THE INTERNATIONAL LEGAL ORDER AND THE RULE OF LAW

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"If the goal is peace by law, we are still as far away from it as ever."
Raymond Aron[1]

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This Article addresses whether international law today is capable of instituting the rule of law. It offers a renewed look at the internationalists who brought us modern international law, such as Lauterpacht, Cassin, and Lemkin. They tenaciously worked at placing the individual's right to life and to human dignity front and center in international law while also

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[1] RAYMOND ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 398 (Richard Howard & Annette Baker Fox trans., 1973).

preserving peace among states. Their struggle began in earnest first in the interwar years after the "war to end all wars" (1918–1939), and then again in 1945 after yet another, still worse, world war had occurred, devastating Europe, but leaving the internationalists with undiminished commitment. The internationalists drew inspiration from others, such as Grotius and Vattel, and in a more general way from the Enlightenment tradition in which they were steeped. This Article looks beyond international law to fields that can shed light both on the internationalists and on prospects for international law in its dynamic with the rule of law. It incorporates work from philosophy, political science, history, diplomacy, and even psychology. It explores arguments surrounding the U.N. Charter's Article 2 prohibition against humanitarian intervention and the issues of whether war is inevitable, and if war can be moral. It seeks to create a dialogue among the thinkers whose work was consulted, both from the standpoint of their various fields and across time, sometimes even across centuries. In this way, readers are invited to draw independent conclusions from the sources discussed as I take them along the path I followed in reaching my own assessments.

I. INTRODUCTION

Whether the international legal order can be governed by the rule of law has always been a pressing question, and it has seemed more urgent since Russia's invasion of Ukraine. As the French political philosopher Raymond Aron wrote, "[o]ne does not judge international law by peaceful periods . . . ."[2] The war in Ukraine has disrupted the West's sense that the post–World War II legal order would continue indefinitely and that a major European war was unthinkable.[3] The war in Ukraine, ongoing as of this writing, resembles the Second World War in that both began as acts of bold aggression on the part of the invading country. Russia's aggression violated

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[2] *Id.*

[3] This is despite the fact that war had broken out between 1992 and 1995 in Europe between Bosnia and Herzegovina. *See, e.g.*, Ivo H. Daalder, *Decision to Intervene: How the War in Bosnia Ended*, BROOKINGS (Dec. 1, 1998), https://www.brookings.edu/articles/decision-to-intervene-how-the-war-in-bosnia-ended [https://perma.cc/FTR3-AYEY]. Although there were many indications of Russia's growing aggression in the years preceding its invasion of Ukraine, such as its invasion and "annexation" of Crimea in 2014 and rejection of European Court of Human Rights rulings, the invasion of Ukraine in 2022 came as a shock to the system, reminiscent of the comment of a French report on France's pre-Russian national invasion energy policy: "*Cette histoire est celle de l'endormissement d'une nation*." ("*This is the story of a nation that has been asleep."*) Martin Bernier, *La lettre du Figaro du 7 avril 2023*, LE FIGARO (Apr. 7, 2023, 6:54 AM), https://www.lefigaro.fr/la-lettre-du-figaro-du-7-avril-2023-20230407 [https://perma.cc/YEE7-EZZ4].

both codified international law and customary international law and has led the International Criminal Court to issue an arrest warrant for President Vladimir Putin, although not for waging a war of aggression.[4]

In addressing international law's powers over the rule of law, this Article explores the issue of whether international law not just has, but *can* have, the effect of creating a world at peace. It will look at different views on the intertwining of international law with aggressive wars, and on the fragility and strength of the rule of law. It reexamines the internationalists who contributed to the development of international law, with a focus on their writings from the interwar years of 1918 to 1939 until after the Second World War. It also explores relevant secondary literature from various fields to position these internationalists within a larger scholarly context and tradition. The internationalists were Continental European heirs to Enlightenment thinking, steeped in classical education, but also were, inevitably, deeply marked by the catastrophic, genocidal world they had experienced.

I have tried to make this Article reflect current and past secondary literature, but also, as well as possible, to create a dialogue among the thinkers whose works I have consulted. It is through that dialogue that I hope to allow readers to reach their own conclusions, just as juxtaposing the views of these thinkers helped me reach my conclusions. Many of the sources are not legal sources because historians, philosophers, diplomats,

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[4] *See Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, ICC (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [https://perma.cc/G4NY-TVY6]. In 1994, U.S. President Bill Clinton and Russian President Boris Yeltsin persuaded Ukraine to destroy its nuclear arsenal in exchange for a commitment by Russia to respect Ukraine's territorial integrity. Russia first violated that commitment in 2014 when it invaded and took over Crimea, and then again in 2022 when it started the present war. *See, e.g.*, Miriam O'Callaghan, *Clinton Regrets Persuading Ukraine to Give Up Nuclear Weapons*, RTE (Apr. 4, 2023, 10:48 AM), https://www.rte.ie/news/primetime/2023/0404/1374162-clinton-ukraine [https://perma.cc/3HKF-F5QY]. The charges brought against Putin are not for a war of aggression due to jurisdictional impediments in the Statute of Rome against bringing that charge. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter *Rome Statute*]. The trajectory towards including the war of aggression in the Rome Statute was a long one. The statute did not allow for the crime of wars of aggression originally. After years of effort and negotiation, it was added in 2010 in what are known as the "Kampala Amendments," named for the location where the State Parties agreed by consensus to make them. These included adding the war of aggression to Article 8. Pursuant to Resolution 6, however, that crime can only be prosecuted against a State which has not opted out of the ICC's jurisdiction. *See, e.g.*, PARLIAMENTARIANS FOR GLOB. ACTION, *Amendments to the Rome Statute*, https://www.pgaction.org/ilhr/rome-statute/amendments.html#:~:text=The%20Kampala%20Amendments%20to%20the%20Rome%20Statute%20on%20the%20crime,State%20Party%20(territorial%20jurisdiction)%20and [https://perma.cc/792G-EL7K]; *see also* William Schabas, *The Human Right to Peace*, 58 HARV. INT'L. L.J. 28, 29 (2017) ("[A] tendency to marginalize the crime of aggression persists.").

political scientists, and even psychologists can contribute to a better grasp of the internationalists, and because the issues concerning international law and peace also concern human behavior, philosophy, politics, and diplomacy.

II. WHO WERE THE INTERNATIONALISTS?

The internationalists were the men who lived through two cruel world wars without giving up on international law. René Cassin was one of the interwar internationalists who tenaciously retained his enthusiastic fervor, even after the end of the Second World War, to create an international law to civilize the world.[5] A distinguished jurist and veteran of the First World War,[6] Cassin fled from France to join de Gaulle in London during the Second World War.[7] During the war, he lost twenty-six family members, including his sister, to Nazi deportation and murder in Auschwitz—an outcome typical for someone of his Jewish origin.[8] The other great post-war creators of international law, like Cassin, were also European Jews profoundly affected by the war in their personal lives.[9] Hersch Lauterpacht,

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[5] For Cassin's interwar work, *see* JAY WINTER & ANTOINE PROST, RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION 51–79 (Stefan-Ludwig Hoffmann & Samuel Moyn eds., 2013). For his post-war work, *see id.* at 135. Cassin went on to be a chief drafter of the International Declaration of Human Rights and was a Nobel Prize laureate in 1968. *See id.* at 221; RENÉ CASSIN, LA PENSEE ET L'ACTION 217, 218 (1974).

[6] *See* WINTER & PROST, *supra* note 5, at 43–79.

[7] *See* RENÉ CASSIN, LES HOMMES PARTIS DE RIEN 8; WINTER & PROST, *supra* note 5, at 105–06; PAUL REYNAUD, CARNETS DE CAPTIVITÉ 1941–1945, at 74 (1996).

[8] For an account of Cassin's family losses, *see* WINTER & PROST, *supra* note 5, at 304–05; CASSIN, *supra* note 5, at 213 (his sister and brother-in-law were deported and murdered, as were nine other family members on his paternal side and eight on his maternal side; his mother deceased, having to be buried clandestinely; his father was captured by the Gestapo but rescued by the Resistance).

[9] Tragic as the fate of Cassin's family was under Nazi Occupation and the Vichy régime, Cassin's family fared better than the families of Lauterpacht and Lemkin. Both of his parents survived and some, although not all, of his siblings. *See* CASSIN, *supra* note 5. In France, Jews of longstanding French origin, such as Cassin and his family, survived in far greater numbers and percentages than foreign Jews, and France's deportation rate of 75,000 Jews represented a greater survival rate than in many other occupied countries, including the Netherlands, and certainly Poland, the location of the murdered Lauterpachts and Lemkins. For more information on France during the Second World War, see Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France,* 50 HASTINGS L.J. 1 (1999). For more on the fate of Lauterpacht's family, see ELIHU LAUTERPACHT, THE LIFE OF SIR HERSCH LAUTERPACHT, QC, FBA, LLD 266 (2010); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 388 (2001); PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY" 290 (2016). For more on Lemkin's family, see *id.* at 345–46; Michael Ignatieff, *Lemkin's Word: The Danger of a World Without Enemies*, NEW REPUBLIC (Feb. 25, 2001), https://newrepublic.com/article/62613/lemkins-word [https://perma.cc/AN9C-P72U] (writing

a law professor at Cambridge; judge on the International Court of Justice; and drafter of Nuremberg Charter Article 6, which criminalized wars of aggression and crimes against humanity,[10] lost virtually his entire family in Poland.[11] For Lauterpacht, the individual was the key to human rights: in the draft he wrote for British Lord Shawcross's closing statement at the Nuremberg trials, he hailed the U.N. Charter for putting "the rights and duties of the individual in the very center of the constitutional law of the world."[12] Philippe Sands has commented that this phrase "was pure Lauterpacht, the central theme of his life's work."[13]

During the Second World War, a similar personal fate befell Raphael Lemkin, the man who coined the word genocide, and without whom the Genocide Convention would not exist.[14] Yet all three of these men, like many others, never lost their faith in the power of the law and the rule of law to regulate the international legal order. But one may wonder whether that is completely accurate. Did they too, like those suggested by the title of an article by Nathaniel Berman, *But the Alternative Is to Despair*, [15] choose

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that only one brother escaped murder). According to another source, forty-nine family members died, excluding a brother, the brother's spouse, and child. William Korey, *Raphael Lemkin: "The Unofficial Man,"* 35 MIDSTREAM 45, 47 (1989); *accord* JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 72 (2008). On Lemkin's efforts, once he had escaped to the United States, he stirred the Roosevelt administration to act on behalf of Polish Jewry before it was too late. *See id.* at 51. Cooper also recounts from Lemkin's unpublished autobiography that, during this time, when Lemkin's health deteriorated due to worries about his family's fate in Poland, friends insisted he see a doctor and he was told by the American physician, "don't worry." *Id.* at 52.

[10] *See* Philippe Sands, *My Legal Hero: Hersch Lauterpacht*, THE GUARDIAN (Nov. 10, 2010, 11:09 AM), https://www.theguardian.com/law/2010/nov/10/my-legal-hero-hersch-lauterpacht [https://perma.cc/MGA5-AURB].

[11] *See* LAUTERPACHT, *supra* note 9, at 6.

[12] SANDS, *supra* note 9, at 327.

[13] *Id.*

[14] *See id.*; Ignatieff, *supra* note 9; Korey, *supra* note 9. Korey notes that Lemkin was unsuccessful in persuading the British prosecutor to include the term 'genocide' at the Nuremberg Trials because it did not figure in the Oxford Dictionary. *Id.* at 47. It was, however, used in the indictment. *See* WILLIAM KOREY, AN EPITAPH FOR RAPHAEL LEMKIN 24 (2001). Korey notes that the term did not enter the Oxford Dictionary for thirty years. *Id.* at 26. In paying tribute to Lemkin for coining the term, Korey quotes Churchill's having called it "a crime without a name." Korey, *supra* note 9, at 48 (internal quotation marks omitted)*; see also* KOREY, at 14 ("[Lemkin] told an interviewer that he felt compelled to invent an appropriate term after listening to Churchill's radio broadcast that that the crimes of the Nazis had no name.").

[15] *See* Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993). Another example would be Thomas Buergenthal, unequaled champion of international human rights law, who, standing on the site of a former concentration camp, said in 2005, when speaking of genocide: "Today 'never again' often means 'never again, until the next time.'" *See* Sam Roberts, *Thomas Buergenthal, Holocaust Survivor and Judge, Dies at 89*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/02/us/thomas-buergenthal-dead.html [https://perma.cc/9WCU-G2NY].

to behave as if they had not lost their faith because the alternative was to despair? The following conjecture about Lauterpacht and Lemkin written by Michael Ignatieff strikes me as insightful on this issue:

> Both men responded to barbarism in the same way: by seeking to draft international legal instruments that would ban it. In a deeper sense, both these men found a home in the law, and their passionate attachment to international law was a consequence of their homelessness anywhere else.[16]

One of Berman's insights, although it was not his article's principal topic, was the relentless futility of the interwar (1918–1939) internationalist lawyers' undertaking to create and codify a law that would preserve civilization for all time. The internationalists worked on this project after the First World War in the shared, forgivable enthusiasm—to put it in the much-repeated phrase—that it had been the "war to end all wars,"[17] and that the undertaking to create humanitarian textual law would ensure perpetual peace. While the era of Berman's focus was the interwar period between the two world wars, a poignant aspect of his article was the time *following* 1945. He described the internationalists' continued, unabated efforts even after the "war to end all wars" had led to the second, still worse, world war, which left Western Europe in tatters.[18]

The internationalist lawyers were not the first to hope and believe that they could codify rules of civilization in law once and for all times. Scholars in different fields have approached similar questions from the prisms of

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[16] Ignatieff, *supra* note 9, at 27.

[17] Woodrow Wilson, *Fourteen Points*, DIGIT. HIST. (Jan. 8, 1918), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3901 [https://perma.cc/492G-GDMT] ("the culminating and final war"); A. SCOTT BERG, WILSON 471 (2013); *see* Steven Erlanger, *The Great War: The War to End All Wars? Hardly, But It Did Change Them Forever*, N.Y. TIMES (June 26, 2014), https://www.nytimes.com/2014/06/27/world/europe/world-war-i-brought-fundamental-changes-to-the-world.html [https://perma.cc/B6V5-QYJX].

[18] I believe I read somewhere but have been unable to locate the source, that the internationalists' last interwar meeting was in 1939, as the Second World War was already brewing, and that it took place with ironic but unconscious symbolism in the small town in Poland called Oswiecim that the Germans later renamed Auschwitz. Berman's title, *But the Alternative Is to Despair*, captures what my father meant when he told me that the Enlightenment *philosophes* had been mistaken, but that life had to be lived as though they had been right. With respect to international organizations, *see* KOSKENNIEMI, *supra* note 9, at 388 ("The absolute *powerlessness* of law in the face of a political and military logic completely discredited the idea [after the Second World War] of simply resuscitating the League [of Nations]. Despite the infinitely greater horrors of the Second World War compared to those of its predecessors, however, no great movements of . . . rejection followed in its wake.") (emphasis added) (footnote omitted).

their own professional backgrounds. The psychologist Erich Fromm contrasted the attributes that lead one type of person to seek security and protection in hard and fast rules with those that lead another type of person to seek freedom more than security and to develop tendencies towards rebelliousness.[19] Fromm attributed to these two kinds of human personality a division in humankind, positing that all people have both inclinations, but that one of them takes root more than another in people as they develop.[20] His book proposes reasons why one side predominates in one person while the opposite predominates in another, tying this to what he calls individuation: a process dialectical in nature and occurring differently in different people.[21]

Kant made a related but separate distinction in the concept of reason between the search for unity or the search for specificity:

> [O]ne philosopher is influenced more by the interest of diversity (according to the principle of specification), another by the interest of unity (according to the principle of aggregation). Each believes that he has derived his judgment from his insight into the object, and yet founds it entirely on the greater or smaller attachment to one of the two principles, neither of which rests on objective grounds, but only on an interest of reason . . . as long as they are taken for objective knowledge they . . . hinder the progress of truth . . . .[22]

Ernst Cassirer similarly commented on particularities versus universalities in discussing how Machiavelli analyzed history, noting that Machiavelli

> was interested in the statics not in the dynamics of historical life. He was not concerned with the particular features of a given historical epoch but sought for the recurrent features, for those things that are the same at all times. Our way of speaking of history is individualistic;

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[19] This is a central theme of ERICH FROMM, ESCAPE FROM FREEDOM (1941).

