

# Boston College International and Comparative Law Review

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Volume 30

Issue 1 *Sharpening the Cutting Edge of International  
Human Rights Law: Unresolved Issues of War Crimes  
Tribunals*

Article 4

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12-1-2007

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### Recommended Citation

Devin O. Pendas, *“The Magical Scent of the Savage”: Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War*, 30 B.C. Int’l & Comp. L. Rev. 29 (2007),  
<http://lawdigitalcommons.bc.edu/iclr/vol30/iss1/4>

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# “THE MAGICAL SCENT OF THE SAVAGE”: COLONIAL VIOLENCE, THE CRISIS OF CIVILIZATION, AND THE ORIGINS OF THE LEGALIST PARADIGM OF WAR

DEVIN O. PENDAS\*

**Abstract:** Since the beginning of time, war has been accompanied by atrocity. While there were attempts to regulate such violence, for most of history the penchant toward deliberate atrocity was largely viewed as a political or military problem. During World War II, however, the Allies declared that wartime atrocity was not only morally reprehensible, but also legally actionable and this declaration represented the triumph of a new paradigm for how to think about the conduct of war, the “legalist paradigm.” This Article describes the emergence of the legalist paradigm and argues that the emergence of the legalist paradigm of war was a response to the breakdown of a long-standing civilizational consensus among European Elites.

## INTRODUCTION

Since time immemorial, war has been accompanied by atrocity, that is, mass violence directed at non-combatants or at prisoners of war. One need only recall Tacitus’s description of the Roman way of war in Britain— “[t]o robbery, slaughter, plunder, they give the lying name of empire; they make a solitude and call it peace”—or the Roman treatment of the Carthaginians in the wake of the Third Punic War (literally salting the earth) to recognize this.<sup>1</sup> While there were attempts, through customary law or, later, through formal law, to regulate this violence, this inclination towards deliberate atrocity was largely viewed

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<sup>1</sup> Cornelius Tacitus, *The Life of Cnæus Julius Agricola*, in *THE COMPLETE WORKS OF TACITUS* 677 (Moses Hadas ed., Alfred John Church & William Jackson Brodribb trans., 1942).

for most of history as primarily a political or military problem, one firmly under the jurisdiction of politicians, diplomats, or generals.<sup>2</sup> Yet this is precisely what changed beginning in the second half of World War II. Starting in the fall of 1943, with the founding of the United Nations War Crimes Commission (UNWCC) and with the Moscow Declaration, condemning Axis atrocities and promising legal retribution, the Allies declared their intention to pursue a *legal* as well as a political and military strategy for managing the end of the war.<sup>3</sup> Henceforth, wartime atrocity was, in principle at least, legally actionable, not merely morally reprehensible. This declaration that justice, as much as peace or renewed international stability, would be an essential goal of postwar policy represents something new in the history of the world. Indeed, it represented the triumph of a new *paradigm* for how to think about the conduct of war, one that could be termed, to borrow a phrase from Michael Walzer, the “legalist paradigm.”<sup>4</sup>

## I. BACKGROUND

The legalist paradigm of war, as I am using the term, has two central aspects: first, it asserts the possibility of *state criminality*, that state actions can, regardless of the doctrine of state sovereignty, be criminal actions; second, it asserts *individual culpability*, that state criminality does not excuse individual actors for their culpable actions in state sponsored crimes. This definition expands on Walzer’s, which refers exclusively to state criminality and is limited to the question of aggression.<sup>5</sup> By its very nature, Walzer’s definition thus tends to exclude individual criminality. (No individual ever invaded a neighboring country on his or her own.) This seems to me to be too narrow a reading of the paradigm that emerged from World War II. While it is true that crimes against peace, i.e., aggression, were the centerpiece of the prosecution’s case at Nuremberg, it is this area of the international criminal law of armed conflict that has been least developed subsequently. Rather, it is the notion that individuals, acting as state agents,

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<sup>2</sup> See generally, e.g., THEODORE MERON, *WAR CRIMES LAW COMES OF AGE: ESSAYS* (1998).

<sup>3</sup> See Michel Fabréguet, *La Commission des Nations Unies pour les Crimes de Guerre et la Notion de Crimes contre l’Humanité (1943–1948)*, 23 *Revue d’Allemagne* 519 (1991) (on the UNWCC). See generally ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* (1998) (discussing the diplomatic and policy debates surrounding these matters).

<sup>4</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 61–63 (1977).

<sup>5</sup> See *id.* at 61–63, 85, 90.

can and should be held criminally liable for specific atrocities, that has come to dominate the legalist paradigm. In this respect, there is a mutual entanglement of individual and state criminality. The systematic character of these crimes in general requires state—or quasi-state (e.g., separatist guerillas)—sponsorship, but it is individuals, not collectivities, who are held culpable and punished.

#### A. *The Beginnings of the Law of War*

It would overstate the case to say that it had never occurred to anyone that wartime atrocities might be legally actionable prior to 1943. There were precedents. The Romans considered the declaration of war, though not its conduct, to be a matter for the *jus gentium*, the law of nations. Formal laws of war, in the form of Royal ordinances, date back to the Middle Ages, and oral customary law concerning proper conduct in wartime dates back even further.<sup>6</sup> Thus, in the first known war crimes trial in 1305, the English executed Sir William Wallace (of *Braveheart* fame) “for waging a war of extermination against the English population, ‘sparing neither age nor sex, monk nor nun.’”<sup>7</sup> Nevertheless, as this case itself illustrates, enforcement in this period was sporadic, highly politicized—it was more a trial for treason than it was for war crimes—and liable to qualify by today’s standards as criminal itself (in this case torture without any protection of due process).

Above all, regulating military conduct was either ad hoc, through Royal ordinances issued for specific campaigns, or customary and largely unenforceable, as in the heraldic *jus armorum*, the law of warriors. In either case, its promulgation and enforcement was national (or occasionally bilateral), rather than international in scope.<sup>8</sup> Most importantly, the legal regulation of military violence was in this period seen as at best a secondary issue, an option that could be pursued according to the moral or religious predilections of various actors, but which was not established as a general principle that pertained in all conflicts.

In the early modern period, several authors, Hugo Grotius first and foremost, began to articulate a doctrine of natural rights that was not restricted by considerations of sovereignty or domestic jurisdiction,

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<sup>6</sup> MERON, *supra* note 2, at 1–10.

<sup>7</sup> John H.E. Fried, *War Crimes Violate the Laws of War*, in *WAR CRIMES* 13, 16 (Henny H. Kim ed., 2000).

