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Claiming Legality – German Lawyers under the Swastika and the Aggression against Poland

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Abstract

The article studies how German lawyers under the swastika justified the German aggression against Poland in 1939 and questioned the support of the United States for Poland and its Allies. It distinguishes three lines of argument: First, they claimed that the Kellogg-Briand Pact was devoid of normative content and thus could not bind the German Reich. This argument was coupled with a political critique of the League of Nations Covenant and the Kellogg-Briand Pact as instruments for maintaining the territorial status quo. Second, they put forward that the German Reich was acting in self-defence and that it was Poland, France, and Great Britain who had violated the Covenant and the Pact. Third, they rejected efforts to reconceptualise the existing rules of neutrality in light of the Covenant and the Pact. Reliance on a more traditional understanding of neutrality was intended to raise legal obstacles to siding with Poland, France, and Great Britain for third states such as the United States.

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I. Introduction

On September 1, 1939, Germany invaded Poland. Two days later, France and Great Britain declared a 'state of war' between themselves and the German Reich.[1] The British dominions of Canada, Australia, New Zealand, South Africa, semi-sovereign India, and the independent states of Iraq and Egypt soon followed. This marked the beginning of World War II in Europe. By 1945, more than 60 million people, most of them civilians, had died in the global conflict between the Allies (especially France, Great Britain, Poland, and later the Soviet Union and the United States) and the Axis powers (especially Germany, Italy, and Japan).[2] In the eyes of many, the outbreak of war meant the end of the League system and was the final nail in the coffin of the prospects of collective security.[3] At first glance, it seems to make little sense to look for references to international peace and security law at this point in time.

But even in September 1939, the main protagonists relied on international law. The less sovereignty-oriented 'new' international law that had emerged as a response to World War I and found expression in the *Covenant of the League of Nations* and the *1928 Treaty for the Renunciation of War* (the Kellogg-Briand Pact)[4] was used to justify the resort to war. In the wake of the German invasion, the French and British governments argued that the German military actions violated the Pact triggering the obligations under mutual assistance agreements with Poland.[5]

According to the French communication to the League of Nations, the 'aggression committed on September 1st by the German Government against Poland […] in violation of the undertakings contracted, in the most complete freedom, towards both Poland itself and all the States signatories of the Pact

1 Communications relating to the Present State of War, League of Nations Official Journal 20 (1939), 387-394 (387 f.).

2 See instead of many Anthony Beever, *The Second World War* (Weidenfeld & Nicolson 2012).

3 On the contemporary view on the end of collective security see for instance Marcel Hoden, 'Europe without the League', Foreign Aff. 18 (1939), 13-28 (13); Hans Wehberg, 'Warum scheiterte der Völkerbund?', Friedens-Warte 40 (1940), 141-145; for a historical assessment see Zara Steiner, *The Triumph of the Dark. European International History 1933-1939* (Oxford University Press 2013).

4 On the 'new' international law see James W. Garner, Le développement et les tendances récentes du droit international, RdC 35 (1931 I), 605-720 (609).

5 France and Britain had concluded assistance treaties with Poland in 1921/1925 and in 1939 respectively, Franco-Polish Treaties of 1921 and 1925, <https://avalon.law.yale.edu/wwii/ylbka1.asp>, last access 21 January 2025; Agreement of Mutual Assistance between the United Kingdom and Poland, 25 August 1939, <https://avalon.law.yale.edu/wwii/blbk19.asp>, last access 21 January 2025.

for the Renunciation of War of August 28th, 1928' established France's obligation to assist Poland.[6] Similarly, the British government declared that the German government had committed an 'act of aggression against a Member of the League of Nations'. This action had been taken 'in disregard of the obligations which the German Government had assumed towards Poland and the other signatories of the Treaty for the Renunciation of War of August, 27th 1928'.[7] Both states concluded that accordingly they were in a 'state of war' with the German Reich.[8]

The National Socialist government, in contrast, did not put forward an official legal argument for its military action in Poland. Instead, the National Socialists staged a plot to politically justify their actions as a defensive response to Polish aggression. The *Gleiwitz* incident and similar actions on the German-Polish border on the night of August 31, 1939 have become prime historical examples of false flag attacks. SS troops in Polish uniforms broadcasted an anti-German message in Polish from an allegedly captured German radio station.[9] In a speech to the Reichstag on September 1, 1939, Hitler suggested that Germany was responding to Polish atrocities. 'After twenty-one border incidents were recorded the other night, tonight there were fourteen, including three very serious ones. I have therefore now decided to speak to the Poles in the same language that Poland has been using towards us for months. […] For the first time tonight, Poland fired shots on our own territory also through regular soldiers. Since 5:45a.m., the fire is being returned. From now on bombs will be met by bombs.'[10] Although this statement did not refer to the legal rules of peace and security, it could easily be linked to the legal doctrine of self-defence.

This opened the floor for legal debate among international lawyers. British and French lawyers did not put much effort into supporting their governments' case (perhaps because it was too obvious?).[11] In contrast, as the article

6 Communications relating to the Present State of War (n. 1), 387.

7 Communications relating to the Present State of War (n. 1).

8 Communications relating to the Present State of War (n. 1).

9 On this see Jürgen Runzheimer, 'Der Überfall auf den Sender Gleiwitz im Jahre 1939', Vierteljh. Zeitgesch. 10 (1962), 408-426.

10 'Führer' und Reichskanzler Adolf Hitler in seiner Ansprache vor dem deutschen Reichstag, 1. September 1939, <https://archive.org/details/1.-september-1939-fuhrer-und-reichskanzler-adolf-hitler-in-seiner-ansprache-vor->, last access 21 January 2025.

11 Most international lawyers assumed that Germany had been the aggressor without going into a deeper doctrinal analysis. For instance, Quincy Wright merely pointed to the German 'invasion' of Poland but did not go into detail, Quincy Wright, 'The Present Status of Neutrality', AJIL 34 (1940), 391-415 (409); implicit also in René Cassin, 'Présent et avenir de la neutralité', Esprit International 14 (1940), 48-69; James T. Shotwell, 'War as an Instrument of Politics', International Conciliation 20 (1940), 205-213.

will show, German international lawyers under the swastika[12] supported the National Socialist war effort by 'claiming legality' for the German Reich's military actions in Poland and by criticising US support for France and Great Britain. This group consisted of Carl Bilfinger, Axel Freytagh von Loringhoven, Carl Schmitt, Wilhelm Grewe, and Ferdinand Schlüter, who were all but one members of the National Socialist German Workers' Party (NSDAP). While not a party member, Freytagh von Loringhoven was guest of the NSDAP in the Reichstag since 1933 as a former member of parliament for the dissolved German National People's Party (DNVP).[13]

The arguments about the aggression against Poland have not yet received much attention in scholarship. The 'turn to history'[14] has not led to a particularly deep engagement with National socialist conceptions of international law. Key works associated with the 'turn' – such as Martti Koskenniemi's *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)* – do not touch upon the relationship between National Socialism and international law.[15] The existing literature on the subject does not focus on the justifications for the German aggression.[16] As an exception, Bernhard Roscher points to the attempts of some German lawyers to minimise the

12 The terminology is borrowed from Michael Stolleis, Michael Stolleis, 'Against Universalism – German International Law under the Swastika: Some Contributions to the History of Jurisprudence 1933-1945', GYIL 50 (2007), 91-110.

13 These affiliations are mostly well-known, see Michael Stolleis, *A History of Public Law in Germany 1914-1945*, (Oxford University Press 2004), 149, 271, 283, 340, 462; for Ferdinand Schlüter see Institutsfragebogen 1945, 20.12.1945, Ordner 'Bilanz 1945. Aufbau nach 1945', Max-Planck-Institut für ausländisches öffentliches Recht, Heidelberg (received by Dr. Philipp Glahé).

