codification; it was occupied during World War I and an occupier during and after it.

¹³ Graditzky, 'Les expériences belges d'occupation autour de la Grande Guerre: quelle mobilisation du Règlement de La Haye?', in J. Connolly *et al.* (ed.), *En territoire ennemi 1914–1949: Expériences d'occupation, transferts, héritages* (2018) 153, at 156–164.

¹⁴ Violations of the laws of military occupation were, however, occasionally reported (see, e.g., note 76 below and accompanying text).

¹⁵ Mayerhofer, 'Making Friends and Foes: Occupiers and Occupied in First World War Romania, 1916–1918', in H. Jones, J. O'Brien and C. Schmidt-Supprian (eds), *Untold War: New Perspectives in First World War Studies* (2008) 119.

¹⁶ Liulevicius, 'German-Occupied Eastern Europe', in J. Horne (ed.), *A Companion to World War I* (2010) 447, at 459.

¹⁷ *Ibid.*, at 456.

¹⁸ Mayerhofer, *supra* note 15, at 120.

¹⁹ *Ibid.*, at 132, 147.

²⁰ J. Kauffman, *Elusive Alliance: The German Occupation of Poland in World War I* (2015).

ongoing civil wars and revolutions that turned attraction away from any, or substantive discourse on an, in essence, conservationist law of military occupation (Russia);²¹ and, not unrelated to the previous factors, the post-war channelling of remembrance towards heroic feats of arms by soldiers (Serbia)²² or the revolution chronologies (Russia)²³ to the detriment of the sufferings endured by the occupied population.

1 Opportunities to Adapt Treaty Law Emerged during the Interwar Period but Were Ultimately Not Seized

Articles 42–56 of the regulations annexed to the 1907 Hague Convention IV were the latest treaty provisions adopted to regulate situations of military occupation when World War I broke out and caused several such situations to occur. However, the failure of some warring states to ratify this convention made it non-binding for all belligerents, and, thus, it was the 1899 Hague Convention II that was applicable during the war.²⁴ It appears, nevertheless, that when belligerents and other stakeholders discussed the law, they often referred to the 1907 convention and its annexed regulations. Differences in content between the two successive versions of the regulations were minimal in any event, as admitted in the report to the 1907 conference made on behalf of its second commission.²⁵

Treaty law relating to military occupation was referred to but not modified during the war, so, following the close of hostilities, it remained set by the last provisions of the Hague Regulations. These regulations reflect the thoughts, politics and power relations of the time in which they were drafted, embodying a conservationist principle significantly restricting the power of the occupying authorities to implement

²¹ Holquist, 'Making War, Forging Revolution: Russia's Continuum of Crisis 1914–1921', 109 *American Historical Review* (2004) 285.

²² Manojlovic and Gudac Dodic, '“An Ugly Black Night”: Remembering the Austro-Hungarian Occupation of Serbia 1915–1918', in O. Luthar (ed.), *The Great War and Memory in Central and South-Eastern Europe* (2016) 71.

²³ Luthar and Vukov, 'Introduction: Beyond a Western-Centric Historical Interpretation of the Great War', in O. Luthar (ed.), *The Great War and Memory in Central and South-Eastern Europe* (2016) 1, at 10.

²⁴ Hull, *supra* note 12, at 89.

²⁵ Report to the conference by General Baron Giesl von Gieslingen, on behalf of the second commission. *Deuxième Conférence internationale de la Paix*, *supra* note 4, vol. 1, at 96. Changes included: (i) the insertion in 1907 of an additional condition for the population engaged in a *levée en masse* to be considered as belligerent ('if they carry arms openly') (delegates mentioned, however, that this condition had already been implied in the 1899 text) (vol. 1, at 97; vol. 3, at 9, 20, 106); (ii) a redrafting of Art. 44, which was linked with that of Art. 23 and entailed adding that it is 'forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense' (vol. 1, at 86–87, 99–101; vol. 3, at 11–14, 23–25, 111, 120–127, 130–131, 135–141, 247); (iii) other amendments of Arts 52–54 linked with the transfer of the content to another convention, the uncontroversial specification that certain material elements were indeed covered or the inclusion of an explicit reference to an allegedly already existing compensation principle (vol. 1, at 101–104, 581–582; vol. 3, at 14–15, 26–28, 103, 112–113, 133, 142–148).

changes within the legal, political and economic system;²⁶ they are limited in number and scope,²⁷ steeped in military logic²⁸ and focused on property rights.²⁹ They were the result of negotiations that began with an unsuccessful conference held in Brussels in 1874, where tensions were already emerging between small or medium powers, including, first of all, Belgium and Switzerland, and the great powers of the time, in particular, Germany and Russia. Although discussions were much broader in scope and related to a wide range of issues in connection with the laws and customs of war on land, tensions mainly arose in relation to the law of military occupation and its proposed codification, which was opposed by the smaller countries and supported by the major powers. These tensions were still very present in The Hague in 1899, but, this time, they did not prevent the adoption of a convention negotiated on the basis of the text left on the table at the Brussels conference.³⁰

There were only about 20 years separating the end of World War I from the beginning of World War II. Consideration of this fact leads us to the question of whether such a limited span of time prevented the adoption of new conventional rules on military occupation or whether the interwar period simply failed to offer opportunities to adapt the law relating to military occupation and take stock of experiences from World War I. Several attempts to do so were made by experts either acting on their own initiative or commissioned by a handful of states or the International Committee of the Red Cross (ICRC). Some of these initiatives were occasionally pushed forward by an international conference or a state (in particular, Belgium or Switzerland), but none of them led to the adoption of treaties ratified, or to be ratified, by states, as will be observed below. The League of Nations, however, which was a major actor during the interwar period, maintained its distance from the law of armed conflicts and its evolution, which was perceived as a weakening factor for the emerging body of norms aiming at the prevention of war.³¹

A Rules on Air Warfare Drafted by the Commission of Jurists in The Hague

A first endeavour in this direction was made within the framework of the discussion on the Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, which were drafted by the Commission of Jurists created pursuant to a resolution adopted by the USA, Great Britain, France, Italy and Japan during the course of the 1992 Washington Conference on the Limitation of Armaments.³² This body of

²⁶ Benvenisti, *supra* note 1, at 11; Kolb and Vité, *supra* note 5, at 39.

²⁷ Kolb and Vité, *supra* note 5, at 28, 38, 40.

²⁸ *Ibid.*, at 38.

