# The Origins of the Concept of Belligerent Occupation

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The contemporary international law of occupation, which regulates the conduct of occupying forces during wartime, was framed over the course of deliberations among European governments during the second half of the nineteenth century. The debates between representatives of strong and weak powers on this matter dominated the conferences in Brussels (1874) and The Hague (1899), whose goal was to formulate the laws of war through an international agreement. The outcome, enshrined in what is known as the Hague Regulations of 1899,[1] represented a delicate balance that both provided protection for a civilian population brought under the control of an occupant and safeguarded the interests of the ousted government for the duration of the occupation. Occupation was conceived of as a temporary regime existing until the conclusion of a peace agreement between the enemy sides (unless the defeated party ceased to exist as a result of

1. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument ). The text concerning occupation is repeated in the 1907 Regulations: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument ).

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the war, a situation referred to as *debellatio*).[2] The evolution of the law of occupation in the nineteenth century was a gradual process, shaped by changing conceptions about war and sovereignty,[3] as well as by the balance of power emerging in Europe.[4]

The law of belligerent occupation as ultimately expressed in the 1899 Hague Regulations imposes two types of obligations on an army that seizes control of enemy land during war: the obligation to protect the life and property of the inhabitants and the obligation to respect the sovereign rights of the ousted government. These two prongs are not necessarily related to one another and, in fact, derive from different normative backgrounds and are subject to different political constraints. This essay tracks the evolution of the two obligations culminating in their merger in the text of the Regulations. The first principle, protecting individuals and their property, evolved from an earlier distinction between combatants and non-combatants and the duty to spare the latter from the scourges of war. The extension of this principle to encompass the property of non-combatants was first noted by Vattel and Rousseau in the second half of the eighteenth century. The obligation to respect the sovereign rights of the ousted government, the second principle, reflects the final stages of the crystallization of the concept of sovereignty as a nation's claim for exclusive control over its territory and nationals.

2. See, in general, Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993); Adam Roberts, "What Is a Military Occupation?" *1984 British Year Book of International Law* 55 (1985): 249.

3. The concept of occupation was applied in the context of both just and unjust wars. As pointed out by Vattel, the unjust enemy "can absolutely have no right whatever: every act of hostility that he commits is an act of injustice." Emerich de Vattel, *The Law of Nations,* ed. and trans. Joseph Chitty (1758; Philadelphia, 1852), vol. 2, bk. 3, chap. 13, para. 183, see also para. 187). But the law between nations could not be based on such a principle, which would require one sovereign to judge another (para. 188). Both for reasons of principle ("[e]very free and sovereign state has a right to determine, according to the dictates of her own conscience, what her duties require of her, and what she can or cannot do with justice") as well as for pragmatic reasons (para. 188), the law of war must accept reciprocal rights between enemy parties. As a result, "[e]very acquisition [ . . . ] which has been made in regular warfare, is valid according to the voluntary law of nations, independently of the justice of the cause and the reasons which may have induced the conqueror to assume the property of what he has taken. Accordingly, nations have ever esteemed conquest a lawful title; and that title has seldom been disputed, unless where it was derived from a war not only unjust in itself, but even destitute of any plausible pretext" (para. 195).

4. As Oppenheim wrote in 1905, "The distinction between mere temporary military occupation of territory, on the one hand, and, on the other, real acquisition of territory though conquest and subjugation, became more and more apparent, since Vattel had drawn attention to it. However, it was not till long after the Napoleonic wars in the nineteenth century that the consequences of this distinctions were carried out to their full extent by the theory and practice of International Law." Lassa Oppenheim, *International Law: A Treatise,* 1st ed. (London: Longmans, Green, 1905), 2:168.

This obligation emerged in Europe during the second half of the nineteenth century, a manifestation of the evolution of national identities in Europe.

The nineteenth-century notion of occupation as a temporary regime that does not confer sovereign authority can be understood as the culmination of a long process in which the concept of sovereignty was refined.[5] Indeed, the evolution of the concept of occupation can be seen as the mirror-image of the development of the concept of sovereignty. These parallel and interrelated processes were to continue in the twentieth century. The new principles of self-determination, democracy, and human rights that pierced the veil of national sovereignty and limited the sovereign affected also the law of occupation by modifying the restrictions on the occupant's exercise of authority. By the end of the twentieth century, the occupant would, for example, be required to respect the human rights of indigenous populations, who, in turn, would be entitled to promote their collective interests against the oppressive sovereign.[6] Indeed, the law of occupation can be seen as indirectly defining the concept of sovereignty just as tort law defined the Common Law private right to property by providing causes of action for its violation.

Given the evolution of the notion of belligerent occupation throughout the nineteenth century and due to the different political realities in different parts of the world, a variety of contemporaneous understandings of this notion arose. The development of the concept was principally a European project in the nineteenth century. At the same time, the term "occupation" was used quite differently in other parts of the world. The colonial powers operating outside Europe maintained the older doctrine of "occupation," which does not distinguish between conquest and occupation and therefore enabled the unilateral assumption of sovereignty over lands inhabited by what they deemed to be uncivilized peoples. The United States applied the concept of occupation with respect to its adjacent territories to denote an area that had been conquered by the U.S. and thereby became American vis-à-vis other states but did not enter the Union until Congress decided to incorporate it. The two-pronged European concept of occupation only became part of general international law in the early twentieth century, by which time the U.S. and the European colonial powers had already consolidated their territorial gains.[7]

5. Scholars like to portray the Peace of Westphalia (1648) as the birth of the idea of sovereignty. But as Derek Croxton shows, the concept of sovereignty remained vague and contested for centuries, reflecting the evolving balance of power in Europe. See Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *International History Review* 21 (1999): 569.

6. Benvenisti, *Occupation,* chap. 6.

7. On the further evolution of the law of occupation during the twentieth century, see Benvenisti, *Occupation.*

The diverging understandings of the same term created some confusion in the literature on the evolution of the concept of military occupation. In this essay, I attempt to distinguish between these different meanings and trace their distinct lineages. Part I outlines the intellectual roots of the European doctrine on occupation and examines their link with the evolving social and political conditions in Europe. Part II describes the meandering process of translating the doctrine from an idea into a legally binding norm of international law. Part III presents my conclusions.

## I. The Intellectual Roots of an Emerging European Concept

Part I considers the different theoretical approaches that led to the consolidation of the European concept of belligerent occupation by the mid-nineteenth century. Two lines of thought shape this concept: the principle of humanity, which entails a distinction between combatants and civilians as legitimate targets of warfare (discussed in Section A), and the principle of nationality, inspired by the French Revolution (Section B).

### *A. The Principle of Humanity: The Obligation to Protect the Property of Enemy Civilians*

The personal aspect of the law of belligerent occupation is derived from the fundamental distinction in the law of war between combatants and non-combatants. There is a long tradition of a duty to spare non-combatants, going back, Grotius suggested, to Biblical times.[8] But it was in 1758 that Vattel first proposed extending the personal immunity granted to civilians beyond their bodily integrity to include also their property.[9] Vattel explained that this would improve on ancient tradition (the latter acknowledged by Grotius as "a departure from the principles of humanity"),[10] stating,

8. Hugo Grotius, *De Jure Belli ac Pacis* (The Rights of War and Peace) (1625), bk. 3, chap. 11, paras. 9, 10.

9. Vattel, *The Law of Nations,* at para. 200. On the emerging distinction during that period between the conqueror's rights vis-à-vis the former ruler and its more limited authority over the indigenous population, see also Sharon Korman, *The Right of Conquest* (New York: Clarendon Press, 1996): 29–40.

10. According to Grotius, *Jure Belli,* chap. 15, paras. 1–3, the property of enemy subjects may be taken in a just war to recover the debt that the enemy has incurred or by way of reprisal in return for other goods taken by the enemy. In paragraph 4, Grotius explained the logic of his assertion but admitted that "it is in some measure a departure from the principles of humanity."