<sup>8</sup> MERON, *supra* note 2, at 1–2.

thus justifying what amounted to armed humanitarian intervention.<sup>9</sup> Grotius, for instance, wrote:

It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nation and of nations, done to other states and subjects.<sup>10</sup>

Some crimes, he argued, are crimes regardless of the sovereignty of those committing them, on the basis of a natural, and hence international, sense of law. Grotius also argued that it was possible to conduct war in a moderate and humane manner and therefore, since such conduct was in principle possible, it could be legally required.<sup>11</sup> This meant that the specific conduct of war could, in principle, be legislated. This was an important theoretical advance over the ad hoc domestic jurisdiction of earlier royal ordinances.

Yet, as Richard Tuck has argued, Grotius' thought concerning rights was "Janus-faced . . . its two mouths speak the languages of both absolutism and liberty."<sup>12</sup> For instance, like most early modern theorists, Grotius defended slavery based on a doctrine of sovereignty. Under the proper circumstances, a person could cede rights to a sovereign, including the right to one's own liberty and that of one's progeny. Consequently, while sovereignty did not constitute the absolute boundary of legality, neither could its requirements be entirely subsumed under general legal principles. Indeed, in his defense of humanitarian intervention, Grotius continues:

[F]or the liberty of inflicting punishment for the peace and welfare of society, which belonged to individuals in the early ages of the world, was converted into the judicial authority of sovereign states and princes; a right devolving upon them not only as rulers of others, but as subject to the controul

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<sup>9</sup> *Id.* at 122–30.

<sup>10</sup> HUGO GROTIUS, 2 THE RIGHTS OF WAR AND PEACE 334 (A.C. Campbell trans., B. Boothroyd, 1814) (1625) [hereinafter GROTIUS, RIGHTS OF WAR AND PEACE]; MERON, *supra* note 2, at 124 (citing Grotius as well).

<sup>11</sup> See GEOFFREY BEST, WAR AND LAW 1945, at 27–28 (1994); see also Denise Bindchedler-Robert, *L'Individu et ses Droits dans le Système Grotien*, in GROTIUS ET L'ORDRE JURIDIQUE INTERNATIONAL: TRAVAUX DU COLLOQUE HUGO GROTIUS, GENÈVE, 10–11 NOVEMBRE 1983, at 108–12 (Alfred Dufour ed., 1985).

<sup>12</sup> See RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 79 (1979).

[sic] of no earthly power. For that is a right which can belong to no subject.<sup>13</sup>

Sovereignty thus both enabled and limited the demands that justice could impose upon monarchs and their soldiers.

The very nature of war itself imposed further restrictions upon humanitarian principles in this context. “In war things which are necessary to attain the end in view are permissible.”<sup>14</sup> The most obvious necessary thing in war is of course killing, which ought to be limited but cannot be avoided. “Though there may be circumstances, in which absolute justice will not condemn the sacrifice of lives in war, yet humanity will require that the greatest precaution should be used against involving the innocent in danger, except in case of extreme urgency and utility.”<sup>15</sup> Note that here as elsewhere, Grotius’ humanitarianism is bounded strictly by principles of utility. Innocents ought not be harmed *unless* it is urgent and useful to do so. As Peter Hagggenmacher pointed out, for Grotius, a belligerent in a “just war” is permitted everything that is necessary to achieve the ends of that war, namely, the restitution of his violated rights, though no more.<sup>16</sup>

In the end, even Grotius acceded to some degree to a European military *realpolitik*, one in which the logic of violence trumped the logic of law, and which governed the conduct and practice of war to a far greater extent than did any legal considerations. This position culminated in Carl von Clausewitz’s coldly logical conclusion that:

Kind-hearted people might of course think that there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, this is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. . . . War is an act of force, and there is no logical limit to the application of that force. Each side, therefore, compels its op-

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<sup>13</sup> GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 10, at 334–35. Significantly, Meron omits this portion of the quote. MERON, *supra* note 2, at 124.

<sup>14</sup> Grotius, *De jure belli ac pacis libri tres*, in BEST, *supra* note 11, at 30 (1994) [hereinafter Grotius, *De jure belli*].

<sup>15</sup> GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 10, at 286.

<sup>16</sup> Peter Hagggenmacher, *Grotius et le Droit International—le Texte et la Légende*, in GROTIUS ET L’ORDRE JURIDIQUE INTERNATIONAL, *supra* note 11, at 129; *see also* Grotius, *De jure belli*, *supra* note 14, at 31.

ponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes.<sup>17</sup>

For Clausewitz, as for most military practitioners, the logic of military violence of necessity exceeded the capacity of law to regulate it. To think otherwise, he asserted, was both hopeless and dangerously naïve.<sup>18</sup> Any observable moderation of military violence between “civilized” peoples was simply the result of the “social conditions of the states themselves and in their relationships to one another.”<sup>19</sup>

In other words, if civilized nations refrained from inflicting upon one another the worst that war had to offer, this reflected the nature of civilization, not of war; nor could it be dictated as a matter of deliberate policy but was only a spontaneous result of the social condition of civilization:

Savage peoples are ruled by passion, civilized peoples by the mind. The difference, however, lies not in the respective natures of savagery and civilization, but in their attendant circumstances, institutions, and so forth. The difference, therefore, does not operate in every case, but it does in most of them. Even the most civilized of peoples, in short, can be fired with passionate hatred for each other.<sup>20</sup>

Clausewitz’s prescient implication, then, was that a change in these social circumstances could well lead to a barbarization of warfare, even among civilized peoples.

### B. *Toward Formal Codification*

Beginning in the mid-nineteenth century, there was a movement towards the formal codification of what had been a largely informal, ad hoc customary law of war, beginning with Francis Lieber’s *Instructions for the Government Armies of the United States in the Field*, the famous General Orders No. 100 of 1863.<sup>21</sup> Lieber’s code added little that was new to the customary laws of war, and indeed, perhaps because of

<sup>17</sup> CARL VON CLAUSEWITZ, ON WAR 75, 77 (Michael Howard & Peter Paret eds. & trans., 1976).

<sup>18</sup> Clausewitz wrote that “[t]o introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.” *Id.* at 76.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See MERON, *supra* note 2, at 131–41; see also Telford Taylor, *The Development of the Laws of War*, in WAR CRIMES, *supra* note 7, at 49–50.

Lieber's own background as a soldier in Blücher's army fighting against Napoleon, even evinces some of Clausewitz's cold logic of military extremism, justifying both the granting of no quarter when militarily necessary and military reprisals under certain circumstances.<sup>22</sup> Still, the recognition that customary law alone was insufficient protection against military atrocity, and that some form of codified law was necessary, marks a decisive precedent for the emergence of the legalist paradigm of war.