²⁹ Dinstein, *supra* note 2, at 6. For a refutation of arguments put forward to assert the inadequacy of the law of military occupation in contemporary situations, see V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (2010), at 299–302.

³⁰ Benvenisti, *supra* note 1, at 41.

³¹ R. Kolb, *Ius in bello: Le droit international des conflits armés* (2nd edn, 2009), at 52–53.

³² Commission of Jurists nominated by the 1922 Washington Conference on the Limitation of Armaments, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (1923), available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/B9CA3866276E91CFC12563CD002D691C/FULLTEXT/IHL-35-EN.pdf>.

legal experts from the five signatory countries met in The Hague between December 1922 and February 1923 and drafted two separate documents. The Rules on Air Warfare included two provisions relevant to situations of military occupation: Draft Article 23, which prohibited 'aerial bombardment aiming at forcing the execution of requisitions in kind or the payment of contributions in cash' (allegedly inspired by the rules from the Hague Regulations on land warfare) and Draft Article 31, which clarified that Article 53 of the Hague Regulations also provided for the right to requisition neutral aircraft in an occupied zone. Although these rules were ready long before the advent of the following world war, they were never adopted in a binding form. In any event, their intent was never to make substantial changes to the law of occupation.

B *The Monaco Draft Convention and Draft Provisions on Hospital Localities and Zones*

The same holds true for the so-called Monaco draft convention. A commission of doctors and jurists – composed essentially of military doctors and two international law professors, who were in favour of the 'humanization of war' – met on the invitation of Prince Louis II of Monaco on 5–11 February 1934 in response to a wish expressed at the seventh International Congress of Military Medicine and Pharmacy, which was held in Madrid in 1933. It drafted a series of articles on sanitary cities and localities, sanitary assistance by non-belligerents, medical assistance to prisoners of war and the protection of the civilian population.³³ Article 3 of the fourth part of the draft convention relating to the latter issue covered cases of invaded or occupied territories. On the one hand, it defined an obligation to respect the civilian population (protecting the freedom of worship, patriotic feeling, physical integrity and moral dignity of persons as well as property) and outlined limitations to requisitions (restricting them to what was needed for the subsistence of the army only and requiring compensation). On the other hand, it asked for the loyalty of the occupied population to the local authority and allowed the latter to impose sanctions on individuals not complying with instructions aimed at the maintenance of the public order.³⁴ With the exceptions of reference to the 'invasion' phase, in addition to that of 'occupation' proper, and of the fact that it provided for the creation of a special division of the Permanent Court of International Justice to hear all disputes arising between the occupant and the occupied, this draft article brought no new substance in any significant respect. It ultimately disappeared in the course of the process that led to the next formal draft on sanitary cities and localities, as we shall see.

Encouraged by the Standing Committee of the International Congresses of Military Medicine and Pharmacy (hereinafter Standing Committee) to support the Monaco draft convention and submit it to an international conference in line with those in Brussels and The Hague, the Belgian government in July 1934 sent invitations to

³³ 'L'Humanisation de la Guerre', 13 *Revue de droit international* (1934) 7, at 9 (commission report).

³⁴ *Ibid.*, at 57.

other states to participate in such a conference.³⁵ However, given the first reactions it received, and, in particular, those of France, Switzerland and the Netherlands, at the beginning of November 1934, it decided to cancel the invitations. It did so despite the fact that state delegates and international and national representatives of the Red Cross movement, who were gathered at the fifteenth International Conference of the Red Cross held a few days earlier in Tokyo, had thanked Belgium for its initiative and expressed the wish that the ICRC and the Red Cross National Societies should contact governments and encourage them to take steps towards enhanced protection of the wounded and sick in the military and of the civilian population.³⁶ The doubts expressed by France, Switzerland and the Netherlands related to their feeling that this was an issue to be handled by the ICRC, the League of Nations or The Hague.³⁷

Thereafter, in June 1935, the Standing Committee decided to submit to the ICRC all elements of the Monaco draft convention that fell within its purview.³⁸ At this point in time, the ICRC was still mainly oriented towards out-of-combat military personnel, but, nevertheless, it had already begun to work on a draft convention for the protection of civilians, which included a few limited provisions on civilians under occupation (see section C below). To follow up on the elements of the Monaco draft convention, it convened a meeting of experts in October 1936, who decided to focus first on a single aspect of the initial draft (sanitary places for the military) and suggested that the issue be discussed by military experts as well.³⁹ When the ICRC submitted draft articles to the Red Cross National Societies and asked them to enquire with their respective governments whether they would agree to send military experts to a possible meeting, the reactions were particularly disappointing, and the process was put on hold.⁴⁰ After a new push from the sixteenth International Conference of the Red Cross, a meeting of experts took place in October 1938, and a draft convention for the creation of hospital localities and zones in war-time was sent to the governments by the Swiss Federal Council in January 1939, with a view to organizing a diplomatic conference.⁴¹ Scheduled for the following year, this conference was cancelled due to the war.⁴²

³⁵ See a series of letters received or sent by the Ministry of Foreign Affairs, 9 July to 1 September 1934, Belgian Ministry of Foreign Affairs (BMEA), Diplomatic Archives (DA), 3.246.Bis (unindexed).

³⁶ *Ibid.*; see also *Quinzième Conférence internationale de la Croix-Rouge tenue à Tokio du 20 au 29 octobre 1934, Compte-rendu* (1934), at 201–202.

³⁷ Letters from the Belgian representatives in Paris, Berne and the Hague, 19 September, 27 September and 9 November 1934, respectively, BMEA DA, 3.246.Bis (unindexed).

³⁸ Sixteenth International Conference of the Red Cross, London, June 1938. International Committee of the Red Cross (ICRC), *Report on the Proposed Convention for the Establishment of Hospital Towns and Areas (Item 4, d of the Agenda)* (ICRC Report on Proposed Convention), at 2 (Document no. 15a).

³⁹ *Ibid.*, at 2–3.

⁴⁰ *Ibid.*, at 4–5.

⁴¹ At the sixteenth International Conference of the Red Cross, which took place in London in 1938 – only a few months before World War II broke out, putting an end to the process – the International Committee of the Red Cross (ICRC) could do nothing more than submit a provisional report summarizing the status of the enquiry and the opinions of a few military experts. *Ibid.*, at 5. Participants at the conference expressed the wish to see a meeting of experts arranged expeditiously in view of the preparation of a draft to be later submitted to the governments. *ICRC Report on Proposed Convention*, *supra* note 38, at 104 (Resolution 11).

