A Scrap of Paper

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Breaking and Making International Law during the Great War

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For My Beloved Michiganders
(in order of acquaintance)
Gayle, Lynn, and Vicki

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Preface

This book began with a small research project on the interpretation of military necessity in Imperial Germany before World War I.[1] It discovered an enormous cleft between the latitudinarian views current in Germany and the narrow interpretation common in most other Western countries. Military necessity and the laws of war are on opposite ends of a seesaw—the more power you grant to military necessity, the less the law applies or is obligatory, so the stakes at issue are very high. The difference between Germany and other European states was so great that I wondered if it could possibly be true in practice. Finding out meant comparing the actual conduct of war. The obvious comparison seemed to be the great land power (Germany) fighting on land versus the great naval power (Britain) at sea, since states especially tend to minimize the restrictions of international law in the areas of their greatest strength. So, I began to study the British blockade during the Great War as the most apt comparison to Germany's war on land.

As anyone who has visited the British National Archives knows, on your way to your seat you pass a large card cabinet, actually several cabinets together, measuring perhaps twenty feet in length. Now itself classified as a document (FO 370), these index cards rubricized the Foreign Office's documents after 1910 and throughout the war. As I searched for blockade documents, I discovered a large number of rubrics and a staggering number of files dealing directly with issues of international law during the war. Each file revealed extensive correspondence inside the Foreign Office and between it and the War Office, the Admiralty, the attorney general, and others, arguing about what was permissible in the war and why. Obviously, international law was of more importance to how the war was fought than a mere comparison of the blockade to Germany's land warfare would

1. Isabel V. Hull, "'Military Necessity' and the Laws of War in Imperial Germany," in *Order, Conflict, Violence,* ed. Stathis Kalyvas, Ian Shapiro, and Tarek Masoud (Cambridge, 2008), 352–77.

uncover. Consequently, I widened the project to other areas: prisoners of war, automatic contact mines, reprisal, civilian detainees, aerial bombardment, hospital ships, etc. It became important to discover not just the differences between states, but the extent to which international law affected the conduct of the war.

There was a second problem, as well. It was hard to tell if the differences between how Britons and Germans understood law did not simply reflect the difference between the common law and its ways of thinking and those of the Continental civil law tradition. Adding Britain's ally, France, provided a way to check, for when France disagreed with Britain and interpreted law similarly to Germany, we may conclude that their respective positions reflected the common law / Continental law divide and not deeper divisions over the nature of law and war.

The resulting comparative project, covering so many different subjects over four and a half years of war, outstripped the capacity of a single researcher in a single lifetime and was furthermore impossible to distill into a single volume that covered all aspects of the laws of war. Consequently, I have chosen two foci for this book. The first is the original question: How different (or similar) was Imperial Germany from the Western Allies in its interpretation of international law?[2] The second is simply to demonstrate to modern readers a fact that post-1919 writings, academic and popular, have resolutely denied or obscured, namely, that international law was central to how and why the Great War was fought. The first chapter explores why we no longer know this.

Finally, I have chosen to discuss those rubrics that seem most likely to demonstrate in detail these foci. This book therefore does not cover the entire range of subjects concerning international law during the war. James W. Garner's two-volume work, *International Law and the World War,* published in 1920, is still the best compendium of and commentary on the legal issues raised by the war.[3] Garner lacked access to internal governmental correspondence, but the reader will still find his work extremely valuable. It is not a flattering commentary on our times that no scholar has attempted to update Garner's work. Throughout, I have been careful to avoid the anachronistic practice of reading backward our own, often quite different, legal standards. That is why most of the legal writings cited in this book are the old ones, contemporary to the war or before.

I must also admit another motive in writing this book. I have been deeply dismayed by the lawlessness of my own country in its pursuit of the "war on terror." But I am a historian, and not even of the United States. Like most historians, I work out my preoccupations by trying to understand why the dead did what they did when they were as quick, and as responsible, as we are now. I hope that the reader, without misapplying contemporary standards to the past, will still find it helpful to contemplate the choices available when war and law meet.

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2. For the most part "international law" will refer to what was then known as the "laws of war," now called "international humanitarian law." But the fact that the laws of war had recently been codified into convention or treaty law, together with Germany's violation of Belgian neutrality, means that, for the Allies and for this book, "international law" must also be understood more widely as the laws regulating interstate behavior in peace and in war.

3. James Wilford Garner, *International Law and the World War* (London, 1920).

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Abbreviations

AA	Auswärtiges Amt (German Foreign Ministry)
AA/PA	Auswärtiges Amt, Politisches Archiv
AJIL	*American Journal of International Law*
AKO	Allerhöchstes Kabinettsorder (Imperial Edict)
BAB	Bundesarchiv Berlin-Lichterfelde
BayKrA	Bayerisches Kriegsarchiv
BD	*British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print.* Part II: From the First to the Second World War.
BPNL	*Bescheiden Betreffende de Buitenlandse Politiek van Nederland 1848–1919, Derde Periode 1899–1919, Vierde Deel, 1914–1917.*
CIL	customary international law
CRB	Committee for the Relief of Belgium
DDFr	France. Foreign Office. Commission de publication des documents diplomatiques français. *Documents Diplomatiques Français*
DoL	Declaration of London (*1909*)
FO	Foreign Office (Great Britain)
FOPD	Foreign Office Prisoners of War and Aliens Department
FRUS	United States. Department of State. *Papers Relating to the Foreign Relations of the United States; 1914–1918; Supplement: The World War.*
GG	General Government
GP	Germany. Foreign Office. *Die grosse Politik der Europäischen Kabinette, 1871–1914. Sammlung der Diplomatischen Akten des Auswärtigen Amtes.*
Hansard	*Hansard's Parliamentary Debates*
ICRC	International Committee of the Red Cross

ILC	International Law Committee (Britain, *1918*)
KEO	Kriegs-Etappen-Ordnung
MAE	Ministère des affaires étrangères (French Foreign Ministry)
MP	Member of Parliament
NOT	Netherlands Overseas Trust
OHL	Oberste Heeresleitung (German high command)
RGDIP	*Revue Générale de Droit International Public*
RMG	Reichsmilitärgericht
SHAT	Société historique de l'armée de terre (French army archives)
Sten.Ber.	*Stenographische Berichte über die Verhandlungen des Reichstags*
StGB	*Strafgesetzbuch*
TNA	The National Archives (Great Britain)
UA	Germany. National Constitutional Assembly. *Das Werk des Untersuchungsausschusses der Verfassunggebenden Deutschen Nationalversammlung und des Deutschen Reichstages, 1919–1928, Verhandlungen, Gutachten, Urkunden.*

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Prologue

What We Have Forgotten

Precisely four years after the beginning of the First World War, the British minister of blockade, Robert Cecil, approved an internal memorandum written by the Political Intelligence Department of the Foreign Office setting out, among other things, why the Allies fought and how they had explained the war to neutrals and to their enemies. It summarized "the principles at stake in the war" as the destruction of "Prussian militarism" and the triumph of "the ideal of a peaceful settlement based on the rights of small nations, on the reign of international law, and on the introduction into all civilised States of the principle of democratic responsible government."[1] The memo might almost have cited Prime Minister Herbert Asquith speaking to Parliament four years earlier, when he explained that Britain fought "to fulfil a solemn international obligation" against "material force" that threatened to crush "small nationalities" "in defiance of international good faith."[2] "International obligation" and "international good faith" were synonyms for international law. During the entire war those aims had remained the same. They were expressed equally commonly in private letters and in public statements and propaganda. They were so obvious that the (London) *Times* arranged its *Documentary History of the War* into these sections: diplomacy, naval, military, overseas, and international law. Few would have quarreled with Sir Graham Bower (formerly of the Admiralty) that the Allies were "engaged in the defense of international law and justice," or with the most renowned international lawyer of the day, France's Louis Renault, when he wrote

1. Robert Cecil to Committee on Economic Defence and Development, Aug. 1, 1918, *BD,* ser. H, vol. 8: 322, 324.

2. J. A. Spender and Cyril Asquith, *Life of Herbert Henry Asquith, Lord Oxford and Asquith* (London, 1932), 2:114.

(1917) that "the goal of the present war must be to affirm the sanctity of treaties, the destruction of the German theory that necessity justifies the violation of all the laws of war, the guarantee of the existence of small states, the development of arbitration."[3]

International law was so central to how contemporaries interpreted the war because law was a linchpin and guarantee of the post-Napoleonic European state system that the war seemed to be destroying. Many international-legal norms, especially humanitarian ones, long predated 1815; others were the precipitate of the security interests, needs, and mutual claims of the large and small states that defined themselves as the community of self-styled "civilized" states. The legal system they created was set down in treaties and visible in customary practices that had come to be recognized as obligatory. They included rules of war. Beginning in 1856, the rules of war began to be codified. The successful agreement on the rules of land warfare concluded at the Hague Peace Conferences of 1899 and 1907, and the creation of the Permanent Court of Arbitration (1899) and the International Prize Court (1907) seemed to usher in an era of progressive development in which the rule of law would more and more displace the resort to war. August 1914 shattered that hope. More important, violations of treaty law and the laws of war in the opening weeks challenged the international legal system that had defined Europe and held it together. Leaders and public opinion in Great Britain and France were the first to see the war as a titanic struggle over law, a kind of European civil war. Germany almost immediately reciprocated; both sides henceforth vied with one another to claim the international-legal high ground. This was not just or even mostly a public relations battle. Meters and meters of internal documents and diplomatic correspondence record the central role of law in forming war policy, justifying that policy to neutrals, judging one's enemies, and measuring the existential danger they posed. The Allies had two interpretations of the clash of legal systems. The more common one condemned Imperial Germany as a criminal state that disregarded law altogether. International lawyers like Renault instead saw in Germany's actions an alternative "German theory" of law rooted in (military) necessity. As we shall see, there were actually several competing German theories. Judging from their vantage points, it was the Allies who appeared as scofflaws or as self-interested promoters of obsolete or unrealistic legal principles. Therefore, three main objects of this book are, first, to analyze and compare the belligerents' legal assumptions; second, to explore their implications for international law and how it operated and changed *in extremis;* and, not least, third, to examine the effect of international law on the actual conduct of war—that is, on the major governmental decisions on how the war was to be fought (not on atrocities or war crimes committed by individuals).