> In the conquests of ancient times, even individuals lost their lands. Nor is it a matter of surprise that in the first ages of Rome such a custom should have prevailed. The wars of that era were carried on between popular republics and communities. The state possessed very little, and the quarrel was in reality the common cause of all the citizens. But at present war is less dreadful in its consequences to the subject: matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens. The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war; and the conquest only subjects them to a new master.[11]

Note that this proposition is devoted solely to the principle of personal protection and says nothing about the public aspect of belligerent occupation, namely, the ousted prince's retention of sovereignty. Vattel assumed that the occupant replaces the prince and gains valid title over his property. In other words, according to Vattel, there is no distinction between an occupant and a conqueror who may treat the territory gained as under its sovereignty: "If the conquered town or province fully and perfectly constituted a part of the domain of a nation or sovereign, it passes on the same footing into the power of the conqueror. Thenceforward united with the new state to which it belongs."[12]

Similarly, under Vattel's notion, the conqueror acquires other rights of the enemy, such as his right to any "city or a country which is not simply an integrant part of a nation, or which does not fully belong to a sovereign, but over which that nation or that sovereign has certain rights"[13] and title to the ousted sovereign's property.[14]

In the *The Social Contract* (1762), Jean-Jacques Rousseau likewise elaborated on the concept of war as a conflict that takes place only between governments.[15] He attributed the necessary implications of this concept

11. Vattel, *The Law of Nations,* at para. 195 (note that civilians who do take arms against the conqueror may lose their property [para. 19]).

12. Ibid., para. 195.

13. Ibid., para. 199.

14. Ibid., para. 197. However, the conqueror's right to transfer title to a third party must await a peace treaty: "Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them: but it is only by the treaty of peace, or the entire submission and extinction of the state to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect. [ . . . ] Thus, a third party cannot safely purchase a conquered town or province, till the sovereign from whom it was taken has renounced it by a treaty of peace, or has been irretrievably subdued, and has lost his sovereignty." Ibid., paras. 197, 198.

15. Jean-Jacques Rousseau, *The Social Contract,* trans. G. D. H. Cole (1762), bk. 14 ("War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders").

to the rights of governed peoples, recognizing the distinction between public and private property and the consequent immunity of private property: "Even in real war, a just prince, while laying hands, in the enemy's country, on all that belongs to the public, respects the lives and goods of individuals: he respects rights on which his own are founded."[16]

During the first half of the nineteenth century, this statement by Rousseau gained little notice.[17] Better known were pronouncements made by the French jurist Jean-Étienne-Marie Portalis and by Talleyrand, which were later described as heavily influenced by the ideas underpinning the French Revolution, human rights and self-determination.[18] In his inauguration speech at the *Conseil des prises,* on 14 floréal year VIII, Portalis declared, "It is a relationship between objects, not between individuals, which constitutes war; it is the relations between states, not between individuals."[19] Talleyrand was apparently the first to turn this distinction into legal doctrine. Writing to Napoleon on November 20, 1806, he stated: "D'après la maxime que la guerre n'est point une relation d'homme à homme, mais un relation d'État à État, dans laquelle les particuliers ne sont enemis qu'accidentellement . . . le droit de gens ne permet pas que le droit de guerre et le droit de conquêste qui en derive, s'éntendent aux citoyens paisibles et sans armes . . . ."[20]

This view evolved into a general theory of war in the nineteenth century, to be known later as the Rousseau-Portalis doctrine, based on the principle of humanity. Harming non-combatants was deemed excessive under this theory. As Talleyrand suggested, the law of war rested on the principle that nations in war must wreak the least possible harm.[21] As long as civilians keep themselves outside the war, it is not necessary to harm them.[22] This

16. Ibid.

17. As mentioned below, notes 18–22, the German scholars Heffter and Bluntschli who elaborate on this idea do not mention Rousseau in this context.

18. J. C. Bluntschli, *Das Beuterecht im Krieg und das Seebeuterecht Inbesondere: Eine Völkerrechtliche Untersuchung* (Nördlingen: C. H. Beck,1878), 60.

19. "C'est le rapport des choses et non des personnes, qui constitue la guerre; elle est une relation d'État à État, et non d'individu à individu." Cited by August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* (Berlin: E. H. Schroeder, 1844), at para. 119, n. 3.

20. "On the basis of the principle that war is not a relationship between men but a relationship between states, in which individuals are enemies only by coincidence . . . the law of nations does not permit the right of war and the right of conquest that is derived from it, to affect peaceful and unarmed [enemy] citizens." Cited by Heffter, *Das Europäische Völkerrecht,* at para. 119, n. 3. Note that Talleyrand does not restrict the right of conquest. This message found succinct expression in the famous statement of King William of Prussia on August 11, 1870, as the Prussian Army invaded France: "I conduct war with the French soldiers, not with the French citizens."

21. Cited by Heffter, *Das Europäische Völkerrecht,* at para. 119, n. 3.

22. Ibid., para. 119; Bluntschli, *Das Beuterecht,* at 60–70.

approach was reflected in military manuals[23] and, thereafter, in international conventions.[24] In the specific context of the international law of war, this distinction produced rules protecting against the taking of private property in conquered areas.

### *B. Enter National Self-Determination: "Occupation" Becomes Distinct from "Conquest"*

The principle of humanity did not prevent invading armies from annexing or otherwise imposing their governmental structures on the occupied population while, simultaneously, respecting private property. The principle could not explain why such annexations should be illegal under the law. With the French Revolution, however, a new concept emerged—national self-determination—which would ultimately restrict the authority of the occupant. Under this concept, among other things, the territory of the state belongs to its people, not to the king. The ramifications were apparent: The first French Constitution of 1791 proclaimed that "the kingdom is one and indivisible"[25] and no prince may cede it to foreigners. It gave the principle Europe-wide validity:[26] The Constitution recognized further "the liberty of any people" and declared that France would never use its might to conquer other peoples.[27] This marked the beginning of an era in which individuals identified themselves more and more with their governments. Wars were no longer duels between princes. In a war between nations, citizens were expected to sacrifice their lives to repel the invader and resist the occupier. That citizens were interested in far more than the protection of their private property became eminently clear already in

23. Bluntschli, *Das Beuterecht,* at 64–69, described the French military criminal codes of 1793 and 1796, which prohibited pillage and other takings of private property, the 1845 Prussian criminal statute, which prohibited unauthorized acts against enemy combatants and civilians, and the German military criminal statute of 1872, which prohibited "unauthorized" pillage and plunder; and, of course, there was the so-called Lieber Code of 1863 (see below note 95 and accompanying text).

24. The Rousseau-Portalis Doctrine was considered to be reflected in the Hague Regulations of 1899 and 1907. See Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), 79.

25. The Constitution of 3 September 1791, Title II ("Of the Division of the Kingdom and of the Status of Citizens").

26. The Miscellaneous Provisions of the Constitution note that "the French colonies and possessions in Asia, Africa, and America, although constituting part of the French dominion, are not included in the present Constitution."

27. The Constitution of 3 September 1791, Title VI ("Of the Relations of the French Nation with Foreign Nations"): "The French nation renounces the undertaking of any war with a view of making conquests, and it will never use its forces against the liberty of any people."

1808, with the eruption of guerrilla warfare in Spain against the occupying French Army.[28] It thus became increasingly difficult to assert that citizens' allegiance to their nation could be cut simply through military defeat. In fact, by the mid-nineteenth century and, in particular, subsequent to the Franco-Prussian War, the prevalence of irregular fighters in occupied territories threatened to entirely jeopardize the effort to regulate the law of occupation. The failure of the 1874 Brussels Conference was undoubtedly attributable to a lack of accord over the right of citizens to use force against an occupant.[29] The idea of national self-determination and its corollary in the context of war and occupation contributed to the balance of power that emerged in Europe following the Napoleonic Wars. The prohibition on unilateral annexation further bolstered the territorial stability enshrined in the Congress of Vienna in 1815.

Thus, the emerging European order of nation-states and the notion of *national* sovereignty necessitated a new theory that would delineate and provide the rationale for more stringent limits on the occupant's powers. This new theory distinguished "occupation" from "conquest" and was developed in two steps. The first theoretical step was the recognition of the principle of the inalienability of sovereignty through sheer force. Occupation as such does not confer sovereignty over enemy territory. The second step was the recognition of what Gregory Fox has termed "the conservationist principle,"[30] which seeks to protect the bases of power of the ousted government and, hence, imposes limitations on the occupant's authority to manage public property and modify existing legislation.