This development toward formal codification continued with the Hague Conventions on the Laws and Customs of War of 1899 and 1907.<sup>23</sup> These were important developments, to be sure, beginning a process of bringing the laws of war into line with the increasingly formal, stipulative character of domestic law in this same period. Although they relied heavily on Lieber's code, the Hague Conventions were more stringent in their prohibition against giving no quarter, and prohibited, among other things, the bombardment of towns or other civilian habitations, the pillage of occupied territories, and the maltreatment of prisoners. In a real sense, the history of the modern laws of war begins with these Conventions, and they continue to supply much of the vocabulary of the international laws of war. As Telford Taylor has noted, "in all of these treaties, the laws of war are stated as general principles of conduct, and neither the means of enforcement nor the penalties for violation are specified."<sup>24</sup> Taylor slightly overstates the case, as Article 3 of the 1907 Hague Convention does stipulate that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part

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<sup>22</sup> Lieber wrote:

It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.

MERON, *supra* note 2, at 134. Similarly, "Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter." *Id.* at 135.

<sup>23</sup> See DOCUMENTS ON THE LAWS OF WAR 59–138 (Adam Roberts & Richard Guelff eds., 2000) (for excerpts). See generally DOROTHY V. JONES, TOWARD A JUST WORLD: THE CRITICAL YEARS IN THE SEARCH FOR INTERNATIONAL JUSTICE 6–8 (2002).

<sup>24</sup> Taylor, *supra* note 21, at 50.

of its armed forces.”<sup>25</sup> Nonetheless, the fact that the stipulated penalties are restricted to reparations indicates the extent to which the Hague Conventions were still working within an essentially *political* understanding of military atrocity. Indeed, one might go further and argue that the Hague Conventions conceptualized military atrocity as essentially a civil law violation of the implicit contract of civilization itself and thus subject to compensatory, but not penal, sanctions. This would make their use of reparations as a sanction symptomatic of a civilizational model of international law itself, one based on a largely tacit, but nonetheless powerful, sense of shared normative consensus.

Furthermore, the assertion that states are responsible for the actions of their military personnel in the Hague Conventions stops well short of a doctrine of state criminality, as there is no indication that the state itself could be a criminal actor.<sup>26</sup> There remains a substantial gap between individual atrocity and state liability in the Hague Conventions. A fully legalist paradigm of mass atrocity and war crimes, one that stipulates the criminal, as opposed to political, liability for war crimes of both individuals and states is at most still inchoate.

The primacy of sovereignty can again be seen in the first rudimentary efforts at a systematic prosecution of military atrocity in the wake of World War I.<sup>27</sup> Under pressure from British Prime Minister David Lloyd George, who had pledged in the elections of 1918 to “hang the Kaiser,” Article 28 of the Versailles Treaty declared that Allies had the right to try Germans for violations of the laws and customs of war.<sup>28</sup> In fact, however, no such tribunals were ever convened. Indeed, there was a fundamental conflict between the British, who favored the creation of an international tribunal after the war, and the Americans, who did not.<sup>29</sup> In 1919, American representatives to the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties argued that they were unaware of any “international statute or convention making the a violation of the laws

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<sup>25</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 23, at 70.

<sup>26</sup> *See generally* PIETER N. DROST, *THE CRIME OF STATE: PENAL PROTECTION FOR FUNDAMENTAL FREEDOMS OF PERSONS AND PEOPLES* (1959).

<sup>27</sup> *See generally* GERD HANKEL, *DIE LEIPZIGER PROZESSE: DEUTSCHE KRIEGSVERBRECHEN UND IHRE STRAFRECHTLICHE VERFOLGUNG NACH DEM ERSTEN WELTKRIEG* (2003); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* (1982).

<sup>28</sup> WILLIS, *supra* note 27, at 49, 177.

<sup>29</sup> KOCHAVI, *supra* note 3, at 2.

and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offense.”<sup>30</sup> Thus, although the Allies delivered a list of 845 suspects to the Germans in February 1920 whom they wanted turned over for trial, the conditions were already in place for Allied capitulation to German pressure to abandon international trials. Instead, they allowed the Germans to stage their own trials of a mere forty-five suspects.<sup>31</sup>

The principle of sovereignty won out even in the case of a defeated and, at the time, widely detested power, one against whom allegations of war crimes, although treated skeptically for much of the past eighty years, have turned out to be more true than many have assumed.<sup>32</sup> With great reluctance and typical respect for matters of military policy, the Germans opened their trials under the jurisdiction of the German Supreme Court in Leipzig in the spring of 1921. The trials proved to be a fiasco. Only a handful of the accused were convicted and those that were received very mild sentences (ranging from two to four years).<sup>33</sup> Two of the worst offenders soon escaped prison, probably with police assistance, and disappeared.

Despite their limitations, however, the Leipzig trials, together with their equally problematic counterparts in Constantinople, marked an important step in the development of the legalist paradigm of war, in that they represented the first serious effort to use international pressure to enforce the laws of war.<sup>34</sup> Nonetheless, the central significance of the Leipzig trials was essentially as a negative precedent. They fully, if temporarily as it turned out, discredited the Hague notion that states could and should be allowed to prosecute their own war criminals.

## II. EMERGENCE OF THE LEGALIST PARADIGM

These rather unsatisfactory precedents make the emergence in the wake of World War II of the legalist paradigm of war even more striking. This time around, it was the Americans in particular who, in contrast to their position after World War I, strongly favored the application of legal prosecutions to Nazi atrocities. Secretary of War Henry J.

<sup>30</sup> HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 26 (1993).

<sup>31</sup> KOCHAVI, *supra* note 3, at 2–3.

<sup>32</sup> See generally JOHN HORNE & ALAN KRAMER, *GERMAN ATROCITIES, 1914: A HISTORY OF DENIAL* (2001).

<sup>33</sup> WILLIS, *supra* note 27, at 126.

<sup>34</sup> See PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA'S RESPONSE* 331–47 (2003) (discussing the Constantinople trials).

Stimson, one of the leading American advocates of trials, wrote in his journal that “it is preferable to organize a major trial during which we can prove, in its entirety, the Nazi plot to wage a war of aggression that once set in motion violates all the normal rules which limit cruelty and unnecessary destruction.”<sup>35</sup> The drafting of the London Charter for the International Military Tribunal in June 1945 thus marked a major turning point, one that had to overcome considerable opposition, not only from those, like Churchill and Stalin, who initially favored summary executions, but also from lawyers working for both the U.S. State Department and the British Foreign Office.<sup>36</sup> The three crimes outlined in the London Charter, crimes against peace, war crimes, and crimes against humanity, mark the first full articulation of the legalist paradigm of war by connecting both state and individual criminality.

If the emergence of a full legalist paradigm in the aftermath of World War II thus marks a fundamental transformation of the relationship between law and war, then the question obviously arises as to why this shift occurred. Why did it make sense after World War II, in a way that it never had before, to think about the conduct of war as a potentially *criminal* enterprise, one that ought to be legally actionable in some manner? Why did justice, understood in legal (rather than, say, political or moral) terms, come to join peace or victory as an increasingly common war aim? I would argue that the emergence of the legalist paradigm of war after 1945 was a response to the breakdown of a long-standing civilizational consensus among European Elites.