Three weeks after the Armistice, Britain's attorney general and its law officers issued a report on how to rebuild the legal system after the "dangerous challenge to the fundamental

3. Graham Bower, "The Laws of War: Prisoners of War and Reprisals," *Grotius Society, Problems of the War: Papers Read before the Society in the Year 1915* 1 (1916): 24; Louis Renault, *Les premières violations du droit des gens par l'Allemagne, Luxembourg et Belgique* (Paris, 1917), 81. Renault was, in turn, citing the British international jurist Pearce Higgins.

principles of public law" that defeated Germany had posed.[4] Like the leaders of Britain and France, they favored trials of the Kaiser and his generals. Attorney General Frederick E. Smith was confident that "common people" everywhere saw what was at issue. "These things are very easy to understand, and ordinary people all over the world understand them very well." In November 1918, Smith was undoubtedly correct, but in a few short years, what was so completely obvious to contemporaries had become just as completely erased.

That erasure continues to this day in both academic writing and popular culture. It has robbed the war of meaning. The Great War has come to stand for tragic senselessness (*Oh! What a Lovely War*) and pointless mass death. A further aim of this book is to restore international law to its rightful place in the conflict, to recall the great stakes at issue in 1914–18, as well as to explore the complexities of international law during belligerency.

Before beginning that task, we must examine why and how international law became forgotten. This subject deserves an entire book, because many of the misconceptions driving the erasure process continue to mislead us about what international law is and how it works, and about its relation to power and high politics. Here, we can only briefly survey the matter.

Forgetting was an active process that began with a threefold disillusionment. First, pacifists were frustrated that the laws of war codified at the Hague Peace Conferences had not prevented war altogether. That, of course, was not the mandate of those laws, which was rather to "mitigate the severity [of war] as far as possible."[5] Second, the laws of war did little to prevent the shocking carnage among soldiers. Artillery shells and machine guns, the two main causes of combat death, were perfectly legal when used against regular troops. Four and a half years of killing, ten million soldiers' deaths, were simply appalling. As Adam Roberts writes, "law [had] got separated from some of the real causes of moral concern" to the public.[6] Third, the very clash of legal views among the belligerents produced confusing claims and counterclaims of violations that seemed easiest to sum up as a tit-for-tat process of destruction. Even U.S. Secretary of State Robert Lansing (a lawyer) despaired in December 1916 that "every new breach begat another, which in turn begat others, until the standards of right sanctioned by treaties and usage, were torn to bits."[7]

But building on these disappointments, the eclipse of international law's reputation among the public after 1919 was most strongly determined by two propaganda campaigns: paradoxically, the successful British one during the war, and the successful German one afterward. The first made international law the centerpiece of attention, the second erased it.

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4. Imperial War Cabinet meeting No. 39, Nov. 28, 1918; the appendix is the full report, G.T.-6411, TNA CAB 23/42. Hereafter, TNA will be omitted; all archival signatures beginning with CAB, FO, WO, and ADM are from The National Archives, Great Britain.

5. Preamble to Convention (IV) Respecting the Laws and Customs of War on Land [the Hague Rules], in *Documents on the Laws of War,* 3rd ed., ed. Adam Roberts and Richard Guelff (Oxford, 2004), 69.

6. Adam Roberts, "Land Warfare: From Hague to Nuremberg," in *The Laws of War: Constraints on Warfare in the Western World,* ed. Michael Howard, George Andreopoulos, and Mark Shulman (New Haven, CT, 1994), 125.

7. Lansing memo of Dec. 1, 1916, United States, *Papers Relating to the Foreign Relation of the United States: The Lansing Papers, 1914–1920,* 2 vols. (Washington, DC, 1939), 1:229.

Although both the French and German foreign offices had press sections, Britain entered the war with none. Its propaganda effort developed from scratch; in the formative days of August and September 1914, it simply reacted to widespread shock at Imperial Germany's methods of warfare, relying on volunteers to put into words and images what Britain's leaders and the Allied and neutral public already felt.[8] Already on August 2, a liberal Belgian paper used the word "barbarism" to describe the German campaign. Repeated by French philosopher Henri Bergson in Paris on August 8, barbarism versus civilization became the organizing epithet of the struggle, with its suggestion that Germany had left the community of the civilized.[9] As Britain belatedly assembled its propaganda apparatus, it adopted several rules that responded to the ill repute of propaganda in a liberal society. Its propaganda would be based on facts, not lies, nor on heavy censorship at home; it would primarily target neutral public opinion; and it would be subtly contoured to its foreign audience rather than an ostentatious display of government opinion.[10]

The resulting British propaganda campaign was massive, successful, and partly secret. In less than a year, Wellington House, the coordinating organ, had issued two and a half million publications; two years into the war, it ran six semimonthly newspapers, had published three hundred books and pamphlets, commanded three hundred distribution centers in Latin America alone, and circulated four thousand photos each week to newspapers.[11] One of the most influential publications was the "German crimes' calendar," devoted to striking violations of the laws of war. As one German observed regarding the effects of this deluge on opinion in America, "Today we may say that the three names Louvain, Reims, Lusitania, almost in equal measure, have wiped out sympathy with Germany."[12]

Together with the facts, however, exaggerations and untruths also circulated, some under government cover but most via the popular press. These myths later discredited the entire campaign. The most notorious legend concerned the allegation that German soldiers had hacked off the hands of infants and children in Belgium and Northern France. No genuine eyewitnesses or mutilated corpses were ever found.[13] The severed-hands myth

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8. Prime Minister Herbert Asquith to King George V, Aug. 31, 1914, CAB/41/35/38; Asquith to King, Sept. 5, 1914, ibid., CAB 41/35/41; Alan Kramer, *Dynamic of Destruction: Culture and Mass Killing in the First World War* (Oxford, 2007), 13–14; Michael L. Sanders and Philip M. Taylor, *British Propaganda during the First World War* (London, 1982), 25–35, 37; Gary S. Messinger, *British Propaganda and the State in the First World War* (Manchester, 1992), 33–36.

9. Daniel H. Thomas, *The Guarantee of Belgian Independence and Neutrality in European Diplomacy, 1830s–1930s* (Kingston, RI, 1983), 495; Kramer, *Dynamic of Destruction,* 183; Sophie De Schaepdrijver, *La Belgique et la Première Guerre Mondiale* (New York, 2004), 73.

10. Messinger, *British Propaganda,* 37–39, 90, 123; Sanders and Taylor, *British Propaganda,* 143; Marion Girard, *A Strange and Formidable Weapon: British Responses to World War I Poison Gas,* Studies in War, Society and the Military (Lincoln, UK, 2008), 129–30. In fact, the foreign offices of Britain, France, and Germany all tried to check facts before issuing public statements, though the armies and navies were variously cooperative and mostly rather slow to respond.

11. Messinger, *British Propaganda,* 40–41.

12. Kramer, *Dynamic of Destruction,* 30; Sanders and Taylor, *British Propaganda,* 119.

13. John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven, CT, 2001), 202–4, 212–25; Trevor Wilson, "Lord Bryce's Investigation into Alleged German Atrocities in Belgium, 1914–1915," *Journal of Contemporary History* 14, no. 3 (July 1979): 369–83.

was at least partly the creation of the free press, which heedlessly multiplied the rumor. Newspapers often rushed ahead with "squalid forms" of propaganda unsanctioned and in many cases condemned by the government's own propaganda agencies.[14] Later critics lumped them together, tarring the government with the brush of yellow journalism.

More troublesome than lurid false stories was secrecy. The existence of Wellington House was unknown to the public for two years, and one of the most successful British propagandists working in the United States, Gilbert Parker, did so under cover.[15] Secrecy made credible later claims of lying government manipulation.