French practice and law seem to have been the impetus for recognizing the principle of inalienability of sovereignty. In adherence with the 1791 Constitution, invading French armies would refrain from unilateral annexation of territories and would not seek treaties of cession with defeated enemies to legitimate new French holdings. The principle of national self-determination, as applied outside of France, meant that invaded populations were, at least in French eyes, entitled to determine their preferred form of government.[31] A decision to "reunite" with France could be made only by

28. On the evolution of guerrilla warfare in Europe in the early nineteenth century and its legal implications, see Francis Lieber, *Guerrilla Parties* (New York: Nostrand,1862).

29. See below, notes 35–43 and accompanying text.

30. Gregory H. Fox, "The Occupation of Iraq," *Georgetown Journal of International Law* 36 (2005): 195–297, 199.

31. J. H. W. Verzijl, in his *International Law in Historical Perspective* (Leyden: Sijthoff, 1978), 9–A: 152, reproduces the French Decree of 15/17 December 1792, which promised to export the French ideas of liberty, equality, and fraternity to occupied countries, which, in turn, would thereby achieve sovereignty and self-determination.

local assemblies in the occupied territories.[32] "Les Pays Réunis" would then become part of the French nation.[33]

The French Cour de cassation, despite its initial hesitation,[34] for the most part followed the same line of thought when deciding that occupation of enemy territory does not transform into sovereignty, nor does it otherwise alter the status of that territory or subject it to the laws of the occupant. Challine reported that the Cour de cassation began to apply this doctrine in 1812, when it ruled that the French occupation authorities in the Papal States need not respect laws promulgated by the King of Naples, the previous occupant of the same area, due to his lack of sovereignty over the territories; the court asserted that recognition of the laws of the previous occupant would violate the rights of the sovereign, the Pope.[35] In another decision, from January 22, 1818, which later caught the attention of legal scholars and was even cited by the U.S. Supreme Court,[36] the Cour de cassation determined that the French occupation "had not communicated to the inhabitants of Catalonia the title of Frenchman, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed."[37] The same court subsequently found, in 1837, that the temporary occupation of Martinique by Britain in 1813 could not effect any change to the status of the island as French nor to the laws there. "The temporary

32. See Nehal Bhuta, "The Antinomies of Transformative Occupation," *European Journal of International Law* 16 (2005): 733 ("The revolutionary government in France renounced the right of conquest, and offered instead 'fraternity' with peoples who rejected the dynastic principle of legitimacy in favour of popular sovereignty"); Thomas Baty, "The Relations of Invaders to Insurgents," *Yale Law Journal* 36 (1927): 974–77 ("When the French in 1792 invaded Italy, they had no scruple in summoning the invaded populations to repudiate all allegiance to their sovereigns. . . . Nys may tell us that the French generals 'limited themselves' to breaking the ties between invaded peoples and their princes and to convoking assemblies to determine the form of government").

33. Paul Challine, *Le droit international public dans la jurisprudence française de 1789 à 1848* (Paris: Domat-Montchrestien, 1934): 116. Challine also noted the Decree of 15/17 December 1792 (see above, note 31), which provided, inter alia, that it was not necessary to sign a treaty of cession to effect sovereignty change when the people situated in the occupied area, being the sovereign there, had manifested their wish to be reunited with France.

34. Edgar Löning reported on an early decision of the Paris Cour de cassation from 23 Frimaire year V, which determined that a French area occupied by an enemy was no longer to be considered part of France. Edgar Löning, *Die Verwaltung des General-Gouvernements im Elsaß* (Strassburg: K. J. Trübner, 1874), 27, n. 1.

35. Challine, *Le droit international public* at 116–19.

36. Ibid., 119. This was later discussed by Heffter, *Das Europäische Völkerrecht,* at para 186, 350; Henry W. Halleck, *International Law* (New York: D. Van Nostrand,1861), 775 and following.

37. Halleck, *International Law,* 782 (quoting Ortolan's *Diplomatie de la Mer*).

suspension of possession as a consequence of the conquest did not end the area's subjection to French law."[38] Moreover, Challine described a Cour de cassation 1841 ruling that occupation cannot abrogate the laws in force in the occupied territory,[39] as well as an 1843 decision that concluded that regulations promulgated by an occupant imposing limits on interest rates were no longer in force from the moment the occupation had ended.[40] The doctrine was far from clear at the time, however. Challine pointed also to several decisions that seem to contradict the new theory, such as the Cour de cassation's reference to events occurring in French territory occupied by Spain as taking place in enemy territory.[41]

But the Cour de cassation's assertions were pronounced only in the context of civil or criminal litigation and were not conceptualized as a general doctrine of the laws of war. Instead, such a conceptualization was to be the achievement of the German scholar August Wilhelm Heffter, a University of Berlin professor of law.[42] In his influential 1844 treatise on European international law,[43] he suggested that, except in situations of complete subjugation (*debellatio*), occupation should be regarded as temporary control that does not amount to the acquisition of sovereignty: "By the mere occupation of the other side's territory or part thereof, the invading enemy does not immediately replace the former state authority, for as long as the invader continues the war, when it is still possible that the fortunes of the war will change. . . . From a legal perspective, the defeat of the enemy does not immediately bring about the complete subjugation of the enemy's state authority."[44]

38. "L'occupation temporaire de cette colonie par la Puissance anglaise n'a pu porter aucune attainte aux droits de la France ni changer le caractére de sa possession sur la Martinique, possession momenanément suspendue par l'effet de la conquête, mais qui n'a pas cessé quant au droit d'être régie par la loi française." Charles Rousseau, *Le droit des conflits armés* (Paris: Pedone, 1983), 136–37 (citing the French Cour de cassation decision of February 1, 1837, *Magill v. Héritiers Monnel-Gonnier*).

39. Challine, *Le droit international public* at 122–24.

40. Ibid., 124–25.

41. Ibid., 119–22.

42. According to Schulze, "notice nécrologique," *Annuaire de l'institut de droit international* 5 (1882): 25–40, Heffter (1796–1880) was influenced by French law and culture while serving as a young professor in Bonn. When he later moved to Berlin, he came to be influenced by his friend Eduard Gans, who had been Hegel's student. In fact it was Gans who suggested to Heffter that he write the 1844 book. Heffter also served as a consultant to governments and as a high-ranking judge. According to one commentator, his dual role kept him from pushing his ideas forward and from seeing through the chrysalis of the modern state (ibid., 38).

43. His 1844 book is the first attempt of a "real" lawyer to tackle international law. This is probably the reason for some of his normative refinements and the book's impact within the German and international academia (ibid.).

44. Heffter, *Das Europäische Völkerrecht,* 220–21: "Der eindringende Feind tritt nicht

Heffter noted that his thesis diverged from the vast literature on the subject, which had failed to distinguish between occupation and conquest.[45] His theory was formulated as a logical inference ("*unmittelbar folgerung*")[46] from what he referred to as "the new principle of war" ("*neuere Kriegsprincip*"), namely, the principle that war among civilized nations is not a war of mutual annihilation but one of limited duration that never loses sight of the goal of reestablishing peace. This principle rested on the two basic tenets of the society of states in Europe, sovereign equality[47] and minimum harm,[48] which, together, yielded a new theory on limited warfare.[49]

But not only was Heffter a thinker, he was also a realistic lawyer attuned to state practice and power relations.[50] Despite his reliance on Portalis and Talleyrand and his vision of a society of sovereign and equal European states as the basis for the modern law of nations, he stopped short of requiring the occupant, when acting as an administrator of the occupied territory, to respect the bases of power of the ousted government under the principle of minimum harm. He also did not subscribe to the French understanding of the consequences of the principle of national self-determination, that treaties of cession are not a legitimate way of ending wars. Quite to the contrary, he believed that occupants have a legitimate expectation of acquiring sovereignty after a successful military campaign. This expectation,

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sofort durch die bloße Besitzgreifung des anderseitigen Gebietes oder eines Theiles desselben an die Stelle der bisherigen Staatsgewalt, so lange der letztern noch eine Fortsetzung des Krieges, mithin auch eine Umkehr des Kriegsglückes ist. . . . eine vollkommene Subjugation des eingedrungenen Feindes in die Staatsgewalt des Andern, vermag juristisch nicht sofort gefolgert zu werden."

45. Ibid., 221, n. 1. He did single out one commentator, Cocceji, in his book "de iure victoriae" and his commentary on Grotius, who had been, according to Heffter, "on the right track."

