Kelly Maddox and Tino Schölz

Military Justice in Modern History: An Introductory Overview

Recent conflicts in Europe and the Middle East have brought renewed international attention to the problems of adjudicating violence in war. Under the rubric of international law there now exists a robust legal framework intended to regulate belligerent conduct, to limit the devastation of war, and to protect civilians and other non-combatants. This framework has been mobilised, as a form of "lawfare," in attacks against the legitimacy of military actions and in an effort to incite international pressure against belligerents.[1] In response to alleged war crimes in these current conflicts, the International Criminal Court has begun investigations and, in some cases, issued arrest warrants to compel belligerent efforts to halt or otherwise deter continued violations of the laws of war by their forces.[2] In Europe judicial efforts have been undertaken at a national level, too.[3] Consequently, concerns have been raised on both sides regarding judicial misconduct and breaches of the fair trial provisions established in the 1949 Geneva Conventions and their additional protocols.[4] These contemporary examples emphasise that wars are fought, not only on the battlefield, but also in court rooms.

The weaponisation of international law as a means of war has attracted a great deal of scholarly attention in recent decades. The role of military justice sys-

1 On law as a means of war, see David Kennedy, *Of Law and War* (Princeton: Princeton University Press, 2006) and on the concept of "lawfare" specifically, see Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016).

2 "Situation in Ukraine," case ICC-01/22, *International Criminal Court* (2022). accessed 11 June 2025, https://www.icc-cpi.int/situations/ukraine; "Situation in the State of Palestine," case ICC-01/18, *International Criminal* Court (2018), accessed 4 March 2025, https://www.icc-cpi.int/palestine.

3 For examples, see "Britons sentenced to death after 'show trial' in Russian-occupied Ukraine," *The Guardian*, 9 June 2022, accessed 11 June 2025, https://www.theguardian.com/world/2022/jun/09/britons-sentenced-to-death-russian-occupied-ukraine-aiden-aslin-shaun-pinner; "Death sentence for Ukraine foreign fighters is a war crime," *UN News*, 10 June 2022, accessed 11 June 2025, https://news.un.org/en/story/2022/06/1120102.

4 United Nations Human Rights Office of the High Commissioner, "Treatment of Prisoners of War and Persons Hors de Combat in the Context of the Armed Attack by the Russian Federation against Ukraine," 24 March 2023, accessed 11 June 2025, https://www.ohchr.org/en/documents/country-reports/ohchr-report-treatment-prisoners-war-and-persons-hors-de-combat-context. For discussion of fair trial guarantees under international law, see David Weissbrodt, "International Fair Trial Guarantees," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Andrew Clapham and Paola Gaeta (Oxford: Oxford University Press, 2014), 410–440.

https://doi.org/10.1515/9783110989588-001

tems in the adjudication of war, less so. Such systems have traditionally been established during peacetime to ensure the effective functioning of armed forces, and have thus been informed by a national framework of distinct but mutable norms and values. However, military justice has also been at the heart of the production and restraint of violence as a necessary feature of conflict and, as a result, has been increasingly subject to an international body of laws and customs designed to constrain war.[5] Indeed, wars have long been fought in military courts as military justice is one of the main mechanisms through which soldiers are disciplined and their behaviour towards both combatants and non-combatants controlled.[6] Military laws and regulations supplement international and civilian criminal laws to create a regulatory framework which establishes expected and accepted standards of conduct. The threat of punishment is used to coerce compliance and obedience – so vital to the effective functioning of armed forces. Actual enforcement of laws by the agents and organs of a military judiciary reinforce these proscriptions and further contribute to the shaping of soldierly comportment towards their superiors and comrades, as well as enemy belligerents, prisoners of war, and civilians. Strict, swift punishment of crime or offences of a military nature, for instance, contributes to the formation of an organised army allowing for the use of force to be employed in a salutary and discerning manner consistent with the requirements of the rules and customs of war. Leniency or impunity, on the other hand, may lead to the routinisation and normalisation of illegal practices which, in turn, promotes a battlefield context favourable and open to possibilities for radicalisation and escalation of violent conduct.[7]

In operational and occupied areas, military justice also plays an important role in controlling civilians and other non-combatants. Under international law, occupying powers must strive to protect civilians and ensure public order. If local police or civilian courts are unable to function as normal, military justice organs may be used to uphold existing laws, safeguard against a proliferation of crimes, and offer residents in occupied areas a vital avenue of redress in the absence of normal civilian government. Occupiers are also authorised to impose restrictions

5 On the production and restraint of violence, see Devorah Manekin, *Regular Soldiers, Irregular Warfare: Violence and Restraint in the Second Intifada* (Ithaca, NY: Cornell University Press, 2021), 4–9; Amelia Hoover Green, *The Commander's Dilemma: Violence and Restraint in Wartime* (Ithaca, NY and London: Cornell University Press, 2018), 27–45.

6 For an overview, see Rain Liivoja, "Military Justice," in *The Oxford Handbook of Criminal Law*, ed. Markus D. Dubber and Tatjana Hörnle (Oxford: Oxford University Press, 2014), 326–349.

7 Manekin, *Regular Soldiers, Irregular Warfare*, 4–5. Issues of impunity are also discussed in Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (Abingdon: Routledge, 2017).

on daily life (curfews, blackouts, restrictions on movement, etc.) with a view to shielding civilians and minimising collateral damage during operations. Additionally, belligerents exercise legal and judicial powers in occupied areas as a matter of military necessity since good public order is vital for the safety of occupying forces and the realisation of military objectives. Thus, in addition to imposing reasonable constraints on populations that aim to directly ensure their protection, occupying powers have authority to prohibit and punish acts of detriment to their position (e.g. rebellion, espionage, the carrying of weapons, distribution of propaganda) regardless of established criminality under existing local laws. Military courts may be specially established to handle violations of such regulations.[8] Enemy captives detained as POWs are also subject to military legislative and judicial authority. Regulations can be enacted to ensure discipline in camps for the benefit of detainees – to protect them from each other – and for the security of their captors. Punishment for infractions, as well as ordinarily criminal behaviour, is intended to be corrective, to ease the burdens of maintaining custody and dissuade acts of resistance that, like unrest in occupied territories, causes resources to be redirected away from the main war effort.[9]

Thus, military justice, as a mechanism to limit misconduct, disobedience, and violence, is a vital tool in the realisation of military objectives and the general prosecution of wars. However, as an instrument primarily designed to protect armed forces and support military objectives, it has a high potential to become a form of violence in and of itself. The principles underpinning the purpose and function of military justice can be quite different from those in civil judiciaries since it is fundamentally meant to meet military needs, protect interests, and help realise goals.[10] It does this, not just by seeking judicial redress for violations of military and martial law, but also by punishing to deter further offences, unrest, or defiance. The exercise of legislative and judicial powers by armed forces, then,

8 For a detailed overview on legal authority of belligerents, see Eyal Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford: Oxford University Press, 2012); Yutaka Arai Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2009); Gerhard von Glahn, *The Occupation of Enemy Territory* (Minneapolis, MN: University of Minnesota Press, 1957), 94–105; Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* 16.4 (2005): 662–663 and Peter Stirk, *The Politics of Military Occupation* (Edinburgh: Edinburgh University Press, 2009), 175–202.

9 Vasilis Vourkoutiotis, *Prisoners of War and the German High Command: The British and American Experience* (Basingstoke: Palgrave Macmillan, 2003), 76–77. For an introduction to the punishment of prisoners, see Howard S. Levie, *Prisoners of War in International Armed Conflict* (Newport, RI: Naval War College Press, 1978), 315–342.

10 Liivoja, "Military Justice," 326.

may not necessarily be independent or impartial. Law and justice are often utilised to demonstrate and reinforce military power and, as highlighted by the chapters in this volume, in the pursuit of such goals, swift, severe punishments may be prioritised, streamlined procedures favoured, and certain judicial safeguards omitted to expedite cases and fulfil a deterrent function, especially in the context of wartime.

The "military" nature of military justice has been problematised in existing comparative scholarship which has tended to focus predominantly on post-Second World War efforts to reform military justice systems, especially in Western democracies.[11] Certainly, the Second World War was an epoch-making event. It provided impetus for further codification of international law, particularly as pertaining to civilians, and precipitated national-level reforms in multiple military judicial systems.[12] However, while the Second World War may have acted as a key catalyst for change, as Daniel Marc Segesser explains in the first chapter in this volume, the problem of adjudicating wartime violence had been the subject of legal, and often circular, discussions for over a century. At the core of this debate was the question of whether violations should be prosecuted by national and, accordingly, military means of justice or whether this would be undertaken at an international level in specially established courts. Segesser highlights that, though the former stance always won-out in such debates, within the shifting historical context and observed impact of wars in the late nineteenth and early twentieth century, the international community inched closer to accepting the need to establish a mechanism by which, in the event that national (military) judi-

11 Alison Duxbury and Matthew Groves (ed.), *Military Justice in the Modern Age* (Cambridge: Cambridge University Press, 2018); Brett J. Kyle and Andrew G. Reiter, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice* (London and New York: Routledge, 2021); Georg Nolte (ed.), *European Military Law Systems* (Berlin: De Gruyter Recht, 2003); Benjamin Heng et al., "Military Justice in a Comparative and International Perspective: A View from the Asia Pacific," *Journal of International Peacekeeping* 20 (2016): 133–142. Two recent special issues in the *Revue Internationale de Droit Pénal* have incorporated an historical approach, exploring case studies of military justice in longer-term perspective and highlighting the value of this area of research for understanding contemporary issues. See, for example, Gwenaël Guyon, Jean-Paul Laborde, and Stéphane Baudens (ed.), "Military Justice: Contemporary Challenges, History and Comparison," *Revue Internationale de Droit Pénal* 93.2 (2022) and Gwenaël Guyon, et al. (ed.), "Military Justice: Contemporary Challenges, Historical and Comparative Perspectives," *Revue Internationale de Droit Pénal* 8 (2025).