By emblazoning international law and a stable, peaceful postwar order on their escutcheon ("The War that will end War"—H. G. Wells, September 1914), the Allies set very high standards for themselves and raised equally high expectations among their increasingly exhausted publics. It is remarkable how quickly after the Armistice liberal British newspapers measured their government against its own public standards and found it wanting. The pivotal issue was the continuance of the blockade after November 1918. Britain and France, unsure of the degree of their military victory or the constancy of their American ally, and above all unsure that Germany might not resume fighting, decided to keep the blockade in order to force Germany to sign the peace treaty. As reports trickled out on the parlous health of German civilians, the British government, but not the French, favored relaxing the blockade. By March 1919, liberal journals in Britain pilloried their government in the same register as wartime propaganda. "The failure to raise the blockade has been a political and moral failure," wrote the *Nation*. It claimed that "Germany is being turned into one vast concentration camp," and the rest of the press was hushing up the truth.[16] The following week it asked, "Will history, assigning to Germany the guilt of making the war, assign to the victorious Allies the equal guilt of making a peace which is no peace, but is sown thick with the seeds of hate and future strife?"[17]

These sentiments revived the criticisms of radical liberals and pacifists briefly silenced in August 1914. Some of them had founded the Union of Democratic Control (UDC) to protest Britain's entry into the war, which they saw as the predictable result of Foreign Minister Sir Edward Grey's dishonest, covert policy of entente with France.[18] One UDC member, E. D. Morel, radical liberal and gifted muckraker, in 1916 published *Truth and the War,* setting out this alternate view of the war. Honing a standard radical-liberal criticism of Britain's foreign-policy makers, he argued that the war was the product of secret, antidemocratic diplomacy and its ill-begotten alliance machinery.[19] In 1919 this

14. Messinger, *British Propaganda,* 76.

15. Ibid., 38, 54–68.

16. "The Infamy of the Blockade," *Nation,* Mar. 8, 1919, cited in *The Blockade of Germany after the Armistice, 1918–1919: Selected Documents of the Supreme Economic Council, Superior Blockade Council, American Relief Administration, and Other Wartime Organizations,* ed. Suda Lorena Bane and Ralph Haswell Lutz (Stanford, CA, 1942), 724–25.

17. *Nation,* Mar. 15, 1919, ibid., 732. The *Nation*'s campaign was joined by the *Daily News* and the *Daily Herald,* ibid., 770, 785, 794.

18. John Viscount Morley, *Memorandum on Resignation August 1914* (London, 1928).

19. Annika Mombauer, *Origins of the First World War: Controversies and Consensus* (New York, 2002), 89–93.

well-developed line of radical attack merged with war fatigue, suspicion of war-swollen government, shame at the very success of the blockade and hate-inducing propaganda, and the relaxation made possible by victory.[20] It made some Britons (and isolationist, pacifist, and some self-styled progressive Americans, but fewer French people) susceptible to the unmasking of putative government lies, including the propaganda campaign's claims about international law. In the most influential political book of 1919, the economist John Maynard Keynes added his authority to the growing disillusionment by referring to "so-called international law" in the course of his bitter critique of the economic provisions of the Versailles Treaty.[21] The controversial treaty quickly came to epitomize the seeming falsity of Allied claims about law. For the treaty contained a theory of the origins of the war ("the aggression of Germany and her allies"—article 231), an indictment of the Kaiser and others on war crimes (articles 227–30), and was itself the legal cornerstone of the postwar world and a succinct expression of Allied diplomacy—in short, it was a perfect icon of international law, and, if one opposed the treaty, a perfect icon of all that ailed international law.[22] By the spring of 1919, the grounds were thus set among the victors and some neutrals for a radical revision of the history and meaning of the World War.

This perfect storm of opinion and emotion opened up exciting possibilities to a German state trying to escape the consequences of its defeat. During the war, Germany had become hypersensitive to propaganda. It had been first off the blocks in August 1914, inundating Europe with tendentious news about the war.[23] That early advantage soon vanished as Germany's conduct of the war in Belgium and Northern France became known through refugee and eyewitness reports. By the end of August, the German foreign office (Auswärtiges Amt, or AA) was scrambling to counteract stories in the Allied and neutral press about mass executions, the burning of Louvain and other towns and villages, pillage, shelling of cultural monuments (the cathedral of Reims), and so on.[24] Germany's ambassadors begged for "quick denials with as concrete details as possible in order to stop the planting of lies," but that method often backfired.[25] The *démentis* too often proved false, or significant details were wrong, discrediting the denials altogether. Germany then switched to general denials and *tu quoque* charges—you are as guilty as we are—against the Allies. But these also rested on information provided by the military, and, worse, they often incorporated tough, military language unconvincing or even repulsive to neutrals, the main audience in the propaganda wars. By April 1915, legation secretary Bruno Wedding of the

20. Archibald C. Bell, *A History of the Blockade of Germany and of the Countries Associated with Her in the Great War, Austria, Bulgaria, and Turkey, 1914–1918* (London, 1937), 554; Avner Offer, *The First World War: An Agrarian Interpretation* (Oxford, 1989), 398–401.

21. John Maynard Keynes, *The Economic Consequences of the Peace* (New York, 1920), 71–72; Étienne Mantoux, *The Carthaginian Peace; or, the Economic Consequences of Mr. Keynes* (London, 1946).

22. The Treaty of Versailles, June 28, 1919, available through the Avalon Project, Yale University, http://avalon.law.yale.edu/subject_menus/versailles_menu.asp.

23. Messinger, *British Propaganda,* 33–34, 36; Poincaré diary entries of Aug. 11, 12, and 14, 1914, in *The Memoirs of Raymond Poincaré, 1914,* trans. George Arthur (Garden City, NY, 1929), 34–35, 42–43, 48, 105; Ambassador Beau to Delcassé, Bern, Oct. 29, 1914, *DDFr* 1: doc. 440.

24. Jagow to AA, GHQ, Aug. 29, 1914; Zimmermann to Jagow, Berlin, Aug. 31, 1914, AA/PA R 22382.

25. Ambassador Beau, Bern, in Zimmermann to Jagow, Berlin, Nr. 1427, Oct. 4, 1914, AA/PA, R 22383.

AA had despaired; in his view, Germany had lost the propaganda war.[26] Gary Messinger, a historian of British propaganda, argues that the German propaganda campaign was handicapped not only by organizational bifurcation characteristic of Imperial German government, but also by the "failure to understand foreign audiences." The "bluntness," "extreme nationalism," and "blustering mannerisms" that characterized German propaganda were, he maintains, "the consequences of growing up in an autocratic culture, where . . . practice in listening to opposing points of view was limited."[27]

Cosmopolitan Germans fretted about precisely these shortcomings. The Catholic Center Party leader Matthias Erzberger, a propaganda activist during the war, noted that Germany's violation of Belgian neutrality made Belgium "the darling of the world"; the éclat concerning the Belgian deportations (1916) finished off all German hopes: "Germany lost the game completely," he concluded.[28] Unable to defend how it conducted the war, Germany was equally unable to provide positive reasons why neutrals should hope for a German victory. The claim of higher German *Kultur* rang hollow. Theodor Wolff, editor of the *Berliner Tageblatt,* complained in November 1914 that "presenting German culture as the savior of world culture is not exactly flattering for the neutrals."[29] By 1918 nothing had changed. In that year the future chancellor Max von Baden observed that "to date our claim to power has been grounded only on securing Germany's existence and vital interests," which meant, as Erich Volkmann summarized for the Reichstag investigating committee after the defeat, that "the Central Powers never developed an idea that could unite peoples like the [Allied claims of justice and freedom]."[30]

As a result, Germany, but especially the AA, learned to answer the Allies in their own coin. During the war, the AA founded institutes dedicated to counteracting the Allies' legal barrage: the War Archive of International Law (Kriegsarchiv des Völkerrechts) in Kiel, the Research Institute for the History of the War (Forschungsinstitut für die Geschichte des Krieges) and the War Archive (Kriegsarchiv) in Jena, and the German Society for International Law (Deutsche Gesellschaft für Völkerrecht).[31] It paid journalists and established useful foreign contacts. And it learned from Britain's oblique techniques. An especially good learner was Bernhard Wilhelm von Bülow, a jurist and former attaché in Washington. In June 1918, Legation Secretary Bülow found himself in charge of containing the damage from the Allied contention that Germany had started the war. Dissatisfied

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26. Wedding to Grünau, Berlin, April 10, 1915, AA/PA, R 22386.

27. Messinger, *British Propaganda,* 18.

28. Matthias Erzberger, *Erlebnisse im Weltkrieg, von Reichsfinanzminister a. d. M. Erzberger* (Stuttgart/Berlin, 1920), 8.

29. Diary entry of Nov. 16, 1914, *Theodor Wolff. Tagebücher 1914–1919; Der Erste Weltkrieg und die Entstehung der Weimarer Republik in Tagebüchern, Leitartikeln und Briefen des Chefredakteurs am "Berliner Tageblatt" und Mitbegründer der "Deutschen Demokratischen Partei,"* ed. Bernd Sösemann (Boppard am Rhein, 1984), 1:119.

30. Prince Max von Baden, *Erinnerungen und Dokumente* (Stuttgart, 1927), 253; Archivrat im Reichsarchiv Major Erich Volkmann, report on "Die Annexionsfragen des Weltkrieges," in *UA* 4:12, 19.