14 On the 'turn' see George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law', EJIL 16 (2005), 539-559; Matthew Craven, 'Introduction: International Law and Its Histories' in: Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Brill 2007), 1-25 (3 ff.).

15 Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge University Press 2001); Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2005).

16 Dan Diner, 'Rassistisches Völkerrecht. Elemente einer nationalsozialistischen Weltordnung', Vierteljh. Zeitgesch. 37 (1989), 23-56; Stolleis, *Against Universalism* (n. 12), 91 ff.; Detlev Vagts, 'International Law in the Third Reich', AJIL 84 (1990), 661-704; Manfred Messerschmitt, 'Revision, Neue Ordnung, Krieg. Akzente der Völkerrechtswissenschaft in Deutschland 1933-1945', Militärgeschichtliche Mitteilungen 9 (1971), 61-95; Rüdiger Wolfrum, 'Nationalsozialismus und Völkerrechtswissenschaft' in: Franz Jürgen Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus* (Nomos 1992), 89-102; Diemut Majer, 'Die Perversion des Völkerrechts unter dem Nationalsozialismus', Jahrbuch des Instituts für Deutsche Geschichte Tel Aviv 14 (1985), 311-332; Felix Lange, 'The Dream of a Völkisch Colonial Empire: International Law and Colonial Law During the National Socialist Era', London Review of International Law 5 (2017), 343-369.

normative content of the Kellogg-Briand Pact in the context of the outbreak of World War II.[17]

While Roscher's study is an important building block, this paper aims at a deeper and more systematic assessment. It distinguishes three lines of argument developed by German international lawyers under the swastika and situates them within the larger struggle over the limits of the right to wage war in the late 1930s and early 1940s. First, it was claimed that the Kellogg-Briand Pact was in any case devoid of normative content and thus could not bind the German Reich. This argument was coupled with a political critique of the League of Nations Covenant and the Kellogg-Briand Pact as instruments for maintaining the territorial *status quo* (II.). Second, it was argued that the German Reich was acting in self-defence and that it was Poland, France, and Great Britain who had violated the Covenant and the Pact (III.). Third, German lawyers under the swastika rejected efforts to reconceptualise the existing rules of neutrality in light of the Covenant and the Pact. Reliance on a more traditional understanding of neutrality was intended to raise legal obstacles to the support of the United States to France and Great Britain in World War II (IV.).

Taken together, the analysis sheds light on the current debate about the evolution of doctrines on the 'outlawry of war'. While Oona A. Hathaway's and Scott J. Shapiro's influential monograph *The Internationalists: How a Radical Plan to Outlaw War Remade the World* emphasises the normative and factual impact of the Kellogg-Briand Pact,[18] some have criticised the work for overemphasising its relevance.[19] This contribution shows that the normative framework for peace and security in general and the Pact in particular, have not generally been seen as 'scraps of paper',[20] nor as a 'radical

17 While this is the most comprehensive assessment of this issue so far, Roscher does not systematise the arguments and does not reference the highly relevant writings of Axel von Freytagh-Loringhoven, see Bernhard Roscher, *Der Briand-Kellogg-Pakt von 1928. Der "Verzicht auf den Krieg als Mittel nationaler Politik" im völkerrechtlichen Denken der Zwischenkriegszeit* (Nomos 2004), 262-267; also Daniel Marc Segesser mentions key writings on 'Kriegsschuld' by German authors in his assessment of the legal debate about the criminalisation of war crimes between 1872 and 1945, see Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen fachwissenschaftlichen Debatte 1872-1945* (Brill Schöningh 2010), 301-306.

18 Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

19 For critical reviews see Anna Spain Bradley, 'The Internationalists: How A Radical Plan to Outlaw War Remade the World. By Oona A. Hathaway and Scott J. Shapiro', AJIL 112 (2018), 330-335; Charlotte Peevers, 'Liberal Internationalism, Radical Transformation and the Making of World Orders', EJIL 29 (2018), 303-322.

20 See as an example the debate in the British parliament of the time,<https://hansard.parliament.uk/lords/1935-02-20/debates/55b8f0a2-14cc-4a5e-8b9f-51a4596b1bf0/Briand-KelloggPact>, last access 21 January 2025.

plan[s] that remade the world'.[21] Instead the discussions demonstrate that the Pact was part and parcel of a struggle over different visions of how to regulate war and peace in the 1930s, 1940s and beyond.

II. The Alleged Lack of Normative Force of the Pact

In the late 1930s, two treaties were particularly important for legal assessments of war and peace. The Covenant of the League of Nations aimed to achieve international peace and security and established organs such as the League Council and the League Assembly for that matter. The Covenant contained procedural obligations about what had to be done before a state could legally go to war. The elaborate procedural regime provided for prior arbitration or a Council report, as well as a mandatory waiting period before military action amounting to war could be taken (Arts 12 to 15). If a League member went to war without complying with the procedure, the Covenant provided for automatic economic sanctions and authorised military sanctions (Art. 16).[22]

The Kellogg-Briand Pact of 1928 then placed a substantive limit on war-making. In its Art. I, the High Contracting Parties declared 'that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another'. However, unlike the Covenant, it was silent on the issue of sanctions. The Pact was ratified by 63 states, including all the major powers.

How did German international lawyers associated with the National Socialist regime interpret these treaties in the context of the German invasion of Poland? With regard to the Covenant, the argument was quite simple: The Covenant did not apply to the German Reich in view of Germany's withdrawal from the League. Art. 1 III provided for a two-year notification period before withdrawal from the League became effective.[23] Since Germany

21 Hathaway and Shapiro, *Internationalists* (n. 18).

22 Some highlighted that the Covenant also contained a prohibition of conquest by force in its Article 10, Titus Komarnicki, *La question de l'integrite territoriale dans le Pacte de la Societe des Nations (1'article X du Pacte)*, (Les Presses Universitaires de France 1923). On the Covenant from today's perspective Robert Kolb (ed.), *Commentaire sur le pact de la société des nations* (Bruylant 2015).

23 Art. 1 III of the Covenant stipulated: 'Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal'; on its interpretation Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (Vahlen 1924), 254-255; Jean Ray, *Commentaire du pacte de la société des nations* (Recueil Sirey 1930), 110-113.

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had given notice of its withdrawal in October 1933, after the National Socialist government had taken power, the German Reich was no longer bound by the Covenant in 1939.[24] Not only Germany, but also Japan, Paraguay, and Italy left the League in the 1930s in order to free themselves from their legal obligations.[25]

A similar argument did not apply to the Kellogg-Briand Pact. The German Reich had subscribed to its Art. I renouncing war as one of its original members. The Pact thus was binding on the German Reich even in 1939. German lawyers under the swastika therefore had to develop a somewhat more sophisticated justificatory strategy.

One attempt stemmed from Carl Bilfinger (1879-1958). In 1940, Bilfinger justified the German aggression in Poland in his article '*Die Kriegserklärungen der Westmächte und der Kelloggpakt*'.[26] The article was published in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) which was edited at the Berlin *Kaiser-Wilhelm-Institute for Foreign Public Law and Public International Law* (KWI).[27] At the time, Bilfinger was a Professor for Public Law and International Law at the University of Heidelberg with close ties to the KWI.[28] Bilfinger published regularly in its journal, probably because its director Viktor Bruns was his cousin. After Bruns' death in 1943, Bilfinger succeeded him as the new director from 1944 to 1945.[29]

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24 For this argument see Axel Freiherr von Freytagh-Loringhoven, *Kriegsausbruch und Kriegsschuld 1939* (Essener Verlagsanstalt 1940), 11.