12 On the development of international law, see Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon, 1997); Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872–1945* (Paderborn: Schöningh, 2010); Kerstin von Lingen, *Crimes against Humanity: Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864–1945* (Paderborn: Schöningh, 2018).

cial systems failed in this task, war and violence could be adjudicated *ex post facto* by the international community.

With Segesser's chapter providing the critical international context, the remaining chapters in this volume focus on the functioning of national military justice systems from a range of geographical areas within modern history, circa 1850–1945, as a dynamic, formative period. Indeed, though the notion of civil rights and of humanising war had a longer philosophical and intellectual tradition, this period witnessed an acceleration in efforts to standardise and internationalise the rules and customs of war which informed the development and reform of military justice. Transformations in the nature and status of armies against the backdrop of evolving ideas about sovereignty, nationhood, and citizenship, and changing realities in political orders, similarly impacted the character of military justice, as did the increasing totalisation and globalisation of warfare which brought new challenges and placed additional demands upon military control mechanisms. Situated in this dynamic context, the case studies in this volume explore issues inherent to the "military" character of military justice and reflect on its implications for the adjudication of violence, particularly in wartime, but also in peacetime. The chapters therefore address two major themes: firstly, observable tensions in the multiple functions of military justice within armies and navies, and secondly, the instrumentality of military justice over civilians and non-combatants during wartime.

Military Justice towards Soldiers and Sailors: Tensions between Discipline and Civil Rights

The evolution of military justice systems across individual countries during the nineteenth and twentieth centuries unfolded along distinct trajectories, shaped by a complex interplay of factors. These encompass the relationship between the political and military structures of the respective countries including domestic and external dynamics of power relations, the development of their (general/civil) legal systems and their affiliation with certain legal traditions (common law, continental, Romano-Germanic law, socialist law, etc.), or their experiences in relation to warfare and internal violence.[13] Notwithstanding this diversity, several universal devel-

13 On the history of and debates on legal traditions, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2014); Mariana Pargendler, "The Rise and Decline of Legal Families," *The American Journal of Comparative Law* 60.4 (2012): 1043–1074.

opments can be discerned, which indicate structural similarities as well as analogous tensions and lines of conflict in the period under discussion.

The fundamental purpose of the various military justice systems in the period under review was to guarantee the enforcement of obedience, discipline, and order among their respective military personnel, with the ultimate objective of protecting the state from both external and internal threats. This function was a common feature of all the countries discussed in this volume and was closely linked to the widely shared belief amongst military leaders that swift and stern justice was a necessary prerequisite to achieve this goal. A particularly noteworthy illustration of this phenomenon, in addition to the well-known cases of the Wehrmacht[14] and the Red Army during the Second World War,[15] is the Italian Army during the First World War.[16] Here, capital punishment and summary executions were comparatively prevalent, and even a form of decimation was practised.[17] In accordance with this logic of necessity, the purpose of punitive measures was less to penalise specific transgressions of soldiers and sailors or to preserve the principles of due process of law and therefore the rights of the accused, but rather to deter disobedience and thereby ensure the effective operation of the troops. In other words, institutional and national interests were clearly prioritised over the individual.

Accordingly, military justice systems were regarded and organised as distinct legal systems, largely separate from civilian law. The norms and procedures that characterised these systems were tailored to the unique needs of the armed forces. This applied both to states whose militaries were relatively autonomous within the political structures, for example Prussia/Germany until the end of the

14 Manfred Messerschmidt, *Die Wehrmachtsjustiz 1933–1945* (Paderborn: Schöningh, 2005); Claudia Bade, Lars Skowronski and Michael Viebig (ed.), *NS-Militärjustiz im Zweiten Weltkrieg: Disziplinierungs- und Repressionsinstrument in europäischer Dimension* (Göttingen: V&R unipress, 2015); Kerstin von Lingen and Peter Pirker (ed.), *Deserteure der Wehrmacht und der Waffen-SS: Entziehungsformen, Solidarität, Verfolgung* (Paderborn: Schöningh, 2023).

15 See the chapter by Franziska Exeler in this volume. On the difficult assessment of the Soviet military justice system, see Aleksandr Yakovlevich Kodintsev, "Military Justice Institutions of the USSR in the 1930s–1950s: The Soviet and Russian Historiography," *Journal of Advanced Research in Law and Economics* 35 (2018): 1676–1683.

16 Mark Thompson, *The White War: Life and Death on the Italian Front, 1915–1918* (London: Faber and Faber, 2004), 261–276; Irene Guerrini and Marco Pluviano, "Extrajudicial Executions in the Italian Army during World War I," in *Justices Militaires et Guerres Mondiales,* ed. Jean-Marc Berlière, et al. (Louvain-la-Neuve: Presses Universitaires de Louvain, 2013), 179–192, accessed January 12, 2025, https://books.openedition.org/pucl/2941.

17 Thompson, *White War*, 264–265; Anthony King, "Discipline and Punish: Encouraging Combat Performance in the Citizen and Professional Army," in *Frontline: Combat and Cohesion in the Twenty-First Century*, ed. Anthony King (Oxford: Oxford University Press, 2015), 96–97.

First World War or Japan before 1945, and to states whose armies and navies were much more closely controlled by democratic institutions, such as the Third Republic in France, Great Britain, and the United States. Closely related to the objective of enforcing discipline and order was the significant power held by commanders within many military justice systems. This was primarily due to the historical fact that ensuring discipline had been traditionally one of their functions, with military justice frequently perceived as an extension of their command authority.[18] Consequently, they exercised a high degree of discretion in the jurisdiction of their subordinate units. Usually, they could deal with misdemeanours and minor offences by soldiers and sailors summarily within the framework of disciplinary punishment, while crimes were tried by courts martial. But also, in these criminal proceedings, the formal and informal influence of commanding officers was frequently significant, as in many legal systems they were able to decide which charges were brought forward, appointed judges, or confirmed a judgement.

Another common feature was the widespread belief that only those with experience in the armed forces were equipped with the requisite knowledge to understand the unique demands of the institution. Consequently, it was considered appropriate that commissioned and non-commissioned officers (rather than civil legal experts) served as judges in the military justice systems, constituting at least a majority of the judges or the jury present at a court martial. To reinforce the military hierarchy, many armed forces also implemented the principle that judges were required to hold a higher rank than the accused, or at least an equivalent rank. A further shared characteristic was that the penal norms that were applied during wartime were considerably more severe than those that were applied in peacetime. This was largely in order to address the unique challenges posed by the extreme conditions that were present in the field or during combat operations. During war, even the application of summary punishment for crimes was permitted if deemed necessary to uphold discipline, whereby court proceedings could be shortened or dispensed of altogether. Finally, the military was regarded as the ultimate means of maintaining security and order domestically and

18 In Western history, this tradition dates back to ancient Rome, where military criminal justice was a function of the *imperium militiae* of a commander. Theodor Mommsen, *Römisches Strafrecht* (1899; Berlin: Akademie-Verlag, 1955), 29. See also, Erich Sander, "Das Römische Militärstrafrecht," *Rheinisches Museum für Philologie* 103.4 (1960): 289–319; Sara E. Phang, *Roman Military Service: Ideologies of Discipline in the Late Republic and Early Principate* (Cambridge: Cambridge University Press, 2008), 111–151. Roman practice was fundamentally different from Ancient Greek practice. In Athens, for example, a commander could bring charges against citizens for disciplinary offences before the people's assembly following the end of a campaign. The assembly then passed judgement on the accused. Hans Delbrück, *Geschichte der Kriegskunst im Rahmen der politischen Geschichte: Erste Abteilung: Das Altertum*, 3rd ed. (Berlin: Georg Stilke, 1920), 294–295.

thus acted as a guarantor of political order or as an instrument of suppression of domestic political enemies. This is why military justice could extend to its own population in exceptional cases, a phenomenon that can be analysed particularly impressively using the example of 19th-century France.[19]

However, during the nineteenth and the early twentieth century, these principles and/or practices of military justice, and therefore the prioritisation of perceived military necessity over the individual, became contested in many countries, leading in some cases to substantial adaptations. These developments were driven by a wide variety of impulses which assumed different significance in different countries and at different points in history. One important impulse was the (ideal typical) transformation of militaries from mercenary to national conscript armies.[20] This transition was often accompanied by an idealistic upgrading of soldiers, who had previously often been recruited from the lower stratum of society and now became, at least ideally, regarded as "citizen soldiers", "citizens in uniform" or "defenders of the fatherland", whose motivation should no longer be based on coercion and fear of draconian punishments, but on civil virtues and patriotism. For these newly formed "citizen soldiers", a harsh military justice system with severe punishments was considered neither appropriate nor necessary. This development gave rise to questions not only regarding the relationship between an individual soldier's or sailor's duties and his rights as a citizen, but also the distinction between civil and military legal systems or the extent to which military courts exercised jurisdiction over civil, non-military affairs of members of the armed forces.

