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## ‘*Inter ruinas publicas scriptum*’: Ernest Nys, a legal historian in defence of Belgian tax payers during the Great War

Frederik Dhondt\* 

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The Belgian scholar Ernest Nys (1851–1920), a big name in public international law and legal history, is primarily known for his extensive publications in the *Revue de droit international et de législation comparée*, which often focus on medieval and early-modern doctrine. Yet, Nys was also active as a judge and an *ad hoc* legal adviser, combining his abilities as a traditional continental jurist and a legal historian. During World War One, he drafted an impressive manifesto against wartime contributions on movable property designed by the German occupant. The text combines an intellectual pedigree of political thought with strict legal reasoning on the basis of classics, such as the 1874 Brussels Conference or the 1899 and 1907 Hague Conventions. Finally, Nys’ motivations for an assault on this capital tax, which included a compulsory declaration of personal wealth, can be situated in traditional liberal resistance against state intrusion into the private sphere.

**Keywords:** history of international law; tax law; World War One; legal history

Ernest Nys (1851–1920)<sup>1</sup> has been called the ‘first professional historian of public international law’ by a leading historian<sup>2</sup> and, in the words of another eminent

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<sup>1</sup>Nys had also been active as a judge in the Tribunal of First Instance in Antwerp (1882) and Brussels (1883), Chamber President in the Brussels Court of Appeal (1898) and, finally, member of the Permanent Court of Arbitration in The Hague. An outspoken anglophile, Nys spent each summer in the manuscripts collection of the British Museum: Paul Errera, ‘Notice sur Ernest NYS, membre de l’Académie’ *Annuaire de l’Académie Royale de Belgique* 1. See also the biographical entry in the *Biographie Nationale de Belgique* by Jean Salmon (ULB): <http://www.academieroyale.be/cgi?lg=fr&pag=906&tab=102&rec=17794&frm=363>; Frederik Dhondt, ‘België en de historiografie van het volkenrecht in de Belle Époque: François Laurent en Ernest Nys’ in Bruno Debaenst (eds), *De Belle Époque van het Belgisch Recht* (Die Keure, 2015) (forthcoming).

<sup>2</sup>Martti Koskenniemi, ‘A History of International Law Histories’ in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford UP,

specialist of the discipline, stands out as a ‘*très très grand nom*’<sup>3</sup> whose works ‘*ont plutôt bien vieilli*’.<sup>4</sup> After his law studies in Ghent (1874) under his master François Laurent (1810–1887),<sup>5</sup> combined with a training at the faculty of Arts and Philosophy, Nys took courses in Heidelberg, Leipzig and Berlin in the roaring German Empire, where Heinrich von Treitschke, Theodor Mommsen or Rudolf von Gneist taught. Back in Belgium, Nys refrained from a personal political commitment. Yet, he benefitted from the liberal electoral victory in 1878, and obtained a directorship in the Ministry of Justice. At the age of 35, on recommendation of Alphonse Rivier (professor of Roman law and international law 1835–1898),<sup>6</sup> he was appointed a professor at the Law faculty of the Université Libre de Bruxelles in 1885. Nys taught several courses on positive law, as well as, in the School for Political Science, ‘diplomatic history since 1815’.<sup>7</sup> In 1898, after Rivier’s death, Nys took over the latter’s course on the law of nations. He published an astonishing amount of work on the history of public international law, extensively covering the Middle Ages and the early-modern period. Most of these are still worth reading today and have lost nothing of their appeal. He was one of the pillars of the *Revue de droit international et de législation comparée* (°1868), the official organ of the *Institut de droit international*, founded in Ghent in 1873. An annual summer visitor to the British Museum’s manuscripts department, translator of James Lorimer (1818–1890)<sup>8</sup> and John Westlake (1828–1913),<sup>9</sup> *doctor honoris causa* in Edinburgh and Glasgow, Nys was a crucial bridge to the Anglo-American world. He contributed an astonishing 116 times to the journal between 1884 and 1914, and published 39 books in the same time span.

This article will not discuss Nys’s published texts, but a handwritten memorandum, *Les impôts dans l’occupation de guerre*, composed in September 1917 and kept at the Belgian Royal Library.<sup>10</sup> Contrary to what is often assumed, there was no contradiction in Nys’s activities as a practical lawyer and a legal

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2012) 955; Martti Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (2011) 19 *Rechtsgeschichte* 152.

<sup>3</sup>Dominique Gaurier, *Histoire du droit international* (PU Rennes, 2005) 202.

<sup>4</sup>*Ibid.*, 32.

<sup>5</sup>Ernest Nys, ‘François Laurent, sa vie et ses oeuvres’ (1887) XIX *Revue de droit international et de législation comparée* 409; Dirk Heirbaut, ‘Een hopeloze zaak: François Laurents nieuw burgerlijk wetboek voor België’ (2013) 15 *Pro Memoria. Bijdragen tot de rechtsgeschiedenis der Nederlanden* 261.

<sup>6</sup>Alphonse Rivier, *Introduction historique au droit romain* (Mayolez, 1881); *Principes du droit des gens* (Rousseau, 1896); Henri Rolin, ‘Notice sur Ernest Nys: Biographie’ (1951–1952) IV *Revue de l’université de Bruxelles* 349.

<sup>7</sup>Rolin (n 6) 349.

<sup>8</sup>James Lorimer, *Principes de droit international* (E Nys tr, Muquardt, 1885).

<sup>9</sup>John Westlake, *Études sur les principes du droit international* (E Nys tr, Fontemoing, 1895).

<sup>10</sup>Ernest Nys, *Les impôts dans l’occupation de guerre. Inter ruinas publicas scriptum* (s.n., 1917). Belgian Royal Library, 58558 (third series), 291383 (available at <http://uurl.kbr.be/1041910>).

historian.<sup>11</sup> In his positive law teachings, including constitutional law, social law or introduction to civil law, Ernest Nys clung to a strict exegetic method.<sup>12</sup> The present text is an example of Nys's interdisciplinary skills in his practical advisory work, combining both a historical and a strict legal approach.<sup>13</sup>

Since October 1914, almost the whole of Belgium had been under belligerent occupation by the German Empire.<sup>14</sup> The German army had reduced the 1839 Treaty of London,<sup>15</sup> which guaranteed Belgium's neutrality, to 'a scrap of paper',<sup>16</sup> invoking necessity.<sup>17</sup> The multilateral diplomatic system, which had dominated part of the eighteenth and most of the nineteenth centuries and inspired considerable periods of stability, had come to a halt.<sup>18</sup> Throughout the war, Nys continued to draft legal opinions, refuting German claims '*la plume à la main*', using the laws of war against the *Diktat* of the temporarily dominant party.<sup>19</sup> Nys claimed not to have been totally unsuccessful, finding interlocutors within German civil administration outside the army.<sup>20</sup> His memoranda not only attacked

<sup>11</sup>Dominique Gaurier, *Histoire du droit international* (PU Rennes, 2014) 544.

<sup>12</sup>See the handwritten syllabi by Ernest Nys in the ULB's archives, 01Q/3653 (droit civil), 01Q/3651 (droit constitutionnel), 01Q/5257 (introduction au cours de droit civil), 01Q/3654 (législation sociale).

<sup>13</sup>Nys was appointed on the commission on violations of the laws of war by the German army on 7 August 1914 by the Minister of Justice. After the occupation of Brussels (20 August 1914), where Nys lived, he continued to write privately. Nys drafted the 1916 declaration of the ULB against the German occupant, advised the City of Brussels, the Province of Brabant (for which he already drafted an anti-tax memorandum on 26 August 1914), the Belgian National Bank (Ernest Nys, *L'Occupation de guerre. Avis, études, exposés juridiques* [Weissenbruch, 1919] 14–15, 17, 20–24) and the Belgian State as well. See Nys's memorandum on the League of Nations, compared to the Post-1815 Holy Alliance: Rolin (n 6) 351–71.