⁴² ICRC, *Report Concerning Hospital and Safety Localities and Zones* (ICRC Report on Hospital and Safety Zones), May 1946, at 3.

In any event, the last two documents – the 1936 draft articles and the 1938 draft convention – included only one provision relating to the situation of military occupation. Rules were proposed regarding the fate of a hospital town, locality or zone fallen into enemy hands, though without any provision for additional protection of persons therein, be they military or civilian.⁴³ The course of events tends to illustrate the supposition that, within this domain, lack of interest was a more relevant factor than lack of time. The Belgian government did not appear to be particularly proactive or enthusiastic about the conference that it proposed to organize, and an apparently unusual attribution of the file within the Belgian Ministry of Foreign Affairs pushed the full initial Monaco draft convention even further than it would have gone had it been handled in a more orthodox way.⁴⁴ As far as this article is concerned, and although during the war Belgium had been heavily affected by the German occupation of most of its territory, it displayed no particular desire to see the law of occupation re-discussed after the war.

C *The Tokyo Draft on the Protection of Enemy Civilians*

More indicative of a lack of time and its potential consequence was the process surrounding (and, ultimately, the fate of) a draft convention concerning the condition and protection of enemy civilians on territory belonging to, or occupied by, a belligerent. This text was the result of a lengthy process that began as early as 1921 with a resolution at the first International Conference of the Red Cross following World War I. It was drafted by a commission organized by the ICRC and was limited in its focus to a number of general principles without entering into detailed regulations. In a brief chapter dedicated to the subject of occupied territories, it introduced three general principles: (i) hostages must always be treated humanely and may not be killed or subjected to corporal punishment; (ii) deportations out of the occupied territory are prohibited, unless they are conducted for security reasons, to the benefit of the inhabitants and in connection with the extension of military operations and (iii) enemy civilians may exchange family news (subject, when communicating with the exterior of the occupied territory, to limitations generally imposed on the population of the occupying state) and may apply for and receive relief (subject to the same limitations).⁴⁵ While the general principles on the protection of the first category of

⁴³ See draft Art. 8 in the respective texts. *ICRC Report on Proposed Convention*, *supra* note 38, at 13–14; *ICRC Report on Hospital and Safety Zones*, *supra* note 42, at 15. After World War II, while provisions on hospital and safety zones and localities were inserted in Geneva Convention IV, *supra* note 6, Art. 14, the case of occupation was relegated to the draft agreement proposed in Annex I to this convention.

⁴⁴ A note in the diplomatic archives of the Belgian Ministry of Foreign Affairs shows that the Directorate for Policy within this ministry, to its understandable surprise, was not put in charge of this issue and that it was critical of the way in which the matter was handled by the Directorate for Trade. The Directorate for Policy, it appears, would have first informally approached other governments and abandoned the project earlier on, as soon as it had been aware of the French opposition. Short handwritten note stapled to the file with unidentified initials, no date, BMEFA DA, 3.246.Bis (unindexed).

⁴⁵ Provisions on the execution of the convention, which were strongly inspired by those included in the Convention Relative to the Treatment of Prisoners of War 1929, 118 LNTS 343, were also included

civilians (enemy civilians on the territory of a belligerent) touched on an entirely new area, those on the protection of civilians in occupied territories aimed at recalling, and, to some extent, supplementing and specifying, the regulations annexed to the 1907 Hague Convention.⁴⁶

When this draft was submitted to the fifteenth International Conference of the Red Cross, which was convened in Tokyo in 1934, the ICRC admitted to a need for further development of the text before it could be passed on to the Swiss government with a view to organizing a diplomatic conference.⁴⁷ However, the ICRC representative reporting at the conference referred to a lacuna in the law of war and stressed the need for urgent action.⁴⁸ The 1934 international conference recommended the draft to the attention of states and asked the ICRC to work and press further for the timely adoption of a convention.⁴⁹ Four years later, at the next International Conference of the Red Cross in London, the draft convention was not discussed. It was simply considered to be one of the conventions under study at the time that the conference wished to see examined at a diplomatic conference as soon as possible.⁵⁰ As recognized by the ICRC, states displayed no great enthusiasm over engagement in this process either.⁵¹ One decade and a world war later, this draft convention would be revisited, forming a basis for the discussion that led to the adoption of the 1949 Geneva Convention IV on the protection of civilian persons.⁵²

During the interwar period, proposals to adapt treaty law relating to military occupation remained marginal or were left undeveloped. They never matured to the point of being formally adopted by states. Further codification or adjustment achieved through the drafting of new treaties did not seem to be a priority within the law of armed conflict or in comparison to other bodies of international law. There was also put forward the argument that further codification of the laws and customs of war, as a whole, had somehow been neglected by both lawyers and a number of officials due to their belief that it would be inconsistent for governments to discuss rules relating to

in the draft convention. See Quinzième Conférence internationale de la Croix-Rouge, Tokio, 20 octobre 1934, in *Projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'un belligérant ou sur un territoire occupé par lui*, at 11–13. An English translation (by the ICRC) of the French original text of the draft convention is available at www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=85EE9A58C871B072C12563CD002D6A15&action=openDocument.

⁴⁶ *Ibid.*, at 4, 6–7.

⁴⁷ *Ibid.*, at 8.

⁴⁸ See Quinzième Conférence internationale, *supra* note 45, at 203.

⁴⁹ *Ibid.*, at 262 (Resolution 39).

⁵⁰ Report of the Sixteenth International Red Cross Conference, London, June 1938, at 103 (Resolution X); see also Sixteenth International Red Cross Conference, Second Commission, Summary of the Discussions of the Legal Commission, prepared by the International Red Cross Committee and the League of Red Cross Societies (1938), at 11.

⁵¹ Pictet, *supra* note 8, at 4.