31. Ernst Stenzel, *Die Kriegführung des deutschen Imperialismus und das Völkerrecht; zur Planung und Vorbereitung des deutschen Imperialismus auf die barbarische Kriegführung im Ersten und Zweiten Weltkrieg, dargestellt an den vorherrschenden Ansichten zu den Gesetzen und Gebräuchen des Landkrieges (1900–1945)* (Berlin, 1973), 52.

with mere short-term efforts, Bülow already in the summer of 1918 developed the basic idea that shaped Germany's propaganda efforts during the Weimar Republic: Germany would influence public opinion through scholarship. The campaign would ostensibly be run by a "politically trained" historian with no seeming governmental contact. In reality, he was to enjoy "a special relationship of trust" with the AA.[32]

Because of the crush of events following the Armistice, it took several years before Bülow's idea could be put into practice. The AA first poured its energy into trying to avoid the coming reparations bill. That effort helped establish the later template for Weimar-era propaganda. First, Bülow was put in charge of sifting diplomatic documents to build a legal case disproving Germany's "war guilt." The AA thus joined the fight on the same terrain and using the same legal language as the Allies. Second, Bülow's office became institutionalized as the "Guilt Office," or Schuldreferat. The Schuldreferat coordinated propaganda into the 1930s. Third, the AA used moderate professors with good reputations among the neutrals to present to the Peace Conference as their own scholarship a "professor's memorandum" on Germany's innocence that was in fact produced by the AA. None of them had read the material before they signed it.[33] Nevertheless, this first postwar propaganda campaign failed; it halted neither reparations nor the rest of the Versailles Treaty.

The effort now shifted to revising the entire treaty. Bülow was again *spiritus rector.* Although the Allies had pointed out that the Treaty of Versailles could indeed be modified, either through the League of Nations or in collective negotiation, Bülow fastened on a third, more absolute way.[34] He sought to discredit the treaty by convincing world opinion that "the whole treaty has been built upon a lie, namely on the forced confession of Germany's sole guilt for [starting] the war."[35] If one could disprove war guilt, one could expose the treaty as invalid and get it annulled.

The AA's propaganda plan was entirely in the service of German foreign policy. Continuity of personnel and decisions by early Weimar cabinets not to make a clean break with the Kaiserreich produced continuity in foreign policy, insofar as the struggle to revise the Treaty of Versailles aimed to roll back Germany's defeat, recoup its great power status, and recommence its prewar policies of prestige and power.[36] The key to this plan was treaty

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32. Bülow to Smend, June 20, 1918, cited in Erich J. C. Hahn, "The German Foreign Office and the Question of War Guilt," in *German Nationalism and the European Response,* ed. Carole Fink, Isabel V. Hull, and MacGregor Knox (Norman, OK, 1985), 47.

33. Holger Herwig, "Clio Deceived: Patriotic Self-Censorship in Germany after the War," in *Forging the Collective Memory: Government and International Historians through Two World Wars,* ed. Keith Wilson (Providence, RI, 1996), 93–94.

34. Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace (Clemenceau to Ulrich von Brockdorff-Rantzau), Paris, June 16, 1919, in *FRUS, Paris Peace Conference,* 6:935; art. 19 of the Covenant of the League of Nations, contained in the Treaty of Versailles, Avalon Project, Yale University, http://avalon.law.yale.edu/imt/parti.asp.

35. Bernhard Wilhelm von Bülow, "Völkerfrieden" unpublished manuscript, cited in Ulrich Heinemann, *Die verdrängte Niederlage; Politische Öffentlichkeit und Kriegsschuldfrage in der Weimarer Republik* (Göttingen, 1983), 57.

36. Peter Krüger, *Deutschland und die Reparationen 1918; Die Genesis des Reparationsproblems in Deutschland zwischen Waffenstillstand und Versailler Friedensschluss* (Stuttgart, 1973).

revision. A weakened Germany aimed to use history to discredit the legal underpinnings of the treaty by attacking the "war guilt" clause. Historians have since disagreed about whether war guilt could bear such a legal burden.[37] The AA's campaign against *Alleinschuld* (Germany's sole war guilt) assumed that the Allies justified the reparations burden as a legal rather than a political measure, that is, that reparations were due as punishment for launching aggressive war in violation of international law, rather than as the usual political price of losing a major war. In fact, politics and law were inextricably entwined. Article 231 of the Versailles Treaty said that "Germany accepts the responsibility of Germany and her allies for causing all the loss and damage [to the victors]…as a consequence of the war imposed upon them by the aggression of Germany and her allies."[38] The treaty made two charges: the legal one of violating treaty law and the laws of war, and the political one of launching an aggressive war, which the Allies regarded as a "crime against humanity" and which had vast legal implications because the aggression was undertaken against a state order partly guaranteed by law. *Alleinschuld* focused on the second as *pars pro toto*—the part taken for the whole.

In targeting war guilt Bülow merely followed the lead of Germany's head diplomat at Versailles, Ulrich Count von Brockdorff-Rantzau. On May 24, 1919, Rantzau had laid down the main argument against the reparations bill: Germany had signed the Armistice on the basis of President Woodrow Wilson's promise that it would be "a Peace of Right," not Might, and therefore that "the President demanded the unconditional restitution of the violated Right."[39] Under that rubric, Germany admitted to violating Belgian neutrality and via that breach to entering Northern France; it indirectly admitted waging aggressive war: "It was for this aggression," Rantzau wrote, "that the German Government admitted Germany to be responsible: it did not admit Germany's alleged responsibility for the origin of the war or for the merely incidental fact that the formal declaration of war had emanated from Germany." If the Allies now wanted to saddle Germany with reparations for the entire war, then Germany must respond by demanding reparations for the "immeasurable injury" that German civilians suffered "owing to the Blockade, a measure opposed to the Law of Nations." Five days later, the German delegation submitted an eighty-four-page rebuttal of the draft treaty. By asking for an impartial inquiry into both responsibility for the war and "culpable acts in its conduct," Rantzau's cover letter questioned Germany's responsibility for both.[40]

The Allied reply put violations of international law at the heart of the war and therefore of the proposed peace treaty. The cover letter was drafted by Philip Kerr (of the British delegation) and went out over the signature of the French prime minister, Georges

37. Fritz Dickmann, *Die Kriegsschuldfrage auf der Friedenskonferenz von Paris 1919* (Munich, 1964) argues that it could not.

38. Clearly, the Allies also included Austria-Hungary in "responsibility," as one insider in AA operations admitted: internal report by Major Alfred von Wegerer, head of the Center for the Study of the Causes of the War, cited in Heinemann, *Verdrängte Niederlage,* 230.

39. Brockdorff-Rantzau to Clemenceau, Versailles, May 24, 1919, *FRUS, Paris Peace Conference, 1919,* 6:38.

40. Brockdorff-Rantzau to Clemenceau, Versailles, May 29, 1919, ibid., 6:798–99.

Clemenceau.[41] Historians who minimize the legal weight of article 231 point out that the cover letter was "not at all an official interpretation of Art. 231," but merely a compromise designed to paper over internal Allied disagreements over reparations.[42] There were certainly disagreements, and the reply was certainly a compromise, but it is all the more striking that Britain, France, the United States, and Italy continued to agree so fully on the central issues at stake: the violation of international laws.

The cover letter began by pointing out Germany's failure "to understand the position in which Germany stands today," "as if this were but the end of some mere struggle for territory and power," that is, as if it were merely political.[43] Instead, the war was, in the judgment of "practically the whole of civilised mankind," "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilised, has every consciously committed." Germany, it said, had dedicated itself to the "doctrine that might was right in international affairs," and had set out to achieve "predominance in Europe by force." "Germany's responsibility, however is not confined to having planned and started the war. She is no less responsible for the savage and inhuman manner in which it was conducted." There followed a paragraph listing the methods and weapons that the Allies viewed as clear violations of international law. The letter then repeated a number of statements by Wilson, British prime minister David Lloyd George, and Clemenceau naming the chief Allied war aim as to "make Right the law of the world," quoting Wilson (speech of April 6, 1918). "Justice, therefore, is the only possible basis for the settlement of the accounts of this terrible war," and "reparation for wrongs inflicted is of the essence of justice." The Allies modified some economic and financial sections of the draft treaty but stuck by the reparations section. At the end, they announced that "in its principles they [the Allies and Associated powers] stand by the Treaty."

The lengthy official reply that followed was entirely consistent with its cover letter. In both the Allies pursued a dual process. On the one hand, they charged Imperial Germany with violations of international law, a clearly judicial matter pertaining mostly to how Germany had waged the war. On the other, they poured political content into legal forms. That is, as victors in a great war, they set about creating deterrents, mechanisms, guarantees, and precedents designed to establish "that reign of law among nations which it was the agreed object of the peace to set up" (962)—the legal order was meant to maintain peace in a stable European state system. The official reply and the cover letter both accorded with the private views of Wilson, Lloyd George, and Clemenceau.[44]

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41. Michael Graham Fry, "British Revisionism," in *The Treaty of Versailles: A Reassessment after 75 Years,* ed. Manfred H. Boemeke, Gerald D. Feldman, and Elisabeth Glaser (Cambridge, 1998), 581.

42. Heinemann, *Verdrängte Niederlage,* 230, following Fritz Dickmann and Klaus Schwabe: Dickmann, *Kriegsschuldfrage;* Schwabe, "Versailles Nach 60 Jahren," *Neue Politische Literatur* 24 (1979): 446–75, esp. 451n17, where Schwabe points out how very interested Britain was in pursuing war crimes trials.

43. Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace (Clemenceau to Brockdorff-Rantzau), Paris, June 16, 1919, *FRUS, Paris Peace Conference 1919,* 6:926–35, here 926.