46. Ibid., 221.

47. Heffter understood sovereign equality and independence as implying "complete equality" among states under international law (ibid., para. 27). States, just like individuals, have the fundamental right to exist and to develop themselves physically and morally (para. 29). Moreover, states are entitled to respect for their physical personalities as members of human society (para. 31) ("Achtung des fremden Staates in seiner physischen Persönlichkeit, als eines Theiles des Menschengeschlechtes").

48. Heffter's principle of necessity, articulated as a "fundamental maxim": "Do not cause more harm to your enemy, even during the war, beyond what is necessary for accomplishing the goal." ("[F]üge Deinen Feinden auch im kriege nicht mehr Uebel zu, als es für die Durchsetzung des Zweckes unvermeidlich ist.") Ibid., para. 119.

49. Ibid., para. 130.

50. Immediately following the "fundamental maxim" of necessity (see above, note 48) Heffter recognizes the doctrine of the "reason of war" ("Kriegsräson"), which accepts that, in situations of extreme danger or in the face of a need to reestablish equality in combat, one is released from the principle of necessity.

based on state practice, entitles the occupant to administer the territory under its control like the sovereign. In his discussion of how war ends, Heffter relied on state practice, rather than moral principles, to explore the limits of the occupant's authority. According to Heffter, European state practice revealed that peace agreements usually assign sovereignty to occupants over territory they gained during war. Therefore, an occupant that seeks to acquire sovereignty in a peace treaty can be regarded as having "definitive possession." Its expected sovereignty authorizes the occupant to exercise provisional authority over the territory also during the interim period between the end of hostilities and commencement of peace. While the occupant is required to respect both general human rights as well as the private rights of citizens, it is not otherwise bound by the laws of the former sovereign.[51] Only when the occupant has no intention of keeping the occupied area under its sovereignty, must it be more circumspect, upholding the ousted sovereign's laws and institutions and generally acting like a creditor handling his debtor's goods.[52]

The second theoretical step in the evolution of the law of belligerent occupation, namely, recognition of the conservationist principle, was developed by the Italian jurist Pasquale Fiore.[53] Writing in 1865, this young international lawyer provided the missing theoretical basis for the conservationist principle by founding the system of international law on the idea of the *nation,* as proclaimed by the French Revolution, rather than the *state.* In Fiore's view, under prevailing international law, all nations must be considered equal and autonomous. Their equal right to sovereignty in their territories implies that their title cannot be taken away by force: "According to our principles, all nations are equal and autonomous and have equal right to sovereignty in their territories, [they] do not succumb to the law of force, and their territories do not pass to the dominion of the victorious power if it arbitrarily and violently occupies them."[54]

51. Heffter, *Das Europäische Völkerrecht,* paras. 181–86. At para. 185, he states, "Der Eroberer ist dabei auch keinesweges, wie Manche behaupten, an die Regel des früheren Staates gebunden. Er hat nur die allgemeinen Menschenrechte, so wie die demgemäß erworbenen speciellen Privatrechte der Unterthanen zu beachten; aber die Form des öffentlichen Verhältinsses hat er allein als freier Inhaber der Staatsgewalt zu bestimmen. Das Staatsgut steht unter seiner Disposition."

52. Ibid., 186.

53. On Fiore's (1837–1914) humanitarian-liberal philosophy and his approach to the study of international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001): 54–57.

54. Pasquale Fiore, *Nuovo dritto internazionale pubblico* (Milan: Casa Ed. e Tip. degli autori-ed,1865), 177 ("[S]econdo I nostri principii essendo le nazioni tutte eguali ed autonome, ed avendo l'egual dritto di sovranità nel loro territorio, non possono soggiacere al dritto della forza, nè le loro terre possono passare nel domino del vincitore se questo arbitrariamente e violentemente le avesse occupate").

From this premise, Fiore deduced the limitations on the occupant's authority. Just as it is restricted from interfering with the property of individuals, an occupant is precluded from interfering with the property of the nation: "The law of postliminium, which, according to our doctrine, is founded on the principle that the fact of war is not sufficient to destroy legitimate rights and that these rights may not be lost without the consent of the individuals to whom they belong, applies to private relations as well as to public relations."[55] For this reason, Fiore asserted that laws promulgated by the occupant that seek to change the preexisting public legal order expire with the termination of the occupation, unless the nation has consented to those laws.[56]

In the 1885 French edition of Fiore's book,[57] the restrictions on the occupant's authority are more elaborate and clear. The occupant is obligated to exercise only the authority necessary for meeting the immediate needs of the occupation. This, according to Fiore, is the product of the consolidation of three principles: all communities' need for a governing body, the need to enable the entity with authority to exercise sovereign functions, and the principle that the entity that exercises sovereign rights in an occupied territory must do so without dispossessing the actual sovereign completely and definitively. The occupant must exercise its power under the constraints of necessity and the immediate goals of the occupation[58] and in accordance

55. Ibid., 443: "Il dritto di postliminio, che secondo la nostra dottrina si fonda sul principio che il fatto della Guerra non è sufficiente a distruggere I dritti legittimi, e che questi non posson perdre senza il consenso degli individui a cui appartengono, si applica ai rapporti privati ed ai rapporti pubblici."

56. Ibid., 444: "[T]utti gli atti amministrazione fatti per ordine del sovrano invasore cessano di aver vigore, tutte le modificazioni fatte alla costituzione dello Stato e alle relazioni politiche dei citadini, cessano egualmente, a menochè non siamo volute e consentite dalla nazione. . . . per quello che si riferisce ai giudizii compiuti, questi sono validi a meno che non contraddicano il dritto pubblico costituzionale voluto e consentito dalla nazione." ("When the occupation ends, all administrative acts made by the invading sovereign expire, all amendments made to the constitution of the State and to the political relations of the citizens cease equally, unless the nation sought and consented to them. . . . With respect to final judgments, these shall be valid as long as they do not contradict the public constitutional law sought and consented to by the nation.") See also Charles Calvo, *Le droit international théorique et pratique,* 4th ed. (Paris: Guillaumin,1888), vol. 4, para. 2181 (p. 220): "Le droit international ne reconnaît pas à l'occupant la faculté de changer les lois civiles et criminelles des territories sur lesquels se trouvent ses troupes, ni d'y faire administrer la justice en son nom. . . . Cependant, si des necessities militaries l'y contraignent, l'occupant peut empêcher l'application de certaines lois et substituer le pouvoir militaire à l'autorité legal du pays, mais uniquement dans la mesure où cette authorité constitue une force pour l'ennemi et par consequent un danger pour l'armée d'occupation." (Calvo, an envoy for Argentina, was a founding member of the *Institute de droit international*.)

57. Pasquale Fiore, *Nouveau droit international public,* trans. Charles Antoine, 2nd ed., (Paris: Durand, 1885), vol. 3.

58. Ibid., 317–18.

with the laws of humanity and justice and honor, as well as with the laws and functions of the sovereign and laws and customs recognized by civilized peoples.[59] Calvo took the same approach.[60]

The theoretical basis for the law of belligerent occupation is derived from the idea of equal sovereignty, which implies the inalienability of sovereign title without the consent of the sovereign. Under this theory, sovereignty, just like private property, is protected from unilateral alienation from its rightful owner. Therefore, the mere exercise of control over enemy territory does not confer sovereignty on the occupant, whose authority is temporary and limited. As a result—a step Heffter hesitated to make, but Fiore took—the occupant must take into account not only the rights and interests of the local inhabitants, but also those of the nation as represented by the ousted government. This vision of the regime of occupation yields restrictions on the occupant's powers that are aimed, among other things, at ensuring the preservation of the ousted government's bases of power until its return to power.