⁵² See Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross, Geneva, 26 July to 3 August 1946, in *Documents Furnished by the International Committee of the Red Cross*, vol. 3; Commission of Government Experts for the Study of Conventions for the Protection of War Victims, Geneva, 14–26 April 1947, in *Preliminary Documents Submitted by the International Committee of the Red Cross*, vol. 3.

a phenomenon that they considered to be a form of international crime.⁵³ According to these individuals, emphasis should have been placed on the prohibition of recourse to war rather than on developing new wartime rules. However, successful codification attempts did occur with respect to improving the treatment and conditions for the sick and wounded, the treatment of prisoners of war and the means of warfare.⁵⁴

2 Minimal Change or Adaptation Occurred outside or within Existing Treaty Law

Another possible explanation for the limited reaction and enthusiasm for adapting treaty law relating to the law of occupation in the interwar period may have been linked to a perception that customary law had evolved enough to adequately supplement treaty law or that its interpretation in recent years had clarified issues left open at the time of codification. However, available evidence of practice seems to show that customary law was rarely invoked, at least as far as the law of occupation was concerned.⁵⁵ A particularly striking example relates to the so-called Martens clause, which, for lack of a treaty provision in the negotiated text to cover the issue of popular resistance in situations of occupation, had been inserted in the preamble of the 1899 Hague Convention.⁵⁶ The clause was included in the 1907 Hague Convention as well and would have allowed Belgium – a state that had been instrumental in the drafting

⁵³ See, e.g., Legal Department of the Belgian Ministry of Foreign Affairs, *Note* (drafted by Fernand Muïls), 1934, BMFA DA, 3.246.Bis (unindexed); Pictet, *supra* note 8, at 8.

⁵⁴ These included the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929, 118 LNTS 303; Convention Relative to the Treatment of Prisoners of War, *supra* note 45; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925, 94 LNTS 65.

⁵⁵ Except, to some extent, for Germany's abusive recourse to an overarching permissive notion of military necessity, and although reference was made by Germany, Great Britain and other parties to the conflict to some 'usages of war' or to 'usual practice', it seems that the existence or alleged existence of a customary rule of law was never raised in the framework of the discussions on military occupation involving Germany. Hull, *supra* note 12, at 95–140.

⁵⁶ Original French text of the main part of the clause: 'En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties Contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.' *Conférence internationale de la Paix*, *supra* note 4, at 19. English translation: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' Translation available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/4D47F92DF3966A7EC12563CD002D6788/FULLTEXT/IHL-19-EN.pdf>. On the origin of the clause see Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause', 25 *European Journal of International Law (EJIL)* (2014) 847; Graditzky, 'Bref retour sur l'origine de la clause de Martens: une contribution belge méconnue (ou: "Ceci n'est pas la clause de Martens")', in J. Grignon, *Tribute to Jean Pictet* (2016) 185.

and adoption of this clause – to argue the existence of a right for its citizens to resist occupation on the basis of norms stemming from non-treaty sources, particularly customary law.⁵⁷ In its debate with Germany over the legality of popular resistance at the beginning of World War I, Belgium made no use of the clause, however, and no reference to a rule of customary law that may have existed.⁵⁸ Hence, the very state that had worked hard to ensure an express possibility was inserted in a treaty to refer to non-treaty law in relation to a specific issue relating to the law of military occupation abstained from doing so when it was confronted with this concrete situation.

In general, it seems that during the war customary law was not used to fill in gaps in treaty law governing military occupation. If one wanted to refer to international law, the tendency was to turn to treaty provisions (the Hague Regulations) and, should the need arise, to the preparatory work (*travaux préparatoires*) for the adoption of these regulations. A reference of this kind was made by the Belgian representatives – including the head of the Roman Catholic Church, Cardinal Mercier, in his written correspondence with General Governor von Falkenhausen – in their attempts to justify the resignation of officials after Germany had launched its policy for the administrative separation of Belgium.⁵⁹ Other examples drawn from the discussions between German and Belgian authorities on the legality of measures taken in Belgium during the war also reveal efforts made to find arguments in the Hague Regulations when these (or the *travaux préparatoires*) were not at all straightforward. Such was the case regarding deportation, forced labour and requisitions likely to lead to the starvation of the occupied population.⁶⁰ If Germany, in its external communication, came to challenge the prohibition of (massive) civilian deportations and forced participation in the German war effort, internal discussion showed that many German authorities, notably von Bissing, the governor general in Belgium between December 1914 and April 1917, did recognize these acts as being forbidden under the Hague Regulations.⁶¹

In any event, the argument did not shift to customary law. Many issues were in fact discussed on the basis of Article 43 of the Hague Regulations, which, like many other

⁵⁷ On the clause and its interpretations, see, e.g., Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’, 11 *EJIL* (2000) 187; Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 78; Von Bernsdorff, ‘Martens Clause’, in *Max Planck Encyclopedia of Public International Law* (2012) 1143.

⁵⁸ See, e.g., the absence of this line of argument in Royaume de Belgique, *Correspondance diplomatique relative à la guerre de 1914–1915* (1915), vol. 2, at 57–64; Kingdom of Belgium, Ministry of Justice and Ministry of Foreign Affairs, *War of 1914–1916: Reply to the German White Book of the 10th May, 1915*, ‘Die volkerrechtswidrige Führung des belgischen Volkskriegs’ (1918). A possible reason for the lack of reference by Belgian authorities to the (alleged) existence of a rule of customary law allowing for a wider possibility of popular resistance is the severity of the consequences that they anticipated for the civilian population had they insisted on the position held in Brussels and The Hague.

⁵⁹ See section 3 below and, e.g., *Protestations des parlementaires belges sous l’occupation allemande* (1919), at 65–66; F. Mayence, *La correspondance de S.E. le Cardinal Mercier avec le Gouvernement Général allemand pendant l’occupation 1914–1918* (1919), at 373–374.

⁶⁰ Hull, *supra* note 12, at 116, 124. In such cases, the prohibitions claimed to be existing were, as underlined by Hull, ‘inherent’ but not ‘explicit’ in contemporary treaty law.

⁶¹ Hull, *supra* note 12, at 128–138.

provisions relating to the law of occupation, was the result of a compromise between the great powers of the time (potential occupiers) and states that were more likely to be occupied in the foreseeable future, notably Belgium. Article 43 provides: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'⁶² Issues with reference to this provision discussed during, and still, to some extent, after the war, included, for instance, the 'Flemishization' of the University of Ghent, the administrative separation of Belgium and the measures taken by Germany in reaction to the strike of the judiciary, which started in February 1918 and lasted until the end of the war.⁶³

In the same vein, it is difficult to find elements of an argument stating that rules under customary law were different from those under treaty law and therefore required special attention. In this regard, we may recall that the Nuremberg tribunal stated after World War II, with reference to the 1907 Hague Regulations taken as a whole, that 'by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war'.⁶⁴ This statement means that, for the law of military occupation enshrined in the Hague Regulations, there was a form of alignment between treaty law and customary law, at least in the end of the interwar period.