#### A. *The Civilizational Consensus*

This civilizational consensus rested on the assumption that there was an intrinsic connection between the nation-state form—defined legally by the doctrine of sovereignty as it emerged from 1648 on—and the practice and protection of “civilized” norms of both internal and international conduct. “Barbarism,” generally seen in at least implicitly racist terms, was held to be an attribute primarily of pre-state peoples, and international law was seen as pertaining to the relationships

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<sup>35</sup> HENRI MEYROWITZ, LA RÉPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L’HUMANITÉ ET DE L’APPARTENANCE A UNE ORGANISATION CRIMINELLE EN APPLICATION DE LA LOI NO. 10 DU CONSEIL DE CONTRÔLE ALLIÉ 31 (1960).

<sup>36</sup> Christopher Simpson, *Die seinerzeitige Diskussion über die in Nürnberg zu verhandelnden Delikte*, in STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN: ZUM VÖLKERSTRAFRECHT 50 JAHRE NACH DEN NÜRNBERGER PROZESSEN 39, 39–72 (Gerd Hankel & Gerhard Stuby eds., 1995).

between, but not within, civilized, and hence sovereign, nation-states.<sup>37</sup> Henry Bonfils and Paul Fauchille argued in 1898 that international law “applies to relations between states which have attained this level of civilization.”<sup>38</sup> International law, including the law of war (as in the Hague Conventions), was not just, as the Romans had held, a *jus gentium*, a law of nations, but a law of civilized nations. This in turn delimited what it was that the international law of war needed to regulate: individual excesses against enemy civilians or prisoners of war, the victims presumed to be citizens of sovereign nation-states; and who was in charge of enforcement, each sovereign state being responsible for its own personnel. Far from there being any provision for dealing with the reciprocal entanglement of state and individual criminality, there was a radical disjuncture between the two.

The legalist paradigm as it emerged after World War II marks a clear departure from this model. In particular, in the categories of “crimes against peace” and “crimes against humanity,” as they emerged in the London Charter, the mutual implication of individual and state criminality is largely codified. But why? Why did a legalist paradigm emerge for responding to mass atrocity in wartime in the mid-twentieth century? The most obvious and common answer is that the unprecedented character of Nazi atrocities made anything less than an unprecedented response seem trivial and inadequate. Geoffrey Robertson, for instance, has asserted that “the Holocaust was a revelation that . . . crystallized the Allied war aims and called forth an international tribunal—the court at Nuremberg—to punish individual Nazis for the barbarities they had authorized against German citizens.”<sup>39</sup> This answer is inadequate for two reasons.

First, while the Holocaust was hardly ignored completely at Nuremberg or in the successor trials, it was hardly central either.<sup>40</sup> In particular, the prosecution’s insistence at Nuremberg that crimes against peace, and not crimes against humanity, was the foundational criminal charge, as well as the court’s finding that crimes against humanity had to be linked to crimes against peace (thus making peacetime crimes

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<sup>37</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 102–03 (2001).

<sup>38</sup> HENRY BONFILS & PAUL FAUCHILLE, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 17–18 (2d ed. 1898) (1894).

<sup>39</sup> GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE*, at xiv (1999).

<sup>40</sup> See Michael R. Marrus, *The Holocaust at Nuremberg*, in 26 *YAD VASHEM STUDIES* 4–45 (David Silberklang ed., 1998).

against humanity non-actionable), marginalized the Holocaust to a significant degree. Second, Nazis were hardly the only ones tried under the new legalist paradigm of war after 1945. There were a series of trials conducted in East Asia as well.<sup>41</sup> It would be a mistake to see the East Asian trials as a purely derivative phenomenon, particularly given the lasting impact of the Yamashita precedent regarding the doctrine of command responsibility. The legalist paradigm in 1945 was not a uniquely European phenomenon, and thus cannot be held to have originated solely in the experience of Nazi genocide.

### 1. Doctrine of State Sovereignty

If the specifically unprecedented character of Nazi atrocities cannot fully account for the emergence of the legalist paradigm, how then do we account for it? The answer to this question can be discerned by noting a particular feature of the paradigm it replaces—the doctrine of state sovereignty. In July 1998, when Undersecretary of State David Scheffer testified before the Senate Foreign Relations Committee concerning the Statute of the International Criminal Court then being negotiated in Rome, Senator Jesse Helms (R-NC) noted, in defending his opposition to the ICC:

I've been accused by advocates of this court of engaging in 18th century thinking. Well, I find that to be a compliment. It was the 18th century that gave us our Constitution and the fundamental protections of our Bill of Rights. I'll gladly stand with James Madison and the rest of our Founding Fathers over that collection of ne'er-do-wells in Rome any day.<sup>42</sup>

In his inimitable fashion, what Senator Helms was arguing was that rights are inextricably connected with sovereignty and that the state is their only possible guarantor.<sup>43</sup> At its theoretical and jurisprudential core, international law prior to 1945 was, as I have shown, a law of sovereignty. The legalist paradigm of war was a direct challenge to this

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<sup>41</sup> See generally TIMOTHY P. MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* (2001); PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951* (1979); RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

<sup>42</sup> Lawrence Wechsler, *Clinton Grows a Spine*, SALON, Jan. 5, 2001, <http://www.salon.com/news/feature/2001/01/05/icc/index1.html>.

<sup>43</sup> See generally JEREMY RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005) (for a more scholarly articulation of this same argument).

vision of the sovereign nation-state—even if much of this challenge was deflected, first by the Nuremberg tribunal and subsequently by the United Nations in the face of the Cold War. In this respect, the legalist paradigm of war has to be understood as a key element in the broader universalizing project of international human rights.

The doctrine of state sovereignty, stated in its most austere form by Thomas Hobbes, holds that “because every subject is by this institution author of all the actions and judgments of the sovereign instituted; it follows that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice.”<sup>44</sup> Though subsequent authors and legal developments, ranging from John Locke to the U.S. Constitution, were able to more or less successfully challenge the rigidity of Hobbes’s assertion that the sovereign is incapable, by nature, of injustice, they mostly restricted their critiques to domestic politics, defending a legal restriction of unbounded state sovereignty only within the nation. In other words, the sovereignty of the state could, on these accounts be limited by the citizens of that state, but not by outsiders.