No doubt, these two scholars, Heffter and Fiore, managed to capture and translate into a legal concept both the evolving perceptions as well as the political realities of their period. Factors that contributed to the evolution of these two dimensions of the legal doctrine included the French Revolution, with its notions of human rights and national self-determination, the subsequent Napoleonic Wars and the ensuing rise of national identities, the Congress of Vienna and the balance of power it successfully established, and, lastly, the actions of private entrepreneurs that stirred public outcry against the scourges of war. This new doctrine accommodated well the emerging political order in Europe, an order of nation-states, not of princes fighting private duels. These nation-states sought two principal goals. On the one hand, they were committed to their nationals and, hence, wanted to guarantee the lives of their citizens once subject to enemy control. Yet, on the other hand, they were also apprehensive of their citizens and sought, at the same time, to ensure that their citizens did not seize the moment to secede or unite with the enemy. Hence the rules protecting private individuals and their property; hence the rules authorizing the occupant to apply but also to protect—against indigenous challenges as well—the ousted sovereign's laws and property during the occupation. These common European concerns explain why the European version of the doctrine on occupation was accepted as law within a relatively short period of time.[61] The shared understanding of the concept of occupation did not mean that everyone saw all aspects

59. Ibid., 323.

60. Calvo, *Le droit international,* vol. 4, para. 2181 (p. 220). See above, note 56.

61. On the codification efforts, see below, Part II (B).

of the law in the same light. Quite the contrary: the views of potential occupants diverged significantly from those of the potentially occupied. But both sides were prepared to obscure these differences—with the aid of able drafters—because both had much to gain from an agreement.

## II. The Transformation of the Concept of Occupation into European and International Law

The transformation of the doctrine on belligerent occupation from an idea into a binding legal norm was a meandering process with many participants. This Part outlines the different shapes and forms the idea took until it was ultimately included in the 1899 Regulations of the First Peace Conference at The Hague. As pointed out below, the inclusion of the doctrine of belligerent occupation in these Regulations did not endow it with global applicability. Rather, it was understood, at the time, as applying only among the signatories, which were mostly European states.[62] The last Section of this Part describes the territorial scope of the doctrine as things stood in 1899.

### *A. The Doctrine on Belligerent Occupation Arrives in America*

The evolving doctrine on occupation reached the United States of America as part of a process of territorial expansion through war. As could be expected, this doctrine took on an idiosyncratic meaning, or even a number of meanings, once it crossed the Atlantic, which reflected the constraints of a nation engaged in wars of expansion as well as civil war. The American doctrine on occupation was shaped by two conflicting approaches. On the one hand, the evolving European doctrine had a significant influence; on the other hand, the Americans were intimately and acutely aware of the British position, which did not distinguish between occupation and conquest[63] and

62. This should not be surprising, given the European view at the time that international law encompassed relations only among "civilized nations." See Oppenheim, *International Law,* 1:31 (the family of civilized nations has the discretion to consent to the entry of a new member based on the family's assessment of the new entrant's being a "civilized State which [wa]s in constant intercourse with members of the Family of Nations"). On the law of occupation as a European project, see also Bhuta, "The Antinomies of Transformative Occupation."

63. This was made clear in the case of *The Foltina,* 1 Dodson 450, 451 (1814), 165 Eng. Rep. 1374, 1375 (1752–1865). ("No point is more clearly settled in the Courts of Common Law than that a conquered territory forms immediately part of the King's dominions.") Despite the asserted "clarity" of the law, the High Court of Admiralty was breaking ground in this decision. The case it cited as authority for its decision, *Campbell v. Hall,* 98 ER 1045,

whereby mere occupation was an effective way of expanding its dominion to occupied territories and their inhabitants.[64] Indeed, as late as 1914 and despite ratifying the 1899 and 1907 Hague Regulations, Britain asserted sovereignty over Egypt and Cyprus through occupation.[65]

The British influence is reflected in the jurisprudence of the U.S. Supreme Court throughout the nineteenth century. In the case of *U.S. v. Rice,* for example, which discussed the legal status of a port captured by the British during the War of 1812, Justice Story recognized that "[b]y the conquest and military occupation of [the U.S. territory of] Castine, the [British] enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place."[66] The occupant was not subject to any restrictions imposed by international law: "By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose."[67] In a case from 1850, this time dealing with

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1047 (1774), referred to a territory (Grenada) that had been formally ceded by France to Britain in a peace treaty. But Heligoland, where the *Foltina* had been seized, had not been ceded (by Denmark) to Britain at the time of seizure. In *The Foltina,* the court acknowledged as "somewhat extraordinary, that, in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the Court in the decision of the present question." Ibid. The claimant was probably relying on the distinction made by Vattel between title based on possession, which becomes complete upon a treaty, and title based on right (see above note 12 and accompanying text); the court, however, rejected this distinction as "more formal than real and substantial" (ibid., 452, 1375).

64. Halleck, *International Law,* 784: "[F]oreign territory becomes a dominion, and its inhabitants the subjects of the king, ipso facto, by the conquest made by the British arms, without any action of the legislature."

65. For a critical assessment of these occupations, see Baty, "The Relations of Invaders to Insurgents," 974–77; Bhuta, "The Antinomies of Transformative Occupation," 729. It would not be surprising to learn that the British government was, in principle, not very enthusiastic about the European efforts to codify the laws of war on land during the nineteenth century. It opposed the Russian idea of convening the conference in Brussels, initially rejecting the invitation to participate. Later, after receiving proper assurances, the British government instructed its delegate to monitor the negotiations without taking an active part. See Fedor F. de Martens, *La paix et la guerre,* trans. N. de Sancé (Paris: A. Rousseau, 1901), 106–9.

66. *United States v. Rice,* 4 Wheat. 246, 17 U.S. 246, 254, 4 L.Ed. 562 (1819). Justice Taney further noted, "The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to Recognise and impose. . . . Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require." Ibid., 254.

67. Ibid.

the U.S. occupation of Mexico, Chief Justice Taney reaffirmed the view that "by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country."[68] This approach is essentially similar to that first suggested by Vattel and Rousseau: as long as one has exclusive possession[69] over a given territory, one is entitled to treat it as one's own, while the sovereignty of the ousted government is "of course, suspended."[70] "[M]ilitary conquest completely displace[s] the sovereignty of the prior possessor."[71]

At the same time, American jurists were influenced by the European literature on international law in general and on the laws of war in particular. Betsy Baker Röben has described in her work[72] a large informal group of liberal American and European international lawyers who corresponded regularly and shared their scholarship.[73] Included in this group were Heffter and Bluntschli, the Europeans, and Halleck and Lieber, the Americans.[74] Heffter's 1844 book had considerable influence in America, which grew even stronger with the publication of the French versions (the first in 1857),[75] and was regarded as one of the two most important authorities on international law for Americans along with Wheaton's 1836 *Elements of International*

68. *Fleming v. Page,* 9 How. 603, 50 U.S. 603, 612, 13 L. Ed. 276 (1850) at 50 U.S 603, 615. On this doctrine, see also William Birkhimer, *Military Government and Martial Law,* 3rd ed. (Kansas City, Mo: F. Hudson, 1914), 54–58.

69. The key test is possession: "while the victor maintains the exclusive possession of the conquered country." *United States v. Rice,* above, note 66, ibid. See also Halleck, *International Law,* 780 (same emphasis).

70. *U.S. v. Rice,* above note 66, ibid.

71. See the decision of the U.S. Court of Appeals in *State of Netherlands v. Federal Reserve Bank,* 201 F2d 455, 461 (2d Cir. N.Y. 1953) (citations omitted): "The nineteenth century American view that military conquest completely displaced the sovereignty of the prior possessor, was substantially modified by the Regulations respecting the Laws and Customs of War on Land, ratified by the United States as an annex to the Fourth Hague Convention of 1907. Since the adoption of these Regulations it is generally agreed that the occupant does not succeed to sovereignty over the occupied territory, but has only limited administrative authority."

72. Betsy Röben, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht, 1861–1881* (Baden-Baden: Nomos Verlagsgesellschaft, 2003); Betsy Baker Röben, "The Method behind Bluntschli's 'Modern' International Law," *Journal of the History of International Law* 4 (2002): 249.

73. Röben, *Bluntschli,* at 67–68.

74. Lieber was born in Germany in 1800. He moved to the United States in 1827. See G. Rolin-Jaequemyns, "François Lieber," *Revue de Droit international et de legislation comparée* 4 (1872): 700–705.

75. In the Preface to the 1866 French edition, Heffter noted the success of his earlier versions. The book had been favorably mentioned by American, British, and Russian authors and translated into Greek, Russian, and Polish. It was subsequently translated also into Japanese and Spanish (see Preface of the 8th German edition by Geffken, 1888).

*Law.*[76] Francis Lieber regarded Heffter as the "acknowledged highest authority on the L. of nations on the continent of Europe,"[77] and the contemporary American writing on international law drew heavily on his book.