Since, ultimately, there arrived no alteration or supplement to treaty law provisions relating to military occupation, one may wonder whether all of the necessary clarification for such provisions had been provided by World War I practice, thereby reducing any potential need for further codification. The various disagreements on the interpretation of specific rules certainly do not support such a conclusion; for instance, disagreements related to the rules on the powers of the occupant to change local laws under Article 43 of the Hague Regulations,⁶⁵ rules protecting the property of private citizens or those prohibiting forced labour and deportation.⁶⁶ If World War I did bring any clarification, it was the light that it shed on a divide that had developed between the German military, civilian officials and lawyers and most of the other European actors (particularly, the British and French); views diverged substantially on

⁶² *Deuxième Conférence internationale de la Paix*, *supra* note 4, vol. 1, at 636.

⁶³ See, e.g., Bureau documentaire belge, *Ce que les Belges de la Belgique envahie pensent de la séparation administrative* (1918); *Protestations*, *supra* note 59; F. Passelecq, *La magistrature belge contre le despotisme allemand* (1918).

⁶⁴ International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgment, 1 October 1946, *Official Documents*, vol. 1, at 253–254.

⁶⁵ On the discussions between German and Belgian authorities in relation to measures taken in Belgium, see, e.g., the references in note 63 above.

⁶⁶ Hull, *supra* note 12, at 111–116, 124–138. The controversy between Germany and Belgium on the legality of the deportation and forced labour policy persisted until at least 1927. See, e.g., Chambre des Représentants (Belgium), *Rapport présenté aux chambres législatives par M. le Ministre des affaires étrangères en réponse au rapport présenté par la Sous-Commission parlementaire du Reichstag allemand sur les déportations belges (1916–1917)*, No. 336 (1927).

the role that military necessity should be permitted to play in relation to the laws of war, including the law of military occupation.⁶⁷

Faced with differences in interpretation, states could have considered clarifying doubts through the adoption of new treaties. Indeed, they occasionally did so. In fact, during the interwar period, proposed modifications to treaty law mostly focused on the clarification of existing rules rather than on the addition of any significant new substance (the taking of civilian hostages remained an accepted feature, for example).⁶⁸ As we have noted, state efforts were minimal, and attempts at clarification never led to concrete results.⁶⁹ As Yutaka Arai-Takahashi notes, '[i]n the legal discourse of the interwar period, despite the deviations from the general rules on occupiers' legislative power during World War I, the normative framework on occupation remained intact'.⁷⁰ The state of customary law and the interpretation of treaty law, therefore, are not among the most relevant factors in explaining why, between the two world wars, states appeared unmotivated to adapt the law of military occupation through new international treaties.

3 The Hague Regulations on Military Occupation Met Stakeholders' Expectations Overall

At this stage, should we conclude that the Hague Regulations on military occupation essentially met all of the stakeholders' expectations and that they fulfilled all hopes? Little doubt exists about the fact that occupied populations certainly wished that the applicable law had been more protective or more explicitly so, given the extent to which they suffered under occupation during World War I. Authorities and individuals involved in legal arguments during the war struggled at times to find elements to support their positions. We see this exemplified in the efforts made by Belgian representatives to argue in favour of a choice given to public officials to opt out of performing their duties. Indeed, a substantial number of Belgian public officials resigned after Germany had begun the implementation of its policy of administrative separation of Belgium in 1917. The Hague Regulations were used as a legal basis for the Belgian argument under international law, but, since the draft provision initially proposed in view of settling this specific matter had not been inserted into the adopted regulations,⁷¹ it was felt that there was a need to reference the *travaux préparatoires* as well,

⁶⁷ Hull, *supra* note 12, at 67–76.

⁶⁸ The taking of hostages would be prohibited in 1949 (Geneva Convention IV, *supra* note 9, Art. 34, at 310). Deportations would be explicitly prohibited as well (Art. 49, at 318).

⁶⁹ See section 1 above.

⁷⁰ Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation', 94 *International Review of the Red Cross* (2012) 51, at 63.

⁷¹ Ironically enough, if the provision on public officials initially proposed was not included in the treaty in 1899, this was due in large part to the intervention of the Belgian delegation. *Actes de la Conférence de Bruxelles de 1874*, *supra* note 4, at 23–24; *Conférence internationale de la Paix*, *supra* note 4, Part 3, at 101–102.

as mentioned above. In these records were statements made by a number of state representatives in support of the possibility for civil servants to resign.⁷² On the other hand, occupying authorities certainly wished at times to have more leeway than they felt they had. Presented by the imperial government with a request to provide manpower to Germany, von Bissing thought that the Hague Regulations he was bound to apply set constraints on his capacity to respond. Although he challenged the legality of forced recruitment and labour in Germany, he nevertheless attempted to comply as much as possible with his government's request.⁷³ Hence, it would certainly be incorrect to conclude that the state of treaty law relating to military occupation met all of the stakeholders' expectations.

Disappointment, frustration and discomfort were felt. However, to the extent that these perceptions related to what seemed to be a unique case – that of Belgium – it was still possible to treat this one instance as an exception and to avoid challenging more generally the adequacy – in coverage or content – of the treaty law governing military occupation. The seemingly exceptional character of the situation in Belgium made it unnecessary to even consider adapting or supplementing the Hague Regulations. This is a possible explanation considered, for example, by Eyal Benvenisti:

At that time the Belgian experience may have seemed unique. It was thought that not every occupant would engage in such extensive exploitation of a country under its control and that only rarely would an occupant attempt to achieve substantial long-term outcomes during a limited presence in the occupied territory. This was probably the assumption of Garner and other international lawyers of that period who failed to perceive the need for updating the law of occupation.⁷⁴

Leaving aside the affirmation contained at the end of this quotation that modifying the law had in fact been necessary, we can conclude that, in the extent to which such a need would be derived from this Belgian 'special case' (where Germany's own conception of the laws of war at that time found particular expression), treating this case as highly exceptional would accommodate the supposition that no action was required in any event. It was indeed possible, in light of this conclusion, to retain confidence in the conviction that the rules of military occupation, as they had been codified, were sufficiently able to play their regulatory role between occupying and occupied powers.⁷⁵

As a matter of fact, reports and lists of alleged violations of the laws of war drafted during or after the war include many entries connected with other situations of military occupation as well (including Greece, Serbia, Russian Poland and Romania). Pointing at occasional and isolated condemnable behaviours, more systematic ones, or even policies implying disregard for the law, these documents, however, did not suggest that the Hague Regulations on military occupation were inadequate, in their

⁷² See the references in note 59 above.

⁷³ Hull, *supra* note 12, at 129–137.

⁷⁴ Benvenisti, *supra* note 1, at 121.