44. On Wilson's views on German guilt: Manfred F. Boemeke, "Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles," in Boemeke, Feldman, and Glaser, *Treaty of Versailles,* 603–14; Lloyd George: Fry, "British Revisionism," 581–83, 598.

The ensuing "innocence campaign" redefined guilt in ways that made it easier to defend Germany (and the AA itself for its complicity in the July Crisis).[45] First, by focusing on "war guilt"—that is, on who began the war—the enormous question of how the war was conducted dropped from sight. For it was in the conduct of the war, beginning with the violation of Belgian neutrality, that most observers saw the clearest evidence of repeated and obvious violations of international law—starting an aggressive war was not yet an actual infraction of positive law (hence the reference to "international morality," instead of "law" in the Allied reply). The narrow focus on "war guilt" obscured Germany's more fundamental challenge to the legal order. Second, the AA's campaign displaced attention from the July Crisis, where it was easiest to see Germany's and Austria's bellicosity, to the complicated and often obscure diplomatic history of preceding decades.

Less than a month after Germany signed the treaty (June 28, 1919), the German cabinet approved the first phase of the campaign to revise it: the publication of Germany's prewar diplomatic documents (1871 to 1914).[46] The Schuldreferat controlled access to the documents and exercised veto power over publication. These forty volumes appeared from 1922 to 1927, the first of any nation's records to be open to historians. Formative in setting the standard historical record, *Die Große Politik* was tendentious and based in part on the suppression and destruction of records.[47] The *Grosse Politik* was just the beginning. The Schuldreferat also fed documents and legal briefs to the Reichstag committee investigating the war; orchestrated the suppression, delay, or timely publication and distribution of its lengthy, detail-ridden reports; created front organizations to combat the "war-guilt lie" in Germany and abroad (for example, in Norway, the Netherlands, Austria, Hungary, and Bulgaria) and secretly funneled government money to these organizations; arranged countless conferences and public lectures; published and translated books and pamphlets; falsified memoirs; and altogether dominated the public relations and the historical scholarship on the origins of the war during the entire interwar period.[48] It did these things clandestinely, and, because it was active in many countries, produced an international synergy of revisionist works in which the various recipients of its largesse reinforced one another and seemed part of an inexorable groundswell of enlightened opinion.

Through the well-financed Center for the Study of the Causes of the War (1921) led by the energetic Alfred von Wegerer, the "innocence campaign" especially targeted the

45. Hahn, "German Foreign Office," 69.

46. Germany and Auswärtiges Amt, *Die grosse Politik der Europäischen Kabinette, 1871–1914. Sammlung der Diplomatischen Akten des Auswärtigen Amtes,* ed. Johannes Lepsius, Albricht Mendelssohn Bartholdy, and Friedrich Thimme (Berlin, 1922–27).

47. Heinemann, *Verdrängte Niederlage,* 78–87; Herwig, "Clio Deceived," 95–98.

48. An early account of this clandestine activity: Hahn, "German Foreign Office." Now the best documented study: Heinemann, *Verdrängte Niederlage.* See also Herwig, "Clio Deceived"; Wolfgang Jäger, *Historische Forschung und politische Kultur in Deutschland; Die Debatte 1914–1980 über den Ausbruch des Ersten Weltkrieges* (Göttingen, 1984); Herman Wittgens, "Senator Owen, the Schuldreferat, and the Debate over War Guilt in the 1920s," in *Forging the Collective Memory: Government and International Historians through Two World Wars,* ed. Keith Wilson (Providence, RI, 1996), 128–50; Ellen L. Evans and Joseph O. Baylen, "History as Propaganda: The German Foreign Ministry and the 'Enlightenment' of American Historians on the War-Guilt Question, 1930–1933," in Wilson, *Forging the Collective Memory,* 151–77. My account follows these studies.

United States and American historians. The United States was important because the AA hoped to bring a revisionist America, which moreover never ratified the treaty, back into European politics on its side.[49] The center was guided by the Schuldreferat and aided by German embassies and consulates, each of which had a trained staff person dedicated to combating the "war-guilt lie" and ordered to provide lists of promising persons whom the center might influence.[50] In the United States, this list included major historians, of whom the most useful proved to be Sidney B. Fay (Harvard) and Harry Elmer Barnes (Smith). The AA's desired message was subtle: Germany bore some responsibility for the war, but it was shared with other powers. Gradually that message solidified into the theory that out-of-control, entangling alliances had caused Europe to slide into war; thus, no state was responsible. That was the conclusion of Fay's influential 1928 *The Origins of the War,* heavily based on the German documents; it was so useful that the AA bought a hundred or more copies, distributed them for free, and underwrote the French translation.[51] The enormous clandestine activity directed at American historians is well documented.[52] It was remarkably successful. The German consul in New York reported in June 1933 that most influential historians in the United States held views similar to Fay's—for example, scholars at Harvard (two), Princeton, Columbia, Virginia, and Stanford—whereas only one, Bernadotte E. Schmitt (Chicago), demurred.[53] In the words of one scholar, by 1929 "the Germans had largely won the battle of history."[54] The historian Holger Herwig notes that the success of revisionism "retarded critical appraisal of the origins of the war until the 1960s."[55] In fact, revisionism still dominates U.S. high school history textbooks and reappears in recent works presenting themselves as revisionist.[56] And, in a vicious cycle, revisionism encouraged isolationism and appeasement, and vice versa.[57]

For our purposes, however, the important point is that the innocence campaign's triumph necessarily obliterated from consciousness the legal interpretation against which it struggled with such success. Gone was the central importance of international law, both to how contemporary leaders (including Germans) fought the war, and to what they thought was at stake in it. Claims of systematic violations were now dismissed as mere war propaganda, and the shock at what happened to law during the war and the Allies' heated

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49. Heinemann, *Verdrängte Niederlage,* 68, 232; Evans and Baylen, "History as Propaganda."

50. Heinemann, *Verdrängte Niederlage,* 112.

51. Sidney B. Fay, *The Origins of the World War* (New York, 1928), 2:250; Herwig, "Clio Deceived," 105; cf. Evans and Baylen, who say one hundred: Evans and Baylen, "History as Propaganda," 154. On Fay: Selig Adler, "The War-Guilt Question and American Disillusionment, 1918–1928," *Journal of Modern History* 23, no. 1 (March 1951): 11, 23.

52. Evans and Baylen, "History as Propaganda"; Adler, "War-Guilt." See also Jeff Lipkes, *Rehearsals: The German Army in Belgium, August 1914* (Leuven, 2007), ch. 15.

53. Evans and Baylen, "History as Propaganda," 168–69.

54. Adler, "War-Guilt," 21, cited in Evans and Baylen, "History as Propaganda," 170.

55. Herwig, "Clio Deceived," 119.

56. For example, Niall Ferguson, *The Pity of War: Explaining World War I* (New York, 1998), and Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (New York, 2012).

57. Adler, "War-Guilt," 27.

insistence on refounding an international legal order at Versailles and in the League of Nations became mere cant, or a fig leaf for Allied imperialism.[58]

For the most part, historians have accepted this state of affairs. Few modern histories of the First World War even mention international law in the index.[59] Few historians any longer recognize the importance of the violation of Belgian neutrality, either to Britain's entry into the war, or to setting the parameters by which contemporaries began to judge the conflict. Faced with claims and counterclaims concerning violations of the laws of war, too many historians despair of getting to the bottom of things and making a reasonable judgment. Instead, they refuse to judge; they fall back on the *tu quoque* defense. That position generally rests on the unspoken (and rarely examined) premise that every violation was equal, that every decision of statesmen or military leaders to break the law was taken for the same reasons, or taken as easily or thoughtlessly, or was arrived at in the same way, following the same procedure, or was justified or explained to themselves or the world with the same arguments, or in the same language. In fact, all of these things could, and often did, differ. These differences are critical to understanding why state leaders did what they did, what they thought was permissible, and why. Understanding these differences goes to the heart of what they thought the order of (European) states actually was and what it ought to be. Uncovering and analyzing these differences are major goals of this book.

The legacy of revisionism is even stronger in political science. There, international law disappeared even more completely because it disappeared theoretically, in the "realist" theory of international relations. One of the twin foundations of IR theory was the "realism" of the 1930s in such writings as those of E. H. Carr, whose rejection of what he identified as Wilsonian idealism led him, in the words of Stanley Hoffmann, to "swallow some of the 'tough' arguments which the revisionist powers such as Mussolini's Italy, Hitler's Germany, and the militaristic Japan had been using against the order of Versailles—arguments aimed at showing that idealism served the interests of the status quo powers."[60] The other foundation was the work of Hans Joachim Morgenthau, an international lawyer who fled Nazi Germany and who founded international relations theory in the United States after 1945.[61] This is not the place to rehearse Morgenthau's enormous and complicated

58. Key to demoting violations to propaganda: Arthur Ponsonby, *Faleshood in War-Time* (London, 1928), and James Morgan Read, *Atrocity Propaganda, 1914–1919* (New Haven, CT, 1941). The classic account of law as a cover for Allied imperialism: Carl Schmitt, "Völkerrechtliche Formen des modernen Imperialismus (1932)," in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923–1939* (Berlin, 1994), 184–203.