The conflicts caused by this phenomenon manifested at different times and in different countries. For instance, in Prussia, they became evident in the context of the Prussian Reforms as early as the beginning of the nineteenth century and led to a significant liberalisation of the military justice system, including the abolition of the widespread practice of corporal punishment.[21] In Britain, where until

19 For the Anglo-Saxon tradition and contemporary debates in the United States, see Francis Lieber and G. Norman Lieber, *To Save the Country: A Lost Treatise on Martial Law*, ed. Will Smiley and John Fabian Witt (New Haven and London: Yale University Press, 2019); for a broader context of such a "military overreach" from the perspective of democracy, see Kyle and Reiter, *Military Courts*, 32–34, 159–223.

20 On the impact of conscription in Western Europe and the United States see Morris Janowitz, "Military Institutions and Citizenship in Western Societies," *Armed Forces and Society* 2.2 (1976): 185–204; Ute Frevert, "Bürgersoldaten: Die allgemeine Wehrpflicht im 19. und 20. Jahrhundert," in *Die Wehrpflicht und ihre Hintergründe. Sozialwissenschaftliche Beiträge zu einer aktuellen Debatte,* ed. Ines-Jaqueline Werkner (Wiesbaden: VS-Verlag für Sozialwissenschaften, 2004), 45–64.

21 Manfred Messerschmidt, "Das preußische Militärwesen," in *Handbuch der preußischen Geschichte III: Vom Kaiserreich zum 20. Jahrhundert und Große Themen der Geschichte Preußens*, ed. Wolfgang Neugebauer (Berlin, New York: Walter de Gruyter, 2001), 385–386.

the beginning of the twentieth century the army was based on volunteers and had little interaction with civil society, and where soldiers and sailors had a low social status, harsh discipline and a severe justice system were regarded as appropriate and rarely publicly discussed.[22] However, analogous tensions emerged during the First World War with the introduction of compulsory service and the extension of military justice to civilians, as Gerard Oram's contribution to this volume demonstrates. The establishment of conscription in the UK resulted not only in an increased public awareness of the deficiencies of the British military justice system, but also in divergent levels of severity in military justice for volunteers and conscripts.[23]

A second impulse, closely linked to the first, originated from the constitutionalisation and democratisation of nation states, in conjunction with the emergence of criticism in public spheres. These developments resulted in an expansion of the field of actors, transcending the confines of the armed forces, which had previously been the primary domain for deliberations concerning the military justice systems. This expansion consequently facilitated a more comprehensive discourse on issues pertaining to military justice, including the composition and independence of courts, the position of commanders, but also specific injustices perpetrated against individuals. This was evident, as Gwenaël Guyon highlights, for instance in France, where the Dreyfus Affair (1894–1906) and the practices in penal companies in North Africa were subjects of public debate.[24] In Japan, too, the parliament utilised its legislative powers after 1905 to promote a liberalisation of military criminal procedures in peacetime, as Tino Schölz demonstrates. In Germany, around the turn of the century, the Social Democratic opposition addressed the systematic mistreatment of soldiers in the military, as well as the extent to which soldiers' civil rights were restricted during their service or the arbitrary nature of punitive measures taken by commanders.[25] Consequently, they called for a reform of the Code of Military Criminal Procedure and the introduction of, for example, the right to legal representation or the publicity of criminal proceedings. Following the November Revolution in 1918 and during the Weimar Republic, military justice was even temporarily abolished altogether, as it had fallen into disre-

22 Anja Johansen, "Licence not to Kill: British Opposition to Military Justice during the First World War," in Berlière, *Justices Militaires,* 57–72.

23 Johansen, "Licence not to Kill." See also Gerard Oram's contribution to this volume.

24 On the Dreyfus Affair see, in addition to Gwenaël Guyon's contribution, Eric Cahm, *The Dreyfus Affair in French Society and Politics*, (London: Routledge, 1996); James Brennan, *The Reflection of the Dreyfus Affair in the European Press, 1897–1899*, (New York: Peter Lang, 1989).

25 Helge Berndt, "Die Reform der Militärstrafgerichtsordnung 1898: Die Haltung der Parteien im Reichstag," *Militärgeschichtliche Mitteilungen* 14.2 (1973): 7–30.

pute as an instrument of repression in the hands of officers during the First World War.[26] In the United States, a movement to civilianise military justice emerged in the aftermath of the First World War led by the former Judge Advocate General, General Samuel T. Ansell, who vehemently denounced the practices of the American legal system that had transpired during the war, especially the outrageously severe sentences pronounced.[27] Nonetheless, its endeavours to afford soldiers and sailors the constitutional and due process rights common in civilian courts met with limited success, as evidenced by the reform of the Articles of War in 1920.

A third impetus for reform was provided by transnational learning processes, both within Europe and in non-European regions. Legal norms and practices of military justice systems were thoroughly analysed and served as a reference for upcoming reforms, whether as a solitary project or as part of reforms of the armed forces or of the civil justice system. In Europe, notable examples include the discussions in France, Russia, the German Empire, and Austria-Hungary.[28] Outside of Europe, Bolivia and Japan merit particular attention, as the French model played a pivotal role in their respective reform processes, while in Japan, in the 1880s, German and Swiss models were utilised as well.[29] However, it is important to note that transnational learning rarely resulted in complete adoption; rather, it involved complex processes of assimilation, rejection, and modification to existing structures. This observation underlines the importance of path dependency analysis for understanding national developments.

The questioning of the military's traditional one-sided prioritisation of discipline and order over the principles of individual rights of soldiers and sailors as citizens as well as of fair trial and due process of law that prevailed at the time thus gave rise to conflicts and as previously described, resulted in partial liberalisation and greater consideration of civil rights in certain countries. These developments were, however, neither a teleological, unidirectional progression nor an irreversible development. This is most clearly exemplified by the fact that the totalisation of warfare as well as of political rule did also have repercussions on

26 Patrick Oliver Heinemann, *Rechtsgeschichte der Reichswehr 1918–1933* (Paderborn: Ferdinand Schöningh, 2017).

27 Edward F. Sherman, "Justice in the Military," in *Conscience and Command: Justice and Discipline in the Military*, ed. James Finn (New York: Random House, 1971), 24–25.

28 For instance, at the close of nineteenth century, the legal scholar Ernst Franz Weisl (1857–1931) advocated for the reform of military procedural law in Austro-Hungary by drawing parallels with the Russian and French systems. Ernst Franz Weisl, *Das Militär-Strafverfahren in Russland, Frankreich und Deutschland* (Wien: Verlagsanstalt Reichswehr, 1894). In 1912, he drafted a Military Procedural Law, which was adopted by the Imperial Council on July 5, 1912.

29 See the contributions by Liz Shesko and Tino Schölz in this volume.

military justice, as evidenced by the Third Reich and the Soviet Union.[30] As Franziska Exeler's chapter highlights, the practices of the Red Army during the Second World War were partly a continuation of the Stalinist terror of the 1930s, and the totalitarianism of the Soviet Union was also visible in the parallel existence of military justice institutions of the armed forces and the state security organs. Nevertheless, even during the totalisation of warfare, military justice remained bound to strategic considerations of military necessities, and commanders and sometimes courts were given considerable discretionary powers. Maria Fritsche convincingly demonstrates the former using the example of the German occupation of Norway between 1940 and 1945, which differed considerably from the *de facto* abandonment of legal norms in the Wehrmacht's war in the East. Gerard Oram shows the latter for British military justice on the various theatres of war during the First World War, where the influence of supreme commanders led to significant different degrees of rigour in the practices of military justice, or where army courts utilised a considerable degree of latitude to carry out "pious perjury".