<sup>14</sup>'Le massacre de paisibles populations, l'emploi de peines collectives contre les habitants, l'envoi en Allemagne de prisonniers civils, l'emploi de civils comme bouclier devant l'ennemi ... l'orgie, le saccage, le viol, le pillage!': Note, Ministry of Foreign Affairs (Belgium), Diplomatic Archives, CL B, 261 A, 5 February 1915, nr 12.278/6266, s.p.; Sophie De Schaepdrijver, *La Belgique et la Première Guerre Mondiale* (PIE: Peter Lang, 2004); Frank Wende, *Die belgische Frage in der deutschen Politik des Ersten Weltkrieges* (Böhme, 1969).

<sup>15</sup>Treaty between Great Britain, Austria, France, Prussia, and Russia, and the United Kingdom of the Netherlands, London, 19 April 1839, National Archives (Kew), Foreign Office, 94/150.

<sup>16</sup>Isabel V Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell UP, 2014); Horst Lademacher, *Die belgische Neutralität als Problem der europäischen Politik 1830–1914* (Röhrscheid, 1971) 274.

<sup>17</sup>Nys (n 13) 13.

<sup>18</sup>Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (Allen Lane, 2012); René Dollot, *Les origines de la neutralité de la Belgique et du système de la barrière (1609–1830)* (Alcan, 1902).

<sup>19</sup>Nys (n 13) 14.

<sup>20</sup>*Ibid.*

the manifest violations and atrocities, but also systematically argued against almost every German measure.

The trigger for Nys's 30-page-long essay was a decree by Colonel-General Baron Ludwig Alexander von Falkenhausen (1844–1936), German governor-general of Belgium.<sup>21</sup> The order, dated 29 July 1917, created a tax on movable wealth<sup>22</sup> and can be seen as part of the policy of 'expropriation' imposed by the German military.<sup>23</sup> All fiscal residents in Belgium were subjected to it, excluding persons 'entitled to fiscal exemption on the basis of the law of nations or in case of reciprocity' (art 2). Since the German occupation did not replace the existing Belgian executive organs, the recovery of this tax was delegated to the administration for registration and demesnes, a department of the Belgian Ministry of Finance (art 1).<sup>24</sup>

All movable wealth, including capital investments abroad, fell under the scope of the tax (art 3).<sup>25</sup> The imposition is clearly a capital tax, and not a capital gains tax. Inhabitants of occupied Belgium faced the choice of deducting countervailing debts from their claims, or not. If they did so, the German occupant asked for a detailed declaration on the nature of the countervailing debt and the identity of the creditor, '*de manière à ne laisser aucun doute*' (art 4).<sup>26</sup> Tariffs varied from

<sup>21</sup>S Vandenbogaerde, 'Een kijk op de administratiefrechtelijke organisatie van het "Etappen-gebied" tijdens de Eerste Wereldoorlog' (LLM thesis, University of Gent, 2010) (available at [http://lib.ugent.be/fulltxt/RUG01/001/458/406/RUG01-001458406\\_2011\\_0001\\_AC.pdf](http://lib.ugent.be/fulltxt/RUG01/001/458/406/RUG01-001458406_2011_0001_AC.pdf)).

<sup>22</sup>Verordnung über Einführung einer Steuer vom beweglichen Vermögen, Brussels, 29 July 1917, *Verordnungsblatt des Etappengebiets der IV. Armee*, nr. 87 (14 August 1917), nr. 395, 839–886. Eyal Benvenisti, *The International Law of Occupation* (Oxford UP, 2012) 114 notes the existence of the measure, but does not discuss it further.

<sup>23</sup>Hull (n 16) 116.

<sup>24</sup>It should be kept in mind that a general income tax was only introduced in Belgium after the First World War, in 1919. France, the object of the main precedent discussed in Nys's text, had introduced an income tax on 15 July 1914, on the eve of World War One. As a result of the Franco-Prussian War, France had resorted to the introduction of an income tax restricted to movable property. At that time, Adolphe Thiers (1797–1877), the conservative president, had managed to postpone the introduction of a general income tax ('*l'impôt sur le revenu, c'est le socialisme par l'impôt!*'): André Neurisse, *Histoire de l'impôt* (PUF, 1978) 103–106; Mireille Touzery, 'Les origines de l'impôt sur le revenu en France: de la monarchie aux républicains radicaux (XVIIIe–XIXe siècles)' (1997) 75 *Revue belge de philologie et d'histoire* 1027. In 1919, when Belgium created its income tax as a result of the war, it was split according to three sources of wealth: movable, immovable and industrial. Dirk Heirbaut, *Een beknopte geschiedenis van het sociaal, het economisch en het fiscaal recht in België* (Academia Press, 2nd edn 2013) 159.

<sup>25</sup>This included paper money, coins, interest contracts, life insurance, cautions, deposit accounts, any kind of claim (privileged claims, mortgages, without distinction in nature or source of obligation), treasury bonds, governmental, provincial or municipal debts, shares, profit-sharing bonds in a corporate entity ... (art 3).

<sup>26</sup>The similarity with the transitory mechanism installed by the federal government (2011–2014) for the recovery of movable income tax shall not have escaped the attentive reader. Belgian taxpayers could either opt for a fixed tariff of 25%, or reclaim part of the amount paid at their final fiscal declaration, which of course gave rise to fears of the creation of a 'wealth register'. Either pay or declare your (hidden? 'black?') assets! The system was

0.1% in the lowest scale (20,000–30,000 Belgian Francs) to 3.5% in the highest (1,400,000–1,500,000 Belgian Francs) (art 12). From 1,500,000 Francs, the tariff increased by 0.25% per slice of 100,000. All ‘fortunes’ below 20,000 Francs were exempt. This may seem rather marginal, but the obligation to declare one’s possessions created a considerable amount of intrusion into the private lives of the occupied population. All persons physically residing on Belgian soil for longer than a year had to declare their movable fortunes before 15 February 1918 (art 15). Failure to do so could occasion the application of a 25% or 50% fine by the local receiver (art 20). Moratory interests of 4.8% per year were added to sums due by 1 July 1918, half of which was due for 31 December 1917. Recourse against the receiver’s decisions was possible in two successive stages: first an administrative appeal to his hierarchical superior (art 22), then before the local Tribunal of First Instance (art 23). In case of failure to comply with these fiscal rules, the administration disposed of a general privileged claim, taking rank after the claims listed in articles 19 and 20 of the Belgian 1851 Securities law<sup>27</sup> as well as of a legal mortgage, taking effect from the date of its registration (art 30). In case of fraud, financial penalties could run even higher (arts 32–44), and came with penal sanctions (art 70).

From the start of the German occupation of Belgium, the military authorities debated the legal grounds for the imposition of contributions<sup>28</sup> and whether the

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quickly abandoned, as well-off citizens were clearly prepared to pay the price for anonymity, ie a rise in the tariff (‘Déclaration obligatoire pour les revenus mobiliers’, *Le Soir* [Brussels, 23 November 2002]) [http://www.rtbf.be/info/economie/detail\\_declaration-obligatoire-pour-les-revenus-mobiliers?id=7879714](http://www.rtbf.be/info/economie/detail_declaration-obligatoire-pour-les-revenus-mobiliers?id=7879714) accessed 12 September 2014. Further, the decree mentioned a list of logical exceptions (art 5): interests that were due for the future, potential but not actual profits in the framework of a life-insurance contract, goods under usufruct by a third person, pensions and rents payable *in natura*. Holders of a usufruct (or any person entitled to receive the income or products of a good) would pay for the full value of the good they controlled (art 6). In case of litigation over the ownership, the possessor would be the fiscal debtor.

