

The Silence of the Law

Review of *Scrap of Paper: Breaking and Making International Law during the Great War* by Isabel v. Hull

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Russia's military incursions in Ukraine earlier this year violated international law. So did China's implementation of an air defense identification zone above Japanese islands in the East China Sea. The United States violated international law by sending military forces into Iraq in 2003 and Serbia in 1999—as did a number of European countries, like Great Britain, which joined these interventions. Russia and the United States have also violated the laws of war in recent conflicts—Russia in Chechnya, the United States in Iraq. Russia and China routinely violate human rights law. The West imposed modest sanctions on a handful of Russian officials and firms after the Ukraine violations, but otherwise none of these countries faced sanctions for their legal violations.

And yet it is rare for countries to admit that they violate international law, or to argue that they are free to violate international law. Vladimir Putin justified the Ukraine incursion in a speech that elaborately weaved in themes of international law and political morality. The U.S. government tried to justify the 2003 Iraq War based on old Security Council resolutions and human rights considerations. China has argued that its claims in the East China sea are based on historical title.

We are left with questions. Do countries care about international law, or do they comply with it only when it happens to coincide with their interests? If they don't care about international law, then why do they try to justify their actions under it? But if they do care about international law, how do we explain the violations? What role does international law play, anyway?

Isabel Hull tries to answer these questions in her new book about the role of international law in World War I. The title of the book comes from the notorious statement of Germany's Chancellor Bethmann Hollweg, who said that a treaty guaranteeing the neutrality of Belgium was only a "scrap of paper," and so Germany's violation of it did not justify entry into the war by Great Britain (p. 42). That statement, along with the unprecedented savagery of that war, has contributed to a historical memory of World War I as a war that was completely ungoverned by law. It was the "bad war" to World War II's "good war," one in which all combatants behaved lawlessly, and where fault for the barbarity could not be clearly attributed to any one country.

Hull seeks to set the record straight. First, she tries to show, through a meticulous examination of the voluminous archival records, that governments on all sides did take law seriously even if they did not always follow it. Second, she argues that Germany bears primary responsibility for the war because it took law less seriously than the Allies did. The claim that everyone committed law violations so no one was at fault for the war does not hold water.

World War I seems like an unpromising place to look for the influence of international law. While the German invasion of France was probably not a violation of international law at the time—there were no clear rules that prohibited countries from invading the territory of each

other—Germany did violate numerous other laws. In addition to violating the treaty guaranteeing Belgian neutrality, Germany executed Belgian civilians; starved POWs and used them as human shields; authorized U-Boats to blow up merchant ships and allow survivors to drown; deployed poison gas, flame-throwers, and dum-dum bullets; and bombed civilians from Zeppelins. All of these activities either violated international law or the humanitarian spirit of many international norms.

The allied countries were not blameless either. Britain launched a blockade against Germany which led to the starvation of thousands of civilians. It disregarded other rules that constrained military operations at sea. The Allies also used poison gas, and mistreated POWs, although not as badly as Germany did.

Hull's key point is that for all that, governments—or officials within the governments—spent countless hours debating the minutiae of international law. Even the Germans did. Indeed, Hollweg himself acknowledged that Germany had committed an injustice by invading Belgium and announced that Germany would “seek to make [the injustice] good as soon as our military goal is reached.” (p. 44). That these debates frequently occurred in confidential meetings inside governments suggest that officials took the law seriously, and didn't just trot out arguments to rationalize actions that they had decided on for military reasons.

However, for all the internal debate, Germany officially argued that none of its actions violated international law. In some cases, the law was genuinely ambiguous, and a reasonable claim could be made. For example, Germany could reasonably argue that its U-Boats had no duty to rescue survivors of ships it sank if they thereby exposed themselves to an enemy attack. But in the harder cases, Germany relied on three sweeping arguments.

First, Germany argued that “military necessity” justified actions that otherwise violated the letter of the law. The invasion of Belgium was justified because unless Germany preemptively attacked France, it would be strangled by its enemies, and the only practical way to invade France was through Belgium because of defenses along the border with France.

Second, Germany appealed to the doctrine of changed circumstances, arguing that laws and customary norms that arose for nineteenth-century conditions did not make sense in the twentieth century. The purpose of the treaty guaranteeing Belgian neutrality was to block territorial aggrandizement by post-Napoleonic France, not to block Germany from countering the military ambitions of France.

Third, Germany argued that many of its putative violations were justified as reprisals. Under international law at the time, a country could violate the letter of the law in order to retaliate against an enemy who violated it first. Germany argued that its mistreatment of POWs was justified retaliation against the Allies for their mistreatment of German POWs.