In addition to the tensions mentioned above, further developments in the military justice systems were shared in numerous countries. Two of these should be discussed briefly here. Firstly, codification, which entailed the compilation, systematisation, and supplementation of existing penal regulations for the military, which frequently dated back to the early modern period, and / or the formulation of new, comprehensive codes. Examples of this trend can be found throughout the whole nineteenth century: in the German states following the end of the Napoleonic Wars and the Reich in 1872, in Sardinia in 1840 and 1859 and in the newly united Kingdom of Italy in 1869, in Switzerland in 1851 and Austria in 1855, in France in 1857, in the United States with the Lieber Code of 1863 (which augmented the Articles of War from 1806) and the revised Articles of War in 1874, in Japan in 1873, 1881 and 1908, in Russia in 1838 and 1869, in Britain with the promulgation of the Army Discipline and Regulation Act in 1879 and the Army Act

30 On the history and concept of total war see, for example, Manfred F. Boemeke, Roger Chickering and Stig Förster (ed.), *Anticipating Total War: The German and American Experiences, 1871–1914* (Cambridge: Cambridge University Press, 2009); Roger Chickering and Stig Förster (ed.), *Great War, Total War: Combat and Mobilization on the Western Front, 1914–1918* (Cambridge: Cambridge University Press, 2006); Roger Chickering and Stig Förster (ed.), *The Shadows of Total War: Europe, East Asia, and the United States, 1919–1939* (Cambridge: Cambridge University Press, 2003); Roger Chickering, Stig Förster and Bernd Greiner (ed.), *A World at Total War: Global Conflict and the Politics of Destruction, 1937–1945* (Cambridge: Cambridge University Press, 2010); Jeremy Black, *The Age of Total War, 1960–1945* (Lanham: Rowman and Littlefield, 2010). On totalitarianism, for example, David D. Roberts, *Totalitarianism* (Cambridge: Polity, 2020); Philipp W. Gray, *Totalitarianism: The Basics* (New York: Routledge, 2023).

in 1881, or in Bolivia in 1903.[31] In some countries, this codification was an integral component of broader modernisation policies and extensive reforms of the civil legal systems, a prime example being Russia under the reign of Alexander II (1855–1881) or Japan during the Meiji period (1868–1912).[32] Concurrent with this codification process was the introduction of legal concepts such as the separation of substantive and procedural law, the standardisation of penal norms, which in early modern societies often had been differentiated according to rank, the humanisation of the penal system by the abolition of corporal punishment, or the establishment of a jury system. Another frequently observed trend was the exclusion of civilian matters involving soldiers and sailors from the jurisdiction of military justice.[33] Some of the codes also reflected the ongoing international debates concerning the codification of the laws and customs of warfare, including penal provisions on pillaging and looting, as well as on the mistreatment of wounded or captured enemies.[34]

Secondly, a tendency towards bureaucratisation and professionalisation can be observed. This tendency can, in some countries, be traced back to the early modern period. It refers to the gradual increase in the importance of individuals trained in law, who were deployed in military justice proceedings, for example as judges, preliminary examination magistrates, prosecutors, or legal advisors to commanders and courts martial, as well as serving as administrative staff responsible for the handling of cases. In certain instances, legal experts were also assigned with the responsibility of reviewing and revising judgements. In terms of institutional framework, they thus constituted a counterpart to the lay status of the commanders and officers serving as judges in courts martial, and their ascen-

31 The developments in the German states are discussed in Sylvia Kesper-Biermann, "'Jeder Soldat ist Staatsbürger': Reformen im Militärstrafrecht in Deutschland 1800 bis 1870," in *Reform, Reorganisation, Transformation: Zum Wandel in den deutschen Streitkräften von den preußischen Heeresreformen bis zur Transformation der Bundeswehr,* ed. Karl-Heinz Lutz, Martin Rink and Marcus von Salisch (München: Oldenbourg, 2010), 131–151.

32 On the broader context of the transformation of the legal justice system in Russia, see Girish Narayan Bhat, *Trial by Jury in the Reign of Alexander II: A Study in the Legal Culture of Late Imperial Russia, 1864–1881* (Berkeley: University of California Press, 1995); Peter H. Solomon (ed.), *Reforming Justice in Russia, 1864–1996: Power, Culture and the Limits of Legal Order* (Armonk: M.E. Sharpe, 1994); Ben Eklof, John Bushnell and Larissa Zakharova (ed.), *Russia's Great Reforms, 1855–1881,* (Bloomington: Indiana University Press, 1994). On Japan, see Wilhelm Röhl (ed.), *History of Law in Japan since 1868* (Leiden: Brill, 2005); Ishii Ryōsuke, *Japanese Culture in the Meiji Era: Volume 9: Legislation* (Tōkyō: Toyo Bunko, 1969).

33 Emil Dangelmaier, "Geschichte des Militär-Strafrechts," *Jahrbücher für die deutsche Armee und Marine* 79.3 (1891): 288.

34 Dangelmaier, "Geschichte des Militär-Strafrechts," 285.

dance was regarded as a significant step in the "civilianising" of the military's legal system. However, it is again imperative to exercise caution and avoid simplistic assumptions that bureaucratisation and professionalisation were invariably a progression towards liberalisation and due process of law, whilst disregarding their ambivalent nature for legal systems. In France, as Gwenaël Guyon shows, the complex bureaucratic regulations of procedural criminal law proved to be inadequate in responding to the challenges of war during the Franco-Prussian War and again during the First World War. This necessitated a constant simplification of these regulations in wartime. Similarly, Elizabeth Shesko demonstrates that bureaucratisation of the military justice system in Bolivia after 1903 resulted in such cumbersome and complicated criminal proceedings, even in peacetime, that superiors sought to circumvent them whenever possible, leading to a sharp increase in informal, even arbitrary, punishments. In the Japanese case, detailed in Tino Schölz's chapter, the introduction of more robust, and procedurally more cumbrous, safeguards for soldiers and sailors was actually legally restricted so that, despite progress in the "civilianisation" of the peacetime system, there was a notable consistency in the application of military justice during wartime across the period under review. Consequently, whether evolving principles regarding soldier's rights would be upheld in the field depended a great deal on the personalities, practices, and habitus of those involved in the administration of justice.

The institutional latitude and independence of legal experts within armed forces varied considerably. In countries such as the United States, Italy, Japan, or France, they formed distinct branches or justice corps. Nevertheless, they were often also integrated within the headquarters of larger units, such as divisions or armies, thereby rendering them subject to the authority of the respective commanders. In addition to this institutional dimension, however, it is evident that legal officers were subject to the specific norms and values of the military culture of the armed forces to which they belonged, the experiences of these armed forces in past and current military conflicts, as well as the political agenda and the war aims of their respective states, in addition to what was perceived as necessary to achieve those aims – in other words: the realities and demands of war. Such influences had the potential to conflict with and supersede the professional standards of legal experts. As Urs Matthias Zachmann shows with reference to the legal department of the Japanese Tenth Army on its march to Nanjing in 1937, the military value system could dominate legal practice, thereby contributing to the creation of scope for violence towards enemy soldiers and non-combatants during the infamous Nanjing Massacre. In contrast, Giovanni Focardi and Nicolò Da Lio emphasise in their analysis of biographies of Italian military legal magistrates during the Fascist era, that they employed a wide range of strat-

egies in such conflict situations, particularly after the fall of Mussolini in 1943, the spectrum of behaviour ranging from support of the Fascist regime in Salò to active resistance against it. In this regard, the experiences and actions of military jurists, whose systematic analysis still remains in its infancy, reflects the tensions between the character of the military justice system as an instrument designed principally to enforce discipline and to serve military necessity, on the one hand, and legal principles such as the protection of civil rights or due process of law, which became increasingly established in the nineteenth and early twentieth centuries, on the other.

The developments and transformations in national military justice systems discussed in this section also informed the administration of justice to enemy civilians and prisoners. This phenomenon became more pronounced over the course of the nineteenth and twentieth centuries as the nature of warfare changed, occupation became conceptualised as a temporary measure bound to legal provisions, and the confinement of enemy combatants became a more established practice. Similar tensions can be observed between safeguarding the rights of non-combatants and the inherent necessity and instrumentality at play in the application of military principles of justice over enemy civilians and prisoners who came under military authority during conflict. However, such tensions were also compounded more directly by the evolving international framework of law and custom which, as detailed in Segesser's chapter, aimed to constrain belligerent conduct in wartime.

Punishing Civilians and Prisoners in Wartime: Necessity and the Instrumentality of Military Justice

The extension of military jurisdiction over civilians in occupied territories during wartime was a branch of what in the Anglo-Saxon tradition is referred to as "martial law", a complex and historically confused term akin to the French concept of a "state of siege".[35] In popular understanding, martial law is declared in a state of emergency. It permits temporary military authority over aspects of governance principally to restore order during times of urgency, such as war, invasion, rebellion, disaster, or other forms of national crisis. Under martial law, civilian laws

35 William Birkimer, *Military Government and Martial Law*, 3rd ed. (London: Kegan Paul, Trench, Trübner & Co. Ltd., 1914), 21–22; on the confusing use of the term, see Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (Can-

and judicial procedures may be partially or wholly suspended to permit extraordinary preventive or punitive measures. These measures could involve a curtailment of civil rights, such as restrictions on movement and the imposition of curfews, as well as suspension of legal protections that enable searches to be conducted without warrants or which allow suspects to be detained without meeting evidentiary requirements. Additionally, civilians may be prosecuted in military courts which follow streamlined judicial procedures and under military penal codes which allow for harsher penalties than otherwise prescribed in civilian legislation. Expanding on Carl Schmitt's conceptualisation, Giorgio Agamben has thus argued that emergency powers create a "state of exception" which defines law's threshold in respect to the suspension of the juridical order.[36] David Dyzenhaus has similarly posited that martial law forms, paradoxically, a "legal blackhole" when declared.[37]

The powers afforded military forces during times of emergency to safeguard the nation's interests are sweeping, but they are not intended to be completely unrestrained. Historically, the scope of military authority over civilians has been limited in one of two ways. First, in some nations (e.g. France, Germany, and Japan), emergency powers had been enacted as laws until later written into the constitution and could be declared only by formal government decree which placed legal restrictions on the scope of permitted practices and set jurisdictional boundaries with regard to place or people, as deemed necessary in balancing the perceived demands of the crisis with accepted civil rights. In other countries, such as Britain and the US, the scope of military authority was more fluid; martial law was not, as Charles Fairman observed, "a definite legal regime whose powers [were] determined in advance."[38] The legality of measures taken under martial law were assessed afterwards, either in courts (e.g. the *ex parte* Milligan case of 1866) or, in the British context, in parliament which issued acts of indemnity of-

berra: Australian National University Press, 2018), 130–132. For comparison with the state of siege, see William Feldman, "Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege," *Cornell International Law Journal* 38.3 (2005): 1021–1048.

