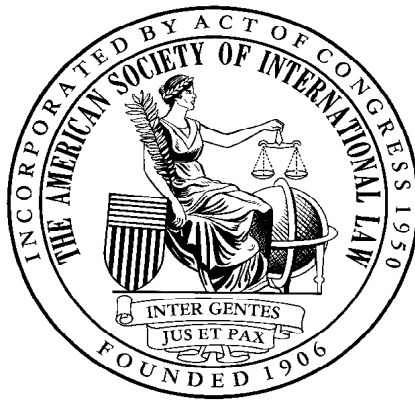


INTERNATIONAL LEGAL THEORY



A Just World Under Law

FALL 2006

VOLUME 12



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INTERNATIONAL LEGAL THEORY · *Volume 12*





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A Just World Under Law
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Editor's Introduction

M.N.S. Sellers
University of Baltimore

Throughout this year the American Society of International Law has been celebrating the hundredth anniversary of the Society's foundation in 1906. The theme of the Centennial celebration, "A Just World Under Law," succinctly expresses the Society's founding ideals and continuing aspiration to limit the role of arbitrary power in world affairs. The ASIL Legal Theory Interest Group observed the Centennial by asking some of its members to examine the philosophical basis of a just world under law, and specifically to consider what role international law can and should (or cannot and should not) play in achieving global justice. This raises questions not only about the nature of law, but also of law's usefulness and possible unintended consequences. Volume 12 of *International Legal Theory* presents the results of this discussion.

Volume 12 is also the final volume of *International Legal Theory* in its present form. Future volumes will present the results of the ASIL International Legal Theory Seminar, held at Tillar House on the first Friday in November each year. The 2006 seminar





M.N.S. Sellers

considered “Liberalism, Cosmopolitanism, and the Foundations of International Law.” The 2007 seminar will discuss “Parochialism and Difference in International Law.” All ASIL members are welcome to attend the seminars and also to participate in a parallel discussion on the ILT listserv of the issues considered by the seminar each year. Papers and communications should be sent to cicl@ubalt.edu or to msellers@ubalt.edu.

Our sister society, the European Society of International Law, has just inaugurated its own International Legal Theory Interest Group under the direction of Thomas Skouteris. This will promote a renewed European interest in the philosophical and ethical foundations of international law, and encourage a greater attention to theory and justice throughout the world. The American Society of International Law and the Legal Theory Interest Group welcome this new development, which will facilitate transatlantic cooperation and international deliberation about the most important questions in the law of humanity and the law of nations.

The law of nations and the universal values it protects have been an influential force for justice and peace since the time of the Stoics, with growing influence and importance since their revival by Hugo Grotius and others in the





Introduction

seventeenth century. More recently, in the face of nationalism, corruption, and short-sighted self-interest, this progress has become much slower. The American Society of International Law has played a leading role in maintaining the principles of justice and peace through the dark years of the twentieth century. We look forward to the Society's continued leadership over the next hundred years in securing a just world under law, so that there will increasingly be, as the Society's founders envisioned, *inter gentes ius et pax*.







The Benefits of the Pure Theory of Law for International Lawyers, or: What use is Kelsenian Theory?

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What use is Hans Kelsen's *Pure Theory of Law* (*Reine Rechtslehre*) for an international lawyer? No use at all, one is tempted to say, if one looks at the major international law text-books,¹ at the International Court of Justice or even at the International Law Commission's recent excursion into theory.² Naturally, my answer is that Kelsen

¹ Though cf. Malcolm Shaw's treatise, which includes a short section on Kelsen (Malcolm N. Shaw, *International Law* (4th ed. 1997): 40-44).

² The topic of "fragmentation of international law" raises many fundamental issues of legal theory, more so than most other topics the International Law Commission has discussed so far (Marti Koskeniemi, "Fragmentation of international law: Difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission," (13 April 2006) [A/CN.4/L.682]). The Commission would have





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(together with many of the other members of his 'school')³ is extremely useful. However, the reader may be surprised to hear that it is not primarily Kelsen the international lawyer whom I consider in this respect, but Kelsen the legal theorist. Kelsen's dogmatic writings on international law are very useful, and his commentary on the UN-Charter⁴ and his *Principles of international law*⁵ are still cited frequently today. Indeed, Kelsen the international lawyer's writings are wholly consistent with his theoretical works and his international law teachings flow from the *Pure Theory*.⁶ It is the very core of the *Pure Theory of Law* that every

had the opportunity to discuss these issues; it would, I submit, also have been necessary to do so. I believe its approach was flawed, because the Commission largely remained on the pragmatic and dogmatic levels. For example, the Commission took the Vienna Convention on the Law of Treaties to be the decisive norm on norm-conflict solution and did not question the Treaty's role and value for that purpose. One of Kelsen's major accomplishments was to make scholars aware that all dogmatic reasoning has a theoretical background.

³ Foremost Adolf Julius Merkl, the pre-1923 Alfred Verdross and Josef L. Kunz.

⁴ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1950).

⁵ Hans Kelsen, *Principles of International Law* (1952); Hans Kelsen & Robert Tucker, *Principles of International Law* (2nd ed. 1966).

⁶ I have recently argued this point, while disagreeing with some elements of either category: Jörg Kammerhofer, "Kelsen?—which Kelsen? Kelsen the theoretician and Kelsen the international lawyer—a tentative re-application of the Pure Theory to international law," in Iain Scobbie, Akbar Rasulov (eds), *International Legal Positivism: Images of a Tradition* (forthcoming).





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international lawyer, every normative theorist *must* observe in order to be able to practice legal (normative) science, rather than sociology, psychology or political science. This core is the essential and categorical dichotomy of Is and Ought and the attendant demand for *Konsequenz*.⁷

This exposition of Kelsen's vital importance to the understanding of international law will have two parts. Section I will present the core features of the *Pure Theory of Law*. It is in these tenets that the reader will find an impressive 'armory'—not only effective for criticizing other theories, but also for constructing a *consistent* theoretical superstructure. Section II concerns the *application* of the *Pure Theory of Law* to the construction of international law and to the issues facing today's international lawyer (Section 2). Both Kelsen's own views as well as my re-application of my interpretation of the Pure Theory to international

⁷ One can approximate this untranslatable and archetypal German word to a conjunction of "logical consistency" and "thinking things through to the end." Kant writes: "Consistency is the highest obligation of a philosopher, and yet the most rarely found. The ancient Greek schools give us more examples of it than we find in our syncretistic age, in which a certain shallow and dishonest system of compromise of contradictory principles is devised..."—"Konsequenz zu sein, ist die größte Obliegenheit eines Philosophen und wird doch am seltensten angetroffen. Die alten griechischen Schulen geben uns davon mehr Beispiele, als wir in unserem synkretistischen Zeitalter antreffen, wo ein gewisses Koalitionssystem widersprechender Grundsätze voll Unredlichkeit und Seichtigkeit erkünstelt wird..." Immanuel Kant, *Kritik der praktischen Vernunft* (1788): AA V 24 (translation by Thomas Kingsmill Abbott).





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law will be discussed in that section.

I. THE PURE THEORY OF LAW

Why is Kelsen useful? Polemically speaking, because the Pure Theory is the only theory worth having: Not only does it “eliminate” many of the confusions inherent in modern international law discourse, but also it alone is able to show what the law is on any given subject. The Pure Theory can do this because only a theory that is “pure” in Kelsen’s specific sense—a theory that categorically distinguishes between Is and Ought—can cognize norms; the Is-Ought dichotomy is a *conditio sine qua non* for the possibility of cognizing norms (of Ought) in the first place. This section outlines the characteristic elements of the *Pure Theory of Law*’s legal theory.

A. The Core Idea: The Categorical Dichotomy of Is and Ought

Hans Kelsen wanted to found a true *science of law* (*Rechtswissenschaft*). This does not mean that in his theory law is reduced to empirical facts, but that anyone attempting this has a clear program of work: “[Legal science’s] purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is,





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not how it ought to be.”⁸ It is *this* motivation—the strict scientificity—that results in the endeavor for “purity.” The notion of purity, however, has no moral overtones for Kelsen, and it has a very specific meaning. Purity in normative sciences means to enable normative science as *Wissenschaft* by keeping it free from all foreign elements:

It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.⁹

These foreign elements come in two forms and Kelsen’s early restatement of the Pure Theory starts out with a critique of the encroachment of natural sciences, on the one hand, and of the moral sciences, on the other hand (Section I.B).¹⁰ Scientificity requires purity and purity requires *Konsequenz*. Kelsen wanted to overcome the traditional half-measures employed by legal science, which tends towards “pragmatic” or “case-by-case”

⁸ Hans Kelsen, *Pure Theory of Law* (1967): 1.

⁹ Kelsen (1967) *supra* note 8, at 1.

¹⁰ Hans Kelsen, *Reine Rechtslehre. Einleitung in die Problematik* (1934): 1-11, 12-18.





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solutions as soon as a consistent application of a theoretical basis leads to ideologically undesirable consequences. The Pure Theory is characterized—throughout Kelsen’s *œuvre*, but also in the writings of the other members of the “Vienna School of Jurisprudence”—by purity and consistency of thought.¹¹

For a *normative* science, purity requires the categorical and fundamental dichotomy of Is and Ought (*Sein* and *Sollen*). This dichotomy, then, is the basis of the Pure Theory of Law.¹² But what is this dichotomy about, why would it be of such tremendous importance? The dichotomy of Is and Ought had been formulated before, not least by Hume¹³ and Kant.¹⁴ Kelsen, however, was

¹¹ Adolf Julius Merkl, “Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der *lex posterior*,” in *37 Archiv des öffentlichen Rechts* (1918): 56-121, reprinted in Dorothea Mayer-Maly, Herbert Schambeck & Wolf-Dietrich Grussmann (eds.), *Adolf Julius Merkl, Gesammelte Schriften* I/1 (1993): 169-225, at 186.

¹² Hans Kelsen, “Was ist die Reine Rechtslehre?,” in *Demokratie und Rechtsstaat. Festschrift für Zaccharia Giacometti* (1953): 143-161 in Hans Klecatsky, René Marcić, Herbert Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968): 611-629, at 614.

¹³ David Hume, *A Treatise of Human Nature* (1739-1740): Volume II, Book III, Part I, Section I; Hans Kelsen, *Allgemeine Theorie der Normen* (1979): 68-69.

¹⁴ “For as regards nature, experience presents us with rules and is the source of truth, but in relation to ethical laws experience (alas!) is the parent of illusion, and it is in the highest degree reprehensible to limit or to deduce the laws which





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the first theorist who presented this distinction consistently.

Ought is the form that ideals take. Without the possibility of Ought no ideals could be cognized—could exist. The Ought is prescription. “You *ought* to do something” is a categorically different sentence from “you are doing something.” In order to cognize the possibility of the ideal, the ideal has to be divorced from reality, because description is something categorically different from prescription. Confounding Is and Ought reduces Ideals to reality—*ens et bonum convertuntur*—and the possibility of norm and reality diverging, *and, with it, of an ideal as placing a non-real requirement*, vanishes. The Ought is the realm of norms and norms are the claim to be observed. In other words: (most) norms¹⁵ postulate a claim that human behavior conform to the norms’ terms. When I order you to

dictate what I *ought to do*, from what *is done*.”—“Denn in Betracht der Natur gibt uns Erfahrung die Regel an die Hand und ist der Quell der Wahrheit; in Ansehung der sittlichen Gesetze aber ist Erfahrung (leider!) die Mutter des Scheins, und es ist höchst verwerflich, die Gesetze über das, was ich tun soll, von demjenigen herzunehmen, oder dadurch einschränken zu wollen, was getan wird.” Immanuel Kant, *Kritik der reinen Vernunft* (1781, 1787): A 318-19, B 375 (translation by John Miller Dow Meiklejohn); Kelsen (1979) *supra* note 13 at 62-65.

¹⁵ Kelsen later identified four norm-functions: (1) obligation/prohibition, (2) permission, (3) empowerment (to create norms) and (4) derogation. Kelsen (1979), *supra* note 13, at 76-92 Only the first two refer to human behaviour with a ‘claim to be observed,’ broadly understood. The latter two refer to acts of will (3) and other norms (3 and 4); they cannot be obeyed or disobeyed.





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stand up, the norm I create postulates the claim that you act accordingly, which does no more, but also no less, than to create an Ought—you *ought* to stand up. A norm is also *no more* than a *claim* to be observed. And this *claim* is at the same time its “existence” as norm and its binding nature. If this sort of claim—the Ought—exists, the norm exists, is valid and is binding. There is no need for further validation, no need for “ennoblement.”

The categorical distinction between Is and Ought in a sense evokes a second realm of the ideal besides the realm of the real. This second realm of Rickertian character is a meta-physics, something going beyond reality in a materialist sense. Heinrich Rickert—the famous neo-Kantian of the “South-West German School”—put “value” (ideal) into the second realm and saw validity as the “existence” of value.¹⁶ Norms “exist” in the ideal realm through their validity;¹⁷ this is the so-called “ontological” interpretation of the dichotomy of Is and Ought.¹⁸

By “validity” we mean the specific existence of norms. To say that a norm is valid, is to

¹⁶ Heinrich Rickert, *System der Philosophie. Erster Teil: Allgemeine Grundlegung der Philosophie* (1921): 121-22.

¹⁷ Kelsen (1934), *supra* note 10, at 7; Kelsen (1979), *supra* note 13, at 22-23.

¹⁸ Carsten Heidemann, *Die Norm als Tatsache. Zur Normentheorie Hans Kelsens* (1997): 24-25.





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say that we assume its existence or—what amounts to the same thing—we assume that it has “binding force” for those whose it regulates.¹⁹

There is a second interpretation of the Kelsenian Ought, more along the lines of the Kantian (rather than Cohenian or Rickertian *neo*-Kantian) influence of the *Critique of Pure Reason*. The category of the Ought—and Kelsen at various points sees the Ought as analogous to the Kantian Categories—is not an absolute, ultimate foundation of the metaphysical reality more real than real reality. In this sense Kelsen is not a Platonist. He finds his “epistemology of norms” on a mere hypothetical basis: if one wishes to conceive of norms, one has to presuppose the dichotomy. It is the concept of norms as a scheme of interpretation (*Deutungsschema*).²⁰ It is an interpretation of *apperception* and thus constitutes cognition (of a different kind). In other words: Ought as a Category²¹ allows us to order and thus cognize reality in a certain sense.²² A theory of cognition is an epistemology; the references to Kant’s transcendental method—

¹⁹ Hans Kelsen, *General Theory of Law and State* (1945): 30.

²⁰ Kelsen (1967), *supra* note 8, at 3-4.

²¹ Kelsen (1934), *supra* note 10, at 21.

²² *Id.* at 66.





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“transcendental” enquiries being directed towards the possibility of cognition²³—prove that this was very much an aspect of the Kelsenian theory of norms, even though Kelsen’s reliance on Kant is a loose and “pedagogical” analogy, rather than a strict philosophical basis.

Yet the main point of contention remains: the foundation of the very possibility of “value” or of an “ideal” presupposes the distinction of Is and Ought and makes the reduction to Is impossible. As it stands, the Pure Theory is incompatible with logical positivism; it is also incompatible with Legal Realism, for the Pure Theory cannot be reductive in the sense of the latter’s empirico-scientific programmes.

B. Kelsen’s *two* Two-front War

The programme just described—“Purity” as the dichotomy of Is and Ought—leads Kelsen to criticize the two mainstream legal philosophies of the time. This, his “two-front war”²⁴ against both natural law and traditional positivism, is a polemic against

²³ Kant (1781, 1787), *supra* note 14, at A 56, B 80, 150.

²⁴ Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1990); Horst Dreier, “Rechtsdeutung zwischen Normativierung der Natur und Naturalisierung des Normativen am Beispiel von Kelsens Rechtsbegriff,” in Clemens Jabloner, Friedrich Stadler (eds), *Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen-Schule* (2001): 291-305 at 298.





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what he perceived as a “syncretism of method” (*Methodensynkretismus*).²⁵ The syncretism consists in the confusion of Is and Ought, of description and prescription, and ultimately of empirical and normative science. Kelsen found this confusion in both of the classical antipodes of jurisprudential discourse. Kelsen’s critique is similar to Martti Koskenniemi’s identification of “apologetic” and “utopian” discourse, with natural law playing the part of “utopia” and positivism being “apology.” Kelsen’s Pure Theory, I believe, is the only theory not caught up in Koskenniemi’s pattern of alternation between descending and ascending patterns of justification²⁶—the “constant movement from emphasizing concreteness to emphasizing normativity and vice-versa.”²⁷ The Copernican revolution in legal thought that the Pure Theory has inaugurated is the dialectical completion between positivity, on the one hand, and normativity, on the other hand.

On the first front, Kelsen viewed the idea of a natural law system as not realizable, at least not in the way their creators intended. Scholars who

²⁵ Kelsen (1934), *supra* note 10, at 2.

²⁶ Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989): 42-48.

²⁷ Koskenniemi (1989) *supra* note 26 at 46.





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propound natural law theories presuppose the possibility of an absolute value. This absolute norm is imagined to be hierarchically higher than all positive law. Whether it be “the nature of man,” or of God or of reason, some “instance” or fact that transcends human will is said to create norms of natural law that are claimed to be hierarchically higher than positive law. As Johannes Messner tells us, positive law is delegated by natural law, hence natural law can derogate from, void or prohibit the creation of contrary positive law.²⁸ Kelsen shows that such an absolute value cannot exist; that all attempts by the various natural law approaches to found such a value are bound to fail. Kelsen does not deny the idea of values, the “idea of the ideal,” to borrow a phrase from Philip Allott’s work.²⁹

²⁸ Johannes Messner, *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* (1950): 212. Alfred Verdross, one of Kelsen’s earliest students, later espoused a neo-Aristotelian/neo-Thomassian theory of natural law, but he is among a few proponents of natural law theory that do not espouse derogatory powers for natural law *vis-à-vis* positive law. See, e.g., Alfred Verdross, “Abendländische Rechtsphilosophie. Ihre Grundlagen und Hauptprobleme,” in *geschichtlicher Schau* (1958): 246-48. Verdross’ theory is seen by adherents to the Pure Theory as an attempt on his part to placate Kelsen’s effective critique (Verdross can certainly not be accused of having been ignorant of Kelsen’s ideas), but is regarded by Robert Walter in a recent paper as not having been able to successfully combine natural law and the Pure Theory’s ideas. Robert Walter, “Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts,” in Robert Walter, Clemens Jabloner, Klaus Zeleny (eds), *Hans Kelsen und das Völkerrecht. Ergebnisse eines Internationalen Symposiums in Wien (1-2 April 2004)* (2004): 37-49 at 47-49).