<sup>27</sup>Belgian Civil Code, Book III, Title XVIII, Napoleonic version replaced by the Mortgage Law of 16 December 1851, *Moniteur Belge*, 22 December 1851.

<sup>28</sup>Report on the session of the civil administration council on wartime contributions, Brussels, 4 December 1914, BA, PH 30-I/106. The country was asked to pay 40 million Belgian Francs per month for the upkeep of the German army, or 480 million Belgian Francs per year. This equalled 20 times the amount of taxes and retributions collected by the Belgian provinces in normal times (Ministry of Foreign Affairs (Belgium) (n 14) 8). 10 million Belgian Francs were to be paid by the city of Charleroi (Report on the session of the civil administration council on wartime contributions, 32). Antwerp and Liège were equally punished by a collective *Strafkontribution* (*ibid*, 27). The occupant saw these payments as distinct from (supplementary) requisitions under the Hague Conventions. However, Franck, a member of the occupying curatorium, invoked Ernest Nys’s publications to support the view that (one-off) requisitions ought to stop, once (permanent) contributions were in place (*ibid*, 27). The German army not only counted its upkeep costs, but also the costs caused by the Belgian army’s blowing up of bridges over the Meuse (*Verwaltungschef* Maximilian von Sandt (1861–1918; *ibid*, 26). As expounded further in this

Hague Conventions permitted to collect at the same time (one-off) requisitions and (permanent) contributions. Nevertheless, the imposition of a new tax was different, since the occupant directly modified Belgian internal legislation. Contributions were negotiated with (ie, imposed upon)<sup>29</sup> first the *Société Générale* and a consortium of Belgian banks, and next the nine Belgian provinces.<sup>30</sup> The provinces asked for a halt in requisitions, but the Occupant was of a different opinion.<sup>31</sup>

### I. The historical ‘voie royale’ of military philosophy: war as the continuation of politics

Nys was opposed to this measure and argued it to be contrary to public international law. Conformable to his personal interests, his reflections start with Antiquity. The specific fiscal question under German occupation finds its roots in a more general or philosophical reflection on the nature of belligerent occupation and state administration in times of war. Nys starts with Flavius Vegetius Renatus, a figure of the late West-Roman Empire. Vegetius drew up the *Instituta rei militaris ex commentariis Catonis, Celsi Trajani, Hadriani et Frontini*, or a digest of military doctrine. In view of the military context of the late Empire, war was not seen as a ‘weapon of destruction and ruin’, but more as the ‘most supreme means of defence’ for a state, in order to escape the utter destruction of its civilization. Vegetius advised military men to keep to ‘prudence, circumspection and precautionary measures’. ‘*Qui desiderat pacem praeparet bellum*’ (whoever aspires to peace, should prepare for war ... and should imbue these maxims into his soldiers).<sup>32</sup>

Vegetius was subsequently transmitted to the Middle Ages within the writings of Egidio Colonna (1243–1316), preceptor to the young Philip IV of France (1268–1314), pupil of Thomas Aquinas, professor at the Sorbonne and archbishop of Bourges.<sup>33</sup> Nys focused on Colonna’s phrase ‘*Quomodo regenda sit civitas aut*

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article, the occupant would go on to claim supplementary contributions. On the occupation system: Michel Dumoulin, ‘L’entrée dans le XXe siècle (1905–1918)’ in Michel Dumoulin, Mark Van den Wijngaert and Vincent Dujardin (eds), *Nouvelle Histoire de Belgique Volume 2: 1905–1950* (Complexe, 2006) 96 ; Hull (n 16) 98.

<sup>29</sup>‘Sie befinden sich im Irrtum, wenn Sie glauben, dass es ein Handelsgeschäft zu machen wäre. Die deutsche Regierung habe nichts zu geben, sie habe das Recht zu fordern’ (von Schwabach): Report on the Session of the Civil Administration Council on Wartime Contributions, Brussels, 4 December 1914, BA, PH 30-I/106 (n 28) 14.

<sup>30</sup>The provinces were seen as an intermediary capable to asset-back paper-money created by the *Zivilverwaltung*. Banks would then trade the debt certificates issued by the provinces and thus give them credibility in financial relations. Direct imposition in the first months of the war was feared to wreck the already heavily touched Belgian economy. BA, PH 30-I/106, 2, 22.

<sup>31</sup>BA, PH 30-I/106, 13.

<sup>32</sup>Nys (n 10) 1.

<sup>33</sup>*Ibid*, 2; Stephen C Neff, *War and the Law of Nations: A General History* (Cambridge UP, 2005) 70.

*regnum in tempore belli*’, emphasizing that the Italian scholar saw wartime governance as a form of policy. In that sense, he is argued to have been a precursor of Carl von Clausewitz (1780–1831).<sup>34</sup>

Just as Vegetius or Colonna, Clausewitz drew his wisdom from practice and was in a direct relationship with the supreme decision makers. Nys, trained as a historian, does not omit an overview of Clausewitz’s career: first in the Prussian army (having fought in Russia during the 1812 and in ‘Belgium’ during the 1815 campaign), then as instructor of the Prussian Royal Prince and Director of the Superior Academy for War in Berlin. If ‘Politics constitutes the intelligence of the state itself’, nothing should escape its control, not even the most intense of all armed conflicts. War remains subject to the rational calculation inherent to the political process. War might be ‘an act of force’, by which the opponent can be deprived of his territory and brought down, but it remains the continuation of politics by other means. Between states, or, better, beyond the State and its (internal) Law, there is no such thing as morals ... according to Clausewitz, at least, the law of nations consists but of a small set of limitations on brute force. Nys, a convinced liberal and freemason, did not defend the latter idea at all, but emphasized that the act of conquest should be looked at in Clausewitzian terms.<sup>35</sup> I conquer my opponent’s territory in order to submit him to my will, but beyond that, the ordinary rules of law apply.

## II. From conquest to occupation

What are then the legal consequences of ‘submission by arms’? Nys distinguishes two doctrines: pure conquest and belligerent occupation.<sup>36</sup> The former is found in Napoleon’s instructions for the conquest of Austria in 1809: ‘I will take possession of the country in my own name, will plant my standards, administer justice in my own name, destroy all feudal rights, publish the Code Napoléon, and replace the paper money by my own.’ The latter thesis, expressed in the Fourth Hague Convention of 1907, is more subtle, since it limits the rights of the belligerent occupant to a transitory and temporary phenomenon.<sup>37</sup> The purpose of Nys’s memorandum was to position von

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<sup>34</sup>Raymond Aron, *Penser la Guerre: Clausewitz* (Gallimard, 2009).

<sup>35</sup>Ernest Nys, *Idées modernes, droit international et franc-maçonnerie* (Weissenbruch, 1908).

<sup>36</sup>Nys (n 13) 71–75. For rhetorical purposes, Nys classified seventeenth- and eighteenth-century warfare alike in the category of pure conquest. Historical research, however, pointed out that the situation was more nuanced in practice: Hubert Van Houtte, *Les occupations étrangères en Belgique sous l’Ancien Régime* (Van Rysselberghe & Rombaut, 1930); Augustus Johannes Veenendaal, *Het Engels-Nederlands condominium in de Zuidelijke Nederlanden tijdens de Spaanse successieoorlog 1706–1716* (Kemink, 1945).