Halleck's book on the laws of war[78] turns to both Heffter and the U.S. case-law in the chapters devoted to military occupation. His theory consolidated the two radically different approaches—the British approach and Heffter's—into one, with the outcome a distinction based on the occupant's subjective intention. Once an occupant has successfully secured control over the enemy territory and the ousted government is incapable of regaining that territory through military efforts, the occupant may opt to treat the area as subject to military occupation, during which it "can, at his pleasure, either change the existing laws, or make new ones."[79] However, the occupant can also gain sovereign title over the territory by executing an authoritative and unequivocal sovereign act, such as annexation or incorporation, thereby manifesting its intention to retain the occupied territory as its own.[80]

This distinction had little impact from the perspective of international law, because it still enabled the unilateral acquisition of enemy territory through the use of force. But the distinction was invaluable to upholding the U.S. federal system of government: Occupation in and of itself did not yet render an area subject to U.S. laws or, in particular, the Constitution.[81] Extending U.S. law to these territories could be effected only by an act of Congress, not a presidential act,[82] for the president, acting through his armed forces, had no constitutional authority to do so.[83] This purely domestic distinction was clarified by Chief Justice Taney:

> As regarded all other nations, [the occupied Mexican territory] was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. . . . But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which [the

76. Röben, *Bluntschli,* at 69–70.

77. Ibid., 69, n. 411 (citing Lieber's letter from 1863 and other letters). See also Silja Vöneky, "Der Lieber's Code und die Wurzeln des modernen Kriegsvölkerrecht," *Zeitschrift fur Ausländisches öffentliches Recht und Völkerrecht* 62 (2002): 424–60.

78. Halleck, *International Law.*

79. Ibid., 781.

80. Ibid., 811–12.

81. Halleck attributed this to the peculiar nature of the U.S. governmental structure. Ibid., 784.

82. Ibid., 785.

83. Under the U.S. constitutional arrangement, the president, as commander-in-chief, can wage war and therefore conquer territory but cannot "extend the limits, or enlarge the boundaries of the Union." Ibid., 784–85.

> occupied territory] stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress.[84]

In other words, under this "somewhat peculiar and anomalous"[85] doctrine, the American occupying army enjoyed the best of all worlds: It was not constrained by international law from acting as it pleased vis-à-vis the enemy government, because its very possession of the occupied territory gave it exclusive title and unfettered discretion. At the same time, it was not constrained by its own domestic law, which did not automatically extend to areas not yet part of the Union.[86] This doctrine suited well the needs of an expanding nation[87] and, consequently, guided American conduct throughout the nineteenth century.[88]

The definition of an occupied area was predicated on actual possession. As a result, an occupant's authority was contingent on its remaining in control of the specific area over which it asserted authority.[89] This distinction explains Chief Justice Marshall's reference in 1828[90] to occupation as distinct from conquest, in a case that raised a question about the status of Florida. In a paragraph that some[91] later inaccurately regarded as anticipating the newly evolving norm of international law, Justice Marshall stated, "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed."[92]

This passage made it clear that Marshall did not have in mind a new

84. *Fleming v. Page.* See above, note 68, ibid.

85. Halleck, *International Law,* 784–85.

86. The same rationale applied to the so-called insular cases, where the Supreme Court asserted that the U.S. Constitution does not automatically extend to areas (such as Hawaii, the Philippines, and Puerto Rico) that have come under American control. See, e.g., *DeLima v. Bidwell,* 182 U.S. 1 (1901), *Goetze v. United States,* 182 U.S. 221 (1901).

87. For example, this doctrine was invoked to set up governments in New Mexico and California in 1846 and 1847, respectively. Birkhimer, *Military Government,* at 55–56.

88. *The Netherlands Case,* above note 71 (describing American practice until ratifying the 1907 Hague Regulations). The incorporation of Hawaii in 1898 is a case in point.

89. "The government of the conqueror being *de facto* and not *de jure,* it must always rest upon the fact of *possession,* which is adverse to the former sovereign, and therefore can never be inferred or presumed. . . . Not only must the possession be actually acquired, but it must be *maintained.*" Halleck, *International Law,* 780 (emphasis in original).

90. *American Insurance Company v. Canter,* 26 U.S. 511.

91. Von Glahn presented this case as a departure from the British approach. See Gerhard von Glahn, *The Occupation of Enemy Territory* (Minneapolis: University of Minnesota Press, 1957), 7.

92. *American Insurance Company v. Canter,* above note 90, at 542.

concept of occupation when he noted that the U.S. government "possesses the power of acquiring territory, either by conquest or by treaty."[93] It must be concluded that Marshall made the distinction between conquest and "mere" military occupation to explain why it was not necessary to prove in court actual and uninterrupted U.S. possession of Florida: the formal cession of title by Spain was sufficient to grant the U.S. formal title without proof of actual possession.[94]

When Francis Lieber drafted his renowned Lieber Code in 1863,[95] his most immediate concern was the U.S. Civil War, and his reference to occupied territories was necessarily aimed at regulating the Union's occupation of Confederate territories. The instructions set meaningful constraints on occupying armies: they authorized the occupation authorities to make new laws, but only "as far as military necessity requires,"[96] and required the occupant, *inter alia*, "to be strictly guided by the principles of justice, honor, and humanity"[97] and to "acknowledge and protect . . . religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations."[98] The Code did not address the question of sovereignty: in this Civil War, it was not at issue.

The Lieber Code opened new horizons for European governments and jurists seeking new modalities for the regulation of the conduct of warfare. What fascinated the Europeans was not the ideas embedded in the Code,

93. Ibid.

94. This was also Halleck's interpretation when he referred, inter alia, to this case while emphasizing that "[d]uring mere military occupation the sovereignty of the conqueror is unstable and incomplete." Halleck, *International Law,* 791.

95. Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

96. Lieber Code, Art. 3: "Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation." According to Robert J. Futrell, "Federal Military Government in the South, 1861–1865," *Military Affairs* 15.4 (1951): 190–91, the Lieber Code was interpreted by the Union's various military governments to allow them considerable latitude. The Federal military governors "assumed a broad direction of Southern civil affairs." These governors issued orders to protect public order and public health, regulated, inter alia, the sale of liquor and gambling, organized local militias, introduced new taxes, and, in general, "made themselves masters of the Southern population." The secretary of war of the Confederate states criticized the Code for allowing the military governors unfettered discretion under the concept of "military necessity" (cited in Doris Appel Graber, *The Development of the Law of Belligerent Occupation, 1863–1914* [New York: Columbia University Press, 1949], 17–18).

97. Lieber Code, Art. 4.

98. Ibid., Art. 37. See also Arts. 5, 6, 31, 38.

as these ideas were borrowed from Europe and had been discussed already by Halleck.[99] Rather, what was novel to them was the very system of a code: the possibility of a common text, potentially the basis of a treaty. As a matter of substance, however, the novelty of the Lieber Code should not obscure the fact that, under prevailing American doctrine, occupants could, if they so desired, extend their sovereignty unilaterally based on their ability to control enemy territory.

Before turning attention back to Europe to trace the evolution of the law of occupation there, I will briefly outline the American position in this context up until 1907, when it joined the Second Peace Conference at The Hague. In its relations with its neighbors and enemies, the U.S. government sometimes hid its stance that it had absolute authority over occupied areas. General Taylor's proclamation to the people of Mexico on June 4, 1846, was a distorted paraphrasing of the Rousseau-Portalis doctrine: "[W]e come to overthrow the tyrants who have destroyed your liberties; but we come to make no war upon the people of Mexico, nor upon any form of free government they may choose to select for themselves."[100]

President McKinley's order to the Secretary of War on July 18, 1898, upon the occupation of Santiago de Cuba stated, among other things, "Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, . . . are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent . . . This enlightened practice is, so far as possible, to be adhered to in the present occasion."[101]

During the International American Conference of 1889–1890, all the participants except for the U.S. supported a text declaring that "the principle of conquest shall never hereafter be recognized as admissible under American public law." The agreed-upon compromise would have provided that the principle of conquest would not be recognized as admissible "during the continuance of the treaty of arbitration," but the treaty never came into effect.[102] The occupations of Hawaii, The Philippines, and Puerto Rico reflected the same unique American view on the unlimited authority of the occupant.[103] The U.S., then, made no contribution to the development of

99. See above, notes 78–82. Bluntschli, Lieber's closest colleague, deemed the Lieber Code "particularly noteworthy because it annunciates the modern rules with clarity and energy." Bluntschli, *Das Beuterecht,* at 66.