²⁹ Philip Allott, *Eunomia. New Order for a New World* (Preface to the paperback





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Quite the contrary, he focuses our attention on the Ought. However, all values are merely relative, there is no such thing as “absolute” value (*Werterelativismus*).³⁰ All value is relative, because it is always possible to imagine a norm with a content contrary to majority morality: “You ought to commit genocide.” More importantly, however, all value is relative, because the Ought is (only) a *claim to be observed*—all norms are only claims, all can potentially be disobeyed. Natural law can be seen as an “ethical-political standard”³¹ for positive law, but that does not produce a change in positive law. The noblest ideal is only *one claim amongst others*—in its form, in its “existence” (validity) it does not differ from other norms. There simply is no basis for deciding amongst claims, because any basis that one might imagine is just another norm—is just another *claim*! Just as one could imagine natural law to be the “basis” for international law,

edition 2001): xvi.

³⁰ Matthias Jestaedt, “Der Rechts- und Demokratietheoretiker Hans Kelsen—Eine Einführung,” in Matthias Jestaedt & Oliver Lepsius (eds), *Hans Kelsen. Verteidigung der Demokratie. Abhandlungen zur Demokratietheorie* (2006) vii–xxix, at xvi–xvii; Kelsen (1934), *supra* note 10, at 21; Kelsen (1945), *supra* note 19, at 393–395; Hans Kelsen, *Die Grundlagen der Naturrechtslehre, 13 Österreichische Zeitschrift für öffentliches Recht* (1963): 1–37, in: Hans Klecatsky, René Marčić, Herbert Schambeck (eds), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968): 869–912.

³¹ Kelsen (1967), *supra* note 8, at 218.





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as in Verdross' description of the *Grundnorm* (*infra*) of international law as a “norm, anchored in the cosmos of values”³² so too could I imagine my very own basis for international law (or even for natural law itself): “follow Mr Kammerhofer's orders,” because all three claims are *a priori* equal “claims to be observed.”

Natural law—taken by its word, if you will—necessarily entails a breach of the Is-Ought dichotomy. A very clear example of such a breach can be found in Aristotle's teleological theory (adapted for international law by Alfred Verdross): For Aristotle, all entities are striving toward their perfection, because only if and when they have reached that goal (*telos*), will they have reached their true nature (*physis*). Thus, all beings or entities have an imminent purpose (or goal)—this purpose-oriented nature is their *entelechia*.³³ This, then, is their *objective nature*. The teleological metaphysics of Aristotle alone, however, do not yet amount to much in the sphere of practical philosophy. The crucial “twist” is added when Aristotle considers the nature of humans. Human

³² “eine ... im Kosmos der Werte verankerte Norm” Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926): 31, 23. (All translations where the German original is given in the footnotes and where another translator is not mentioned are mine).

³³ Verdross (1958), *supra* note 28, at 39-40.





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telos somehow is (forms) a norm which humans have to observe in order to reach completion—the goal prescribes the means.³⁴ Thus, an Is (human nature) alone supposedly creates an Ought (an *objective norm*).³⁵ Human nature is societal (man as a *zoon politikón*, as a state-building being): “[Human beings] thus by their nature are directed towards community with other humans.”³⁶

This is the derivation of an absolute value standard from the alleged social nature of man. Kelsen proves that to derive a value from a series of facts (assuming that, empirically speaking, humans have unifiable characteristics) is a negation of the Is-Ought dichotomy,³⁷ which negates the very possibility of the factual becoming a standard. This step from man as *zoon politikon* to the norms that apparently are implied in this teleological world-view cannot be explained.

³⁴ Alfred Verdross, *Statisches und dynamisches Naturrecht* (1971): 98-99.

³⁵ Verdross (1958), *supra* note 28, at 40; Verdross (1971), *supra* note 34, at 20-21.

³⁶ “[Der Mensch] ist also durch die Dynamik seiner Natur auf die Gesellschaft mit anderen Menschen hingerichtet.” Verdross (1958), *supra* note 28, at 41.

³⁷ Hans Kelsen, “Naturrechtslehre und Rechtspositivismus. La doctrina del derecho natural y el positivismo jurídico, *Revista Jurídica de Buenos Aires* (1961) Number 4,” 8-45, in Hans Klecatsky, René Marcić, Herbert Schambeck (eds), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968): 817-32, at 818; Kelsen (1979), *supra* note 13, at 4-5, 56.





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In Kelsen's late works, he takes this *critique* one step further and asks—or so I understand his writings—what natural law systems actually would be if the absolute were disallowed. The cunning re-interpretation is this: Natural law systems are not positive norms, because they are not the sense (or meaning) of real acts of will. In fact they are fictional norms, because they were thought-out by scholars presupposing acts of will (e.g. God's will). As such they are valid norms, but only in the head of the scholar dreaming up the natural law system.³⁸ Kelsen argues that objective principles of justice, allegedly deduced from nature, are in truth highly subjective value judgments projected into nature.³⁹

On the second front, Kelsen turns on traditional positivism. Traditional positivism had only accepted as law those norms which were created by “the state.”⁴⁰ If pressed, the proponents of that view would have argued that “the state” is nothing more than the most effective, the most powerful force. Alternatively, certain streams of positivist theory presuppose the *psychological fact* of acceptance

³⁸ Kelsen (1979), *supra* note 13, at 5-6.

³⁹ Kelsen (1961), *supra* note 37, at 821.

⁴⁰ Jochen Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001): 24-26.





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as the supra-positive fact creating norms. Herbert Hart's Rule of Recognition can be seen in this way:

If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists.⁴¹

In response Kelsen first points out that the anthropomorphic view of the state is an absolutization akin to natural law. The notion of state sovereignty is false, because from a legal view the state is naught but the legal order itself (cf. Section II.B). Second, with respect to Hart, he would have argued that because the *fact* of acceptance is necessarily the basis of the validity of a constitution—since, all the various (and different) Rules of Recognition are always those *accepted* as such—this means presupposing just the same type of absolute and external standard as natural law does. Just as with natural law, the essential and insoluble duality⁴² of “Is” and “Ought” is breached.

⁴¹ H.L.A. Hart, *The Concept of Law* (2nd ed. 1994): 293 (ad 100).

⁴² Kelsen (1979), *supra* note 13, at 44-46. In a similar, but unspecific vein see Matthew Kramer, “The Rule of Misrecognition in the Hart of Jurisprudence, 8 *Oxford J. Leg. Stud.* (1988): 401-33, at 432.





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Traditional positivism can found law's validity as little as natural law theory can—both confound Is and Ought, both seek to reduce one to the other.

Kelsen's solution is ingenious: it is the Copernican revolution in normative science, one that combines the positivity of law—the actual occurrence of acts of will—with the normativity of law—the Oughtness, its nature as an ideal. He simply does not ask the ultimate question, because he puts the validity of norms on an “as if” basis.⁴³ The ultimate “norm” of any normative order is the so-called *Grundnorm*.⁴⁴ The *Grundnorm* or basic norm is merely the condition for the possibility of the cognition of Ought; it is the Is-Ought dichotomy concretized as the transcendental-logical presupposition that allows the cognition of a given normative order.⁴⁵ We simply argue as if the normative order were valid: If I order you to stand up, my order is valid *if* we assume the validity of a *Grundnorm*, such as: “follow Mr. Kammerhofer's orders.” There is no absolute basis, this is a hypothetical—an epistemological⁴⁶—basis only; the *Grundnorm* is

⁴³ Kelsen (1979), *supra* note 13, at 206-207.

⁴⁴ Kelsen (1967), *supra* note 8 at 193-201.

⁴⁵ *Id.* at 201-205; Kelsen (1934), *supra* note 10, at 21-24; Kelsen (1945), *supra* note 19.

⁴⁶ Kelsen (1967), *supra* note 8, at 218.





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neither a norm *properly speaking*, nor properly of the normative order.

C. The Pure Theory's Potential—and its Potential Appeal to International Lawyers

The Pure Theory of Law “in operation” has both a deconstructive and a constructive modus.

1. On the one hand, its utter commitment to consistently following the dichotomy of Is and Ought—the *one* foundational element of all normative sciences—means that, like a surgeon's scalpel, its application to any body of legal doctrine and in particular to international legal doctrine with its heterogenous origins, means that it cuts deep into the flesh of received opinions. Kelsen did not shy away from toppling well-settled doctrinary constructs.⁴⁷ If a scholar wishes to apply the Pure Theory to international law he or she must not shy away from these “unpleasant” consequences. Its utter consistency is an ideal basis for the immanent critique of international law, rather than transcendent critiques from political

⁴⁷ “Kelsen has subjected traditional presentations of international law to a rigorous critique...” Leo Gross, “States as Organs of International Law and the Problem of Autointerpretation,” in George A. Lipsky (ed.), *Law and Politics in the World Community. Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (1953): 59-88, at 60.





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ideology or the social sciences.

2. On the other hand, this critique leads to a re-interpretation of many doctrines of international law and a clarification of old “puzzlers.” Sometimes our muddled argumentation as international lawyers—something that Critical International Legal Scholarship has sharply criticized—is clarified by strictly observing the Is-Ought dichotomy, so that the true issues or the true problems come to light.

But this utter commitment, this *Konsequenz*, has been the object of frequent attacks. Kelsen has often been accused of being a dry theorist without regard for the “realities” of international life. Kelsen, however, was never only a theorist. He helped draft the Austrian Constitution 1920; he advised the Austrian and various other governments (including the United States government); he was a judge of the Austrian Constitutional Court from 1921 to 1930—a court for which he drafted the constitutional provisions; there was even talk that he might become a judge on the Permanent Court of International Justice,⁴⁸ and Kelsen was retained several times to write opinions on international legal disputes. It is clear that not only was he practically minded and that he *could* practice law,

⁴⁸ Rudolf Aladár Métall, *Hans Kelsen. Leben und Werk* (1969): 66.





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but also that he made his practice consonant with his theory: The daily operation of the Austrian Federal Constitution of 1920/1929⁴⁹ shows that a legal system “based,” as it were, on the Pure Theory of Law can work and does not need natural law or moralist elements. Someone who sees Kelsen as a dry theorist not only forgets that Kelsen was an accomplished practitioner both in constitutional law and international law, but also overlooks the immense importance of theory for the practice of a *normative* science.

Normative theory is different from empirical theory in that—for all the distortion that theory in the natural sciences can produce—empirical science the object of study seems to be an objectively given “reality.” An empirical science has a “given” object of its study, its theories have to fit and explain that “given.” A normative *theory* does not have such a “given,” because here the *theory* through the creation of the intellectual superstructure determines its object: the Ought. A purported “norm” that does not satisfy the criteria of normative theory *simply is not a norm!* A zoologist classifying butterflies does not create them; a legal theorist by proposing a theory can “decide” what is to be a norm: “[N]ature is as it is, before and even entirely independently of whether

⁴⁹ Bundes-Verfassungsgesetz 1920 idF 1929, BGBl 1/1930 idgF.





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its laws are cognized by science... positive law itself is a product, something generated by human activity....”⁵⁰

In the following section, I shall attempt to apply the Pure Theory of Law to international law. Two *caveats* seem in order: *First*, it is not any specific or “historical” Kelsen, not the Kelsen, for example, of the *General theory of law and state* (1945) that I consider relevant here, but the *α*-historical Pure Theory of Law as a thought-construct that is independent of its creator as a logical entity in the realm of ideas; that has and can be understood in different ways and that can and has been developed further by other scholars. *Second*, I shall use my reading and slight modification of Kelsen’s ideas—what I have called *neo-Kelsenianism*, to achieve a further purification of the Pure Theory, by eliminating any remaining modifying “force” of actual enforcement of the law and the “force” of empirical effectiveness from the validity of norms. I do this because to allow empirical facts alone to influence the validity of norms would violate the essential and categorical distinction of Is and Ought. If, therefore, my results vary slightly from Kelsen’s—especially as regards the sources of

⁵⁰ Geert Edelman, “The *Hypothesis* of the Basic Norm: Hans Kelsen and Hermann Cohen,” in Stanley L. Paulson, Bonnie Litschewski Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1998): 195-219, at 211; Adolf Menzel, *Naturrecht und Soziologie* (1912): 59.





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international law (Section II.B), this is not due to an involuntary misinterpretation of Kelsen, but a conscious development of the Pure Theory.

II. TWO EXAMPLES OF A PURE THEORY OF INTERNATIONAL LAW

The following section is devoted to giving the reader two examples of the use of the Pure Theory for international law: One on the subjects of international law, where Kelsenian theory helps to overcome traditional *problematiques* (Section II.A); one on the constitution of international law, where only the consistency of the Pure Theory allows us to clearly see the magnitude of the problems we are facing (Section II.B).

A. The Subjects of International Law and the “Problem” of Sovereignty

The uneasy relationship between states as sovereigns and the binding force of international law is a classical problem of international law. Ulpian’s formulation of “*princeps legibus solutus est*,”⁵¹ was famously reiterated by Jean Bodin,⁵²

⁵¹ Dig. 1.3.31.

⁵² Jean Bodin, *Les six livres de la république* (1576).





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and has given rise to a vigorous debate amongst international lawyers and legal theorists in the late 19th and early 20th centuries. As a proponent of a radical departure from both traditional schools of thought, Kelsen soon wrote on the problem of sovereignty. One of his earliest books—his first foray into international law—was *The Problem of Sovereignty and the Theory of International Law*.⁵³ In his writings over the next 50 years, he develops and repeats what I consider to be the only possible solution to the problem; a solution based on a strict “legalization” of the topic.

For Kelsen, the problem stems from confusion about the nature of “the state.” He solves the problem by applying a legal-scientific viewpoint, drawing our attention away from “power” and from the anthropomorphic, hypostatic view of the state towards the totality of the norms in a legal order as the determining factor. On a legal-scientific view, he argues, *the state is nothing but the legal order itself*.⁵⁴ This may not sit well with international lawyers brought up on a fare of seeing the states

⁵³ Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920). At that time, the adjective “rein” (“pure”) is not yet capitalized, which means Kelsen did not yet consider the Pure Theory a proper name.

⁵⁴ *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (1922); Kelsen (1952), *supra* note 5, at 100.





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as equal sovereigns and who perceive international law as Civil Law writ large, but if one takes the idea of a legal science at its word—to be a purely legal inquiry—no other view remains but to see the state as an object of legal science.⁵⁵

[T]he state, insofar it is object of legal cognition... has to be legal, i.e. the legal order itself or a part of it, because one cannot “legally” cognise anything but the law; to apprehend the state legally... cannot mean anything but apprehending the state *as law*.⁵⁶

In this connection, the notion of “sovereignty” is transferred: it is a hierarchy created by norms, not by humans. The norm is the “master” and it is sovereign only if it is presupposed as the highest norm.⁵⁷ The state as order is what is usually called ‘its’ law: a specific legal order. The state as person, *i.e.* as subject of international law (*infra*) is a personification of this legal order. Thus for

⁵⁵ Kelsen (1920), *supra* note 53, at 10.

⁵⁶ “[D]er Staat, insoferne er Gegenstand der Rechtserkenntnis ist... von der Natur des Rechts, d. h. entweder die Rechtsordnung selbst oder ein Teil derselben sein muß, weil eben “rechtlich” nichts anderes begriffen werden kann als das Recht, und den Staat rechtlich begreifen... nichts anderes heißen kann, als den Staat *als Recht* begreifen.” *Id.* at 11-12 (emphasis mine).

⁵⁷ *Id.* at 8.





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Kelsen the problem of sovereignty is a problem of the relationship between the sovereignty of the various statal legal orders to the international legal order.⁵⁸ Sovereignty in this sense, then, is not some objective quality of an entity—perhaps seen as *a priori* accruing to the nation state—but a precondition: the precondition of a normative order as the highest (partial) normative order of a given (complete) normative order, its validity not being derived from another normative order.⁵⁹ Sovereignty is a quality of a legal order, not of a “state” *qua* “person.”⁶⁰ In other words: from the point of view of international law—and on a consistent legal-scientific view—*international law is the sovereign*, not the states themselves.⁶¹ If we take international law as our starting point (and I

⁵⁸ Hans Kelsen, *Souveränität*, in: Hans-Jürgen Schlochauer, *Wörterbuch des Völkerrechts* (2nd ed. 1962): Volume 3, 278-85, in: Hans Klecatsky, René Marcić, Herbert Schambeck (eds), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968): 2269-82, at 2270.

⁵⁹ Kelsen (1962), *supra* note 58, at 2272.

⁶⁰ Kelsen (1920), *supra* note 53, at 16-17.

⁶¹ A *caveat*: Kelsen admits the possibility of constructing the rest of the legal “world”—international law and all but one municipal legal order—from one municipal legal order. While this paper is not about Kelsen’s theory of the relationship of municipal and international law, it bears out to emphasize that under this such a scheme, only *one* state (*qua* municipal legal order) can be sovereign. This is a world-view associated with nationalism and imperialism. Leo Gross, *Pazifismus und Imperialismus. Eine kritische Untersuchung ihrer theoretischen Begründungen* (1931).





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submit it is relatively irrelevant whether we pursue a pluralistic or monistic theory), the states are naught but corporations writ large. They constitute partial legal orders within international law, just as a limited liability company, or a club/association would be in municipal law. The state is “only” a juridical person;⁶² the state is not a sovereign, it certainly is not *legibus solutus*.⁶³

Now—on this consistent legal-scientific view—what does it mean to be a “subject of law?” The “subjects of international law,” states included, are constituted by law. There is no *a priori* quality as “subject of international law” that (pre-positively) “confers” certain rights, duties or faculties to create norms independently of the law,⁶⁴ but the totality of the norms referring to certain human behavior *can* be personalized as “subject of law:”

What, now, does the statement of traditional legal theory mean that the legal order invests the human being, or a group of human beings, with the quality of legal personality – with the quality of being a “person”? It means that the legal order imposes obligations upon,

⁶² Kelsen (1920), *supra* note 53, at 20.