As Hull explains, these arguments were all based on valid doctrines of international law, but Germany took them much farther than any other country had, with the effect of virtually wiping out all international law. Most international lawyers believed that military necessity could justify narrow, tactical violations of international law in extreme circumstances; that's a far cry from invading Belgium so as to avoid French border defenses.

Hull argues that while the Allies also violated international law, their violations were not nearly as rife. Allied treatment of German POWs was relatively humane. Violations occurred but they were sporadic and rarely the consequence of official policy, unlike in Germany. Britain's law violations like use of poison gas was based on a more reasonable view of reprisal than Germany's as the UK claimed the right to use poison gas only as long as Germany did.

Germany believed that Great Britain violated international law by imposing a blockade that killed hundreds of thousands of German civilians as a result of starvation or malnutrition. Hull argues that a blockade that killed civilians was lawful (or at least not clearly unlawful) at the time, so long as civilians were not "targeted"; that the British started out their blockade within a legal framework; and that the British thought long and hard about the legal ramifications of the blockade. Still, she admits that the British blocked lawful forms of trade between neutrals and Germany by stretching the definition of contraband, declaring a war zone in areas where military operations did not exist, and deploying other subterfuges.

Her bottom line is that the Allies did not violate international law as flagrantly and cynically as Germany did. Why not? Hull points to a number of factors. Civilian authorities exerted greater control over the military in the UK and France than in Germany, where the military operated almost autonomously. The UK and France also benefited from better organized governments, whose parts coordinated with each other effectively. Thus, the military could be forced to heed the foreign ministry's judgment that law violations would antagonize neutrals. And the UK and France had more legalistic cultures than Germany did. So while the militaries in all countries were less concerned about international law than civilian authorities were, the German military enjoyed greater freedom to act on its views.

But a probably more important reason is that the UK and France believed that international law served their interests; Germany did not. This was due to some fundamental asymmetries. The UK was the major sea power; and it used that power to strangle the Germany economy. The laws governing sea power greatly favored the UK. Under international law a country could intercept and block neutral shipping to an enemy country only if it could maintain a "real" as opposed to "paper" blockade. The UK, with its many ships, could do that; Germany, whose navy was inferior to the British navy, could not. Germany possessed U-Boats but not in numbers sufficient to maintain a blockade, so the destruction of shipping with those U-Boats was illegal. And international law obligated warships to stop and inspect neutral vessels in order to check for illegal contraband—they could not just blow them up based on suspicion. This was possible for warships but not (according to Germany) for submarines, which became vulnerable to attack if they surfaced.

From Germany's perspective, the international legal regime exposed it to threats from all sides, and the only way it could protect itself was by launching a preemptive attack on land. The protections for POWs turned out to burden Germany more than the Allies because Germany captured many more enemy soldiers, and so providing care for them imposed greater costs on Germany. Belgian neutrality also blocked Germany from taking its rightful place in Europe.

Why did international law favor the Allies? The reason is that most of the relevant international law had emerged over the previous century, a period of British dominance and German

weakness. Britain was able to scuttle efforts to legally regulate military operations on the sea, and thus was able during World War I to rely on older customary norms that were vague and harsh. The efforts to regulate military operations on land were more successful; Germany consented to them while maintaining an extremely narrow interpretation of them, possibly because it was trying to avoid international isolation. But, in fact, Germany was isolated in law just as it was politically. International law always favors status quo powers because those are the countries that make it. Newly powerful countries and revolutionary countries are the usual lawbreakers—Germany, the Soviet Union, and, today, China.

It's harder to tell whether legal culture played an important role in the countries' attitudes toward international law. Hull quotes a great many officials in all three governments, and a pattern emerges. Some officials—typically lawyers in the foreign office—adopted a legalistic stance and argued that their governments should obey international law as a matter of national honor. Other officials—typically in the military—argued that international law was all nonsense. But most officials in all the countries adopted a pragmatic or instrumental attitude. For them, international law should be obeyed when it advanced the government's interest; otherwise, it should be ignored, evaded, or interpreted narrowly.

How exactly to tell whether obeying international law advanced the government interest could be tricky. In some cases, international law clearly favored one country over another—so, for example, the British argued that unrestricted submarine warfare violated international law while the Germans argued that it did not. In more complicated cases, international law depended on reciprocity. Both sides thought that some of the POW rules advanced their interests only so long as the other side obeyed them. But each side found certain rules excessively burdensome and ignored them. As we saw, the British could not accept some of the rules that constrained blockade; the Germans disregarded many of the rules that protected POWs.