The rise of a universalist human rights culture in opposition to strong notions of state sovereignty is in effect an attempt to replace norms guaranteed politically by the state with norms guaranteed legally by international consensus—though still enforced, if at all, by third party states acting in the name of international institutions.<sup>45</sup> As such, it often appears as either a utopian project for world governance in a liberal vein or, more pragmatically, as an attempt to impose legal norms on the state form via an international cultural consensus, i.e. as a form of pressure politics.<sup>46</sup> The question then is not just why the state came to be seen as a threat to certain rights-based norms—the answer to that is all too obvious—but rather why it was ever assumed otherwise. In other words, given the explicitly anomic *form* of sovereignty, why was it ever assumed that this form would not on occasion acquire an anti-normative or immoral content? If many now recognize that the state form is at best morally neutral, at worst, capable of great evil, why was it ever assumed otherwise?

The explicit answer, formulated in the aftermath of the wars of religion, was that whatever the potential evil of the state form, it was

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<sup>44</sup> THOMAS HOBBS, *LEVIATHON* 232 (Penguin Books 1968) (1651).

<sup>45</sup> PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 273–75 (2d ed. 2003).

<sup>46</sup> See generally, e.g., ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* (2001).

preferable to the anarchic violence ensuing from universalizing moral projects. That, in effect, was Hobbes's answer. Yet this answer only acquired plausibility against a background assumption that the state form itself would not, as a rule, act all that badly. Why not? The answer is that for much of the history of the modern European nation-state, it was taken for granted that the anomic state form was embedded in a larger, transnational normative framework conceptualized loosely as "civilization."<sup>47</sup>

As defined by J.S. Mill, civilization entailed a "multiplication of physical comforts; the advancement and diffusion of knowledge; the decay of superstition; the facilities of mutual intercourse; the softening of manners; the decline of war and personal conflict; the progressive limitation of the tyranny of the strong over the weak . . . ."<sup>48</sup> European states, along with other honorary Europeans, like the United States and even to a degree Japan, were *civilized states* and could be expected to behave more or less accordingly, certainly vis-à-vis other civilized states.<sup>49</sup> In the context of European colonialism, this civilizational consensus also had a clear racial dimension to it. Yet if "civilization" was a code word for "white," it was also viewed as a mode of regulating violence.<sup>50</sup>

The state had no need to subject itself to the explicit norms of formal law because it was always already an institutional embodiment of the prior informal normative consensus of civilization. It was only when this assumption proved itself to be spectacularly untrue—not once but twice in the span of a generation—that the project of exogenously regulating state violence through international law could acquire more than utopian force. Indeed, for a time at least, it came to be widely perceived as a matter of life and death, both for the state and for civilization itself.

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<sup>47</sup> GERRIT W. GONG, *THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY* (1984).

<sup>48</sup> J.S. Mill, *Coleridge*, 33 *LONDON & WESTMINSTER REV.* 257, 261 (1840), *quoted in* RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 58 (rev. ed. 1983).

<sup>49</sup> This formulation brackets the difficult question of whether "civilization" as such in fact exists, as Norbert Elias has argued, or whether it is simply a cultural fiction, a just-so story that some societies have chosen to tell about themselves. *See generally* NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* (1978).

<sup>50</sup> This latter understanding is the sense in which Elias uses the term. *See id.*

## 2. The Civilized Versus the Savages

To trace the collapse of what might be termed the “civilizational supposition” to the Holocaust alone would be too narrow. A doctrine as venerable and self-interested as state sovereignty does not succumb easily.<sup>51</sup> What one must keep in mind is that the Holocaust was not an isolated event, however unprecedented it was; rather, it marked the culmination of thirty years’ crisis, involving two world wars, and unparalleled destruction. In particular, what was troubling to a great many European and American elites in the mid-twentieth century is that events seemed to be proving the pessimists right. Such pessimists, whether of the right (Oswald Spengler), the left (H.G. Wells), or the middle (Joseph Conrad), had long argued that European civilization was fragile and that Europeans themselves were paradoxically the main source of the threat. German barbarism in the two world wars was thus a problem both because of its victims and because of its perpetrators. That such things happened was unfortunate, but not actually that surprising. That Europeans did them to other Europeans was truly shocking. Civilization apparently provided an inadequate moral check on sovereign states, even “civilized” ones.

This is one of the key points in Justice Robert H. Jackson’s famous declaration, in his opening statement to the court at Nuremberg, that:

[T]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment

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<sup>51</sup> One could, of course, argue in terms of hegemonic stability theory that there was a shift in global hegemony in 1945, from Europe (or Britain) to the United States and that this accounts for the emergence of the transnational norms of the legalist paradigm. Yet this would not explain why the new hegemonic regime took the specific form of the legalist paradigm, particularly given that the United States’ hegemonic status has, if anything, increased in recent years, yet its support for the legalist paradigm has changed into explicit opposition. So it seems unlikely that a change in hegemony alone explains more than the conditions of possibility for the emergence of the legalist paradigm. *See generally* ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987) (describing hegemonic stability theory).

of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>52</sup>

Two things are worth noting about this statement. First, reason here is synonymous with law, and the argument is clearly that even state power is, or ought to be, subordinate to law. Second, law is placed in the service of civilization; indeed, it serves as both its embodiment and its most powerful shield.

Even when the Holocaust was used to justify the emerging legalist paradigm after World War II, what was relevant was not the killing but the “civilized” status of the killers. Thus, Judge Michael Musmanno, who served at the successor trials at Nuremberg, wrote:

How can one write about a planned and calculated killing of a human race? It is a concept so completely fantastic and so devoid of sense that one simply does not want to hear about it and is inclined to turn a deaf ear to such arrant nonsense. Barbarous tribes in the wilds of South Pacific jungles have fallen upon other tribes and destroyed their every member; in America, Indian massacres have wiped out caravans and destroyed whole settlements and communities; but that an enlightened people in the 20th century should set out to exterminate, one by one, another enlightened people, not in battle, not by frenzied mobbing, but by calculated gassing, burning, shooting, poisoning is simply blood-curdling fiction, fit companion for H.G. Wells’ chimera on the invasion from Mars.<sup>53</sup>

In his opening statement in the same case (the *Pohl* case), prosecutor James McHaney argued:

The systematic and relentless annihilation of the Jewish people by the Nazis constitutes one of the blackest pages in the history of the civilized world. . . . One must search as far back as the massacres by Genghis Kahn and by Tamerlane to

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<sup>52</sup> Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945, in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–99 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

<sup>53</sup> Michael A. Musmanno, Concurring Opinion, *The Pohl Case*, in 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1128–29 (1950) [hereinafter TRIALS UNDER CONTROL COUNCIL LAW].

find anything remotely comparable to the extermination of the Jews by the Nazis.<sup>54</sup>

For McHaney, as for Musmanno, it was not genocide as such that was shocking, but rather that it had occurred in the “civilized world.”