25 Some indicated that the case could be made against effective withdrawal by Japan since it was questionable whether it had fulfilled all its obligations as a precondition for League withdrawal, see Josephine Joan Burns, 'Conditions of Withdrawal from the League of Nations', AJIL 29 (1935), 40-50 (45-47).

26 Carl Bilfinger, 'Die Kriegserklärungen der Westmächte und der Kelloggpakt', HJIL 10 (1940), 1-26.

27 On the role of the Institute in German international legal scholarship see Felix Lange, 'Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920-1980)', EJIL 28 (2017), 535-558; Ingo Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus. Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht' in: Doris Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus. Bestandsaufnahme und Perspektiven der Forschung*, Vol. 1 (Wallstein 2000), 490-527; Rüdiger Hachtmann, 'Das Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht 1924 bis 1945', MPIL 100, 15 December 2023, <https://mpil100.de/2023/12/das-kaiser-wilhelm-institut-fuer-auslaendisches-oeffentliches-recht-und-voelkerrecht-1924-bis-1945/>, last access 21 January 2025.

28 From 1924 to 1935, Bilfinger had been Professor of Public Law and Public International Law at the University of Halle.

29 Philipp Glahé, Reinhard Mehring and Rolf Rieß (eds), Der Staats- und Völkerrechtler Carl Bilfinger (1879-1958): Dokumentation seiner politischen Biographie. Korrespondenz mit Carl Schmitt, Texte und Kontroversen (Nomos 2024), 11-24.

Despite being a strong supporter of National Socialist revisionist foreign policy, Bilfinger continued his academic career after World War II. In 1949, Bilfinger became director of the renamed Heidelberg Max Planck Institute for Comparative Public Law and Public International Law – the same year he turned 70.[30]

Given the international visibility of the *ZaöRV* as one of the leading German international law journals, Bilfinger's 1940 article was the most prominent piece on the outbreak of World War II that was also addressed to an international audience.[31] The main focus of the article was a critique of the Kellogg-Briand Pact as the main 'legal title on which the Western powers wanted to base their justification for the attack against Germany'.[32] Bilfinger thus took issue with the British and French statements of September 3, 1939, in which they accused Germany of violating the Pact by its aggression against Poland.[33]

Against this background, Bilfinger put forward a general critique of the Pact. It would be wrong to rely on the Pact because the legal instrument 'does not reach the minimum level of certainty required for a legal norm'.[34] Thus, Germany could not have violated a legal obligation toward Poland even if it had initiated the hostilities.[35] For him, the Kellogg-Briand Pact had no legal force and therefore could not constrain German action in Poland.

Bilfinger supported his 'lack-of-normative-force' claim with two arguments. First, he argued that questions of war and peace could not be meaningfully addressed by (international) law. The Christian idea of a just war, or *bellum justum,* would not be plausible in the 20th century since the 'structure of modern international law' would be based on a premise of a 'coexistence of independent states'.[36] Bilfinger was referring to the *bellum justum* idea often associated with Augustine of Hippo. Augustine had introduced a distinction between unjust and just wars, the latter having a just cause (*causa iusta*) and aiming at restoring peace (*iustus finis*).[37] For Bilfinger such a

30 Felix Lange, '*Carl Bilfingers* Entnazifizierung und die Entscheidung für Heidelberg. Die Gründungsgeschichte des völkerrechtlichen Max-Planck-Instituts nach dem Zweiten Weltkrieg', HJIL 74 (2014), 697-731.

31 His colleagues advanced their claims about the legality of German action mostly in fora addressed primarily to a German audience, see below.

32 Bilfinger, 'Kriegserklärungen' (n. 26), 4 (all translations are my own).

33 Communications relating to the Present State of War (n. 1), 387.

34 Bilfinger, 'Kriegserklärungen' (n. 26), 7.

35 Bilfinger, 'Kriegserklärungen' (n. 26), 7.

36 Bilfinger, 'Kriegserklärungen' (n. 26), 7-8.

37 Raimund Schulz, 'Augustinus und die Vorstellung vom „gerechten Krieg"' in: Hans-Joachim Heintze and Annette Fath-Lihic (eds), *Kriegsbegründungen. Wie Gewaltanwendung und Opfer gerechtfertigt werden sollten* (Berliner Wissenschaftsverlag 2008), 11-18.

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distinction was necessarily linked to the Christian idea of a world state.[38] Bilfinger suggested that '[m]odern international law cannot fundamentally and universally organize the protection of the sovereignty of states through measures that are incompatible with this independence of the states themselves'.[39] Moreover, the 'existential struggle between sovereign states' cannot be solved 'by universal substantive legal principles (*Rechtssätze*)'.[40] In this 'existential struggle every opponent fights for his fundamental right of existence: therefore, the "jus ad bellum"'.[41]

For Bilfinger, the term 'jus ad bellum' had to be understood as a free right to wage war. Legal rules would have no constraining force in this respect. Efforts to regulate issues of peace and security were futile. Accordingly, Bilfinger suggested that the Western powers would reach the 'extra-legal sphere' when they invoked the Pact in connection with the outbreak of World War II.[42]

Second, Bilfinger argued that the Covenant and the Pact would discriminate against Germany because they were intended to confirm the existing territorial *status quo*. As Bilfinger pointed out in his 1940 article, the 'reservations'[43] that would bring the Pact into line with the Covenant would mean a 'doubling of the […] status quo safeguards' to the detriment of Germany.[44] During the negotiations on the Pact, a US note of June 1928 clarified that 'the Covenant can […] be construed as authorising war in certain circumstances' but that there was 'no necessary inconsistency between the Covenant and the idea of an unqualified renunciation of war'.[45] For Bilfinger, this was evidence of the problematic link between the Covenant and the Pact.[46] The prohibition of war in the Pact and the prohibition of territorial changes under Art. 10 of the Covenant would be against the interests of the powers that had lost World War I. Linking the Pact to the Covenant would go against their interests and violate

38 Bilfinger, 'Kriegserklärungen' (n. 26), 8.
39 Bilfinger, 'Kriegserklärungen' (n. 26), 8.
40 Bilfinger, 'Kriegserklärungen' (n. 26), 8.
41 Bilfinger, 'Kriegserklärungen' (n. 26), 8.
42 Bilfinger, 'Kriegserklärungen' (n. 26), 8.
43 Not only Bilfinger, but also others treated the declarations made in the context of the Kellogg-Pact negotiations as 'reservations' in the legal sense, Hans Wehberg, *Die Ächtung des Krieges* (Vahlen 1930), 106-107. The character as legal 'reservations' is, however, not obvious, since the declarations were not formally made by each state upon ratification, on this see Robert Le Gall, *Le Pacte de Paris du 27 Août 1928* (Receuil Sirey 1930), 83-85.
44 Bilfinger, 'Kriegserklärungen' (n. 26), 11.
45 'Note des amerikanischen Botschafters in Berlin an den Staatssekretär des Auswärtigen Amts vom 23. Juni 1928' in: *Materialien zum Kriegsächtungspakt*, (3rd edn, Verlag der Reichsdruckerei 1929), 70.
46 Bilfinger, 'Kriegserklärungen' (n. 26), 11.

the principle of equality.[47] It would mean that the existing legal framework for peace and security would privilege one group and discriminate against another.[48] The Kellogg-Briand Pact could be activated 'to the detriment of poor nations or nations dependent on the acquisition of territory for settlement and economic expansion because of overpopulation'.[49] It would work 'automatically against the "have-nots" and for the saturated powers'.[50]

