

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

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Abstract

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

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

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

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

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1. An elusive category

When lawyers speak today of ‘colonial war’ at all, they often do so in order to mark the progress of the law of war, its transformation into international

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humanitarian law ('IHL').¹ To an extent, the only echo of colonial war in current IHL literature is a claim that law no longer engages with such categories; that its reach and domain are truly humanitarian and universal.² Rendering the past inconsequential, as a means for overcoming it, remains a principal strategy 'by which international [humanitarian, I would add] law rewrites its history'.³ To historians, triumphalism of this kind is suspect; and yet, awareness of the pitfalls of progressive history is not enough. Stephan Neff's book on the history of the laws of war acknowledges 'sadly' that there was such a thing as 'colonial warfare, which in many ways was quite distinct from conflict amongst developed (chiefly European) countries'; but informs the reader not to expect there 'will ... be much about' it in the book.⁴

Historians of international law have crafted many of the tools required to reflect on colonial war,⁵ even if they pay less attention to colonial war as a distinct category or topic of study. Several critical engagements with the history of the laws of war are now available, but these remain few and far between: Wilde's account of the law of occupation as part in a continuum of international territorial governance, or Mégret exploration of the equivalent 'otherness' of present-day 'unlawful combatants' and the savages of not-so-long-ago remain exceptions confirming the rule.⁶ IHL professionals, boasting pragmatic sensibilities, rarely note works on the *praxis* or intellectual history of colonial warfare⁷ or in-depth and broad critical analyses such as Berman's exposé on the Riff war or Kennedy's sustained theoretical engagement with law and war.⁸ Last, the role of race—one of the key determinants of colonial war—still awaits systematic exploration.⁹

One question to ask about colonial war is 'when exactly did the category disappear from the international legal landscape'? This ostensibly simple question immediately raises a number of preliminary issues. Thus, we have to

¹ On progress in IHL: R. Giladi, 'Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography' (unpublished ms).

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

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

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

⁵ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

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

⁷ E.g. I.V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Germany* (2004).

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

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

account, *first*, for the possibility that, perhaps under other terminology or through the operation of other doctrinal devices, it never quite ‘went away’.¹⁰ If so, we may well find the category repackaged into the principle of distinction, or the classification of armed conflicts into international and non-international, *etc.* *Second*, even if ‘colonial war’ has in fact disappeared from the landscape of the laws of war, it may have left traceable imprints on international law that no longer acknowledges its relevance. Such an enduring legacy could be found outside today’s framework for the regulation of warfare. Restructuring the internal divisions of international law—the erosion of the distinction between ‘law of war’ and ‘law of peace’ is just one example—tends to obfuscate such imprints that, today, are classified as ‘intervention’, ‘human rights’, ‘international governance’, ‘law of treaties’, *etc.*¹¹

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

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

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

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

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

Such compound indeterminacy can be treated like a challenge, driving a project to precisely define the space, time, and subject-matter boundaries of the category and analyse its operation so as to pronounce the precise moment of its demise, record its death throes, and identify, *post mortem*, its lingering legacies. This paper aims at no such *nécrologie*. Rather, embracing the category's elusiveness, it focuses on race—a single yet itself elusive aspect of colonial war. The paper deals, moreover, with a single episode. Taking place in the immediate aftermath of WWI, it involved the racial construction of the laws of war and of the notion of 'humanity' in war.

That episode presents patent and ubiquitous evidence, in plain sight, about colonial war, its elusivity and prevalence, and its demise. It is, however, marked by amnesia and silence. Simply put, it is entirely and thoroughly muted and forgotten. It represents a moment where the very logic of colonial war—racially constructed—met its own internal contradictions, threatening to collapse the category itself. And yet, precisely at the moment of collapse, the colonial war category had—like the fabled phoenix—found a new life. By recovering that episode and charting, through it, the course of colonial war's collapse, *oubliette*, and resurgence I seek to demonstrate the resilient elusiveness of 'colonial war'—and of race as one of its intellectual underpinnings: patent yet, at the same time, obscure from view. This, I hope, would help sketch an intellectual framework through which colonial war may be historically approached.

2. 'Horror on the Rhine'

The episode in question concerns the Rhineland occupation or what historians refer to as the 'watch on the Rhine', 'black shame', the 'horror on the Rhine', *etc.* Essentially, it involved the employment of colonial troops in the German Rhineland at the end of the WWI.¹³ The 1918 armistice provided for the French occupation of the Rhine following German evacuation. The French deployed, among others, units of colonial troops on occupation duty. A vitriolic, partly official,¹⁴ and carefully timed¹⁵ German campaign against the stationing of 'black' soldiers over a white population followed. '[A]bductions ... rape, mutilation, murder and concealment of the bodies'¹⁶ were alleged. Public protests followed—not just in defeated Germany but also in victorious Britain and the US. European liberals and socialists were scandalized; women's group in the US, Sweden, Norway and Finland were aghast.¹⁷ An American woman recommended time-

¹³ S. Jeannesson, 'French Policy in the Rhineland, 1918-1924', in C. Fischer and A. Sharp (eds.), *After the Versailles Treaty: Enforcement, Compliance, Contested Identities* (2008), 57 (useful brief discussion of French policy).

¹⁴ P. Collar, *The Propaganda War in the Rhineland: Weimar Germany, Race and Occupation* (2012), at 9 ('sanctioned or encouraged from above' but not 'centrally coordinated or directed'); K. Nelson, 'The "Black Horror on the Rhine": Race as a Factor in Post-World War I Diplomacy', (1970) 42 *Journal of Modern History* 606 ('concerted'); I. Wigger, "'Black Shame"—The Campaign Against "Racial Degeneration" and Female Degradation in Interwar Europe', (2010) 51 *Race and Class* 33 (government 'initiated').

¹⁵ S. Marks, 'Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience', (1983) 13 *European Studies Review* 297, at 311 ('correlation with reparation deadlines was evident').

¹⁶ 'Finds Negro Troops Orderly on Rhine', *New York Times* (20 February 1921).

¹⁷ Nelson, *supra* note 14, at 616.

tested methods to German men: ‘there still remains a rope and a tree. Take up the natural arms which our men in the South resort to: lynch! Hang every black who assaults a white person!’¹⁸ In 1920, an aspiring British politician published a pamphlet titled ‘The Horror on the Rhine’, soon translated into various languages. The eighth edition boasted that circulation in the occupied area was proscribed; ‘the truth’, the cover claimed, ‘will not be stifled’. In the 1922 general elections, the author defeated Winston Churchill for the Dundee seat.

The grounds of the author’s protest merit attention. From the start, he decried ‘outrages committed by these African troops upon women and girls’ and ‘the erection of brothels for their use’.¹⁹

Danger lurks everywhere for women and girls in the French area of occupation. Women are afraid to walk alone after sunset. Strolling in the woods is no longer possible. Girls doing agricultural work in the fields often need the protection of their men-folk. Girls and boys are molested on their way to and from school. The towns and villages and the roads leading to them are alike unsafe. In ones and twos, sometimes in parties, big, stalwart men from warmer climes, armed ... living unnatural lives of restraint, their fierce passions hot within them, roam the countryside. Woe to the girl returning to her village home, or on the way to town with market produce, or at work alone hoeing in the fields. Dark forms come leaping out from the shadows of the trees, appear unexpectedly among the vines and grasses, rise from the corn where they have lain concealed. Then—panic-stricken flight which often availeth not...²⁰

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

among the more primitive—or the more natural, if that word be preferred—races inhabiting ... Africa, the sex-impulse is a more instinctive impulse, and precisely because it is so, a more spontaneous, fiercer, less controllable impulse than among European peoples hedged in by the complicated paraphernalia of convention and laws.²¹

The ‘world-wide’²² campaign produced pornographic imagery of black men lurking in the fields, hovering over a fainting or ravaged *fräulein* or, often, depicted as gorillas carrying her away. ‘The propaganda’, Sally Marks noted, ‘routinely portrayed 40,000 black savages roaming the Rhineland at will, raping the women, infecting the population, and polluting the blood.’²³ There were allegations of ‘ordinary’ atrocities; but sexual violence took centre stage.²⁴ In 1920, Karl Goetz cast a bronze medal, bearing the inscriptions *Die schwarze Wacht am Rhein* and *Die schwarze Schande*. One face depicted a naked

¹⁸ ‘Is the Black Horror on the Rhine Fact or Propaganda?’, *The Nation* (13 July 1921) 44, at 45.

¹⁹ E.D. Morel, *The Horror on the Rhine* (1921), at 5 [hereafter ‘Horror’].

²⁰ *Ibid.*, at 13.

²¹ *Ibid.*, at 10.

²² Marks, *supra* note 15, at 297.

²³ *Ibid.*

²⁴ *Ibid.*, at 302 (‘most ... propaganda centred on rape’).

woman—the Rhenish *Lorelei*—hands tied behind her back to an erect, larger-than-life phallus crowned by a military helmet, the Eye of Providence looking down upon her predicament. The other face presented a stereotypical depiction of a helmeted African, protruding lips, flat nose, *etc.*, next to the words ‘*Liberté, égalité, fraternité*’.²⁵ The *médailleur* only gave visual expression to concerns voiced by the pamphlet’s author: in the state of affairs created by the French, the latter observed, ‘the sexual requirements of the ... African troops ... *must be satisfied upon the bodies of white women*’.²⁶

The Rhineland occupation and the ensuing ‘horror’ debate were not obscure, momentary, or isolated.²⁷ The French occupation, mandated by the armistice agreement, was later sanctioned by the Versailles Treaty. German allegations and public protests waxed and waned; the campaign was replicated in the French-held Saar basin and the Ruhr, invaded by France and Belgium in 1923. These sites gave rise to official protests and diplomatic correspondence, fuelled parliamentary debates, saw committees established and reports commissioned, inquiries launched and disciplinary proceedings instituted—not to mention meetings, rallies, resolutions, petitions,²⁸ newspaper caricatures, *etc.* A novel was published, translated, made into a movie, then a play.²⁹ French colonial soldiers came and went. Echoes of the controversy were heard in League of Nations deliberations.³⁰ And historians have since thoroughly mined the episode, producing a rich corpus of data on dates and numbers, places and motives, grievances and responses, official records and popular culture, movements and agents; *etc.*³¹

I see no reason to reproduce this data or its many ironies³² except as pertinent to my argument. Some characteristics of the debate, however, are worth noting. Allegations of rape and attributions of uncontrollable sexual impulse or depravity dominated much of the discourse. Health concerns—venereal disease taking a place of pride—were the subject of equally preposterous protest.³³ Public order, racial purity, *etc.* also played a role. Yet often, disapproval was framed in humanitarian terms. Specifically, the French policy of stationing of troops of non-white races on European soil to watch over white population was portrayed as contrary to the principles of humanity, an offense against European morality and civilisation.

²⁵ ‘The Black Watch on the Rhine’/‘The Black Shame’: www.karlgoetz.com/galleries/WWI/pages/K-262.html.

²⁶ *Horror*, at 10 (emphasis in original).

²⁷ Though the deployment of African contingents was brief: Marks, *supra* note 15, at 298.