<sup>37</sup>Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907,

Falkenhausen's decree in the first category of thinking, belonging to an obsolete era, bypassed by international law's march of progress.<sup>38</sup>

### 1. *The Franco-Prussian War: auto-restraint by the Prussian occupant?*

When Nys wrote his text in 1917, the immediate precedent in the nineteenth century was the occupation of Alsace and Lorraine by the German Empire in the war of 1870.<sup>39</sup> His starting point was the definition by Paul Laband (1838–1918), theorist of German Imperial Public Law,<sup>40</sup> who saw belligerent occupation as the 'suspension of the exercise of political power' to the benefit of the occupant.<sup>41</sup> In other words, ambitions such as those of Napoleon, who aimed to change the legal or monetary system, were excluded. The prevailing political system under the occupied power's full sovereignty was not to be modified by the occupant.<sup>42</sup>

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205 CTS 277. Previous to the 1899 Hague Conference, William Edward Hall, *A Treatise on International Law* (Clarendon Press, 1895) 487 limited the acceptation of the temporary and restricted nature of occupation at the Brussels conference to 'smaller states' and 'most of the great military powers'.

<sup>38</sup>Diplomatic practitioners, trained in a different, 'positivist' tradition, were of course of a different opinion on the matter, eg Jules Greindl (Belgian resident in Munich) to Jules Joseph Baron d'Anethan (Foreign Affairs Minister), Munich, 26 January 1871 (Ministry of Foreign Affairs (Belgium), Diplomatic Archives, Series 'Indépendance, neutralité, défense militaire', v 2, P2, N° 35, sf: '*Si je pouvais espérer que la conquête cessât bientôt dans le droit des gens européen comme un mode d'acquisition légitime, je serais l'adversaire décidé de toute annexion territoriale; mais il y aurait folie à espérer que ce progrès soit réalisé de nos jours.*' The main reasoning framework remained 'l'équilibre européen', eg Greindl justified the annexation of Alsace/Lorraine by Prussia on the basis of a right of conquest, by pointing to the – in his opinion – marginal impact on the Balance of Power between France and Prussia. It would not shift because of '*quelques forteresses*' or '*deux provinces dont les habitants seront longtemps allemands malgré eux*'. The distinction of Paul Schroeder between 'dangerous' eighteenth-century Balance of Power thinking (Paul W Schroeder, *The Transformation of European Politics, 1750–1848* [Oxford UP, 1994] 659) and the post-1815 Concert of Europe suggests a transition in legal reasoning, whereas both modes coexisted and at many occasions amalgamated into tautological metaphors. On Greindl (1835–1917): Jacques Willequet, 'Jules Greindl, une grande figure de notre diplomatie' (1968) III *Revue générale belge* 5. On d'Anethan (1803–1888): Alex Cosemans, 'ANETHAN (Jules-Josep, baron d')' in *Biographie Nationale de Belgique* (Bruylant, 1956), 29, col 94–96.

<sup>39</sup>Albert Sorel, *Histoire diplomatique de la guerre franco-allemande* (Plon, 1875).

<sup>40</sup>Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge UP, 2001) 184.

<sup>41</sup>Nys (n 10) 5; Paul Laband, *Die Verwaltung Belgiens während der kriegerischen Besetzung* (Mohr, 1916).

<sup>42</sup>Eg Charles Calvo, *Le droit international théorique et pratique* (Rousseau, 1896), 212: '*l'occupation implique jusqu'à un certain point la possession du territoire, mais seulement en ce sens que l'occupant peut y faire exécuter ses volontés ... aussi longtemps que l'état de guerre continue*'; John Westlake, *International Law. Part II: War* (Cambridge UP, 1913) 96:

Alsace and Lorraine were ceded by France – which suffered a heavy defeat against Prussia – starting on 2 March 1871, as a legal consequence of a Treaty of Cession dated 26 February 1871.<sup>43</sup> Any action by the German authorities up to this date constituted acts of belligerent occupation. The German Empire, established in January 1871, only acquired full sovereignty over the French departments at the exchange of ratifications between both states. All acts issued by the commander in chief of the German armies, the King of Prussia, proclaimed Emperor in between, pertained to a purely factual and transitory exercise of power. The distinction between the King of Prussia (before January 1871) as commander in chief and the Prussian government as such is important. It already indicates that not all powers of the occupied state's institutions can be exercised by an occupying force. The judiciary escaped completely control by an occupying army, for instance. Nys found supplementary support in the work, *International Law*, published in 1861 by US General Henry W Halleck (1815–1872).<sup>44</sup> Only the army of the victor, not the political institutions, occupy a defeated state. Occupation is a purely factual state of affairs, resulting from the rules of war. Denominations as 'civil government' or 'military government' are illusory, they do not change the fundamental nature of military occupation, which is restricted to one branch of the executive power of government: military forces.

On 21 August 1870, King William of Prussia (1797–1888) issued the regulations regarding the military occupation of Alsace and Lorraine. Accessorily, separate regulations were issued for the city of Reims (16 September 1870) and that of Versailles (16 December 1870, where the German Empire was proclaimed in the Hall of Mirrors). The question of taxation seemed novel to the occupying authorities, in view of the dereliction of the preceding doctrine of conquest. Based on the account by Edgar Loening (1843–1919), Professor at the University of Strasbourg,<sup>45</sup> Nys confirmed that the occupying authorities

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'the source of an invader's authority cannot be looked for in a transfer of that of the territorial sovereign.' Or, in Nys's own words, building on *occupatio* as a means of acquiring property in Roman Law (Nys (n 13) 7–8): '*L'occupation est, à proprement parler, une prise de possession d'une chose sans maître dans l'intention d'en acquérir la propriété ... la notion de l'occupation de guerre est tout à fait différente ... la souveraineté de l'Etat dont le territoire est foulé ... n'est nullement abolie; elle est suspendue.*' See as well Hall (n 37) 482; Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant, 2001) 776.

<sup>43</sup>After barely a month of fighting, Napoleon III lost the devastating battle of Sedan on 1–2 September 1870. From September 1870 to January 1871, the Prussian army besieged Paris. The German Empire was proclaimed on 18 February 1871 in Versailles. On 28 January 1871, the provisional government of national defence signed an armistice with Prussia. On 17 February 1871, Prussian troops paraded on the *Champs Élysées*. Preliminaries of Peace between France and the Germanic Empire, 26 February 1871, Versailles, in: Jules De Clercq (ed), *Recueil des traités de la France* (Amyot, 1872), t X, 430–435.

<sup>44</sup>Nys (n 10) 6; Henry W Halleck, *International Law or, Rules Regulating the Intercourse of States in Peace and War* (Bancroft & Company, 1861) 775.

<sup>45</sup>Edgar Loening and Johann Caspar Bluntschli, *Allgemeine Staatslehre* (Cotta, 1886); *Grundzüge der Verfassung des Deutschen Reiches* (Teubner, 1901).

had the right to claim fiscal revenues from the inhabitants of the occupied lands. In case civil servants refused to cooperate, the occupant could simply fire them.<sup>46</sup>

Loening was of the opinion that Prussia could simply alter or suppress existing legislation and impose supplementary penal sanctions for fiscal contraveners.<sup>47</sup> However, in Nys' personal view, the Brussels conference of 1874, assembled at the request of Czar Alexander II of Russia (1818–1881) to treat the laws of war, added restrictions. Occupants could not alter the legal system installed by the occupied state to collect taxes.<sup>48</sup> Nys used the statement by the German delegate, General Konstantin Bernard von Voigts-Rhetz (1809–1877), that the occupant could only affect fiscal revenue from the occupied zones to his own administration. During the Franco-Prussian war, the general had commanded the city of Versailles on behalf of the Prussian occupying army. In other words, whereas it had been customary in the *Ancien Régime* to make 'war feed war', Nys claimed the general opinion on the laws of war had shifted to the mere financing of the occupational activities, and not to the war effort as a whole.