Bilfinger's use of language suggests that he was deeply troubled by the perceived 'Schmach of Versailles'. The Treaty of Versailles was signed on June 28, 1919 between Germany and most of the Allied and Associated Powers to end World War I. France, Great Britain, and the United States played a key role in the negotiations. The treaty imposed onerous obligations on the German Empire: Germany had to disarm, give up significant portions of its territory, pay heavy reparations to the Allies, and accept responsibility for the war. As a result, the treaty became a primary target of attack by German international lawyers during the interwar period.[51] Some abroad also criticised the heavy burden the peace treaty placed on Germany.[52]

Bilfinger built on these arguments but took them one step further. For Bilfinger, Germany was a 'have-not' that needed to regain its lost territories. The rules of international law restricting revision, even if carried out by force, had to be set aside. Bilfinger did not mention that the German Reich had been one of the original signatories of the Pact. With Gustav Stresemann as Foreign Minister, the *Auswärtige Amt* had generally sought to bring France and Germany closer together and to enhance Germany's international standing through participation in international fora. After the German Reich became a member of the League of Nations in 1926, it was quick to signal its support for the Kellogg-Briand Pact.[53]

This foreign policy direction clearly did not find favour with Bilfinger, as can be seen from his early extensive writings on questions of war and peace.[54] Already in the first issue of the *ZaöRV* in 1929, shortly after the adoption of

47 Bilfinger, 'Kriegserklärungen' (n. 26), 11.

48 Bilfinger, 'Kriegserklärungen' (n. 26), 11-12.

49 Bilfinger, 'Kriegserklärungen' (n. 26), 15.

50 Bilfinger, 'Kriegserklärungen' (n. 26), 15.

51 On the reaction of German international legal scholarship to the Treaty of Versailles, see Stolleis, *A History of Public Law* (n. 13), 60-64; however some saw some potential for peaceful 'revision' under the Covenant, Hans Wehberg, 'Die Revision internationaler Verträge', Friedens-Warte 32 (1932), 196-202 (200-201).

52 John Maynard Keynes, *The Economic Consequences of the Peace* (Harcourt, Brace & Howe 1920).

53 See Roscher (n. 17), 82.

54 Carl Bilfinger, 'Betrachtungen über politisches Recht', HJIL 1 (1929), 57-76; Bilfinger, 'Die russische Definition des Angreifers', HJIL 7 (1937), 483-496; Bilfinger, *Völkerbundsrecht gegen Völkerrecht* (Duncker & Humblot 1938).

the Kellogg-Briand Pact, Bilfinger pointed out that the terms of the Pact were too vague to be recognised as legal obligations.[55] The many contradictory declarations made by states prior to its adoption were evidence that essential questions of war and peace could not be meaningfully addressed by international law. The Pact would be 'a programmatic declaration that does not contain the minimum level of legal bindingness required for political legal norms'.[56] Moreover, since the mid-1930s, Bilfinger had attacked the League of Nations as an institution which would 'guarantee […] the status quo through hegemony and sanctions'.[57] In his lecture at the *Hague Academy of International Law* published in 1938 Bilfinger also expressed scepticism about regulating issues of war and peace through law.[58]

Bilfinger thus put forward a particular 'political' understanding of international law, based on the premise that international law could not touch the vital interests of states. Through this lens, the major new universal treaties on peace and security – the Covenant and the Pact – were meaningless because the issue was not amenable to legal regulation and the treaties would discriminate against Germany. Bilfinger tried to revive the doctrine of the 19th century, when international law was rather indifferent to questions of war and peace.[59]

Bilfinger was not a lone wolf. His prominent colleague Carl Schmitt – with whom Bilfinger had had a close collegial relationship at least until 1934 –[60] had developed similar arguments, albeit with a primary focus on the League of Nations Covenant rather than the Pact. In his 1924 article *Die Kernfrage des Völkerbundes,* Schmitt emphasised that the League contained a 'guarantee of a status of possession' and was based on the assumption that the territorial arrangements of the peace treaties were legitimate.[61] Normative rules such as

55 Bilfinger, 'Politisches Recht' (n. 54), 70.

56 Bilfinger, 'Politisches Recht' (n. 54), 72.

57 Bilfinger, *Völkerbundsrecht* (n. 54), 35.

58 Carl Bilfinger, 'Les bases fondamentales de la communauté des états', RdC 63 (1938), 129-241 (135).

59 For a recent critique of the 'indifference'-account see Agatha Verdebout, *Rewriting the Histories of the Use of Force: The Narrative of 'Indifference'* (Cambridge University Press 2021), 107; Hendrik Simon, 'The Myth of Liberum Ius ad Bellum: Justifying War in 19th-Century Legal Theory and Political Practice', EJIL 29 (2018), 113-136.

60 Reinhard Mehring, 'Vom Berliner Schloss zur Heidelberger „Zweigstelle". Carl Bilfingers politische Biographie und seine strategischen Entscheidungen von 1944', MPIL 100, 9 February 2024, <https://mpil100.de/2024/02/vom-berliner-schloss-zur-heidelberger-zweigstelle-carl-bilfingers-politische-biographie-und-seine-strategischen-entscheidungen-von-1944/>, last access 21 January 2025.

61 Carl Schmitt, 'Die Kernfrage des Völkerbundes (1924)' in: Carl Schmitt and Günter Maschke (ed.), *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978* (2nd edn, Duncker & Humblot 2005), 1-25 (7).

Article 10 of the Covenant, which obligated League members to preserve the territorial integrity of all members against external aggression, would intend to secure this *status quo*. For Schmitt, therefore, the 'rule of law is the dangerous thing' because the more one would emphasise the law, the more one would 'legitimize the existing situation'.[62] Some years later, Schmitt emphasised that the League of Nations would be 'a system of legalization' aimed at 'monopoliz[ing] the decision on just war with a certain authority and place[ing] the momentous decision on the right and wrong of war associated with the turn to the discriminatory concept of war in the hands of certain powers'.[63] As a lawyer dedicated to German revisionism, Schmitt devoted his efforts to discrediting the existing system of peace and security. In response to the Polish aggression against Germany, Carl Schmitt again criticised the Geneva system in general terms for blurring the distinction between war and peace by attempting to impose legal rules on the issue. Although he did not mention the German-Polish hostilities, he made it clear that the attempts in Geneva to regulate war were to blame for the outbreak of World War II.[64]

Such 'lack-of-normative-force' arguments were not exclusively of German origin. Some other international lawyers, in particular Italian scholars, did not regard war and peace as amenable to regulation.[65] However, this claim was only a minority position in the discipline. Scholars from a variety of different national backgrounds treated the Pact as a proper instrument of legal interpretation. Among them were well-known lawyers such as Quincy Wright in the US, George Scelle in France and Hersch Lauterpacht situated in Great Britain.[66] But also lawyers from less powerful states, such as the Polish international lawyer Miroslas Gonsiorowski or the Chinese lawyer Yeun-li Liang, emphasised the legal relevance of the Pact.[67] Even German-speaking legal scholars of different political persuasions, such as Hans Weh-

62 Schmitt, 'Kernfrage' (n. 61), 11.

63 Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (4th edn, Duncker & Humblot 2007), 8.

64 Carl Schmitt, 'Inter pacem et bellum nihil medium', Zeitschrift der Akademie für Deutsches Recht 6 (1939), 594-595 (594).

65 On Francesco Coppola and Umberto Campagnolo see Roscher (n. 17), 156-158, 165-167.

66 Quincy Wright, 'The Meaning of the Pact of Paris', AJIL 27 (1933), 39-61; Georges Scelle, 'Le Pacte Kellogg', La Paix par le Droit 38 (1928), 432-439; Hersch Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', Transactions of the Grotius Society 20 (1934), 178-204.