[20] *Id.* at 51 (discussing the urge to freedom and to individuation as dialectic in character in the formation of an integrated personality).

[21] *Id.* at 39–52.

[22] IMMANUEL KANT, CRITIQUE OF PURE REASON 535–36 (Friedrich Max Müller trans., 1922) (emphasis omitted) (internal note omitted).

> Machiavelli's way was universalistic. We think history never repeats itself; he thinks that it always repeats itself.[23]

According to Machiavelli,

> Any one comparing the present with the past will soon perceive that in all cities and in all nations there prevail the same desires and passions as always have prevailed; for which reason it should be an easy matter for him who carefully examines past events, to foresee those which are about to happen in any republic, and to apply such remedies as the ancients have used in like cases . . . . But these lessons being neglected or not understood by readers, or, if understood by them, being unknown to rulers, it follows that the same disorders are common to all times.[24]

Accordingly, Machiavelli viewed mistakes in politics as unpardonable, as did Talleyrand, the French aristocratic statesman renowned for resurfacing intact after the French Revolution.[25]

The legal internationalists were among those who sought hard and fast rules to give security to the future. The international law they wanted to create was unified, uniform, codified, and gapless.[26] Isaiah Berlin described characteristics resembling those Fromm analyzed as being attributable, not to each person as Fromm had done, but to the distinctive historical periods of the Enlightenment and Romanticism.[27] Illustratively, Berlin depicted German Romantic literature's[28] negative response to the French Enlightenment as a

> reaction . . . against the tendency on the part of the French to generalise, to classify, to pin down, to arrange in albums, to try to produce some kind of rational ordering of human

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[23] ERNST CASSIRER, THE MYTH OF THE STATE 76, 125 (1946).

[24] NICOLO MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVY 105 (Ninian Hill Thomson trans., 1883) *quoted in* CASSIRER, *supra* note 23, at 125.

[25] *See* CASSIRER, *supra* note 23, at 146. For more on Talleyrand's life, see DAVID LAWDAY, NAPOLEON'S MASTER: A LIFE OF PRINCE TALLEYRAND (2006).

[26] *See* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 68–77, 78–92, 94–96 (Oxford Univ. Press 2011) (1933) (applying domestic rules to international law, evoking Article 4 of the French Civil Code, and rejecting positivism to the extent that doctrine would allow judges to refuse to adjudicate cases in the event of gaps in the text of law).

[27] *See* ISAIAH BERLIN, THE ROOTS OF ROMANTICISM 141 (Henry Hardy ed., 1999).

[28] More specifically, Hamann's influence on Goethe in his early Romantic period. *See* ISAIAH BERLIN, THE POWER OF IDEAS 40–41 (Henry Hardy ed., 2000).

> experience, leaving out the *élan vital*, the flow, the individuality, the desire to create, the desire, even, to struggle, that element in human beings which produced a creative clash of opinion between people of different views, instead of that dead harmony and peace which . . . the French were after.[29]

Berlin was not writing about the law, but his separation of the defining characteristics of Romanticism and the Enlightenment was also an excellent explanation of the traits that separate the fundamental concepts underlying the common law from their equivalents in civil law legal systems.[30] In this context, it is worth noting that the interwar internationalists were civil law lawyers imbued with the spirit of the Enlightenment that their legal order imparted to them.[31]

As Berlin put it, Enlightenment thinking meant that

> [t]o every genuine question there were many false answers, and only one that was true; once discovered, it was final, it remained for ever true; all that was needed was a reliable method of discovery . . . . If the laws were correct, the observations upon which they were based authentic, and the inferences sound, then true and impregnable conclusions would provide knowledge of hitherto unexplored realms, and transform the present welter of ignorance and idle conjecture into a clear and coherent system of logically interrelated elements . . . ."[32]

This statement could have been applied to civilian law. In *The Power of Ideas*, Berlin stressed that the Enlightenment belief in one true answer did not mean a lack of disagreement among Enlightenment thinkers. Rather, it meant they agreed that *in principle* it was possible to know what was right. It was, in his words,

> the assumption that there existed a reality, a structure of things, a *rerum natura*, which the qualified enquirer could

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[29] *Id.* at 51.

[30] This was one of the principal themes of my article, Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COL. J. EUR. L. 63 (2001).

[31] I include Lauterpacht in this group. Although he came to live in England, his legal education was in Continental Europe before his emigration.

[32] ISAIAH BERLIN, THE AGE OF ENLIGHTENMENT: THE EIGHTEENTH-CENTURY PHILOSOPHERS 6 (Henry Hardy ed., Isaiah Berlin Literary Tr. 2017) (1984).

> see, study and, in principle, get right. Men were violently divided about the nature of the wise – those who understood the nature of things – but not about the proposition that such wise men existed or could be conceived . . . . This was the great foundation of belief which romanticism attacked and weakened.[33]

Peter Gay put it another way, but I think Isaiah Berlin would have agreed with him: "[T]he [Enlightenment] philosophes . . . never wholly discarded that final, most stubborn illusion . . . the illusion that they were free from illusions."[34] Like Fromm, Berlin also spoke of the deep aspiration for security:

> Plainly one of the most powerful of philosophical stimuli is the search for security – the infallible knowledge of incorrigible propositions . . . . [N]o matter how dry, dull, uninformative such propositions may turn out to be, or how difficult to formulate, all our efforts and austerities will be most richly rewarded if really secure unassailable certainty at last . . . for surely even the weariest river of analysis must somewhere wind safe to the sea of the 'ultimate stuff' of which everything is made?[35]

The Enlightenment also meant that all truths were reconcilable, a belief which persisted until romanticism challenged it.[36] Koskenniemi discusses Lauterpacht's embrace of natural law concepts, and belief that all truths and goods are reconcilable, when Lauterpacht's focus was turned to international human rights after the Second World War. Koskenniemi writes that, for Lauterpacht, "the (realist) tragedy of irreducible conflict, of incompatible goods, is defined away. Morality and enlightened self-interest

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[33] BERLIN, *supra* note 28, at 202.

[34] PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE RISE OF MODERN PAGANISM 27 (6th ed. 1976). The extent to which Gay believed the Enlightenment *philosophes* to be under an illusion may be gleaned from his writing in the second volume of his work that "the philosophes did not wholly abandon "romance" for science; or, rather, they often took for science what was really romance." PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 174 (1969).

[35] ISAIAH BERLIN, CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS 77 (Henry Hardy ed., 1979).

[36] *See* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 181–85 (Henry Hardy ed., 1992).

always point in the same direction. The general good is 'identical with' national interest . . . ."[37]

In *Four Essays on Liberty*, Berlin wrote:

> The language of the great founders of European liberalism—Condorcet, for example, or Helvétius—does not differ greatly in substance, nor indeed in form, from the most characteristic moments in the speeches of Woodrow Wilson or Thomas Masaryk. European liberalism wears the appearance of a single coherent movement, little altered during almost three centuries, founded upon relatively simple intellectual foundations, laid by Locke or Grotius or even Spinoza; stretching back to Erasmus and Montaigne, the Italian Renaissance, Seneca, and the Greeks. In this movement, there is in principle a rational answer to every question. Man is, in principle at least, everywhere and in every condition, able, if he wills it, to discover and apply rational solutions to his problems. And these solutions, because they are rational, cannot clash with one another, and will ultimately form a harmonious system in which truth will prevail, and freedom, happiness, and unlimited opportunity for untrammelled [sic] self-development will be open to all.[38]

Similarly, the law reflects these Enlightenment understandings in the codes of Continental Europe.[39] The internationalist lawyers' undertaking, then, was just such an Enlightenment project to draft a code of international humanitarian law, which, if they got it right, would etch into permanence laws that would keep the peace and outlaw barbarism. Lassa Oppenheim,[40] for instance, believed that international legal codification would bring about

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[37] KOSKENNIEMI, *supra* note 9, at 410 (quoting HERSCH LAUTERPACHT, *Professor Carr on International Morality*, *in* COLLECTED PAPERS 2, 90 (Elihu Lauterpacht ed., 1979)).

[38] ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 8 (1969).

[39] *See* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 69–111 (2001).

[40] Whewell Professor of International Law at Cambridge, the professorship that Lauterpacht was to occupy a number of years later, and whose seminal treatise on international law Lauterpacht updated. *See, e.g.*, Mark W. Janis, *The New Oppenheim and Its Theory of International Law*, 16 OXFORD J. LEGAL STUD. 329, 330 (1996) (referring to Lauterpacht's update); on the Whewell chair, see LAUTERPACHT, *supra* note 9, at 82–83.

"the development of a universal society with legal structures . . . ."[41] A hallmark, at least theoretically, of the first great modern civil code, the Code Napoléon of 1804, was that it was gapless.[42] According to Lauterpacht, who analogized international law to the French Civil Code,[43] "there are no gaps in the legal system taken as a whole."[44] All answers are discoverable in the Code to a judge who understands the law of the nation.[45] This also was Lauterpacht's idea for international law: "Lauterpacht elaborated the doctrine of a gapless international legal order to defend in legal terms the unity of a world that seemed to be heading from fragmentation to catastrophe, from the League of Nations to the Holocaust."[46] For Koskenniemi, it was "in line with the ideas of nineteenth-century Jewish enlightenment and prevailing pacifist sentiments . . . ."[47] Elsewhere, Koskenniemi put it as follows:

> No doubt, the invocation of Greek and philosophy and Enlightenment thought seemed necessary in order to re-establish the credibility of European liberal political culture after the catastrophe of the [Second World] war: to make the dark past appear as an externally imposed distortion and not as a logical consequence of the tradition. Only an openly philosophical argument could make the old project of peace through law seem credible.[48]

In still another analysis that evokes Enlightenment thinking and lack of gaps, Koskenniemi notes that Lauterpacht "reconstructs the law's unity as a *scientific* postulate. Law, no less than physics, shares a horror vaccui; it detests a vacuum."[49] He describes Lauterpacht's 1947 work, *Recognition in International Law*,[50] as "a consistent and far-reaching attempt to imagine

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[41] *See* Mathias Schmoeckel, *Lassa Oppenheim (1858–1919)*, *in* JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 583, 592 (Jack Beatson & Reinhard Zimmermann eds., 2004).

[42] *See, e.g.*, Curran, *supra* note 39, at 97 ("Code lacunae in civil-law legal cultures represent imperfections in the legislative attempt to create a complete and coherent body of law.").

[43] LAUTERPACHT, *supra* note 26, at 70.

[44] *Id.* at 72.

[45] *See id.* at 97–99.

[46] KOSKENNIEMI, *supra* note 9, at 411.

[47] *Id.*

[48] KOSKENNIEMI, *supra* note 9, at 392–93.

[49] Martti Koskiennemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L. L. 215, 223 (1977) (emphasis in original).

[50] HERSCH LAUTERPACH, RECOGNITION IN INTERNATIONAL LAW (1947).

international law as a complete and self-regulating normative system."[51] For Koskenniemi, Lauterpacht's was a "double programme" of "scientism and individualism . . . [that was] central to inter-war cosmopolitanism."[52]

The legal internationalists also held the beliefs of the eighteenth-century Enlightenment *philosophes* who were no longer as interested in the theorizing project of their predecessors, such as Hobbes and Grotius, but, rather, in "'ideas' . . . [to be] forged into weapons for the great political struggle."[53] The goal of the legal internationalists was similarly practical—to prevent future wars and international human rights violations. In summarizing another analysis of Lauterpacht by Koskenniemi, I suggest elsewhere that "Lauterpacht believed that, if correctly conceived and made universally obligatory, international law had the capacity to endow the world with security and peace."[54]

In *But the Alternative Is to Despair*, Berman does not explore the dichotomy between the Enlightenment and Romanticism, yet his article relates to it tangentially: he believes that the fervent, unabated resumption of the internationalist law project after the Second World War was due to unconscious articles of faith that he seeks to unveil.[55] As he puts it, "this persistence of faith in the international legal policy . . . should be cause for astonishment. Between 1919 and 1947, the fragility of the various international legal solutions . . . had become evident."[56] Yet the internationalists who pursued the same dream after the Second World War did so in what he terms an act of "unreflective repetition."[57] There is an underlying feeling of unspoken, tacit despair that can be read into Berman's portrayal of the insistence of the European inter- and post- war internationalists, who framed a law to enable and require international human rights in a world that had shown itself utterly contemptuous of the right to life and human dignity. This understanding tallies well with Ignatieff's rendition of Lauterpacht and Lemkin.[58]

The issues that then and now engulfed Europe, and that then and now caused wars, include nationalism, minority protection, and a State's desires to expand. In 1922, after several uprisings in Upper Silesia, a plebiscite in

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[51] Koskiennemi, *supra* note 49, at 239.
[52] *Id.* at 225.
[53] CASSIRER, *supra* note 23, at 177.
[54] Vivian Grosswald Curran, *Voices Saved from Vanishing*, 70 U. PITT. L. REV. 435, 459 (2009).
[55] *See* Berman, *supra* note 15, at 1792.
[56] *Id.* at 1797.
[57] *Id.* at 1903.
[58] *See* Ignatieff, *supra* note 9, at 411.

the region led to the German-Polish Accord in East Silesia in 1923.[59] Berman notes that "[t]wo years after World War II, a majority of the international community . . . manifested its now seemingly unconscious faith in the approach that had reached its zenith, and its nadir, in European venues like Upper Silesia."[60] Upper Silesia was a zenith in internationalism because the Silesia Accord was a triumph of the internationalist law project: the Versailles Treaty specifically called for plebiscites to allow minorities to choose their governments, and in particular for a plebiscite in Silesia.[61] Upper Silesia also was a nadir because Nazi Germany annexed Polish Silesia after it invaded Poland in 1939, in what was the beginning of the Second World War.[62] In his article, Berman concludes that the internationalist lawyers nevertheless, however inexplicably from a logical point of view and without missing a beat, picked up after the Second World War where they left off after the First.[63]

III. KELLOGG-BRIAND AND THE VERSAILLES SYSTEM

Two authors writing recently about the internationalist movement from a perspective of optimism, Oona Hathaway and Scott Shapiro,[64] have introduced the novel thesis that the Kellogg-Briand Pact of 1928 ("the Pact" or "Kellogg-Briand"),[65] better known to most as the Treaty of Paris, has changed the world by making war a crime in international law.[66] Generally speaking, the Pact has been considered an ineffectual treaty, and by some even an outright act of hypocrisy by the nations that signed on to it knowing that its mission was unrealizable.[67] In particular, the authors do not claim

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[59] *See* T. Hunt Tooley, *German Political Violence and the Border Plebiscite in Upper Silesia, 1919–1921*, 21 CENT. EUR. HIST. 56 (1998).

[60] Berman, *supra* note 15, at 1798.

[61] 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE 552, n.2 (Hersch Lauterpacht ed., David McKay Co. Inc., 8th ed. 1955); Berman, *supra* note 15, at 1859.

[62] *See Invasion of Poland, Fall, 1939*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/invasion-of-poland-fall-1939 [https://perma.cc/VGC7-5LG9] (last updated Aug. 25, 2021).

[63] Berman, *supra* note 15, at 1901.

[64] OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD xiii (2017).

[65] Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (1929).

[66] HATHAWAY & SHAPIRO, *supra* note 64, at 330, 334–35.

[67] *See, e.g.*, Julie M. Bunck & Michael R. Fowler, *The Kellogg-Briand Pact: A Reappraisal*, TUL. J. INT'L. & COMP. L. 229, 230 (2019) ("Few, if any, international agreements have been so universally scorned as the Pact of Paris (1928), better known in the United States as the Kellogg-Briand Pact . . . .").

that the Pact ushered in a world of peace,[68] but rather that it vastly improved the world by banning wars of aggression, launching a "New World Order" in which we live today.[69] The authors' focus on the Pact may be debatable, given that World War II followed within some ten years, with atrocities on an even greater scale than had occurred in the First World War. Their answer to this anticipated objection is that the Pact was not fully realized until after the Second World War.[70] They still see the Pact, rather than the international legal innovations that followed World War II, as the most significant international act, even though the Pact was not eventually applied to punish violators of international law.[71]

For Berman, by way of contrast, as for many others, the post-World War I vision embodied in the Pact and

> the Versailles system . . . eroded and then collapsed under the ideological, political, and, finally, military attack of the Nazis and fascists. The subtle system aimed at the simultaneous preservation of sovereign prerogatives, national identities, and individual and minority rights did not prevent the destruction of millions – state "citizens," ethnic "nationals," linguistic "minorities," and internationalized "inhabitants" – in the name of putatively national and even European goals. Auschwitz is located in Upper Silesia, the very region in which the interwar "experiment" in attempting to resolve the "chaos and violence" of nationalist conflict had achieved its fullest expression.[72]

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[68] They immediately acknowledge that it did not: "The Peace Pact quite plainly did not create world peace." They say, rather, that it created a new international legal order that was "the beginning of the end of war between states." HATHAWAY & SHAPIRO, *supra* note 64, at xiii.