⁶³ *Id.* at 46.

⁶⁴ Kelsen (1967), *supra* note 8, at 170-71.





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or confers rights to, human beings, that is, that the legal order makes human behavior the content of obligations and rights. “To be a person” or “to have legal personality” is identical with having legal obligations and subjective rights. The person as a holder of obligations and rights is not something different from the obligations and rights... “Person” is merely the personification of this totality.⁶⁵

A juridical person is merely the personified concept of the unity of a bundle of legal duties and legal rights—the personified expression of a complex of norms.⁶⁶ In this way, *all* subjects of the law—even if their inclusion in a legal order seems fundamental to its working⁶⁷—are constituted by the law itself through the content of the legal order. This is as true of natural persons as it is of juridical persons. On this line of reasoning, natural persons are nothing other than juridical persons. This may sound ludicrous at first, but Kelsen’s point is fundamental (and fundamentally important),

⁶⁵ *Id.* at 172-73.

⁶⁶ Kelsen (1934), *supra* note 10, at 52-53.

⁶⁷ This is the case with individuals in municipal law and states in international law. This perceived necessity has led traditional approaches to the conclusion that this necessity is the legal basis for their inclusion. Such reasoning is, however, a breach of the Is-Ought dichotomy.





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because it shows the extent to which traditional doctrine was an admixture of the juristic and other views, of Is and Ought. It is not the real human being as a physiological entity that is cognized by legal science—how could it, legal science is a normative science, not a natural science—but the *legal person*, the person established and *created*, by law!

The so-called physical person, then, is not a human being, but the personified unity of the legal norms that obligate or authorize one and the same human being. It is not a natural reality but a legal construction, created by the science of law.... In this sense a physical person is a juristic person.⁶⁸

The only difference to a juridical person is that the determination of the individual (human behavior) is left by the total legal order to the partial legal order of the corporation, club or state.

[T]he individuals whose conduct forms the content of duties and rights of the juristic person, are determined only indirectly by the national legal order under which the juristic person exists, whereas the individuals whose conduct forms the content of the duties

⁶⁸ Kelsen (1967), *supra* note 8, at 174.





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and rights of so-called physical persons are directly determined by the national legal order.⁶⁹

The same applies from the view-point of international law. International law also directly connects to human behavior (in Kelsen's terms: "their legally determined actions which form the content of the legal norms"),⁷⁰ but leaves it to the partial legal orders called "states" to determine the individuals (and sometimes also the precise behavior). The personifications of "legal subject" (the subject of obligations and rights) and "legal organ" (entitled to create norms) are not necessary concepts of a legal order,⁷¹ but merely "pedagogical concepts" to allow us to conceive of a legal "actor;" to aid in the conception of an unordered bundle of norms. On the other hand, of course, the non-necessity of the personification called "legal subject" means that the *content* of the rights and duties of a legal person is *not determined* by affixing the label "legal subject." The content of the rights and duties remains to be set by positive international law!

⁶⁹ Kelsen (1952), *supra* note 5, at 99.

⁷⁰ Kelsen (1967), *supra* note 8, at 169.

⁷¹ *Id.* at 169.





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The International Court of Justice was correct in the *Reparation* case, when it described the United Nations as a legal person under international law, and made the existence and content of personality dependent upon positive international law (in this case the Charter).⁷² However, when the Court deduced certain rights from this label alone and, crucially, when it deduced the capacity of possessing rights and duties from its property as “legal subject”: “What it does mean is that it is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims.”⁷³ I would submit that the Court was going about it the wrong way. The “capacity” *qua* validity of norms establishing duties and rights creates legal personality, not vice versa.

Thus, Kelsen brings “sovereignty” and “subject of law” firmly back to legal *terra firma*. Sovereignty and statehood are moved from an absolutist *legibus solutus* and ‘fundamental rights of states’ position to a question on the precise content of the positive international legal order. This may entail a ‘narrower’ view, but that (a “legal”) view is the whole point of a *legal science* as understood by the Pure

⁷² *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949): 174, at 178-80.

⁷³ *Id.* at 179.





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Theory of Law Only a legal view can be the method of a legal science, not an admixture of ideological, sociological, moralist and legalist claims. The Pure Theory's findings thus solve several of the classical problems of international law:

The problem of the possibility of an “international law” properly speaking. International law is not categorically different from municipal law, because the main objection—famously propounded by John Austin⁷⁴—that there is no political authority standing “above” the states as subjects of international law (as seems the case with the state in relation to individuals), is now seen as a syncretism of method. For a consistent legal science, the authority is not one “of” a human *vis-à-vis* another, but only of a norm *vis-à-vis* an individual. Individuals may sometimes be empowered to create commands, but:

the authority of this individual is in the last analysis only the authority of the normative order, an authority delegated to the individual by that order.... [I]ndividuals are not actually subordinated to the individual from whom the norm emanates, but to the order that delegates the authority to

⁷⁴ John Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson ed. 1954): 201.





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this man; not to the lawmaker, but to the law....⁷⁵

The same applies to Georg Jellinek's theory of *Selbstverpflichtung* ("auto-obligation").⁷⁶ According to this theory, international law only binds the state because and insofar as it binds itself. This is a result of the omission of the resolution of the personification or hypostasis of the municipal legal order as state.⁷⁷ It was simply forgotten that the state *qua* person was created by legal science only as an illustration for the multiplicity of norms making up the legal order and that the attribution to the legal person "state" is only a figurative expression for the duties and rights stipulated by the norms.⁷⁸ The notion that the state can always change law and thus is not really bound by it is wrong, even though states are the makers of international law. "[This] means only that individuals determined by law can change the law in a procedure likewise determined by the law."⁷⁹ The states as makers of international law are bound by the meta-law on law-creation—without it, they could not make

⁷⁵ Kelsen (1952), *supra* note 5, at 104.

⁷⁶ Georg Jellinek, *Die rechtliche Natur der Staatenverträge* (1880): 8.

⁷⁷ Kelsen (1920), *supra* note 53, at 169.

⁷⁸ *Id.* at 18.

⁷⁹ Kelsen (1952), *supra* note 5, at 439.





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law. The states as subjects of obligations cannot change the law, especially not by simply breaching it. International law is sovereign in international law, whoever is authorized by international law to create, change or derogate from it.

The problem of law “above” the sovereign. This also means that the states—as subjects and as organs of international law—are not “above” international law. From the point of view of international law, they are not sovereign in the classical sense. As a legal order, positive international law can vary its contents; no subject, whether state or individual, has rights (or duties) under international law independent from that law. The Permanent Court of International Justice held in discussing the *Nationality Decrees in Tunis and Morocco* that the *domaine réservé* of states “depends on the development of international relations.”⁸⁰ Kelsen argues that it depends on the concrete content of international law, for his is a consistently *legal* view:

The question of in how far the sovereignty of a state can be restricted... can only be answered on the basis of the content of international law, and cannot be deduced

⁸⁰ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, PCIJ Series A No. 4 (1923): 24.





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from the concept of sovereignty. The restrictability of the sovereignty of states... is not limited by international law.⁸¹

The problem of other subjects of international law. Unlike traditional positivist theories of international law, the Pure Theory of Law is also not troubled by the alleged appearance of various non-statal entities. Because subjects of international law *are* the legal norms, rather than a pre-positive entity, it wholly depends upon the content of positive law whether and to what extent other entities are subjects of international law. Kelsen was an empathic proponent of the role of individuals in international law⁸² and of international organizations and other collective legal persons.⁸³ He even foretold the possibility of an international organization becoming state-like, as may now be happening with the European Union: “An international organization could be created by treaty which is so centralized that it has the character of a state, and that the contracting

⁸¹ “Die Frage, wieweit diese Souveränität des Staates...beschränkbar ist, läßt sich nur auf Grund des Inhaltes des Völkerrechts beantworten, nicht aber aus dem Begriff der Souveränität ableiten. Der Beschränkung der Staatssoveränität... setzt aber das positive Völkerrecht keine Grenze.” Kelsen (1962), *supra* note 58, at 2279.

⁸² Kelsen (1920), *supra* note 53, at 162 *et seq.*; Kelsen (1952), *supra* note 5, at 124-31, 140-48.

⁸³ Kelsen (1950)), *supra* note 4; Kelsen (1952), *supra* note 5, at 158-88.





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states... lose their character as states.”⁸⁴ Since, for the Pure Theory, the law can have any substantive content, it has no problem whatever integrating new actors (or new substantive norms, for that matter). Where the Pure Theory is unrelenting, however, is that proponents of a change provide concrete evidence that *positive law has this content*, for this is the only basis that counts in international legal science.

B. The Possibility of a Constitution for International Law and the Problem of the Architecture of Formal Sources

This section is, admittedly, less Kelsenian and more *neo*-Kelsenian than the others, in that it is based upon ideas developed in my forthcoming book ‘Uncertainty in international law’.⁸⁵ However, I feel the ideas are within the remit of the Pure Theory, even though—and especially because—they are more deconstructive than constructive. The “sources” of international law, are the highest echelons of positive norms of international law;

⁸⁴ “Durch völkerrechtlichen Vertrag kann eine Internationale Organisation geschaffen werden, die so zentralisiert ist, daß sie selbst Staatscharakter hat, so daß die vertragsschließenden Staaten...ihren Charakter als Staaten verlieren.” Kelsen (1962), *supra* note 58, at 2279 (arrow omitted).

⁸⁵ Cf Jörg Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems,” 15 *European J. Int’l L* (2004): 523-553.





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they are its “constitution.” Simply assuming them will not do for a consistently normativist-positivist view. Only the *Grundnorm* is assumed in order to enable cognition of a legal order in the first place (Section I.B). Any and all positive norms’ creation and ‘existence’ *qua* validity has to be proven. We cannot simply argue that Article 38(1) of the Statute of the International Court of Justice reflects the sources of international law, we have to show for each, *e.g.*, treaty, custom, general principles (and for all the other alleged sources), on what *legal* grounds they came to be “sources.”

International law has a constitution. This may be a much debated point,⁸⁶ but at least from the Pure Theory’s point of view *any* normative order has a constitution in the “material”⁸⁷ or “norm-logical” sense. The constitution of a normative order is the highest echelon of positive norms; the first positive norms below the *Grundnorm* (which itself is not a positive norm). The international legal order—if it is indeed *one* normative order—therefore also has a constitution; the problem is not whether it has a constitution at all, but whether it has only one

⁸⁶ “[T]he use of the term “constitution” with respect to international law carries the danger of confusion by putting international law at par with national legal systems...international society does not possess a constitution in the sense most national societies do.” G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983): 58.

⁸⁷ Kelsen (1967), *supra* note 8, at 222.





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constitution.

Hierarchy in normative orders is a hierarchy of norm-creation. Since norms have a specific form of “existence,” which is to say, validity, the norm that authorizes the creation of another norm (its “source”) is the reason of validity for the norm(s) created under it. The meta-norm on norm-creation can be portrayed as the “higher” norm in the pyramid of norms, Kelsen’s famous *Stufenbau*:

The term “source of law” is used only figuratively and has more than one meaning. It may denote any higher norm in its relationship to a lower norm, whose creation the former regulates. Thus, the term “source of law” may denote also the basis of validity and especially the ultimate basis of validity of a legal order: the *Grundnorm*. In fact, however, only the positive basis of validity of a legal norm, i.e. the higher positive legal norm regulating its creation, is called its “source.”⁸⁸

⁸⁸ “Rechtsquelle ist ein bildlicher Ausdruck, der mehr als eine Bedeutung hat. Man kann damit jede höhere Norm im Verhältnis zu der niederen Norm bezeichnen, deren Erzeugung sie regelt. Daher kann unter Rechtsquelle auch der Geltungsgrund und insbesondere der letzte Geltungsgrund, die Grundnorm, einer Rechtsordnung verstanden werden. Doch wird tatsächlich nur der positivrechtliche Geltungsgrund einer Rechtsnorm, das heißt die höhere, ihre Erzeugung regelnde, positive Rechtsnorm als “Quelle” bezeichnet.” Hans Kelsen, *Reine Rechtslehre* (2nd ed. 1960): 238-39; Kelsen (1967), *supra* note





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All this seems very much in line with traditional international legal scholarship; Alfred Rub has even suggested that traditional scholarship has taken on the “Kelsenian understanding of the term source of international law as method of law-creation.”⁸⁹ However, traditional theory of sources has several trends which make it unacceptable to the Pure Theory of Law:

1. Many scholars of international law do not recognize sources as norms themselves, but only to speak vaguely (and potentially erroneously) of them as “methods” or “procedures,”⁹⁰ or to explicitly deny that sources are norms.⁹¹ The

8, at 233.

⁸⁹ “Kelsensche Hauptbegriff der Völkerrechtsquelle als Rechtserzeugungsart” Alfred Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (1995): 335.

⁹⁰ Peter Fischer, *Heribert Franz Köck, Allgemeines Völkerrecht* (4th ed. 1994): 35; Gerald G. Fitzmaurice, “Some Problems Regarding the Formal Sources of International Law,” in F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl. Présentées au Prof. J.H.W. Verzijl à l’occasion de son LXX-ième anniversaire* (1958): 154; David J. Harris, *Cases and Materials on International Law* (5th ed. 1998): 21; 1 Robert Y. Jennings, Arthur Watts (eds.), *Oppenheim’s International Law* (9th ed. 1992): 23; Hanspeter Neuhold, Waldemar Hummer, Christoph Schreuer (eds), *Österreichisches Handbuch des Völkerrechts* (4th ed. 2004): 31; Clive Parry, *The Sources and Evidences of International Law* (1965): 4; Shaw (1997), *supra* note 1, at 55; Helmut Strebelt, *Quellen des Völkerrechts als Rechtsordnung*, *36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976): 302-03; Michel Virally, “The Sources of International Law,” in Max Sørensen (ed.), *Manual of Public International Law* (1968): 120.

⁹¹ Maarten Bos, *The Recognized Manifestations of International Law. A New*





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idea that sources are not meta-law, but facts or evidences, is wrong. I would submit that it is only through a creation *according to norms* that a norm can base the validity of a norm. All else is the violation of the duality of Is and Ought, without which no cognition of norms is possible.

2. There is a trend to consider “the sources of international law” as somehow existing at an absolute level.⁹² Sources are seen as exhaustively law-creative and not to have anything but a “doctrine” of the “basis of obligation” above them. Law-creation *within a normative order* is done only on the basis of norms empowering norm-creation and thus law-creation is always also law-application. Adolf Merkl’s *doppeltes Rechtsantlitz* (the “Janus-face of law”)⁹³ is a

Theory of “Sources,” 20 *German Yearbook of Int’l L.* (1977): 10-11; Antonio Cassese, *International Law* (2001): 118; Torsten Gihl, The legal character and sources of international law, 1 *Scandinavian Studies in Law* (1957): 51-92 at 83; Peter Hulsroj, “Three Sources-No River: A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and ‘General Principles of Law,’” 54 *Zeitschrift für öffentliches Recht* (1999): 219-259 at 234; Alf Ross, *Lehrbuch des Völkerrechts* (1951): 78, 81; A.J.P. Tammes, “Inter-action of the Sources of International Law,” 10 *Netherlands Int’l L. R.* (1963): 225-38 at 225-27; Alfred Verdross, Bruno Simma, *Universelles Völkerrecht* (3rd ed. 1984): 323-24.

⁹² Hints of this may be found in: Jennings (1992), *supra* note 91, at 15, 23; Fitzmaurice (1958), *supra* note 90, at 154.

⁹³ Adolf Julius Merkl, “Das doppelte Rechtsantlitz. Eine Betrachtung aus der





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very apposite metaphor in this respect.

The Pure Theory can be usefully applied to combine the notion of “constitution” as the highest echelon of authorizing norms in a given normative order (in international law traditionally treaty law and customary law)⁹⁴ with the notion of the hierarchy of norms (*Stufenbau*),⁹⁵ the response to the question ‘whence do the sources of law come?’ appears almost automatically: “What norm of international law authorizes the creation of the norms that authorize the creation of (for example) customary international law?”⁹⁶ According to the Pure Theory, we must find positive norms of international law that create source-law.⁹⁷

If there is such a meta-meta-law of source-creation, it would probably fit what Kelsen has called the *historisch erste Verfassung* (“historically first

Erkenntnistheorie des Rechtes,” 47 *Juristische Blätter* (1918): 444-47, 463-65, reprinted in: Dorothea Mayer-Maly, Herbert Schambeck, Wolf-Dietrich Grussmann (eds), *Adolf Julius Merkl, Gesammelte Schriften I/1* (1993): 227-52.

⁹⁴ Josef L. Kunz, “The ‘Vienna School’ and International Law,” 11 *N.Y.U.L. Quarterly Rev.* (1934): 370-421, at 412.

⁹⁵ Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923): 129.

⁹⁶ Rub (1995), *supra* note 89, at 312-13.

⁹⁷ Verdross (1926), *supra* note 32, at 43.





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constitution”).⁹⁸ Despite the name, that specific form of constitution has not only got historical priority, but also logical priority in the hierarchy of validity:

If one asks why norms which regulate the creation of general norms are valid, one may find a yet older constitution, i.e. the validity of the present constitution is based in its being created according to the provisions of a previously valid constitution by way of an amendment of the constitution. Thus one finally comes to the historically first constitution, which cannot be founded in a positive norm, a constitution, which came into validity by way of revolution. If one asks why the historically first constitution is valid the answer can only be that the validity of this constitution, the assumption that it is a binding norm, must be *presumed*.⁹⁹

⁹⁸ Kelsen (1952), *supra* note 5, at 411.