67 Yuen-li Liang, 'The Pact of Paris as Envisaged by Mr. Stimson: Its Significance in International Law', China Law Review 5 (1932), 198-207; Miroslas Gonsiorowski, 'The Legal Meaning of the Pact for the Renunciation of War', Am. Polit. Sei. Rev. 30 (1936), 653-680.

berg, Viktor Bruns, and Alfred Verdross also wrote positively about the new legal instrument in the late 1920s and early 1930s.[68]

In the early 1930s, Bilfinger's position thus was the exception rather than the rule. During the National Socialist era and in the context of Germany's aggression against Poland, Bilfinger's 'lack-of-normative-force' claim became increasingly popular among German international lawyers. Like Bilfinger, the young lawyer Wilhelm Grewe (1911-2000) argued in 1940 that the conduct of war was not constrained by legal rules. Grewe – who was to become an important legal expert in the *Auswärtige Amt* during the Adenauer government after World War II – was then a research assistant at the *Deutsches Institut für außenpolitische Forschung* (German Institute for Foreign Policy Research) at the time. In the Institute's monthly publication, he emphasised that questions of war guilt (*Kriegsschuld*) would be a moral but not a legal issue. The 'vague wording and numerous reservations […] largely deprived the Briand-Kellogg Pact of its legally binding force'.[69] Neither the term aggression, nor the scope of self-defence would be clearly defined.[70] Grewe concluded: the question of war guilt would be 'no legal question in the narrow sense according to which a matter could be assessed against a fixed legal norm and a clear legal consequence could be derived from it'.[71]

In sum, the 'lack-of-normative-force' argument was popular with German international lawyers under the swastika because it implied that the German Reich had not violated any legal obligations with its aggression against Poland. Instead, Germany could rely on a free right to wage war. In the specific context of German aggression against Poland, this argument was used as a justificatory strategy to enable National Socialist Germany's territorial expansion without any legal constraints.

III. Embracing National Socialist Propaganda and Claiming Violations by Western Powers

Some German jurists offered a more doctrinal justification for the German aggression arguing with the existing rules of peace and security. Axel Freiherr von Freytagh-Loringhoven (1878-1942), a professor at the University of Bres-

68 Wehberg, *Ächtung* (n. 43); Alfred Verdross, 'Die Ausnahmen vom Kriegsverbote des Kellogg-Pakts', Friedens-Warte 39 (1930), 65-66; Viktor Bruns, 'Völkerrecht als Rechtsordnung I', HJIL 1 (1929), 1-56 (25-27).

69 Wilhelm G. Grewe, 'Die Kriegsschuldfrage als völkerrechtliches Problem', MAP 7 (1940), 99-102 (101).

70 Grewe, 'Kriegsschuldfrage' (n. 69), 101.

71 Grewe, 'Kriegsschuldfrage' (n. 69), 102.

lau, provided the most detailed doctrinal analysis. A strong opponent of the 1918 Revolution and the Weimar Republic, he described himself as 'a monarchist standing on *völkisch* ground'.[72] As a member of parliament for the nationalist, anti-republican and anti-Semitic DNVP, Freytagh-Loringhoven focused his political energies on criticising Gustav Stresemann's foreign policy of rapprochement with France and Germany's entry into the League of Nations.[73] After the National Socialist takeover, Freytagh-Loringhoven was a key figure in the DNVP's self-dissolution and remained in parliament as a guest of the NSDAP. As a member of the notorious *Akademie für Deutsches Recht* and chairman of the Colonial Law Committee he was a protagonist in the German legal efforts to recover the 'stolen' German colonies.[74]

After the German aggression against Poland in 1939, Freytagh-Loringhoven was the first to develop the legal case for National Socialist aggression in the *Zeitschrift der Akademie für deutsches Recht*.[75] In 1940, he also published a 115-page book on 'Kriegsausbruch und Kriegsschuld 1939' which dealt with the question of the legal and political guilt for the outbreak of World War II.[76] The monograph was part of the *Veröffentlichungen des Deutschen Instituts für Außenpolitische Forschung*, edited by Friedrich Berber, another important German international lawyer and legal advisor to National Socialist foreign minister Joachim von Ribbentrop.[77] A colleague praised Freytagh-Loringhoven's monograph for exemplifying that 'German legal science' would be 'the master of the situation' at this 'historic moment'.[78]

Freytagh-Loringhoven put forward two lines of argument. First, he justified German aggression as self-defence. For him, not the German Reich but Poland had violated the Pact.[79] Freytagh-Loringhoven explained that while the terms 'war' and 'aggression' were not defined in the Pact, Poland was bound by a definition of 'aggression' that had been enshrined in a treaty

72 Axel von Freytagh-Loringhoven, *Die Weimarer Verfassung in Lehre und Wirklichkeit* (J. F. Lehmann 1924), preface V; on this Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Weimarer Republik und Nationalsozialismus* (C. H. Beck 2002), 161-162.

73 On this Thomas Ditt, „Stosstruppfakultät Breslau": Rechtswissenschaft im „Grenzland Schlesien" (Mohr Siebeck 2011), 19; Joachim Wintzer, Deutschland und der Völkerbund 1918-1926 (Brill Schöningh 2006), 127.

74 On this Lange, 'Colonial Empire' (n. 16), 350.

75 Axel Freiherr von Freytagh-Loringhoven, 'Das deutsche Weissbuch', Zeitschrift der Akademie für Deutsches Recht 6 (1939), 591-594.

76 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24).

77 On Berber Katharina Rietzler, 'Counter-Imperial Orientalism: Friedrich Berber and the Politics of International Law in Germany and India, 1920s-1960s', Journal of Global History 11 (2016), 113-134.

78 Gustav A. Walz, 'Besprechung Freytagh-Loringhoven: Kriegsausbruch und Kriegsschuld 1939', Zeitschrift für Völkerrecht 25 (1941), 267 (269).

79 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13-14.

between the Soviet Union, Poland and other Soviet neighbours.[80] According to Freytagh-Loringhoven, Poland committed a number of acts with 'obviously warlike character' in particular 'the shelling of the German town Beuthen with artillery fire in the night from August 31 to September 1'.[81] In addition, Freytagh-Loringhoven mentioned various alleged military actions by Poland since August 27, cumulating in ten attacks on August 31. These actions could not be regarded as mere border incidents but would amount to aggression.[82]

According to Freytagh-Loringhoven, Polish aggression meant that Germany had the right under international law to use force to defend itself and to respond to these attacks.[83] For him, 'it was unequivocally clear that Germany was legally defending herself, even if she went on the offensive militarily'.[84] He suggested that defence by military means was not only a right but an obligation, especially for a great power like Germany.[85] Without explicitly mentioning it, Freytagh-Loringhoven argued for self-defence under international law.

At the doctrinal level, the doctrine of self-defence was indeed recognised as a legal exception to the prohibition of war. Although not explicitly codified in the Kellogg-Briand Pact, it was recognised as an implicit exception. A US note dated June 23, 1928 clarified prior to the adoption of the Pact: 'There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions, to defend its territory from attack or invasion […].'[86] The parties responding to the note agreed with this interpretation or argued for even more far-reaching exceptions.[87] Freytagh-Loringhoven thus based his claim on an existing legal concept.

