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Beyond the Mud: Revisiting the Legal History of World War I

Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War*. Ithaca: Cornell Univ. Press, 2014. Pp. xiii, 368. ISBN 978-0-8014-5273-4.

Thomas J. Shaw, *World War I Law and Lawyers: Issues, Cases, and Characters*. Chicago: American Bar Assoc., 2014. Pp. xix, 539. ISBN 978-1-62722-431-4.

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Isabel Hull (Cornell Univ.) has written a sophisticated historical study of broad issues in legal theory and comparative law during the First World War, including the relationship between law and power and the relevance of the sundry legal traditions of the participants. In particular, she squarely tackles the realist dismissal of international law as ephemeral by exhaustively documenting how legal actors and analysts determined the scope of options available to British decision-makers.

Hull rightly rejects the insupportable position that legal norms always carried the day with the British, but she does show that they mattered. Protecting Belgian neutrality may have been in Britain's strategic interest, but the legal obligation to protect that neutrality motivated a reluctant Liberal cabinet's decision to go to war. Hull also demonstrates that, once war started, perceptions of Germany as a scofflaw—regarding the use of new weapons, treatment of POWs, and unrestricted submarine warfare—affected the belligerents' power and standing in the world, especially vis-à-vis neutrals. That is, she avoids dichotomizing law and self-interest or law and power.

In assessing the relevance of different legal traditions, Hull clarifies the effect of various forms of legal reasoning on decisions made in wartime Britain and Germany. Her portrayal of German legal thinking as governed by notions of military necessity sometimes veers into common law boosterism. This is in contrast to her view of the perceived easy reliance of the British (used to “judge-made” law) on customary international law (general state practice accepted as law, rather than codified law in treaty form). But she also makes similar comparisons between types of legal reasoning in Germany and France, both civil law jurisdictions. At all times, Hull abides by the comparative lawyer's dictum that legal norms cannot be understood outside the prevailing culture. She carefully places German legal thinking in the context of a militarized society and contrasts it with the role of law in a liberal democracy, even in time of war. One may, of course, disagree with her somewhat categorical representations of the prevailing national cultures.

Hull's legal analysis is not without flaws, but it improves as the book goes on; perhaps her familiarity with international law grew with the manuscript. For example, Hull early on describes customary law as law “not yet written down” (59); in fact, it need never be codified to be binding. And, too, her reliance on an undergraduate international law textbook (26n52) is unreassuring. But her later, nuanced accounts of British contributions to customary law making (or breaking) with respect to blockade law are persuasive and rest on a thorough review of the relevant legal literature.

The major drawback in Hull's book, however, is its adherence to the often tendentious argumentation in her earlier, pathbreaking work *Absolute Destruction*.¹ Specifically, she champions the old “Special Path” (*Sonderweg*) explanation of modern German history, which posits that pre-1914 German military thinking was “special,” differing from that of its neighbors by its deliberate strategy of almost mindless aggression without concern for the military realities on the ground or, indeed, for any laws of warfare. Such an argument reverts to the conventional narrative of German history as following a “crooked path.”

1. Subtitle: *Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell U Pr, 2004); see review at *MiWSR* 2007.05.01.

A Scrap of Paper takes us to a place even further down the special road, where almost all of Britain's legal positions appear familiar and reasonable to a present-day Western reader, and almost all of Germany's legal moves appear backward and barbaric. But Hull also tries to have it both ways. Starvation is the most egregious example. The British Blockade makes it difficult to cast the Allies as saints and the Germans as devils. Hull's defense of the Blockade has two prongs, both problematic.

First, the author claims that withholding food from enemy civilians was not really illegal under customary international law. This ignores the 1854 Treaty of Paris, signed by the British, and the 1909 Declaration of London (DoL), which was passed by the House of Commons and became official policy in the British Navy. Hull simply dismisses these precedents, contending that the DoL was of "doubtful international validity" (214) and that its contraband lists were "too restrictive to apply adequately to industrial warfare" (143). She attempts to "normalize" British behavior by claiming (wrongly) that it is legal today to withhold food from enemy civilians (166). While it is legal to deny food to enemy soldiers, it is patently illegal to deprive civilians of "objects indispensable to their survival, including foodstuffs."²

Hull thus consistently rationalizes British bad behavior, while never once excusing similar German behavior. The Germans constantly claimed that the Hague Rules were woefully inadequate to the realities of massive, modern industrialized armies, yet Hull sees nothing but unprincipled intentions behind such assertions. In light of her pronouncements on the legality of withholding food from civilian populations, her extended discussion of whether the Germans intentionally starved Belgians is plainly irrelevant after she has already exonerated the British of doing the same to Germans.

Hull's second defense of the British Blockade invokes the doctrine of proportionality—that killing civilians is allowed if it is proportionate to military advantage. Therefore, her argument runs, since the British Blockade was crucial to Allied victory, the starvation of a few hundred thousand women, children, and old men was ultimately legal. First of all, Hull's understanding of the legal principle of proportionality is misleading. A specific attack, yielding "concrete" and "direct" military advantage, even should it cause civilian deaths, can be relatively justified. But proportionality has never been defined in international law at the abstract, strategic level that Hull is invoking. She has opened a Pandora's Box that weakens her otherwise valid attacks on German illegal activity. Despite the obvious parallel, Hull never, for example, applies the same theory of proportionality to the German program of unrestricted submarine warfare. Had Germany been spectacularly successful in 1915, sinking virtually all vessels bound for the United Kingdom and forcing it to sue for peace by Christmas of that year, then, by Hull's logic, millions of lives would have been saved, far fewer civilians would have died, and German actions would have been, ipso facto, completely legal. Again, intriguingly, Hull sees the deportation of Belgians to Germany for labor as clearly illegal even though it fits her proportionality argument: Belgian forced labor would have helped the Germans end the war more quickly, thereby reducing the starvation of Belgian civilians in the long run.

Despite these inconsistencies of argumentation, *A Scrap of Paper* is a work of enormous erudition. It will provide a mandatory starting point for future histories of international law and the First World War.

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Legal historian Vince Masciotra has written that "Professional groups traditionally look back on their own history to reinforce their professional and social identity. The studies which result often take the form of biographies of 'great legal men' This literature is characterized by hagiographical and anecdotal approaches."³ Thomas Shaw's *World War I Law and Lawyers* is very much a case in point. Though impressive in scope and full of amusing and interesting facts, it belongs on a lawyer's coffee table, not a scholar's desk.

While there is no reason why legal history should not be readable or popular in nature, this book is unfortunately also rife with errors. For example, Shaw suggests that the legal regulation of warfare was a novelty in

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 54(2), 8 June 1977.

3. "Quebec Legal Historiography, 1760–1900," *McGill Law Journal* 32 (1987) 724.

1914–18, when, in fact, codification of the law of armed conflict went back to the US Civil War and customary law developed over centuries. There are also serious lacunae; for instance, there is virtually no analysis of the issue of starving civilians through blockade. Thus, despite its colorful biographies of legal actors and summaries of fascinating cases, this volume's 539 pages merit only a thumb-through in an idle moment rather than serious study.