100. John Basset Moore, *A Digest of International Law* (Washington: Government Printing Office, 1906), 7:273.

101. Ibid., 262.

102. Ibid., 315–16.

103. See *The Netherlands* decision, above note 71. In 1901, the U.S. Supreme Court

the international doctrine on occupation during the period of its crystallization. When it ratified the Hague Regulations in 1907, the doctrine had already taken shape.

### *B. Back in Europe: The Franco-Prussian War and Its Aftermath*

The occupation of parts of France by the Prussian Army during the 1870–1871 War provided an opportunity for Europe to assess the prospects and limits of the laws of war in general and of the law of belligerent occupation in particular. Edgar Löning indicated that Heffter's distinctions were implemented by the Prussian Army.[104] The Prussian Army divided the area under its control into three governments-general: Alsace, Lorraine, and a third region consisting of the rest of the territories.[105] All three administrations, each of which was headed by a military governor-general and a civil commissioner as an associate, declared that French law would remain in effect as long as the state of war did not require its suspension.[106] Concurrently, however, certain proclamations made by Prussian governor-generals addressing the local populations in their jurisdictions indicated an intention to treat the areas as subject to German sovereignty. Upon assuming his post, the Governor-General of Alsace issued a declaration to the inhabitants of Alsace informing them that the territories under his jurisdiction "are withdrawn, by the very occupation, from [French] imperial sovereignty, and in its stead German authority is established."[107] A declaration to the people of Strasbourg was similarly formulated, proclaiming that the city had been newly reunited ("*de nouveau réunie*") with Germany.[108]

The validity of these declarations and other acts and policies of the Prussian occupation authorities was the subject of much debate among

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(in *Dooley v. United States,* 182 U.S. 222 [1901]) reaffirmed Halleck's description of the doctrine, in a case concerning duties imposed on individuals in occupied Puerto Rico in 1898–1900.

104. Löning, *Die Verwaltung,*13–15.

105. G. Rolin-Jaequemyns, "Chronique du droit international," *Revue de Droit international et de legislation comparée* 2 (1870): 645, at 691. Bordwell mentions a forth district. See Percy Bordwell, *The Law of War between Belligerents* (Chicago: Callaghan, 1908), 98.

106. Rolin-Jaequemyns, "Chronique du droit international." See also Löning, *Die Verwaltung;* Coleman Phillipson, *Alsace-Lorraine, Past, Present and Future* (London: T. F. Unwin, 1918), 155; Graber, *Development of the Law,* 268–70.

107. Declaration of 30 August 1870. "[C]es territories se touvent, par ce fait même, soustraits à la souveraineté imperiale, en lieu et place de laquelle est établie l'autorité des puisances allemandes." Quoted in A. Lorriot, *De la nature de l'occupation de guerre* (Paris: Lavauzelle, 1903): 76–77.

108. Declaration of 8 October 1870, reprinted in Lorriot, *De la nature de l'occupation,* at 42.

jurists. Beyond the partisan views, this debate helped to highlight issues that warranted further refinement. Rolin-Jaequemyns, the Belgian jurist who co-founded the *Institut de droit international* (IDI) and the first professional journal on international legal affairs,[109] examined these issues closely in a series of articles he wrote. He sought not to make judgments but, rather, to extract general principles. Among those principles he suggested was a limitation on the occupant's exploitation of local resources. The occupant, per Rolin-Jaequemyns, was entitled to use only those local resources necessary for maintaining its troops and was prohibited from enrichsing itself from the resources of the occupied territory. It was required to use local resources in moderation proportionate to their availability.[110] This limitation on the occupant's authority meant that it was not entitled to exploit immovable resources and was restricted to enjoying only the fruits of those resources accrued through regular use.[111]

The Franco-Prussian War and the Prussian demand to annex Alsace and Lorraine also brought to the fore the link between the laws of war and the need to ensure regional stability. A right to conquest created incentive to resort to arms, and an internationally accepted constraint on this right could diminish that incentive.[112] Bismarck himself explained his government's demands by invoking security concerns,[113] and German scholars sought general justifications for these claims.[114]Asserting that the right of conquest did not exist, Rolin-Jaequemyns argued that an occupant had no right to demand cession of the territory, but, rather, such a demand must be negotiated and supported by morality and public utility considerations.[115]

The 1870–1871 War prompted Europe-wide efforts to clarify the rules of warfare. Fedor de Martens wrote in 1901[116] that, during the war, both

109. See Koskenniemi, *Gentle Civilizer,* 13–15.

110. G. Rolin-Jaequemyns, "Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international," *Revue de droit international et de legislation comparée* 3 (1871): 335.

111. Ibid., 357.

112. A. de Montluc, "Le droit de conquéte," *Revue de droit international et de legislation comparée* 5 (1873): 581.

113. André Merquiol, *Les occupations etrangères en France au XIXme siècle* (Nice: Imprimerie de "L'Eclaireur de Nice," 1944): 51–53.

114. Phillipson, *Alsace-Lorraine*, at 145–47, cites German writers who, although writing generally about the illegitimacy of conquest, stated that Germany's demand to annex Alsace-Lorraine was not a conquest, but, rather, a "restoration" or a response to earlier French provocations.

115. G. Rolin-Jaequemyns, "Note," *Revue de droit international et de legislation comparée* 5 (1873): 588, 589. Among these considerations, he mentioned the historic and ethnic ties of the population in the ceded territory and evident considerations of security.

116. de Martens, *La paix et la guerre,* 93–98.

sides had accused each other of violations of the laws of war, while public opinion had called for a clarification of these laws before a new war were to occur. This generated private initiatives to study the subject and put forth proposals to governments. Private societies—such as the IDI and International Law Association—formed with this as their founding purpose, while publicists and scholars called for a convening of a conference on the laws of war, eventually initiated by the Russians.[117]

The debates in Brussels and, later, in The Hague over the details of the regime of occupation were intense and complex. As a full discussion is beyond the scope of this essay, I will confine myself to outlining the different stages of the codification of the concept of occupation. The Heffterian concept of occupation was at no time in dispute;[118] the Russian text presented before the 1874 Brussels Conference gave quite clear expression to the concept.[119] Finding the right formula to describe the occupant's authority in the occupied territory proved to be more difficult, however.[120] In this context, we may recall, a gap existed between the more permissive approach advocated by

117. Martens credited himself with the initiative. In January 1873, he published an article in a St. Petersburg journal, in which he stated that a code on military regulations was a prerequisite in an era of general conscription: "Au moment où le service militaire obligatoire est en vue d'être introduit chez nous . . . l'opportunité de fixer par la loi les droits et les devoirs des troupes s'impose impérieusement. Il serait desirable que chaque défenseur de la patrie entrât en campagne, non seulement armé d'aprés toutes les règles de l'art militaire, mais encore pénétré de cet vérité que la guerre n'est pas une lutte physique, qu'aucune prescription de droit et de morale ne contient." This article caught the attention of the emperor and his ministers (de Martens, *La paix et la guerre,* at 102).

118. Jean De Breucker, "La Declaration de Bruxelles de 1874 concernant les lois et coutumes de la Guerre," *Chronique de Politique Étrangère* 27 (1974): 22 (noting that the parties to the Brussels negotiations could not deny the validity of Heffter's distinction between occupation and conquest).

119. Article 1: L'occupation par l'ennemi d'une partie du territoire de l'État en guerre avec lui y suspend, par le fait même, l'authorité du pouvoir legal de ce dernier et y substitute l'authorité du pouvoir militaire de l'État occupant. See *Annuaire de l'institut de droit international* 1 (1877): 277, 278.