[69] *See id.* at xvii.

[70] *Id.*

[71] *See id.* at xvi. If I have attributed a tendency to Hathaway and Shapiro to exaggerate the impact of the international treaty to the exclusion of facts on the ground, I was struck by a similar bent with respect to a different treaty in the author of a more recent book concerning the treaty to end the Second World War, *The Unknown Peace Agreement*. Its author attributes to that treaty, signed decades after the end of actual hostilities between World War II Allies and Axis forces, importance that vastly overstates its effect and understates the effect of facts on the ground, such as popular demand and action in ending the Soviet domination of Eastern Europe. *See* JOHN J. MARESCA, THE UNKNOWN PEACE AGREEMENT: HOW THE CSCE NEGOTIATIONS PRODUCED THE FINAL PEACE AGREEMENT WITH GERMANY AND CONCLUDED WORLD WAR II IN EUROPE (2022).

[72] Berman, *supra* note 15, at 1899.

Lauterpacht agreed with this assessment, writing tersely in his private diaries in 1940 that the Kellogg-Briand Pact was a joke.[73] Similarly, in *The Pact of Paris and the Budapest Articles of Interpretation*,[74] he wrote that the Pact was "legally meaningless,"[75] further explaining that "[a]n interpretation which leaves to the interested States the right to decide finally and conclusively whether they have observed the Treaty probably deprives the Pact of the essential *vinculum juris* and renders it legally meaningless."[76]

Another assessment put it this way:

> Out of [a joint U.S. and French] draft came the multilateral treaty for the renunciation of war generally known as the Kellogg-Briand Pact (August 27, 1928). The pact was intended as a supplement to the safeguards implicit in the Covenant of the League [of Nations and the Locarno agreements] . . . . Formally, however, the treaty was independent of the Versailles system and served not so much to buttress as to supplant it. Unfortunately, its practical effect was reduced to a minimum, if not completely nullified, by the official interpretation given to it, and by the separate reservations and counter-reservations made by the individual powers when they signed.[77]

The international human rights lawyer and professor Philippe Sands describes Kellogg-Briand as, in practice, forbidding very little. For him, it was only in 1941 that the real effort to "build a rules-based system"[78] began through the Atlantic Charter of 1941 and later the U.N. Charter of 1945.[79]

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[73] Hersch Lauterpacht Diary Entry of October 5, 1940, *quoted in* LAUTERPACHT, *supra* note 9, at 114. On the other hand, in drafting a memo for U.S. Attorney General Robert H. Jackson to the effect that U.S. aid to Britain by all means short of entering the war was justified under international law, Lauterpacht argued that the Kellogg-Briand Pact had given such aid a basis in international law. *See id.* at 137, 142, 144.

[74] Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANSLATIONS OF GROTIUS SOC'Y. 178, 198 (1934).

[75] *Id. quoted in* KOSKENNIEMI, *supra* note 9, at 377.

[76] Lauterpacht*, supra* note 74, at 198; MARGARET MACMILLAN, WAR: HOW CONFLICT SHAPED US (2020); *accord* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021).

[77] JACOB ROBINSON, OSCAR KARBACH, MAX M. LASERSON, NEHEMIAH ROBINSON & MARK VICHNIAK, WERE THE MINORITY TREATIES A FAILURE? 50 (1943) (citation omitted).

[78] PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR 8 (2005).

[79] *Id.* at 8–9.

According to Hathaway and Shapiro, however, rather than history having made a joke of the Pact, the Pact changed the course of history:

> The Peace Pact . . . was among the most transformative events of human history, one that has, ultimately, made our world far more peaceful. It did not end war between states, but it marked the beginning of the end—and, with it, the replacement of one international order with another.[80]

They further explain that

> States are no longer permitted to enforce their legal rights through the resort to arms whenever they feel aggrieved. We locate the source of this transformation in 1928—with the signing of the Paris Peace Pact. Beginning then . . . there has been a tectonic shift—a transformation from what we have called the Old World Order to the New World Order.[81]

Hathaway and Shapiro look to Hersch Lauterpacht as the primary internationalist of the "[N]ew [W]orld [O]rder" of peace,[82] and to Hugo Grotius as the leading "exponent of the logic of the Old World Order,"[83] namely, the order of interventionism by one state into the affairs of others by means of war.

While Grotius, writing in the seventeenth century, did not espouse the outlawing of all war—as Kellogg-Briand also did not, and the U.N. Charter similarly does not—Grotius, like the Pact, did condemn wars of aggression. He referred with approval to "the saying of Augustine: 'To make war on one's neighbors and from that to proceed to more violence, and purely out of greed for territory to crush inoffensive peoples, what must we call this but brigandage on a grand scale?'"[84] As novel as the claim is that the Pact changed the world, the claim that Grotius, widely known as the father of international human rights, was not primarily interested in international human rights, but rather in constructing a law of war,[85] is equally novel. It

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[80] HATHAWAY & SHAPIRO, *supra* note 64, at xiii.

[81] *Id.* at xix–xx.

[82] *Id.* at xxi; *Hersch the Great*, *in id.*, at 303–05.

[83] *Id.* at xx.

[84] HUGO GROTIUS, THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS) 245 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625).

[85] *See* HATHAWAY & SHAPIRO, *supra* note 64, at xix ("[H]e is the preeminent philosopher of war.").

is difficult to reconcile with Grotius' own writing that "[w]ar-making is not one of the honest crafts. Rather it is a thing so horrible that nothing but absolute necessity . . . can make it honorable."[86] Grotius urged respect for international law and indeed looked to the law to make "obligatory what by itself was only laudable."[87]

Lauterpacht, for his part, did see Grotius as the father of international human rights.[88] Perhaps because of his sense of how long the ongoing struggle for international human rights was, however, Lauterpacht was not an optimist. Koskenniemi assessed Lauterpacht's outlook even in 1950, five years after the end of the Second World War and four years after the Nuremberg trials, as follows: "Lauterpacht did not hide his dissatisfaction. In his view, the situation was worse now than it had been in 1919. The inter-war years had been a period of regression to which the peace of 1945 had brought no significant relief."[89]

As noted, Lauterpacht took a dim view of Kellogg-Briand. Hathaway and Shapiro portray Lauterpacht's views on the Pact, as they do René Cassin's, very differently, suggesting, rather, that Kellogg-Briand provided the legal basis for prosecuting Axis leaders at Nuremberg.[90] They also quote Lauterpacht's seminal 1935 revision of Oppenheim's *International Law*'s[91] description of the Pact as having "effected a fundamental change in the system of International Law,"[92] inasmuch as wars had become "the concern of the entire world."[93] It is possible to reconcile Lauterpacht's negative descriptions of the Pact[94] with Hathaway and Shapiro's very different account of Lauterpacht's views about it if one concludes that Lauterpacht was ready to cite to the Pact in order to argue for peace without genuinely considering it to be a meaningful, practical tool of law. In 1935, Lauterpacht argued for the international community's right to consider aggressive wars by one nation the concern of all nations in the passage Hathaway and

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[86] GROTIUS, *supra* note 84, at 264. Grotius's attitude toward war has been called the "introduction to JWT [Just War Theory] of the principle of last resort." CORNELIU BJOLA, LEGITIMISING THE USE OF FORCE IN INTERNATIONAL POLITICS: KOSOVO, IRAQ AND THE ETHICS OF INTERVENTION 31 (2009) (emphasis in original).

[87] GROTIUS, *supra* note 84, at 26.

[88] *See* HERSCH LAUTERPACHT, *The Law of Nations and the Inalienable Rights of Man, in* INTERNATIONAL LAW AND HUMAN RIGHTS 117–18 (1950).

[89] *See* KOSKENNIEMI, *supra* note 9, at 391.

[90] HATHAWAY & SHAPIRO, *supra* note 64, at 248–49. On the influence of Lauterpacht at Nuremberg, see SANDS, *supra* note 9, at 280–81; LAUTERPACHT, *supra* note 9, at 275–77.

[91] 2 OPPENHEIM'S INTERNATIONAL LAW (Hersch Lauterpacht ed., Longmans, Green & Co., 5th ed. 1935).

[92] *Id.* at 517, *quoted in* HATHAWAY & SHAPIRO, *supra* note 64, at 239.

[93] HATHAWAY & SHAPIRO, *supra* note 64, at 239. This phrase is not Lauterpacht's but Hathaway and Shapiro's, referring to his fifth edition.

[94] *See* SANDS, *supra* note 78; HATHAWAY & SHAPIRO, *supra* note 64, at xiii, xx.

Shapiro quote.[95] The passage was written after Hitler had come to power and was in the throes of rearming Germany to prepare for a new war,[96] and before the legal basis for the Nuremberg trials existed, namely, the London Agreement and Charter of the International Military Tribunal of 1945. Similarly, when Hathaway and Shapiro describe Cassin as arguing that the Pact provided the legal basis for prosecution, they quote him from 1941, before the enactment of the legal means under international law that become the basis of trying war criminals.[97] Thus, there was no other document besides the Pact that might have been cited. In the event, when it came to prosecuting the Second World War's crimes under international law, it was not Kellogg-Briand, but the Nuremberg Charter that set forth the relevant law.[98]

For his part, Cassin devoted an essay to the Pact in his book *La Pensée et l'action*.[99] He expressed hope at the time of the treaty's enactment that it might prove to be of value, but warned that it might not: "Does the Pact offer even the guarantees which we consider insufficient that the League of Nations has? *The answer is no*."[100] He cautioned those who believed that the United States would enforce the treaty by quoting Coolidge's then-recent speech in which Coolidge said that the Pact left his country entirely free and unbound.[101] In Cassin's opinion, the treaty had to be taken for no more in terms of guarantees than what its text contained and that, he wrote, was "very weak."[102] He called the Pact dubiously a document of "morality and politics,"[103] concluding that only the future would tell if it would or could become a document of "law and practice."[104]

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[95] *See* HATHAWAY & SHAPIRO, *supra* note 64, at xix.

[96] *See, e.g.*, ROBINSON ET AL., *supra* note 77, at 55 ("As soon as Hitler came to power, Germany embarked upon a course of grand rearmament, for the purpose of achieving its sweeping political aims through the threat of war, or through war itself.").

[97] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 249 (giving the date of Cassin's speech as November 14, 1941).

[98] *See, e.g.*, SANDS, supra note 9, at 187.

[99] CASSIN, *supra* note 7, at 15–27. According to the eminent historian Antoine Prost, who is, among others, the co-author of RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION (2013), Cassin probably wrote this essay by 1930. In a private email response to my question as to the date of its writing, he said that the Cassin archives do not contain the manuscript nor any drafts of it, but he believes it would have been written between 1927 and 1930. (Email on file with author). This would make the essay contemporaneous with the Pact, and its antecedents to which he was a part. *La Pensée et l'action*, in which the essay was published, does not list the date of writing but its contents suggest that it was written as the Pact had just been enacted.

[100] *Id.* at 23–24 (emphasis added).

[101] *Id.* at 25.

[102] *Id.* ("*Il faut s'en tenir à ce qui y est et qui est très faible.*").

[103] *Id.* at 27.

[104] *Id.*

Perhaps most noteworthy in this essay is that, according to Cassin, Kellogg-Briand permitted military intervention by third parties on behalf of victims of wars of aggression.[105] Referring to Mr. Kellogg's responses to questions about the Pact, Cassin commented as follows: "*it does not prohibit a considered war* and the term war is quite bad and equivocal on this point—as *a collective police operation that could be decided by nations when one nation, violating its obligations, waged an aggressive war against its neighbors* . . . ."[106] Cassin also explained that under civil law treaty interpretation, military retaliation would be permitted for any country's violation of its terms through aggressive war under the basic contract law provision that a party that violates a contract frees other parties from further compliance with it: "all states are freed [from their obligations] towards any state which violates it [i.e., the Pact]."[107] Raymond Aron analyzed the Pact in a similar manner, noting that self-defense was permissible under the Pact and that Article 6 specified that an act of war against any signatory to the Pact was an act of war against each other party.[108] This was a general principle of treaty interpretation that Grotius set forth in *The Law of War and Peace (De Jure Belli ac Pacis)*:

> [If] one party violates a treaty, the other is released from it. For every clause of a treaty has the force of a condition . . . . This is true, except where it has been agreed to the contrary, as is sometimes done, so that a treaty may not be abandoned for trifling grievances.[109]

Lauterpacht was once again clear about his critical view of Kellogg-Briand in a lecture he gave about "Peaceful Change – an International Problem,"[110] in which he said that

> [t]he Treaty of 1928 prohibited war as a means either of applying the law or of modifying it. But it is clear that *unless the institution of war, proscribed as a means of changing the law, is replaced by another instrument, the Treaty, far from becoming a starting point of departure for*

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[105] *See id.* at 24.

[106] *Id.* at 20 (emphasis added).

[107] *See id.* at 24 ("*Quiconque viole un contrat ne peut pas se targuer des avantages du contrat. Il y a bien par conséquent une sanction négative au Pacte Kellogg, à savoir que tous les États sont libérés envers l'État qui viendrait à manquer à sa parole*.").

[108] ARON, *supra* note 1, at 375.

[109] GROTIUS, *supra* note 84, at 174.

[110] HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS (Elihu Lauterpachat ed., 1970).

> *progress, may become a cause of illegality, by necessarily increasing the occasions for infringing the law*.[111]

Lauterpacht thought that only an international legislature could accomplish this:

> [P]eaceful change as an effective part of the constitution of the international society means international legislation, not in its popular, loose sense of multilateral treaties of a general character but in the sense of an external and imperative will. *An international legislature of that nature may without impropriety be described as a super-State*.[112]

Lauterpacht explained that "[i]f an international legislature is impossible and unacceptable, then peaceful change as an institution is impossible and unacceptable – It is important . . . that we should be conscious of the true meaning of the by now popular demand for peaceful change as an effective international institution."[113] Hathaway and Shapiro urge that only economic sanctions may be implemented against states that engage in the crime of aggressive war. They believe this is enough to ensure international order and to combat the disorder of the "Old World."[114] Indeed, under the rules of the U.N. Charter, states have renounced their right to use force or the threat of force.[115]

For all the differences between Lemkin and Lauterpacht,[116] Lemkin agreed with Lauterpacht that the enforceability of international law was of the essence: "Lemkin was contemptuous of the work of Eleanor Roosevelt and the drafters of the Universal Declaration of Human Rights . . . . Mere declarations, he believed, were meaningless. What was needed was a

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[111] *Id.* at 411 (emphasis added).

[112] *Id.* at 414 (emphasis added).

[113] *Id.*; *see also* LAUTERPACHT, *supra* note 26, at 352 (describing "the absence of an international legislature" as "a defect of international organization").

[114] The political philosopher Raymond Aron had a different view of sanctions: "the concrete obligations of international law cannot be enforced by sanctions: they remain prescriptive, like morality." ARON, *supra* note 1, at 101 (referring to Hegel).

[115] U.N. Charter art. 2, ¶¶ 4, 7.