⁹⁹ “[F]ragt man nach dem Geltungsgrund der Normen, die Erzeugung der generellen Normen regeln... so gerät man vielleicht auf eine ältere Staatsverfassung; daß heißt: man begründet die Geltung der bestehenden Staatsverfassung damit, daß sie gemäß den Bestimmungen einer vorangegangenen Staatsverfassung im Wege einer verfassungsmäßigen Verfassungsänderung... zustande gekommen ist; und so [gerät man] schließlich auf eine historisch erste Staatsverfassung, die nicht mehr auf eine [positive] Norm zurückgeführt werden kann, eine Staatsverfassung, die revolutionär... in Geltung getreten ist... [F]ragt man nach dem Grund der Geltung der historisch ersten Staatsverfassung... dann kann die Antwort... nur sein, daß die Geltung dieser Verfassung, die Annahme, daß





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Kelsen's "historically first constitution" is the *highest positive norm of a positive normative order*. Because it is historically first and hierarchically highest, it is not derived from a previous (higher) norm and thus its creation was revolutionary (or at least "originary"). The historically first constitution is thus directly below the *Grundnorm* of a given normative order (*Grundnormunmittelbarkeit*).¹⁰⁰ Alfred Verdross—though by this time no longer a member *stricto sensu* of the Vienna School of Jurisprudence around Kelsen—has given a theory of the historically first constitution of international law. In 1973, he argued that history shows that:

[T]heir original norms were thus neither created by a formal treaty nor by customary international law, *but through informal consensus of the then powerful entities*, where they acknowledged certain principles of law as binding.... Still, these constitutional norms are not a series of hypothetical norms, but *actual* norms constituting the basis for

sie eine verbindliche Norm sei, *orausgesetzt* werden muß...." (*nota bene*: I have deliberately mis-translated "Staatsverfassung" ("constitution of a state") only as "constitution" in order to show that Kelsen's notion is not bound by its application in the municipal realm. Due to the lack of succinctness of the German original, my translation here is slightly less literal than others); Kelsen (1967), *supra* note 8, at 200.

¹⁰⁰ Rudolf Aladár Métall, "Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre," 11 *Zeitschrift für öffentliches Recht* (1931): 416-28, at 421.





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customary international law and formal treaty law.¹⁰¹

Verdross and Simma continue in 1984: “The originary source of international law—international consensus—is not only the historical basis of the formalized methods of creation [in Article 38], but is still superimposed upon them.”¹⁰² I submit they use the notion of ‘consent’ as a historically first constitution in Kelsen’s sense. They consider “consensus” to be originary, that it came into being *uno actu* with the coming-into-existence of the modern state.¹⁰³ If one were to express this thought in terms of the Pure Theory one would say that this is the first positive norm of the constitution of international law, not itself based upon another positive norm. Various problems with this specific

¹⁰¹ “[I]hre ursprünglichen Normen sind also weder durch einen förmlichen Staatsvertrag noch durch die völkerrechtliche Übung, *sondern durch einen formlosen Konsens zwischen den damaligen Machthabern entstanden*, durch den sie bestimmte Rechtsgrundsätze als rechtsverbindlich anerkannt haben.... Gleichwohl bilden jene Verfassungsnormen kein bloß hypothetisches, sondern ein dem VGR und dem förmlichen Vertragsrecht tatsächlich zugrundeliegendes Normengebilde.” Alfred Verdross, *Die Quellen des universellen Völkerrechts* (1973): 20-21 (emphasis mine); Verdross (1984), *supra* note 91, at 59.

¹⁰² “Die originäre Völkerrechtsquelle des zwischenstaatlichen Konsenses liegt diesen formalisierten Erzeugungsarten [in Artikel 38] aber nicht nur historisch zugrunde, sondern überlagert sie nach wie vor.” Verdross (1984), *supra* note 91, at 324.

¹⁰³ Verdross (1973), *supra* note 101, at 20.





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theory¹⁰⁴ prohibit it from being taken on board by a neo-Kelsenian view of international law, but if we were to argue that “consensus” is the historically first constitution of international law, then consensus, as a positive norm of international law, would have authorized the creation of the modern sources of international law, custom and treaty. International law’s *Grundnorm* would authorize consensus to create norms of international law and everything would be just fine—except that we would first have to prove that consensus is the originary constitutional norm of international law.

That is where the problems begin: How can we prove that there was a positive act of will creating, say, customary international law, at some point in the past? That is the point of a historically first constitution in the positivist theoretical edifice of the Pure Theory: a positive norm has to be *positus* and cannot be presupposed.¹⁰⁵ Our epistemological horizon is too limited to answer this question with more than a presumption—and as long as we are presupposing, we could presuppose any norm to

¹⁰⁴ In particular, they do not conceive of the historically first constitution as a meta-meta-law with the full brunt of Kelsen’s consistency. Also, they warn their readers not to misunderstand “consensus” as the source of validity of international law. If it were to be compatible with the Pure Theory, however, the historically first constitution would have to be both “source of law” and “source of validity.”

¹⁰⁵ Fitzmaurice (1958), *supra* note 90, at 163-64.





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found international law, even absurd ones.

What now? We can only speculate how the sources of international law *could* be arranged. We can also ask how scholars in the past have arranged them. This is not the place for a detailed assessment; an overview will have to suffice here:

1. There is the notion that one of the sources is immediately based on the basic norm, either (a) that international law is based on the *Grundnorm*: *pacta sunt servanda*, custom being a *pactum tacitum*,¹⁰⁶ or (b) that customary international law is the highest source,¹⁰⁷ *pacta sunt servanda* being only a positive norm of customary international law,¹⁰⁸ or (c) that general principles of international law are the highest source (together with customary international law) as some sort of manifestation of natural law.¹⁰⁹

¹⁰⁶ Verdross (1926), *supra* note 32, at 29.

¹⁰⁷ Kelsen (1952), *supra* note 5, at 418; Kelsen (1967), *supra* note 8, at 214-17, 323-24; Metall (1931), *supra* note 100, at 425.

¹⁰⁸ Kelsen (1952), *supra* note 5, at 314, 417; Kunz (1934), *supra* note 94, at 403; Virally (1968), *supra* note 90, at 128; Rub (1995), *supra* note 85, at 314.

¹⁰⁹ Alfred Verdross, "Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle. Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts," in Alfred Verdross (ed.), *Gesellschaft, Staat und Recht. Untersuchungen zur reinen Rechtslehre. Festschrift Hans Kelsen zum 50. Geburtstag gewidmet* (1931): 354-65, at 362.





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2. The other possibility is a meta-stratum of law that co-ordinates the sources of international law—a *Völkerverfassungsrecht*. Thus, while “international treaty law” as a source would not be derived from customary international law, and the two sources would be “two separate branches of law”¹¹⁰ of equal standing, they would be connected by a superstructure of meta-meta-laws which regulates the relationship of sources. I doubt whether such positive norms exist.

3. The last theory is what I would call the “default theory.” Within the limits of our cognition we may have to live with that option, for we may not be able to prove a validity-relationship between the sources. The three main formal sources are not hierarchically ordered and the sources are themselves not normatively connected.¹¹¹ Applied to current international law this would mean that both “*pacta sunt servanda*” and “*consuetudines sunt servanda*” are examples of a *Grundnorm*. No constitution which binds these two types of norms in one normative order is cognizable. Both types of law

¹¹⁰ Grigory Tunkin, “Is General International Law Customary Law Only?” 4 *European J. Int’l L.* (1993): 534-41.

¹¹¹ In 1920 Kelsen shows the theoretical possibility of this solution: Kelsen (1920), *supra* note 53, at 106-07.





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may be part of international law, but may only be *empirically classified as such*. Without an overarching constitution regulating what kinds of formal sources international law has, the two or three sources might be two or three different legal normative systems. This might well be the consequence of the current mainstream of international legal scholarship that sees the sources as “equals.”¹¹²

The fundamental problem of the sources of international law is this: No meta-meta source-law is apparent. No such thing as a law on the formation of law, a law specifying the forms international law may take, immediately appears to our senses, imposes itself upon us, blinds us to other possible architectures of the highest echelons of law. The constitution of international law may lack positivity, i.e. it may be a product of thought, not of will; it may exist only in the minds of the scholars who have the time to muse about the theory of international law. The law's, the norms', ontology, its ideal existence, is one of boundless possibility, limited and shaped only by the arbitrary act of will of those humans empowered by norms to create norms. If one wants to account for the will of the subjects of law, one must adhere to the demand

¹¹² Bos (1977), *supra* note 91, at 73-74; Cassese (2001), *supra* note 91, at 117-18; Gihl (1957), *supra* note 91, at 75; Neuhold (2004), *supra* note 90, at 31.





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to describe only positive norms. The constitution of international law may also simply be very hard (or impossible) to perceive. Its unwritten nature, its contentiousness and the structural problem of accurately defining the definition make it impossible to ascertain which claim to the “truth” corresponds with positive law. This epistemological difficulty—if, indeed, it is merely a problem of epistemology and not of a lack of norms—results in a lack of provability.

III. CONCLUSION

Kelsen’s analysis of the problems was useful for both topics, but in different ways. The Pure Theory is critical of traditional international legal scholarship, deconstructive even, not for the sake of deconstruction, but for the sake of consistency to the core idea of normative science: consistently maintaining the dichotomy of Is and Ought. It is precisely its consistency that makes the Pure Theory deconstructive; it forces us to re-think our *dogmata* and to challenge their foundations or bases. We might find that what we have taken for granted is not so well supported. It may be more destructive for some subjects of doctrine (Section II.B) than for others (Section II.A), but this is because, like the surgeon’s scalpel, it cuts straight and clean through the body of doctrine, irrespective





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of historically grown *doctrinaire* constructs, to show if and to what extent traditional doctrine can be squared with the categorical dichotomy of Is and Ought and the resulting possibilities of normative orders. The Pure Theory of Law is not a theory applicable only in domestic settings. It is the only theory with the only possible basis for the possibility of norms. Only on the basis of the Is-Ought dichotomy. Divergences between the Pure Theory and traditional doctrine of international law may occur throughout our subject; on the basis of the “only possible theory” presumption, it is the doctrine that must be re-interpreted, not the Pure Theory that needs to be discarded.





Modern War and Modern Law

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The wars of my time and my country have been varied. The United States has fought a cold war, postcolonial wars, and innumerable metaphoric wars on things like “poverty” and “drugs.” Our military has intervened here and there for various humanitarian and strategic reasons. The current war on terror partakes of all these.

When framed as a clash of civilizations or modes of life—secular and fundamentalist, Christian and Muslim, modern and primitive—the war on terror is reminiscent of the Cold War. Like the Cold War, the war on terror seems greater than the specific conflicts fought in its name. It transcends the clash of arms in Iraq or Afghanistan. On their own, those wars resemble postcolonial and anticolonial conflicts, as in Algeria and Vietnam. When we link the war in Afghanistan to women’s rights or the war in Iraq to the establishment of democracy, we evoke the history of military deployment for humanitarian ends.





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In our broader political culture, the phrase “war on terror” echoes the wars on drugs and poverty as the signal of an administration’s political energy and focus. At the same time, the technological asymmetries of battling suicide bombers with precision-guided missiles and satellite tracking has made this war on terror seem something new, as has the amorphous nature of the enemy made up of dispersed, loosely coordinated groups of people or individuals imitating one another, spurring each other to action, within the most and the least developed societies alike.

Strictly speaking, terror is a tactic, not an enemy. The word is a way of stigmatizing the use of deadly force for political objectives by non-state actors one does not approve. When we say we are fighting a “war on terror,” we not only disparage the tactic and those who use it, we also condense all these recollections of prior wars in a single term, situating this struggle in our own recent history of warfare. The phrase frames our broader project with fear, and marks our larger purpose as that of reason against unreason, principle against passion, the sanity of our commercial present against the irrationality of an imaginary past. In this picture, we defend civilization itself against what came before, what stands outside, and what, if we are not vigilant, may well come after.





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It is not novel to frame a war in the rhetoric of distinction, waged by “us” against “them” or by “good” against “evil.” When the American administration calls what we are doing “war,” they mean to stress its discontinuity from the normal routines of peacetime. War is different. To go to war means that a decision has been taken: the soldier has triumphed over the peacemaker, the sword over the pen, the party of war over the party of peace. Differences among us are now to be set aside, along with the normal budgetary constraints of peacetime. This is serious and important. War is accepted as a time of extraordinary powers and political deference, of sacrifice and national purpose.

Increasingly, these distinctions between war and peace, civilian and combatant, terror and crime, have come to be written in legal terms. But war and peace are far more continuous with one another than our rhetorical habits would suggest. Should we have responded to September 11 as an attack or as a terrible crime? Are the prisoners at Guantanamo enemy combatants, criminals, or something altogether different? These are partly questions of tactic and strategy, about the appropriate balance between our criminal justice system and our military in the struggle to make the United States secure. But these are also questions of political and legal interpretation. We can imagine a spectrum of





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positions, from insistence that the country remain on a war footing, at home and abroad, to the view that we treat the problem of suicide bombing or terrorist attacks as a routine cost of doing business, a risk to be managed, a crime to be prevented or aggressively prosecuted. The boundary between war and peace or terror and crime has become something we argue about, as much or more than something we cross. Law has built practical and rhetorical bridges between war and peace, just as it has become the rhetoric through which we debate and assert the boundaries of warfare.

These immediate controversies will be better understood by stepping back to explore three ideas which stand behind modern conceptions of the law and warfare. First, modern war as a legal institution. Law has crept into the war machine. The battlespace is as legally regulated as the rest of modern life. Once a bit player in military conflict, law now shapes the institutional, logistical and physical landscape of war. No longer standing outside judging and channeling the use of force, law has infiltrated the military profession, and become, for parties on all sides of even the most asymmetric confrontations, a political and ethical vocabulary for marking legitimate power and justifiable death.

Second, the surprising fluidity of modern law. International law is no longer an affair of clear





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rules and sharp distinctions. Law today rarely speaks clearly, or with a single voice. Its influence is subtle, its rules plural. Legality is almost always a matter of more or less, and legal legitimacy is in the eye of the beholder. Indeed, as law has become an ever more important yardstick for legitimacy, legal categories have become far too spongy to permit clear resolution of the most important questions. They are spongy enough to undergird the experience of self-confident outrage by parties on all sides of a conflict.

Third, the opportunities and dangers opened up by this strange partnership of modern war and modern law. There are new strategic possibilities for both military professionals and for humanitarians seeking to limit the violence of warfare. When things go well, law can provide a framework for talking across cultures about the justice and efficacy of wartime violence. More often, the modern partnership of war and law leaves all parties feeling their cause is just and no one feeling responsible for the deaths and suffering of war. Good legal arguments can make people lose their moral compass and sense of responsibility for the violence of war





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I. FIRST, MODERN WAR AS A LEGAL INSTITUTION

It is now commonplace to observe that the Second World War, as a “total” war, in which the great powers mobilized vast armies and applied the full industrial and economic resources of their nation to the defeat and occupation of enemy states, is no longer the prototype. Experts differ about what is most significant about the wars that have followed.

Wars are rarely fought between equivalent nations or coalitions of great industrial powers. They occur at the peripheries of the world system, among foes with wildly different institutional, economic, and military capacities. The military trains for tasks far from conventional combat: local diplomacy, intelligence gathering, humanitarian reconstruction, urban policing, or managing the routine tasks of local government. It is ever less clear where the war begins and ends, or which activities are combat and which “peacebuilding.”

Enemies are dispersed and decisive engagement is rare. Battle is at once intensely local and global in new ways. Violence follows patterns more familiar from epidemiology or cultural fashion than military strategy. Networks of fellow travelers exploit the infrastructures of the global economy to bring





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force to bear here and there. Satellite systems guide precision munitions from deep in Missouri to the outskirts of Kabul. The political, cultural, and diplomatic components of warfare have become more salient. And the whole thing happens in the glare of the modern media.

But what does it mean to say that war has also become a legal institution or that war is the continuation of law by other means? Not that everyone always follows the rules or that everyone agrees on what the rules are or how they should be interpreted. But the media coverage of violations and interpretive differences could throw us off the track, leading us to underestimate the place of law in modern warfare. After all, the identification of violations also isolates the bad apples from the killing that law privileges and allows.

Law no longer stands outside conflict, marking its boundaries or limiting its means. Military operations take place against a complex tapestry of local and national rules. Laws shape the institutional, logistical, and even the physical landscape on which military operations occur. International law has become the metric for debating the legitimacy of military action. In all these ways, law now shapes the politics of war.

War is a legal institution first because it has





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become a professional practice. Today's military is linked to the nation's commercial life, integrated with civilian and peacetime governmental institutions, and covered by the same national and international media. Officers discipline their force and organize their operations with rules.

Some years ago, before the current war in Iraq, I spent some days on board the *USS Independence* in the Persian Gulf. Nothing was as striking about the military culture I encountered there as its intensely *regulated* feel. Five thousand sailors, thousands of miles from base, managing complex technologies and weaponry, constant turnover and flux. It was absolutely clear that even if I could afford to buy an aircraft carrier, I couldn't operate it. The carrier, like the military, is a social system, requiring a complex and entrenched culture of standard practices and shared experiences of rules and discipline.

War is a complex organizational endeavor, whose management places law at the center of military operations. Law structures logistics, command and control, and the interface with all the institutions, public and private, that must be coordinated for military operations to succeed. At least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation. This is less the mark of a military





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gone soft, than the indication that there is simply no other way to make modern warfare work, internally or externally. Warfare has become rule and regulation.

Mobilizing “the military” means setting thousands of units forth in a coordinated way. Branches of the military must be coordinated. Other departments must be engaged. Public and private actors must be harnessed to common action. Coalition partners must be brought into a common endeavor. Delicate political arrangements and sensibilities must be translated into practical limits and authorizations for using force.

Think back to the negotiations over the United Nations force in Lebanon. At issue were the “rules of engagement.” Who could do what, when, to whom? For politicians who will take the heat, it is important to know just how trigger happy (or “forward leaning”) the soldiers at the tip of the spear will be.

Operating across dozens of jurisdictions, today’s military must comply with innumerable local, national, and international rules regulating the use of territory, the mobilization of men, the financing of arms and logistics and the deployment of force. If you want to screen banking data in Belgium, or hire operatives in Pakistan or refuel your plane





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in Kazakhstan, you need to know the law of the place.