36 Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL: Chicago University Press, 2005), 4.

37 David Dyzenhaus, "The Puzzle of Martial Law," *The University of Toronto Law Journal* 59.1 (2009): 2.

38 Charles Fairman, "The Law of Martial Rule," *The American Political Science Review* 22.3 (1928): 600.

fering *ex post facto* sanction for the use of armed force over British subjects.[39] In Britain, this resulted in several political debates over the use of martial law, especially when used to legitimise extreme violence across the empire.[40] Thus, in the Anglo-Saxon tradition, martial law was both born of and, as such, constrained only by necessity.[41]

It is this latter configuration that informs the exercise of legislative and judicial authority over civilians by belligerents in enemy territory during the nineteenth and early twentieth century. In enemy territory, martial law was, in the phrasing of General Winfield Scott who had issued orders permitting civilians to be punished in military commissions during the Mexican-American War (1846–1848), "an unwritten code" that "all armies in hostile countries are forced to adopt, not only for their own safety, but for the protection of unoffending inhabitants and their property [. . .]."[42] Francis Lieber had held similar views and in the instructions he drafted for soldiers of the Union Army during the American Civil War (1861–1865) (known as the Lieber Code), he had written of martial law as a "consequence" of occupation which permitted the suspension, substitution, or dictation of general laws as far as military necessity required.[43] It was thus conceived of as similar to martial law at home – an exceptional measure used in times of urgency.

However, martial law also functioned differently in occupied territories. While the regular enforcement of law may have ceased in the vacuum left by the circumstances of occupation, thus requiring intervention by the occupier, the local judiciary was not typically to be supplanted by military organs. As a matter of practicality, customary rules of warfare had seen occupiers allow the contin-

39 For a detailed, comparative and historical overview of martial law in Britain, France, Germany, and the US see Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948). On Japan, see Ōe Shinobu, *Kaigenrei* (Tōkyō: Iwanami shoten, 1978).

40 For more on the use of martial law in the British Empire, see Charles Townshend, "Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940," *The Historical Journal* 25.1 (1982): 167–195; Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor, MI: The University of Michigan Press, 2003); Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

41 Fairman, "Law of Martial Rule," 615; see also a lengthy discussion on the nature of martial law in Lieber and Lieber, *To Save the Country*, 75–108.

42 Cited in Birkimer, *Military Government*, 581–582.

43 Lieber and Lieber, *To Save the Country*, 87; "Instructions for the Government of Armies of the United States in the Field (Lieber Code)." 24 April 1863, accessed 10 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863.

ued enforcement of existing laws through local courts, suspending only those which militated against their interests, such as laws on recruitment, as it was perceived as generally easier to administer territory if the laws in force were those that occupied populations were accustomed to following.[44] However, under the doctrine of necessity, occupiers had an accepted customary right to impose prohibitions on civilian activities and punish acts of harm against their forces.[45] As a result, martial law in occupied territories created something of a dual legal and judicial framework in ways that martial law at home did not and, consequently, some American legal theorists argued (albeit unsuccessfully) for use of "martial rule" or "military government" to describe the situation in occupied areas instead.[46]

At the root of this difference were evolving ideas about the sovereignty of nations and a related shift towards the concept of occupation as a temporary and necessary condition of war distinct from conquest.[47] The gradual transition of such ideas into customary international law accelerated in the nineteenth century. The development of laws of war, as well as related notions about sovereignty and the rights of civilians, had a much longer intellectual, philosophical, and customary history.[48] However, the Lieber Code, as one of the first examples of broad instructions limiting the conduct of armies regarding occupation and martial law, and subsequent instances of violent excess during the Franco-Prussian War (1870–1871) – which ran counter to changing attitudes and trends towards the humanisation of conflict – inspired efforts to codify shifting practices and ideals.[49]

44 Birkhimer, *Military Government*, 134; James M. Spaight, *War Rights on Land* (London: Macmillan and Co., 1911), 356.

45 William E. Hall, *International Law* (Oxford: Oxford University Press, 1880), 400–402; Henry Sumner Maine, *International Law: A Series of Lectures delivered before the University of Cambridge* (London: John Murray, 1888), 180–181.

46 Birkhimer, *Military Government*, 21–22; Fairman, "Law of Martial Rule," 593–596.

47 On this evolution, see Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), 20–42; Peter Stirk, *A History of Military Occupation, 1792–1914* (Edinburgh: Edinburgh University Press, 2016).

48 For the longer history of the development of the laws of war and the humanisation of warfare, see Best, *Humanity in Warfare*; Stephen Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005); Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (Oxford: Oxford University Press, 2005); Alexander Gillespie, *A History of the Laws of War: Volume 2: The Customs and Laws of War with regards to Civilians in Times of Conflict* (Oxford: Hart Publishing, 2011).

49 Benvenisti, *International Law*, 36–38.

The legal authority of belligerents in occupied territory was a subject of much debate during the first attempt at codification during a conference held in Brussels in 1874. At issue was striking a delicate balance between protecting the sovereignty of the occupied power (in view of the agreed transient nature of occupation and the sovereign rights of emerging nation-states) by restricting the authority of belligerents to exercise legislative authority on the one hand, and the accepted customary practices and rights occupiers held as necessary for the safety of their forces and prosecution of war, on the other.[50] Art. 2 of the so-called Brussels Declaration, which was agreed but not ratified after the conference, had confirmed that the authority of the "legitimate Power" passed to the occupier and, in addition to the requirement that the sovereignty of the occupied government be protected, placed a further obligation on said occupier to "take all the measures in his power to restore and ensure, as far as possible, public order and safety." Art. 3 made customary practice binding by clarifying that the occupier should maintain the laws in force during peacetime and should not alter, suspend, or substitute them "unless necessary."[51]

This formulation represented, in one respect, a compromise between the competing interests of the occupiers, the occupied government, and the civilian population.[52] In another, it left much to the discretion of the occupier since, as the jurist Henry Sumner Maine concisely explained of occupation in the late nineteenth century: "[the] modern practice rests, in fact, upon military necessity, and is circumscribed by the military necessity."[53] Indeed, William Hall had further elaborated in his seminal work on international law that occupiers had a general right to do as was necessary for the prosecution of war, including suspending laws inconsistent with their safety or punishing acts of disobedience or hostility even with death, but that necessity had to be determined on a case-by-case basis. It was, in his view, "impossible to set bounds on the limit of military necessity".[54] As such, matters relating to the enforcement of laws and the punishment of violations of such, acknowledged as the "most important power" exercised by an occupying power, were, according to the British *Manual of Military Law*, to be handled "in such manner as he [the occupier] thinks expedient".[55]

50 Stirk, *History of Military Occupation*, 230–233.

51 "Project of an International Declaration concerning the Laws and Customs of War." Brussels, 27 August 1874 (hereafter "Brussels Declaration"), accessed 11 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874.

52 Benvenisti, *International Law*, 69.

53 Maine, *International Law*, 182.

54 Hall, *International Law*, 400–406.

55 Stirk, *History of Military Occupation*, 245; *Manual of Military Law* (London: HMSO, 1894), 315.

Nonetheless, while rooted in necessity, it was largely recognised within military manuals and legal treatises that it was in the interest of the occupier to abide by the "dictates of humanity" and treat civilians with leniency, as was consistent with the security of the occupying force's military administration.[56] It was understood that punishments should be imposed after trials held in military courts, though these need not necessarily be identical to courts martial. Belligerents did, however, reserve a right to enact reprisals when faced with more serious acts of rebellion. This summary punitive practice became common during military occupations as popular resistance, especially that which took the form of irregular combat, emerged as a significant problem in nineteenth and twentieth century warfare. The practice of reprisals had been debated, alongside hostage-taking, during the conference at Brussels, but delegates could not agree on acceptable limitations, largely because it was bound up with unresolved questions over a population's right to resist occupation and, thus, formed a major conflict of interest between the potential occupier and the likely occupied.[57]

While the Russian administration of Bulgaria during the Russo-Turkish War (1877–1878), which had taken a "transformative" tone, had renewed attention to the problem of permitting belligerents to legislate in occupied territory, discussions during conferences at the Hague in 1899, a second more successful attempt at codification, resulted in few changes to the principles underlying occupiers' legislative and judicial authority in occupied territory.[58] The aforementioned two articles from the Brussels Declaration, for instance, were brought together in Art. 43 of the resulting Hague Convention (II) which stated that: "[the] authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[59] There had been some discussion about removing the term "unless absolutely prevented", however, this was kept on the reasoning of Colonel

56 *Manual of Military Law* (1894), 315; see also Hall, *International Law*, 404 and Spaight, *War Rights*, 353.