²⁸ A. Schüler, ‘The “Horror on the Rhine”: Rape, Racism, and the International Women’s Movement’, (1996) *John F. Kennedy-Institut für Nordamerikastudien Working Paper 86*, at 3.

²⁹ Marks, *supra* note 15, at 315-16.

³⁰ *E.g.* (1922) 3 *LNOJ* 44, at 1131.

³¹ C. Koller, ‘The Recruitment of Colonial Troops in Africa and Asia and their Deployment in Europe during the First World War’, (2008) 26 *Immigrants and Minorities* 111.

³² *E.g.* the construction of ‘black’: Marks, *supra* note 15, at 298 (‘few were actually black’). Classification was crucial: ‘An Indescretion’, *New York Times* (19 June 1922) (‘Most ... were Arabs, of oval face, aquiline nose and thin lips’, citing an American general); Wallace to Secretary of State, 25 June 1920, *FRUS* 1920 (1936), Vol.II, at 329.

³³ Marks, *supra* note 15, at 301, 316.

Thus, the author of the 'Horror of the Rhine' framed his objections as humanitarian concerns for 'the African', the ultimate victim of 'French militarism'.³⁴ The Versailles Treaty, in enabling this 'outrage upon Europe as a whole', was 'a betrayal so stupendous and so overwhelming' that 'last faith in humanity [now] wither'.³⁵ The British government, he accused, was a party to a 'breach of ... international morality'; he appealed to 'humanitarians ... who have for years laboured for justice to the African',³⁶ denouncing their enslavement to the cause of European empires. 'Are the races of Africa to be militarily enslaved', he asked, 'and, as an eventual result, is war to rage all over Africa in order that the ambitions of European Imperialism ... may be fulfilled?'³⁷

His humanitarianism, however, was predicated on racial notions. He denounced the 'occupation of German territory in time of peace by African troops, conscripted by their white masters ... for the purpose of killing white men in Europe'.³⁸ He warned against 'inevitable local effects' and 'political consequences both in Europe and in Africa'³⁹ that would follow the very presence, in Germany, 'of these African troops—many of them conscripted among races in a primitive stage of civilization'.⁴⁰ The consequence of the 'sexual requirements' of 'African troops which French militarism has thrust upon the Rhineland', he observed, already sow 'the seeds of racial hatred and racial prejudice' and 'after-effects ... in European-administered Africa.'⁴¹ The French forcing German women to service black soldiers in brothels, as he alleged, was bound to lead to inter-racial 'promiscuity' in Africa. That, too, would ultimately disadvantage the native: 'habitual sexual connection between African troops and European professional women in Europe ... has already begun to [intensify] ... the complexities of European administration in Africa in a hundred subtle ways.'⁴²

The pamphlet's cover reproduced part of a 1920 Reichstag speech by 'Frau Rohl', a 'socialist member', who appealed to 'the women of the world' to protest the 'utterly unnatural occupation by coloured troops of German districts'. It also reported a protest 'signed by Prince Max von Baden' addressing 'the whole civilised world, ... all right-thinking and chivalrous men and women, to use every effort in order that an end may be put to the occupation of a European country by coloured troops and the unavoidable consequences'. The preface quoted a Swedish officer, 'well known in Stockholm': the '[C]onscience of the whole civilised world has been outraged...'.⁴³

These and other protests against the French 'pernicious policy'⁴⁴ were often phrased, all but explicitly, as a claim that the laws of war, governing how humane

³⁴ *Horror*, at 8, 11.

³⁵ *Ibid.*, at 21, 6.

³⁶ *Ibid.*, at 6, 21.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*, at 5.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, at 10.

⁴² *Ibid.*

⁴³ *Ibid.*, at 4.

⁴⁴ *Ibid.*, at 2.

and civilized war should be fought, were contravened. The German Foreign Minister announced in the Reichstag that ‘the introduction of ... coloured troops in the centre of white Europe’ was ‘a crime against the whole of Europe’. German Chancellor Friedrich Ebert denounced the use of African troops as ‘injury to the laws of European civilization’.⁴⁵

3. *Antebellum* ambivalence

It was perfectly natural to frame such grievances in terms resonating with legal notions of what was humane in civilized war. If anything, it is surprising that no explicit recourse was made to law that was largely on the side of those aggrieved. International law literature up to the Great War regularly addressed the legality of using of colonial troops in ‘European wars’.⁴⁶ The first edition of Lassa Oppenheim’s *International Law* (volume ii: ‘War and Neutrality’, published in 1906), contained a section on ‘Barbarous Forces’:

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

⁴⁵ Marks, *supra* note 15, at 311.

⁴⁶ Constructing war as ‘European war’ was foundational in the nineteenth Century project to modernize the laws of war: F. Lieber, *Twenty-Seven Definitions and Elementary Positions Concerning the Law and Usages of War* (1861), Box 2, Folder 15, manuscript in Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD; War Department, *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100* (24 April 1863), Arts.8, 14, 20, 22, 24-25, 27, 42, 148 (hereafter ‘Lieber Code’).

Nations, should not enjoy the privileges due to the members of armed forces according to International Law.”⁴⁷

No footnote accompanied the text, yet Oppenheim’s treatment of the issue disclosed ambivalence. It oscillated between scholarly consensus⁴⁸ and the juxtaposition of the ‘employment of barbarous forces’ to ‘the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers’, ‘bred and educated’ in a civilised country or, at any rate, under white command.⁴⁹ Underlying ambivalence was anxiety: could they be disciplined and controlled? Could they be civilized? Such questions ‘formed the crux’ of the international law debate.⁵⁰ Anxiety was equally manifest in how Oppenheim shifted the discussion of the *legality* of such employment to a speculation on the *status* and privileges attending such irregular combatants. Could they fit extant categories?

Antebellum scholarship, though generally taking a dim view of the use of colonial troops in European wars, was marked by similar ambivalence. Percy Bordwell cited the opinion of ‘Rolin-Jaequemyns, the most impartial commentator ... [who] condemns in severe terms their use’. He also noted Calvo, ‘inclined to be favorable to the French’ as it was doubtful that they would allow ‘any of the improper practices to which the Africans were accustomed in their own warfare’ once ‘commanded by French officers and subject to the same discipline as the rest of the army’.⁵¹ Bordwell’s own take on the ‘Employment of savage troops’ emphasised propriety, not strict legality: ‘it has been recognized as improper to employ troops whose accustomed manner of warfare gives evidence that they will not live up to the standards of civilized life’.⁵² But he also described a long-standing denunciation by ‘publicists and statesmen’ of employing ‘peoples of a lower civilization whose manner of life makes it improbable that they will follow the rules of civilized warfare...’.⁵³ If of ‘lower civilisation’, marked by uncivilized ‘manner of warfare’, what evidence could overcome probability?

Spaight’s 1911 *War Rights on Land*, written in Pretoria, also pondered propriety and control. His basic position on ‘the employment of troops of a non-European race, or at least of a race of inferior civilisation to the belligerents, in a civilised war’ seemed negative: ‘To employ savage troops is clearly improper, for they are of their nature predisposed to fail in the fourth condition of Article I of

⁴⁷ L. Oppenheim, *International Law* (1906), Vol.II, at 91-2. The second edition contained a shorter text: Oppenheim, *International Law* (1912), Vol.II, at 98.

⁴⁸ Grounded in the civilizational construction of international law’s history, the absence of crystallised practices, the silence of treaties, British imperial policy, and common sense.

⁴⁹ Similar ambivalence and anxiety in War Office, *Manual of Military Law* (1914), at 242 (‘Coloured individuals belonging to savage tribes and barbarous races should not be employed in a war between civilized States. The enrolling, however, of individuals belonging to civilized coloured races and the employment of whole regiments of disciplined coloured soldiers is not forbidden’); footnotes omitted. Oppenheim co-authored that chapter.

⁵⁰ D. van Galen Last, *Black Shame: African Soldiers in Africa 1914-1922* (2015), at 10.

⁵¹ P. Bordwell, *The Law of War between Belligerents: A History and Commentary* (1908), at 90.

⁵² *Ibid.*, at 232.

⁵³ *Ibid.*, at 51.

the [Hague] *Règlement*, and officers cannot be ubiquitous'.⁵⁴ Though willing to trust the civilising effect of white command and discipline, Spaight remained skeptical:

Today ... however, the Colonial indigenous troops of the European Powers are, for the most part, as highly disciplined and trained as any troops can be. Against such troops there is no law. The black man who has been 'drilled white' is under no disability as a fighter in the eyes of International Law. There is nothing, save perhaps policy, to forbid Great Britain employing her Sikh or Gourkha regiments, or France employing her Algerian troops, against another European Power. Individual cases of irregular conduct are alleged against even highly disciplined white troops in every war ... But even where the conduct of troops of an inferior race is unimpeachable, their employment may be a mistake as a matter of policy.⁵⁵

His misgivings persisted in the extensive survey of past incidents where, on policy, he considered the 'Mistake of employing black troops in Secession War', implying that Confederacy soldiers—'civilised troops in a civilised land'—were thereby provoked into slaughtering black Union soldiers "because they were niggers," the whites "because they were fighting with niggers".⁵⁶

German scholars displayed similar ambivalence. An 1860 textbook by Robert von Mohl, a former minister of justice and Professor of State and Administrative Law at Tübingen (later Heidelberg)⁵⁷ enumerated among the 'Methods of Warfare which Violate International Law' the use of 'barbaric warring people' in 'European wars and on European soil'. Acknowledging the scourge of European warfare, he argued there was no need to increase it:

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

If even the troops of civilized nations spread scourge around the country, it is disgraceful to the sophistication of a European state to, through the use of savages, make misery reach an unbearable level.⁵⁸

Mohl's ambivalence was rooted in contrasting the 'nature' of savage warfare with evident savagery of European warfare. He nonetheless acknowledged the advantage of using uncivilized troops in their own lands.⁵⁹ He recommended the question to an international congress.

⁵⁴ J. M. Spaight, *War Rights on Land* (1911), at 65-6.

⁵⁵ *Ibid.*, at 66.

⁵⁶ *Ibid.*, at 67.

⁵⁷ Koskenniemi, *supra* note 5, at 32.

⁵⁸ R. von Mohl, *Staatsrecht, Völkerrecht, und Politik* (1860), Vol.I, at 771.

⁵⁹ *Ibid.*, at 770.