[116] For Lauterpacht's strong criticism of the Genocide Convention, even suggesting that it might be more harmful than beneficial, see his edition of OPPENHEIM'S INTERNATIONAL LAW, *supra* note 61, at 749–52. Lauterpacht and Lemkin's mutual disagreements on how best to approach a new international law for the sake of international human rights is a major theme running through SANDS, *supra* note 9.

binding convention, with universally enforceable powers."[117] In a related manner, Cassin downplayed the possible effectiveness of the Genocide Convention without an International Criminal Court *with bite* to accompany it,[118] while Lauterpacht went so far as to say that "*the only real sanction against genocide [is] war,*"[119] Under the U.N. Charter, it has been suggested that not even the U.N. itself may have the right to intervene on humanitarian grounds if a state is committing genocide domestically because the U.N. may only intervene where there is a breach of peace or threat of it, or an act of aggression against another state.[120]

To the questions as to whether the world has been changed by international law—since Kellogg-Briand or since post-World War II enactments—and if international law can be effective in creating the rule of law, Hathaway and Shapiro answer with a resoundingly affirmative vote.[121] Their response to the undeniably violent lawlessness in the world today, with all its massacres and destruction, is that Kellogg-Briand outlawed wars only *between states*, and that the modern world's wars increasingly have involved non-state wars: "Why, if war has been outlawed, is there still so much conflict? The answer is that *these* conflicts are not prohibited by the Pact."[122] This implies not only that such massacres in Rwanda and Bosnia

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[117] Ignatieff, *supra* note 9, at 27; *see also* COOPER, *supra* note 9, at 209 (according to Cooper, Eleanor Roosevelt had "incurred Lemkin's wrath" in 1951 when she declined to charge the Soviet Union with genocide on behalf of Poles, Lithuanians, Ukrainians and Hungarians. Roosevelt, for her part, insisted that she would work through the Declaration but not the Genocide Convention, given that the United States was not a party to the latter. *See id.*, at 219–20 (quoting Eleanor Roosevelt, on behalf of the Sixth U.N. General Assembly to Andrew Valuchek, representative of the Czech National Council, 5 December 1951)).

[118] CASSIN, *supra* note 5, at 160.

[119] LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 752 (Hersch Lauterpacht ed., 8th ed. 1955) (quoting with approval Sir Hartley Shawcross's comment, in Official Records, [U.N.] General Assembly, 1947, 6th Committee (2d Session), at 35) (emphasis added); *see also* SANDS, *supra* note 9, at 364 (Lauterpacht feared that the Genocide Convention would spark a racial group to be declared a victim of genocide so as to benefit from international law).

[120] *See* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS vii–viii (Richard B. Lillich ed., 1973). The U.N. Charter Article 2(7) states that

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII reads as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter, art. 2, ¶ 7; *id.* at art. 39.

[121] HATHAWAY & SHAPIRO, *supra* note 64, at xiii.

[122] *Id.* at 352 (emphasis added).

would not have occurred had the Pact alluded to non-state actors, but also that present international agreements which ban aggressive wars among *non-state* actors would complete the necessary work for the present international order to know true peace.

IV. NON-STATE VICTIM POPULATIONS THEN AND NOW

Contemporary violence in the world has been analyzed as surging among many ethnicities that have emerged as peoples in search of nationhood.[123] Non-state actors' and sub-states' violence is often perceived as a new phenomenon on the international stage, but this phenomenon existed after the First World War and is not new. It was the tension that existed in the interwar years between each states' recognition of rights to equality among each other—that is, each state being as worthy as each other, no matter how great or small a power—and the rights of each state's minority populations *within* the state.[124] These two concepts existed in mutual contradiction during the interwar period following World War I and were issues of ethnicity and self-identified peoples in quest of nationhood that resemble today's struggles.

These issues were dealt with after World War I in a series of treaties related to the Versailles system.[125] Enacted at the time as "a corollary and corrective to the principle of national self-determination"[126] enshrined in the Versailles system, the treaties inevitably failed in the wake of the Nazi invasion and occupation of the European nations that were party to those treaties,[127] just as most people believe that Kellogg-Briand failed.

A book that follows the demise of those treaties, *Were the Minority Treaties a Failure?*,[128] believes a principal cause was the United States' failure to ratify the Versailles Treaty or join the League of Nations.[129] The United States had been the most energetic proponent of minority rights at the Versailles Conference.[130] According to the authors,

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[123] *See, e.g.*, *id.* at 364–68.

[124] ROBINSON ET AL., *supra* note 77. Berman's article does analyze this tension as a major theme, explaining various viewpoints, as does MINORITY TREATIES, since those treaties' objective was to resolve it.

[125] *See id.* at 17–41.

[126] *See id.* at 41 (emphasized in original).

[127] *See id.* at 55 for the initial role of Nazi Germany in the breakdown of the Versailles system, and Lauterpacht; *see* LAUTERPACHT, *supra* note 9, at 80–81 for an account of the World Jewish Congress's approach to Hersch Lauterpacht in 1936 for legal assistance on behalf of the Jewish people of Upper Silesia after Nazi Germany had "acquired" it and they feared what the implications of this would be for their rights.

[128] ROBINSON ET AL., *supra* note 77.

[129] *Id.* at 47; *accord* ARON, *supra* note 1, at 38.

[130] ROBINSON ET AL., *supra* note 77, at 58.

> [t]he failure of the [U.S.] Senate to ratify the Treaty of Versailles rendered entirely worthless the special Agreement between the United States and France which was signed by Wilson and [his Secretary of State] Lansing . . . for the purpose of assistance to France in the event of unprovoked aggression by Germany. The American refusal to guarantee assistance to France resulted in a similar stand on the part of Great Britain. Having thus been deprived of the assurance of its recent allies and being unwilling to risk complete dependence upon the still incomplete peace structure and the enforcement machinery of the League, France began to look for security safeguards through both Versailles and pre-Versailles methods; by strengthening its own military forces and by organizing ententes and alliances against possible enemies.[131]

The authors also analyze other important causes of the treaties' failure. In particular, in the reshaped world that followed World War I, many states were eager to have their own former nationals, who now were residing in different states, become protected minorities in their new legal homes: "they were anxious that their minorities abroad be safeguarded against possible oppression . . . and welcomed the inclusion of minorities clauses in the peace treaties protecting their co-nationals."[132] Notably, however, many objected vigorously to being asked to sign such provisions themselves, arguing that this intruded on their national sovereignty, granted special privileges only to minorities,[133] and was intended only "for the benefit of Jews."[134] According to Margaret MacMillan, in her book on the Versailles peace process, when the lesser powers protested that the great powers were not being asked to sign these minority treaties, they were told "unhelpfully"[135] by Clémenceau that "East Europeans were different."[136] After much insistence by the great powers, the vanquished states signed the treaties in what MacMillan views as an inauspicious beginning at a time of

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[131] *Id.* at 47–48 (internal quotation marks omitted).

[132] *Id.* at 151.

[133] *Id.* at 154–68.

[134] *Id.* at 163; On the plight of Poland's Jewish minority in the interwar years, see COOPER, *supra* note 9, at 20 (quoting EZRA MENDELSOHN, THE JEWS OF EAST CENTRAL EUROPE BETWEEN THE WORLD WARS (1987)).

[135] MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 487 (2003).

[136] *Id.*

rising nationalism;[137] they proceeded, perhaps predictably with the exception of Czechoslovakia under Benes,[138] to fight against the equal treatment of their minority populations by failing to abide by treaty terms[139] and by actively impeding would-be petitioners from vindicating their rights under the relevant treaty.[140] MacMillan calls these treaties "a feeble gesture,"[141] with swift condemnation or derision born perhaps of the hindsight that the authors of *Minority Treaties* lacked in the 1940s when writing what was the first (and possibly only) comprehensive study and thorough analysis of the minority treaties and why they failed.[142]

Some seventy years later, after the fall of the Soviet Union, many of the national entities it had swallowed gained independence as free states, some eventually joining the European Union. Hathaway and Shapiro praise the European Union as having enabled those smaller states which became free after the fall of the Soviet Union, to exist under its protective mantle without needing to fear either that they would be too weak to survive, or that their distinctive national attributes would not be respected.[143] They also praise Kellogg-Briand for what they see as this modern result of the Pact.[144] A problem that the interwar internationalists had correctly perceived but did not resolve,[145] and that continues to tear apart the fabric of the international world order today, is the fate of individual minorities within nations. This problem includes the fate of newly formed states or states fairly recently detached from the Soviet Union, as well as the issues concerning individuals in pursuit of a place to live outside the country of their birth.[146] These twenty-first century problems are not new despite the modern rise of non-

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[137] *Id.*

[138] ROBINSON ET AL., *supra* note 77, at 169, 190.

[139] *Id.* at 177–78.

[140] *Id.* at 175–77.

[141] MACMILLAN, *supra* note 135, at 487.

[142] *See* ROBINSON ET AL., *supra* note 77.

[143] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 342–44. On the ongoing issues of unresolved national narratives clashing within the European Union, see "SCHMERZLICHE ERFAHRUNGEN DER VERGANGENHEIT" UND DER PROZESS DER KONSTITUTIONALISIERUNG EUROPAS (Christian Joerges, Mathias Mahlmann & Ulrich K. Preuß, eds., 2008); Vivian Grosswald Curran, *Addressing Member State Deviations From EU Foundational Values and the Rule of Law*, GLOB. CMTY. Y.B. OF INT'L. L. & JURIS. 145, 147–53 (2022).

[144] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 351.

[145] *See* ROBINSON ET AL., *supra* note 77, at 43–60, 175–87. President Wilson vigorously pushed for minority rights but was sidelined by his European counterparts after non-ratification by the U.S. because France lost its guarantee of U.S. protection in a future war with Germany.

[146] *See* Dmitry Kochenov, *EU Rule of Law Today: Limiting, Excusing or Abusing Power?*, *forthcoming in* THE RULE OF LAW IN THE ERA OF CRISES 18–23 (Anna Söersten & Edwin Hercock eds., 2023).

state belligerents.[147] Rather, they echo the tension recognized during the interwar years from the clash between aspirations to respect each nation as equal, thus emphasizing national sovereignty, with aspirations to vindicate the rights of individuals and minority groups to be free from discrimination and persecution *within* each nation.[148]

In examining this clash of goals, where does a right to peace, if any, come into play? As David Stewart has noted, "[f]or many, keeping the peace has always been the ultimate purpose of international law."[149] Despite the U.N.'s 2017 Resolution declaring a right to peace,[150] Stewart believes it remains unclear whether international law recognizes such a right.[151] Hathaway and Shapiro both advocate for a right to peace.[152] Others, such as Michael Walzer, believe that some wars are just, and analyze the morality and immorality of war.[153] The topic at hand blends these issues to some extent by asking if international law can have the power to effect peace.

Whether a right to peace exists in international law or not, it should be remembered that law itself—both domestic and international law—exists in human society and, inasmuch as the law depends on popular faith and belief for continuity and enforcement,

> [t]he self-preservation of the state cannot be secured by its material prosperity nor can it be guaranteed by the maintenance of certain constitutional laws. Written constitutions or legal charters have no real binding force, if they are not the expression of a constitution that is written in the citizens' minds.[154]

The law's incapacity to have such "binding force"[155] in the absence of popular agreement must be part of the consideration about international

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[147] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 367–68 (portraying the belligerence of non-state actors as a modern phenomenon of violence).

[148] *See id.* and accompanying text.

[149] David P. Stewart, *Lex Pacificatoria, Jus Post Bellum, or Just "Good Practice"?*, 117 AM. J. INT'L L. 189, 196 (2023).

[150] G.A. Res. 71/189, annex (Feb. 2, 2017).

[151] Stewart, *supra* note 149, at 196.

[152] *See* HATHAWAY & SHAPIRO, *supra* note 64, at xiii–xiv (introducing central theme that Kellogg-Briand had transformative, beneficial impact on world because it instituted the concept of peace as part of the international legal order and war as "a departure from civilized politics").

[153] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977).

[154] CASSIRER, *supra* note 23, at 76.

[155] *Id.*

law's ability to impose the rule of law. The next Part discusses the history and meaning of this analysis and similar questions.

V. REASONING ABOUT INTERNATIONAL LAW AND POLITICS

International law's capacity to impose the rule of law has been called an "abstruse" issue.[156] Other equally apt terms might be "elusive" or "unanswerable." For Aron, the French philosopher and political scientist, the problem may lie in the very nature of international law, which, in his view, ultimately is not really law.[157] He argues that

> no theory of international law has ever been satisfactory, either in itself or in relation to reality. Logically, a theory that posited the absolutism of sovereignty did not justify the obligatory character of international law. Politically, such a theory restrained the authority of law and encouraged international anarchy. A theory that posited the authority of a law superior to states was incapable of finding either "normative facts" or an originating norm comparable to these same facts or to this same norm in the case of internal law. Further, the absence of . . . an irresistible force of sanction compromised the logical rigor of the theory of a law superior to the state and rendered it alien to reality.[158]

Aron further criticizes international law for being based on *jus gentium*, itself based on natural rights, when the contemporary inclination runs counter to recognizing natural law as having "a strictly juridical character."[159] Basing international law on natural law should have led legal theorists to "emphasize the state of nature (absence of tribunal and police) . . . hence to emphasize the difference between municipal [such as domestic or national] law and international law."[160] However, international lawyers do not reason in this manner because doing so would mean "[denying] the juridical character *stricto sensu* of what we call international law."[161] Aron theorized that internationalists do not distinguish between

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[156] ROBINSON ET AL., *supra* note 77, at viii. The term was used in the more specific context of the interwar treaties' ability to protect minority populations.
[157] *See* ARON, *supra* note 1, at 385–87.
[158] *Id.* at 720.
[159] *Id.* at 722.
[160] *Id.*
[161] *Id.*

municipal and international law because their legal training is primarily as domestic lawyers.[162]

Cassirer approached such questions historically, comparing the universalism of Machiavelli with that of Galileo, the social and natural sciences, and the idea that "all natural events obey the same invariable laws."[163] Since the future eludes prediction, Cassirer asked if we must "give up the principle of universal determinism in the field of politics? Shall we say that here things are incalculable; that there is no necessity in political events; that, as contrasted with the physical world, the human and social world is governed by mere chance?"[164] As the physical world became better understood, could its principles elucidate the non-physical world? Cassirer commented as follows:

> If knowledge means *mathematical* knowledge, can we hope for any *science of politics?* The very concept and ideal of such a science seems, at first sight, to be a mere utopia. Galileo's saying that philosophy is written in geometrical characters may apply to nature; but it does not apply to man's social and political life, which is not to be described in mathematical terms. It is a life of emotions and passions. No mere effort of abstract thought seems to be able to rule these passions, to set them definite boundaries, and then direct them to a rational end.[165]

From Hobbes to Grotius to Locke, these seventeenth-century thinkers, whatever the substance of their views, "had an almost unbounded faith in the power of human reason."[166] (Auguste Comte, it is said, even "asked why, if there was rightly no demand for freedom to disagree in mathematics, it should be allowed or even encouraged in ethics or the social sciences.").[167]

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[162] *Id.* at 723. He views areas of international law as fully appropriate to the sort of domestic law analysis that is common, giving the example of areas involving property, and indicates that his comments are to be taken with respect to international law theory; *but see id.* (the possibility that the League of Nations initially seemed to "show the way" to overcoming the theoretical problem proved untrue). Lauterpacht for his part did distinguish between domestic and international law, but also gave an account of legal and political theorists who did not. *See* LAUTERPACHT, *supra* note 26, at 407–31.

[163] CASSIRER, *supra* note 23, at 156.

[164] *Id.* at 157.

[165] *Id.* at 164.

[166] *Id.* at 165; *accord* NIKOLAUS K. TSAGOURIAS, JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION 12–13 (2000); *but see* GROTIUS, *supra* note 84, at 250 ("There is much truth in what Aristotle wrote, that in the realm of practical morals, certainty cannot be reached to the extent that it can in the mathematical sciences.").

[167] BERLIN, *supra* note 38, at 28.

According to Cassirer, "they follow the same great historical example as Galileo,"[168] even, in Grotius' case, stating the goal of a "mathematics of politics."[169] The stability they sought has been elusive: "In politics we have not yet found firm and reliable ground . . . we are always threatened with a sudden relapse into the old chaos."[170] Cassirer rejected the utopia of a reasoned science of politics or, one may surmise, of law, but not of the *logic* inherent to them, "a logic of the social world."[171] He probably meant, rather, a logic *to* the social world, including much unreason, irrationality, and internal mechanisms that include human passions.