57 Gillespie, *History of the Laws of War*, 144–146, 151; Nabulsi, *Traditions of War*, 27–33; for the most comprehensive treatment of this subject, see Fritz Kalshoven, *Belligerent Reprisals* (Leyden: A.W. Sijthoff, 1971).

58 Benvenisti, *International Law*, 40–41. On the concept of transformative occupation, see Adam Robert, "Transformative Military Occupation: Applying the Laws of War and Human Rights," *The American Journal of International Law* 100.3 (2006): 580–622.

59 "Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land" (hereafter "Hague Convention (II)"). The Hague, 29 July 1899, accessed 11 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899.

von Schwarzhoff, the German delegate, that to remove it would be to forbid a declaration of martial law and to force occupiers to respect laws on recruiting; in other words, laws that worked against the occupier.[60] As such, the legal and punitive authority of occupiers remained within the preserve of military necessity, though delegates intended it to be exercised in view of the understanding that the Hague Conventions were incomplete and should be enforced in line with the broader objective of diminishing "the evils of war", at least in so far as military necessities permitted.[61] This was due to the ongoing conflict of interests between would-be occupiers and the potentially occupied at this conference. Representing the stance of the latter, the Belgian delegate, Edouard Rolin Jaequemyns, had remarked that the purpose of the conference had been to assert limits on belligerents and what they should be prohibited from doing, it was not to give legally-binding rights to occupiers to impinge on the sovereignty of the occupied territory.[62]

For this reason, too, belligerents reprisals and hostage-taking remained unaddressed in the convention, though a new provision was added in the form of Art. 50 which prohibited the imposition of punishments upon a population for "acts of individuals for which it cannot be regarded as collectively responsible."[63] While setting important limits, Art. 50 did not do away with the concept of collective punishments altogether and created issues related to interpreting the collective responsibility of certain acts.[64] During the Russo-Japanese War (1904–1905), Japanese forces had, on the advice of the international law expert Ariga Nagao, issued proclamations that made communities in occupied China responsible for damage to railways, telegraphs, roads, and other important transportation or communication lines in advance. According to Ariga, this had principally been used as a deterrent and no collective fines had actually been issued.[65] The authors of the American *Rules of Land Warfare* and the British *Manual of Military Law* accepted this interpretation, though the latter had suggested that it would have contravened Art. 50 if communities had been punished for acts committed by enemy

60 James Brown Scott, *The Proceedings of the Hague Peace Conference: Translation of the Official Texts* (New York, NY: Oxford University Press, 1920), 520.

61 Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (Oxford: Clarendon Press, 1908), 14–16, 53; Spaight, *War Rights*, 353.

62 Scott, *Proceedings*, 515.

63 "Hague Convention II," Art. 50.

64 Spaight, *War Rights,* 408.

65 Ariga Nagao, *Extracts from La Guerre Russo-Japonaise au Point de Vue Continental et le Droit International: d'après les Documents Officiels du Grand État-Major Japonais* (Washington D.C.: Division of International Law of the Carnegie Endowment for International Peace, 1942), 10–15.

forces in their localities which they would have been powerless to stop.[66] A slight change to the wording of this article during a second conference at the Hague in 1907 (one of few changes made to articles dealing with occupation during this conference), aimed to address this issue, although did not challenge the accepted customary right to enact reprisals.[67]

Other interpretive problems relating to the scope of belligerent legislative authority garnered renewed international attention after the German occupation of Belgium during the First World War.[68] The German military had faced criticism, especially among legal theorists, for apparently overstepping the bounds of necessity regarding the issuing of decrees and ordinances and for the harshness of the judicial process followed in military courts.[69] Others with a military background, however, had a different perspective. British Army Lieutenant-Colonel Henry de Watteville, for example, had argued at the Grotius Society in 1921 that because the First World War had been unprecedented in scale and duration, the demands of occupation had exceeded those envisaged by the drafters of the Hague Conventions.[70] The different nature of warfare had also seen the day-to-day administration of occupied territory become more closely connected with measures of security and, as such, extensive legislative changes had been essential security measures.[71] Additionally, he noted that occupiers had a right to utilise military courts to try prejudicial offences and, since punishments must also be deterrent in nature, they "must therefore be severe."[72] The importance of strict punishment to intimidate or coerce populations was recognised in military manuals at this

66 *Rules of Land Warfare* (Washington D.C.: GPO, 1914), 123–124; *Manual of Military Law* (London: HMSO, 1914), 292.

67 "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land." (hereafter "Hague Convention (IV)") The Hague, 18 October 1907, accessed 11 June 2025, https://ihl-databases.icrc.org/pt/ihl-treaties/hague-conv-iv-1907?activeTab=default.

68 For an overview of some of the conflicting ideas about legislative authority, see Edmund Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," *The Yale Law Journal* 54.2 (1945): 393–395.

69 W. R. Bisschop, "German War Legislation in the Occupied Territory of Belgium," *Transactions of the Grotius Society* 4 (1918): 110–168; James Wilford Garner, *International Law and the World War* (London: Longmans, Green and Co., 1920), Vol. 2, 81–82, 88–89, 95–97.

70 Henry de Watteville, "The Military Administration of Occupied Territory in Time of War," *Transactions of the Grotius Society* 7 (1921): 133–135.

71 de Watteville, "Military Administration," 133–136.

72 de Watteville, "Military Administration," 143–145.

time and was also understood by legal experts, though they expected that military authority would be restrained by the "dictates of humanity".[73]

Aside from highlighting tensions in the attitude of legal scholars and military officials in regard occupation, de Watteville's emphasis on the centrality of the exercise of law and justice to occupiers' security underscored the diverse ways in which these powers might be used to protect occupying forces, safeguard occupiers' interests, and to uphold military authority. This instrumentality of military justice and the implications of such is a key theme in the three chapters in this volume which explore the functioning of military judicial systems during wartime occupation, predominantly during the Second World War.

The Second World War and its devastating human toll was pivotal in shifting focus to the need for more codified protection of civilians, especially in occupied territory.[74] Where practices like hostage-taking, reprisals, collective punishments, and the exercise of legislative authority had long been regarded as an issue, the conduct of belligerents in this second global conflict shined more light on military administration of justice in occupied territory and the denial of fair trial as a war crime.[75] Such issues are examined in Kelly Maddox's chapter. Her comparative exploration of the military justice system employed by the Imperial Japanese Army during the First Sino-Japanese War (1894–1895), and then during the first four years of the Second Sino-Japanese War (1937–1941), reflects on the potential for violence towards civilians in the administration of justice. By comparing two wars fought decades apart, she underscores the implications for the treatment of civilians inherent in a military justice system that in the absence of codified restraint had historically prioritised military needs and, at an institutional level,

73 *Rules of Land Warfare* (1914), 132; *Manual of Military Law* (1914), 304; *The German War Book: Being "The Usages of War on Land" issued by the Great General Staff of the German Army*, trans. J.H. Morgan (London: John Murray, 1915), 120–122; Lassa Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," *The Law Quarterly Review* (1917): 370.

74 Geoffrey Best, "World War Two and the Law of War," *Review of International Studies* 7.2 (1981): 67–78; Efforts to draft a convention for the protection of civilians on the part of the International Committee of the Red Cross proved unsuccessful in the interwar years, perhaps because, as Thomas Graditzky has posited, it had been thought that the problems exposed in the First World War had been caused by a disregard for international law and not by gaps in the content or loopholes in the wording of the Hague Conventions, themselves. See Thomas Graditzky, "The Law of Military Occupation from the 1907 Hague Peace Conference to the Outbreak of World War II: Was Further Codification Unnecessary or Impossible?" *The European Journal of International Law* 29.4 (2019): 1305–1326.

75 Bridget Dunne and Helen Durham, "The Prosecution of Crimes against Civilians," in *Australian War Crimes Trials 1945–51*, ed. Georgina Fitzpatrick, Tim McCormack and Narelle Morris (Leiden: Brill, 2016), 217, 224–234.

had denied evolving judicial rights to those punished within it. In doing so, she highlights the impact of war on the functions of military justice and draws attention to the ways in which it was used, not just to protect Japanese forces, but to facilitate occupation policies.

The use of law and justice in support of broader military and political agendas is similarly a central theme of the chapter by Sarah Maya Vercruysse and Nina Janz, the first of two examining German military justice in occupied territories during the Second World War. This chapter outlines the legal framework established to conscript Luxembourgish men into the Wehrmacht and then explores the associated problem of desertion. Vercruysse and Janz show that, in response to increasing rates of desertion and an inability to locate offenders, the communities and family members aiding deserters were increasingly targeted to force compliance and loyalty from conscripted soldiers. In observing the "long arm" of military justice in this respect, Vercruysse and Janz demonstrate the complicated, yet collaborative relationship between the military and the civil administration and expose the ways in which military justice was co-opted in support of extra-judicial, political policies of control in occupied Luxembourg.