Some ambivalence remained in the work of later German scholars inclined towards a prohibition, such as August Wilhelm Heffter⁶⁰, Karl Christoph Johann Lueder,⁶¹ and (Austrian) Peter Resch⁶² who were likely influenced by the legacy of Franco-Prussian War. There, Bismarck absolved colonial troops of fault *and agency* when blaming French commanders for their cruelty and ‘gender bestiality’.⁶³

German writers inclined to permit such employment entertained similar doubts. Franz von Liszt admitted the legality of employment of troops ‘foreign to European civilization’; but insisted that such troops be placed under civilized command.⁶⁴ The first edition of his *Das Völkerrecht* (1898), ‘the period’s most widely used German international law textbook’,⁶⁵ took no note of scholarship or practice. After discussing methods of war prohibited as unnecessary, he observed:

While the use of troops, which are foreign to European civilization, cannot be considered illegal under public international law, it obliges the belligerent using them, to closely monitor whether they comply with the rules of war.⁶⁶

Antebellum Francophone scholars, generally predisposed to allow the use of colonial troops, were not immune to ambivalence. Louis Le Fur, in an early contribution to the *Revue de droit international* on the Spanish-American War, first intimated the practice was ‘universally proscribed’, but conceded that ‘no agreement was yet established’. Though ‘generally rejected by the authors of international law’, such method of war could be justified if one focused ‘on the spirit and not the letter’ of the rule; if ‘indigenous troops’, that is, were ‘commanded by European officers’ and ‘respecting the laws of war’.⁶⁷ Still, he was concerned with US provision of arms to uncivilised insurgents.⁶⁸

In 1907, the year of the second Hague Conference, Alexandre Mérignhac published a critique of the positions presented by German General Staff at the 1899 Conference. He agreed with German criticism of ‘the employment of troops ignorant of the laws of civilized warfare, [who] therefore will commit all kinds of

⁶⁰ A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1881), at 263.

⁶¹ K.C.J. Lueder, ‘Das Landkriegsrecht im Besonderen’, in Franz von Holtzendorff, *Handbuch des Völkerrechts, auf Grundlage europäischer Staatspraxis* (1889), at 394-8.

⁶² P. Resch, *Das europäische Völkerrecht der Gegenwart: Für Studierende und Gebildete aller Stände* (1885), at 220.

⁶³ *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungsausschusses der Verfassunggebenden Deutschen Nationalversammlung und des Deutschen Reichstages 1919-1928* (1927), at 98.

⁶⁴ See also J.K. Bluntschli, *Das moderne Kriegsrecht der civilisirten Staaten* (1868), at 312 (‘use of savages ... prohibited... Civilised warfare does not allow for barbarism and thus barbaric tribes must not be made into soldiers. However, the use of barbaric individuals and tribes that comply with the law of war *and obey orders from civilised officers* is not forbidden’); emphasis added.

⁶⁵ Koskeniemi, *supra* note 5, at 225.

⁶⁶ F. von Liszt, *Das Völkerrecht, systematisch dargestellt* (1898), at 222.

⁶⁷ L. Le Fur, in ‘*Chronique des Faits Internationaux*’, (1898) *RDI* 749, at 753.

⁶⁸ *Ibid.*, at 754.

atrocities and inhumanities'. Mérignhac insisted, however, that this applied only to 'savages auxiliaries' 'who did not even know about the Geneva Convention', such as the Sublime Porte's 'Bashi-bazouks' or Transvaal 'Kaffirs, employed against the Boers by the English'.⁶⁹ By contrast, 'indigenous troops from Algeria' the French had employed in 1870-1 were 'regimented, registered, commanded by French officers'. Their only fault was fighting '*une furia déconcertante pour le flegme teutonique*'.⁷⁰

Ambivalence persisted right until the outbreak of hostilities. In 1914, the seventh edition of Henri Bonfils' *Manuel*—'perhaps the most widely used French textbook'⁷¹—was published under Paul Fauchille. It was clear that 'nations of different civilisations cannot observe the same international law in wartime'.⁷² Although agreed that 'International Law prohibits civilized nations to enlist into their army savages ... troops to which the laws of war are unknown', Fauchille implied that practice⁷³ in Europe cast doubt on the rule's 'frequent application' and utility.

Such ambivalence was chronic and, if the word is apt, practically universal.⁷⁴ Whatever the position taken or the nuance employed, questions about 'savage' troops remained unanswered: could they be civilised enough to fight a civilised war? Were they humane enough to display humanity in battle? Could their manner of warfare, reflecting their customs, culture, and race be undone by command, overcome by training? Could white control be maintained? These very doubts haunted members of the *institut de droit international* when called to discuss, on 11 September 1877, an appeal to the belligerents in the Russo-Turkish War. Rolin-Jaequemyns, the Secretary-General, noted the need to discuss the 'responsibility of the belligerents due to the use by them of savage hordes, unsuitable to comply with these rules [of the laws of war]'.⁷⁵ A communication from den Beer Portugael, irked by the 'incontestable' brutality of '*les Bachi-Bouzouks, les Tscherkesses, les Cosaques nomades, les tribus asiatiques*' used by the Ottomans, would have banned 'in the wars between civilized peoples to use barbarian hordes'. If not feasible, officers placed to command 'wild creatures' should at least be trained in the laws of war—and take appropriate oaths.⁷⁶

The details of the ensuing debate were not reported, but the '*Observations et vœux*', drafted by Rolin-Jaequemyns and Gustave Moynier, the Red Cross President, were unanimously approved the following day. The resolution noted, nonetheless, that there existed '*une question de responsabilité qui peut résulter soit de la négligence dans l'instruction des troupes, soit de l'emploi de hordes*

⁶⁹ A. Mérignhac, '*Sur Les Lois De La Guerre Continentale*', (1907) *RGDIP* 197, at 210.

⁷⁰ *Ibid.*

⁷¹ Koskenniemi, *supra* note 5, at 280.

⁷² H. Bonfils, *Manuel de droit international public* (1914), at 722.

⁷³ Largely that discussed by Mérignhac; H. Bonfils, *Manuel de droit international public* (1914), at 764.

⁷⁴ For a rare ambivalence-free position: P. Fiore, *Il Diritto Internazionale Codificato* (1898), at 436.

⁷⁵ (1878) ii *Annuaire de Institut de droit international*, at 139.

⁷⁶ *Ibid.*, at 139-40.

sauvages, non susceptibles de faire une guerre régulière. It implied that such troops might well be ‘*absolument incapables*’ of fighting humanely, but detailed procedures and conditions for officers to follow. A government using such soldiers, if indeed incapable of fighting humanely, ‘*comme l’enseigne depuis longtemps l’unanimité des auteurs*,’ commits ‘*une infraction grave aux lois de la guerre*’.⁷⁷ But it did not quite answer the question.

If *les auteurs* had shown any *unanimité*, it touched less the rule and more their lingering anxieties. Still, the employment of colonial troops in the Rhine *did* raise a question of French compliance with the laws of war. There *was* room for debate whether French policy contravened ‘the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience’ alluded to in the Martens clause.⁷⁸

4. Amnesia

The ubiquity of the Rhine debate, compounded by the fact that it begged the question of legality, surely should have produced some memory of the episode. The Rhine occupation is not unknown to international lawyers; the epitome of the ‘armistice occupation’ scenario, it is referenced in monographs on the law of occupation,⁷⁹ and in IHL and international law textbooks. None, however, contains even the slightest hint of the Rhine horror tale. As far as I can tell,⁸⁰ the only mention of that sordid affair in *current*⁸¹ international law literature is a single paragraph in Schroer’s 2013 path-breaking reconstruction of the 1929 codification of racial segregation of prisoners of war.⁸²

Beyond ubiquity and salience of the legal question, other reasons would have entailed familiarity with the Rhine scandal. Race had played a distinct role in debates among belligerents about international law, and the laws of war, during WWI. German detention of white and black captured soldiers together led to British protests, inviting Germany to imagine the horrid fate awaiting captured

⁷⁷ *Ibid.*, at 154-9.

⁷⁸ *Convention No. II with Respect to the Laws and Customs of War on Land, with annex of Regulations* (29 July 1899) 32 *Stat.* 1803; R. Giladi, ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, (2014) 25 *EJIL* 847.

⁷⁹ Mentions of Rhine occupation, but not the ‘horror’: G. vohn Glahn, *The Occupation of Enemy Territory* (1957), at 267-8; E. Benvenisti, *The International Law of the Occupation* (2012), at 122 *et seq.*; Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 36. The same goes for entries in *The Max Planck Encyclopedia of Public International Law* (Oxford University Press Oxford, May 2016), opil.ouplaw.com/home/EPIL: E. Benvenisti, ‘Occupation, Pacific’; Y. Dinstein, ‘Armistice’. The Rhine occupation merited no separate entry, though J. Schwietzke, ‘Saar Territory’, *ibid.*, did; none references race, rape, *etc.*

⁸⁰ I cannot categorically establish that current international law literature, in any language, makes no single reference the ‘horror on the Rhine’; if any such reference exists, it is extremely rare.

⁸¹ E. Fraenkel *Military Government and the Rule of Law: Occupation Government in the Rhineland 1918-1923* (1944), at 159 *et seq.* briefly discussed the ‘*Schwarze Schmach*’ *apropos* the jurisdiction of Rhine military tribunals; racial prejudice and allegations of sexual offenses against ‘colored soldiers’ mentioned but understated; Fraenkel did not raise the question of legality.

⁸² T.L. Schroer, ‘The Emergence and Early Demise of Codified Racial Segregation of Prisoners of War under the Geneva Conventions of 1929 and 1949’, (2013) 15 *JHIL* 53, at 62.

German soldiers if ‘interned amongst large numbers of prisoners of alien race, say, for instance, with Ottoman troops’,⁸³ their own allies. The Germans relented.

On their part, already in 1915, Germany’s Foreign Office published a two-page ‘Memorial’ (with thirty pages of appendices and testimonials) protesting the ‘Employment ... of Colored Troops upon the European Arena of War by England and France’ ‘contrary to International Law’.⁸⁴ This was accompanied by the publication in Germany of ‘a variety’⁸⁵ of pamphlets making the case that both pre-war scholarship and treaties, as one put it, prohibited wartime English and French use of ‘yellow, brown and black fellows from remote parts of the world’.⁸⁶ As for the Memorial, its first paragraph read:

In the present war England and France have not relied solely upon the strength of their own people, but are employing large numbers of colored troops from Africa and Asia in the European arena of war against Germany's popular army. Gurkhas, Sikhs and Panthans, Sepoys, Turcos, Goums, Moroccans, and Senegalese fill the English and French lines from the North Sea to the Swiss frontier. These people, who grew up in countries where war is still conducted in its most savage forms, have brought to Europe the customs of their countries; and under the eyes of the highest commanders of England and France they have committed atrocities which set at defiance not only the recognized usages of warfare, but of all civilization and humanity.⁸⁷

The legal argument was presented, first, moderately. The Memorial acknowledged that ‘The laws of nations do not, indeed, expressly prohibit the employment of colored tribes in wars between civilized nations’;⁸⁸ but submitted that ‘The presupposition for such employment, however, is that the colored troops ... be kept under a discipline which *excludes* the possibility of the *violation of the customs of warfare among civilized peoples*’. It argued that England and France had failed to meet this requirement.⁸⁹ Next, however, came an appeal to greater normative force, political prevalence, historical pedigree, and the spirit animating the preamble to the 1899 Hague Convention:

Just as *Lord Chatham* once protested in the English House of Lords, during the American war of Independence ... and *Prince Bismarck* in the Franco-Prussian war of 1870/71 ... against the employment, contrary to International Law, of uncivilized peoples in wars against white troops, so

⁸³ *Ibid.*, at 59.

⁸⁴ Foreign Office, *Employment, contrary to International Law, of Colored Troops upon the European Arena of War by England and France* (1915) [hereafter ‘*Employment*’].