Berlin also captured the historical desire to scientize the social sciences:

> If only we could find a series of natural laws connecting at one end the biological and physiological states and processes of human beings with, at the other, the equally observable patterns of their conduct – their social activities in the wider sense – and so establish a coherent system of regularities, deducible from a comparatively small number of general laws (as Newton, it is held, had so triumphantly done in physics), we should have in our hands a science of human behaviour. Then we could perhaps afford to ignore, or at least treat as secondary, such intermediate phenomena as feelings, thoughts, volitions, of which men's lives seem to themselves to be largely composed, but which do not lend themselves easily to exact measurement . . . . This would constitute the natural sciences of psychology and sociology, predicted by the materialists of the French Enlightenment, particularly Condillac and Condorcet and their nineteenth-century followers – Comte, Buckle, Spencer, Taine . . . ."[172]

For some of the proponents of this view, natural scientists were more intelligent than their counterparts in the social sciences; they believed that natural scientists would have been able to solve "the disordered mass of truth and falsehood"[173] that clutters fields outside of the natural sciences.[174]

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[168] CASSIRER, *supra* note 23, at 165.
[169] *Id.*
[170] *Id.* at 293.
[171] *Id.* at 295 ("a logic of the social world").
[172] BERLIN, *supra* note 35, at 105.
[173] *Id.* at 106.
[174] *See id.*

For Berlin, questions about what makes people obey international law can never be amenable to knowledge in a scientific sense; they are philosophical questions involving value judgments and value judgments lack universal agreement.[175]

The late legal comparatist and internationalist Mireille Delmas-Marty hoped to assimilate pluralism with agreement where it could be reached. She spoke of a *pluralisme ordonné*, an "ordered pluralism" that would accommodate difference through harmonization rather than through unification.[176] At the end of her life, she embarked on a multinational project to see if a new kind of global *jus commune* was possible in which differences could co-exist with harmonized, though not identical, values.[177] Berlin would not, I think, have thought her undertaking, or that of the interwar internationalists, impossible on a theoretical level:

> Some of the classical constructions are in conflict with one another, but, inasmuch as each rests on a vivid vision of permanent human attributes and is capable of satisfying some inquiring minds in each generation, no matter how different the circumstances of time and place . . . so long as men are as they are, the debate will continue in terms set by these visions and others like them . . . .[178]

He may well not have been optimistic as to the ultimate impact of the resulting *jus commune* or international law, however, because he thought that harmonization may not be part of a coherent world vision: "ends collide . . . the need to . . . sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament."[179] He cautioned against believing in the capacity of reasoned thought to lead to harmonious systems in the social and political sciences.[180] Berlin was not a

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[175] *See id.* at 148–49.

[176] MIREILLE DELMAS-MARTY, LE PLURALISME ORDONNE: LES FORCES IMAGINANTES DU DROIT (II) (2006). For an excellent account of the evolution of international law theory in France, see Emmanuelle Jouannet, *A Century of French International Law Scholarship*, 61 ME. L. REV. 83 (2009).

[177] *See* MIRIELLE DELMAS-MARTY, KATHIA MARTIN-CHENUT & CAMILLA PERRUSO, SUR LES CHEMINS D'UN JUSCOMMUNE UNIVERSALISABLE (2021).

[178] BERLIN, *supra* note 35, at 170.

[179] BERLIN, *supra* note 38, at li; Stuart Hampshire agreed, arguing against Aristotle's "theory of complete happiness and complete virtue in a complete life," as well as against the Platonic ideal of harmony, "for complete intelligibility and for rational coherence . . . ." STUART HAMPSHIRE, JUSTICE IS CONFLICT 69 (2000).

[180] BERLIN, *supra* note 38, at 8.

determinist; he fully believed that people choose their own acts and are responsible for their own conduct.[181]

For his part, Walzer's view, like Lauterpacht's, sees the foundations of the international legal order as so fragile in the absence of an authority to enforce it that legal theory may be unsustainable:

> [I]nternational society as it exists today is a radically imperfect structure. As we experience it, that society might be likened to a defective building, founded on rights; its superstructure raised, like that of the state itself, through political conflict, cooperative activity, and commercial exchange; the whole thing shaky and unstable because it lacks the rivets of authority . . . . It is unlike domestic society in that every conflict threatens the structure as a whole with collapse. Aggression challenges it directly and is much more dangerous than domestic crime, because there are no policemen.[182]

VI. THE "NEW WORLD ORDER" TODAY

Hathaway and Shapiro issue a call to internationalist action in the last part of their book.[183] At the heart of their book is the idea that outlawing war is a workable solution for the international legal order, and that not only can it work, but it already has.[184] Accordingly, they believe that "law creates real power."[185] To them, the response to those who violate international law is to meet violence with economic sanctions rather than force:

> [W]ar is not a permissible mechanism for righting wrongs, even if that means some wrongs remain unaddressed . . . . It is better to live in a world where those who wage aggressive war can be convicted in a court of law than in one where they cannot. It is better to live in a world where states can use economic sanctions to punish aggressors without fear of being drawn into a war as a consequence. In short, it is better to live in the New World

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[181] *See id.* at 178 ("[T]o attribute conduct to the unalterable laws of nature is to misdescribe reality.").
[182] WALZER, *supra* note 153, at 58–59.
[183] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 418–22.
[184] *See id.* and accompanying text.
[185] *Id.* at 422.

> Order . . . than to go back to a system where war is legal or to a chaotic in-between.[186]

The world that the authors depict may leave a great deal unsaid. In practical terms, a similar refusal of violence in response to violence led Gandhi, for instance, to counsel the Jews of Nazi Germany to commit suicide as a sole method of resistance.[187] There are sometimes, perhaps, even worse things than war. It is no doubt better to live in a world in which international law reigns supreme and in which international courts that convict war criminals can do so when needed, as Hathaway and Shapiro urge. One may question, however, if we do in fact live in the New World Order the authors describe, and if the peace has not owed more to nuclear deterrence than to legal precepts in places like the West. Margaret MacMillan, a historian of war, would disagree with the cheery pre- and post-1928 statistics provided by Hathaway and Shapiro concerning the New World Order. According to MacMillan, not only does war itself hark back to the earliest days of humankind,[188] but also "war deaths in the twentieth century may amount to 75 percent of all war deaths in the past 5,000 years."[189]

Can we say today that international law has proven to be much of a deterrence if we look at the evidence? We learn, for instance, that the Genocide Convention has not prevented genocide but, rather, has prevented the U.S. State Department from using the *term* "lest it entrain the very responsibilities Lemkin had written into the Convention."[190] As Iran has or is about to acquire nuclear weapons and North Korea builds up its arsenal, do we believe that peace is being kept by the U.N., or even by fear of conviction by the court in The Hague? If one looks around the world, not just since the end of the First World War, but since the Second,[191] how many genocides have been committed,[192] and how many humans have lost their lives and limbs? Would anyone from Africa agree that we are now living in a New World Order of international law, one ordered by the Kellogg-Briand

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[186] *Id.*

[187] *See* WALZER, *supra* note 153, at 332.

[188] MACMILLAN, *supra* note 76, at 4–5.

[189] *Id.* at 7.

[190] Ignatieff, *supra* note 9, at 27*; see also* SANDS, *supra* note 9, at 364 ("[T]oday there is a race to be considered a victim of genocide, as Lauterpacht feared might happen.").

[191] I am here looking at the Second World War if only for the sake of argument, since Hathaway and Shapiro maintain both that the New World Order starts with Kellogg-Briand, and that they cannot be asked to account for World War II because the post-First World War Peace Pact of 1928 took until after the Second World War (1945) to ripen to full fruition.

[192] On the dismal failure of the Genocide Convention, see Ignatieff, *supra* note 9, at 27; KOREY, *supra* note 14, at 87–92; SANDS, *supra* note 9, at 364.

Pact's interdiction of war? From 1945, MacMillan estimates there have been "between 150 and 300 armed conflicts."[193] Lemkin himself wrote in his posthumously published autobiography that "*genocide is not the result of the mood of an occasional rogue ruler but a recurring pattern in history. It is like a disease that is congenital . . . .*"[194] If that is true of *genocide*, how much truer is it of war?

MacMillan does not find the distinction between state and non-state actors germane when it comes to assessing wars. For her, Hobbesian chaos is a default situation that can be upon us all too easily[195] and makes war likely when nations fail and sub-states take up arms.[196] Hathaway and Shapiro repudiate war at all costs, even as a remedy to wars of aggression, except where the U.N. has duly authorized it.[197] In their own words, "international law prohibits states from using force to enforce international law."[198] This would mean refusing to stop an ongoing genocide in another part of the world if the U.N. Security Council did not vote to approve military action. This view is controversial,[199] and Lauterpacht disagreed with it in his seminal Oppenheim treatise on international law: "*when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible*."[200] The argument in favor of making such atrocities a universal concern, as Lauterpacht believed they were, has been made more recently by Walzer in *Just and Unjust Wars*,[201] and by others, including Richard Lillich[202] and Fernando Tesón.[203] Where Walzer frames his

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[193] *See also* Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 VA. J. INT'L. L. 63 (2006) (recounting the ethnic cleansing of Germans from the Sudetenland after World War II, to which the Allies made no objection).

[194] RAPHAEL LEMKIN, TOTALLY UNOFFICIAL: THE AUTOBIOGRAPHY OF RAPHAEL LEMKIN 138 (Donna-Lee Frieze ed., 2013) (emphasis added).

[195] *See* CASSIRER, *supra* note 23, at 297.

[196] MACMILLAN, *supra* note 76, at 19.

[197] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 369–70 (emphasis in original).

[198] *Id.* at 370.

[199] *See, e.g.*, ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 351–52 (1995); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 173–74 (2d ed. 1997); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326–34 (1967); Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 167–78 (Richard B. Lillich ed., 1973). It is, however, in keeping with U.N. Charter Art. 2 (4). For further discussion of this issue, *see infra* Section VIII.

[200] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 61, at 312 (emphasis added).

[201] WALZER, *supra* note 153.

[202] *See* Lillich, *supra* note 199.

[203] *See* TESÓN, *supra* note 199.

argument in terms of morality, Raymond Aron suggests, in practical terms, that if states do not respond militarily to violence, they submit to what he calls "imperial peace" in which "the imperial state . . . reserves to itself the monopoly of legitimate violence."[204]

That said, Hathaway and Shapiro are not alone in ruling out any military intervention that is not formally permitted by the U.N.[205] Their Yale colleague from the History Department makes an even stronger case than they in his book, *Humane: How the United States Abandoned Peace and Reinvented War*,[206] discussed in Part VII, below.

VII. THE ARGUMENT AGAINST HUMANE CONDUCT IN WAR

Moyn's central point is that war is evil and that conducting wars in a humane manner is worse than conducting them inhumanely because it augments the likelihood of popular agreement to war: it is precisely the atrocities of war that will curtail war.[207] Citing Leo Tolstoy as an inspiration, he says the Russian author's personal experiences in the Crimean War led Tolstoy to the conclusion that "war itself is the moral evil to be concerned about, not the niceties of how it is fought"[208] and that "brutality can make [war] rare."[209] Moyn gives a historical account of the law of war and positions taken on it, starting with Clausewitz[210] and Lieber, both of whom, they argue, did not advocate for humane war despite, in Lieber's case, being at the origin of codifying rules of war,[211] and proceeding to the Hague Treaties on rules for war.[212] For Moyn, the concept of humane war is intrinsically incoherent in the same way that humane slavery is.[213] Moyn believes that the history of humanizing war has been responsible for perpetuating wars.[214]

Lauterpacht understood that the principal objection to making war humane was the risk of making it more probable and frequent, and said so

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[204] ARON, *supra* note 1, at 134.

[205] Georges Scelle, *Quelques réflexions sur l'abolition de la compétence de guerre*, 58 REVUE GENERALE DE DROIT INT'L PUB. 1 (1954).

[206] MOYN, *supra* note 76.

[207] *See id.* at 3–14.

[208] *Id.* at 18.

[209] *Id.* at 27.

[210] *See id.* at 28–29 (quoting Clausewitz as saying that war cannot be conducted without a great deal of bloodshed); *id.* at 86–87 (quoting British Lord Sea Admiral Fisher for the proposition that "moderation in war is imbecility").

[211] *Id.* at 30, 105, 111, 113; *see* MACMILLAN, *supra* note 76, at 203–04.

[212] *Id.* at 88–89.

[213] *Id.* at 38 (attributing this thought to Tolstoy).

[214] *See id.* at 45.

in the *Preface* to *Volume II* of the fifth edition of *Oppenheim*, published in 1935.[215] In that *Preface,* written before the postwar Geneva Conventions, he wrote that "it is obviously preferable that the use of force . . . should be regulated and, if possible, humanized."[216]

Moyn is deeply critical of Kellogg-Briand for failing to have any enforcement provisions, likening it to a diet that bans overeating without showing how to restrain oneself from doing so.[217] Moyn views the treaty as a palliative to the overwhelming popular demand to avoid future wars after World War I, and suggests that the treaty was calculated to allow states to eviscerate its meaning by permitting them to qualify their agreement with exceptions and conditions.[218] Like the authors of *Minority Treaties*, Moyn believes that Kellogg-Briand was not worth more than the United States' ability and willingness to enforce it.[219]

Moyn's book recounts the devastation of many wars and the inefficacy of international legal measures through the Second World War.[220] It also discusses the Geneva Conventions of the 1950s, describing them as "toothless."[221] It then focuses considerable attention on the war in Vietnam, arguing that U.S. atrocities, such as the My Lai Massacre, invigorated the public to oppose the war,[222] ultimately leading to the Geneva Protocols of 1977.[223]

In accordance with his perspective, Moyn condemns the U.S. intervention in Bosnia Herzegovina as a violation of international law, even after the U.N. peacekeeping mission there had proven itself unable to prevent mass atrocity because President Clinton did not seek or obtain U.N. approval for military intervention.[224] Hathaway and Shapiro's book indicates that they would share Moyn's response to that intervention since they argue that only economic measures should be taken against Russia for its invasion of Ukraine lest the result of military intervention be yet more

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[215] *See* LAUTERPACHT, *supra* note 9, at 76 (quoting Hersch Lauterpacht, *Preface to the Fifth Edition* of LASSA OPPENHEIM, INTERNATIONAL LAW (1935)).

[216] *Id.* at 74–76.

[217] *Id.* at 73–74.

[218] *Id.* at 74.

[219] *See id*; *see generally* ROBINSON ET AL., *supra* note 77.

[220] *See, e.g.*, MOYN, *supra* note 76, at 131–43.

[221] *Id.* at 148.

[222] *See id.* at 161–232.

[223] *Id.* at 200–03.

[224] *Id.* at 228. For the UN's failure to control violence by the Serbs, including UN Secretary, General Kofi Annan's self-critical conclusions, see BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 9 (2002).

illegal invasions and territorial usurpations.[225] However, nowhere do Hathaway and Shapiro argue against the humane conduct of war.

Finally, Moyn concludes that the modern humanitarian methods of war, such as armed drones in the war on terrorism, have become "the recipe for endless war"[226] because they have allowed for good public optics, including politicians' "playing up the humanity of the fighting."[227] Thus, the representation of a war as humane assuages what might otherwise have led to popular resistance to war and conceals both the reality of ongoing war and the underlying violence of it.[228] For Moyn, "[h]umane war may become increasingly safe for all concerned–which is also what makes it objectionable. In the concluding sentence of the book, he says that the answer lies in law.[229] Given the message he delivers throughout the book, it could only be an international law to outlaw war, with no provisions for its humane conduct. One can only ask at the end of his disquisition what would give Moyn the impression that such a law would have a chance of being any more successful than the many ones he describes as abject failures. In particular, Moyn does not indicate what would provide it with "teeth."

VIII. WAR AS INEVITABLE

A. HUMANKIND'S HISTORY

In contrast to Hathaway, Shapiro, and Moyn, many believe war is endemic to humanity, and consequently engage in various ways, depending on their discipline, to seek to avoid it, explain it, or minimize its savagery. Lauterpacht was one who, unlike Hathaway, Shapiro, and Moyn, did not believe that an end to war was a realistic prospect, despite his idealistic theorizing about a world federation: "[c]lashes of physical force on a large scale will not be absolutely eliminated even after the Federation of the World has become a reality . . . ."[230] MacMillan, the historian of war, has reached back in time to the earliest presence of humans to show evidence of war in the Stone Age.[231] She believes that we are mistakenly "confident

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[225] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 390–91 (discussing Russia's 2014 invasion, their book antedating the 2021 invasion, and deeming economic sanctions taken by the West against Russia as having succeeded in "out casting" Russia, making its territorial conquest of the Crimea of little value to it).

[226] *Id.* at 280, 283–90.

[227] *Id.* at 290.

[228] *See id.* at 296.

[229] *See id.*

[230] LAUTERPACHT, *supra* note 9, at 76 (quoting Hersch Lauterpacht, *Preface to the Fifth Edition* of LASSA OPPENHEIM, INTERNATIONAL LAW (1935)).