<sup>46</sup>Edgar Loening, 'L'administration du gouvernement-général de l'Alsace durant la guerre de 1870–1871' (1873) IV & V *Revue de droit international et de législation comparée* 622–50, 69–136; *Die Verwaltung des General-Gouvernements im Elsaß. Ein Beitrag zur Geschichte des Völkerrechts* (Tübner, 1874); Nys (n 10) 10.

<sup>47</sup>A similar opinion to Loening's is upheld in the *Pandectes Belges* (Larcier, 1894) col 510–11, nr 107 (based on Rivier, Dudley Field, Destriveaux and Arntz): 'L'occupant peut donc suspendre la loi du pays, prendre toutes les mesures que commandent sa sûreté et ses besoins, et administrer le pays occupé tout en tenant compte de cette restriction que l'occupation n'est ou peut n'être que provisoire.'

<sup>48</sup>Similar: Calvo (n 42) 220: 'le droit international ne reconnaît pas à l'occupant la faculté de changer les lois civiles et criminelles ... ni d'y faire administrer la justice en son nom'. In the same sense Hall (n 37) 489: '[The occupant] is forbidden as a general rule to vary or suspend laws affecting property and private personal relations, or which regulate the moral order of the community'; Franz von Liszt, *Das Völkerrecht systematisch dargestellt* (Häring, 1913) 313: 'die Erhebung der Steuern, Zölle und Abgaben soll nach Maßgabe der bestehenden landesrechtlichen Bestimmungen erfolgen'; Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green & Co, 1912), II, 211: '[The occupant] is not the sovereign of the territory, and therefore has no right to make changes in the laws ... except those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purpose of war'; Hannis Taylor, *A Treatise on International Public Law* (Chicago, 1901) 599. This interpretation is indeed more restricted than that of Bluntschli (n 57) 304 –writing in the late 1870s, used as impartial authority in the memorandum, but not for this precise point. The Swiss-German professor rejected too strict an interpretation, but allowed legislative measures by the occupant proportionate to his immediate financial needs. Suspension of domestic legislation could not concern 'das ganze bestehende Landesrecht, das öffentliche und das Privatrecht'. Yet, 'vielmehr dauert die Rechtsordnung so weit fort, als sie mit den Kriegszuständen verträglich ist und nicht von der Kriegsgewalt ausser Wirksamkeit gesetzt wird'.

## 2. French disobedience

An analysis of the Prussian ordinance of 22 October 1870 provided arguments against Loening's thesis. The latter document stated that tax collection would take place conform to French laws in force at the time of the occupation. The French state, however, had given instructions to its civil servants not to transfer any sums to the occupant and to bring their archives and accountancy in safety at the nearest non-menaced fiscal authority. In other words, the Prussian occupant was confronted with the practical impossibility of using the existing administrative structures.

At this point, Loening reported a Prussian decision to practically bypass the existing French fiscal structures. A single imposition, calculated on the mean revenue for the fiscal years 1868 and 1869, ought to replace all direct taxes and indirect duties (registration, stamps ... with the exception of tobacco, salt and gunpowder).<sup>49</sup> However, since the war had caused an absolute impoverishment, a calculation based on pre-wartime revenues amounted to a tax rise in relative terms. Next, not the – inexistent – fiscal administration, but mayors and municipal councils would apportion the total tax burden, fixed by the occupant on the abovementioned estimate based on past revenues, to individual tax payers. In every department, Prussia established a central tax chest, where a twelfth of the estimated yearly revenue had to be deposited on the tenth of each month, in advance, by local authorities. In return for their services, local mayors enjoyed a 3% discount, cantonal mayors (the intermediate administrative level between municipality and 'département') benefitted from a 1% cut. The system strangely resembled tax collection in the *Ancien Régime*, where the 'contrôleur-général des finances' relied on advances by local treasurers, and tax collection was *de facto* exercised by local communities, not by a top-down controlled bureaucracy.<sup>50</sup>

## 3. Sanctions

However, since this concerned military occupation, failure to live up to these obligations by the fifteenth of the month could give rise to forcible execution by the Prussian army. Nys consulted a doctoral dissertation written at the University of

<sup>49</sup>Nys (n 10) 12. A new Prussian ordinance, dated 28 December 1870, was applicable to the departments Aisne, Ardennes, Aube, Seine-et-Marne and Marne. Again, French taxes and duties were absorbed by a single contribution, with the exception of local taxes (financing municipal expenses). Inhabitants of the latter departments were enjoined to pay a fixed amount of 50 French Francs to compensate indirect taxes, whereas in Alsace, the latter was seen as representing 150% of direct tax revenue.

<sup>50</sup>Jean-François Dubost and Peter Sahlins, *Et si on faisait payer les étrangers? Louis XIV, les immigrés et quelques autres* (Flammarion, 1999) 97–125; Guy Rowlands, *The Financial Decline of a Great Power: War, Influence, and Money in Louis XIV's France* (Oxford UP, 2012) 57–71; Mireille Touzery, 'Taille' in Lucien Bély (ed), *Dictionnaire de l'Ancien Régime* (PUF, 3rd edn 2010) 1200–01.

Paris in 1900 by J Depambour.<sup>51</sup> The latter stated that Prussian sanctions had actually been enacted: delays in payment by the municipalities were sanctioned by interest payments of 5% a day. When payments to the general war chest in every department became overdue by eight days, Prussian troops were quartered in at the expense of the inhabitants, including the duty to pay every soldier two French Francs and every officer six Francs a day. Recalcitrant inhabitants could be physically seized and brought to reason. On 11 February 1871, the Prussian governor-general in Reims ordered the internment in Germany of hostages taken in recalcitrant municipalities, reserving for the Prussian army supplementary means of execution of debt, such as plundering and burning down private dwellings. Moreover, the amounts of fiscal revenue extorted from local authorities increased nearly twofold in Reims: 271,000 Francs at the end of 1870 and 447,000 early in 1871. After the cession to the German Empire had become effective in March 1871, revenue in Nancy was more than tripled, from 91,000 Francs to 327,000.<sup>52</sup>

Nys was revolted at these practices and thought the Prussian occupant had exceeded his competence, limited to a ‘short duration’, and linked to the exceptional state of necessity an occupant could invoke in occupied territories. Fiscal revenues could only serve to cover administrative costs, not to sustain the general war effort or to release domestic fiscal pressure. *Causa necessitatis cessante cessare debet quod ob necessitate est concessum* (when the immediate cause for a state of pressing necessity ceases, concessions exacted on the basis of necessity should equally disappear)! Although Nys admitted that a limitation to the costs of administration was not in force at the time of the Franco-Prussian war, he asserted that the 1874 Brussels Conference had changed the *opinio iuris* and had thus made it impossible for the German occupant in 1917 to create a new tax in Belgium. In his interpretation, the tax increases enacted by the Prussian occupant in 1871 constituted a violation of an initially recognized principle of equivalence between pre-wartime taxation levels and those under belligerent occupation, as defined in the respective ordinances which fixed the amounts of revenue to be collected from municipal authorities. Moreover, the latter had frequently disobeyed the Prussian occupant’s orders, citing the example of Rameau, mayor of Versailles.<sup>53</sup>

### III. Brussels 1874: a non-ratified codification of the laws of war

The Swiss international lawyer Johann Caspar Bluntschli (1808–1887), pupil of the famous Friedrich Carl von Savigny (1779–1861), had taught at Zurich,

<sup>51</sup>Nys (n 10) 13; J Depambour, *Des effets de l’occupation en temps de guerre sur la propriété et la jouissance des biens publics et particuliers* (Université de Paris, 1900).

<sup>52</sup>Nys (n 10) 14.

<sup>53</sup>*Ibid*, 15.