Baron de Jomini famously defined strategy as “the art of making war upon the map.” Maps are not only representations of physical terrain. They are also legal constructs. Maps describe powers, jurisdictions, liabilities, rights and duties. Law is perhaps most visibly part of military life when it privileges the killing and destruction of battle. If you kill *this way* and not that, *here* and not there, *these people* and not those, then what you do is privileged. If not, it is criminal. And the war must itself must be legal. Domestically, that means within the President’s constitutional authority as Commander in Chief. Internationally, it means in compliance with the United Nations Charter and not waged for a forbidden purpose, such as “aggression” or “genocide.”

Lawyers have long known that using law is also to invoke violence—the violence that stands behind legal authority. But the reverse is also true. To use violence is to invoke the law, the law that stands behind war, legitimating and permitting violence. Battlefield conduct is disciplined by rules: kill soldiers, not civilians. Respect the rights of neutrals. Do not use forbidden weapons. “Don’t shoot until you see the whites of their eyes.” Behind the rules stand general principles: no





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“unnecessary” damage. Any killing or injury must be “proportional” to the military objective. *Defend* yourself. Together, these principles have become a global vernacular for assessing the legitimacy of war, down to the tactics of particular battles. Was the use of force “necessary” and “proportional” to the military objective? Were the civilian deaths truly “collateral?” Military lawyers today are often forward deployed with the troops poring over planned targets.

The vocabulary that legitimates targeting and proportionate violence has been internalized by the military. Not every soldier and not every commander follows the rules. But this is less surprising than the fact that people on all sides discuss the legitimacy of battlefield violence in similar legal terms. This common vernacular has also leached into our political life. If war remains, as Clausewitz taught us, the continuation of politics by other means, the politics continued by warfare today has itself been legalized. The sovereign no longer stands alone, deciding the fate of empire. He stands instead atop a complex bureaucracy, exercising powers delegated by a constitution, and shared out with myriad agencies and private actors, knit together in complex networks that spread across borders. Even in the most powerful and well-integrated states, power today lies in the capillaries of social and economic life.





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To say that the Pentagon reports to the President as Commander in Chief is a plausible, if oversimplified, description of the organizational chart. But it is not a good description of Washington, D.C. There are the intelligence agencies, the president's own staff, the political consultants and focus groups. Born alone, die alone, perhaps—but sovereigns do not decide alone. The bureaucracies resist, the courts resist, the dead weight of inertia must be overcome.

Political leaders today act in the shadow of a knowledgeable, demanding, engaged and institutionally entrenched national and global elite. As a result, expert consensus can and does influence the politics of war. Consensus, for example, on whether Iraq had weapons of mass destruction, or that American credibility was on the line. The assessments of background elites are matters of ideological commitment and professional judgment. They can be incredibly stable, outlasting one leader after another, like the broad American consensus about the importance of “containing” the Soviet Union throughout the Cold War period. But elite opinion can also change, sometimes quite rapidly. This was clearly visible in the fallout from the prisoner abuse scandals in the Iraq war. They affected the political status of forces among elites debating all manner of broad and narrow issues relation to the conflict and Amer-





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ica's place in the world. Indeed, the global political system is a fragmented and unsystematic network of institutions, often only loosely understood or coordinated by national governments.

Law has become the common vernacular of this dispersed elite, even as they argue about just what the law permits and forbids. This is what has led opponents of the Iraq conflict, or Guantanamo, so often to frame their opposition in legal terms. They asserted that what the United States was doing was *illegal*.

II. MODERN LAW: ANTIFORMALISM AND LEGAL PLURALISM

Before considering the opportunities and dangers opened up by the legalization of war, we need to understand two aspects of modern law: its antiformalism and its pluralism.

Formalism crept into international law in the course of the nineteenth century. Two hundred years ago, international law was rooted in ethics. To think about the law of war was to meditate on considerations of right reason and natural justice. One hundred years ago, law had become far more a matter of formal rules, de-linked from morality and rooted in sovereign will. At the end





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of the nineteenth century, some lawyers seemed almost proud of law's disconnection from political, economic, and military reality.

Law stood outside the institutions it regulated, offering a framework of sharp distinctions and formal boundaries. War and peace were legally distinct, separated by a formal "declaration of war." For their killing to be privileged, warriors would need to be identifiable and stay on the battlefield. Protected persons, would need to stay *outside* the domain of combat.

In this spirit, lawyers wrote rules distinguishing combatants from non-combatants, belligerents from neutrals. As late as 1941, it seemed natural for the United States to begin a war with a formal declaration, as Congress did in response to Pearl Harbor. In the lead-up to both world wars, the United States carefully guarded our formal status as a "neutral" nation until war was declared. That Japan attacked the United States without warning and without *declaring* war, in violation of our neutrality, was a popular way of expressing outrage at the surprise attack.

Humanitarian voices supported the legal separation of war and peace, and often continue to insist on the sharp distinction between civilian and combatant. Just as they emphasize the ethical





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and legal distinctiveness of warfare. For good or ill, this approach is simply no longer realistic. Warfare has changed, law has changed, and humanitarians have developed new tactics.

For the humanitarian, doubt about an external strategy, sharply distinguishing the virtues of peace from the violence of war, often begins when we recognize how easily moral clarity calls forth violence and justifies warfare, just as war can strengthen moral determination. Indeed, there seems to be some kind of feedback loop between our ethical convictions and our use of force. Great moral claims grow stronger when men and women kill and die in their name, and it is a rare military campaign today that is not launched for some humanitarian purpose.

Ethical denunciation gets us into things on which we are not able to follow through, triggering intervention in Kosovo, Afghanistan, even Iraq, with humanitarian promises on which it cannot deliver. It can focus our attention in all the wrong places. After all, sexually humiliating, even torturing and killing prisoners is probably not, ethically speaking, the worst or most shocking thing that has happened in Iraq, yet the law of war focuses our outrage there.

We know that formal rules can often get taken





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too far. Is it sensible, for example, to clear the cave with a firebomb because tear gas, lawful when policing, is unlawful in “combat?” Absolute rules lead us to imagine we know what violence is just, what unjust, always and for everyone. But justice is not like that. It must be imagined, built by people, struggled for, redefined, in each conflict in new ways. Justice requires leadership, both on the battlefield and off.

For all these reasons, humanitarians also tried to get inside the thinking of the military profession. The International Committee of the Red Cross has always prided itself on its pragmatic relationship with military professionals. It is not unusual to hear military lawyers speak of the ICRC lawyers as their “partners” in codification and compliance. They attend the same conferences, and speak the same language, even when they differ on this or that detail. As external expressions of virtue became internal expressions of professional discipline, formal distinctions gave way to more flexible and pragmatic standards of judgment.

ICRC lawyers work with the military to codify rules that the military can live with, and want to live with. Exploding bullets are forbidden. Respect for ambulances and medical personnel is required. Of course, this reliance on military acquiescence limited what could be achieved. Military leaders





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outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defense would be too expensive or difficult. Moreover, narrowly drawn rules permit a great deal and legitimate what is permitted.

As a result, the detailed rules of The Hague or Geneva Conventions were transposed into broad standards, such as “proportionality,” that call for more contextual assessments, and can be printed on a wallet-sized card for soldiers in the field. “The means of war are not unlimited.” “Each use of force must be necessary.” Simple statements such as these have become ethical baselines for a universal modern civilization.

At the same time, the sharp distinction between war and peace, and the need for a “declaration,” or even the legal status of “neutral,” were abandoned. The United Nations Charter replaces the word “war” with more nuanced (and vague) terms such as “intervention,” “threats to the peace” or the “use of armed force,” which trigger one or another institutional response.

This did not happen in a vacuum. It was part of a widespread loss of faith in the formal distinctions of classical legal thought, and in the wisdom, as well as the plausibility, of separating law sharply from





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politics, or private right sharply from public power. In this new framework, humanitarians often try to expand the scope of narrow rules by speaking of them in the broad language of principles. Military professionals have done the same thing for other reasons, to ease training through simplification, to emphasize the im-portance of *judgment* by soldiers and commanders, or simply to cover situations not included under the formal rules with a consistent practice. For example, a standard Canadian military manual instructs that the “spirit and principles” of the international law of armed conflict apply to non-international conflicts not covered by the terms of the agreed rules.

It is not just that rules have become principles, we as often find the reverse. Military lawyers turn broad principles and nuanced judgments into simple bright line rules of engagement for soldiers in combat. Humanitarians comb military handbooks and government statements of principle promulgated for all sorts of purposes, to distill “rules” of customary international law. The ICRC’s recent three volume restatement of the customary law of armed conflict is a monumental work of advocacy of just this type.

Law’s century-long revolt against formalism has been successful. More than the sum of the rules, law has become a vocabulary for political judgment,





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action, and communication. At the same time, however, the modern law of armed conflict has become a confusing mix of distinctions that can melt into air when we press on them too firmly. “War” has become “self-defense,” “hostilities,” “the use of force,” “resort to arms,” “police action,” “peace enforcement,” “peace-making,” and “peace-keeping.” It is hard to remember which is which. Ours is a law of firm rules and loose exceptions, of foundational principles and counter-principles. Indeed, law now offers the rhetorical and doctrinal tools to make and unmake the distinction between war and peace. As a result, the boundaries of war can now be managed strategically.

Take the difficult question—when does war end? The answer is not to be found in law or fact, but in strategy. *Declaring* the end of hostilities might be a matter of election theater or military assessment. Just like announcing that there remains “a long way to go,” or that the “insurgency is in its final throes.” We should understand these statements as *arguments*. They are messages, but also weapons. Law and legal categorization are communication tools. Communicating is another way of fighting the war.

This is a war, this is an occupation, this is a police action, this is a security zone. These are insurgents, those are criminals, these are illegal combatants,





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and so on. All these are claims with audiences, made for a reason. Increasingly, defining the battlefield is not only a matter of deployed force, but also a rhetorical and legal claim.

Law provides a vernacular for making such claims about a battlespace in which all these things are mixed up together. Troops in the same city are fighting and policing and building schools. Restoring water is part of winning the war. It is the continuation of combat by other means. Private actors are everywhere: insurgents who melt into the mosque, armed soldiers who turn out to work for private contractors. Freedom fighters dressed as refugees, special forces operatives dressing like natives, private contractors dressing like Arnold Schwarzenegger, and all the civilians running the complex technology and logistical chains “behind” modern warfare. Who is calling the shots? At one point apparently the Swiss company backing up life insurance contracts for private convoy drivers in Iraq imposed a requirement of additional armed guards if they were to pay on any claim, slowing the whole operation.

In the confusion, we want to insist on a bright line. For the military, after all, defining the battlefield defines the privilege to kill. But aid agencies also want the guys digging the wells to be seen as humanitarians, not post-conflict combatants. They





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seek the privilege not to be killed. Defining the not-battlefield opens a “space” for humanitarian action.

When we use the law strategically, we change it. The Red Cross changes it. Al Jazeera changes it. CNN changes it. And the US administration changes it. Humanitarians who seize on vivid images of civilian casualties to raise expectations about the accuracy of targeting are changing the legal fabric. When an Italian prosecutor decides to charge CIA operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted.

In the Kosovo campaign, news reports of collateral damage often noted that coalition pilots could have improved their technical accuracy by flying lower—although this would have exposed their planes and pilots to more risk. The law of armed conflict does not require you to fly low or take more risk to avoid collateral damage—it requires you to avoid superfluous injury and unnecessary suffering. But these news reports changed the legal context, making the bombings seem “unfair.” Humanitarians seized the moment, developing various theories to demand “feasible compliance,” in order to hold the military to technically achievable levels of care. In conference after conference, negotiation after negotiation, representatives of the U.S.





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military have argued that this is simply not “the law.” Perhaps not, but the effect of the legal claim on the political context for military action is hard to deny.

As a result, strange as it may seem, there are now more than one set of laws of armed conflict. Different nations, even in the same coalition, will have signed onto different treaties. The same standards look different if you anticipate battle against a technologically superior foe. Or a weak and ill-equipped enemy. Although we might disagree with one or the other perspective, we must recognize that the legal materials are elastic enough to enable diverse interpretations. Amnesty International called Israeli attacks on Hezbollah “war crimes that give rise to individual criminal responsibility.” Israel rejected the charge that it “acted outside international norms or international legality” and insisted that “you are legally entitled to target infrastructure that your enemy is exploiting for its military campaign.” Who will judge?

In the United States, the Supreme Court or the ballot box might be the final arbiter. Does the detention center at Guantanamo violate the law in war or is it, in fact, a legitimate exercise of the President’s war power? If the justices of the Supreme Court make a ruling, they will have the





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final word. If they do not, there is always another election.

On the international stage, there is only the Court of World Public Opinion. As a lawyer, advising the military about the law of war means making a prediction about how people with the power to influence our success will interpret the legitimacy of our plans. What will our allies or our own citizenry say? If we will need the cooperation of citizens in Iraq, or Lebanon or Pakistan, what will they have to say? We have seen the cost in political legitimacy and international cooperation that comes from playing by rules that others don't recognize.

III. OPPORTUNITIES FOR HUMANISTS AND MILITARY PROFESSIONALS.

It is easy to understand the virtues of a powerful legal vocabulary, shared by elites around the world, for judging the violence of warfare. It is exciting to see law become the mark of legitimacy as legitimacy has become the currency of power.

It is more difficult to see the opportunities this opens for the military professional to harness law as a weapon, or to understand the dark sides of war by law. But the humanist vocabulary of international





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law is routinely mobilized by as a strategic asset in war. The American military have coined a word for this: “lawfare,” to describe the situation when law is used as a weapon, or as a tactical ally, or as a strategic asset, or as an instrument of war.

Law can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent. When the military buys up commercial satellite capacity to deny it to an adversary, contract is used as a weapon. They could presumably also have denied their adversary access to those pictures in many other ways. When the United States uses the Security Council to certify lists of terrorists and force seizure of their assets abroad, they have weaponized the law. Those assets might also have been immobilized in other ways.

It is not only the *use* of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one’s prerogative and a threat to cross that line and exact a penalty. This will take some getting used to. How should we feel when the military “legally conditions the battlefield” by informing the public that they are *entitled* to kill civilians, or when our political leadership justifies





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warfare in the language of human rights? We need to remember what it means to say that compliance with international law “legitimizes.” It means, of course, that killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified.

In 1996, I traveled to Senegal as a civilian instructor with the Naval Justice School to train members of the Senegalese military in the laws of war and human rights. At the time, the US military was the world’s largest human rights training institution, operating in 53 countries, from Albania to Zimbabwe. As I recall it, our training message was clear: humanitarian law is not a way of being nice. Compliance will make your force interoperable with international coalitions and suitable for international peacekeeping missions. To work with us, use our weapons, your military culture must have parallel rules of operation and engagement to our own.

Most importantly, we insisted, humanitarian law will make your military more effective, as an institution you can sustain and proudly stand behind. There is something chilling here in our attempt to build a culture of violence one can “proudly stand behind.”

When we broke into small groups for simulated





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exercises, a regional commander asked “when you capture some guerrillas, isn’t it better to place a guy’s head on a stake for deterrence?” Well, no, we patiently explained. This will strengthen the hostility of villagers to your troops, and others too, if CNN were nearby. They all laughed and assured us they would be sure to keep the press away. Ah, we said, but this is no longer possible.

If you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or, better, just over your shoulder. Not because force must be limited and not because CNN might show up, but because only force which can imagine itself to be seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, and more, *legitimate*. Indeed, we might imagine calculating a CNN-effect, in which the additional opprobrium resulting from civilian deaths, discounted by the probability of it becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity, as well as its tactical value and strategic consequences.

Law reminds the military professional of the landscape, and of the views, powers and





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vulnerabilities of all those who might influence the space of battle. Law frames the strategic question this way: who, understanding the law in what way, will be able to do what to affect our ongoing efforts? How, using what mix of behavior and assertion, can we transform the strategic situation to our advantage? These questions cannot be answered by a code of conduct. They require a complex social analysis of the dynamic interaction between ideas about the law and strategic objectives.

Not all military professionals think of the law in these terms. Many are suspicious about embracing law as a strategic partner. When I was in corporate practice, I often saw the same suspicion among businessmen. Law, they said, was too rigid, looked back rather than forward. In their eyes, law was basically a bunch of rules and prohibitions. You figure out what you want to achieve, and then, if you have time, you can ask the lawyers to vet it to be sure no one gets in trouble.

But these businessmen were not getting all they could from their legal counsel. Neither are military commanders or Presidents who think of law as a set of formal limits to be gotten around. What is difficult for us to realize is that a war machine which used law more strategically might, in fact, be far more violent, more powerful, and more





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(dangerously) legitimate.

Imagine a businessman contemplating a potential deal. Figuring out what law will govern the transaction requires a complex assessment of national and local laws and private arrangements, in whatever jurisdictions might seek to have, or simply turn out to have, transnational effects on the business. A good corporate lawyer will assess the impact of many legal regimes, considering who will *want* to regulate the transaction? Who will be able to do so? What rules will influence the transaction even absent enforcement?

Savvy clients do not treat the law as static. They seek to influence it. They forum shop. They structure their transactions to place income here, risks there. They internalize national regulations to shield themselves from liability. They lobby, they bargain for exceptions. Like businessmen, military planners routinely use the legal maps proactively to shape operations. When fighter jets scoot along a coastline, and build to a package over friendly territory before crossing into hostile airspace, they are using the law strategically, as a shield, and method of demarcation between what is safe, and what is not.

We know that corporations often lobby hard to *be regulated*. The food and drug industry wants





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federal safety standards in order to legitimize their products, defend against price competition from start-ups who do not invest in long term brand reputation, and to shield themselves from liability. They want to be able to claim that they have complied with all applicable legal regulations, so that if you die anyway, it is not their responsibility. Something very similar goes on in the military.