[231] MACMILLAN, *supra* note 76, at 3–4.

that we ourselves will never have to take part in war. The result is that we do not take war as seriously as it deserves."[232]

MacMillan's book traces war from ancient history to the present. She notes that a principle

> generally accepted by international society is that unprovoked wars for gain or dominance are illegitimate. Self-defense, however, is not. Yet, following the classical world and medieval thinkers such as Augustine and Aquinas, we like to think that war should be a last resort after all other alternatives have been exhausted . . . Grotius . . . introduced the idea that war was only just if it was waged by states, to protect themselves, and not by private forces. What that came to mean in practice was that opposing states could each claim to be waging a just war. Furthermore, we have come to believe, governments that resort to war ought to have reasonable grounds for thinking they will prevail; otherwise they will be throwing away their people's lives for nothing.[233]

Like MacMillan, Aron notes that international law leaves states able to define their own need to defend themselves. Aron discusses additional issues arising from the inadequate definition of the term "aggression"[234] and the equally prohibited "threat of aggression":[235]

> By the term *aggression*, diplomats, jurists and mere citizens designate, more or less vaguely, an *illegitimate* use, direct or indirect, of force. Now relations among states are such that it is not possible to find the general and abstract criteria in the light of which the distinction between legitimate and illegitimate use of force would be automatic and obvious . . . . [A]ll states have relied and continue to rely on themselves to obtain justice; none genuinely subscribes to the view that threats in the service of a just cause are, as such, culpable.[236]

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[232] *Id.* at xii–xiii.

[233] *Id.* at 211.

[234] ARON, *supra* note 1, at 121–22; *accord* JULIUS STONE, AGGRESSION AND THE WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 32 (1958) (criticizing Kellogg-Briand for leaving the term undefined).

[235] ARON, *supra* note 1, at 112.

[236] *Id.* at 121–22.

Like Aron and Moyn, MacMillan makes short shrift of Kellogg-Briand because of its lack of enforcement provisions and points to the outbreak of the Second World War as proof of its futility.[237] Further, and more importantly, MacMillan believes that it is not international law, but rather the threat of nuclear war that prevented wars after the Second World War.[238] In looking at today's powerful states and their continual buildup of modern means of warfare, including cyberwarfare and the weakening of consensus to keep space demilitarized, MacMillan does not look to international law, but to the need to be aware of the ever-present danger of war, both between states and sub-state terror groups.[239]

MacMillan's longer view opposes that of Hathaway and Shapiro in tracing a history of attempts to outlaw war that go back much farther than Kellogg-Briand to medieval Europe but that could never overcome the will to aggressive war:

> In Europe's Middle Ages the Church tried repeatedly to impose the Peace of God and outlaw war, except for the holy cause of the Crusades. From the tenth century to the twelfth bishops called on local nobles to attend councils where they would take vows . . . . In the eleventh century the Church also attempted to forbid fighting on certain days . . . . [B]ut the nobles and their retainers kept on their lawless ways even under threat of excommunication . . . . While religions have, like the medieval Church, a mixed record when it comes to war, certain sects have produced more than their share of antiwar activists. After the Napoleonic wars, the British dissenters and evangelicals established the Society for the Promotion of Permanent and Universal Peace and Quakers and Mennonites have been active in antiwar movements up until the present.
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> Others have put their hope in reason rather than religion. Christine de Pisan . . . of the fifteenth century, wrote that, if a prince feels wronged, he should assemble 'a great council of wise men . . . as legal advisers . . .' [240]

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[237] MACMILLAN, *supra* note 76, at 233; *accord* ARON, *supra* note 1, at 102.

[238] *See* MACMILLAN, *supra* note 76, at 234; *accord* HENRY KISSINGER, WORLD ORDER 341 (2015).

[239] *See id.* at 269–72.

[240] MACMILLAN, *supra* note 76, at 227–28.

MacMillan proceeds to Kant and Bertha von Suttner's view (also the subject of analysis by Moyn and Walzer) that as civilization progressed, peace would be an inevitable byproduct: "It is a mathematical certainty that in the course of centuries the warlike spirit will witness a progressive decline."[241] In *To Perpetual Peace*, Kant wrote that "nature irresistibly *wills* that right should finally triumph."[242] MacMillan cites Stefan Zweig for the proposition, more fully developed by Kissinger, that, lulled by the long European peace which preceded the outbreak of the First World War in 1914, "[p]eople no more believed in the possibility of barbaric relapses, such as wars between the nations of Europe, than they believed in ghosts and witches."[243] Zweig's description in *The World of Yesterday* of the shock waves he experienced through his glimpses of the barbarity of that war[244] is reminiscent of the contemporary shock at the new war in Europe between Russia and Ukraine.

In describing the continuous efforts to end war through law up to the present, MacMillan concludes (like Lauterpacht and Lemkin) that the principal problem, "as it has always been,"[245] continues to be enforcement.[246] She notes that, while so far the catastrophic potential of mutually assured destruction has kept a nuclear war at bay,

> the superpowers and some lesser ones fought proxy wars and fueled, as they still do, civil wars. And violence need not be committed by the latest high-tech weapons; out-of-date, cheap weapons can do great damage. In Rwanda before Hutu militias started their slaughter of the Tutsi, the country imported enough machetes for every third Rwandan male to have a new one. Those machetes were not used for farming. As we look around the world, we need to remember that war and all the others since 1945. War and the threat of war are still very much with us.[247]

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[241] *Id.* at 229; *see* Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch, in* PERPETUAL PEACE AND OTHER ESSAYS 112 (trans., Ted Humphrey 1983) (For Kant, a first step had to be a federation of republics). For Zweig's encounter with the elderly van Suttner in high distress at the outbreak of the First World War, see STEFAN ZWEIG, THE WORLD OF YESTERDAY 208–09 (Univ. Neb. Press, 1963) (1943).

[242] Kant, *supra* note 241, at 124 (emphasis in original).

[243] *Id.* at 229.

[244] *See* ZWEIG, *supra* note 241, at 249–50.

[245] MACMILLAN, *supra* note 76, at 227.

[246] *Id.*

[247] *Id.* at 233.

Her view tallies well, albeit in different ways, with the work of Raymond Aron and of Henry Kissinger on how diplomacy must be undertaken as a preventative measure to avert disaster,[248] and with that of Walzer who believes that some wars should be fought and, therefore, that it is vital to (1) assess whether a war is just or unjust and (2) maintain humanity in the conduct of war.[249]

B. DIPLOMACY AND THE INTERNATIONAL ORDER

In *World Order*,[250] Kissinger tackles how to maintain peace in a world of greater interdependence than ever, while lacking agreement on basic values, and where many parts of the world have had no part in the system of rules governing international law,[251] and, indeed, where nations' goals often conflict with each other.[252] Beginning with Roman times and proceeding to the Church's efforts to unify Europe, to the Treaty of Westphalia, Kissinger emphasizes that the Treaty of Westphalia[253] led to a European order consisting of a balance of power.[254]

Preservation of a balance of power and legitimacy sufficient to keep peace is the central theme and goal of the book. According to Kissinger, European success in keeping peace between 1815 and the first World War's outbreak in 1914 resulted from the work of the diplomats at the Congress of Vienna ("Congress") who established the foundations for a European order after Napoleon's defeat.[255] In his view, such a balance of power and legitimacy among the great powers overcame the minor disturbances to the peace, which occurred as nationalism grew within Europe; it even proved capable of withstanding the revolutions of 1848, although it was somewhat frayed from them.[256] The European order that the Congress of Vienna engendered, based on balancing the power and legitimacy of the great powers, managed to keep Europe free of a major war for almost a century—from 1815 until 1914.[257]

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[248] *See* ARON, *supra* note 1; KISSINGER, *supra* note 238.
[249] *See* WALZER, *supra* note 153.
[250] *See* KISSINGER, *supra* note 238.
[251] *Id.* at 2.
[252] *Id.* at 2–9.
[253] *See id.* at 25 (Kissinger prefers the term 'Peace of Westphalia' because there was no single treaty).
[254] *See id.* at 27.
[255] *Id.* at 2.
[256] *See id.* at 60–73.
[257] *See id.* at 79 (Kissinger counts the Crimean War as one such general war, but not the Franco-Prussian War because it engaged only two states). For President Wilson's post-World War I view

Kissinger was primarily inspired by Metternich's perspective when analyzing how this achievement was attained.[258] Although Metternich was Austria's foreign minister, he sought first and foremost to intertwine the interests of all involved states in the Congress.[259] His understanding of the wisdom of this approach may have stemmed from the Austrian Empire's own makeup of numerous nationalities:

> For Metternich, the national interest of Austria was a metaphor for the overall interest of Europe – how to hold together many races and peoples and languages in a structure at once respectful of diversity and of a common heritage, faith and custom. In that perspective, Austria's role was to vindicate the pluralism and, hence, the peace of Europe.[260]

In Kissinger's view, the dissolution of this order into the catastrophic First World War was due to the great powers ignoring the hard work of balancing power and legitimacy that had been able to keep the peace for a hundred years.[261] Kissinger is not alone in commenting that World War I could have been avoided.[262] His focus on the process that brought about the end to peace reflects the gravity of the lesson it bears for us today:

> [T]he war that overturned Western civilization had no inevitable necessity. It arose from a series of miscalculations made by serious leaders who did not understand the consequences of their planning, and a final maelstrom triggered by a terrorist attack occurring in a year generally believed to be a tranquil period. In the end, the military planning ran away with diplomacy. It is a lesson subsequent generations must not forget."[263]

Just as Kissinger critiques the final phase of the period leading to 1914 as being a result of the European powers' unworkable focus on power to the

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rejecting balancing power as a basis for peace, see MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 13 (2003).

[258] *See* KISSINGER, *supra* note 238, at 73–76.

[259] *See id.* at 75.

[260] *Id.*

[261] *Id.* at 82–86.

[262] *Id.* at 82; a*ccord* BARBARA W. TUCHMAN, THE GUNS OF AUGUST 3–132 (1962); ARON, *supra* note 1, at 39–40.

[263] KISSINGER, *supra* note 238, at 82.

exclusion of legitimacy,[264] he also condemns the Versailles system after the war as swinging too far in the opposite direction: "The drafters of the Versailles settlement veered back to the legitimacy component by creating an international order that could be maintained, if at all, only by appeals to shared principles—because the elements of power were ignored or left in disarray."[265] Citing the French philosopher Pierre-Joseph Proudhon, Aron also agrees that it is a mistake for international law to ignore the role of force:

> All international jurists set law in opposition to force. Might, they say, cannot make right. But the law resulting from agreements between states is based upon force, since without it the states would not exist. To declare that force is intrinsically unjust is to decree the original injustice of all juridical norms, inconceivable without the existence of states."[266]

Looking to the contemporary world, Kissinger analyzes the weakening of the concept of the Westphalian state structure,[267] and the European Union's contemporary tendency to concentrate "inward[s] just as the quest for a world order it significantly designed faces a fraught juncture whose outcome could engulf any region that fails to help shape it."[268] In a substantial portion of his book, he takes pains to explain parts of the non-Western world's very different origins, history, political systems and values.[269] For this profound diversity among interdependent nations, Aron, for his part, questions if one can speak of international community and

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[264] *See id.* at 83. Of the Versailles system, Kissinger writes that it "achieved neither legitimacy nor equilibrium. Its almost pathetic frailty was demonstrated by the Locarno Pact of 1925, in which Germany 'accepted' the western frontiers and the demilitarization of the Rhineland to which it had already agreed at Versailles but explicitly refused to extend the same assurance to its borders with Poland and Czechoslovakia—making explicit its ambitions and underlying resentments. Amazingly, France completed the Locarno agreement even though it left France's allies in Eastern Europe formally exposed to eventual German revanchism—a hint of what it would do a decade later in the face of an actual challenge." *Id.* at 85.

[265] *Id.* at 83.

[266] ARON, *supra* note 1, at 604 (referring with approval to P.J. PROUDHON, LA GUERRE ET LA PAIX. RECHERCHES SUR LE PRINCIPE ET LA CONSTITUTION DU DROIT DES GENS (1861)).

[267] KISSINGER, *supra* note 238, at 92.

[268] *Id.* at 95.

[269] *See id.* at chapters 3–6.

whether it is possible to "impose an international law on a divided humanity."[270]

Kissinger also points out a significant and insightful difference between American and European perspectives that may be useful in considering the prisms through which we see issues of international law's relation to the rule of law:

> The American experience supported the assumption that peace was the natural condition of humanity, prevented only by other countries' unreasonableness or ill will. The European style of statecraft, with its shifting alliances and elastic maneuvers on the spectrum between peace and hostility, seemed to the American mind a perverse departure from common sense.[271]

One can wonder if the approach that military intervention may never be justified in the absence of U.N. approval does not hark in part to such an outlook.[272] For Kissinger, there is a similarity between contemporary times and the world that saw Kellogg-Briand and the League of Nations: the challenge of dealing with states in violation of international law, sometimes following their withdrawal from international organizations or treaties, sometimes in violation of them.[273] If force is not used, will the failure to use it reward the violators of the international order?[274]

His consideration of nuclear warfare and cyber warfare today as well as the clash of different cultures in a world more interdependent than ever before leads him to conclude that the Westphalian order's[275] strength was founded in process rather than substance, that it was "derived from its

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[270] ARON, *supra* note 1, at 332; *compare* David L. Sloss, *Introduction* to IS THE INTERNATIONAL LEGAL ORDER UNRAVELING? 1, 15 (2022) ("In short, the international order is fraying because the multiplicity of state and nonstate actors is nudging the system toward chaos, and it is uncertain whether the United States (or any combination of states) has the will or capacity to preserve order in a highly decentralized system.").

[271] KISSINGER, *supra* note 238, at 241.

[272] *See infra*, note 331.

[273] KISSINGER, *supra* note 238, at 265–66.

[274] *Id.*

[275] The Westphalian order emanated from the treaties ending the thirty years' war of religion in Europe and is considered to be the basis of the modern idea of the sovereign state. It dates from the seventeenth century and is to be distinguished from the Congress of Vienna, which Kissinger considers the harbinger of a century of European peace took place in the nineteenth century, and which I have been discussing as Kissinger's focal point. On the treaties or the Peace of Westphalia, see ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE HISTORICAL ANALYSIS 139–51 (1992); DEREK CROXTON, WESTPHALIA: THE LAST CHRISTIAN PEACE (2013).

procedure—that is, value-neutral—nature."[276] For Kissinger, "[t]he Westphalian system . . . represented a judgment of reality . . . as a temporal ordering concept over the demands of religion."[277]

The idea of seeking justice through procedure rather than substance because of the irreconcilable diversity of values was also central to the work of the legal philosopher Stuart Hampshire.[278] Hampshire believed that hearing both sides of an argument could resolve conflict rather than the substantive superiority of one side.[279] Hampshire developed the idea from a theory for societal and legal justice to an ideal of personal interaction and, indeed, to the resolution of inner conflict within the individual.[280] As he put it, "fairness in procedures for resolving conflicts is the fundamental kind of fairness . . . . Justice and fairness in substantial matters, as in the distribution of goods or in the payment of penalties for a crime, will always vary . . . with varying conceptions of the good."[281] Writing for the self and the state, what Hampshire said applies equally and perhaps especially well to international legal issues:

> Because there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and the city, there is everywhere a . . . need for procedures of conflict resolution, which can replace brute force and domination and tyranny. This is the place of a common rationality of method that holds together both the divided and disruptive self and the divided and disruptive state.[282]

MacMillan argues that war has been with us since the beginning of human time, tracing its history as far back as archeologists can take us.[283] Aron and Kissinger both view war as endemic to humankind. Kissinger tries to reformulate Metternich's approach to peace for the twenty-first century, which saved Europe from major wars for a century,[284] while Aron analyzes the gap between international legal theory and its material prospects.[285] Walzer believes that war is a part of human society and argues that it is

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[276] KISSINGER, *supra* note 238, at 363.

[277] *Id.* Throughout the book, Kissinger contrasts this order to the many in the world which are ordered on substantive values.

[278] *See* HAMPSHIRE, *supra* note 179.

[279] *See id.*

[280] *See id.*

[281] *Id.* at 4.

[282] *Id.* at 5.

[283] *See* MACMILLAN, *supra* note 76.

[284] *See* KISSINGER, *supra* note 253; *see also supra* notes 253–80 and accompanying text.