There is an explicitly racial dimension to Musmanno’s and McHaney’s shock at European genocide. This is hardly surprising, given that America shared a patriarchal understanding of the civilizing mission of late Imperialism, as one can see in Theodore Roosevelt’s well-known remark that it was the United States’ obligation vis-à-vis the “weak and chaotic people south of us,” to “police these countries in the interest of order and civilization.”<sup>55</sup> The leading role played by the United States in formulating the legalist paradigm of war after 1945 was hardly innocent of its own imperialist past.<sup>56</sup> Musmanno’s shock is that of a colonizer forced to recognize in a society much like his own the behavior long attributed to the colonized.

As Catherine Hall has recently remarked, “The right to colonial rule was built on the gap between metropole and colony: civilization here, barbarism/savagery there.”<sup>57</sup> Often, however, such dialectical encounters are understood in postcolonial studies as cultural encounters in lieu of military ones; as discursive, rather than coercive, engagements.<sup>58</sup> In a broad sense, of course, European cultural norms were central to the colonialist project, including its legal dimensions. Yet while colonialism was indeed as much a cultural process as it was anything else, in the context of the emergence of the legalist paradigm of war, it was the dialectics of colonial violence that was key.<sup>59</sup>

Walter Bagehot asserted in 1869 that, like “the magical scent of the savage,” which he took to be indicative of their amazing physical prowess, their “persecuting tendency” likewise set them apart from

<sup>54</sup> James McHaney, Opening Statement, *The Pohl Case*, in 5 TRIALS UNDER CONTROL COUNCIL LAW, *supra* note 53, at 250–51.

<sup>55</sup> DANA G. MUNRO, INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN 1900–1921, at 76 (1964).

<sup>56</sup> See generally PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY (2001).

<sup>57</sup> CATHERINE HALL, CIVILIZING SUBJECTS: METROPOLE AND COLONY IN THE ENGLISH IMAGINATION, 1830–1867, at 10 (2002).

<sup>58</sup> “How, precisely, were structures of inequality fashioned during colonial encounter, often in the absence of more conventional, more coercive tools of domination?” Jean & John L. Comaroff, *Of Revelation and Revolution*, in CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA 6 (1991).

<sup>59</sup> See generally LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900 (2002).

civilized nations.<sup>60</sup> Colonial subjects were held to be particularly violent, especially prone to atrocities against non-combatants, great rapers of women and murderers of children, and to practice a mode of warfare that systematically refused to recognize the consensual limits of “civilized” fighting.

If Clausewitz had recognized that civilization provided only a limited and extrinsic check on the totalizing logic of violence, others, less intellectually honest than Clausewitz, projected any European excesses onto the colonial situation itself. Perhaps the most famous example of this projection of imperial violence onto the colonial context is Joseph Conrad’s *Heart of Darkness*, where it is Africa itself that strips away the veneer of civilization from Kurtz, such that he reverts to an atavistic savagery.<sup>61</sup> Barbarism is something Kurtz learns in Africa, not something he brings with him from Europe.

This projection of barbarism onto the colonial context can be seen, paradoxically, in much of the anti-imperialist rhetoric of Europe itself. For instance, at a meeting of the Queenstown Town Commissioners in County Cork, Ireland, in 1879, one of the commissioners interrupted the proceedings to condemn the British conduct of the war in Zululand. He requested:

[T]hat this board do express its utter abhorrence of the brutal savagery practiced in the name of war upon the unfortunate native tribes in South Africa by the British army . . . and whilst we look upon this war as altogether an unjustifiable one, we also most emphatically condemn the atrocious means adopted in carrying it on, for which there is scarcely a parallel to be found in the history of the darkest days of feudal barbarism.<sup>62</sup>

Two points must be made with regard to this anti-imperialist condemnation of barbaric colonial war. The first is that it was by no means a universal attitude among Europeans. In the same meeting in Queenstown, another commissioner took the occasion to remark that

<sup>60</sup> WALTER BAGEHOT, PHYSICS AND POLITICS, OR, THOUGHTS ON THE APPLICATION OF THE PRINCIPLES OF “NATURAL SELECTION” AND “INHERITANCE” TO POLITICAL SOCIETY 104–05 (1948).

<sup>61</sup> JOSEPH CONRAD, HEART OF DARKNESS AND OTHER TALES (Oxford University Press 1998) (1899); see also SVEN LINDQVIST, EXTERMINATE ALL THE BRUTES (Joan Tate trans., 1996) (discussing Conrad’s *Heart of Darkness*).

<sup>62</sup> *The Queenstown Town Commissioners and the Zulus*, FLAG OF IRELAND, Aug. 9, 1879. I am indebted to Prof. Paul Townend for pointing me to this source.

“those Zulus deserved what they got.”<sup>63</sup> More generally, there was a refusal even to acknowledge the possibility of European atrocities in the colonies. Sir Constantine Phipps said of King Leopold’s Congo Free State that he could not believe “that Belgians, members of a cultivated people amongst whom I lived could, under even a tropical sky, have perpetrated acts of refined cruelty.”<sup>64</sup>

Second, and more important, was the sense clearly implied in Phipps’s statement that if Europeans practiced barbaric tactics in colonial warfare, they did so only in response to the exigencies imposed upon them by the barbarians they were fighting. Britain’s leading theoretician of colonial war, Colonel C. E. Callwell, remarked that “uncivilized races attribute leniency to timidity. A system adapted to [the suppression of the French rebellion in] La Vendée is out of place among fanatics and savages, who must be thoroughly brought to book and cowed or they will rise again.”<sup>65</sup> To this he added that, in what he termed “small wars,” “operations are sometimes limited to committing havoc which the laws of regular warfare do not sanction.”<sup>66</sup>

The French had first perfected the art of barbaric warfare against barbarians in their invasion of Algeria in the 1840s, practicing *razzia*, or raid, against the indigenous economic infrastructure as a means of literally starving the people into submission. “We must forget those orchestrated and dramatic battles that civilized peoples fight against one another. . . and realize that unconventional tactics are the soul of this war,” proclaimed General Thomas Bugeaud, the commander of French forces in Algeria.<sup>67</sup> The French general Castellane justified this unconventional economic war by explaining:

In Europe, once [you are] master of two or three large cities the entire country is yours[,] . . . but in Africa, how do you act against a population whose only link with the land is the pegs of their tents? The only way is to take the grain which feeds them, the flocks which clothe them. For this reason, we make war on silos, war on cattle, the *razzia*.<sup>68</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 204 (1998).

<sup>65</sup> C.E. CALLWELL, SMALL WARS: THEIR PRINCIPLES AND PRACTICE 148 (Bison Books 1996) (1896).

<sup>66</sup> *Id.* at 42.

<sup>67</sup> DOUGLAS PORCH, WARS OF EMPIRE 73–74 (2000).