⁷⁵ For a discussion, e.g., of how the law of military occupation framed the Austrian-Hungarian occupation of Serbia, see Gumz, 'Norms of War and the Austro-Hungarian Encounter with Serbia, 1914–1918', 4 *First World War Studies* (2013) 97.

substance, in dealing with acts committed by the belligerents in such situations.⁷⁶ Some past sources of tension had even disappeared by the time World War I began, notably that which eventuated the insertion of the Martens clause into the Hague Convention's preamble. No longer did any state argue the right of the local population to resist occupation with force, and even Belgium and Germany limited their controversy over 'levée en masse' to the issue of whether or not the rule, as drafted in the Hague Regulations, had been respected.⁷⁷

The future victors of World War I shared mostly identical views on the rules relating to military occupation, and new areas were even identified where this body of law might become applicable or useful as a point of reference – in Africa, for instance. After a series of border clashes and failed incursion attempts between German East Africa and the bordering Belgian and British possessions (the Congo, Uganda, British East Africa and Northern Rhodesia, in particular), which had already begun at the end of the summer of 1914, Great Britain and Belgium resolved to regain control of Lake Tanganyika and joined forces to invade German territory. On 17 April 1916, the very day that Belgian troops began their operations, a letter was sent to the Belgian Ministry of Foreign Affairs on behalf of the British government suggesting that, for the sake of equal administration and treatment, all territories successfully invaded by either of the two allied powers would be placed under British administration exclusively. Belgium strongly opposed this idea but agreed with the British government's assertion 'that all occupation of German East Africa by British or Belgian troops should be regarded as provisional and temporary and that the close of hostilities must be awaited before a settlement is made'.⁷⁸

The instructions that the Belgian minister of colonies had sent earlier to General Tombeur, who led the invading Belgian troops, were already quite similar in substance to a number of provisions contained in the Hague Regulations. However, the instructions sent thereafter by Belgium and Great Britain to their men in German East Africa explicitly referred to these regulations, which were to be applied as far as practicable.⁷⁹

⁷⁶ As an example of such reports and an early endeavour to systematically collect and compile information on alleged violations of the laws and customs of war by the defeated powers, see *Conférence des préliminaires de paix, Rapport présenté à la Conférence des préliminaires de paix par la Commission des responsabilités des auteurs de la guerre et sanctions* (1919). Violations of the law of military occupation by the 1919 victors, for instance, by the British in Mesopotamia, were also identified. C. Rousseau, *Le droit des conflits armés* (1983), at 153.

⁷⁷ The first Belgian delegate in The Hague in 1899 gave priority to theoretical considerations over what he admitted would have been an attitude more likely to prove in the interest of occupied populations. *Conférence internationale de la Paix*, *supra* note 4, Part 3, at 89. Conversely, in 1914, Belgian public officials appear to have given precedence to the latter by inviting civilians not to resist (particularly after the invasion phase) and to hand in weapons they might possess. For the German and Belgian positions and claims, see, in particular, Auswärtiges Amt (Germany), *Die völkerrechtswidrige Führung des belgischen Volkskriegs* (1915); Kingdom of Belgium, Ministry of Justice and Ministry of Foreign Affairs, *supra* note 58; see also note 58 above and the text accompanying it.

⁷⁸ De Villiers to Belgian Ministry of Foreign Affairs, 17 April 1916, BMEF DA, AF 1.2, at 7280.

⁷⁹ Letter from the British representative in Le Havre to the Belgian Minister for Foreign Affairs, 9 November 1916, BMEF DA, AF 1.2, at 7730 (for instance); Order sent by the Belgian Minister of Colonies to General Tombeur, 23 September 1916, BMEF African Archives (AA), AE 371 (unindexed).

Both states agreed to recognize these regulations as the standard to be complied with by their troops and their civilian personnel, and bilateral discussions linked with the coordination of their action in German East Africa indeed occasionally mentioned the Hague Convention (or its annexed regulations). After the war, such references were also made, for instance, in Belgian internal correspondence concerning limitations on the possibility of adapting the system of justice in Ruanda-Urundi – the Belgian-occupied territory – before a mandate was officially attributed to it under the developing League of Nations system.⁸⁰ Application of the law of occupation to the colonial sphere was a new feature; the understanding at the time of the drafting of the Hague Regulations had been that they would apply within the boundaries of the so-called ‘civilized’ world only.⁸¹

Although less surprising in that these territories had links of a different nature with a state party to the Hague Convention,⁸² the law of military occupation was also applied in Ottoman Mesopotamia and Palestine before these territories were transformed into British mandates.⁸³ In any event, applying this body of law extensively to non-European territories Allied Powers gained over the Central Powers had several advantages. It played a part in establishing the appearance of a positive attitude towards international law, placing the Allies at a better moral angle and feeding expectations that reciprocity would ensue in situations where the occupier–occupied relationship was reversed on home territories. Moreover, in regard to the administration of territories won by the Allies over the Central Powers, it provided a suitable temporary solution that did not pre-empt any future decisions to be made concerning the possible return of these territories to their previous rulers or a redistribution of them amongst the Allies. Although it was not, and could not have been, anticipated, this also facilitated the transition of these territories towards their placement under the League of Nations mandate system.⁸⁴

In Europe, the section of the Hague Regulations relating to military occupation was also used as an instrument in the regulation of interaction between Germany and the powers occupying parts of its territory after the armistice. Marechal Foch’s note of instruction to the Allied commanders-in-chief, dated 15 November 1918, urged the latter to adhere to these rules,⁸⁵ and the German Reichsgericht in Leipzig concluded

⁸⁰ Letter from the British representative in Le Havre to the Belgian Minister for Foreign Affairs, 9 November 1916, BMFA DA, AF 1.2, at 7730; Ministry of Colonies: Note from the Second Direction to the Ruanda-Urundi Service, 21 March 1922, BMFA AA, AE 373 (unindexed).

⁸¹ Arai-Takahashi, *supra* note 70, at 72–79; Benvenisti, *supra* note 1, at 31, 41–42.

⁸² Turkey ratified Hague Convention II of 1899 but has not yet ratified Hague Convention IV of 1907, a treaty that it signed, however, on 18 October 1907. See <https://ihl-databases.icrc.org/ihl>.

⁸³ N. Bentwich, ‘The Legal Administration of Palestine under the British Military Occupation’, 1 *British Year Book of International Law* (1920–1921) 139; N. Bentwich, ‘Mandated Territories: Palestine and Mesopotamia (Iraq)’, 2 *British Year Book of International Law* (1921–1922) 48.