IV. THE DARKER SIDE OF MODERN WAR AND MODERN LAW.

The role of American lawyers assessing the Bush administration's approach to the treatment of detainees illustrates the difficulties. I shuddered when I read the legal memoranda provided to our civilian and military leadership by the lawyers at the justice department. However tightly reasoned their conclusions, this was legal advice tone deaf to consequences and strategic possibilities. The inattention to reaction, persuasion, strategy and to the world of legal pluralism and asymmetric warfare was astonishing. Our best legal minds had analyzed the legality of the President's proposed course of action as if this were something one could look up in a text and interpret with confidence. But we know that what can be done with words on paper can but rarely be done in the world of real politics and war. Politics and warfare are an





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altogether different medium for writing. It is the legal advisor's task to assess risks and reactions.

In the meantime, we have all learned how to argue for a stricter reading of international law. "Common Article 3" of the Geneva Conventions has been all over the news. We hear arguments for a stricter reading rooted in ethics, in the practicalities of interrogation, in the requirements of an effective public diplomacy. Were I the judge, I have no doubt how I'd rule. But in the international system there is no judge. Or we are all judges. In such a world, I hope the President's counsel considered the impact on discipline in our own forces of announcing so permissive an interpretation of what might be done in secret, off the map. Or the effect on our enemies, our allies, ourselves, of insisting so doggedly on our prerogatives. How did our assertions communicate American power?

Of course people will be detained and interrogated in war. That there might be those on the battlefield who were neither privileged enemy combatants nor protected civilians has long been recognized. But what was our *strategy* in marking these detainees with the neologism "illegal combatant," thereby flagging what we were doing as exceptional? Was it sensible to place such a diverse group of detainees in a common legal status? Could our lawyers have helped us to build





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a bridge between the criminal justice system and warfare, rather than a wall separating this conflict from the resources and habitual practices of each? Might they have used the problems of detention and interrogation to link offense abroad with defense at home, rather than stressing the *sui generis* nature of all that we do?

The best corporate lawyers help their clients to look forward to the next step, always asking those entering into a deal, how they will get out? What will happen when it goes wrong? What if the regulators don't buy it? What if the rules change? What if the business climate changes and you change your own mind about what to do?

Did the lawyers crafting our war on terror worry about how we would *unbuild* Guantanamo, and get these people out of this status?

It seems that they worried more about establishing principles of authority and limits to legality than about the war their client was starting to fight. They strategized for the law and for their ideas and legal theories about the President's authority, but not for the nation. Of course, maybe they told their client what he wanted to hear, and perhaps he has offered the American public the war they wanted to fight. But we know that statesmen and military commanders can find themselves trapped





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in a bubble. So do businessmen.

At its best, the law can be a great strategic mirror. How will this deal, this battle, this campaign, look in the eyes of the other? To think strategically is to treat the law as an index of reactions, or as predictions, in Holmes' famous formulation, of "what the courts will decide in fact, and nothing more pretentious." It is far too soon to know what the court of public opinion, at home and abroad, will ultimately make of our strategy for the war on terror, and how that opinion will be translated into political power. In the meantime, our nations' lawyers and judges seem utterly unaware of this concern.

But the dangers inherent in the modern partnership of war and law go beyond bad lawyering. More significant, is the loss of critical distance on the violence of war. As we all know, the United Nations Charter prohibited the use of force, except as authorized by the Charter itself. Not as authorized *by the United Nations*, but as authorized by the Charter. Like a constitution, the Charter was drafted in broad strokes and would need to be interpreted. Over the years, what began as an effort to monopolize force has become a constitutional regime of legitimate justifications for warfare.





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This system of principles has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that *could not* be legitimated in the language of the Charter. It is a rare statesman who launches a war simply to *be aggressive*. There is almost always something else to be said. Those initiating the use of force will assert that the province is actually ours, that our rights have been violated, that our enemy is not, in fact, a state, that we were invited to help, that they were about to attack us, that we are promoting the purposes and principles of the United Nations. There will always be an explanation.

A parallel process has eroded the firewall between civilian and military targets. It is but a short step to what the military terms “effects based targeting.” And why *shouldn’t* military operations be judged by their effects, rather than by their adherence to narrow rules that might well have all manner of perverse and unpredictable outcomes?

Indeed, I was struck during the NATO bombardment of Belgrade, which was justified by reference to the international community’s humanitarian objectives in Kosovo, to hear discussions about targeting the civilian elites supporting the Milosevic regime. If bombing the bourgeoisie would have been more effective than a long march inland toward the capital, would it





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have been proportional, necessary and humanitarian to place the war's burden on young draftees in the field rather than upon the civilian population who sent them there? Might not targeting civilians supporting an outlaw regime follow easily from the Nuremberg principle of individual responsibility? We must recognize that humanitarian idealism no longer provides a standpoint outside the ebbs and flows of political and strategic debate about how to achieve our objectives on the battlefield.

Conversing before the court of world public opinion, statesmen not only assert their prerogatives, they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy, just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, states must defend their prerogatives to keep them. States must back up their assertions with action to maintain their credibility. A great many military campaigns have been undertaken for just this kind of credibility as missiles are used as missives, to send a message.

The pragmatic assessment of wartime violence can be deeply disturbing. Take civilian casualties. Of course, civilians *will* be killed in war. Limiting civilian death has become a pragmatic commitment





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that there should be *no unnecessary damage, not one more civilian death than necessary*. In the vernacular of humanitarian law, no “superfluous injury,” and no “unnecessary suffering” should occur. It is here that we find the military’s public affairs teams preparing the way by explaining that they are entitled to kill, and expect to kill, some civilians.

You may remember Major General James Mattis, poised to invade Falluja, concluding his demand that the insurgents stand down with these words:

We will always be humanitarian in all our efforts. We will fight the enemy on our terms. May God help them when we’re done with them.

I know I shivered at his juxtaposition of humanitarian claims and blunt threats.

We need to understand how this sounds, particularly when the law of armed conflict has so often been a vocabulary used by the rich to judge the poor. When the Iraqi insurgent quoted on the same page of the *New York Times* as Mattis threatened to decapitate civilian hostages if the coalition forces did not withdraw, he was also threatening innocent civilian death, but without the humanitarian promise. And, of course, he also





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made me shiver.

When the poor deviate from the best military practices of the rich, it is tempting to treat their entire campaign as illegitimate. But before we jump to the legitimacy of their cause, how should we evaluate the strategic use of perfidy by every outgunned insurgency battling a modern occupation army? That evaluation forces us to encounter the different ways these statements are received by all the publics with the capacity to influence the military operations.

From an “effects-based” perspective, perfidious attacks on our military, such as firing from mosques, or attacks by insurgents dressing as civilians or using human shields, may have more humanitarian consequences than any number of alternative tactics the insurgents may have used. Perhaps more importantly, they are very likely to be interpreted by many as reasonable responses by a massively outgunned, but legitimate force. Indeed, even our own troops typically respond in at least two registers. In the first, it is all perfidy, such that the insurgents are barely recognizable as human, understand only force, know no boundaries, and deserve no mercy. But we also find a common recognition that, as one soldier put it “what would I do if this were my town? How would I fight—probably just as they are now.”





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I am often asked how today's wars can be seen as "legal" when our opponents, the terrorists, respect no laws at all. Of course, the role law will play in our own campaign will be a function of our own values and our own strategy. But the surprising thing is the extent to which even opponents in today's asymmetric conflicts argue about tactics in a parallel vernacular. In Lebanon, everyone was citing United Nations resolutions and claiming that their tactics were proportional, and their opponents' were perfidious. We should not be surprised to find various Palestinian factions differentiated by their interpretation of legitimate targets, whether they would kill Israeli civilians or only soldiers, in the territories or in Israel proper, and so forth.

We will need to become more adept at operations in a world in which the image of a single dead civilian can make out a persuasive case that law has been violated, trumping the most ponderous technical legal defense. At the same time, the legitimacy of wartime violence is all mixed up with the legitimacy of the war itself. If the use of force is to be proportional, using more force for more important objectives—it seems reasonable to think there would be a sliding scale for more and less important wars. Wars for national survival, wars to stop genocide might seem to justify more extreme measures than run of the mill efforts to enforce United Nations resolutions? There





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can be something perverse here in that harsher tactics might become more legitimate in more “humanitarian” campaigns.

It is in this atmosphere that discipline has broken down in every asymmetric struggle, when neither clear rules nor broad standards of judgment seem adequate to moor one’s ethical sense of responsibility and empowerment. In self-defense, we grant the most permissive rules of engagement. You hear about navy pilots briefed on all the technical rules of engagement, and then sent off with the empowering and permissive words “just don’t get killed out there—defend yourselves, do what’s necessary.” At the same time, all sides assess their adversaries by the strictest standards.

Technological asymmetry and legal pluralism leave everyone uncertain what, if any, rules apply their own situation. Everyone has a CNN camera on their shoulder. But who is watching? Is it the enemy, the civilians, your family at home, your commanding officer, your buddies?

Soldiers, civilians, media commentators, politicians, all begin to lose their ethical moorings. We can surely see that it will be hard for any Iraqi—or Lebanese—mother to feel it was necessary and proportional to kill her son. “Why,” she might well demand to know, “when America is so powerful





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and strong did you need to kill my husband?”

Here we can begin to see the dangers in turning the old distinction between combatants and civilians into a principle. But what can it *mean* for the distinction between military and civilian to have *itself* become a principle? The “principle of distinction” has an oxymoronic feel: either it is a distinction, or it is a principle.

I have learned that if you ask a military professional the question precisely how many civilians can you kill to offset how much risk to one of your own men, you won't receive a straight answer. Indeed, at least so far as I have been able to ascertain, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians. You expect more than 50 civilian casualties? Cheney's office needs to be informed.

As the law in war became a matter of standards, balancing, and pragmatic calculation, the difficult, discretionary decisions were exported to the political realm. But when they get there, they find politicians seeking cover beneath the same legal formulations. Judgment, leadership, and responsibility is in short supply.





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In the early days of the Iraq war, coalition forces were certainly frustrated by Iraqi soldiers who advanced in the company of civilians. A Corporal Mikael McIntosh reported that he and a colleague had declined several times to shoot soldiers in fear of harming civilians. “It’s a judgment call,” he said, “if the risks outweigh the losses, then you don’t take the shot.” He offered an example: “There was one Iraqi soldier, and 25 women and children, I didn’t take the shot.” His colleague, Sergeant Eric Schrupf chipped in to describe facing one soldier among two or three civilians, opening fire, and killing civilians: “We dropped a few civilians, but what do you do. I’m sorry, but the chick was in the way.”

There is no avoiding decisions of this type in warfare. The difficulty arises when humanitarian law transforms *decisions* about whom to kill into *judgments*. When it encourages us to think the young woman’s death resulted not from an exercise of human freedom, for which a moral being is responsible, but rather from the abstract operation of professional principles.

We know there are clear cases both ways, as when soldiers destroy the village to save it, or cause minor accidental damage en route to victory. But we also know that the principles are *most* significant in the great run of situations that fall





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in between. What does it mean to pretend these decisions are principled judgments? It can mean a loss of the experience of responsibility, whether it is command responsibility, ethical responsibility, political responsibility.

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians being counseled back to duty by their officers, their chaplains, or mental health professionals, who explained that what they had done was necessary, proportional, and therefore just.

Of course, if you ask leading humanitarian law experts how many civilians you can kill for this or that, you will also not get an answer. Rather than saying “it’s a judgment call,” however, they are likely to say something like “you just can’t target civilians,” thereby refusing to engage in the pragmatic assessments necessary to make that rule applicable in combat. In psychological terms, it is hard to avoid interpreting this pragmatism-promised-but-not-delivered as anything other than denial. A collaborative denial, by both humanitarians and military lawyers, of their responsibility for the decisions inherent in war. Indeed, the greatest threat posed by the merger of law and war is loss of the human experience of moral jeopardy in the face of death, mutilation and all





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the other horrors of warfare. Whatever happened was legitimate, proportional, necessary. Wherever responsibility lies, it lies elsewhere. Responsibility is relocated to the civilian command, to the bad apples among the troops, to the peregrinations of an ineffective diplomacy, or to the enemy, or the enemies of civilization itself.

V. CONCLUSION

With every passing year it seems that war has become more of a legal institution. Law has become a flexible strategic instrument for military and humanitarian professionals alike. As such, law may do more to legitimate than to restrain violence. It may accelerate the vertigo of combat and contribute to the loss of ethical moorings for people on all sides of a conflict. We modernized the law of war to hold those who use violence politically responsible. That is why we applaud law as a global vernacular of “legitimacy.”

Unfortunately, however, the experience of political responsibility for war has proved elusive. Recapturing a politics of war would mean feeling the weight of the decision to kill or let live. Most professionals flee from this experience. But citizens flee from this experience as well. We have all become adept in the language of war and law.





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We all yearn for the reassurance of an external judgment, made by political leaders, clergy, lawyers and others, that determines the boundaries of an ethically responsible national politics.

In a sense, the commander who offloads responsibility for warfare to the civilian leadership is no different than the foot soldier who blames the officers, the lawyer who faults the rules, or the citizen who repeats what he heard on the evening news. Clausewitz was right: war is the continuation of political intercourse by other means. When we make war, humanitarian and military professionals together, let us experience politics as our vocation and responsibility as our fate.







Linking Virtue and Justice: Aristotle on Melian Dialogue

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Inter arma silent leges.

Why should international law be obeyed? This question assumes there is a law to be obeyed, and that entities subject to the law have identifiable, concrete choices which could lead to obedience or sanctionable disobedience. It may be that neither of these assumptions is entirely justified. This paper will apply Aristotle's ideas about justice to the "Melian Dialogue," a debate between two Athenian generals and members of the Melian "magistrates and the few," as described by Thucydides in his history of the Peloponnesian War.¹ Aristotle suggested that justice is natural in the sense that it arises in relations between people

¹ Thucydides, *HISTORY OF THE PELOPONNESIAN WAR* 268 (Richard Crawley, tr., 2004) (1910) (hereinafter *WAR*). See generally, Frank Adcock and D.J. Mosley, *DIPLOMACY IN ANCIENT GREECE* (1975); Anton Powell, *ATHENS AND SPARTA: CONSTRUCTING GREEK POLITICAL AND SOCIAL HISTORY FROM 478 B.C.* (1988).





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as a necessary element in the fulfillment of their life in, and as, society. For all groups or populations, for all relationships, justice refers to the attribute of those relationships that is perceived as fairness and adherence to moral ideals or virtues. In constituted groups, or states, one important expression of justice is found in the constitution and laws. In this paper I examine how the idea of justice as a characteristic of international group behavior is often identified as international law, and how it is determined not only by the social structure of the individual members of the group (states), but also by the characters of the personalities involved. I examine the overlap of politics, foreign relations and international law. The Melian Dialogue offers a classic locus in which to examine these ideas.

The Athenian generals Cleomedes and Tisias, in the sixteenth year of the Peloponnesian War (between Athens and Sparta), were sent to subjugate the Island of Melos. Melos was a Spartan colony and, although claiming neutrality since the beginning of the War, had become actively hostile to Athens. The Athenian generals landed and the Melian elite went out to speak with them.² The Generals, in their famous speech, at one point put it to the Melians starkly:

² WAR, *id.*, at 268.





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For ourselves, we shall not trouble you with specious pretences... and make a long speech which would not be believed... since you know as well as we do that right... is only in question between equals in power, while the strong do what they can and the weak suffer what they must.³

This quote and some of the accompanying story is often recited at the beginning of discussions of just war theory, to introduce the question of international justice. For instance, Michael Walzer opens his well known book on just wars analyzing the Melian debate and its circumstances as an example of real-politik, as an exercise in necessity.⁴ The Melians must yield or be destroyed, while the Athenians face the necessity of consolidating their territory or being seen as weak and subject to losing the War. Walzer uses this story to argue against the realist position that international politics and matters of war are primarily expressions of power.⁵

³ *Id.*, at 269.

⁴ Michael Walzer, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 4 – 13 (1977).

⁵ This view of the Melian Dialogue is credited to the French classicist scholar Jacqueline de Romilly in her dissertation *Thucydide et l'impérialisme athénien, la pensée de l'historien et la genèse de l'œuvre*, (1947). See Wikipedia, *Jacqueline de Romilly*, http://en.wikipedia.org/wiki/Jacqueline_de_Romilly, last viewed May. 23, 2006. But some, such as Richard Ned Lebow, a political scientist, argue that Thucydides' main effect is to put political actors on notice





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He points out that if we accept the realist position moral discourse is foreclosed, and one can speak only of interests, not of justice.

I am not interested in this story as a way to introduce a moral discourse about war, but rather as a way to highlight some of the problems of transnational justice. There is little agreement about what justice requires, except within the narrow confines of specific homogenous communities. When different political communities come into contact with one another it is hard to know how to best resolve conflicts between them.⁶ Apart from power differentials, there seem to be few universal standards by which to judge the relative merits of the various positions or interests that find themselves in disagreement. The concept of justice requires a moral assumption that some solutions are better than others, or that certain inter-societal structures have fairer outcomes. But this intuition seems to occur more frequently among certain

that their actions will be judged by dispassionate reporters who will question the integrity of the political act. In this case it shows the moral decay of Athens, that it has become a power-mad tyrant, no longer Pericles' shining city on the hill. See Wikipedia, *Thucydides*, <http://en.wikipedia.org/wiki/Thucydides>, last viewed May. 23, 2006. See also Walzer, *supra* note 4.

⁶ See, e.g., WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS 3-10 (Robert C. Solomon & Mark C. Murphy, eds., 2000); see also, e.g., JUSTICE (Alan Ryan, ed., 1993); Hans Kelsen, WHAT IS JUSTICE?: JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE (1957).





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kinds of people. When confronted with a problem, everyone will have some sense of what would be a fair outcome, based on various factors, including psychological and factual considerations. But as the problems grow in scope, and begin to involve the welfare of large populations or states that do not share a common culture, it becomes increasingly difficult to agree on which solutions would be fair. Thus, international or transnational justice becomes the province of the elite, often made up of persons who have been educated in law, political science, economics, and other relevant disciplines that in theory inform their evaluations of international problems. All these disciplines seek justice. State structure is for justice; law is for justice; political theory is for justice; international and foreign affairs are for justice. In short, all societal structures relate to justice. Society is constructed and run largely by elites, and these elites have elaborated views of these justice-oriented principles.