On the factual level, however, Freytagh-Loringhoven built his case on National Socialist propaganda. The National Socialist media reported a series of incidents in which Polish troops had allegedly entered German territory and fired on German soldiers in late August 1939.[88] These incidents were all

80 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 16.
81 Freytagh-Lovringhoven, 'Weissbuch' (n. 75), 593.
82 Freytagh-Lovringhoven, *Kriegsausbruch* (n. 24), 16.
83 Freytagh-Loringhoven, *'Weissbuch'* (n. 75), 593.
84 Freytagh-Loringhoven, *'Weissbuch'* (n. 75), 593.
85 Freytagh-Lovringhoven, *Kriegsausbruch* (n. 24), 6.
86 Note des amerikanischen Botschafters (n. 45), 70.
87 On this see Roscher (n. 17), 92-95.
88 Jürgen Runzheimer, 'Die Grenzzwischenfälle am Abend vor dem Angriff auf Polen' in: Wolfgang Benz and Hermann Graml (eds), *Sommer 1939. Die Großmächte und der europäische Krieg* (Deutsche Verlags-Anstalt 1979), 107-147.

staged. Reinhard Heydrich, head of the *Reichssicherheitshauptamt* and later responsible for organising the mass murder of the Jews, had led the planning. Heydrich reportedly told subordinates that Hitler needed a pretext for war.[89] At various locations, SS personnel used Polish uniforms to simulate an attack. However, because the activities apparently did not give the local population the impression of a serious attack, initial plans to bring in foreign journalists were not carried out.[90]

Freytagh-Loringhoven did not question the press reports and did not attempt to investigate the factual basis for Germany's actions. Despite the fact that the German large-scale offensive against Poland began only hours after the faked incidents, German international lawyers happily accepted these claims. Carl Bilfinger even cited Hitler's Reichstag speech as the only evidence of Polish aggression.[91]

Second, Freytagh-Loringhoven argued that Britain and France had violated both the League of Nations Covenant and the Briand-Kellogg Pact by 'declaring war' on the German Reich.[92] With respect to the Covenant, Freytagh-Loringhoven suggested that Britain and France had violated the Covenant's procedural obligations. For him, these procedural obligations applied even to a non-member State such as Germany. At the very least, Britain and France should have waited for a decision by the League Council before going to war.[93] Carl Bilfinger had made similar points. By not going through the League's mediation procedure before 'declaring war' on Germany, the Western powers violated the Covenant. This would amount 'from the point of view of the law of the League of Nations to a confession of war guilt on the part of the Western Powers'.[94]

This argument was rather surprising. As explained, Germany was no member of the League Covenant by 1939 since its withdrawal had become effective in 1935. The procedural obligations of Arts 12 to 15 applied only to 'disputes between members of the League'. For Germany, only the provisions of the League Covenant dealing with non-members were applicable. Art. 17 provided for a procedure whereby non-member states 'shall be invited to accept the obligations of membership in the League for the purposes of [a] dispute'. If a state refused the invitation and went to war against a member of the League, the sanctions mechanism under Art. 16

89 Runzheimer (n. 88), 111.

90 Runzheimer (n. 88), 147.

91 Bilfinger, 'Kriegserklärungen' (n. 26), 3: with a reference to 'Polish hostilities', Friedrich Schlüter, 'Der Ausbruch des Krieges', HJIL 10 (1940), 244-269 (244); Walz (n. 78), 267.

92 Freytagh-Loringhoven, *'Weissbuch'* (n. 75), 592.

93 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 11.

94 Bilfinger, 'Kriegserklärungen' (n. 26), 2-3; see also Carl Bilfinger, *Der Völkerbund als Instrument britischer Machtpolitik* (Junker & Dünnhaupt 1940), 16, 40.

would be triggered. The member states of the League thus had the power to extend the sanction system to non-League members through Art. 17. This did not mean, however, that members of the League were bound by the provisions of the Covenant *vis-a-vis* non-members.[95]

Beyond the Covenant, Freytagh-Loringhoven also saw a violation of the Kellogg-Briand Pact by France and Great Britain. The Pact would not allow self-defence in the name of Poland.[96] Self-defence would be legal only if directed against an immediate attack, not to protect an ally.[97] He claimed: 'This has always been the unanimous opinion of the entire literature on international law.'[98] Similarly, Carl Bilfinger suggested that a third state could not claim self-defence on behalf of another state that had allegedly been attacked.[99] The British reliance on the idea of defensive wars would amount to 'a record of distortion, falsification and inversion'.[100]

In this case, the German lawyers had a point. The law of the time did not recognise the concept of 'collective self-defence' as we know it today. In the context of the adoption of the Pact, a number of States had made it clear that self-defence was limited to a response to an armed attack on the territory of the state invoking it. As the US note of June 23, 1928 prior to the adoption of the Pact, made clear: 'Every nation is free at all times and regardless of treaty provisions, to defend its territory from attack or invasion. […].'[101] The French response of July 14, 1928 emphasised that each state may 'defend its territory against an attack or invasion'.[102] While some states argued for a broader understanding of self-defence when vital interests were at stake,[103] others signalled agreement. None suggested that self-defence could be invoked on behalf of other states even if the attacked state asked for help. Accordingly, the major textbooks of the time on war and peace did not mention collective self-defence.[104] It was not until Art. 51 of the United

95 Standard accounts accordingly did not touch upon potential obligations of member states vis-à-vis non-member states, Schücking and Wehberg (n. 23), 637-644.

96 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

97 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

98 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

99 Carl Bilfinger, 'Angriff und Verteidigung', Zeitschrift der Akademie für Deutsches Recht 8 (1941), 253-255 (253).

100 Bilfinger, 'Angriff' (n. 99), 253.

101 Note des amerikanischen Botschafters (n. 45), 70.

102 'Note des französischen Außenministers an den amerikanischen Botschafter in Paris vom 14. Juli 1928' in: Materialien zum Kriegsächtungspakt (3rd edn, Verlag der Reichsdruckerei 1929), 84.

103 On this see Roscher (n. 17), 84-88.

104 See for instance Paul Barandon, Das Kriegsverhütungsrecht des Völkerbundes (Carl Heymanns 1933), 270-279; Lassa Oppenheim, International Law: A Treatise. Disputes, War and Neutrality (5th edn, Longmans, Green and Co 1935), 157-162; Le Gall (n. 43), 94-109.

Nations Charter that the doctrine of collective self-defence was enshrined in international law.[105]

Did France and Great Britain thus have no legal basis for acting on behalf of Poland? Not at all. It was generally accepted in the international legal literature that the Pact did not restrict war against a state that had itself violated the Kellogg-Briand Pact. In the negotiations on the Pact, the US had proposed to amend the preamble to clarify this issue. The new version of the preamble stated that 'any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty'. According to the US, it was clear that wars against the violator of the Pact were excluded from the scope of the Pact. 'There can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state.'[106] Soon France and Germany explicitly adopted the US interpretation and Australia even suggested that 'the preamble in this respect is to be taken as part of the substantive provisions of the treaty itself'.[107] Scholars from Germany, the US, and France accordingly emphasised that the Pact did not protect its breakers.[108] Thus, the Pact did not prohibit war against the aggressor Germany. Freytagh-Loringhoven's criticism of France and Britain for their support of Poland thus came to nothing.

IV. Against the Shift in the Rules of Neutrality

The third line of argument put forward by German lawyers under the swastika does not concern the *ius ad bellum* in the strict sense. Rather, the rules of 'neutrality' are codified in two of the 1907 Hague Conventions dealing with *ius in bello*, one devoted to warfare on land and one to warfare at sea.[109] The Conventions set out the obligations of third states in war

105 Josef L. Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', AJIL 41 (1947), 872-879; Hans Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations', AJIL 42 (1948), 783-796.

106 Note des amerikanischen Botschafters (n. 45), 70.

107 'Note des britischen Staatssekretärs für auswärtige Angelegenheiten an den amerikanischen Geschäftsträger in London vom 18. Juli 1928' (Antwort der Australischen Regierung) in: Materialien zum Kriegsächtungspakt (3rd edn, Verlag der Reichsdruckerei 1929), 104; on this Roscher (n. 17), 94-95.