⁸⁵ J. Riesz, *Afrikanische Kriegsgefangene in deutschen Lagern während des Ersten Weltkriegs*, in M. Hofmann, R. Morrien eds., *Deutsch-afrikanische Diskurse in Geschichte und Gegenwart: Literatur-und kulturwissenschaftliche Perspektiven* (2012), at 74.

⁸⁶ Dr. Hans Belius, *Die farbigen Hilfsvölker der Engländer und Franzosen* (1915).

⁸⁷ *Employment*, at 1, signifying the encounter between black man and white women: ‘the French military authorities ... set these savages to guard *innocent women* ... and to *expose* them to their *animal passions*’: *ibid.*, at 2 (emphases in the original).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*; emphasis in the original.

the *German Government* sees itself compelled in the present war to enter a *most solemn protest* against England and France bringing into the field against Germany troops whose savagery and cruelty are a disgrace to the methods of warfare of the twentieth century. The Government bases its protest upon the spirit of the international agreements of the past few decades, which expressly make it a duty of civilized peoples ‘to lessen the inherent evils of warfare,’ and ‘to serve the interests of humanity and the ever-progressing demands of civilization.’⁹⁰

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

Another reason to expect present-day familiarity with the ‘horror on the Rhine’ concerns its consequences. It left lasting, and patent, imprints on Weimar society and politics and on interwar international relations. In *Mein Kampf*, published in 1925-1926, Adolf Hitler, for whom the Rhine had become ‘the playground of black African hordes’, found the true culprits for Germany’s racial humiliation and degradation: ‘It was ... the Jews who bring the negro to the Rhine, always with... the clear goal of destroying, by ... bastardization ... the white race which they hate...’⁹¹ After the Nazis came to power, they subjected the progeny of mixed (often legal) unions of ‘black’ troops and white women to forced sterilization.⁹² Official proposals to so treat ‘Rhineland bastards’ dated back to 1927, but were rooted in *fin de siècle* German colonial ‘science’.⁹³

In various ways, the ‘horror on the Rhine’ had left its mark on international law itself. If ‘intermixing prisoners of war of different nationalities and races’ was followed by codification of racial segregation in the 1929 Geneva Prisoners of War Convention,⁹⁴ the employment of colonial troops on occupation duty in the Rhine had produced another type of *postbellum* codification and a reworking of international law’s theoretical postulates. For now, however, the question is how to explain amnesia.

5. Postbellum silence

⁹⁰ *Ibid.*; emphasis in the original.

⁹¹ A. Hitler, *Mein Kampf* (1941), at 917, 448-9. C. Lusane, *Hitler’s Black Victims* (2002), at 79-83; G. Mosse, *Towards the Final Solution: A History of European Racism* (1978), at 176: (‘it was against blacks, not Jews, that the ominous accusation of “Kulturschande” (rape of culture) was first raised after the war’).

⁹² R. Pommerin, *Sterilisierung der Rheinlandbastarde: das Schicksal einer farbigen deutschen Minderheit* (1979); R. Pommerin, ‘The Fate of Mixed Blood Children in Germany’, (1982) 5 *German Studies Review* 315.

⁹³ M. Burleigh and W. Wippermann, *The Racial State: Germany 1933-1945* (1991), at 129; F.W. Carr, *Germany’s Black Holocaust, 1890-1945* (2003); S. Köhl, *For the Betterment of the Race: The Rise and Fall of the International Movement for Eugenics and Racial Hygiene* (2013).

⁹⁴ Schroer, *supra* note 82, at 58.

Can embarrassment explain why today's international lawyers are ignorant of the 'horror on the Rhine' despite its prior legal salience, ubiquity, and consequence? The racialized past of international law is an awkward matter.⁹⁵ The skeleton of race is kept the closet to demonstrate that international (humanitarian) law—following the Holocaust, or decolonization—has purged itself of such detestable notions to become truly universal and egalitarian; progressive histories do require amnesia.⁹⁶ Though persuasive, this explanation is nonetheless unsatisfactory. Present day international lawyers were never given the opportunity to forget the 'horror on the Rhine': it has never entered the corpus of international law literature.

Interwar international lawyers never responded to the Rhine scandal or the allusions that the laws of war had been violated. Though it may be possible that a few exist, I could not locate a single textbook or article authored by an international lawyer, in English, German or French, between 1918 and the end of the 1920s, weighing on the legality of the French employment of colonial soldiers in the Rhine or alluding to the 'horror'.

Again, consider Oppenheim. The 'War' volume of the third edition came out in 1921. Section 82 was expanded again as some 'new' instances of practice were added: the US 'employed two coloured cavalry regiments in Cuba during her war with Spain'.⁹⁷ Even WWI merited a mention: 'some Indian regiments were employed by Great Britain in France'.⁹⁸ The Rhine occupation—or horror—received no mention.

Oppenheim died on 7 October 1919—almost a year after the armistice. While the Rhine propaganda campaign had yet to reach its height, German protests and allegations had already been registered in late 1918.⁹⁹ The editor, Ronald F. Roxburgh, noted that Oppenheim 'intended ... to introduce the events of the war when they illustrated, extended, or challenged general principles hitherto accepted'; and that 'for the history of the war' Oppenheim relied on Garner's manuscript 'which he had already read in manuscript'. Roxburgh also made 'frequent references' to Garner's manuscript.¹⁰⁰

In Germany, the source of the 'horror' campaign, silence also reigned.¹⁰¹ The post-war edition of von Liszt appeared in 1925. The new editor, Max von Fleischmann, admitted that it was 'hard to decide' whether von Liszt's text still held.¹⁰² Notwithstanding jabs at the French, von Fleischmann did not mention

⁹⁵ Anghie, *supra* note 3, at 65-6 ('nineteenth century is something of an embarrassment to the discipline ... Its complete complicity with the colonial project has led to its denunciation as an international law of imperialism').

⁹⁶ Giladi, *supra* note 1.

⁹⁷ L. Oppenheim, *International Law* (1921), Vol.II, at 108.

⁹⁸ *Ibid.*, at 108-9.

⁹⁹ Collar, *supra* note 14, at 82; Schüler, at 2.

¹⁰⁰ Oppenheim, *supra* note 97, at v; at vi-vii, noting that Oppenheim himself revised many of the paragraphs on the laws of war. On Garner, *infra* note 113.

¹⁰¹ H. Wehberg, *Le problème de la mise de la guerre hors la loi*, (1928) 24 *RdC* 151.

¹⁰² F. von Liszt, *Das Völkerrecht Systematisch Dargestellt* (1925), at 476.

the Rhine ‘horror’; nor did, apparently, the rich German literature on Versailles and the Rhineland occupation.

French authors likewise avoided the issue. Antoine Pillet did publish ‘a few articles attacking the timidity of the peace’ and the weakness of the League’, starting with several 1920 lectures suggesting Versailles went too soft on Germany; France should have been allowed to occupy the left bank of the Rhine.¹⁰³ He did not comment on the ‘horror’ of the Rhine occupation. Le Fur, who addressed the legal question in 1898, published in 1922, *Races, nationalités, états*. Denouncing the ‘untenable’ German doctrine defending the nation as the subject of international law, he observed that this ‘race theory hardly met so far many supporters outside of Germany, where it is the basis for the pan-German doctrine of *Vollkulturstaat* of the German state superior to all others’.¹⁰⁴ Notwithstanding his anxiety with emergent scientific application of such notions (and his familiarity with doctrine), Le Fur did not enter the Rhine debate.

One French work that promised an exception was a two-volume 1921 book co-authored by Mérignhac. It sought to establish, for public consumption rather than ‘the erudite’, the ‘criminal conduct’ and the ‘horror of the ... hypocritical outrage’ Germany committed ‘upon the civilized world’. What the authors produced was a ‘highly polemic réquisitoire’ characterized by ‘violence of ... language’ and ‘indiscriminate denunciation’.¹⁰⁵ A section on *Les troupes exotiques* reproduced familiar arguments about ‘necessary conditions for the employment of exotic troops’ (‘regimented and controlled in a European way, and respect the principles of International Law’); reviled Bismarck’s false 1871 accusations;¹⁰⁶ noted that ‘Germany itself used exotic troops’;¹⁰⁷ and denounced German ‘abominable methods’ and violations, directed ‘mostly ... towards indigenous troops’.¹⁰⁸ All that demonstrated Germany’s own savagery (*‘on peut être plus sauvage’*) ‘despite the color of skin’.¹⁰⁹ The recent war put an ‘extraordinary spectacle of primitive races’, recently civilised, ‘crossing seas to defend the old European civilization against the new barbarians of the Western world ... those ... well below their level’.¹¹⁰ Yet even this work of international law pulp avoided the Rhine horror. Mérignhac and Lémonon promised to examine German allegations with regard to the use of exotic troops, but only noted how Germany ‘prosecuted with ... tenacious hatred the indigenous troops during the recent war’.¹¹¹

These are only a few samples; it may be that some post-war international law scholars did address the ‘horror on the Rhine’. Yet indices, tables of contents, online databases, *etc.* perused do not record that they mentioned, let alone

¹⁰³ Koskenniemi, *supra* note 5, at 292-3; A. Pillet, *Le traité de Versailles* (1920).

¹⁰⁴ L. Le Fur, *Races, nationalités, états* (1922), at 61. Koskenniemi, *supra* note 5, at 321 *et seq.*

¹⁰⁵ Review by J.W. Garner, (1922) 37 *Pol. Sci. Quarterly* 152.

¹⁰⁶ A. Mérignhac & E. Lémonon, *Le Droit des Gens et la Guerre de 1914-1918* (1921), Vol.I, at 136.

¹⁰⁷ *Ibid.*, at 139.

¹⁰⁸ *Ibid.*, at 138-9.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, at 136-8.

addressed, the Rhine scandal or its legal aspect. Their silence is all the more resounding given that other scholars did address the question of race and the war.¹¹² James Wilford Garner, whose manuscript Oppenheim (and Roxburgh) had read in preparation of the 1921 edition, was an American political scientist with no legal training. That manuscript, published *before* Oppenheim's, comprised a comprehensive record of allegation and counter-allegation of wartime violations, under the title '*International Law and the World War*'. It almost certainly preceded the propaganda campaign. Still, unlike Oppenheim's or Liszt's post-war editions, Garner did discuss *recent* record on the 'Employment of Uncivilized Troops', addressing the German 1915 protest. His analysis illustrated how salient the legal question was; it also explained the silence of treaty law. True, the rule prohibiting the use of 'savage troops who do not respect the laws of humanity or the rules of civilized warfare or whose excesses cannot be restrained by their commander' was not mentioned by the Hague Convention; there was no need to do so. It had for 'so long been a recognized rule of civilized warfare that it has never been deemed necessary to affirm it in express in the international conventions respecting the conduct of war'. Indeed, 'publicists and statesmen of all countries have condemned the use of troops of an inferior civilization, whose savage instincts and manner of life make it improbable that they will observe the rules of civilized warfare.'¹¹³

6. Explaining silence

How can the silence of post-war lawyers be explained? Here, the methodological constraints on any attempt to identify the causes of silence force me to speculate; still, some evidence supports or militates against different hypotheses.