Munich and Heidelberg. A key figure of German and international academia, Bluntschli had been involved in the Alabama arbitration, corresponded with Francis Lieber, frequently contributed to the *Revue de droit international et de législation comparée* and was at the heart of the *Institut de Droit International*. Nys eagerly quoted him in his memorandum, in his role as German delegate to the 1874 Brussels Conference. This gathering failed to produce a binding outcome in terms of codification of the laws of war, since the final text was not ratified.<sup>54</sup> Nevertheless, its efforts were not fruitless, since the 1899 and 1907 Hague Conferences continued the work and produced regulations on the laws of war and usages on land.<sup>55</sup> In his memorandum, Nys presented Bluntschli's interventions at the conference as the statement of the common legal conscience of the world until 1874, and thus as an authoritative source.<sup>56</sup> Bluntschli had at the same time been a supporter of the Second German Empire, a modernizing venture destined to ban petty dynastic infra-German Old Regime politics. He had rejoiced at the consequences of Prussia's victory in 1870. Yet, he deplored the 'grauenhafte Unkenntnis des Völkerrechts' among German army officers and even 'in hohen Kreisen und bei hochgebildeten Männern'.<sup>57</sup> In spite of Kaiser Wilhelm's public assertion that the Franco-Prussian war was a conflict between states, and not individuals, Prussian soldiers had maltreated civilians and their property. For Bluntschli, Imperial Germany could only prosper if it respected the basic rules of the society of states: 'die volle Unabhängigkeit und Freiheit auch der andern Staaten'.<sup>58</sup>

### 1. Occupation entails executive, not judiciary, competence

Armies need to exercise political authority when advancing through enemy lands, for security and efficacy reasons. Yet, this authority is in essence temporary and should thus be distinguished from the authority of the occupied sovereign. No

<sup>54</sup>Koskenniemi (n 40) 42; Bruno Arcidiacono, 'La paix par le droit international, dans la vision de deux juristes du XIXe siècle: le débat Lorimer-Bluntschli' (2012) 149 *Relations Internationales* 13; Betsy Baker Röben, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (Nomos, 2003); 'The Method Behind Bluntschli's "Modern" International Law' (2002) IV *JHIL* 249.

<sup>55</sup>Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard UP, 2014) 323–27; Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (Oxford UP, 3rd edn 2000) 59–138; Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* (Sijthoff & Noordhoff, 1978), vol IX, 150–60.

<sup>56</sup>Dietrich Schindler, 'JC Bluntschli's contributions to the law of war' in Marcelo Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Martinus Nijhoff, 2007) 437–54.

<sup>57</sup>Bluntschli to Francis Lieber, Heidelberg, 1 October 1871, published in Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch Dargestellt* (Beck, 1878) VI–VII.

<sup>58</sup>Bluntschli (n 57) VII.

definitive subordination or obedience of the occupied state's population can be derived from this temporary exercise of restricted political authority. Equally, as article three of the final declaration stated, a belligerent occupant had to 'maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary'.

Nys found further support in a discussion at the 1874 conference on the legal effect of civil contracts concluded between the occupying forces and private individuals. A problem raised – again – by the German delegate, General Voigts-Rhetz, who was particularly concerned to guarantee to private individuals the execution of obligations taken on by the occupying force.<sup>59</sup> In spite of objections by the Dutch delegate, Johan Willem van Lansberge (1830–1905), the consensus in the audience confirmed the principle that the cessation of belligerent occupation would not entail the invalidation of contracts concluded previously, since the occupation only temporarily suspends the legal sovereign's rights. Consequently, it is the duty of the occupied state to assist private individuals in exercising their rights, conformably to its own laws and customs, and to provide them with access to justice.

Nys sustained that the autonomy and independence of the judiciary branch of government, foreseen in articles 30<sup>60</sup> and 100<sup>61</sup> of the Belgian Constitution of 1831,<sup>62</sup> could not be hampered by belligerent occupation. Judges in occupied states kept the discretion to test measures issued by the occupant on their conformity with the law of nations and the 1907 Hague Regulations.<sup>63</sup> Any occupying power willing to discard the judiciary of the occupied state could decide to scrap it.<sup>64</sup> If, however, this had not been the case, the occupant had to grin and bear the exercise of judicial power in the narrow sense.<sup>65</sup> Public

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<sup>59</sup>Nys (n 10) 7.

<sup>60</sup>'Le pouvoir judiciaire est exercé par les cours et tribunaux.'

<sup>61</sup>'Les juges sont nommés à vie. Aucun juge ne peut être privé de sa place ni suspendu que par un jugement.'

<sup>62</sup>Jean Joseph Thonissen, *Constitution belge annotée: offrant, sous chaque article, l'état de la doctrine, de la jurisprudence et de la législation* (Milis, 1844), 113–16 and 283–87.

<sup>63</sup>Calvo (n 42) 220: 'Les autorités civiles et judiciaires du territoire occupés doivent se soumettre au pouvoir de fait de l'occupant ... mais l'occupant ne peut les obliger à remplir leurs fonctions, si elles en jugent l'exercice incompatible avec leurs devoirs.' See also Bluntschli (n 57) 304.

<sup>64</sup>Which effectively happened in Belgium at the end of the First World War: Benvenisti (n 22) 118; Mélanie Bost and Aurore François, 'La grève de la magistrature belge (février-novembre 1918). Un haut fait de la résistance nationale à l'épreuve des archives judiciaires' in Dirk Heirbaut, Xavier Rousseaux and Alain Wijffels (eds), *Histoire du droit et de la justice – Une nouvelle génération de recherches Justitie- en rechtsgeschiedenis – een nieuwe onderzoeksgeneratie* (PUL, 2008) 19–43 ; Georg Wunderlich, *Der belgische Justiz-Streik* (Heymann, 1930). During the Franco-Prussian war, the Nancy Court of Appeal suspended its sessions after Napoleon III's fall, refusing to judge 'in the name of the High German Powers' (Oppenheim (n 48) 215).

<sup>65</sup>Nys (n 10) 8.

prosecutors, who were under the authority of the executive branch, had to take their orders from the occupant. Equally, the execution of judicial decisions was left to the occupying power, including the King's constitutional privilege to release prisoners, a competence of the executive branch (art 73 Constitution).

## 2. *Nys's restrictive reading: between big and small power interest*

Voights-Rehtz remarked at the Brussels conference that limiting the powers of the occupant to a *status quo* in the existing taxation boiled down to a possible discrimination with regards to the domestic situation. If the war effort was sustained by the latter lands, occupied zones could possibly enjoy a lower level of taxation! The German delegate insisted on the possibility for an occupying army to levy supplementary taxes, at least up to the level prevailing at home. Naturally, this point of view was highly beneficial to a major power not unlikely to present itself as a belligerent occupant in the future.

Smaller states, more likely to fulfil the opposite role, would of course object to this. The Belgian delegate, Baron Auguste Lambermont (1819–1905), and his Swiss counterpart, Colonel Bernard Hammer (1822–1907), disagreed.<sup>66</sup> The latter insisted on the strict respect of the laws established by the previous legal government, yet the former argued that admitting the rule advocated by Germany would boil down to a smaller state codifying rules that foresaw the violation of its own territory in an offensive war, whereas the legal status of a country as Belgium, under permanent neutrality since 1831–1839, only foresaw the possibility of defensive wars.<sup>67</sup> Codifying a sanction *par anticipation* would be legally impossible to enact for the Belgian government. Later, at the 1899 Hague Conference, August Beernaert (1829–1912), former Belgian Prime Minister and Nobel Peace Prize recipient in 1909, would defend a similar position.<sup>68</sup> Lansberge, the Dutch delegate, joined his Belgian and Swiss counterparts: one could be obliged to suffer the laws of war in practice, but not to proclaim its detrimental consequences in advance!<sup>69</sup> The right to impose taxes on the population could only emanate from the nation, as foreseen in art 25 of the Belgian Constitution, and was thus excluded from the belligerent occupant's attributions.