⁸⁴ Graditzky, ‘The Military Occupation of German East Africa as Part of Belgian Colonialism: International Law Principles and Beyond’, 48 *Journal of Belgian History* (forthcoming).

⁸⁵ E. Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918–1923* (1944), at 8; Benvenisti, *supra* note 1, at 123.

that they were applicable during the armistice period as well.⁸⁶ The Hague Regulations were also at times invoked after the Treaty of Versailles and the Rhineland Agreement entered into force in January 1920.⁸⁷ The armistice period comes as no big surprise considering that no peace treaty existed at the time. However, the consensual character of this post-armistice occupation – which, indeed, did not occur as the direct result of an invasion but followed the signing of the armistice treaty – was occasionally raised by stakeholders who wished to depart from the Hague Regulations and assertions they had made on occupation policies earlier in the war.⁸⁸ References to the Hague Regulations in the Rhineland Agreement itself⁸⁹ or in connection with events that took place after its entry into force seem more surprising. In the latter case, they were made by analogy or in relation to additional areas occupied in the context of sanctions measures. For instance, it was argued that limitations on collective penalties applicable in time of war under Article 50 of the Hague Regulations were unquestionably also to be respected within the context of peace-time treaty-based occupation.⁹⁰ As an illustration of the second case, arrests outside of the borders of the occupation zone defined in the Rhineland Agreement were justified on the basis of the law of military occupation, which was considered applicable to the area although there was no actual war ongoing.⁹¹

The fact that the Hague Regulations were referred to in many classic instances of military occupation,⁹² as well as in less traditional ones, that they framed discussions with only exceptional resort to external elements (such as customary law or military necessity) and that there was no open challenge to their relevance and substance during the war leads to the conclusion that the Hague Regulations relating to the law of military occupation met stakeholders' expectations overall. They appear to have provided enough flexibility and to have formed a body of law that proved mostly workable. This might explain the lack of further codification during the interwar period.

⁸⁶ Fraenkel, *supra* note 85, at 210, 214, 216.

⁸⁷ Versailles Peace Treaty 1919, 225 Parry 188; Agreement between the United States of America, Belgium, the British Empire, France and Germany 1919, reprinted in *Congrès de la Paix (Rhineland Agreement). Documents relatifs au régime des territoires rhénans pendant l'occupation militaire (28 juin–14 octobre 1919)* (1919).

⁸⁸ Benvenisti, *supra* note 1, at 123. The application of the Hague Regulations to occupied German territories was also challenged by many who argued that Germany had forfeited its rights enshrined therein by the lack of respect it had had for them. Fraenkel, *supra* note 85, at 9.

⁸⁹ Rhineland Agreement, *supra* note 87, Art. 6 (right of requisition), at 7.

⁹⁰ See, e.g., letter sent by Edouard Rolin Jaequemyns to the lieutenant general commanding the Belgian occupation army that relates to the case of the bridge by Hochfeld, 4 July 1923, BMFA DA, HCITR 49.2 (unindexed).

⁹¹ See, e.g., decision of the War Council of the Occupation Army (Aix-la-Chapelle) in the Lieutenant Graff case, 27 January 1923, BMFA DA, HCITR 49.3 (unindexed).

⁹² Including classic instances deemed highly exceptional in certain respects. Belgian stakeholders kept referring with conviction to this set of provisions. Graditzky, *supra* note 13.

4 The Hague Regulations' Equilibrium Remained Operational

It is possible to rest on the conclusion that the reason for the lack of adaptation of treaty law between the two world wars lies in the perception that most states considered the law of military occupation by and large satisfactory, with the possible exception of the Belgian case, and then the treatment of this case, as a *sui generis* situation. However, a critical approach to international law – the so-called 'Reims school' – which employs a sociological perspective and underlines the tensions and balance of power behind the development, interpretation and application of norms of international law, helps us to understand what took place in a more nuanced way, notably avoiding the occasional need to resort to the *sui generis* argument in relation to the occupation of Belgium.⁹³ Under this approach, the reluctance of states to accept proposals from non-state actors to engage in codification may also be easily understood.⁹⁴

In acknowledgement of the fact that legal phenomena may not be understood without recourse to elements of interpretation external to the legal sphere itself, the Reims school asserts that a series of political, economic and social factors that constitute our reality must be taken into account. In light of the fact that interaction between these non-static elements is naturally subject to continuous variation and change, approaching rules of law in order to understand their emergence and evolution requires a dynamic perspective.⁹⁵ At the point of emergence of a legal rule, or set of rules, lies a tangle of interactions between a variety of factors, resulting in tensions or contradictions. The soothing or resolution of these 'primitive contradictions' constitutes the *raison d'être* of the rule or set of rules. Thereafter, with the evolution of the underlying interactions, 'consecutive contradictions' are likely to occur, which may or may not necessitate adaptations within the legal sphere (namely redrafting or re-interpretation of the rules) in response to the need for the consecration of a new equilibrium.⁹⁶

In relation to the body of law under observation here, several lines of tension came to light both in Brussels (in 1874) and The Hague (in 1899 for the most part) while the codification of the law of military occupation was in discussion. These multilateral fora offered ideal venues for the expression of contradictions and potential opportunities for their transformation into written rules. A first line of tension deriving from the positions expressed by represented states pertained to the link between the mere fact of codifying this body of law and the transformation of a *de facto* situation – occupation imposed by military force – into a *de jure* one. A second line of tension arose

⁹³ On the 'Reims school', see, e.g., O. Corten, *Méthodologie du droit international public* (2009), at 59–60; O. Corten, *La rébellion et le droit international: le principe de neutralité en tension* (2015), at 353; J. Salmon, *Dictionnaire de droit international public* (2001), at 290.

⁹⁴ See section 1 above.

⁹⁵ A. Lagerwall, *Le principe ex injuria jus non oritur en droit international* (2016), at 482.