<sup>68</sup> *Id.* at 39.

This, of course, is a euphemistic way of saying that the French in Algeria made war on civilians and, simultaneously, of justifying it. In effect then, if Europeans behaved like barbarians in the colonies, it was because the barbarian circumstances forced them to do so. In short, the atrocities which ineluctably accompanied such unrestrained violence were projected as fantasies onto their victims; their barbarism caused our barbaric actions. Clearly, Conrad was not alone in seeking to pacify barbarism by situating it elsewhere. Barbarism was a function of location, not of military violence as such, and consequently not something one needed to worry about in intra-European warfare.

The logical conclusion of this, which one can see in the so-called Martens clause to the preamble of the 1907 Hague Convention, was that in legally regulating intra-European war, a certain standard of civilized conduct could be presupposed. The Martens clause states:

[U]ntil a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>69</sup>

In effect then, much of the conduct of war within Europe was entrusted to customary international law, conceptualized specifically as the typical practices of “civilized” countries.<sup>70</sup> Cultural norms were explicitly considered an adequate substitute for legal ones. Heinrich von Treitschke argued, in 1898, that “all noble nations” had recognized the need to regulate military violence through an international law of war:

There is nothing in international law more beautiful, or showing more unmistakably the continual progress of mankind, than a whole series of principles, grounded only upon *universalis consensus* and yet as firmly established as those of the Common Law of any country . . . the whole trend of political life has come into the open to such a degree that any gross

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<sup>69</sup> See Hague Convention, *supra* note 25, at 70.

<sup>70</sup> The high contracting parties did not include formal colonies, nor did they include many of the non-western countries who had signed the 1899 Hague Convention, including e.g. Argentina, Chile, Colombia, Ecuador, Honduras, Korea, Paraguay, Persia, Peru, Turkey, Uruguay, or Venezuela.

breach of international law immediately causes great irritation in every civilized country.<sup>71</sup>

Yet, Treitschke was careful to add:

It is mere mockery, however, to apply these principles [of international law] to warfare against savages. A Negro tribe must be punished by the burning of their villages, for it is the only kind of example which will avail. If the German Empire has abandoned this principle to-day it has done so out of disgraceful weakness, and for no reasons of humanity or high respect for law.<sup>72</sup>

The civilization consensus that under-girded the assumption that the laws of war between civilized states need not worry about state criminality and could trust states to police their own soldiers was already felt to be in crisis before World War I. The literature of cultural pessimism in this period is enormous and much of it focuses on the presumed fragility of civilization.<sup>73</sup> As early as 1892, J.G. Frazer ruminated:

It is not our business here to consider what bearing the permanent existence of such a solid layer of savagery beneath the surface of society, and unaffected by the superficial changes of religion and culture, has upon the future of humanity. The dispassionate observer, whose studies have led him to plumb its depths, can hardly regard it otherwise than as a standing menace to civilisation.<sup>74</sup>

Such worries were hardly the exclusive provenance of academic mystics like Frazer (or, one might add, Oswald Spengler or Richard Wagner). It was also a common theme in the popular literature of the day. In his 1913 potboiler, *The Power-House*, John Buchan's arch-villain Andrew Lumley taunts the hero, Sir Edward Leithen, barrister and Tory MP, for defending the principles of civilization:

That is the lawyer's view, but, believe me, you are wrong. Reflect, and you will find that the foundations are sand. You think that a wall as solid as the earth separates civilization

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<sup>71</sup> HEINRICH VON TREITSCHKE, *POLITICS* 300–01 (Hans Kohn ed., 1963) (1898).

<sup>72</sup> *Id.* at 306.

<sup>73</sup> See, e.g., FRITZ STERN, *THE POLITICS OF CULTURAL DESPAIR: A STUDY IN THE RISE OF THE GERMANIC IDEOLOGY* (1961).

<sup>74</sup> I JAMES GEORGE FRAZER, *THE MAGIC ART AND THE EVOLUTION OF KINGS* 236 (St. Martin's Press 1966) (1892).

from barbarism. I tell you the division is a thread, a sheet of glass. A touch here, a push there, and you bring back the reign of Saturn.<sup>75</sup>

To Buchan's Andrew Lumly, one could, of course, add Sax Romer's Fu Manchu, H. Rider Haggard's She, and a host of other master criminals and exotic savages of the late nineteenth and early twentieth centuries, all threatening the complacent civilization of adolescent readers across Europe.

### B. *Europeanization of Colonial Violence*

It was the experience of what Raymond Aron called Europe's second thirty years' war, that is, of two total wars within the space of a generation from 1914 to 1945, that brought home to Europeans the lessons they had hitherto been unwilling to learn from their own conduct of colonial wars around the world: that the modern nation-state was capable of brutality and a callus disregard for elementary rights on a previously unimagined scale.<sup>76</sup> Whether the Herero, the Tasmanians, or the Native Americans were the victims, Europeans and their descendants had been practicing genocide long before there was a word to describe it.<sup>77</sup> The breakthrough to the legalist paradigm came not, as one might expect, from the experience of genocide but from total war.<sup>78</sup> Total war, as conceptualized, if not consistently practiced by Napoleon, and perfected in colonial war, became the dominant experience of two generations of Europeans. Total war had two related dimensions: first, the application of gross, asymmetrical violence, and second, the waging of war not only, or even mainly, against a contending military force but against its constituent society.<sup>79</sup> Total war was

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<sup>75</sup> JOHN BUCHAN, *The Power-House*, in *THE LEITHEN STORIES* 1, 28 (Canongate Books Ltd 2000) (1913).

<sup>76</sup> RAYMOND ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 297 (1966). One thinks, for instance, of the Germans' own genocidal campaign against the Herero and Nama tribes in Africa in 1904–1906. See, e.g., Helmut Walser Smith, *The Talk of Genocide, the Rhetoric of Miscegenation: Notes on Debates in the German Reichstag Concerning Southwest Africa, 1904–1914*, in *THE IMPERIALIST IMAGINATION: GERMAN COLONIALISM AND ITS LEGACY* 107–23 (Sara Friedrichsmeyer et al. eds., 1998).

<sup>77</sup> See A. Dirk Moses, *Conceptual Blockages and Definitional Dilemmas in the "Racial Century": Genocides of Indigenous Peoples and the Holocaust*, 36 *PATTERNS OF PREJUDICE* 7 (2002).

<sup>78</sup> See generally *A WORLD AT TOTAL WAR: GLOBAL CONFLICT AND THE POLITICS OF DESTRUCTION, 1937–1945* (Roger Chickering, Stig Förster & Bernd Greiner eds., 2005); OMER BARTOV, *MIRRORS OF DESTRUCTION: WAR, GENOCIDE, AND MODERN IDENTITY* (2000).