6.1 Race as embarrassment

To argue that race became a source of embarrassment for post-war international lawyers makes little sense. For one thing, they had no qualms with proposing the racial segregation of prisoners of war as a project of post-war law reform to the Grotius Society or, indeed, codifying segregation in the Geneva PoWs Convention of 1929.¹¹⁴ The racialized construction of the law of war survived WWI; if anything, it was now reasserted forcefully. Major Elbridge Colby, challenging Wright's interpretation of the 'Bombardment of Damascus' in 1927,¹¹⁵ made a point of asserting that 'The distinction' in 'the application of laws of war to people

¹¹² *E.g.* the infamous Manifesto by 93 German intellectuals: (1919) 210 *North American Review* 284, at 285 ('those who have allied themselves with Russians and Serbians ... inciting Mongolians and negroes against the white race, have no right whatever to call themselves upholders of civilization'); Von List was among the signers.

¹¹³ J.W. Garner, *International Law and the Great War* (1920), at 293-7. For post-war discussion by non-lawyers, *e.g.* Maj. B.T. Reynolds, 'A Review of the Occupation of the Rhineland', (1928) 7 *J. Royal Inst. Int'l Aff.* 153.

¹¹⁴ Schroer, *supra* note 82.

¹¹⁵ Q. Wright, 'The Bombardment of Damascus', (1926) 20 *AJIL* 263. Ironically, 'black' units withdrawn from the Rhine were sent to quell the Arab rebellion in Syria: Marks, *supra* note 15, at 299, 326; Nelson, *supra* note 14, at 616.

of a different civilization' 'is existent'.¹¹⁶ Colby's 'How to Fight Savage Tribes' did express the orthodox laws of war doctrine. If, as Arnulf Becker Lorca recently argued with regard to that exchange, the standard of civilization was on the decline, the laws of war, with their racialized construction, proved immune.¹¹⁷ The paragraph on 'Barbarous Forces' survived, under that margin heading, subsequent editions of Oppenheim under the editorship of McNair, then Lauterpacht.¹¹⁸ None mentioned 'the horror on the Rhine'. Only in 1944, in the (revised) sixth edition, did Lauterpacht start pondering the status of the rule: 'Writers used to discuss the question, which some tended to deny, whether it is permissible to employ troops consisting of individuals belonging to savage tribes and barbarous races. The question is now largely a theoretical one'. Some ambivalence lingered in the condition: 'if it can be assumed that they would or could comply with the laws and usages of war...'¹¹⁹ The paragraph concluded with the slightest hint of controversy: 'There has been no disposition to contest the legality of the employment of such forces in either of the two World Wars'.¹²⁰ The terminology, condition, and analysis perhaps indicated shifts in how race was read into law, but not that race had become irrelevant; Lauterpacht may have recorded a doctrinal shift, but no embarrassment with race.

Significantly, German protests and the French practice were both predicated on a racialized construction of humanity. Practicalities of force deployment and demobilisation were not the only considerations shaping French motives.¹²¹ Sending colonial troops to the Rhine was preferred over stationing them in France;¹²² though pure vindictiveness or calculated humiliation were not likely present, parts of the French decision-making apparatus were not averse to signifying French victory or showing off empire to Germans who had lost theirs.¹²³ Retorting to German allegations, France hoisted the flag of racial

¹¹⁶ E. Colby, 'How to Fight Savage Tribes,' (1927) 21 *AJIL* 279. Colby's scholarship was not precisely marginal, as implied by A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015), at 289 *et seq.*; Colby authored several pieces on military and other matters, but also, prior to 1927: 'An Obsolete Law of War', (1923-1924) 8 *Minn. L. Rev.* 317; 'Aerial Law and War Targets', (1925) 19 *AJIL* 702; 'Occupation under the Laws of War', (1925) 25 *Colum. L. Rev.* 904; (1926) 26 *Colum. L. Rev.* 146 (pt.ii); 'The Occupation of Michigan an Incident in the History of Military Government', (1924) 22 *Mich. L. Rev.* 509; *etc.* Besides, Wright's own credentials were earned subsequently.

¹¹⁷ Wright, *supra* note **Error! Bookmark not defined.**, at 267 in fact acknowledged the orthodoxy in that very piece: 'It is true, modern international law does not approve the use of "savage tribes or barbarous races" in civilized warfare, but this is on the theory that such troops will not observe the law of war themselves.'

¹¹⁸ Familiar with the Rhine occupation literature: H. Lauterpacht, 'Revolutionary Propaganda by Governments', (1927) 13 *Trans. Grotius Society* 143, at 148.

¹¹⁹ L. Oppenheim, *International Law* (1944), Vol.II, at 206.

¹²⁰ *Ibid.*, at 207. The seventh edition was essentially identical; *International Law* (1952), Vol.II, at 261. No eighth edition of Vol.II ever appeared.

¹²¹ Marks, *supra* note 15, at 297 (no sinister French motives, but 'hard pressed' for men in light of demobilization and force reductions); Lusane, *supra* note 91, at 77 and Collar, *supra* note 14, at 80-1, offer a more nuanced assessment.

¹²² Nelson, *supra* note 14, at 612.

¹²³ Lusane, *supra* note 91, at 77; Collar, *supra* note 14, at 80-1; Nelson, *supra* note 14, at 611-13.

equality of the *'patrie indivisible'*.¹²⁴ Yet notions of negritude and the *mission civilatrice* undergirded the very multiracial composition *and* the European deployment of colonial troops of the French military.

In 1910, a French Lieutenant-Colonel published a book advocating the use of *La Force noire* not only in the empire but, given dwindling birth rates and demographic inferiority to Germany, also in defence of *la Patrie*.¹²⁵ For Charles Mangin, the very savagery of African troops was an advantage. He praised 'those primitives whose young blood flows so ardently, as if avid to be shed';¹²⁶ '*La race nègre*', he declared, survives climates and hardship that no European endures.¹²⁷ Possessing a combination of overdeveloped physique and underdeveloped 'nervous system',¹²⁸ the 'black soldier' is ideal for modern war.¹²⁹ Their presence spelled 'an incomparable power of shock. Their arrival on the battlefield would have a considerable moral effect on the adversary'.¹³⁰

At the same time, Mangin saw the use of black soldiers in European war 'as the pinnacle of France's civilizing mission'; he insisted they would be 'recruited only from peoples who had undergone a certain degree of assimilation'.¹³¹ His ambivalence—the tension between the savagery of colonial troops and their exposure to civilisation¹³²—was the same displayed by legal scholars. After the armistice, General Mangin, now known as the 'father of the black forces', was placed in command in the Rhine.¹³³ Military practice and legal doctrine both, rather than rejecting the relevance of race, embraced its logical-yet-uncertain conclusion.¹³⁴

6.2 Disenchantment

Post-war disenchantment with international law itself could explain the silence of international lawyers on the Rhine horror. International law was framed by belligerents on both sides as what the war was all about. It was used and abused as a tool of propaganda. The result, Isabel Hull suggests, was a post-war fatigue

¹²⁴ Marks, *supra* note 15, at 318.

¹²⁵ C. Mangin, *La Force noire* (1910), at 47; C. Mangin, '*L'Utilisation des Troupes Noires*', (1911) 2 *Bulletins et Mémoires de la Société d'Anthropologie de Paris* 89. See R. Ginio, 'French Officers, African Officers, and the Violent Image of African Colonial Soldiers', (2010) 36 *Historical Reflections* 59.

¹²⁶ Mangin, *supra* note 125, at 258.

¹²⁷ *Ibid.*, at 248.

¹²⁸ J. Lunn, "'Les race guerrières": Racial Preconceptions in the French Military about West African Soldiers during the First World War,' (1999) 34 *Journal of Contemporary History* 517, at 521.

¹²⁹ Mangin, *supra* note 125, at 252; 81 ('the sound of weapons would cover, as always, the protests of the law'). For similar British thinking, and anxiety of 'strict leadership by white officers': C. Koller, 'Military Colonialism in France and in the British Empire', in D. Dendooven, P. Chielens (eds.), *World War One: Five Continents in Flanders* (2008), 11 at 17.

¹³⁰ Quoted in Lunn, *supra* note 128, at 521.

¹³¹ Ginio, *supra* note 125, at 62.

¹³² *Ibid.* Ironically, colonial troops in France were the object of Rhine-like wartime accusations by French population: Koller, *supra* note 129, at 13.

¹³³ Nelson, *supra* note 14, at 611.

¹³⁴ Ginio, *supra* note 125, at 67 (French concerns for sense of equality 'to the white man' and 'the problem of *métissage*' in relations of 'African soldiers with white women').

with international law, caused by the collective European wartime trauma, disillusionment with law's failure to stop the war, despair of its inability to mitigate it, revelations of its propaganda abuse—and wariness of endless partisan claims and counterclaims on what was, in fact, legal, humane and civilized. In 1923, James Brown Scott lamented 'these days when it is heresy to speak of The Hague [Conferences]'.¹³⁵ Could post-war lawyers have somehow known that the allegations concerning atrocities and travesties committed by France's colonial soldiers were propaganda fabrication and refused, conscientiously, to partake in the further abuse of their profession?¹³⁶ Perhaps. Yet if Versailles was the 'perfect icon' of international law or, for its detractors, of 'all that ailed international law',¹³⁷ then attacks on Versailles were attacks on international law. The stakes make it unlikely.

Still, disenchantment is not enough to explain silence. Some were disillusioned enough with international law to drift towards other disciplinary engagements.¹³⁸ Those who stayed, however, did write on law in the Great War, and on Versailles (sometimes, specifically on the Rhineland occupation) without alluding to the scandal. They continued addressing the employment of 'Barbarous Forces'; and debated and reshaped the laws of war, based on WWI experience, as part of a larger project of international law renewal.¹³⁹ If renewal required that international law be forgotten,¹⁴⁰ what about the Rhine scandal required silence, then amnesia?

6.3 Patriotism

Patriotism, too, furnishes no decisive answer. Siding with the Germans, whose own atrocity record was propagated so effectively by the Allied Powers,¹⁴¹ may have simply been too much for British, French, or American lawyers troubled by news coming from Germany. The cost of omitting one recent example may not have been seen as too great.¹⁴² It could not have helped that the 'horror' campaign touched (as it was designed to) on imperial and American sensitivities about race and the very atrocity of the European war itself. Still, other academics and intellectuals of various disciplines and nationalities did make their voices heard on the Rhine scandal. And the *antebellum* international law position, as already

¹³⁵ J.B. Scott, 'Introductory Note', O. Nippold, *The Development of International Law After the Great War* (1923), at v.

¹³⁶ Though the fervent engagements of many learned men and women in the debate militate against such reading.

¹³⁷ I.V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 6. The German propaganda campaign was aimed at undoing Versailles and challenging the German 'war guilt' thesis; J.E. Barker, 'The Colored French Troops in Germany', (1921) *Current History* 594, at 599.