108 Scelle (n. 66), 436; Barandon (n. 104), 269; Wright, 'Pact of Paris' (n. 66), 56.

109 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907; Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

between belligerents. According to the Conventions, belligerents may not use the territory of a neutral state for their military operations, and neutral states are prohibited from permitting such use.[110] Third states are also prohibited from transferring arms directly to belligerents.[111] While neutral states are not obliged to prevent the export of arms to belligerents by private actors, they are obliged to treat belligerents impartially in such cases.[112] Similarly, belligerents must be treated equally when it comes to access to ports or the use of territorial waters of the neutral state.[113] The rationale behind the concept of neutrality is the localisation of war. By not taking sides, it was hoped to limit the spread of war by preventing third states from being drawn into the conflict.[114]

As early as World War I, the question of trade in arms with belligerents had been a focal point for the development of various legal perspectives on the matter.[115] After the adoption of the Covenant of the League of Nations and the Kellogg-Briand Pact, the rules of the Hague Conventions came even under more pressure. As scholars have shown, the Covenant and the Pact sparked a debate between a 'traditional' and a 'reformist' understanding of neutrality.[116] In 1920, the Council of the League of Nations pointed out that a strict reading of the idea of neutrality 'is incompatible with the principle that all members will be obliged to cooperate in enforcing respect for their engagements'.[117] In the 1930s, many scholars argued that the two treaties had implications for the existing rules of neutrality. Since the rules distinguished between lawful and unlawful war, there could be no obligation to remain impartial. At the 1933 meeting of the American Society of International Law international lawyers such as James W. Garner and Charles G. Fenwick argued that sanctions against an aggressor did not violate international law, particularly obligations of neutrality.[118] In Europe, the Greek international lawyer Nicolas Politis dismissed the traditional concept of neutrality as 'a product of international anarchy' and 'a true anachronism'. For him, neutral-

110 Arts 2-5 of the Hague Convention (V).

111 Art. 6 of the Hague Convention (XIII).

112 Arts 7 and 9 of the Hague Convention (V).

113 Art. 9 of the Hague Convention (XIII).

114 On this rationale Edwin Borchard and William Potter Lage, *Neutrality for the United States* (Yale University Press 1937), Preface VI.

115 Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge University Press 2012), 123.

116 With a focus on the US debate Shinohara (n. 115); Stephen Neff, 'A Three-Fold Struggle Over Neutrality: The American Experience in the 1930s' in: Pascal Lottaz & Herbert R. Reginbogin (eds), *Notions of Neutralities* (Lexington Books 2019).

117 Communications relating to the Present State of War (n. 1), 57.

118 On this Shinohara (n. 115), 125-126.

ity as an institution was 'irrevocably doomed' and 'destined to disappear'.[119] In the influential textbook *Oppenheim's International Law*, Hersch Lauterpacht suggested in 1935 that the 'outbreak of war is no longer an event concerning the belligerent alone'. On this basis, he argued that neutral nations such as the United States, which was not a member of the League but a signatory to the Pact, had a *carte blanche* to apply economic or military sanctions against so-called 'guilty belligerents'.[120] In 1940, the French lawyers René Cassin put forward that since localising war through neutrality was a mere illusion, one needed to reject attempts to resurrect 'traditional neutrality'.[121] A 'new school' had emerged.

The shift in the concept of neutrality found expression in two documents. First, the International Law Association, founded as a private institution in 1873, adopted the Budapest Articles of Interpretation in 1934. Art. 4 emphasises the change in the concept of neutrality:

'In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things: […] (b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent; (c) Supply the State attacked with financial or material assistance, including munitions of war; (d) Assist with armed forces the State attacked.'[122]

This was nothing less than an explicit repudiation of the Hague Conventions rules.

Second, in 1939 US scholars adopted the influential *Harvard Draft Convention on the Duty and Rights of States in Case of Aggression*. Philip Jessup, a professor at Columbia Law School, was the rapporteur. Although Jessup himself had long supported the traditional notion of neutrality,[123] the draft maintained that in the case of aggression third states were not bound by the rules of neutrality towards the aggressor.[124] It explained various options for third states in the face of aggression. They could either declare to become 'co-defending' states and assist the defending country militarily – which was

119 Nicolas Politis, *La Neutralité et La Paix* (Hachette 1935), 7-8; on this Shinohara (n. 115), 131-132.

120 Oppenheim (n. 104), 231.

121 Cassin (n. 11), 48-69.

122 Manley O. Hudson, 'The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris', AJIL 29 (1935), 92-94 (93).

123 Philip C. Jessup, 'The Birth, Death and Reincarnation of Neutrality', AJIL 26 (1932), 789-793.

124 Draft Convention on Rights and Duties of States in Case of Aggression, AJIL 33 (1939), 827-830.

the traditional concept. Or they could become 'supporting states' and assist an attacked state without using armed force. The draft emphasised that 'supporting states' could discriminate against the aggressor.[125] Impartiality therefore did not apply.

German international lawyers strongly rejected such ideas in the context of German aggression against Poland. Carl Bilfinger argued that France and Great Britain could not claim that the Kellogg-Briand Pact authorised them to intervene in a dispute between third parties, in this case Poland and Germany.[126] He suggested that the idea of a 'carte blanche for interventions' would affect almost all 'fundamental questions of political international law'.[127] The principle of state sovereignty and the doctrines of neutrality would be at stake: 'The notion of just war and justifiable attack is extended to a legal doctrine of illicit neutrality towards the aggressor state.'[128] This 'new international law' had to be rejected.[129]

Ferdinand Schlüter, a *Referent* at the KWI, took a similar view in his 1942 *ZaöRV* article 'Kelloggpakt und Neutralitätsrecht'.[130] He argued that an explicit convention was needed to override existing neutrality doctrines.[131] In particular, Schlüter attempted to deconstruct the normative weight of the Budapest Articles as a 'scholarly opinion on international law'.[132] The articles would only reflect the position of a 'private association of lawyers'[133] since no state representatives had attended the meeting. In addition, British international lawyers such as Arnold McNair, John Fischer Williams, and J. L. Brierly would have dominated the International Law Association committee in Budapest. He concluded: 'The Budapest Articles, which have been compiled by British international lawyers contrary to the clear will of the signatory states of the Kellogg-Briand Pact, form a link in the chain of British efforts to free itself from all obligations under international law with a view to a future war.'[134] Wilhelm Grewe also rejected the 'well-known American arguments for the abolishment of the term neutrality'.[135] It would be obvious

125 Draft Convention on Rights and Duties (n. 125); on this Stephen Neff, *War and the Law of Nations. A General History* (Cambridge University Press 2005), 310-311.

126 Bilfinger, 'Kriegserklärungen' (n. 26), 6.

127 Bilfinger, 'Kriegserklärungen' (n. 26), 6.

128 Bilfinger, 'Kriegserklärungen' (n. 26), 6.

129 Bilfinger, 'Kriegserklärungen' (n. 26), 6.

130 Ferdinand Schlüter, 'Kelloggpakt und Neutralitätsrecht', HJIL 11 (1942), 24-32.

131 Schlüter, 'Kelloggpakt' (n. 130), 29.

132 Schlüter, 'Kelloggpakt' (n. 130), 31

133 Schlüter, 'Kelloggpakt' (n. 130), 32.

134 Schlüter, 'Kelloggpakt' (n. 130), 32.

135 Wilhelm G. Grewe, 'Die Bestimmung des Kriegszustandes', Zeitschrift der Akademie des Deutschen Rechts 7 (1940), 355-356 (356).

that the Hague Conventions cannot be amended by 'legislative acts' in the United States.[136] The Harvard draft would be a draft without a firm legal basis.[137] '[N]o one will be able to claim that the Harvard draft has any legal significance outside the United States.'[138] German scholars thus attempted to discredit the scholarly projects that reinterpreted the neutrality concept in light of the Covenant and the Pact.