59. Of twenty recent works owned by Cornell University, only three devoted enough attention to the subject to list it in the index: Volker R. Berghahn, *Der Erste Weltkrieg* (Munich, 2003); Hew Strachan, *The First World War,* vol. 1, *To Arms* (Oxford, 2001); and Daniel Marc Segesser, *Der Erste Weltkrieg* (Wiesbaden, 2010).

60. Stanley Hoffmann, "An American Social Science," in *Janus and Minerva: Essays in the Theory and Practice of International Politics,* ed. Stanley Hoffmann (Boulder, CO, 1987), 5. Edward Hallett Carr, *International Relations since the Peace Treaties* (London, 1937); Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (London, 1940); E. H. Carr, *Propaganda in International Politics* (New York, 1939).

61. On the influence of Weimar thinkers on U.S. political science: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge, 2001), 465–67.

influence, especially on American political science.[62] But, briefly, the "six principles of political realism" that Morgenthau identified in his seminal book *Politics among Nations* (1954) accept fundamental assumptions about states, the international system, and hence about international law that characterized Imperial Germany and its Weimar apologists. It is not too much to say that Imperial Germany became a kind of model state for theory. The political realist, wrote Morgenthau, believes in "objective laws that have their roots in human nature," which, on the state level, meant "the concept of interest defined in terms of power."[63] The state was in essence the power state (*Machtstaat*) of Wilhelminian conviction.[64] In a sentence that might have summed up the Weimar critique of the Treaty of Versailles, Morgenthau's fifth principle was that "political realism refuses to identify the moral aspirations of a particular nation with the moral laws that govern the universe" (10). Politics was an independent sphere following its own laws, autonomous from those of the economy, law, and morality (10). A collection of states running on these principles was perforce anarchic. Although Morgenthau never denied the existence of international law, and indeed recommended it to statesmen as prudent, in a system of power states it inevitably became demoted from an obligatory system of rules created by the state community to an expression of morality or ethics coming from outside the power-state system, an expression of the "moral reluctance to use unlimited violence as an instrument of international politics" (216). Its efficacy depended on "complementary interests of individual states and the distribution of power among them. Where there is neither community of interests nor balance of power, there is no international law" (252). Morgenthau remained ambivalent about international law, for on the one hand, he thought the actual community of interest among states sufficient for them to comply voluntarily with the law most of the time (271–72), but on the other, his theory of power/interest meant that law had no real ground or worth in itself—it remained always contingent and likely to be swept away in the first, inevitable power struggle. Many of Morgenthau's followers were less ambivalent; in their writings international law became more ephemeral and contingent, and therefore it was rarely a factor in international relations.[65] On this view, international law could hardly have played an important role in the First World War.

The chapters that follow return to the voluminous internal governmental and diplomatic correspondence to show both how critical international law was to the conduct of the war and to what the conflict was about. Out of the sea of controversies we examine seven central issues that illustrate how law constrained decision makers, when and why it did not, and how law actually operated and changed. The method is for the most part

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62. An excellent introduction: William E. Scheuerman, *Morgenthau,* Key Contemporary Thinkers (Malden, MA, 2009).

63. Hans J. Morgenthau, *Politics among Nations* (New York, 1954), 4, 5.

64. Hoffmann, "American Social Science," 7, on Morgenthau's borrowings from Heinrich von Treitschke and Max Weber.

65. See the discussions of: Stanley Hoffmann, "International Systems and International Law," in *The International System: Theoretical Essays,* ed. Klaus Knorr and Sidney Verba (Princeton, NJ, 1961), 205–37; Stanley Hoffmann, "Is There an International Order?" in Hoffmann, *Janus and Minerva,* 85–121; Morton A. Kaplan and Nicholas deB. Katzenbach, *The Political Foundations of International Law* (New York, 1961), esp. ch. 1, 3–29.

comparative and pays close attention to the inner workings of governmental decision making. Unfortunately, chronology forces us to handle first three subjects—the violation of Belgian neutrality, land warfare, and occupation—that early on set the legal arguments that defined the war. These three subjects do not lend themselves to comparison because they overwhelmingly involve Imperial Germany's policies and not those of the Western Allies. The other four subjects permit comparison: the blockade versus unrestricted submarine warfare, the introduction of new weapons, and the use of reprisals. We turn to the first great shock to international law, the violation of Belgian neutrality.

2

Belgian Neutrality

The First World War began with an international crime: Germany's violation of Belgian neutrality. The issue considered in this chapter is not why Germany went to war in 1914. I have excluded the controversies over the origins of the war, Germany's role in starting it, and its war aims, in order to focus squarely on international law during the conflict itself. In any case, in 1914 launching an aggressive war was not forbidden in international law, though public and state opinion were changing. The avalanche of documents each government immediately published to prove its innocence and the Allied charge at the peace treaty that German aggression had violated "international morality" show the growing condemnation of aggressive war that has indeed become law in our own time.[1] But in 1914 the first incontrovertible issue of law raised by the war was Germany's violation of Belgium's guaranteed neutrality. That act, epitomized in Chancellor Theobald von Bethmann Hollweg's phrase "scrap of paper," instantly became a staple of Allied propaganda. The postwar reaction against the propaganda campaign has helped to erase the importance of Belgian neutrality as a matter over which the war was fought, as a cause of Britain's entrance into the war, and as an indicator of the role of international law in the war. At issue was the legal order of the European state system. This chapter examines what the invasion of Belgium put at risk.

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1. Art. 227 of the Versailles Treaty arraigned Wilhelm II "for a supreme offence against international morality and the sanctity of treaties," thus combining the charge of launching an aggressive war with violating the treaty guaranteeing Belgium's neutrality. Treaty of Versailles, available on the Avalon Project website at http://avalon.law.yale.edu/subject_menus/versailles_menu.asp. For the "colored books" of diplomatic correspondence: Luigi Albertini, *The Origins of the War of 1914* (Oxford, 1952–57), 3:703–8; also, Annika Mombauer, *Origins of the First World War: Controversies and Consensus* (New York, 2002), 23, 24, 27, 32, 41.

The Treaty of 1839

The 1830 revolution in Paris sparked the Belgian provinces to break away from the Kingdom of the Netherlands. The resulting power struggle between France, which would have liked to dominate the new state, and the Netherlands, which wanted to retain the provinces, caused the great powers to intervene. They created in 1831 an independent Belgium. Not until 1839 did the Netherlands agree to that creation. In two separate treaties signed in London on April 19, 1839, the five European great powers (France, Britain, Russia, Prussia, and Austria) and Belgium and the Netherlands set down the final borders and conditions for Belgian independence. The treaty said that "under the auspices of the Courts of Great Britain, Austria, France, Prussia, and Russia," Belgium became "an Independent and perpetually Neutral State . . . bound to observe such Neutrality towards all other States."[2] Thus the great powers became guarantors of Belgium's independence and neutrality *in their own interest.* Belgium's interest was that the independence it was unlikely to be able to defend by itself was guaranteed by major military powers, but at the cost of giving up an entirely independent foreign policy. Belgian neutrality was a European creation, a way to end war over the issue of its independence and above all to prevent any great power, especially France at this juncture, from becoming hegemonic in the region.

The Treaty of London of 1839 was a strong treaty. Every major European power was a signatory. It was a "lawmaking" treaty, setting down international borders, recognizing a new state, and enacting major foreign-policy conditions for all states in future (that is, all states having intercourse with Belgium were to do so within the confines of its neutrality). Because it occurred under the "auspices" of the major military and naval powers, it suggested the strong sanctions that threatened violators. It also contained two trajectories of legal development: first, the principle of the right of small states to exist, and second, the rejection of Continental hegemony as an acceptable foreign policy for any European state.[3] As a fundamental, lawmaking treaty, the Treaty of London would not be annulled by the outbreak of war; it retained its validity.[4] For all these reasons, the treaty of 1839 was a paradigmatic example of positive international law, the sort of treaty that even contemporary skeptics accepted as having the qualities of law.

The Treaty of London was a cornerstone of European international law. It was part of the international system developed in the wake of the Napoleonic Wars to regularize and contain state relations and conflict through law. That principle was famously stated in the Declaration of the 1818 Congress of Aix-la-Chapelle, in which the leaders of the great powers promised "to observe as the fundamental basis [of their relations] their invariable

2. Edward Hertslet, *The Map of Europe by Treaty; Showing the Various Political and Territorial Changes Which Have Taken Place since the General Peace of 1814* (London, 1875), art. 1 and art. 7 of Annex, pp. 981 and 985.

3. On incompatability of a hegemon with international law: Franz von Holtzendorff, *Handbuch des Völkerrechts. Auf Grundlage europäischer Staatspraxis,* vol. 1, Einleitung in das Völkerrecht (Berlin, 1885), 52, 66–67.