<sup>79</sup> There was also the dimension of total mobilization, but that is less relevant in this context.

simply the *razzia* writ large—and as such, was ineluctably linked to atrocity.<sup>80</sup>

World War I began to Europeanize this form of colonial violence.<sup>81</sup> It was marked, as was colonial war, by asymmetrical violence, only here it was reciprocal asymmetrical violence. This somewhat paradoxical formulation must be understood precisely. From the perspective of the individual combatant, the violence was asymmetrical. As Ernst Jünger remarked of his first experience of combat in World War I, “[i]t was quite unlike what I had expected. I had taken part in a major engagement, without having clapped my eyes on a single living opponent.”<sup>82</sup> Artillery was responsible for roughly seventy percent of the wounds inflicted in World War I.<sup>83</sup> In set piece battles, machine guns inflicted the greatest number of fatal wounds and were highly valued by military planners precisely because of their machine-like character, with fixed firing arcs and fixed rates of fire that deliberately reduced the gunner to an adjunct operator who did little more than feed the automatic beast.<sup>84</sup> Thus, for the average soldier in World War I, dying, rather than killing, became the core experience.<sup>85</sup> Soldiers became objects, not subjects, of violence. If for the individual violence was asymmetrical, for the contending forces as a whole, it was reciprocal, each all too capable of inflicting similar casualties on the other; hence the stalemate of the western front and the shift from a war of maneuver to a war of attrition, or what the Germans tellingly called a *Materielschlacht*, a battle of materiel. The failure of the Leipzig trials for German war crimes in 1923 can thus be interpreted in part as the failure of the legal language of agency to comprehend the transformation of soldiers from agents into victims,

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<sup>80</sup> Appropriately enough, World War I also marked the first breakthrough of a meaningful critique of the ideology of European civilization. See Michael Adas, *Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology*, in *DECOLONIZATION: PERSPECTIVES FROM NOW AND THEN* 78–100 (Prasenjit Duara ed., 2004).

<sup>81</sup> See ISABEL V. HULL, *ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICE OF WAR IN IMPERIAL GERMANY* 226–30 (2005).

<sup>82</sup> ERNST JÜNGER, *STORM OF STEEL* 33 (Michael Hoffmann trans., Penguin 2003) (1920).

<sup>83</sup> JOHN KEEGAN, *THE FACE OF BATTLE: A STUDY OF AGINCOURT, WATERLOO AND THE SOMME* 269 (1976).

<sup>84</sup> *Id.* at 230.

<sup>85</sup> One ought not exaggerate this point, of course, since there was plenty of killing in World War I as well. See, e.g., STÉPHANIE AUDOIN-ROUZEAU & ANNETTE BECKER, 14–18: *UNDERSTANDING THE GREAT WAR*, at 15–45 (2000).

quite literally into materiel, and in the process rendering them culturally into martyrs on the altar of civilization.<sup>86</sup>

The Fascist response to World War I can be interpreted in part as an attempt to restore agency in the wake of its violent destruction in the war, but agency conceptualized for a new era, an anti-liberal, anti-individualist collective agency; agency as historical destiny, agency as the voice of the dead.<sup>87</sup> If World War I put Europeans into the military situation of savages, World War II put them into the social situation of savages. World War II was no longer about blurring the distinctions between soldier and civilian, between agent and victim, between subject and object, but about their obliteration. The generality of this situation hid the specificity of the Holocaust from most observers until well after the War; hence Nuremberg's concentration on military violence as the crux of the crisis of civilization in the face of civilized barbarism. Like fascism, but from the radically distinct framework of liberal legalism, it was an attempt to restore agency to a situation that threatened the very conditions of its possibility, primarily by trying to outlaw total war itself since it was rightly feared that total war could not be waged without barbarism.<sup>88</sup>

### CONCLUSION

It was less the unprecedented character than the massive scale of Nazi barbarism that was decisive for the emergence of the legalist paradigm, allowing an implementation of ideas and doctrines that had begun to develop as early as Grotius, but had hitherto been unable to overcome the resistance posed by the institution of national sovereignty. The two key pillars of the legalist paradigm—the disconnection of rights from sovereignty and the doctrine of mutual state and individual criminality—emerged as a response to the realization, driven home by the experience of the mass destruction and atrocity perpetrated by nation-states in the course of global war, that sovereign

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<sup>86</sup> See generally, e.g., JAY WINTER, *SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY* (1995); GEORGE L. MOSSE, *FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS* (1990); DENIS WINTER, *DEATH'S MEN: SOLDIERS IN THE GREAT WAR* (1978); PAUL FUSSELL, *THE GREAT WAR AND MODERN MEMORY* (1975).

<sup>87</sup> See generally, e.g., GIOVANNI GENTILE, *ORIGINS AND DOCTRINE OF FASCISM, WITH SELECTIONS FROM OTHER WRITINGS* (A. James Gregor ed. & trans., 2002); cf. GEORGE L. MOSSE, *THE FASCIST REVOLUTION: TOWARD A GENERAL THEORY OF FASCISM* 83–87 (1999).

<sup>88</sup> See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 20–28 (2000) (describing the principle of liberal legalism).

nation-states alone were not simply insufficient guarantors of the basic rights associated with “civilization,” but that they could often be their worst violators.

It was this experience that was foremost in the minds of many at Nuremberg, lead prosecutor Justice Robert H. Jackson first among them. On July 26, 1946, responding to charges by the defense that the trial violated the prohibition against *ex post facto* law through its retroactive authorization under new international statutes (the London Charter), Jackson justified this novelty by noting that far from:

standing at the apex of civilization . . . in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first. . . . If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization.<sup>89</sup>

According to Jackson, the London Charter, which he had helped draft, merely recorded the state of international law. Even if it marked a new advance, it was roughly parallel to the “evolution of local law when men ceased to punish crime by ‘hue and cry’ and began to let reason and inquiry govern punishment.”<sup>90</sup> Law, as embodied reason, and thus as a marker of civilization and progress, offered the opportunity for the second half of the twentieth century to redeem the first, to use law to bring the principles of international order into line with those of civilization.<sup>91</sup> The failure to do so, Jackson noted with an apocalyptic tone entirely in keeping with the times, might well mean the permanent end of civilization itself. The legalist paradigm of war thus emerged as a mode of redemption, a bulwark against apocalypse, as little less than an eschatological last-chance gamble on the durability of civilization in the face of its own undeniable barbaric tendencies.

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<sup>89</sup> Robert H. Jackson, Summation, in 19 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 52, at 397–98.

<sup>90</sup> *Id.* at 398.

<sup>91</sup> On the “happy ending” of the twentieth century, see Michael Geyer, *Germany, or, The Twentieth Century as History*, 96 S. ATLANTIC Q. 663 (1997).