[285] *Id.*

morally just under certain circumstances. In such cases, he believes it must and should be fought, but always humanely.[286]

C. JUDGING WARS

Walzer may be said to stand at the farthest point from Moyn in analyzing war. Like all those whose views have been considered here, he opposes wars of aggression, considering them to be crimes and those who start them to be criminals,[287] but he believes that wars can be just and that humane conduct in war is vital.[288] He differs not just from Moyn, but also from Hathaway and Shapiro in believing that the crime of aggressive war may be met with armed resistance, and not just through self-defense on the part of the victim, but also by third states: "Other states can rightfully join the victim's resistance; their war has the same character as his own . . . . All resistance is also law enforcement."[289] His book is unique in the extent to which it is a work of logic and ethics, while at the same time permeated with examples of actual conflicts and how his reasoning, at every stage, applies to them. Walzer expressly adopts an approach that refuses to be confined to legal text even when questions of military conduct are concerned: "we look to lawyers for general formulas, but to historical cases and actual debates for those particular judgments that both reflect the war convention and constitute its vital force."[290] He believes in the importance of how soldiers feel on the ground, that soldiers care who it is they are killing,[291] and that practice shows that in its own way "the moral argument[] . . . everywhere accompan[ies] the practice of war."[292]

For Walzer, navigating the decisions that need to be made in situations of conflict inevitably involves more than looking at the text of international law as it now stands precisely because decisions include "moral and political"[293] judgments. He aims to supplement law with "moral argument";[294] he believes that "the morality I shall expound is in its philosophical form a doctrine of human rights."[295] Unlike Hathaway and Shapiro, he does not believe that the solution is for non-state actors to be

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[286] WALZER, *supra* note 153 (this is the principal theme of Walzer).
[287] *See id.* at 31.
[288] *See generally id.* (these are principal theses of his book).
[289] *Id.* at 59.
[290] *Id.* at 45.
[291] *Id.*
[292] *Id.* at 44.
[293] *Id.* at xvi.
[294] *Id.* at xxiv.
[295] *Id.* at xxviii.

brought under the rubric of those who cannot engage in armed conflict under an expanded Kellogg-Briand or an expanded U.N. Charter:

> The U.N. Charter was supposed to be the constitution of a new world, but . . . [t]hings have turned out differently. To dwell at length on the precise meaning of the Charter is today a kind of utopian quibbling. And because the U.N. sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect— except among the positive lawyers whose business it is to interpret them. The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.[296]

Looking back to the time of the Greeks, Walzer notes that *slaughter* in war has always been considered immoral.[297] This belief was continuous from the ancients through the time of the Battle of Agincourt, still centuries ago, during which the element of dishonor in needless slaughter had become an additional consideration.[298]

Two aspects of war are indissociable: the reasons for waging it and the manner of its conduct, or *jus ad bellum* and *jus in bello.*[299] For Walzer, the concepts' "dualism . . . is at the heart of all that is most problematic in the moral reality of war."[300] The difficulty of their indissociable character is that they also are *independent* of each other because, once started, even a war that is criminal substantively (*jus ad bellum*) must be fought with full respect for the humanity of the soldiers on both sides:

> What the required independence of the two judgments means is that we grant soldiers on both sides, whether their cause is just or unjust, an equal right to fire their guns, so long as they aim only at each other and not at innocent civilians. We treat soldiers on the battlefield as moral equals.[301]

If the reason for waging war is aggression, it is a crime and an act of tyranny, and those who start it are criminals, but even such wars, when

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[296] *Id.* at xxiv–xv.
[297] *Id.* at 15.
[298] *Id.* at 16–18.
[299] *Id.* at 21.
[300] *Id.*
[301] *Id.* at 38.

resisted and fought, should, can, and must be fought with respect for the soldiers on both sides.[302] Grotius, some centuries earlier, articulated a similar view, citing Livy, Alexander, and Papinius for admonitions against killing children, women, or the elderly,[303] and Augustine for the proposition that it is only necessity that forces soldiers to kill each other, and not the desire to kill.[304] Furthermore, centuries before any Geneva Conventions, Grotius made clear that to kill a soldier who has already surrendered is "a violation of the law of war,"[305] and devoted a chapter titled "Moderation with Regard to Persons Captured."[306] Similarly, for Walzer, no matter the war, it can still be fought humanely: "Even in hell, it is possible to be more or less humane, to fight with or without restraint."[307] For Walzer, "there is no license for war-makers, [but] there is a license for soldiers, and they hold it without regard for which side they are on."[308] Lauterpacht was in full agreement.[309] Walzer agrees with the Nuremberg judgment to blame those responsible for Nazi aggression and not the soldiers who fought for Germany.[310] To answer the question of how can it be that those soldiers who "marched into Poland, Russia, Belgium, France"[311] should not be held accountable, he explores what happens during war, and how its intensely coercive and collective nature turns it into an undertaking of self-defense.[312]

In keeping with his argument, he views World War II as justified, but makes Rommel an example of someone who was not a criminal because of how he conducted the war.[313] Walzer also believes that first strikes may be justified where a state is about to be the victim of aggression and failure to attack would pose a serious threat to its survival.[314] Walzer's judgments involve complex reasoning since he is not attached to the letter of a law. Complexity persists even in his insistence on the importance of

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[302] *See id.* at 31–33.
[303] *See* GROTIUS, *supra* note 84, at 354–55.
[304] *Id.* at 356.
[305] *Id.*
[306] *Id.* at 369–74.
[307] WALZER, *supra* note 153, at 33.
[308] *Id.* at 36.
[309] *See* DISPUTES, WAR AND NEUTRALITY, INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 585–92 (Elihu Lauterpacht ed., 2004).
[310] WALZER, *supra* note 153, at 339. Here he discusses soldiers fighting at war, not soldiers personally committing Nazi atrocities.
[311] *Id.* at 330.
[312] *Id.* at 339–42.
[313] *See id.* at 38 (providing an example of Rommel's war conduct to distinguish him from other Nazi war leaders who were implicated in crimes and deserved judgment at Nuremberg).
[314] *Id.* at 84.

noncombatant immunity from harm,[315] as he discusses an air attack he considers to have been justified during World War II that resulted in the tragic deaths of twenty-two Norwegian non-combatants.[316] In making the extremely difficult assessments that risk the lives of civilians, Walzer includes the number of non-combatant lives at risk as a pertinent factor.[317] His analysis is detailed and thorough, extending to sieges and blockades,[318] guerilla warfare,[319] terrorism,[320] and reprisals.[321] The only area of his book that lacks the extreme nuance that typifies its overall approach is his examination of nuclear deterrence. He defines the leaders of nuclear states as having put, "[a]gainst the threat of an immoral attack, . . . an immoral response,"[322] namely the threat of nuclear reprisal.[323] The bulk of Walzer's book deals with conventional war. With respect to nuclear war, he is clear: "Nuclear war is and will remain morally unacceptable, and there is no case for its rehabilitation."[324]

One can regard as an inherent weakness of international law that it simultaneously prohibits war (the reason for which Hathaway and Shapiro extol Kellogg-Briand and the U.N. Charter), while also coexisting with ongoing rules of military conduct, an indirect recognition of war.[325] Reflecting upon the dualism that is part of this contradictory reality, Walzer concludes with a comment about the need to face war crimes head-on, just as there is a need to face the justifications in our imperfect world for war under certain circumstances:

> The world . . . is generated by a conflict between collective survival and human rights . . . we experience the ultimate tyranny of war – and also, it might be argued, the ultimate incoherence of the theory of war . . . . [P]olitical leaders . . . must opt for survival and override those rights

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[315] *Id.* at 139.

[316] *Id.* at 158.

[317] *See id.* Many more factors enter into Walzer's consideration in determining if such military actions can be justified.

[318] *Id.* at 160–75.

[319] *Id.* at 176–96.

[320] *Id.* at 197–206.

[321] *Id.* at 207–24.

[322] *Id.* at 268.

[323] *See id.*

[324] *Id.* at 283.

[325] *See id.* at 41; *compare* Kant, *supra* note 241, at 110 ("Some level of trust in the enemy's way of thinking [Denkungsart] must be preserved even in the midst of war, for otherwise no peace can ever be concluded and the hostilities would become a war of extermination (bellum internecinum).").

> that have suddenly loomed as obstacles to survival. But I don't want to say . . . that they are free of guilt when they do that . . . . [t]hey can only prove their honor by accepting responsibility for those decisions . . . . A moral theory that made their life easier, or that concealed their dilemma from the rest of us, might achieve greater coherence but it would miss or it would suppress the reality of war . . . . Soldiers and statesmen live mostly on th[e] side of the ultimate crises of collective survival; the greater number by far of the crimes they commit can neither be defended not excused. They are simply crimes. Someone must try to see them clearly and try to describe them "in express words." Even the murders called necessary must be similarly described; it doubles the crime to look away, for then we are not able to fix the limits of necessity, or remember the victims, or make our own . . . judgments of the people who kill in our name . . . . Mostly, it is possible to live by the requirements of justice . . . . But in supreme emergencies, our judgments are doubled, reflecting the dualist character of the theory of war and the deeper complexity of our moral realism . . . . [T]he world of war is not . . . a morally satisfactory place. And yet it cannot be escaped, short of a universal order in which the existence of nations and peoples could never be threatened. There is every reason to work for such an order. The difficulty is that we sometimes have no choice but to fight for it.[326]

Walzer's focus on morality is also the crux of the modern discussion about the right of a state to intervene militarily to protect against human rights violations in another state, which is the subject of the next Part.

IX. HUMANITARIAN INTERVENTION

Humanitarian intervention, or military intervention to prevent or stop human rights atrocities in another state, has been called "preeminently a case of meddling . . . when it is morally required."[327] International law sends contradictory messages about humanitarian intervention: on the one hand, the U.N. Charter contains humanitarian principles and the Universal Declaration of Human Rights and Genocide Convention. On the other hand,

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[326] WALZER, *supra* note 153, at 326–27.

[327] Anthony D'Amato, *Foreword* to FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY viii (2d ed. 1997).

the Charter in Article 2 (1) proclaims "sovereign equality";[328] Article 2 (4) prohibits the threat of force or the use of force against the "territorial integrity or political independence of any state"; Article 2(7) prohibits states from intervening in the domestic affairs of others.

Some believe that these provisions can be interpreted to allow for humanitarian intervention by insisting that the latter be interpreted in light of the former.[329] The various theories among international lawyers include recognizing that the law, as it stands, does not permit humanitarian intervention, and advocating diverse courses of action. The courses of action include that humanitarian intervention is not accepted if it is not approved by the U.N. (Hathaway and Shapiro; Moyn; Schachter),[330] if the U.N. Charter is not amended to permit it (Humphrey),[331] but that such intervention is accepted where "the moral conscience of mankind" is shocked (Lauterpacht; Lemkin; Tesón; Lillich; D'Amato).[332]

Customary international law traditionally provided for international humanitarian intervention,[333] and when the U.N. Charter eliminated this right it failed to include an effective way to safeguard human rights.[334] Ian Brownlie has explained that Article 2(4) of the U.N. Charter developed as a prohibition to unilateral intervention, including humanitarian intervention, as a result of Hitler's occupation of Bohemia and Moravia, which was framed as humanitarian intervention.[335] At least from the perspective of legislative history, it seems clear that the Charter was meant to prohibit humanitarian intervention not authorized by the U.N.[336]

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[328] For a critique of an International Court of Justice decision that prioritized state sovereignty over human rights in Nicaragua, ignoring the developments in international law since 1945 to privilege human rights, thus "ignor[ing] precedent, United Nations practice, regional practice, state practice, scholarly writing and world opinion," see Fernando R. Tesón, *Le Peuple, C'est Moi!: The World Court and Human Rights*, 81 AM. J. INT'L L. 173, 175 (1987) ("At the very least, it must be recognized that the human rights provisions of the UN Charter, in conjunction with post-1945 state practice, had the effect of generating a *customary* obligation for governments to respect human rights.") (internal references omitted); U.N. Charter art. 2, ¶¶ 4, 7.

[329] *See infra* notes 330–32 and accompanying text.

[330] Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L. L. 645 (1984).

[331] John P. Humphrey, *Foreword* to HUMANITARIAN INTERVENTION AND THE UNITED NATIONS viii (Richard B. Lillich ed., 1973) ("What is needed is some legal mechanism that would make it possible for the United Nations to use force on humanitarian grounds in situations where there is no threat to the peace, breach of peace, or act of aggression. To provide for this would probably require an amendment to the Charter.").

[332] For an overview of various positions on humanitarian intervention, see TESÓN, *supra* note 199, at 21–22.

[333] Lillich, *supra* note 199, at 325.

[334] *Id.*

[335] Ian Brownlie, *Thoughts on Kind-Hearted Gunmen, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 143 (Richard B. Lillich ed., 1973).

[336] *See id.*

To those who believe in the right of humanitarian intervention, "tak[ing] human rights seriously [means that] we cannot insulate a government's actions toward its own citizens by an artificial sovereign boundary."[337] Humanitarian intervention in international law has been traced back to Grotius and farther back than him: "All of the . . . fathers of international law talk about intervention on behalf of oppressed peoples, and there is no record of Grotius resorting to any relation or any identity of any group other than the identity of human beings."[338] Along with Grotius, Émeric de Vattel also condoned humanitarian intervention in his *Droit des gens*.[339] As Lauterpacht noted in *International Law and Human Rights*:

> in assessing the place of Grotius in the fundamental rights of man, we must not forget that it is from him that originates the idea of international humanitarian intervention for the protection of those rights. He claimed for rulers the right to demand punishment 'not only on account of injuries committed against themselves, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.'[340]

The idea that the international legal order must strive to preserve peace was also fundamental to Walzer and Lauterpacht, as it was to Aron, who writes the following about Lauterpacht's *The Function of Law and the International Community*: "Personally, I find convincing, on the conceptual level, the identification of the juridical order with the pacific order on which H. Lauterpacht concludes his book."[341] Aron then proceeds to quote Lauterpacht:

> For peace is not only a moral idea. In a sense, (although only in a sense) the idea of peace is morally indifferent, insofar as it may imply the sacrifice on the altar of stability and security. Peace is above all a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal

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[337] D'AMATO, *supra* note 199, at 350.
[338] TESON, *supra* note 199, at 23–24.
[339] ÉMERICH DE VATTEL, II LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE 94 (1758).
[340] LAUTERPACHT, *supra* note 88, at 117–18 (quoting HUGO GROTIUS, 2 DE JURE BELLI AC PACIS, xl.1 (1738)).
[341] ARON, *supra* note 1, at 382.

> system. Juridical logic inevitably leads to the condemnation by law of anarchy and of private force.[342]

This passage clarifies that the price of maintaining peace can be to sacrifice justice, and Lauterpacht, as we know from his *Oppenheim on International Law*, did not see this principle of keeping the peace as absolutist in nature—the strong imperative of international law to create and keep peace in a world in which the rule of law prevails does not mean that humanitarian intervention is not justified when the violations of human rights and dignity are of a sufficient magnitude.

Thus, contrary to Hathaway, Shapiro, and Moyn, who believe that no military intervention is permissible without U.N. approval, Lauterpacht believed that international law permits such intervention.[343] He reiterated this position after the U.N. Charter had come into effect, writing in 1950, and specifically in the context of discussing the U.N. Charter in his book *International Law and Human Rights*:

> In the eyes of governments there was often deemed to exist a conflict between the defence of human rights through external intervention and the considerations of international peace threatened by such intervention. That conflict was, in the long run, more apparent than real. For, ultimately, peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of the human personality.[344]

Other, more contemporary writers, such as Richard Lillich, share this view, although not always for the same reason:

> The absence of effective international machinery to protect human rights, coupled with a supposed absolute doctrine of nonintervention in the affairs of states, has produced the impression that in many parts of the world today individuals may have less protection than ever before. Surely to require a state to sit back and watch the slaughter of innocent people in order to avoid blanket prohibitions

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[342] *Id.* at 382–83 (quoting HERSCH LAUTERPACHT, THE FUNCTION OF LAW AND THE INTERNATIONAL COMMUNITY 438 (1933)).

[343] *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 61, at 312.

[344] LAUTERPACHT, *supra* note 88, at 32.