Grasping what is fair and just, when the subject is states and large numbers of people, turns out to be exceedingly complex. There are innumerable parties whose interests, desires, and needs must be weighed and balanced. Aristotle's ideas of justice provide a useful analytic framework through which to develop some understanding of transnational justice. Aristotle's starting point is a general idea





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of justice based on an evaluation of whether there is an excess or a deficiency. Justice is having neither too much nor too little. This at first sounds like a concept of distributive justice, since it is quantitative, perhaps calling to mind Walzer's analysis in which all of justice is concerned with the impersonal distribution of goods.⁷ But Aristotle is not so easily pinned down. He locates general justice in the human being, as the proper development and ability to exercise all the virtues well. It is "complete virtue in relation to another."⁸ It is the capacity for virtuous interactions. Thus, in the realm of politics, it is not only about fair distribution of goods [equal goods for equal people],⁹ whether "honours or wealth,"¹⁰ but "living in accord with each virtue."¹¹ The problem of goods is one of equality. The emphasis is on the goods and attributes of the persons to whom the goods are being distributed. But in general justice the focus is on the character of the individual. The potential for

⁷ Michael Walzer, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

⁸ Aristotle, *NICOMACHEAN ETHICS* 1129b1 (Terence Irwin, tr., 1999) [hereinafter EN]. See generally *ESSAYS ON ARISTOTLE'S ETHICS* (Amélie Oksenberg Rorty, ed. 1980); J.L. Ackrill, *ARISTOTLE THE PHILOSOPHER* 135-155 (1981); W.D. Ross, *ARISTOTLE* 187-234 (1937).

⁹ *Id.*, 1131a30.

¹⁰ *Id.*, 1130b31.

¹¹ *Id.*, 1130b25.





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justice resides in individuals, but what we “call just is whatever produces and maintains happiness and its parts for a political community.”¹² For the most part this is the law, since the law “requires actions in accord with... virtues.”¹³ Justice is the norm in the individual that is right with “correctly established law,”¹⁴ and in this way the individual is linked to his or her constituted community. Since “a human being is by nature a political animal,”¹⁵ the end of the individual is subsumed into the end of the political community, “for the sake of living well.”¹⁶ Justice is a nested set of norms at one end residing in the habits of the individual and at the other in the structure of the state. If life proceeds in accord with these norms the people and the community both flourish.¹⁷ This is an outline of a robust theory

¹² *Id.*, 1129b18.

¹³ *Id.*, 1129b24.

¹⁴ *Id.*, 1129b25.

¹⁵ Aristotle, *POLITICS* 1253a3 (C.D.C. Reeve, tr., 1998) [hereinafter *POL*]. See generally Peter L. Phillips Simpson, *A PHILOSOPHICAL COMMENTARY ON THE POLITICS OF ARISTOTLE* (1998); W.D. Ross, *ARISTOTLE* 235-269 (1937).

¹⁶ *Id.*, 1252b28.

¹⁷ See also, *POL* 1280a24-1280b6. The picture is complicated by the idea that the constituted group, the state, exists “prior in nature to the household and to each of us individually, since a whole is necessarily prior to its parts.” *POL*. 1253a19. I bracket a discussion of the implications of this wholism. It suggests justice, or injustice, or just and unjust acts, are in a fundamental way determined by nature. A discussion of determinism and responsibility, especially with regard to the individual, is beyond the scope of this article.





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of justice that fits into and links Aristotle's theories of biology, ethics and politics. Although it requires familiarity with a complex worldview, it provides an intuitively correct, humane, and comprehensive theory grounded in individual and political life. The more fanciful work of contemporary scholars such as John Rawls and Michael Walzer seems somehow one-sided when compared to Aristotle.¹⁸

I now apply Aristotle's theory to the relationship between the Athenians and Melians described in Thucydides' Melian Dialogue. The problems faced by these antagonists, the arguments made, the postures adopted, and the possible solutions reached are remarkably similar to the basic problems of justice found in contemporary international disputes. This discussion also will provide a basis for considering current disputes about human rights injustices and their place in the international order.

I. THE MELIAN DIALOGUE¹⁹

The Melian dialogue took place towards the

¹⁸ See John Rawls, *A THEORY OF JUSTICE* (1971); John Rawls, *THE LAW OF THE PEOPLES* (1999); Walzer, *SPHERES*, *supra* note 7.

¹⁹ All references to the Melian Dialogue are from Thucydides, *THE PELOPONNESIAN WARS*, *supra* note 1.





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end of a negotiated peace (the Peace of Nicia) between Athens and Sparta (Lacedaemonia).²⁰ The Athenians sent two generals and their forces to the island to complete their hegemony in the Aegean Sea, peacefully if possible, otherwise by force. The dialogue occurs between the two generals and some members of the Melian elite (oligarchy). The underlying question concerns justice as noncompliance with one, the law or two, fairness.²¹

There are several bodies of law or treaties that could apply to the Athenian aggression.²² Melos a remote island in the Aegean Sea in Athenian territory was a colony of Sparta. It had claimed neutrality at the outbreak of the War (431 BC). In 425 Athens began to try to enroll Melos as its colony, since Athens was a sea power and did not like islands it did not control. Melos rebuffed Athen's offers, and at some point assumed a hostile attitude towards Athens. As a colony it had some legal claim on Sparta to protect it, assuming its treaty with Sparta included provisions for

²⁰ WAR, *supra* note 1 at 236-240; Adcock, DIPLOMACY, *supra* note 1 at 53-59.

²¹ Aristotle, EN 1137b13-24 (Terence Irwin, tr., 1999). *See also* J.L. Ackrill, ARISTOTLE THE PHILOSOPHER (1981).

²² For a general treatment of treaty law among the Greek city-states, *see e.g.*, David J. Bederman, INTERNATIONAL LAW IN ANTIQUITY 154-183 (2001).





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protection.²³ But at this point in the Pelopponesian War, Sparta was too weak. In addition, Sparta's power was on land, whereas Athens controlled the seas. Melos could not expect help from its historical ties to Sparta. Sparta and Athens had concluded the Peace of Nicaea, a peace treaty, several years earlier, but the intended subjugation of Melos was a sign of how far it had fallen apart.²⁴ Both the Athenians and the Melians had laws, but there was no treaty between them. The Athenians may have had laws that govern their generals, but these play no role in the dialogue. Melos was an oligarchy,²⁵ and this fact does play a role.

Athens and Melos were both states in the sense that they each had citizens who shared a national territory, cooperated to prevent wrongdoing, and sought the mutual benefit of the fellow citizens and families.²⁶ Both states had a constitution, and laws based on that constitution, to organize public life and guarantee justice among the citizens.²⁷

²³ *Id.*, at 155-159.

²⁴ See WAR, *supra* note 1 at 229-274; Adcock, DIPLOMACY, *supra* note 1 at 45-59; POL, *supra* note 15 at 176-181; Bederman, *supra* note 22 at 156.

²⁵ WAR, *supra* note 1 at 9.

²⁶ Aristotle, POLITICS 1280b29-41 (C.D.C. Reeve, tr. 1998) [hereinafter POL].

²⁷ EN, at 1159b25 – 1161b11.





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Our story is about two states and we are interested in extracting insight about justice from it. Each state has its own system of justice embodied in its laws, but these laws do not extend to cover the conflict between the two states. Since there appear to be no overarching laws to govern the conflict, the standards for its resolution must derive from justice or fairness or some similar measure which will be very hard to identify objectively.

On Aristotle's view, if we are going to look for justice outside of the law, it is appropriate to use the standard of fairness.²⁸ But how is the standard known and who is to apply it? Aristotle suggests that a "decent" or "respectable" person should know the standard because justice is apparent to anyone with a just character.²⁹ He distinguishes between just (or unjust) acts and just (or unjust) character.³⁰ A person with a just character can discern whether an act is unjust or not because she will have all of the virtues developed in her character, and justice is excellence of character, not intellect. Therefore, a decent person could look at our story and determine, in the absence of a system of laws, whether the acts of the Athenians

²⁸ *Id.* at 1137b13-24.

²⁹ *Id.*

³⁰ *Id.* at 1129a4 – 1138b11.





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(or Melians) were unjust, and, separately, whether the Melians (or Athenians) suffered an injustice.

But there is a problem. Who is this decent person? Does it make sense to assume that a decent Athenian and a decent Melian would reach the same conclusion? To ask the question more generally, is there a “natural” law by which acts that occur outside of a legal system can be judged in terms of justice? Aristotle suggests that there is.³¹ The Melian dialogue illustrates the problems raised. I will recite parts of the dialogue and then comment:

Thucydides: Melos was an island colony of Lacedaemon. As Athens expanded its empire, it was at first neutral, but in time became hostile to Athens. Athens sent an armed force to Melos and “before doing any harm to their land, sent envoys to negotiate.” The Melians did not bring the envoys (Generals Cleomedes and Tisias) before the people, but sent some magistrates and other important citizens to meet them elsewhere.

Comment: The status of Melos as a colony implies a treaty relationship between Melos and Lacedaemon. A treaty is an agreement that

³¹ *Id.* at 1134b19-1135a6.





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guarantees just behavior between the states (as defined above), but which creates no offices in common to make the citizens good and just; *i.e.*, it is an agreement between constituted groups, and is in that sense external to the justice system of the laws of either Lacedaemon or Melos.³² The treaty establishes rules by which to measure the interactions between Lacedaemon and Melos. The treaty is a standard of justice, a law governing the parties. But it is law in a different sense than law derived from a constitution, because constitutional systems are intended to serve more comprehensive purposes, encompassing a system of laws and enforcement regimes, enabling governing bodies, and systems of oversight for the purpose of ordering relationships in a unitary society.³³ We do not know from this dialogue what kind of mechanisms the treaty between Melos and Lacedaemon contained, but they did not rise to the level that unified the two policies in one state.

The issue of who can identify an injustice is presented here and will be developed below. There are five actors potentially represented: Athens, the Generals, the elites from Melos, the Melian

³² POL, at 1280a34-1281a1.

³³ Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L LEGAL THEORY 39 (2005); Louis Henkin, *Elements of Constitutionalism*, Center for the Study of Human Rights Occasional Paper (1992).





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citizens, and Sparta. It is not clear whether a state is the same as its citizens. For the present I will assume that they have separate identities but a common concern. Athens the state is presented as wanting to expand its empire as part of its strategy to consolidate rule of the seas. The Generals represent Athens, but they also are potentially decent people that can recognize injustice when they see it. The Melian elite are like the Generals, potentially decent people; but they are presented here as being directly responsible for the welfare of their citizens in a way the Generals are not directly responsible to the Athenian citizens. Lacedaemon remains unrepresented in the dialogue, except as a potential, but probably not actual, guarantor of Melian security.

Generals: Since the negotiations are not to go on before the people, in order that we may not be able to speak straight on without interruption, and deceive the ears of the multitude by seductive arguments which would pass without refutation (for we know that this is the meaning of our being brought before the few), what if you who sit there were to pursue a method more cautious still? Make no set speech yourselves, but take us up at whatever you do not like, and settle that before going any farther. And first tell us if this proposition of ours suits you.





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Comment: The Athenians want the Melians to surrender, and one of their strategies was to go straight to the Melian populace (demos) to deceive them into surrendering. The Generals thus reveal the intention of Athens. This is the first clue to unraveling the problem of justice, because an act of injustice can only be done intentionally (although an unjust act may be done unintentionally). For an act of injustice, the agent must be acting with knowledge of the person (Melians), instrument (war apparatus), and goal (subjugation), and the agent must not be acting in ignorance or because of force, and the act must not be coincidental to some other end.³⁴ There are complications here. Can a state have an intention and commit an injustice? Or, is it the Generals that should bear the blame if such an act is an injustice? Is the fact that the Generals intended to deceive the Melians relevant to whether or not justice is being done? If the lie is successful and the Melians surrender, and the result is less suffering, has the lie resulted in less injustice than if the Generals lay waste to the Melians and all the while told the truth?

We are also told in this passage that the Melian elites have decided to keep the populace out of this negotiation. This detail in and of itself raises many questions. Is that how the Melian laws were set up?

³⁴ EN, at 1135a24-28.





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Or, did these ruling elites take it on themselves to meet the Athenians? Would it make a difference if the elite kept the Melian citizenry out of the negotiation because they did not want to the populace to be scared or did not trust the people to make the right decision?³⁵ The Generals seemed confident in their ability to convince the Melian people to surrender. Why would the elites not want the people to be involved in the substantive decision of how to respond to the Generals? We know from the story that the elites decided not to surrender and a great suffering was ultimately levied on the Melian people by the Athenians. It is clear that if the legal system of the Melians was set up so that the elites had legal authority to keep this matter from the populace and negotiate the matter on the populace's behalf, that this would not legally have been an act of injustice. But is this the kind of matter that is not planned as part of the legal system,³⁶ and therefore invokes the query as to fairness among the Melians?

The Generals offered the elite time to think about their offer and discuss it. This suggests fairness,

³⁵ Aristotle thinks the people can make the right decision much of the time, but not all the time. POL, at 1281b25-28.

³⁶ For example, is this a Schmittian emergency that justifies suspending the rights of citizenship? See, e.g., William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. Pol. Phil. 61 (2006).





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because had the Generals not intended to try to resolve the conflict peaceably, they would simply have attacked. But how is this to be interpreted in light of their goal to subjugate Melos? If the goal is unjust, can the means be just? Are there degrees of justice? Is the end more unjust if the means was also unjust? Perhaps, had the Melians accepted the injustice offered, the final injustice would not have been as great. This is an example of the strength of the idea of procedural fairness. We are tempted to give the Athenian generals some moral ground because they are offering an easier way, an option that reduces the risk of extreme suffering in return for a guarantee of colonization, but not destruction. Some theories of justice hold that if the procedure is fair, then the outcome must be just.³⁷ Legal systems often work on this principle. If a crime is committed, and the procedural requirements of the law are adhered to, the outcome is thought to be just. But, we will see, this conception does not offer a complete accounting for all problems of justice:

Melians: To the fairness of quietly instructing each other as you propose there is nothing to object; but your military preparations are too far advanced to agree with what you say,

³⁷ See e.g., Rawls, *A THEORY OF JUSTICE*, *supra* note 4. For a survey of different conceptions of justice, see *WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS*, *supra* note 5.





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as we see you are come to be judges in your own cause, and that all we can reasonably expect from this negotiation is war, if we prove to have right on our side and refuse to submit, and in the contrary case, slavery.

Comment: The Melians take note of the procedural fairness offered by the Athenians, but make a practical point based on their experience in human affairs. The Athenians' offer to settle now for less injustice is made in bad faith, according to the Melians', because the Athenians are ready for battle. Anyone who has prepared thus far, the Melians think, intends to finish the business for which he has prepared. It is an accepted form of negotiation to prepare for the worst but be willing to settle in order to reach a negotiated end. Lawyers are familiar with this principle in preparing for trial and being open to settle even after trial has begun. Perhaps we are seeing the introduction of a tragic series of evaluations made by the Melian elites, small miscalculations that lead to their destruction.³⁸ If there had been a system of procedural justice, for example, a mechanism in a treaty between Melos or Lacedaemon and Athens, then the risk of these miscalculations would be diminished, but there

³⁸ See Powell, *ATHENS*, *supra* note 1, at 182-184.





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were no such arrangements.³⁹

The Melians note that the Athenians are “judges” in their own cause. Thucydides, and the Melians, recognize that justice within and among the Athenians means something different than justice between the Melians and the Athenians.

The Melians also make reference to the idea of having “right” on their side. This idea of “right” signifies justice. If the Melians have justice on their side, they say, and for that reason refuse to submit, the Melians will be at war. If the Melians submit to the injustice, and go against the “right,” the end result will be slavery. The standard of justice the Melians’ reference must be natural law,⁴⁰ because there is no constitutional law that applies, and no treaty based law. The Melians’ reference to natural law by which justice or injustice can be

³⁹ The Peace of Nicia between Athens and Sparta did indeed have an arbitration provision, but the Peace was all but dead at the time of the Melian invasion. WAR, *supra* note 1, at 237 (“But should any difference arise between them they are to have recourse to law and oaths, according as may be agreed among the parties”).

⁴⁰ I use the terms “natural law” and “customary international law” interchangeably in this paper on the Aristotelian grounds that law arises naturally from the interaction of people. On this account there is nothing to suggest a manifestation of natural law cannot change to accommodate new social circumstances. If this is the case it becomes conceptually difficult to distinguish between customary international law and natural law. I do not mean to suggest this explanation is complete in any way, but it serves the purposes of this paper.





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identified suggests that the Melians' are "decent" people, virtuous people who are qualified to judge whether an act is just or unjust. The natural law they are referring to—"right"—has the quality of existing everywhere, independent of a state constitution and/or legislature, but that does not mean it is always the same.⁴¹ The Melians assert that submission to slavery is wrong, and that to seek to enslave, oppress or destroy another state is wrong. Since it is not legally wrong, it must be a moral wrong. Submission to slavery is morally wrong because it contradicts the purpose of the state, which is to provide an environment to make citizens good and just,⁴² and because it is unjust for a free person to be in a position of slavery.⁴³

Aristotle offers interesting and very relevant observations about slavery as a spoil of war.⁴⁴ He begins by noting that there are people who are naturally closer to being animals and that they are natural slaves. Likewise there are natural masters, and therefore the relationship between a master

⁴¹ EN, 1134b29-32.

⁴² POL, at 1280b39-1281a2.

⁴³ *Id.* at 1254b18-19. See also, Martha Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, in *ESSAYS ON ARISTOTLE'S ETHICS* 395, 420 (Amélie Oksenberg Rorty, ed., 1980) (hereinafter *ESSAYS ON ARISTOTLE*).

⁴⁴ POL, at 1255a3-1255b15.