¹³⁸ Koskenniemi, *supra* note 5, at 236 *et seq.*, 291 *et seq.*

¹³⁹ Hull, *supra* note 137, at 328-9.

¹⁴⁰ *Ibid.*, at 3.

¹⁴¹ G.S. Messinger, *British Propaganda and the State in the First World War* (1992).

¹⁴² Allied governments and officials often displayed evident discomfiture with the Rhine presence of French colonial troops: Nelson, *supra* note 14, at 609-10, 614; R.C. Reinders, 'Racialism on the Left: E.D. Morel and the "Black Horror on the Rhine"', (1968) 13 *International Review of Social History* 1, at 23; P.G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (1996), at 112 (British warning not to use 'nigger' armies).

noted, was ambiguous enough to allow a patriotically driven engagement with the legality question by lawyers on all sides. If anything, patriotism required taking a stand.

6.4 *Dramatis personae*

The campaign against the employment of French colonial soldiers on the Rhine involved one more factor that may explain why international lawyers had never entered the fray. It concerns the identity of the defender of Rhine morality, the author of that eight-editions ‘Horror on the Rhine’ pamphlet. He had impeccable liberal credentials, unmistakable socialist leanings, proven humanitarian record, and an expertise in matters African. Years before, as a shipping clerk, he noted that ships leaving for the Congo carried only guns, ammunition, explosives, and chains. This revelation led him to wage a campaign that would eventually end Leopold’s genocidal exploitation of the Congo. For that campaign, Adam Hochschild credited Edmund Dene Morel with paternity of ‘the first great international human rights movement of the twentieth Century’.¹⁴³

The ‘Horror on the Rhine’ pamphlet was not Morel’s only engagement with the affair; rather, he had ‘obsessively led’, until his 1924 death, ‘one of the most racist political campaigns to be launched in the first half of the twentieth century’.¹⁴⁴ This was ‘a global effort, using some of the most racist propaganda, tactics, and arguments possible ... against the presence of black French troops’ in Germany.¹⁴⁵ Through the Union of Democratic Control (UDC) platform and the media apparatus of the British socialist and liberal Left, Morel’s pen produced other pieces titled *e.g.* ‘Black Scourge in Europe, Sexual Horror Let Loose by France on Rhine, Disappearance of Young German Girls’;¹⁴⁶ ‘The Prostitution of the Rhineland’;¹⁴⁷ ‘The Employment of Black Troops’;¹⁴⁸ *etc.*

Morel’s Congo campaign had exposed the complicity of many of that generation’s leading international lawyers with Leopold’s project, through *naïveté*, ideological susceptibility, or greed. ‘During the peak years of the Congo controversy’, Martti Koskenniemi writes, ‘the international law community stayed silent’.¹⁴⁹ By 1918, that generation had died; a new generation of international lawyers may have been too timid to confront—or align with—Morel.

6.5 Masculinity in crisis

Another explanation for the silence of *postbellum* lawyers is masculinity crisis. The ‘horror’ campaign concentrated, after all, on the violation of German women

¹⁴³ A. Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1998), at 274.

¹⁴⁴ Lusane, *supra* note 91, at 71; Reinders, *supra* note 142, at 26-8 (Morel’s motives).

¹⁴⁵ Lusane, *supra* note 91, at 71.

¹⁴⁶ *Daily Herald* 9 April 1920.

¹⁴⁷ *Foreign Affairs*, II (June 1921) 196.

¹⁴⁸ *The Nation*, 26 (27 March 1920), 893. All this was unaddressed by Hochschild: Lusane, *supra* note 91, at 70 (‘profound irony’); P. Campbell, ‘“Black Horror on the Rhine”: Idealism, Pacifism, and Racism in Feminism and the Left in the Aftermath of the First World War’, (2014) 47 *Social History* 471, at 476.

¹⁴⁹ Koskenniemi, *supra* note 5, at 163.

and girls through a construction of the inhumanity of black masculinity. Morel's protest described the 'tremendous sexual instincts' of Africans;¹⁵⁰ it was their 'instinctive', 'spontaneous, fiercer', and less controllable 'sex-impulse', not hedged 'by the complicated paraphernalia of convention and laws',¹⁵¹ that was let loose upon '*the bodies of white women*'.¹⁵²

Morel furnished evidence for both the terms and the profundity of the crisis. France, he wrote elsewhere, was 'thrusting her black savages ... into the heart of Germany'.¹⁵³ He described the 'barely restrainable bestiality' of Africans, observing they are 'the most developed sexually' race.¹⁵⁴ '[F]or well-known physiological reasons', he lectured, 'the raping of a white woman by a negro is nearly always accompanied by serious injury and not infrequently has fatal results ...'.¹⁵⁵ To socialists, he agitated that 'the manhood of these races, not so advanced in the forms of civilisation as ourselves', if 'used against the Germans', may eventually also be directed '*against the workers*' at home.¹⁵⁶ The threat was to 'manhood', and so was the real victim: 'Boys, *these men raped your mothers and sisters!*'¹⁵⁷ A recurrent propaganda theme was the Rhenish 'fettered husband'.¹⁵⁸

That such anxieties were driven by fabrication and wild exaggeration only serves to fathom their depth and the 'receptive cultural terrain'.¹⁵⁹ They were exacerbated by facts emanating from the occupied Rhine.¹⁶⁰ Colonial troops were, in fact, harshly disciplined; and, unlike their French comrades, they harboured no *revanchism*. They were, reportedly, better behaved than their white comrades.¹⁶¹ German mayors protested when they left their towns.¹⁶² French authorities thoroughly investigated and severely punished suspected misconduct.

As one may expect, 'the propagandists deemed it inconceivable that any woman born into German Kultur would voluntarily associate with "black savages", all liaisons between such troops and German women were automatically termed rape.'¹⁶³ And male and female American and German investigators reported from the Rhine that the culprits of interracial promiscuity were not colonial troops: 'German women were chasing the non-European

¹⁵⁰ In Reinders, *supra* note 142, at 4.

¹⁵¹ *Supra* note 21.

¹⁵² *Supra* note 26.

¹⁵³ In Reinders, *supra* note 142, at 1.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, at 2.

¹⁵⁷ 'Horror', at 22; italics in the original.

¹⁵⁸ Marks, *supra* note 15, at 313, 315.

¹⁵⁹ S. Maß, 'Das Trauma des weißen Mannes: Afrikanische Keolonialsoldaten propagandistischen Texten, 1914-1923', (2001) 12 *L'Homme: Zeitschrift für feministische Geschichtswissenschaft* 11, at 13-14.

¹⁶⁰ Most of the propaganda came from unoccupied Germany.

¹⁶¹ Marks, *supra* note 15, at 299-300, 310.

¹⁶² *Ibid.*, at 300.

¹⁶³ *Ibid.*, at 302.

soldiers, who often complained to their officers of being pestered'.¹⁶⁴ One reported that, according to a German journalist, the 'German women were largely responsible for the mingling of colored and white blood';¹⁶⁵ 'The attitude of certain classes of German women toward the colored troops', observed a State Department report, 'has been such as to incite trouble'.¹⁶⁶ German Courts tried 'bad women' in 'inciting to debauchery' cases.¹⁶⁷ The government, notably, carefully culled any such evidence.

Given such framing and evidence, it is not surprising that several historians have interpreted the *Schwarze Schmach* as a register of an 'acute crisis of masculinity',¹⁶⁸ a repository of 'male anxieties and male sexual phantasies'.¹⁶⁹ An entire generation of young European men had just been emaciated.¹⁷⁰ Germany was made to surrender, forced to disarm, stripped of its colonial possession and imperial position, then occupied. German humiliation,¹⁷¹ so great that some architects of the post-war settlement decried it,¹⁷² was compounded by the 'loose' behaviour of German women towards African troops whose constructed sexuality revealed how severe was the threat to white patriarchy.¹⁷³ In the Rhine campaign, the former became the symbols of German (white, male) victimhood;¹⁷⁴ the latter,

¹⁶⁴ *Ibid.* ('German women married Anamese, Algerians, Malagasies, and Senegalese, returning with them to their homes').

¹⁶⁵ Barker, *supra* note 137, at 596; Lusane, *supra* note 91, at 74-5. On French counter-propaganda: Ginio, *supra* note 125, at 68.

¹⁶⁶ State Department, *Colored Troops in the French Army* (1921), at 12.

¹⁶⁷ Marks, *supra* note 15, at 302; Wigger, *supra* note 14, at 39 ('lecherous traitors of the white race').

¹⁶⁸ J. Roos, 'Women's Rights, Nationalist Anxiety, and the "Moral" Agenda in the Early Weimar Republic: Revisiting the "Black Horror" Campaign against France's African Occupation Troops', (2009) 42 *Central European History* 473, at 475.

¹⁶⁹ Schüler, *supra* note 28, at 2.

¹⁷⁰ Mass, *supra* note 159, at 15 (shame propaganda as opportunity 'to talk about psychological and physical fragmentations of the male body without having to mention explicitly' war's traumatic experience or express 'fears of violent physical dismemberment').

¹⁷¹ Roos, *supra* note 168, at 475.

¹⁷² A. Lentin, *General Smuts: South Africa* (2010); Smuts spoke vehemently against the posting of black troops in Germany.

¹⁷³ E. Kuhlman, *Reconstructing Patriarchy after the Great War: Women, Gender, and Postwar Reconciliation between Nations* (2008); Mass, *supra* note 159, at 15 (the 'Black Shame' as 'male traumata' of the war; 'trauma of the white man'); E. Kuhlman, 'American Doughboys and German *Fräuleins*: Sexuality, Patriarchy, and Privilege in the American-Occupied Rhineland, 1918-23', (2007) 71 *Journal of Military History* 1077, at 1093 ('not only an ignominious Peace but a race shame that threatens our destruction'); B. Bush, "'Britain's Conscience on Africa": White Women, Race and Imperial Politics in Interwar Britain', in C. Midgley, ed., *Gender and Imperialism* (1998), 215 ('trans-racial sex between white women and black men of all classes became an obsession among white males').