> against the use of force is to stress blackletter at the expense of far more fundamental values.[345]

Walzer concurs with Lillich:

> Against the enslavement or massacre of political opponents, national minorities, and religious sects, there may well be no help unless help comes from the outside . . . . Examples [of oppressive governments, of massacred peoples] are not hard to find; it is their plenitude that is embarrassing."[346]

Though Walzer justifies humanitarian intervention, he notes that states do not engage in it in practice unless their own citizens are endangered:

> [C]lear examples of what is called "humanitarian intervention" are very rare. Indeed, I have not found any, but only mixed cases where the humanitarian motive is one among several. States don't send their soldiers into other states, it seems, only in order to save lives. The lives of foreigners don't weigh that heavily in the scales of domestic decision-making.[347]

For Walzer, as for Lillich, Lauterpacht, and others mentioned in these pages, unilateral humanitarian intervention is justified where the nature of the wrong sought to be fought "shock[s] the moral conscience of mankind."[348] Ultimately, for Lauterpacht, only domestic and international positive law would be able to secure fundamental human rights.[349]

If we credit Walzer's conclusion that the probability of genuine humanitarian intervention is very small, with which Farer agrees,[350] at least where not combined with protecting the intervening state's own nationals, the issue arises as to its abuse. Lillich's book acknowledges this danger, and indeed we have historically seen powerful states intervene in the affairs of

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[345] Lillich, *supra* note 199, at 344.

[346] WALZER, *supra* note 153, at 101.

[347] *Id.* at 101–02; *see* Lillich, *supra* note 199, at 344; *accord* Tom J. Farer, *Humanitarian Intervention: The View from Charlottesville, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 149, 152 (Richard B. Lillitch ed., 1973). Although Lillich agrees with this, he nevertheless categorizes forcible intervention as humanitarian if it results in the rescue of non-nationals as well.

[348] WALZER, *supra* note 153, at 107.

[349] LAUTERPACHT, *supra* note 88, at 126.

[350] *See* Farer, *supra* note 347.

smaller states in the name of humanitarian intervention,[351] what has been called "piratical imperialism."[352] Tesón believes the fear of abuse to be unsubstantiated by empirical research, and contrary to Rawlsian theory and the general interest of states in their own stability.[353] Unsurprisingly, Moyn is among those arguing against humanitarian interventions lest they slip into abuse in the hands of dictators and tyrants.[354]

For some, including myself, the antidote to the risk of abuse is to restrict humanitarian intervention to situations of extreme violations of human rights.[355] Ian Brownlie remains unconvinced even of such a solution. For him, the risks of abuse, coupled with ever "slack" definitions of humanitarian intervention, outweigh the moral argument.[356] Yet where a people is threatened, its rescue depends on military intervention: "Only an army can rescue whole peoples,"[357] and where an entire people within a state is threatened with annihilation, military intervention may also need to effect regime change, other solutions such as emigration being inadequate to the massive nature of the problem.[358] In some cases, it can be the majority population that is threatened.[359] Julius Stone takes the same position in *Aggression and the World Order*.[360] He posits a situation in which a country about to destroy another would be permitted to do so with impunity if U.N. support for action against it could not be mustered.[361] Walzer gives the example of Pakistan's massacre of Bengalis that led to a futile attempt by India to engage U.N. military involvement, followed by unilateral armed action. To Walzer, India's military intervention was morally justified.[362] Moyn, by contrast, condemns the U.S. unilateral humanitarian intervention in Bosnia even after U.N. military intervention had been tried but failed to prevent massacres.[363] Hathaway and Shapiro oppose any contravention of U.N. Charter Article 2's requirement of U.N. approval before waging

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[351] TESÓN, *supra* note 199, at 28–29, 33; a*ccord* Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

[352] Farer, *supra* note 347, at 156.

[353] TESÓN, *supra* note 199, at 67, 102–07.

[354] MOYN, *supra* note 76, at 2, 49 (citing Michael Ratner with approval for this proposition).

[355] *See* Farer, *supra* note 347, at 152 (only in situations of "large-scale deprivation.").

[356] Brownlie, *supra* note 335, at 146 ("There is a great deal of useful circumstantial evidence which suggests both that the law does not recognize humanitarian intervention and also that the prognosis for such action . . . is not good.").

[357] Farer, *supra* note 347, at 153.

[358] *See id.*

[359] *See id.*

[360] STONE, *supra* note 234.

[361] *See id.* at 99.

[362] WALZER, *supra* note 153, at 107.

[363] *See* MOYN, *supra* note 76, at 229.

military intervention, conceding how difficult it is to obtain such approval, but maintaining that such restraint is necessary to avoid the descent into chaos that would ensue if states take it upon themselves to act without it.[364] Similarly, Georges Scelle was adamant that no intervention could be legal under international law.[365] As Julius Stone explains it, Scelle initially took this position in the 1930s, writing in France as war waged by Germany loomed as an ever-present threat, and then reiterated the same view in his 1954 article after the war.[366] One might think in this context of what Scelle's position means concretely: for instance, where Vietnam ousted the murderous Khmer Rouge government, and the U.N. General Assembly criticized Vietnam for interfering in another state's internal affairs, Scelle's idea of international law was fulfilled.[367]

The justification for humanitarian intervention is best made within the spirit of international law—as conforming to its purposes and values even where it "appears to chafe against some specific crystallization of community values."[368] Isaiah Berlin's insistence that values conflict means that choices must be made under circumstances that do not permit all of our values to harmonize.[369] The U.N. Charter both embodies humanitarian values and decrees nonintervention in the affairs of sovereign states. As one scholar has put it, "[i]t is now almost commonplace to say that international legal discourse suffers from a congenital tension between the concern for human rights and the notion of state sovereignty–two of the pillars of international law."[370]

W. Michael Reisman places Article 2(4) as part of the larger U.N. structure to ensure collective security.[371] Given its presence amidst other provisions for U.N. armed intervention to further humanitarian goals, Reisman turns to the U.N.'s ineffectiveness in maintaining the international order:

> Within 5 years of the creation of the Organization, a pattern, to be reflected thereafter, was established according to which unilateral violations of Article 2(4) might be condemned but to all intents and purposes

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[364] *See* HATHAWAY & SHAPIRO, *supra* note 64, at 368–70.

[365] Scelle, *supra* note 205.

[366] *See* STONE, *supra* note 234, at 5.

[367] *See, e.g.*, TSAGOURIAS, *supra* note 166, at 69.

[368] Farer, *supra* note 347, at 160.

[369] *See* BERLIN, *supra* note 27 and accompanying text.

[370] TESÓN, *supra* note 199; *accord* LEPARD, *supra* note 224, at 3–4.

[371] W. Michael Reisman*, Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L. L. 642, 642 (1984).

> validated, with the violator enjoying the benefits of its delict. A curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics. While the general Charter prohibition against unilateral action continued, and appropriate organs of the United Nations frequently condemned such action, nothing was done beyond verbal condemnation. In many cases, the party subject to the condemnation, and hence in violation of international law, was permitted to continue to benefit from the fruits of its illegal action.[372]

While it is difficult to weigh atrocities against each other, according to Lepard, perhaps the most signal example of the U.N.'s failure to contribute to the international order through humanitarian intervention occurred in Rwanda in 1994:

> As in the case of Bosnia, the Security Council responded to the atrocities by creating bodies to engage in criminal investigations and impose criminal sanctions *after the fact* . . . . In hindsight, many observers believe that a prompt and forceful U.N. response to the initial episodes of violence in April 1994 could have prevented the ferocious spread of the slaughter, which ultimately claimed up to approximately 800,000 lives.[373]

Reisman criticizes Article 2(4) for "assum[ing] that the only threat of usurpation of the right of political independence of a people within a particular territorial community is from external, overt invasion."[374] History has proved this assumption to be wrong, from Hitler's persecution of German Jews to Idi Amin's persecution of populations within his sovereign territory, and the list goes on. The law's perennial difficulty has been in setting in stone and pinning down rules that can have validity on a permanent basis.[375] Reisman explains the inadequacy of the Charter by contrasting the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1966 to oust regimes—both of which had the consent of the governed—with Tanzania's invasion of Uganda in 1978 to overthrow Idi Amin. Article 2(4) treats both as similarly illegal for violating the sovereignty of another state. For Reisman,

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[372] *Id.* at 643.

[373] LEPARD, *supra* note 224, at 16 (emphasis added).

[374] *Id.* at 644.

[375] *See supra* notes 29–39 and accompanying text (discussing Isaiah Berlin).

> [c]oercion should not be glorified, but it is naive and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question in a decentralized system is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order.[376]

If states respond by failing to intervene even when "the conscience of mankind is shocked," in obedience to the letter of the law as set forth in Article 2(4) of the Charter, it can only serve to encourage other states to feel freer to act as butchers of their own citizens.[377] Humanitarian intervention aspires to further basic human rights, including the right of political self-determination.[378] Another way of putting this is that state autonomy is meaningless if not viewed "as the sum of *individual* autonomies."[379] Article 2(4) is oblivious to this concept. Some, like Tesón, argue that it should be construed as allowing humanitarian intervention even though its language forbids it,[380] because a "purposive reading"[381] of the text would be to further human rights. Reisman's argument is similar. He begins his comments by quoting the biblical injunction that "[t]he letter killeth; the spirit giveth life."[382] In this context, one might consider the language of the Universal Declaration of Human Rights, adopted in 1948 by the U.N.: "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[383] Stone's position is similar. For him, interpreting Article 2(4) as a blanket prohibition against humanitarian intervention is an extreme and

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[376] Reisman, *supra* note 199, at 645.

[377] *See* Farer, *supra* note 347, at 160. Tesón recounts that in Argentina, the military junta would invoke the law of nonintervention as it tortured and disappeared Argentine citizens. TESÓN, *supra* note 202, at xiii. For an account of one such prisoner who survived, and who was told by a member of the military who tortured him that eliminating some twenty thousand Argentine "subversives" would not be a problem because, in his words, "Hitler lost the war. We will win," see JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 50 (1981).

[378] *See* LEPARD, *supra* note 224, at 179–88.

[379] TESÓN, *supra* note 199, at 71 (emphasis added).

[380] *See id.* at 130–31.

[381] *Id.* at 131.

[382] Reisman, *supra* note 199, at 642.

[383] G.A. Res. 217 (III) A, Preamble, Universal Declaration of Human Rights (Dec. 10, 1948).

unwarranted position if one does not consider the U.N.'s "repeated calls for justice."[384] Moreover, for Stone, it is absurd to ask the community of states to follow Article 2(4) if the U.N.'s mechanisms for repairing wrongs are unworkable.[385] Lepard suggests construing Article 2(4) to allow for humanitarian intervention in light of ethical principles which flow from both the U.N. and all world religions.[386] He also endorses the view that grave human rights violations should be considered as intrinsic threats to peace within the meaning of the Charter.[387]

Lauterpacht's reasoning was similar: he insisted that the Charter's Preamble and the U.N. institutionally expressed a legally binding obligation on the part of states to respect human rights, even though they included no enforcement provision.[388] According to Lauterpacht,

> [i]t would have been otiose to the point of pedantry for the draftsmen of the Charter to incorporate an explicit provision [requiring the respect of human rights and fundamental freedoms] in a document in which the principle of respect for and observance of human rights and fundamental freedoms is one of the main pillars of the structure of the Organisation created by the Charter.[389]

More recently, Antonio Cassese addressed occurrences of international humanitarian intervention and concluded that the U.N. Charter system has eroded and that developing today is a "rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace."[390] Unlike others who suggest interpreting the Charter as permitting humanitarian intervention, Cassese views NATO's armed intervention in Kosovo as a significant violation of the U.N. Charter:

> The breach of the United Nations Charter occurring in this instance cannot be termed minor. The action of NATO countries radically departs from the Charter system for

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[384] STONE, *supra* note 234, at 97.

[385] *See id.*

[386] LEPARD, *supra* note 224, at 89.

[387] *See id.*, at 151–78.

[388] LAUTERPACHT, *supra* note 88, at 145–54.

[389] *Id.* at 151.

[390] Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L. L. 23, 29 (1999).

> collective security, which hinges on a rule (collective enforcement action authorized by the Security Council) and an exception (self-defence). There is no gainsaying that the Charter system has been transgressed, in that a group of states has deliberately resorted to armed action against a sovereign state without authorization to do so by the Security Council.[391]

Cassese examines the dangers of allowing states to take force into their own hands, but believes that the U.N. Security Council's failure to respond to the crisis justified NATO's intervention morally, although not under international law as embodied in the Charter.[392] Echoing Lauterpacht's view that force may be justified and needed to intervene when a state's conduct is so egregious as to "shock the conscience of all human beings,"[393] and that human rights are a matter of universal concern,[394] Cassese concludes that "nascent trends in the world community . . . [allow] under certain strict conditions resort to armed force . . . even absent any authorization by the Security Council."[395] Ramesh Thakur agrees; writing about NATO's incursion into Kosovo, he states that today "UN authorization is neither a necessary nor a sufficient condition of international legitimacy."[396]

My own view is closest to that of Cassese. I believe that humanitarian intervention should be recognized as a derogation from Article 2(4) that is necessitated by the U.N.'s failure to live up to its mission, and that it will continue to be necessary unless the Charter is amended to allow such intervention in limited circumstances to protect "the conscience of mankind." If there is an amendment, it will not be able to reconcile the contradictory values of state sovereignty and international human rights which are both, as they should be, part of international law. I believe, along with Grotius, as he urged in his chapter titled *Reasons for Going to War to Help Others*,[397] that the "most far-reaching reason for going to war to help others is the common tie of humanity . . . ,"[398] and with Isaiah Berlin, who

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[391] *Id.* at 24.
[392] *Id.*
[393] *Id.* at 26.
[394] *Id.*
[395] *Id.* at 27; *see also* Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L. L. 791 (1999) (further arguing that a customary international rule of law is emerging to permit humanitarian intervention and examining the views of the parties concerned during and after NATO's attack in Kosovo, including the U.N.).
[396] RAMESH THAKUR, THE RESPONSIBILITY TO PROTECT: NORMS, LAWS AND THE USE OF FORCE IN INTERNATIONAL POLITICS 187 (2011).
[397] GROTIUS, *supra* note 84, at 260.
[398] *Id.* at 262.

said that to live in reality is to accept that values clash, that not all goods can be reconciled.

X. CONCLUSION

This article addressed the question of whether international law has the capacity to yield an international rule of law. I have looked at modern international law through the lens of the internationalists who forged it. Central to their purpose was the role of the individual in international law. The tension between respecting state sovereignty and individual rights ran throughout the work of the internationalists and is reflected by contradictions within the U.N. Charter.

The role of international law in creating peace and legal order is one for which internationalists have striven mightily since the time of Grotius. The contradictions inherent in the law are a weak mirror of the tensions, struggles, divisiveness, and hatreds that roil a world whose interdependence and intercommunications are unprecedented due to technology and globalization. The historians, philosophers, political scientists, and legal scholars mentioned in these pages for the most part do not expect wars to end. Among those who insist that they will, or simply say they must, there is the greatest tendency to urge following Article 2 of the U.N. Charter. This means prioritizing state sovereignty over individual rights.

Among the non-lawyers whose works have been quoted, Cassirer cautioned that all human artifacts (of which international law is one) should be approached with the utmost humility because "[t]hey are not eternal nor unassailable . . . . We must always be prepared for violent concussions that may shake our cultural world and our social order to its very foundations."[399] It is no doubt natural for those in any field to see their own area of endeavor as exaggerated in importance. While international law has not, and is not, fulfilling the function of installing a peaceful international order, it is not necessarily useless. Its history suggests simply that its role has always been and is likely to remain a limited one.

The problems have not changed on a deeper level because they are intrinsic to human nature, even if the world we inhabit would be unrecognizable in many ways to those writing centuries ago and, sometimes, much more recently than that. If one looks at the past and the present combined, it would seem that states will continue to pursue what they consider to be in their vital interests. The diplomacy of a Metternich that balances power and legitimacy may be the element needed to accompany international law if that balance can be achieved. It is likely that it will take the genius of a Metternich to attain the equilibrium satisfactory

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[399] CASSIRER, *supra* note 23, at 297.

to a diverse world. Berlin's teaching and the history recounted in these pages suggest that no formula for this balancing can be passed from diplomat to diplomat.

In formulating steps forward, I would remember not only Cassirer's words of caution, but also Isaiah Berlin's and Stuart Hampshire's that values and inherent goods clash and contradictions are not all amenable to harmonization. The great contribution of Lauterpacht, Cassin, Lemkin, and others was placing human beings at the center of international law. International law needs to reflect this objective better. The U.N. system needs to be improved to do so, or it needs to be cast aside to allow states to do so where the Charter would forbid it. Melding idealism and realism has never been an easy task. Many writers I have consulted devoted their lives to doing so in their respective fields. Ultimately, even the best international law cannot vouchsafe the rule of law unless future generations cherish its twin goals of peace and human rights.