Again, there was a German scholarly tradition to this argument which had gained popularity since the mid-1930s. In May 1936, at a high-profile conference on collective security in Paris, Friedrich Berber asserted that all the attempts to reshape the rules of neutrality would expose the 'utopian character […] of the new international legal ideology'.[139] In particular attempts to allow for a 'benevolent' or 'partisan' neutrality would be 'irreconcilably at odds with reality'.[140] As evidence he pointed to neutrality legislation in the United States, which provided for arms embargoes against both belligerents and thus did not distinguish between the aggressor and the attacked state.[141]

Support for the traditional understanding of neutrality did not come only from German lawyers. In the United States, the issue of neutrality divided the so-called 'traditionalists' and the 'reformists'.[142] A key figure among the traditionalists was Edwin Borchard, a professor at Yale Law School, who argued for maintaining the rules of the Hague Convention. He put forward that the debate over the impact of the League of Nations and the Kellogg-Briand Pact on international law should be understood in terms of the binary of realism and evangelism.[143] While the latter school would 'placed its faith in the "enforcement" of peace by collective sanctions', the former would show practical judgment by relying on negotiation, mediation, and arbitration.[144] For Borchard, novel concepts such as 'non-belligerency' were nothing more than 'a name used as a modern excuse for violating the laws of neutrality'.[145] In Europe, the Scandinavian states emphasised the principle of neutrality in the hope of staying out of the continent's wars as European tensions rose in

136 Wilhelm G. Grewe, 'Das Englandhilfsgesetz der Vereinigten Staaten', MAP 8 (1941), 214-217 (216).

137 Grewe, 'Kriegsschuldfrage' (n. 69), 102.

138 Grewe, 'Englandhilfsgesetz' (n. 136), 217.

139 Fritz Berber, 'Neutralität und kollektive Sicherheit', Zeitschrift für Politik 26 (1936), 357-369 (360).

140 Berber (n. 139), 361.

141 Berber (n. 139), 362-363.

142 Shinohara (n. 115), 123-148.

143 Edwin M. Borchard, 'Realism v. Evangelism', AJIL 28 (1934), 108-117.

144 Borchard, 'Realism' (n. 143), 108-109.

145 Edwin Borchard, 'War, Neutrality and Non-Belligerency', AJIL 35 (1941), 618-625 (624).

the late 1930s. Based on a joint effort by international legal experts, Finland, Denmark, Sweden, Norway, and Iceland adopted declarations of neutrality in 1938. The Norwegian international lawyer Edvard Hambro (1911-1977) referred to these declarations as proof of the maintenance of the rules of neutrality: The legislation would 'prove that the old law of neutrality still applies despite all the violations during the war and despite the ideology of the League of Nations Covenant and the Kellogg-Briand Pact'.[146] Thus, there was a deep division between different schools on the question of neutrality.

It was not surprising that German international lawyers during the National Socialist period (and before) embraced the traditional view. The project of revision on the European continent could potentially be hampered by US support for Poland, France, and Great Britain. In World War I, the United States had demonstrated its military and economic power. Keeping the US involvement in the conflict to a minimum by emphasising rules of neutrality was a common cause of German lawyers under the swastika.

V. The Question of Audience

This analysis has shown that German legal scholars developed various arguments to justify Hitler's aggression against Poland and to accuse the Western powers of violating international law. Not surprisingly, these arguments had little force (with the exception of the issue of neutrality, where the new rules of collective security were in tension with traditional understandings under the two Hague Conventions).

Who were the German lawyers under the swastika speaking to? Were the publications aimed at international lawyers abroad or the National Socialist government? Given the international reputation of the *ZaöRV*, at least Bilfinger's article was likely to receive attention abroad. However, in light of the broad consensus on the legal validity of the Pact, it was rather unlikely that Bilfinger could convince his international colleagues by treating the Pact as a 'scrap of paper'. Also, the harsh tone of the article makes it unlikely that it was supposed to persuade scholars abroad. Accordingly, the efforts to reach an international audience were much more limited when compared to earlier cases. Until 1938, German international lawyers had at times translated their arguments into different languages. For instance, when German lawyers under the swastika claimed that Germany had a legal title to regain the colonies lost under the Treaty of Versailles, they translated parts of their

146 Edvard Hambro, 'Das Neutralitätsrecht der nordischen Staaten', HJIL 8 (1938), 445-469 (468).

publications into English, French, and Italian.[147] Such attempts seemed fruitless in the context of the aggression against Poland. German lawyers under the swastika were isolated with their claims of legality.

Bilfinger was thus primarily addressing an internal audience. His colleagues who published in German journals with less international standing were also looking inward. But at whom? Were the arguments directed at the National Socialist government? Did the lawyers diligently offer their justificatory services for Hitler's expansionist foreign policy?

It is important to note that Hitler and Ribbentrop had not asked for such services. The National socialist leaders did not care about possible legal constraints on German expansion by military force. The fact that the *Auswärtige Amt* did not provide any official legal justification for the aggression in Poland speaks volumes. Nonetheless, the lawyers wanted to signal to the government that they were clearly on its side in this matter. While one would have to dig deeper into each case, it is not unlikely that career ambitions had some role to play. Moreover, German lawyers under the swastika had a common starting point: they all considered the territorial arrangements of the Treaty of Versailles to be grossly unjust. They all were members or closely associated with the NSDAP. When the Hitler government took military action to change the territorial *status quo*, the lawyers did not hesitate. Since they shared the expansionist goals, they were willing to provide legal cover for the aggression against Poland – although peaceful revision of Versailles was no longer on the agenda.

Last but not least, German lawyers under the swastika wanted to present an image of legality for self-assurance. The lawyers confirmed to themselves and the interested public that the German Reich could claim legality for its aggressive actions. This may explain the self-confident tone despite the weak legal position: As Freytagh-Loringhoven postulated 'only rarely at the outbreak of war it was so clear which side the law was on.'[148] The lawyers mutually confirmed to each other that Germany was not to blame for World War II.

Claiming legality against all odds is not a thing of the past. Fast forward to 2022: Despite the obvious violation of the prohibition of the use of force and aggression by the Russian Federation with its invasion of Ukraine, the Presidium of the Russian Branch of the International Law Association claimed legality. For them, the 'special military operation' was carried out 'on

147 See Axel Freiherr von Freytagh-Loringhoven, *Das Mandatsrecht in den deutschen Kolonien. Quellen und Materialien* (Duncker & Humblot 1938); on this in general Lange, 'Colonial Empire' (n. 16), 343-369.

148 Freytagh-Loringhoven, 'Weissbuch' (n. 75), 594.

the basis of the provisions of the United Nations Charter on self-defences, on the protection of human rights, in accordance with the international treaties of the Russian Federation with the Donetsk and Lugansk republics, at the request of these states and taking into account the appeals of Russian citizens living on the territory of these republics'.[149] The Russian international lawyers thus supported the official claim of President Putin.

While this is by no means limited to autocratic regimes, it seems that – international lawyers in such regimes tend to act as channels of justification for their governments' foreign policy, no matter what. One lesson from the late 1930s, however, may be that their arguments are paper tigers. If they lack persuasive force, they will have no impact on international legal discourse – at the time and in the long run.

149 Statement of the Presidium of the Russian Branch of the International Law Association (no date provided), <http://www.ilarb.ru/html/news/2022/7032022.pdf>, last access 21 January 2025.