⁹⁶ Terminology by C. Chaumont, *Réalités du droit international contemporain: Force obligatoire et sujets de droit*, Actes des seconde et troisième rencontres de Reims, Faculté de Droit de Reims (1974), at 5.

in connection with the affirmation by some states of the existence of a right (if not a patriotic duty) of the occupied population to resist with force, in opposition to the right of the occupant to severely repress such resistance. At a more general level, there was a line of tension that emerged from the opposition between potential occupants, the great powers of the time (mainly Russia and Germany) and small or medium powers, who could much more easily imagine themselves under occupation, such as Switzerland, Belgium or the Netherlands. The former powers logically strove to grant more rights to occupants and the latter, of course, pushed in the opposite direction.⁹⁷

If tensions along the two first lines were not quite apparent at the time of World War I or in its aftermath,⁹⁸ those along the third line found vivid expression. However, it must have seemed that no better balance could be reached at the time for two reasons that go hand in hand. First, the drafting that resulted from the negotiations in Brussels and in The Hague, with its limited number of provisions and somewhat sketchy language, seemed to suit – or at least not to create major difficulties for – occupiers and occupied alike. Article 43, with its compromising wording, formed a centrepiece for legal argumentation, the balancing of interests and the absorption of tension.⁹⁹ Second, a number of belligerents found themselves in the diametrically opposed roles of the occupier and of the occupant, either simultaneously or alternately. Therefore, it would have proven difficult for them to argue for a change in treaty law in the existing equilibrium without undermining present or past positions.¹⁰⁰ Opening a discussion on the law of military occupation in the interwar period solely to add, amend or clarify a few rules could have been complicated for several states experiencing, or having recently experienced, military occupation. By contrast, the situation following World War II turned out to be sufficiently different to allow for a number of adaptations (disappearance of the German state, type and severity level of practices to regulate and so on).¹⁰¹

If the law of military occupation was perhaps not as complete, appropriate or clear as everyone wished it to be – leaving aside here the position of those who considered war (and occupation) to be a form of criminal act, therefore showing no interest in this regard – it would certainly have seemed undesirable or even hazardous to rethink and modify a balance that proved to be operational. Doubtless, the equilibrium reached in The Hague did not remove all ambiguities or erase all tensions, but it did absorb

⁹⁷ See, e.g., Benvenisti, *supra* note 1, at 31, 41; Graditzky, *supra* note 56, at 187–197; Kolb and Vité, *supra* note 5, at 30–32.

⁹⁸ A new perspective from a number of stakeholders, particularly Belgium, that is more favourable to the interest of the civilian population itself, might explain a decrease in tensions on the two first lines. See note 77 above; Kolb and Vité, *supra* note 5, at 32.

⁹⁹ See section 2 above.

¹⁰⁰ Benvenisti, *supra* note 1, at 130.

¹⁰¹ Adaptations introduced by Geneva Convention IV, *supra* note 6, in connection with situations of military occupation relate in particular to the extension of the scope of application, the improvement of the protection due to civilians (including the provision of food and medical care, the protection from deportation and the prohibition of hostage-taking and reprisals) and the clarification of the rules regarding public officials, judges and the legal system (criminal law). See the references in note 9 above.

most, if not all of them, and brought them to a point of temporary stability that was still effective during the interwar period. Placed in this perspective, the German occupation of Belgium may be seen as a war experience that, in the most powerful way, pushed international lawmakers of the interwar period to consider developing treaty provisions in one particular direction – a push that was still, however, insufficient to upset the balance between rights and duties of opposed stakeholders, as set by the Hague Regulations. For a variety of reasons evoked at the beginning of this work, the suffering experienced on the Eastern Front had far less potential for impacting the making of treaty law, being not so much framed – during or after the war – in terms of tensions within the law of military occupation. Outside of Europe, in contexts where this law – and the equilibrium it captured at the time of its codification – was originally not meant to be applicable, recourse to it was found to be convenient. Flexibility afforded by its rules and displayed by stakeholders' interpretation within the framework of such an extension did not lead to accentuated or new tensions potentially threatening to the pre-existing equilibrium.

5 Conclusion

This equilibrium, which World War I proved was still operational, would not prompt state authorities, as potential actors in amending the old or drafting the new treaty law provisions, to reopen a debate after the war, in diplomatic conference, on rules governing military occupation. At the time, and even taking into account the particularly acute case of Belgium, the existing rules had proven themselves generally adequate in absorbing tensions, in striking the appropriate balance between the necessities of the occupier and the requirement to protect the essential interests of the occupied population and its sovereign (temporarily unable to rule). A prevailing sense that the main problem had been Germany's lack of respect for these rules or its distorted interpretation of them also contributed to the understanding that what existed was adequate.

Admittedly, such a finding does not illustrate the typical, or the more global, lawyers' perspective on World War I and international law involving the notion of the emergence of a new order.¹⁰² What has been examined here, however, is a body of rules written to govern specific, exceptional situations – military occupations – such as those that occurred during the war;¹⁰³ a body of law that had been quite recently codified through a process that involved the broad participation of states – although mostly European – with a dress rehearsal in Brussels in 1874 and a confirmation session in The Hague in 1907. This process significantly integrated the positions that

¹⁰² See, e.g., Krüger, 'From the Paris Peace Treaties to the End of the Second World War', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 679, at 679–680; S. Neff, *Justice among Nations: A History of International Law* (2014), at 346–347.

¹⁰³ Benvenisti notes, however, that for the first time the case of Belgium revealed inadequacy between maintenance of stability, which is an underlying assumption behind the Hague Regulations and a more 'modern' exploitation objective connected particularly with long-lasting occupations. Benvenisti, *supra* note 1, at 120–122.

were to be taken during the war by the military and by civilian officials and lawyers, particularly the Germans, who had representatives participating in it.¹⁰⁴

This finding concerning an equilibrium that had remained operational does not imply that World War I had no impact at all on treaty law governing cases of military occupation. First, it brought forth a range of possible interpretations of provisions containing ambiguities or otherwise that offered room for different readings. Second, the Hague Regulations on military occupation were also applied in the non-European, including African, war theatre, something that had not actually been envisaged by the authors. In this context, it may even be considered that this body of law helped bridge the gap between the pre-war situation and elements of the new post-war paradigm. In the case of German East Africa, for example, the period of administration under the law of military occupation facilitated the transition from colonial status to the status of mandated territories under the mandate system of the League of Nations.

A third manifestation of World War I's influence on treaty law relating to military occupation occurred following World War II, though to a marginal extent and in combination with the much more considerable impact of the latter conflict. The sufferings of occupied populations during the first conflict and contemporary readings of the law had not been forgotten when diplomats met in Geneva in 1949 to debate and adopt new treaties, particularly Geneva Convention IV, which aimed at better protecting civilians and avoiding the recurrence of the horrors that they had experienced during World War II.¹⁰⁵

¹⁰⁴ Hull, *supra* note 12, at 76, 96.

¹⁰⁵ See, e.g., Pictet, *supra* note 8, at 315, 360.