4. On lawmaking treaties: Lassa Oppenheim, *International Law: A Treatise* (London, 1905), 1:518 [para. 18], 2:108 [para. 99], and 1:563–68.

resolution never to deviate, neither among themselves nor in their relations with other states, from the strictest observation of the principles of the laws of nations [*droit des gens*]" which they regarded "as the only effective guarantee of the independence of each government and the stability of the general association."[5]

Making law the basis of inter-state relations contained several principles or assumptions worth examining. First, statesmen (and jurists) considered international law to be formed by the community of European states acting together. No state could form law by itself; the independence and development of each could occur only inside the community.[6] As a result, second, international law was in the states' interest; that is, state self-interest and the legal restraints emanating from the community did not fundamentally conflict.[7] No one denied that states might disagree about its content, or that particular state interests might change, but nineteenth- and early twentieth-century legal writers shared the view that the *legal state system* was "necessary" for every state.[8] Third, treaties (especially general treaties intended to set law for the future) were thought to be especially clear instances of law because as written documents they were often easier to interpret than binding custom, and they more closely resembled codified state law that positivists and Continental lawyers recognized. Fourth, while jurists and statesmen disagreed about many things (the relation of treaty to customary law, the bindingness of general treaties on non-signatories, the validity of reservations to treaty articles, and ratification requirements), no one doubted that treaty law presupposed a rule binding states to fulfill their treaty obligations. That requirement was often called "good faith"; it acquired the Latin tag *pacta sunt servanda*—agreements must be kept.[9] This rule was understood to be a necessary foundation of international life without which normal relations would be simply impossible; it was a general duty to the community as a whole, not simply to one's contracting partner. Good faith played a critical role during the World War, as leaders judged whether their enemies could be trusted to keep their word.

But everyone also recognized that occasionally changed circumstances justified voiding treaty obligations. Before 1914, jurists generally identified three cases: when changed conditions made fulfillment actually impossible; when changes in shared values invalidated the basis of previous treaties (for example, concerning slavery); or when the preconditions or assumptions behind a treaty had changed so radically that it no longer made

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5. Johann Caspar Bluntschli, *Le droit international codifié,* trans. C. Lardy (Paris, 1874), 55n2; Oppenheim, *International Law,* 1:66; Henry Bonfils, *Manuel de droit international public (droit des gens) aux étudiants des facultés de droit et aux aspirants aux fonctions diplomatiques et consulaires* (Paris, 1912), para. 809.

6. Representative: Bluntschli, *Droit international,* 54; Holtzendorff, *Handbuch,* 7; Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), 32; Bonfils, *Manuel* (1912), 23.

7. John Westlake, *International Law; Part II: War* (Cambridge, 1907), 1:15; Bonfils, *Manuel* (1912), para. 47.

8. Holtzendorff, *Handbuch,* 20–21, 45, 65, 81; William Edward Hall, *A Treatise on International Law* (Oxford, 1904), 5–6; Bonfils, *Manuel* (1912), 23.

9. Hugo Grotius, *The Rights of War and Peace Including the Law of Nature and of Nations,* A. C. Campbell (Chestnut Hill, MA, 2003), ch. 19, para. 1, and ch. 21, para. 1; Vattel: Hans Wehberg, "Pacta Sunt Servanda," *American Journal of International Law* 53, no. 4 (October 1959): 779; Holtzendorff, *Handbuch,* 61; Pasquale Fiore, *Nouveau droit international public, suivant les besoins de la civilisation moderne* (Paris, 1885–86), para. 971; Hall, *International Law,* 43, 55; Oppenheim, *International Law,* 1:519–20; Bonfils, *Manuel* (1912), para. 845.

sense.[10] Some writers seemed to recognize broader justifications in the interest of states' development.[11] But writers commonly acknowledged the dangers posed by the claim of changed circumstances (known as *rebus sic stantibus*—things standing thus). If it were elevated to equal status with *pacta sunt servanda,* then "all obligation would cease," as Swiss jurist Johann Caspar Bluntschli noted; it "would make the existence of conventional international law impossible."[12] And so writers before the war (and since) described *rebus* as a "clause," "condition," "doctrine," or "exception," but not generally as a "rule" or "principle"—the words used for *pacta.* Among the limits commonly placed on the *rebus* exception were these: states were not supposed to exercise it by fait accompli; instead, they were to articulate their objections, and if necessary renegotiate with their treaty partner(s). Some writers suggested that *rebus* might only be claimed for certain classes of treaties.[13]

State practice also strongly favored *pacta sunt servanda* over *rebus sic stantibus* in the nineteenth century. Britain's influential jurist Lassa Oppenheim noted how few states used the clause, apparently for fear that doing so "would certainly destroy all [a state's] credit among the nations."[14] The most famous case involved Russia's 1870 renunciation of the clauses in the 1856 Treaty of Paris that banned Russian warships from the Black Sea—a price for Russia's loss in the Crimean War. As Europe became preoccupied by the Franco-Prussian War, Russia claimed that changed circumstances and occasional violations of the treaty entitled it to declare the clauses null and void.[15] Britain protested strongly, not because it feared Russian warships—even seven years later Russia had still stationed none on the Black Sea—but because of the acidic consequences of the *rebus* principle.[16] Foreign Secretary George Leveson-Gower, Earl Granville, did not dispute the possibility that changed circumstances might lead to renegotiation of an out-of-date treaty; doing so unilaterally, however, as "the only judge," was "a very dangerous precedent as to the validity of international obligations."[17] Supported by the other great powers, Britain forced Russia to the conference table. There, Russia received what it wanted, but only after the agreement of all other signatories. In agreeing to the conference, Russia renounced the *rebus* claim. More important, Russia, Britain, France, (North) Germany, Austria, Italy, and Turkey all signed a protocol stating "that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement."[18]

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10. Fiore, *Nouveau droit international public,* para. 1052; Hall, *International Law,* 350; Bonfils, *Manuel* (1912), paras. 856–57.

11. See Hall on Bluntschli and Fiore: Hall, *International Law,* 358–59.

12. Bluntschli, *Droit international,* para. 456, p. 259; Oppenheim, *International Law,* 1:550–53, para. 539.

13. Westlake, *International Law,* 1:304–5.

14. Oppenheim, *International Law,* 1: para. 539, p. 551.

15. Hertslet, *Map of Europe,* 3: nos. 429–31 and 433.

16. A. J. P. Taylor, *The Struggle for Mastery in Europe, 1848–1918* (Oxford, 1954), 215–16.

17. Granville to Sir A. Buchanan, London, Nov. 10, 1870, cited as no. 431 in Hertslet, *Map of Europe,* 3: 1898–1900.

18. Protocol of Jan. 17, 1871, signed by the powers above (Germany was in the process of unification, so its signature appears as "North Germany"): Hertslet, *Map of Europe,* 3: 1904. See Hall, *International Law,* 351–57; Henry Bonfils and Paul Fauchille, *Manuel de droit international public (droit des gens)* (Paris, 1908), paras. 857–58.

The 1839 treaty guaranteeing Belgian neutrality was therefore a strong document deeply embedded in the European legal order. However, it did not specify the nature of the guarantee. A joint, or joint and several, guarantee would have obligated each guarantor separately to intervene to uphold the treaty, even if the other guarantors shirked their duty. A collective guarantee required all guarantors to act together; none was obligated to act alone. However, even a collective guarantee permitted a single guarantor to uphold the treaty itself. Collective guarantees were weaker, and in the immediate years after 1839, European statesmen interpreted the guarantee as collective.[19] But after mid-century, attitudes hardened, especially among British leaders. By 1867 Prime Minister Edward Stanley, Lord Derby, flatly, and incorrectly, informed the House of Lords that the Belgian treaty "was binding individually and separately upon each of the Powers."[20] Derby's statement shows that in the intervening years British policy was determined to uphold Belgian neutrality even alone.

Three years later, the Franco-Prussian War provided a test-run for 1914. Both France and the leader of the German forces, Prussia, announced that they would respect Belgium's neutrality unless the other violated it first. That vow was insufficient for Britain. Prime Minister William Ewart Gladstone concluded two identical treaties with France and Prussia pledging that Britain would join with the unoffending power using "her naval and military forces to insure [the] observance" of Belgium's neutrality and integrity, without however engaging in "the general operations" of war. He explained to the House of Commons that the government had intended to head off a dual violation in which both powers blamed the other for acting first: it was "the combination, and not the opposition, of the two Powers which we had to fear."[21] Britain was thus erasing another misstatement of law that Lord Derby had announced in 1867, namely that if a guarantor violated a treaty, it was nullified, freeing the other guarantors from their duty. Since the guarantors of Belgium and Luxembourg (neutralized by treaty in 1867) were for military and geographical reasons also the most likely potential violators, Derby's construction would have eviscerated the whole project of guarantee. The former foreign minister and prime minister, John, Earl Russell, had corrected Derby at the time, but Gladstone's treaty made Britain's position clear.[22]

As they did in 1914, radical liberals split over the issue in 1870. Radical leader Jacob Bright excoriated the new treaty as a "quixotic expedition"; in his view Britain had to

19. Subsequent investigators have agreed with them: Ernst Satow, "*Pacta Sunt Servanda* or International Guarantee," *Cambridge Historical Journal* 1, no. 3 (1925): 295–318; Daniel H. Thomas, *The Guarantee of Belgian Independence and Neutrality in European Diplomacy, 1830s–1930s* (Kingston, RI, 1983), 586–87.

20. Great Britain, Parliament, *Hansard's Parliamentary Debates,* vol. 183, House of Lords debates, June 20, 1867, 150 (hereafter *Hansard*), available at http://hansard.millbanksystems.com/. The next foreign minister, the Earl of Clarendon, agreed with Derby's interpretation, which seemed uncontroversial; ibid., 152. On the hardening interpretation of Belgian guarantee: Horst Lademacher, *Die belgische Neutralität als Problem der europäischen Politik, 1830–1914* (Bonn, 1971), 483–88; Thomas, *Guarantee,* 580–87. Derby partly quoted in Lademacher, *Belgische Neutralität,* 221.