The following chapter by Maria Fritsche offers, on the one hand, a point of contrast by examining Wehrmacht justice during the more "benign" occupation of Norway, yet on the other, observes the same instrumentality in regard the use of military justice. Her detailed analysis of military court judgements underscores the diverse responses of the German military when faced with certain types of crimes and the different nationality of offenders. The harsher punishment of Norwegian civilians for assault and of German soldiers for property crimes, as revealed in this chapter, reflects a Janus-faced occupation policy designed to stamp out resistance and reinforce military authority, while simultaneously attempting to win approval by projecting an image of a fair, benevolent occupier. It thus emphasises, as also highlighted in the chapters on military justice and soldiers in this volume, that military justice during occupation could be equally influenced by political considerations and, unsurprisingly, this finding is borne out in the chapters exploring military justice and POWs.

Much as evolving ideas about military occupation and civilian rights, along with the changing character of warfare, shaped the emerging international customary and legal framework within which military justice over civilians was meant to function, the nineteenth and early twentieth century witnessed significant developments in respect to military justice and POWs. Historically, enemy soldiers captured in war had been executed, enslaved (or otherwise pressed into

service), exchanged, ransomed, paroled, or released.[76] Against the backdrop of the modernisation, professionalisation, and growing size of armies, which also increased the number of prisoners taken captive, as well as the increased enlistment and conscription of civilians that had given rise to the concept of civilian-soldiers, and shifting attitudes against slavery, the nineteenth century saw a marked shift towards the long-term custody of prisoners in formal camps, now commonly known as prisoner of war camps, specially established for this task.[77] The simultaneous decline of exchange cartels and the proliferation of POW camps during the Napoleonic Wars and the American Civil War drew particular attention to new forms of mistreatment during detainment.[78] Though practices and legal rules of internment had begun to develop much earlier in other parts of the world and were rooted in longer-term theoretical discussions about humanity in war, these examples in Europe and America underscored a need and, in view of the principles of reciprocity and retaliation, a benefit to establishing regulation at an international level.[79]

Like military occupation over civilians, matters related to the treatment of prisoners in enemy hands were discussed and agreed on balance at Brussels in 1874. One of the main precepts established with respect to military jurisdiction over POWs was that the imprisonment of enemy captives would not be penal in character since prisoners had committed no illegal acts in fighting for their country and were to be confined only as a necessity in depriving the enemy of manpower.[80] The internment of POWs was burdensome, but they were nevertheless to be treated fairly and humanely, though would be subject to "such measures of

76 For a detailed historical overview of the treatment of prisoners, see Alexander Gillespie, *A History of the Laws of War: Volume 1: The Customs and Laws of War with Regards to Combatants and Captives* (Oxford: Hart Publishing, 2011), 103–245; Sibylle Scheipers, "Introduction: Prisoners in War," in *Prisoners in War*, ed. Sibylle Scheipers (Oxford: Oxford University Press, 2010), 3–5.

77 Scheipers, "Introduction," 5–6; Stephen C. Neff, "Prisoners of War in International Law: The Nineteenth Century," in *Prisoners in War*, 59–62; Iris Rachamimov, "Military Captivity in Two World Wars: Legal Frameworks and Camp Regimes," in *War and the Modern World*, ed. Roger Chickering, Dennis Showalter and Hans van de Ven (Cambridge: Cambridge University Press, 2012), 214–219.

78 Neff, "Prisoners of War," 69–70; Gunther Rothenberg, "The Age of Napoleon," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George Andreopoulos and Mark R. Shulman (New Haven, CT: Yale University Press, 1994), 86–97; Gillespie, *History of the Laws of War: Volume 1*, 147–159.

79 Will Smiley, for instance, has shown that in the eighteenth century, the Ottoman Empire and its Russian rival had begun negotiating a system of captivity for prisoners of war founded on law, see Will Smiley, *From Slaves to Prisoners of War: The Ottoman Empire, Russia, and International Law* (Oxford: Oxford University Press, 2018).

80 "Brussels Declaration," Art. 23; Hall, *International Law*, 344.

severity as may be necessary."[81] Indeed, the right to impose rules that enforced discipline in camps and to punish prisoners who disobeyed was, much like the use of such authority in occupied territory, recognised to be rooted in the doctrine of necessity as a vital precondition to the maintenance of safe custody (for captor and captive).[82] Prisoners who committed criminal offences against the laws of war may be punished under the military laws and regulations of their captor as criminals. This was understood to apply also to acts considered to be universally illegal, like marauding, committed prior to capture and, in the view of legal experts, such criminality meant that captives forfeited their status as prisoners of war and would be treated accordingly.[83] Lethal measures could be used to stop prisoners who were attempting to escape, but generally, such attempts were not viewed as criminal. Accordingly, making efforts to escape was only subject to disciplinary punishments, except when other offences were committed in the process (assault, theft, murder, etc.) or when prisoners had staged or plotted an uprising with a view to making an attempt, in which case they would be liable to judicial punishments, including the death penalty if prescribed by the captor's laws.[84] Those violating parole conditions, if granted and accepted, were also accountable in military courts.[85]

The issue of punishing escape attempts was reopened briefly during the discussions at the Hague in 1899 where it had been suggested that because prisoners had a duty to try to escape and return to the fight, attempts should not be punished at all. Others, like the Russian delegate Colonel Gilinsky, argued that, in view of the limited resources to guard POWs, disciplinary punishments were insufficient to deter efforts to escape and so judicial punishments should be allowed. Determining the extent of punishment for attempted escape thus reflected a similar conflict of interest between belligerents. The compromise was the retention of the formulation in the Brussels Declaration – that prisoners would be liable to disciplinary punishment – but to accept as custom that they would face more severe penalties imposed in military courts for accompanying offences perpetrated during the escape attempt.[86] Aside from some changes in wording and

81 "Brussels Declaration," Art. 23.

82 Hall, *International Law*, 344.

83 "Brussels Declaration," Art. 28; for interpretation of provision, see Hall, *International Law*, 351; Maine, *International Law*, 161.

84 "Brussels Declaration," Art. 28; Maine, *International Law*, 161–162.

85 "Brussels Declaration," Art. 33; Hall, *International Law*, 347.

86 Scott, *Proceedings*, 477–478.

structure, the resulting Hague Conventions largely reiterated the principles agreed in Brussels and made them legally binding.[87]

These provisions were applied successfully in some instances, but also quite irregularly in subsequent conflicts. Alexander Gillespie, for instance, has suggested that while Japan might have been lauded for its fair treatment of Russian prisoners during the Russo-Japanese War, in other arenas, like the Balkan Wars (1912–1913), belligerents had failed to apply these principles in full. That is to say nothing of conflicts of a more imperial nature, in which the laws of war were deemed not to apply at all.[88] However, it was the large numbers of prisoners taken and their mistreatment in the First World War that emphasised serious issues with existing legislation.

As the different scale and nature of the First World War had heralded distinct challenges for occupiers, so it did for the administration of prisoners. Unprecedented numbers of captives were taken and held in camps during this conflict. The prolonged and resource-demanding nature of the war also saw unforeseen numbers of prisoners recruited as a labour force and thus subject to additional regulation and punishment to ensure obedience.[89] Military justice played an important role in what Heather Jones has pointed out was an "inherently coercive" and unequal power dynamic between captor and captive. Prisoners were forced to comply by the threat of capital and corporal punishments, in addition to long-term incarceration and, through criminal activity, faced losing their privileged status, as well as associated rights as POWs.[90] They also became political pawns, subject to the demands of reciprocity and reprisal.[91] While Jones has shown that avoidance of retaliation resulted in a moderate approach in the judicial punishment of POWs, leading in some instances to the suspension of death sentences and a general reluctance to impose them in the first place, Brian Feltman's chapter in this volume reveals that military justice could also be very much a part of the cycle of reprisals witnessed in the First World War and the various, non-lethal and non-physical forms of violence experienced by captives.[92] In the same

87 "Hague Convention (II)," Section 1, Chapter 2: On prisoners of war, Arts. 4–20.

88 As observed by Gillespie, *A History of the Laws of War: Volume 1,* 165–168.

89 Alan Kramer, "Prisoners in the First World War," in *Prisoners in War*, 75–90. Specifically, on the subject of violence towards prisoners, see the chapters in *Violence against Prisoners of War in the First World War: Britain, France, and Germany, 1914–1920,* ed. Heather Jones (Cambridge: Cambridge University Press, 2011).

90 Heather Jones, "Introduction," in *Violence against Prisoners*, 3.

91 Reprisal was one of the key issues in the treatment of prisoners identified during the First World War. On this, see George G. Phillimore and Hugh H. L. Bellot, "Treatment of Prisoners of War," *Transactions of the Grotius Society* 5 (1919): 47–64.