120. This distinction between general recognition of the principle and the details implied by the principle for an occupation regime is reflected in the description of the project to assess the Brussels text undertaken by the *Institut de droit international*. See Session de La Haye (1875), *IDI Examen de la Déclaration de Bruxelles de 1874* (Rapporteur: M. Gustave Rolin-Jaequemyns) (rep. in http://www.idi-iil.org/idiF/resolutionsF/1875_haye_02_fr.pdf). The project was to focus on the implications of the fact that occupation is a provisional regime:

"VI. Les dispositions du projet de Déclaration relatives à l'occupation du territoire ennemi sont l'application de ce principe vrai: que le seul fait de l'occupation ne confère aucun droit de souveraineté, mais que la cessation de la résistance locale et la retraite du gouvernement national, d'une part, la présence de l'armée envahissante, de l'autre, créent pour celle-ci et pour le gouvernement qu'elle représente un ensemble de droits et d'obligations essentiellement provisoires. Le projet tend surtout, dans cet ordre d'idées, à tracer les limites de ces

Heffter and the rather restrictive stance taken by Fiore, who insisted on the occupant's obligation to respect the public order of the ousted government.[121] The Russian draft allowed the occupant rather broad powers, whereby it could, "in accordance with the demands of the war and in view of the public interest, maintain the obligatory force of the laws that had been in force in peacetime, modify them, or suspend them entirely."[122]

In contrast, the final text of the Brussels Declaration presented a more restrictive formula: "[The occupant] shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [and] shall maintain the laws which were in force in the country in peacetime, and shall not modify, suspend or replace them *unless necessary.*"[123] The basic principles of the Brussels Declaration met with scholarly approval. In 1875, the IDI declared that, although there was room for improvement, the new rules on occupation as suggested by the 1874 Brussels Declaration were essentially more favorable to peaceful citizens and public and private ownership in occupied territories than what had been provided by practice thus far and by the teachings of most scholars.[124] The IDI subsequently adopted the same rules in its Oxford Manual on Land Warfare (1880).[125]

The limits on the occupant's powers were tested when Russia occupied Bulgaria between 1877 to 1878, during the Russo-Turkish War. Russia wasted little time reorganizing the local administrative system, a move that was hardly in line with the occupant's duty to preserve indigenous institutions "unless otherwise necessary." However, de Martens gave several reasons for the legality of these measures. In his view, they in fact were

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droits, et à déterminer ces obligations, dictées par la nécessité de maintenir l'ordre social et de protéger la sécurité individuelle et la propriété privée, en l'absence momentanée de tout gouvernement régulier."

121. See above, notes 54–60 and accompanying text.

122. "Article 2: L'ennemi qui occupé en territoire peut, selon les exigencies de la guerre et en vue de l'intérêt public, soit maintenir la force obligatoire des lois qui étaient en vigueur en temp de paix, soit les modifier, soit les susprendre entièrement." See *Annuaire de l'institut de droit international* 1 (1877): 277, 278.

123. Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, Articles 2 and 3 (http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument).

124. "VI. Les règles tracées à cet égard sont sans doute susceptibles d'améliorations de détail, mais, dès à présent, elles sont au fond plus favorables aux citoyens paisibles et aux propriétés publiques et privées du pays occupé, que la pratique suivie jusqu'ici et que la doctrine de la plupart des auteurs." *IDI Examen de la Déclaration,* above note 120.

125. Article 44 of the Manual: "Art. 44: The occupant should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary." *Institut de droit international,* Session d'Oxford (1880); Manuel des lois de la guerre sur terre (Rapporteur: M. Gustave Moynier) (rep. in http://www.idi-iil.org/idiF/resolutionsF/1880_oxf_02_fr.pdf).

necessary because it had been impossible to restore the local regime from which the Bulgarians had suffered for centuries; the Brussels principles had been aimed at benefiting the local populations and, thus, were irrelevant when their application would only harm those populations. Furthermore, de Martens explained, a "transformative policy" is justified when the main purpose of a war was to annex a province or to "change or ameliorate" its administration.[126]

de Martens indicated, however, that these legal questions were given significant consideration, noting the "great number" of articles in the "turcophile European press" that condemned Russia for violating the laws of war.[127] Regardless, the smaller states of Europe were far from pleased with the Brussels formula and were perhaps even alarmed by Russia's interpretation of the rules of occupation. Thus, when the 1899 Hague Peace Conference provided an opportunity for these states to renegotiate the Brussels text, they cleverly turned their weakness into a weapon. During the negotiations, it became clear that two camps of negotiators had formed, the potential occupants and the potential occupied,[128] and that the latter were being asked to legitimate future actions of the former that might prove to be counter to their interests. The concern with legitimation led the Belgian delegate to suggest that most of the issues in dispute be left "floating in the shadows."[129] But de Martens, who chaired the session as the Russian delegate, managed to convince the smaller states to stay in the game, noting that they could benefit from the imposition of clear limitations on the authority of occupants.[130] Convinced, the smaller states succeeded in extracting stricter restrictions on the occupant's power, most notably a formulation that was aimed at further binding occupants to the legal sta-

126. Fedor de Martens, *Traité de droit international,* trans. Alfred Leo (Paris: Marescq, 1877), 3:257: "L'occupation prend un autre aspect quand elle n'a pas un caractère temporaire et qu'elle a lieu en vue d'une annexion, ou si le but même la guerre est de changer ou d'améliorer l'organisation d'une province appurtenant àl'ennemi. Dans ce cas, la puissance, qui procède à une annexion, a tout à fait le droit de transformer complètement les institutions régnantes et l'ordre établi, afin de les mettre en harmonie avec ses interérêts politiques, ou afin de procurer quelque avantage aux habitants." ("The occupation acquires a different aspect when it is not of a temporary nature but instead annexation is envisioned or the aim of the war itself was to change or ameliorate the organization of a province belonging to the enemy. In this case, the power that executes annexation has the right to transform the ruling institutions and establish order, so as to harmonize them with its political interests or to procure some advantage for the inhabitants.") de Martens, *La paix et la guerre,* at 267–96.

127. de Martens, *La paix et la guerre,* at 271.

128. de Lapradelle, "La conference de la paix," *Revue générale de Droit International Public* 6 (1899): 736–38.

129. Session of 6 June 1899, quoted in Lapradelle, "La conference," at 736–37.

130. Ibid., at 738.

tus quo in occupied territories: "[The occupant] shall take all steps in his power to re-establish and insure, as far as possible, public order and [civil life], while respecting, *unless absolutely prevented,* the laws in force in the country.[131] Thus, in the 1899 Hague Regulations, Fiore's notion finally won out.

### *C. Different Conceptions of Occupation beyond Europe*

The rationale for the concept of occupation as the ultimate manifestation of national sovereignty was not applied beyond Europe. In the colonial context, because the colonialists did not recognize the sovereignty of the "uncivilized" nations, the temporary nature of occupation was regarded as simply inapplicable. As discussed above,[132] there was a doctrinal reason for the limited territorial scope of the European concept of occupation. Because the doctrine was meant to safeguard national sovereignty, it could not apply to regions whose sovereignty was not recognized. The prevailing view among the mainly European powers was that sovereignty, as a "gift of civilization,"[133] did not extend beyond the circle of self-defined "civilized," mainly Christian nations. Thus, the term "occupation" of "*terra nullius*" served, at the time, to denote one of the several ways of acquiring sovereignty over the non-Christian world, in addition to discovery, conquest, and cession.[134]

131. Art. 43, Hague Regulations. See above note 1.

132. See above note 24 and accompanying text.

133. Koskenniemi, *Gentle Civilizer,* at 98. On the modes of unilateral acquisition of non-Christian territories, see Korman, *Conquest,* at 42–66.

134. As Chief Justice Marshal observed with respect to the rights asserted by the Europeans concerning the New World (Johnson and Graham's *Lessee v. M'Intosh,* 21 U.S. 543, 572–73 [1823]), "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which

## III. Conclusion

The story of the evolution of the law of belligerent occupation in the nineteenth century reflects both evolving ideas and changing national interests. These ideas and interests pushed the legal doctrines along several different paths over the years and caused much confusion in the legal literature. Eventually, by the early twentieth century, with the codification of the laws of war in the U.S. and Europe and the consolidation of colonial and American territorial gains, the core meaning of occupation as a temporary and limited regime had gained general acceptance. But this meaning was soon to be challenged. Over the course of the twentieth century, numerous occupants would disregard their obligations, invoke exceptions to the doctrine, or resort to such contemporaneous concepts as national self-determination and human rights law to claim expanded authority. Thus, the doctrine on occupation, just like its mirror-image, the doctrine on sovereignty, continued to be shaped by the ideas of the day and by political realities.

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all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them."

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