21. Gladstone, House of Commons, August 10, 1870, *Hansard,* 3rd ser., vol. 203:1788.

22. Russell in House of Lords, June 20, 1867, *Hansard,* 3rd ser., vol. 183:158. See also Oppenheim's refutation of Derby: Oppenheim, *International Law,* 1:575 (para. 576).

remain "entirely free from Continental entanglements" and to engage in no Continental war "on any pretext whatever."[23] His followers tried to diminish Britain's obligations under the 1839 treaty, arguing that they were merely collective and not individual.[24] One railed against "secret diplomacy," declaring that "I have myself lost all faith in diplomacy."[25] But this same speaker revealed the radicals' dilemma, for he thought that even so it might be necessary to fight "to maintain not only our honour, but our liberties"—that is, to fight for law's sake as well as for security interests.

It was in response to the radicals' criticisms that Prime Minister Gladstone made his longest speech explaining the relation between law and British interests. He made four points. First, he rejected the characterization of Britain's interest in upholding Belgian neutrality as "the specially distinct, separate, and exclusive interest" of Britain alone. "It is the same as that of every great Power in Europe. It is contrary to the interest of Europe that there should be unmeasured aggrandizement."[26] Belgian neutrality was thus a *European* interest.

Second, he responded to the radicals' fear that treaty engagements might automatically pull Britain into a Continental war. He denied that a treaty of guarantee was "binding on every party to it irrespectively altogether of the particular position in which it may find itself at the time." Some historians have thought that Gladstone's remark gave radicals in 1914 an opening to deny the treaty's obligation.[27] But given the context in which Gladstone pressed strongly and unequivocally for intervention, it seems likely that the prime minister was not announcing a doctrine of policy over legality, but simply noting that legal obligation is always subject, as the American jurist James Wilford Garner wrote, to "the conceivable inability of one of the guaranteeing powers at a given moment, resulting from exceptional circumstances, to fulfil the obligations imposed by the treaty."[28]

This interpretation is strengthened by Gladstone's next point, that Belgium's good government based on the "liberty of the people" would disappear without the guarantee. The day that it was absorbed by another power would sound the death knell "of public right and public law in Europe."[29] This was a strong identification of Britain's, and the Liberals', interest with law per se.

Gladstone then continued, "We have an interest in the independence of Belgium which is wider than that"—to avoid the moral ignominy of having quietly stood by as a witness to "the perpetration of the direst crime that ever stained the pages of history, and thus becom[ing] participators in the sin."[30] Gladstone's rhetoric had climbed the ladder from the European interest to prevent aggrandizement, to the practical obligations of treaties, to the sanctity of law, to morality. He had laid out the palette of reasons that decision

23. Bright, House of Commons, Aug. 9, 1870, *Hansard, 3rd ser., vol. 203*:1740.

24. Sir Wilfrid Lawson, House of Commons, Aug. 9, 1870, ibid.

25. Osborne, House of Commons, Aug. 10, 1870, ibid., 1777–78.

26. Ibid., 1786.

27. Thomas, *Guarantee,* 511; Keith M. Wilson, "Britain," in *Decisions for War, 1914,* ed. Keith M. Wilson (New York, 1995), 189.

28. James Wilford Garner, *International Law and the World War* (London, 1920), 2:229.

29. Gladstone, House of Commons, Aug. 10, 1870, *Hansard,* 3rd ser., vol. 203:1788.

30. Ibid.

makers in 1914 debated again. And for Gladstone, as for most British leaders in his time and later, these reasons coincided and reinforced one another.

Britain was the strongest supporter of the legal obligation to protect Belgium's independence and neutrality. But in 1870 both France and Prussia quickly agreed to Gladstone's supplementary treaty, and Austria and Russia indicated their approval.[31] The European interest in preventing the emergence of a Continental hegemon inevitably using war to achieve that position, and their interest in orderly, regular (legal) relations, remained very strong. Belgian neutrality was the result and symbol of that intertwined interest.

Only once did Britain hesitate in its policy of guarantee. That was in 1887 when France, egged on by the unstable populist war minister Georges Ernest Boulanger, appeared ready to attack Germany through Belgium. Britain's default policy is visible in the immediate assurances of its ambassadors to Brussels and Vienna that Britain would automatically come to Belgium's aid. The exasperated prime minister, Robert Gascoyne-Cecil, Third Marquess of Salisbury, reined them in. "It is very difficult to prevent oneself from wishing for another Franco-German war," he sighed, "to put a stop to this incessant vexation."[32] Boulanger's removal ended the crisis before the British government had to make up its mind. Salisbury's unique view was based on his expectation that Germany would defeat France by itself, without help from Britain, and that Chancellor Otto von Bismarck's "satiated," conservative foreign policy meant that Germany would never annex Belgium or infringe on its postwar independence.[33] By 1914 neither of those latter assumptions was true.

Germany and Belgian Neutrality

Imperial Germany's legal obligation to respect Belgian neutrality was universally acknowledged by German statesmen and diplomats. They understood the new German state to be the legal successor to Prussia and bound by its treaties. In 1887 Bismarck repeated Germany's pledge not to violate Belgian neutrality. During and even after the First World War, the AA's official position was always that Germany was bound by the 1839 treaty. In his unpublished legal brief defending the invasion, the chief of the AA's legal division, Johannes Kriege, admitted that Germany's action broke the 1831 and 1839 treaties and the firm principle of customary international law establishing the inviolability of neutral territory.[34] But after Wilhelm II dismissed Bismarck in 1890, military planning soon diverged from legal principle.

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31. Gladstone, House of Commons, Aug. 8, 1870, ibid., 1701.

32. William E. Lingelbach, "Belgian Neutrality: Its Origin and Interpretation," *American Historical Review* 39, no. 1 (October 1933): 69.

33. This is also the view of Thomas, *Guarantee,* 586–87, 591. Both Bismarck and Chief of the General Staff Helmuth von Moltke publicly guaranteed Belgium's neutrality during the crisis: Gerhard Ritter, *The Schlieffen Plan: Critique of a Myth* (London, 1958), 80–81.

34. Johannes Kriege, "Entwurf einer Denkschrift über die Verletzung der belgischen Neutralität durch Deutschland für den Parlamentarischen Untersuchungs-Ausschuss des Reichstages," no date, 9, AA/PA, Kriege Papers, vol. 4, no. 25; Frhr v. Mumm to K. A. Fuehr, Berlin, Jan. 6, 1915, BAB R 901 86588, copy.

It is important to underscore that all governments "plan," or rather discuss, policy options across the widest spectrum, including potential treaty violations, and militaries tend to plan for the worst-case scenarios, regardless of legal limits. In the prewar period one can find British and French military leaders, and even high-ranking civilians, favoring quick troop movements through Belgium to strike at the (German) enemy. As Jonathan Steinberg writes, the difference between these discussions and those in Germany was that Germany put its plans into practice.[35] But there are other differences, too—some commonly remarked upon, others more obscure, visible only in the patterns of decision making over time. These differences concern the structure of government and the political culture it produced, the quality of the Kaiser's leadership, and governing assumptions about international law, most famously about military necessity, but also about fundamental issues of state sovereignty, neutrality, and the relation of military power to international law.

The Schlieffen Plan

General Alfred von Schlieffen became chief of the general staff in 1890. The following year he began considering Belgium the key to solving Germany's geographical problem in a possible two-front war against France and Russia. A quick strike at France via Belgium, sweeping north of the heavily fortified Franco-German border, might destroy France before Russia was fully mobilized; a disastrous two-front war would thus be converted into two, quick one-front wars in which Germany could use its full strength against each foe. By 1897, Schlieffen had formally incorporated the invasion of Belgium into the plan, where it remained the core of German military strategy for the next seventeen years.[36] Actually, Schlieffen's plan called for violating three neutral countries, two guaranteed by international convention (Belgium and Luxembourg) and one pursuing its own neutral policy (the Netherlands). Around 1908, Schlieffen's successor, General Helmuth von Moltke (the younger), dropped the invasion of the Netherlands, concentrating all of Germany's troops through Belgium and Luxembourg.[37]

Germany's constitutional structure conspired to prevent coordinated decision making between its military and civilian parts. Lacking a cabinet and possessing a privileged military whose prerogatives included direct personal access to the Kaiser without the chancellor or foreign secretary, Imperial Germany had no formal venue in which the

35. Jonathan Steinberg, "A German Plan for the Invasion of Holland and Belgium, 1897," in *The War Plans of the Great Powers, 1880–1914,* ed. Paul J. Kennedy (Boston, 1985), 160. Germany's later *tu quoque* defense claimed that the Allied invasion of Salonika in 1915 was the equivalent of Germany's violation of Belgian neutrality. The two cases are quite different. The complexity of the Greek case deserves and requires a full account impossible within the confines of this book. For a beginning see Garner, *International Law,* 2:241–55.

36. Gerhard Ritter, *Staatskunst und Kriegshandwerk; Das Problem des "Militarismus" in Deutschland* (Munich, 1964), 2:247.

37. Annika Mombauer, *Helmuth von Moltke and the Origins of the First World War* (Cambridge, 2001), 94–97.