¹⁷⁴ Wigger, *supra* note 14, at 38-9 (the 'honour of the German woman' equated with the 'honour of the nation', 'their ravaging symbolized German defeat and humiliation', 'an allegory for a disarmed, figuratively raped (and thus emasculated) German people, bound by its enemies and the Treaty of Versailles').

the symbolic instruments of what Jan Smuts saw as a ‘crusade of suicide’ by European civilization.¹⁷⁵ Both groups suddenly proved not amenable to control.¹⁷⁶

Such anxieties were not new. They were rooted in German colonial experience. The register of German anxiety with regard to racial mixture was such that one historian commented on ‘the seeming inability of Germans [in Africa] to stop copulating with African men and women’.¹⁷⁷ Neither were they limited to Germany. The campaign addressed European and global apprehensions: Morel, for one, had warned against the conscription of black soldiers for the purpose of ‘killing white men in Europe’.¹⁷⁸ ‘[W]hite domination’ was threatened.¹⁷⁹

The crisis touched the exposed nerve of the lawyers’ pre-war jurisprudential anxieties about the (in)humanity of colonial troops, their susceptibility to the effects of the civilizing mission, and the ability of white officers to control them. These had been the very source of the lawyers’ ambivalence towards the employment of ‘barbarous forces’ in a European war. For the lawyers, evidently, at stake was far more than the violation of one rule, more or less accepted by pre-war scholars, of the laws of war. In one sense, France introducing colonial troops to the theatres of European war and European peace represented no less than the strict application of the standard of civilisation in warfare, the fulfilment of promise to civilise and humanize savage troops who were ‘drilled white’.¹⁸⁰ At the same time, that very policy threatened to undo the entire legal and political order on which these notions were predicated. *First*, that policy undermined the very foundations of the modern project to humanize war. The recent war supplied ample evidence of the capacity of European civilisation to direct endless inhumanity at itself. The ‘relapses into barbarism’ trope of the modern laws of war, so prevalent since Francis Lieber¹⁸¹ (but hitherto appearing as no more than a rhetorical device), had now materialised as a refutation of Europe’s capacity to restrain warfare or to conduct itself humanely on its own ‘civilised’ battlefields.¹⁸² Colonial war, imported to Europe, forced Europeans to face a horrid mirror-image.¹⁸³ To either impeach or defend the conduct of colonial troops in Europe

¹⁷⁵ In C. Koller, ‘Von Wilden aller Rassen niedergemetzelt’: Die Diskussion um die Verwendung von Kolonialtruppen in Europa zwischen Rassismus, Kolonial-und Militärpolitik (1914-1930), at 290; I. Wigger “Against the laws of civilization”: Race, Gender and Nation in the International Racist Campaign Against the “Black Shame”, (2002) 46 *Berkeley Journal of Sociology* 113.

¹⁷⁶ Wigger, *supra* note 14, at 40 (control of bodies, ‘sexuality of German women’); Roos, *supra* note 168, at 488 (breakdown of traditional controls on female sexuality’).

¹⁷⁷ Lusane, *supra* note 91, at 50.

¹⁷⁸ *Supra* note 38; Koller, *supra* note 31, at 124 (the propaganda expressed concern for ‘the future of the colonial system and the supremacy of the “white race” by raising the specter of colonial troops, trained in modern war, who ‘would turn their weapons against their own masters and remove colonial rule’).

¹⁷⁹ Wigger, *supra* note 14, at 35.

¹⁸⁰ *Supra* note 55.

¹⁸¹ Lieber Code, Art.148; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1968), Vol.II, at 211.

¹⁸² Koskenniemi, *supra* note 5, at 292 (Pillet).

¹⁸³ Evident in the quotes from Mériqnac & Lémonon, *supra* notes 108, 110; Roos, *supra* note 168, at 506 quotes 1922 radical feminist Helene Stöcker: ‘our much-praised “civilization” [Kultur] has proven itself only in one respect, namely in our superior ability to kill’.

could only confirm the futility of the modern laws of war project. International lawyers elected to do neither.

Second, if patent evidence of Europe's 'internecine wars' had underscored white anxiety, in Europe and the US, with the looming 'subjugation of white lands by colored armies',¹⁸⁴ for the lawyers it could have represented no less than the collapse of civilisation as an organizing category and, with it, the very logic of international law geared to maintain and legitimise European colonialism and empire. The Rhine occupation, and the anxieties it let slip, exposed the internal contradictions in legal categories and threatened to undo the distinctions they so carefully constructed: barbarian and civilised, black and white, victor and vanquished, occupied and occupant, colonized and colonizer, sovereign and subjugated. Roles were reversed, subject became object. Critics of the occupation, a proxy for the entire Versailles settlement, 'equated it with colonization, in which the German people had become colonial subjects. It was the world turned upside down...'¹⁸⁵ Smuts thought that the Versailles *Diktat* treated Germany 'as we would not treat a *kaffir* nation'.¹⁸⁶ The old vocabulary of international law could not be used to address any of this; the lawyers remained silent.

Reversal of roles and a sense of collapse reverberate in the silence of two post-war German international lawyers at opposite poles of Weimar politics. Both wrote on the Rhine occupation, and both failed to mention its 'horror'. One was Walther Schücking (1875-1935), the important-yet-marginal pacifist and liberal internationalist.¹⁸⁷ '[F]undamentally opposed' to Versailles, he had served as one of Germany's delegates to the negotiations.¹⁸⁸ In 1929, a year before he was appointed to the world court, he published a short tract making the legal case for Germany's right to demand French withdrawal from the Rhine. Schücking avoided any reference to race or rape; he did protest of Germans 'still ... being humiliated by the presence of many thousand soldiers on German soil!'¹⁸⁹

Yet Schücking was familiar with the *Schwarze Schmach*. The instructions of the German delegation to Versailles 'specified that "colored troops should not be made a part of the army of occupation"'; the delegation's protest of the terms of the treaty complained that Germany's enemies 'bombard us and then send in their black troops'.¹⁹⁰ Schücking, in fact, was a member of the *Heidelberger*

¹⁸⁴ Campbell, *supra* note 148, at 482, quoting Harvard professor Lothrop Stoddard: L. Stoddard, *The Rising Tide of Color against White World-Supremacy* (1920), at vi.

¹⁸⁵ Campbell, *supra* note 148, at 472, footnote omitted (adding: 'German women and girls were now at the mercy of highly sexed colonial troops, rapacious black men lacking the restraint of their more "civilized" white counterparts'; Collar, *supra* note 14, at 6 ('No longer imperialist masters, Germans were now colonial subjects') in reference to J. Poley, *Decolonization in Germany: Weimar Narratives of Colonial Loss and Foreign Occupation* (2005); Collar, however, advocates a more nuanced position.

¹⁸⁶ Lentin, *supra* note 172, at 87.

¹⁸⁷ M. García-Salmones, 'Walther Schücking and the Pacifist Traditions of International Law', (2011) 22 *EJIL* 755.

¹⁸⁸ Koskenniemi, *supra* note 5, at 220-1; C. Tams, 'Re-Introducing Walther Schücking', (2011) 22 *EJIL* 725, at 727.

¹⁸⁹ W. Schücking, *Das Recht auf Rheinlandräumung* (1929), at 12-13.

¹⁹⁰ Nelson, *supra* note 14, at 609.

Vereinigung,¹⁹¹ with whom Morel and the UDC ‘worked intimately’. It even ‘sponsored publication of *The Horror on the Rhine* and provided Morel with information about conditions in the occupied zone’.¹⁹²

The other jurist was Carl Schmitt. In April 1925, he gave a lecture published under the telling title ‘The Rhineland As An Object of International Politics’.¹⁹³ Though silent on the ‘horror’, Schmitt did speak of a duty to ‘guard our countrymen against losing their moral bearings ... in an atmosphere of international promiscuity’.¹⁹⁴ Here Schmitt first dealt with what would develop into familiar themes of his later scholarship:¹⁹⁵ authority, the meaning of the political, the obliteration of ‘the natural boundary’ between peace and war, the ideological baggage and imperial use of ‘humanity’, the taboo on annexation and the invention of ‘newfangled methods’ of imperial domination—and the abandonment of old international law.

Schmitt’s essay opened with a warning of a persisting danger that ‘the Rhine country should be reduced to a mere object of international politics and that the Rhenish people should be degraded into a mere appendage of an object’.¹⁹⁶ The thrust was that Versailles had affected the collapse of German sovereignty, and with it, of the old international legal system and vocabulary.¹⁹⁷ The Rhineland, and Germany, were the subject of ‘attempts to degrade the Rhineland, by means of ... new methods, into an object of international politics’.¹⁹⁸ The treaty provisions on reparations, sanctions, investigation, and occupation ‘are able to convert all Germany into a political object. They concern most nearly the Rhineland...’.¹⁹⁹ Loss of political and legal subjecthood placed Germans ‘at the mercy of an impersonal political machine, thrown into gear by unknown hands, representing not a single foreigner, but an abstract relation between foreigner, and adding the foul practice of anonymity to the gall of foreign yoke’.²⁰⁰ Germany, in short, was ‘lowered to a mere trifle and its population to a second rate thing’.²⁰¹ Turned into an ‘object’, it was in effect a colonial possession of

¹⁹¹ ‘[A]n erudite group that not only researched the question of the guilt for the ... War and the horror propaganda, but also financially supported Morel and violently protested against the deployment of colored troops’: van Galen Last, *supra* note 50, at 172.

¹⁹² Reinders, *supra* note 142, at 13.

¹⁹³ C. Schmitt, *The Rhineland As An Object of International Politics* (1925).

¹⁹⁴ *Ibid.*, at 23.

¹⁹⁵ W. Rasch, ‘Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland’ (2008) 8 *New Centennial Review* 57. Neither C. Schmitt, *The Nomos of the Earth* (1988); nor C. Schmitt, *Concept of the Political* (1996) mentioned the Rhine occupation.

¹⁹⁶ Schmitt, *supra* note 193, at 3.

¹⁹⁷ Rasch, *supra* note 195, at 62 (if Schmitt ‘could see far better than his more liberal colleagues how moral, legal, and economic discourses formed the new mode of effective control over protectorates, mandates, and smaller nations within one’s sphere of influence, this was because in his view similar languages and methods were being used to limit German sovereignty, German liberty, and German economic reconstruction’); 67 (‘the distinction Europeans had traditionally made between Europe and the non-European world, namely the distinction between the representatives of civilization and the less—or uncivilized, began to collapse’).

¹⁹⁸ Schmitt, *supra* note 193, at 23.

¹⁹⁹ *Ibid.*, at 12.

²⁰⁰ *Ibid.*, at 19.

²⁰¹ *Ibid.*, at 23.

anonymous foreigners.²⁰² As Schmitt emphasised, civilisation itself—not merely Germany—had collapsed:

an old political tradition is badly on the wane, which had, down to the last century, guided the international practice more than one commonly knows, namely the division of mankind into christian and heathen nations, the identification of Christianity and civilization, a principle withal, on which the esteem claimed for the European nations was based—all this has dwindled away. A gulf is fixed between our days and those good old times, where the manuals of international law used to speak of Christian International Law and the Right of Christian nations. The biggest stride towards this abdication of Europe was made by the Versailles Treaty.²⁰³

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

7. Resurgence

Through Schmitt’s work, the collapse embodied by the Rhine occupation had left permanent imprints on international legal theory (and, during his Nazi period, likely *praxis* too). That, however, did nothing to dispel anxieties with loss of control of ‘real’ colonial objects or reinstate legal categories and distinctions. Post-war editions of international law textbooks could assert (ambivalently and through selective mutism) the prohibition on employment of colonial troops; that, however, was not enough to reinstate control or revalidate old vernaculars.

The fourth edition of Oppenheim, edited by McNair, saw a new footnote added to the paragraph on ‘Barbarous Forces’. It advised readers to ‘note paragraph 5 of Article 22 of the Covenant’.²⁰⁴ The very instrument, and provision, vilified by Schmitt as an abdication of ‘Christian International Law’ codified the rule on the recruitment of colonial troops.²⁰⁵ The eventual Covenant text on the mandate system famously reasserted the civilizational categories of international law in colonies lost by Germany and Turkey. Its fifth paragraph, dealing with ‘B’ (*i.e.* African) mandates,²⁰⁶ prohibited the ‘military training of the natives’:

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, *and the prevention of the establishment of fortifications or*

²⁰² Rasch, *supra* note 195, at 67 (victors ‘introduced the asymmetrical distinction between the civilized and uncivilized into Europe itself, such that the vanquished Germans ... felt themselves ... pushed beyond the pale ... excluded from the realm of the “cultured” nations altogether.’)