<sup>66</sup>*Ibid*, 17.

<sup>67</sup>Florent de Lannoy, *Histoire diplomatique de l'indépendance Belge* (Albert Dewit, 1930); Lademacher (n 16) 36–96.

<sup>68</sup>Henri Carton de Wiart, *Beernaert et son temps* (La renaissance du livre, 1945); Rik Verwaest, *Van Den Haag tot Genève: België en het internationale oorlogsrecht (1874–1950)* (Die Keure, 2011) 25–35. On Belgium and internationalism in the Belle Époque in general, see Daniel Laqua, *The Age of Internationalism and Belgium, 1880–1930: Peace, Progress and Prestige* (Manchester UP, 2013).

<sup>69</sup>Depambour (n 51) 25.

### 3. *Taxation by equivalent, contributions and requisitions*

Of course, the impossibility to come to a consensus, as Voights-Retz argued, would lead to legal uncertainty for the inhabitants of future occupied territories. In absence of a precise clause defining the extent of an occupant's taxation powers, excesses would be committed in any case. The Brussels Conference did not go further than a general statement in the fifth paragraph of its final declaration stating that the occupant would have to limit taxation to the costs of administration, not exceeding the prevailing levels established by the legal government, passed through the existing institutions and – on insistence of the Swiss delegate – would only have recourse to taxation by equivalent (as had been the case in Alsace-Lorraine) as a subsidiary means.<sup>70</sup>

The Brussels declaration foresaw a distinction between requisitions and contributions, on the one hand, and taxation, on the other. Whereas the latter had been defined by the legal government, the former were unilateral demands from the occupant on the population, governed by the principles of (military) necessity and proportionality (with regards to the general resources of the occupied country). Voight-Retz proposed to leave discretion to the occupant: requisitions and contributions could either be asked as an equivalent for taxation, or as a fine or punishment. Nevertheless, after days of discussion, they were qualified as expropriations, only admissible as exceptions to the normal state of affairs and thus subsidiary with regards to the normal levels of taxation (art 41, Brussels Declaration).

In practice, this did not stop the German occupant from asking for a 'wartime contribution' (*contribution de guerre*) of 40 million Belgian Francs per month (13 November 1915) for administrative costs and maintenance of the army.<sup>71</sup> Next, as indicated above, collective fines on cities such as Antwerp, Brussels or Liège counted as supplementary taxation.<sup>72</sup> In 1915, Nys had already denounced an imposition on absent physical persons, a means of pressure by the German occupant to convince wealthy residents who fled the country in 1914 to return.<sup>73</sup> Local authorities, responsible for tax collection, could autonomously

<sup>70</sup>Final Protocol of the Brussels Conference on the Rules of Military Warfare between Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and Turkey, Brussels, 27 August 1874, 148 *CTS* 133. Similarly, Bluntschli (n 57) 306.

<sup>71</sup>*Befehl* (order) by *Generaloberst* Moritz von Bissing, Governor-General of Belgium, Brussels, 10 November 1915. See 12 *Gesetz- und Verordnungsblatt*, nr (13 November 1915) and the previously cited discussions in the Belgian Occupation's Administrative Board. The preamble of the order simply states its conformity with art 48 of the Hague Regulations on the laws of war IV (1907), but does not give a motivation. On contributions see Oppenheim (n 49) 186–87.

<sup>72</sup>Hull (n 16) 113. In total, Belgian contributions during the occupation would have amounted to 2,575 billion Francs (more than five times the initially foreseen – annual – amount of 480 million). See also n 28.

<sup>73</sup>Nys (n 13) 64–67. Decree of 16 January 1915 by Governor-General von Bissing, 33 *Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens* 33 (19 January

decline assistance to the occupant who had exceeded his competence under the laws of war. The Brussels local authorities consequently declined a request by the Germans, using Nys's argument drawn from the 1874 discussions and a statement by Voight-Rhétz, according to whom services '*contraires au patriotisme et à l'honneur*' could not be exacted from local municipalities.<sup>74</sup>

#### 4. *Further limits to the occupant's fiscal competence: August Beernaert at the 1899 Hague Convention*

How should a lawyer interpret the limited competence of a belligerent occupant to raise taxes? Nys enumerated the following views: either the occupant is seen as enjoying a usufruct (entitled to income and economic exploitation, but not to alienate the occupied territory), or as a replacement of the legal government or as entitled to compensation for the expenses made during his administration in upholding public order. If fiscal revenue exceeds the latter expenses, the occupant is entitled to keep them. Yet, if the occupant desires to draw more revenue out of the inhabitants, should these measures be qualified as contributions or as supplementary taxes? The former opinion seemed to impose itself after the 1899 Hague Regulations on war by land, which confirmed that taxes imposed by the previous government would remain as a fiscal ceiling (art 48).<sup>75</sup>

Nys explained that the conditional wording of article 48 – 'on the same scale as that by which the legitimate Government was bound' – was a result of Beernaert's insistence that no right should be directly granted to the occupant, who could only act as a caretaker for the natural sovereign. Equally, the Belgian delegate criticized the authorization granted to civil servants to follow the occupant's instructions, or the right recognized in article 49 to levy supplementary charges justified by the

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1915). The extraordinary tax increase ('*Ausserordentlicher Steuerzuschlag*') was applicable to persons who had left their legal residence in Belgium for more than two months since 1914 and would not have returned by 1 March 1915 ('*les fuyards belges*') (art 1). Only taxpayers with due amounts above thresholds from 35 to 100 Francs, depending on the size of their municipality, were subjected to imposition. The tariff amounted to the tenfold ('*le décuple*') of what had been paid or claimed by the fiscal administration for the fiscal year 1914. Von Bissing copied the idea from the Ghent City Council (*L'indépendance Belge* [Brussels, 25 January 1915] ; *Le Temps* [Paris, 2 February 1915] ) and shrewdly presented it as a shared local tax, and only in part a war contribution for the German army (which could claim only 50% of the receipts, art 3), in the sense of the arts 48 and 49 of the Hague Regulations IV (1907). Belgian refugees abroad (Paris, London, Le Havre, The Hague, Bern) were portrayed as the wealthy *émigrés* of the French Revolutionary wars (*Frankfurter Zeitung*, 27 January 1915): H Anthonis, *Les réfugiés belges taxés par les Allemands* (Blackwell, 1915). Executory measures ('*Ausführungs-Bestimmungen zur Verordnung vom 16 Januar 1915*'): 33 *Gesetz- und Verordnungsblatt* 115–16.

<sup>74</sup>Nys (n 13) 67.

<sup>75</sup>Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, 187 *CTS* 429.

necessities of war. Why should international law grant supplementary justifications for the exercise of what merely resulted from a matter of fact?

I would not challenge the influence of facts. Things have always been settled this way. As long as humanity does not renounce the use of armed forces, these situations will continue to occur. Yet, if it should be perceived as perfectly normal that a victor can found his competence on the mere force of victory, I would not be able to understand how rights could still emerge from public treaties.<sup>76</sup>

Why would any parliament in a smaller state recognize beforehand the rights of its future victor ‘*chez lui*’, and ‘organise the legal regime of its defeat’? Why give your written consent beforehand as a future victim to entitle your victor to impose taxes and fines, or to instruct your civil servants, whereas their primary duty should consist in loyalty to their own country?