92 Jones, "Introduction," 11–12.

way that military justice was leveraged in support of goals beyond the protection of occupying forces, the punishment of soldiers served additional, in this case, political purposes. Feltman's analysis also records the impact of this upon captives by drawing attention to how, upon conviction in military courts, captives could be stripped of certain benefits, such as access to cigarettes, afforded to those with POW status. This in itself had a psychological impact, exacerbating the mental strain of captivity.

The impact of long-term imprisonment and the cycles of punitive violence visited upon innocent prisoners by way of reprisal, along with other examples of novel or previously overlooked inhumane treatment, paved the way for further codification at a conference held in Geneva in 1929.[93] The resulting convention – the Geneva Convention of 1929 – prohibited reprisals and offered more robust protections for prisoners. Among these were penal provisions which resolved some of the ambiguities and contradictions of the Hague Conventions vis-à-vis punishment of prisoners as exposed by the war. On this matter, for instance, Lieutenant-General Sir Herbert Belfield, Head of the British Prisoner of War Department, had observed that the military laws and regulations of enemy powers had differed sharply and, in the British case too, he had found the penalties ascribed in the Articles of War to be inappropriate for prisoners and the different standards expected of them versus British soldiers.[94]

A further observed issue had been the conflicting interpretation of "disciplinary punishment" for attempted escape, this having been understood by the British as meaning any penalty excluding death.[95] Other belligerents had interpreted this as referring only to punishments that could be awarded summarily by commanders (e.g. short terms of confinement) and, consequently, had been imposing much lighter punishments by comparison. According to Belfield, this had been complicated in the British case because the Articles of War had only allowed for summary disciplinary punishments for the rank and file and not for officers – fulfilling the requirements in the second clause of Art. 8 for officers would have, in his understanding, technically clashed with the provisions in its first clause.[96]

93 For discussion of other issues and the drafting of the convention, see Neville Wylie and Lindsey Cameron, "The Impact of World War I on the Law Governing the Treatment of Prisoners of War and the Making of a Humanitarian Subject," *European Journal of International Law* 29.4 (2019): 1327–1350 and Neville Wylie, "The 1929 Prisoner of War Convention and the Building of the Inter-war Prisoner of War Regime," in *Prisoners in War*, 91–108.

94 Herbert Belfield, "The Treatment of Prisoners of War," *Transactions of the Grotius Society* 9 (1923): 140, 142–143; Jones, "Introduction," 12.

95 *Manual of Military Law* (1914), 247.

96 Belfield, "Treatment," 141–142.

To address these (and other) issues, prisoners of war remained subject to their captor's laws and regulations under the Geneva Convention of 1929, and were liable to punitive measures under such unless this contravened the penal provisions of Chapter 3.[97] The stipulations in that section prohibited corporal punishments, collective penalties, and acts of cruelty completely and did not allow for punishments not also permitted for members of the captor's own forces.[98] Some other key aspects included placing emphasis on reducing periods of detention for those awaiting judicial proceedings and that prisoners not be treated differently from others after punishment (though those who had attempted to escape might be subject to greater surveillance). Attempted escape was also not to be used as an aggravating circumstance if offenders were brought before courts for other offences and, alongside those who helped them, escapees would now only be liable to disciplinary punishment.[99] Even if the circumstances of the escape permitted judicial punishments, belligerents were to err on the side of leniency and favour disciplinary measures instead.[100] Parameters for acceptable disciplinary punishments, the severest of which was imprisonment up to a maximum of 30 days, were also established.[101] In regard to military court proceedings, Arts. 60–67 enumerated a range of judicial guarantees founded on the principles of due process. These included that offenders have knowledge of the charge; have an opportunity for defence; have access to a trained advocate; be subject to the same judicial procedures as soldiers; have the right to appeal; be permitted a three-month delay prior to execution of a death sentence; and have the continued right to petition against mistreatment even after conviction.[102] The Geneva Convention of 1929, then, established strict restrictions aimed at creating a common international framework of acceptable military judicial procedure for POWs.

The Second World War became the first test of this new convention and proved to be a resounding failure.[103] It has been argued that Germany and Japan

97 "Convention relative to the Treatment of Prisoners of War" (hereafter "Geneva Convention (1929)"), Geneva, 27 July 1929, accessed 11 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/gc-pow-1929. Section 5, Chapter 3: Penal sanctions with regard to prisoners of war, Art. 45.

98 "Geneva Convention (1929)," Art. 46.

99 "Geneva Convention (1929)," Arts. 50 and 51.

100 "Geneva Convention (1929)," Art. 52.

101 "Geneva Convention (1929)," Art. 54.

102 "Geneva Convention (1929)," Arts. 60–67.

103 For a broad comparative overview, see S. P. MacKenzie, "The Treatment of Prisoners of War in World War II," *The Journal of Modern History* 66.3 (1994): 487–520; Rachamimov, "Military Captivity," 214–235. For more a detailed exploration of the problem in Europe, see Bob Moore, *Prisoners of War: Europe, 1939–1956* (Oxford: Oxford University Press, 2022) and on the treatment of Allied POWs in the Asia-Pacific, see Tachikawa Kyōichi, "Treatment of Prisoners of War by the

(the only powers to be tried post-war for breaches of international law) had used technicalities and loopholes to avoid applying the Geneva Convention of 1929 in full. For example, since the Soviet Union had not ratified the convention, German authorities had declined to apply it on the Eastern Front, leading to devastating consequences for Soviet prisoners of war.[104] Japan had signed the Geneva Convention of 1929, but had also not ratified it, ostensibly because its provisions conflicted with domestic military law and with evolving military attitudes towards surrender and captivity.[105] In 1942, the Japanese government confirmed that it would apply the convention's main stipulations *mutatis mutandis,* though would make amendments to ensure conformity with Japanese legislation.[106] While some scholars have framed the military leadership's attitude as one of disregard for or an unwillingness to take proactive steps regarding the application of the laws of war, consideration of the matter through the lens of military justice, as in Nicolas Stassar's chapter, suggests a more complex picture.[107] Through examination of the prosecution of British POWs who had attempted to escape the infamous Thai-Burma Railway, Stassar shows that the judicial process had largely been in conformity with Japanese military law. Furthermore, by framing his chapter with a discussion of the key developments in international law and evolving Japanese legislation for handling attempted escape, Stassar highlights that the judicial treatment of prisoners had also been in line with earlier international practices in regard to this offence. This is suggestive then, of an unwillingness on the part of some powers to accept and adapt to the changes in the international legal

Imperial Japanese Army and Navy focusing on the Pacific War," *NIDS Security Reports* 9 (2008): 45–90; for more on the treatment of Asian prisoners (comparatively underrepresented in this topic) see Utsumi Aiko, "Japanese Racism, War, and the POW Experience," in *War and State Terrorism: The United States, Japan, and the Asia-Pacific in the Long Twentieth Century*, ed. Mark Selden and Alvin Y. So (Lanham, MD: Rowman & Littlefield Publishers, 2004), 119–142.

104 Bob Moore, however, suggests that this was used more as propaganda, see Bob Moore, *Prisoners of War*, 211–212.

105 Sarah Kovner, *Prisoners of the Empire: Inside Japanese POW Camps* (Cambridge, MA: Harvard University Press, 2020), 34–36; Ikuhiko Hata, "From Consideration to Contempt: The Changing Nature of Japanese Military and Popular Perceptions of Prisoners of War through the Ages," in *Prisoners of War and their Captors in World War II*, ed. Bob Moore and Kent Fedeorowich (Oxford: Berg, 1996), 253–276; on attitudes, see Yoshito Kita, "The Japanese Military's Attitudes towards International Law and the Treatment of Prisoners of War," in *The History of Anglo-Japanese Relations, 1600–2000, Volume 3: The Military Dimension*, ed. Ian Gow, Yoichi Hirama and John Chapman (Basingstoke: Palgrave Macmillan, 2003), 255–279.

106 Hata, "From Consideration to Contempt," 263–264; Tachikawa, "Treatment of Prisoners of War," 72–73.

107 Kita, "The Japanese Military's Attitudes," 275.

framework post-First World War rather than an outright rejection of the established rules of warfare altogether.

Stassar's chapter touches on the limited reach of international law when not fully accepted by belligerents and, in so doing, draws attention back to the uneasy relationship between national (military) and international means of adjudicating violence in war, as laid out in Segesser's chapter. Underlying this relationship is the structural problem of "military" justice – the tension between the primacy of its function as a control mechanism designed to reinforce military authority on the one hand, and the emergence of broader ideals, now internationally recognised obligations, regarding the legal rights of soldiers, civilians, and enemy combatants on the other. The chapters in this volume detail long-term efforts and failures of national military justice systems across the world to adapt to the dynamic changes within their political orders and societies and to strike a balance in this inherent conflict at a time of immense transformation and globalisation in the international legal framework. A fundamental feature of the case studies presented here is the recurring challenge of reconciling the peacetime ideals upon which military justice systems developed and evolved with the realities, demands, and perceived necessities of wartime. Criticisms of the adjudication of justice in recent conflicts suggest that this remains an ongoing issue.