²⁰³ Schmitt, *supra* note 193, at 12.

²⁰⁴ L. Oppenheim, *International Law* (1926), Vol.II, at 162; the first post-war edition of von Liszt, *supra* note 102 made the same reference.

²⁰⁵ This took some reversal of roles: Smuts intended the mandate system to apply to peoples in Eastern and Central Europe, not Africa: J.C. Smuts, *The League of Nations; A Practical Suggestion* (1918), at 15; M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2008), Ch.1.

²⁰⁶ Art.22(6) applied these ‘safeguards’ to ‘C’ mandates.

military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League (emphasis added).

This prohibition emanated, directly, from the Rhine scandal. Already in the armistice negotiations, France refused Germany's request 'that no black troops would be assigned to occupation duty'.²⁰⁷ When the Peace Conference convened in Paris in January 1919, Woodrow Wilson used the occasion to ask Clemenceau, the French *Premier*, whether the French government really had the intentions of 'sending Senegalese into the left bank [of the Rhine]. Is this true?' Clemenceau's reported reply was that there was one 'battalion there now, but I plan to retire them, for I believe as you do that it would be a grave error to occupy the left bank with black troops.'²⁰⁸ On 24 January, possibly 'with German pleas in mind',²⁰⁹ Lloyd George raised the issue in discussions on the fate of Germany's colonies:

In many cases the Germans had treated the native populations very badly. For instance, in Southwest Africa they had deliberately pursued a policy of extermination. In other parts of Africa they had been very harsh, and they had raised native troops and encouraged these troops to behave in a manner that would even disgrace the Bolsheviks. The French and British, doubtless, had also raised native troops but they had controlled them better.²¹⁰

Germany's militarist designs in Africa were a cause of wartime concern.²¹¹ In Early 1918, Smuts wrote that 'With German East Africa restored to the Kaiser at the end of the war, and a large Askari army recruited and trained from its 8,000,000 natives, the conquest or forced acquisition [of further African territories by Germany—RG] ... may be only a matter of time.' For Germany, these 'almost unlimited economic and military possibilities ... might yet become an important milestone on the road to World-Empire'.²¹² After the war, these concerns drove the move to strip Germany of its colonial possessions.

Wilson, too, had apprehensions about Germany's future designs and the use of colonial troops alike. His draft of 10 January 1919, presented to the American delegation, contained a rudimentary limitation on the 'mandatary' forming military forces going beyond 'internal police'.²¹³ A more developed text was contained in Lloyd George's draft resolution on the mandate system, discussed

²⁰⁷ Pommerin, *supra* note 92, at 316.

²⁰⁸ In Nelson, *supra* note 14, at 610.

²⁰⁹ *Ibid.*, at 609.

²¹⁰ R.S. Baker, *Woodrow Wilson and World Settlement* (1923), Vol.II, at 425-6.

²¹¹ Germany had its own African army, employing about 12000 colonial troops in the African theatre of WWI: Lusane, *supra* note 91, at 71. Hitler had to explain German use of African soldiers: 'Askaris in German East Africa ... In reality ... served only for the defense of the colony itself'; strengthening the *Reich* 'through black blood' would have been 'criminal': *Mein Kampf*, *supra* note 91, at 938.

²¹² In G.L. Beer, *African questions at the Paris Peace Conference* (1923), at 276.

²¹³ Baker, *supra* note 210, at 425.

on January 30. It now included '[a]ctual and definite prohibitions' on 'armaments of natives'.²¹⁴

What transpired next was reported in some detail by the *New York Times*, in the seventh instalment on 'America and the World Peace'. The author, Ray Stannard Baker, was a graduate of the University of Michigan Law School. A former muckraker journalist, he had served as Wilson's press secretary at Versailles. Later he would publish Wilson's papers. The heading was 'Savages in Modern War'; the subheading exposed 'Debates at Secret Sessions of the Paris Peace Conference on the Question of Using Uncivilized or Half Civilized Troops...'.²¹⁵ The piece started with a quotation of General Tasker H. Bliss, former US Army Chief of Staff (1917-1918), now the American Permanent Military Representative to the Supreme War Council and a conference Plenipotentiary:²¹⁶

The United States ... should demand as its right, the right of civilization ... that millions of men of savage races should not be trained to take part in possible wars of civilized nations. If civilization wants to destroy itself, it can do it without barbarian help.²¹⁷

Baker proceeded to report how the conference dealt with the 'ugly practice' and 'a profound menace to future civilization' embodied in 'the right of the great nations of the world, which have in tutelage the weaker races of Africa and Asia, to arm these natives and use them as soldiers in fighting their own wars':²¹⁸

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

Morel, we saw, shared these apprehensions. So did Smuts. Already in 1917 he warned that the military training of natives 'could become a menace not only to Africa, but perhaps to Europe itself'; he expressed the

²¹⁴ *Ibid.*, at 426; D.H. Miller, *The Drafting of the Covenant* (1928), Vol.I, at 110 ('...mandatory must be responsible for the administration of the territory subject to conditions which will guarantee the prohibition of abuses such as the slave trade ... and the prevention of the military training of the natives for other than police purposes, and the establishment of fortifications or military and naval bases').

²¹⁵ R.S. Baker, 'Savages in Modern War,' *New York Times* (12 February 1922); I quote from the extended version republished in Baker, *supra* note 210.

²¹⁶ And an AJIL book reviewer: T. Bliss, 'The Armistices' (1922) 16 *AJIL* 509.

²¹⁷ Baker, *supra* note 215.

²¹⁸ Baker, *supra* note 210, at 422.

hope that one of the results of this war will be some arrangement or convention ... by which the military training of natives in that area will be prevented, as we have prevented it in South Africa. It can well be foreseen that armies may yet be trained there, which under proper leading might prove a danger to civilisation itself.²¹⁹

The peace conference—and Germany’s early protests over French policy in the Rhine—presented an opportunity for such ‘arrangement or convention’.

Lloyd George’s proposal attracted French objections. France wanted to annex ‘part of Togo and the Cameroons in pursuance of her black army policy’,²²⁰ arguing it ‘could not renounce the right of raising volunteers in the countries under her administration, whatever they might be.’²²¹ An exchange among Clemenceau, Lloyd George, and Wilson followed. Time and again, Lloyd George assured Clemenceau that the provision, though phrased in general terms, did not prevent the French from ‘doing exactly the same thing as they have done before. What it did prevent was the kind of thing the Germans were likely to do, namely, organize great black armies in Africa’. He added that ‘so long as M. Clemenceau did not train big “nigger” armies, for the purpose of aggression, that was all the clause was intended to guard against.’ Only after recording his understanding ‘that Mr. Lloyd George’s interpretation was adopted’, which Wilson confirmed, was Clemenceau ‘quite satisfied’.²²²

As Germany was to no longer possess colonies, let alone serve as mandatory, the ‘understanding’ effectively tailored an all-encompassing French exception.²²³ That was not the end of the matter. Later, France again tried to eliminate the language on colonial recruitment.²²⁴ When this failed, Clemenceau, without consulting anyone, ‘on his own authority ordered insertion of words permitting recruiting of natives for “defense of the territory of the mother country”’ when ‘the document ... was already in press.’²²⁵ A ‘considerable commotion’²²⁶ ensued; urgent memoranda comparing versions were drawn. Wilson, who ‘strenuously objected to the addition of *et du territoire metropolitain*’, took ‘prompt measures’ to trump Clemenceau’s unauthorized alteration.²²⁷ France, persistent, finally got the express language it wanted when individual instruments were approved for its African mandates.²²⁸

With that, control of the colonial object was reasserted; Article 22, for all the ambivalence that the French exception reintroduced into its interpretation, presented renewed vocabulary with which to address the employment of colonial troops—and, at last, address the Rhineland occupation. Postwar editions of

²¹⁹ J.C. Smuts, *War-Time Speeches* (1917), at 82.

²²⁰ Q. Wright, *Mandates under the League of Nations* (1930), at 36.

²²¹ Baker, *supra* note 210, at 426.

²²² Miller, *supra* note 214 (Vol.II), at 218.

²²³ Miller, *supra* note 214, at 115-16.

²²⁴ Wright, *supra* note 220, at 43

²²⁵ *Ibid.*; Miller, *supra* note 214, at 501; Baker, *supra* note 210, at 429.

²²⁶ *Ibid.*, at 430.

²²⁷ Miller, *supra* note 214, at 503.

²²⁸ *Ibid.*, at 116.

Oppenheim referring to Article 22(5) did mention the Rhine occupation; it was discussed, however, not in the ‘Barbarous Forces’ section, but rather in the context of mandates, in the volume dealing with ‘Peace’.²²⁹ The horror on the Rhine had caused the collapse of the rule on employment of savage troops and colonial war category itself; yet out of the ashes, driven by the same anxieties, both rule and category re-emerged. All it took was reclassification: if, until 1914, control of the colonial object had been the task of the laws of war, it now became the task of the law of peace. Control was codified; codification internationalised and institutionalised imperial governance—but it could neither resolve ambivalence nor, I suspect, dispel anxiety.

Conclusion: Beyond the Rhine

What are we to learn from the ‘horror on the Rhine’, or from the fall and rise of ‘colonial war’ it had brought about? What instruction it holds on the persistence of the category or on the endurance of ‘race’ as a pertinent, if now obscured, organizing principle of the laws of war? One lesson is that these are not safely buried in international law’s past; and it is quite likely, therefore, that they continue to lurk just beneath the surface of its contemporary normative landscape. To understand the scope, operation, and the forces driving the laws of war today, we need a history that does not relegate race and colonial war to a dead, irrelevant past. The Rhine episode, specifically, warns that the universality or humanity of the laws of war have much in common with Lorelei’s ‘overpowering spell’.²³⁰ Both claims require an in-depth critical assessment.

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

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

²²⁹ L. Oppenheim, *International Law* (1928), Vol.I, at 442 (‘performance of treaty of peace’), 652, 670, 682, 748.

²³⁰ H. Heine, *Die Lorelei* (1824).

To suggest that anxiety attends the international legal profession is, of course, not new; neither is the suggestion that various instantiations of anxiety can be found at key junctures of international legal history.²³¹ I am, however, suggesting something more: that the history of the laws of war, and international law, can and ought be written as a record of anxiety. What this might entail deserves separate elaboration; but the advantage of such an approach can be demonstrated by its capacity to explain why the path of the history of international law is littered with so many ‘new beginnings’ and renewal projects—and why it is, therefore, also strewn with so much amnesia.

²³¹ Both most poignantly demonstrated by Martti Koskenniemi’s work: see Koskenniemi, *supra* note 5; M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 *Leiden Journal of International Law* 553; and the overall argument in M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).