### 5. *Morality and patriotism*

Beernaert placed a fundamental argument on the table. If international law looked at warfare as a process between two states, as had been the case in the *Ancien Régime*, it bypassed the transformations of the French Revolution and the nineteenth century. States drew their internal legitimacy from the Nation, or the *corpus* of their subjects. The bonds existing between subjects and the nation were of such a nature that they could not be broken by a mere change of military domination. This was different under the *Ancien Régime*, where loyalties were regional or infra-regional in the first place.<sup>77</sup> Beernaert argued that the bonds linking individuals to their country were now so strong, that they ought to be recognized in international law.

Attributing extensive competences to a belligerent occupant served the upholding of public order and would reduce material individual suffering. Yet ‘moral and political objections’ were stronger. Foremost for smaller states, which *par la nature des choses* could never be invaders but would remain exposed to foreign assault, there was no reciprocity between Big Powers dictating their facilities as future invaders and smaller players, the sempiternal victims of war. Moreover, for the specific case of Belgium, the country’s neutrality had been guaranteed by the Big Powers in Europe. Belgium could thus not be invaded. Why should the Belgian government then proceed before the Nation’s representatives united in its Parliament with a convention codifying the rules for the case wherein one of the guarantors would not respect its engagements,

<sup>76</sup> ‘*Ce n’est pas, que je veuille attaquer le fait. Les choses se sont toujours passées ainsi et il continuera sans doute à en être de même, tant que l’humanité n’aura pas renoncé à la guerre. Mais, s’il est naturel que le vainqueur puise le pouvoir d’agir ainsi dans la force de la victoire, je ne comprendrais plus un droit résultant d’aucune convention*’.

<sup>77</sup> Peter R Campbell, ‘Absolute Monarchy’ in William Doyle (ed), *The Oxford Handbook of the Ancien Régime* (Oxford UP, 2011) 26.

agreeing beforehand to facts that could potentially constitute an undeniable *abus de force*?

For Beernaert, citizens were patriots. They could not and would not be mere spectators. Their first duty was to defend their country, as the accomplishment of a collective duty, as described in the '*plus belles pages de notre histoire nationale*'. The former Prime Minister lamented the horrible prospect that the Hague Convention could promote '*l'indifférence, qui est peut-être l'un des [maux] les plus graves dont souffre notre temps*'. Why had Belgium spent fortunes on the fortification of Antwerp or the Meuse, if it had not been to discourage any foreign aggressor? The whole country could be occupied within two days!<sup>78</sup> The Nation would suffer irreparable harm if its citizens were discharged from their patriotic duties even before the enemy had crossed its borders. Nys cynically commented on Beernaert's eloquent pleading as '*autant de mots, vides de sens*'.

Friedrich von Martens, the renowned Estonian lawyer acting as a delegate for Russia (1845–1909),<sup>79</sup> pointed to the necessity of codifying rules. If, following Beernaert's reasoning, the laws of war should not be taken down beforehand at an international level, any invader would be free to do whatever he wanted, without having consented earlier to limitations. The final wording of the articles 48 and 49 after the subsequent 1907 Hague Convention did not fundamentally alter the compromise. Yes, a belligerent occupant could levy taxes. However, he had to abide by the existing fiscal legislation.<sup>80</sup> If the costs of administration (or, in a broad sense, '*la gestion des affaires publiques*') exceeded the product of normal taxation, supplementary burdens could be imposed to balance the accounts.

### III. Conclusion

The reality of the Great War, starting by a violation of Belgian 'perpetual' neutrality as established in 1839, entailing a series of violations of the *ius in bello*, could have generated disappointment among international lawyers. The rhetorical basis of many German arguments resided on sovereignty as a fundamental norm of liberty, or on the 'condemned and abandoned'<sup>81</sup> principle of necessity in military affairs. Their true purpose was '*non seulement la victoire, mais l'écrasement*

<sup>78</sup>Nys (n 10) 26–27.

<sup>79</sup>Lauri Mälksoo, 'Friedrich Fromhold von Martens (Fyodor Fyodorovich Martens) (1845–1909)' in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford UP, 2012) 1147–51.

<sup>80</sup>'*Les règlements de l'administration allemande ne sont pas des lois*'. Ministry of Foreign Affairs (Belgium) (n 14) 5. Yutaka Arai-Takahasi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, 2009) 171–84; Eric David, *Principes de droit des conflits armés* (Bruylant, 2002) 509.

<sup>81</sup>Nys (n 13) 13, 92–110 (historical overview), '*l'excuse de la nécessité*'.

*définitif*.<sup>82</sup> The German Empire did not even impose the legal regime of conquest, but a ‘harsher and more cruel’ one. Yet, as the new impetus of the League of Nations<sup>83</sup> has shown, the international legal community aimed at structural restraint of sovereign power. Pre-war codifications of international law could not be allowed to fall into oblivion, but were reaffirmed. Aberrations could not stop the progress of international law.<sup>84</sup> Therefore, it is no coincidence that Nys assembled a selection of his wartime legal reflections in a short book on belligerent occupation. International law was destined to discipline the behaviour of states.

In this short memorandum (30 pages of handwritten material without footnotes), Nys demonstrated all his ability as both a historian and a lawyer, confronting past and present, doctrine and recent practice, to answer to a concrete legal question. Nys’s main point was that the measure decreed in July 1917 by von Falkenhausen and his quartermaster-general, Viktor Hahndorff, constituted a violation of the laws of war. Nys limited the doctrine of conquest (implying an immediate transfer of sovereignty) and claimed that Prussian/German practice in 1870–1871 already (incipiently) applied what Bluntschli or the participants to the main conferences on the laws of war would express later. Attempts at the 1874 Brussels conference to lift restrictions on the taxation powers of a belligerent occupant were not successful. On the other hand, Beernaert’s pathetic *envolée* in 1899 could not prevent the recognition of such powers – albeit within limits. Precisely the interpretation of these limits leads back to his introductory part on the philosophy of war. Armed confrontation is but instrumental to the realization of political aims. The wartime exercise of political power should by all means be limited to a rational expression of government. Anything beyond the ‘temporary paralysis’ of the enemy’s resources would amount to a definitive change of sovereignty. Consequently, only a peace treaty between Belgium and Germany could provide a sufficient legal basis for such a change in sovereignty.

In his collection of essays on the law of belligerent occupation, Nys explicitly linked the German objectives of both material and intellectual annihilation of Belgium’s population.<sup>85</sup> Among others, the intangibility of private deposits in the *Caisse générale d’épargne et de retraite/Algemene Spaar- en Lijfrentekas* (CGER/ASLK), or the status of the National Bank, a private joint stock corporation, were battlegrounds.<sup>86</sup> A final question is thus whether Nys was formally

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<sup>82</sup>Nys (n 13) 13.

<sup>83</sup>Robert Kolb and Markus G Schmidt (eds), *Commentaire sur le pacte de la Société des Nations* (Bruylant, 2014).

<sup>84</sup>Eg Nys (n 13) 12, pointing to the number of ratifications for the 1907 Hague Regulations and the number of countries having transposed them into binding municipal law, or the statement by Edward Fry (1827–1918), British plenipotentiary: ‘*aujourd’hui le sentiment de la solidarité est plus que jamais répandu sur toute la terre.*’

<sup>85</sup>Nys (n 13) 13.

<sup>86</sup>Nys (n 13) 24. See in the same sense, Lieber and Bluntschli’s view of the separation between private and public as the key to the humanization of the laws of war, separating

opposed to the idea of a capital tax on movable property as a modification of existing Belgian fiscal laws, or, on a material level, whether he refrained from the compulsory personal property declaration asked for by the occupant.

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\*accomplishments and property of citizens ... no longer ... available only for public purposes but ... protected as private rights and private goods in time of war and of peace' (Röben (n 52) 281).