The governments also cared about the attitudes of neutral countries and world opinion. Neutral countries mattered because they traded with the belligerents, and because they might at any time enter the war on one side or the other. And world opinion could influence the decisions of the neutral governments. But the implications for international law were complicated. The neutrals did not try to serve as impartial enforcers of international law. They, too, took an instrumental approach, demanding compliance with international law that benefited them, above all laws that permitted neutrals to trade with enemies and protected neutral shipping. World opinion similarly was not really legalistic. Foreign populations were outraged at German atrocities at the time, but ordinary people reacted to the horrors of war, not legal violations. As Hull notes, opinion turned against the Allies and Germans alike after World War I. After the war, people did not give credit to the Allies for their greater level of law-abidingness during the war.

The safest conclusion from all this is that countries agreed to laws of war in order to limit war but only when doing so did not put them at a disadvantage. But where it turned out that they had miscalculated, or circumstances changed, they disregarded those rules that put them at a disadvantage. Germany violated the law more than the Allies did because the laws hurt them more—either because Germany miscalculated when it negotiated the laws, failing to see how those laws would interfere with their interests in the future; or because circumstances turned against Germany more than they did against the other countries.

Hull seems open to this view at various places in her narrative. She agrees that countries supported international rules that advanced their interests. But in her concluding chapter her argument takes a turn. She takes aim at “realists”—commentators who believe that international relations are characterized by an anarchic security competition where states struggle for power. She attributes to realists the view that no one was at fault for starting World War I—it was the result of billiard-ball like states rationally maximizing power and prestige—and that law had nothing to do with it. Hull argues that while Germany was “realist,” it was also an outlier. The other countries did not act as realists say they should—they took international law seriously—and they won the war.

An immediate problem with this argument is that Hull does not look at all the belligerents. She focuses on France, Great Britain, and Germany. She doesn’t discuss abuse of POWs by the Ottoman Empire, or even the Armenian genocide, or the Ottoman Empire’s various breaches of its obligations as a neutral before it entered the war. Nor does she discuss Austria-Hungary or Russia, which held millions of POWs under brutal conditions, or lesser belligerents like Japan, Italy, and Serbia. Hull cannot be faulted for limiting the scope of her research to a manageable number of countries, but it is doubtful that the others shared the legalistic outlook of the UK.

To be sure, Hull is right that if realists believe that international law doesn’t matter, then it’s hard to understand a lot of the behavior of officials during World War I—or now, for that matter. As she shrewdly points out, if international law were a ploy, then while one might expect phony public arguments about international law, the secret debates about international law that took place within governments would be hard to explain. Why would officials make elaborate legal arguments if the law doesn’t matter? But not all realists believe that law doesn’t matter. Many realists believe that law affects decisions on the margin, and Hull doesn’t refute this view. In Hull’s telling, even the Allies disregarded the law when it stood in their way.

An even more perplexing problem for Hull is that public opinion in the 1920s placed the same amount of blame for the war and its destruction on the Allies as on Germany; many historians would also take this view. Why didn’t the public give allied governments credit for complying with international law, or at least trying to? Hull attributes this to Britain’s failure to comply with the unrealistically high legal standards it espoused to the public and to Germany’s successful post-war propaganda campaign. Maybe, but doesn’t this mean that the Germans were right that in the long term they would not be blamed for their legal violations? Indeed, the attempt to place all the legal blame on them in the war guilt clause in the Versailles Treaty backfired badly.

As Paul Fussell argued in *The Great War and Modern Memory*, for many Europeans World War I was the end of civilization—“a hideous embarrassment to the prevailing Meliorist myth which dominated the public consciousness for a century.” International law played a central role in this myth, and thus stood condemned for its contribution to the slaughter in the trenches. That slaughter—or 99 percent of it—was, after all, legally unassailable. It was, moreover, the system of alliances under international law that turned a localized dispute in the Balkans into a World War. The extinction of the Meliorist myth may explain why efforts by the Allies to prosecute German and Ottoman leaders collapsed and the war guilt clause and reparations were seen as victor’s justice. If the whole system was corrupt, the question of which country acted most consistently with it—the topic of Hull’s book, and the basis of her condemnation of Germany—

was idle. And what country was the greatest champion of this failed system of international law?—Great Britain.

But if Hull's final conclusions are open to question, her book is well worth reading. Her exhaustive research will benefit historians and international lawyers alike. And there are interesting parallels between the debates about international law in the governments she surveys and the debates about international law that have taken place in the Bush and Obama administrations. There, too, one sees a range of opinion with most official decisions based on instrumental considerations, rather than a legalistic or "realist" attitude toward international law. And internationally, it is hard to avoid seeing parallels between Great Britain and the United States, and Germany and China—the legalists who benefit from the status quo and the rising powers that chafe at it. International law is more intricate than it was one hundred years ago, but otherwise not much has changed.