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and slave is a natural one.⁴⁵ But, he goes on to point out, there is a kind of slavery that arises by law. In this case, he says, the “law is a sort of agreement by which what is conquered in war is said to belong to the victors.”⁴⁶ Many have challenged this kind of slavery, *i.e.*, slavery by force, as being unjust, even though it is legal. The conflict in these points of view arises because to be victorious in war implies virtue, as well as excellence, and the virtuous are natural rulers. It is, therefore, just that the more powerful rule. There is also justice in this conception of slavery, because it is lawful. On the other hand, the idea of justice implies benevolence, *i.e.*, a concern for the good of another, that slavery is not good for the slave. Furthermore, wars can be unjust, and it is not just that a person be enslaved if it is not his or her natural state.⁴⁷

Aristotle concludes that because when slavery is natural it benefits both master and slave, but when the master/slave relationship has been established by law or force it harms both master and slave because it is not virtuous, it is therefore unjust.⁴⁸ He implies, but does not directly state, that it is

⁴⁵ POL, 1255a1-2.

⁴⁶ POL, 1255a5-6.

⁴⁷ POL, 1255a3-32.

⁴⁸ *See also*, Plato, REPUBLIC, 338c, 343c.





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not the unjustness of the war that gives rise to the violation of natural law, but it is enslavement by force of law, which can occur after both just and unjust wars, which violates natural law. The focus seems to be on the use of force to maintain an unnatural relationship between people that gives rise to the injustice. Aristotle thus explains why the Melians thought the idea of slavery was not “right.”

Although we are separated by at least 2,300 years from these events and analyses, it is obvious they are as relevant today as they were then. The argument between what is naturally unjust and what the law or force allows, reflects a deep and intractable problem that seems to arise as a result of natural differences among human kind.⁴⁹

The Melians then agree to let the Athenians present their case:

Athenians: For ourselves, we shall not trouble you with specious pretences-either of how we have a right to our empire because we overthrew the Mede, or are now attacking you because of wrong that you have done

⁴⁹ See e.g., Plato, PHAEDO; Martin Luther King, Jr., *Letter From a Birmingham Jail*, April 16, 1963, available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html, last viewed July 11, 2006.





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us-and make a long speech which would not be believed; and in return we hope that you, instead of thinking to influence us by saying that you did not join the Lacedaemonians, although their colonists, or that you have done us no wrong, will aim at what is feasible, holding in view the real sentiments of us both; since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.

Comment: This is the famous core of the dialogue. The Athenians purport to cut to the chase and lay the truth on the table. “Let us have no more pretense,” they say, “we both know ‘right... is only in question between equals in power.’” Here the Athenians refer to another theory of justice, or perhaps it can be thought of as a condition of, or constraint on, the “right” referred to by the Melians. The Melians had asserted that it is unjust, or “wrong” to enslave them against their wishes, but the Athenians respond that that standard would only be relevant if the Melians were equal in power to them. But is that true? Why should a standard of justice apply only if the parties are of equal power? One might think it exactly the opposite because in a just society laws are to some extent for the protection of the weak.





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Aristotle explains that although justice seems to be equality, in fact it is a complicated matter that depends on political philosophy.⁵⁰ As a basis for the discussion of equality and justice, Aristotle first distinguishes general justice from special justice. Justice in general encompasses all virtues, and in some ways is synonymous with virtue and well-constituted laws. Injustice can be identified as unlawful or unfair acts. An act is unfair if it results in an excess or a deficiency. That is, what is just is the mean, *i.e.*, the state of being neither too much nor too little.⁵¹ But there is a kind of injustice (special injustice) that amounts to over-reaching associated with anything that can be divided among members of a community who share in a political system. Special justice is equal shares for equals while recognizing not everyone is equal. Equality as justice is spoken of in reference to special justice, not justice as the whole of virtue. Special justice is a virtue on par with courage and other individual virtues.⁵²

Democracy is the political system in which people think they are equally free and therefore unqualifiedly equal. On the other hand, oligarchy

⁵⁰ POL, 1280a10-11, 1282b20-23.

⁵¹ *See* EN, 1129a5-6.

⁵² *See Id.*





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is a system in which those who are unequal in some respect, think themselves unqualifiedly unequal, *e.g.* in property or wealth. As a result, democrats think themselves entitled to an equal share of everything because they are equal, whereas oligarchs think themselves entitled to an unequal share (more) of everything because they are unequal.⁵³ On these principles we can say justice is equality, but only for equals; and we can say that justice is inequality, but only for those who are not equals. But, Aristotle says, neither of these formulae work because people judge themselves badly and because they agree with what constitutes equality in the thing, but disagree what constitutes equality in the person.⁵⁴ Aristotle applies this problem of equality (as justice) in practice to argue that what constitutes the best political community is one which does not concern itself with the equal or unequal (special justice), but with creating conditions for nobility and political virtue (general justice). Aristotle would say that between the Athenians and the Melians there is no political justice because they do not share “in common a

⁵³ POL, at 1301a28-35. Powell notes the sarcasm or irony in the Athenian argument. The Athenians are democrats, but argue from the oligarchic position. There is equality (right), but only among equals. Since not everyone is equal, not everyone is entitled to the right. The Melians in turn respond with a democratic (Athenian) argument. Everyone is equal with regard to the right. Powell, *ATHENS*, *supra* note 1, at 182.

⁵⁴ *Id.* at 1280a12-15.





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life aimed at self-sufficiency,” nor are they free and either numerically or proportionately equal.⁵⁵

In this mix of possible ways to understand equality in a political context in which there is no community, i.e. between states, what do the Athenians mean that “right... is only in question between equals in power?” The Melians had used the term “right” to refer to a natural law that slavery by force is unjust. The Athenian response indicates that the idea itself of natural law is not applicable, not available for use, unless the two sides are equal. The Athenians reject the Melians’ idea of justice. Aristotle is clear that strength is a virtue and it is natural for some to be stronger than others. Justice can be found in relations among equals, so on its face there is philosophical support for the Athenians’ reference to equality among equals.

Before going further it is important to notice we are now discussing the terms of natural law. There are no statutes or constitutions to guide the international transaction facing the Melians and Athenians. Each tries to create the law, the standard by which justice can be measured, by argument, through rhetoric and reference to “rights.” Both states have sovereignty (autonomy),

⁵⁵ EN, at 1134a27-29.





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but neither can appeal to a shared system of law or government to regulate them both. The reference to natural law is an attempt to force recognition of such a common structure, albeit one that is changeable.⁵⁶

It is also clear to Aristotle that justice can be measured by the ends, not simply by the means. Procedural fairness is not enough, and in some ways the Athenians are making a procedural argument. They assert that all things being equal, it is just for the powerful to call the shots, and therefore what happens is just. The Melians, however, look to both the procedure and the end. They argue that right is on their side and therefore they are forced to take an uncompromising position. For them this right is deontic, a rule that should not be broken for utilitarian or other ends. But they also invoke right as end, arguing that for them it would be unjust to be enslaved by the Athenians. The Melians' argument is consistent with that of Aristotle.

Can it be said that either the Athenians or the Melians have a better claim to justice? On Aristotle's reading of politics and ethics, there is a law in nature and failure to adhere to it does not result in punishment by an authority, but degradation

⁵⁶ See footnote 39 for a discussion of natural law and customary international law.





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as a human being or political community. On this reading what is at stake between the Melians and the Athenians is virtuous life, and justice as character or general justice. The cost to the Athenians of pursuing their excessive (unjust) political conquest will be loss of reputation or moral degradation. People will be able to “name and shame” them, as our contemporary human rights workers say.

After invoking right as a standard for those equal in power, the Athenians state the rule of justice of the strong: “the strong do what they can and the weak suffer what they must.” On Aristotle’s general theory of justice, this statement represents injustice. On the Melian’s idea of natural law this statement also represents injustice. Contrary to the opinion of the Athenians, they exist in a matrix of natural principles which do provide a means with which to measure what is just and unjust, but this matrix is moral and easily ignored by those who cannot take their own measure well. It is a measure, in some ways, of the philosophical class of people, of people with the leisure time to contemplate and develop virtue and decency.⁵⁷ It is the Melian elite who assert natural law to the Athenians, and perhaps as decent people they felt it was important to try to guide the interaction with the Athenians in conformity with natural law,

⁵⁷ EN, 1177a13-18.





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rather than letting fear or deception carry the tide of public opinion to the shores of slavery. But here we must question again whether the Melian elite were indeed acting “decently,” with the highest virtue, or whether they were inflexibly sticking to the law without regard to the ends.⁵⁸ It is clear that their adherence to principle did lead to greater suffering, so how are we to interpret this? Aristotle again provides insight into this problem. He argues that the decent man is flexible and able to fill in the rules if the rules do not cover the situation.⁵⁹ Here the elite reference the rules where there are no laws, and meet one aspect of the test for decency. But it can be argued that because the elite clung to the rule, the fate of the Melians was much worse than had they not, and therefore they do not meet a different test of decency. This can be seen in Aristotle’s system as an act of special injustice because the elite claimed honor for themselves (in adhering to the “right”), and although they were increased in honor, their beneficiaries, the Melian populace, suffered egregiously:

⁵⁸ For a contemporary version of this argument in the context of the Vietnam War, see Thomas Nagle arguing that there are some things that are absolutely wrong, and R.M. Hare responding with a utilitarian argument that sometimes there are exceptions. Thomas Nagle, *War and Massacre*, in *WAR AND MORAL RESPONSIBILITY* 3 (Marshall Cohen, Thomas Nagle & Thomas Scanlon, eds., 1974); R. M. Hare, *Rules of War and Moral Reasoning*, in *WAR AND MORAL RESPONSIBILITY* 46.

⁵⁹ EN, at 1137b20-24.





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Melians: As we think, at any rate, it is expedient—we speak as we are obliged, since you enjoin us to let right alone and talk only of interest—that you should not destroy what is our common protection, the privilege of being allowed in danger to invoke what is fair and right, and even to profit by arguments not strictly valid if they can be got to pass current. And you are as much interested in this as any, as your fall would be a signal for the heaviest vengeance and an example for the world to meditate upon.

Comment: The Melians acknowledge the “injunction” of the Athenians not to speak of right, but only of interest, yet they consider themselves obliged to continue speaking of right. They now expand their earlier invocation of “right” by asserting it is the “common protection” of both the Melians and the Athenians. Because there is no treaty, they are invoking a system of natural law that appears to be agreed on; a system of custom that allows those in danger to appeal to the “fair and right” for protection. The Melians attempt to persuade the Athenians by reminding them that the right to claim against the “fair and right” even belongs to them, and if the Lacedaemonians come to the Melians’ protection the Athenians may need to call on that right themselves.





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Here we find another reference to the realities of diplomatic life. The Melians acknowledge that they are entitled to use any arguments possible to save themselves, even if they are deceptive, if there is a chance they will succeed. Although I have tried to describe the “decent man” standard, and use it to distinguish what the Melian elite are doing, it is not clear that the Melians could do anything other than what they are doing. If their assessment of the Athenians is accurate, *i.e.*, that the Athenians intend destruction without recourse, then the Melians have done all they can. However, as I read the dialogue so far there is nothing to suggest the Athenians wanted anything more than to reduce the Melians to slavery (as opposed to the wholesale slaughter that occurs later):⁶⁰

Athenians: The end of our empire, if end it should, does not frighten us: a rival empire like Lacedaemon, even if Lacedaemon was our real antagonist, is not so terrible to the vanquished as subjects who by themselves attack and overpower their rulers. This, however, is a risk that we are content to take. We will now proceed to show you that we are come here in the interest of our empire,

⁶⁰ It was not normal in Greek warfare hostilities to end with the total destruction of a state. Bederman, *INTERNATIONAL LAW*, *supra* note 22, at 155; Adcock, *DIPLOMACY*, *supra* note 1, at 196.





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and that we shall say what we are now going to say, for the preservation of your country; as we would fain exercise that empire over you without trouble, and see you preserved for the good of us both.

Comment: The Athenians express a lack of concern at the Melian threats of their own ruin; most importantly though, the Athenians again insist that they have come to seek a peaceful surrender. They recognize the good in preserving the Melian country and the Melian people. They recognize it as a good for both Melos and Athens. This strengthens the idea that the Melian elite made the wrong decision in the interest of adhering to the law. Thus, the Athenians in fact look to the good of the Melians in their offer. Although they depend on force, this is beginning to look like virtuous force, or, if not virtuous, at least force with practical reason. What interest would it serve for the Athenians to destroy the Melians if they surrendered and acknowledged their fealty to Athens? They are currently a colony or protectorate of the Lacedaemonians, who are acknowledged to be better masters than the Athenians, yet the fact of being a colony remains. What choices do the weak have, but to align themselves with the powerful? On this line of reasoning, the Melians will have justice through the Lacedaemonians or the Athenians, but it will be more or less the same justice (as a colony).

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The conversation continues with the Melians questioning the wisdom of this course of action for the Athenians. In responding, the Athenians point out that their subjects think of themselves as equal to one another, that they seek to colonize the Melians for security purposes, and that they recognize it is the liberty of other neutrals that keeps them (the neutrals) from attacking or rebelling against the Athenians. Clearly in these lines the Athenians recognize many aspects of just rule: the equality of subjects, the need for security, and the value of liberty in keeping the peace.

The Melians, still threatening the Athenians, then assert it would indicate “great baseness and cowardice” if they who were still free did not do everything in their power to resist submitting to their yoke. The Melian elite continue to cling to their ideals. They keep insisting to the Athenians that they have hope in the gods, and faith in the fact they are the just fighting the unjust. Their insistence supports the theme the Melian elite are being unjust by seeking to protect and strengthen their honor.

The Athenians press reality, noting that it is a law of nature that men rule when they can, and that the Melians would themselves seek to rule if they were strong. The Athenians were not the first to respond to this law, nor will they be the last. They





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point out that hope is slim protection, and it would not be dishonorable to “submit to the greatest city in Hellas, when it makes... the moderate offer of becoming its tributary ally, without ceasing to enjoy [the Melian] country.” Here the Athenians appeal to natural law also, but it is the law of the strong. They then describe their offer of surrender in what appears to be generous terms; certainly terms that rational men would strongly consider.

But the Melians preferred to put their trust in fortune, and soon they were under siege. Within a year, in retaliation for Melian resistance against the surrounding Athenian forces, and with the aid of Melian traitors, Athens slaughtered all the Melian males, made slaves of the women and children, and populated the city with its colonists.⁶¹

The Melian Dialogue has many lessons. The story illustrates the vital importance of the negotiators themselves when states deliberate in the absence of clear international law. We see fairness being created (and uncreated) as the Melians and Athenians negotiate. The customary international norms are entirely present in the minds of the negotiators, but it is a combination of virtue, power and intelligence that ultimately determines the amount of suffering (injustice) that will result.

⁶¹ WAR, *supra* note 1, at 273.





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When one initially hears the story, and reads the famous statement of the Athenian generals, one thinks that the powerful will simply use their power without consideration of the consequences. But, in fact the Athenian generals reveal a greater sense of justice than the Melian elite. They are well aware of the importance of keeping their citizens and involuntary subjects relatively free and happy; otherwise the citizens cause problems for the state in the form of rebellions and war. In a sense, what the Athenians offer to the Melians is an offer to switch allegiance from Sparta to Athens. If indeed Athens is the strongest ruler, then there is some merit in making the switch.⁶² Perhaps Athenian rule would be harsher than Lacedaemonian, but it would certainly be more secure and better in the short term for the citizens. The hubris of the Melian elite plays a decisive role in the outcome. They hold to honor, and reveal a tragic inflexibility in their judgment. The law to which they cling becomes unjust because it leads to defeat.

The final lesson is that justice as law or fairness resides in the hearts of man. It was individual Melians who recognized and asserted natural law, but imprudently. That is why Aristotle identifies justice as a virtue of character, and justice as the whole of virtue. A decent person, one who can

⁶² Athens lost the war. Powell, *ATHENS*, *supra* note 1, at 198.





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identify and be flexible in attaining justice, has all of the virtues developed in their character. This is a very high standard that requires training from an early age, and self-imposed discipline later in life. It is not normally found in the young. Many human rights may exist on paper, but they are identified and enforced by virtuous people.

II. HUMAN RIGHTS

Today we have a system of international justice established by agreement of most states of the world called the United Nations (UN) system. It consists of a fundamental or constitutional treaty, the UN Charter, and many subsidiary treaties, some of which are updated or recorded versions of long-standing treaties and understandings (custom), and some of which embody what are perceived as new ideas, such as human rights.

The UN Human Rights system is embodied in the International Bill of Human Rights (IBHR).⁶³

⁶³ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), the Optional Protocol to the ICCPR, the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, and the United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, all of which can be found on the internet at





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For citizens of states party to the treaties it establishes a system of protections for individuals, and to a lesser degree groups, from the power of the signatory state(s). As a system it relies for the manifestation or implementation of rights on the structure of a state.⁶⁴

Although the specificity with which human rights are articulated in the IBHR is new, the idea of human rights and the requirement of a state structure to implement them is not new. Johannes Morsink, in his analysis of the Universal Declaration of Human Rights⁶⁵ traces the idea of rights found in the IBHR to Enlightenment ideas stripped of references to God or Nature as their source,⁶⁶ but it is clear the idea of rights has ancient roots in many civilizations.⁶⁷

We can see in the Melian Dialogue and the Aristotelian commentary evidence of individual human rights as customary international law,

the UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, available at <http://www1.umn.edu/humanrts>, last viewed May, 4 2006.

⁶⁴ See Louis Henkin, *THE AGE OF RIGHTS* 1–50 (1990).

⁶⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

⁶⁶ Johannes Morsink, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 283, 284 (1999).

⁶⁷ Paul Gordon Lauren, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 4-16 (2003).





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evidence of the need for a state in order to implement or manifest the rights, and evidence of a comprehensive idea of rights as a theory of human flourishing and the state in ancient Greek thought. That rights have their origin much earlier than that is well understood and demonstrate in this analysis.

The Melian elite argued against slavery by claiming their rights as a free people who should not be enslaved. They argued that this justice or right applies equally to the Athenians. This suggests that the idea of the right to be free from slavery already existed as a norm of customary international law, although clearly it was conditional. The victor of a war could take slaves in some circumstances, yet as the Melians' pointed out, to enslave a free people is fundamentally unjust. Similarly, in contemporary international jurisprudence, the right to life is enshrined in the International Covenant on Civil and Political Rights, yet the law of war allows legal killing. The conditionality of a norm does not undermine its reality, or destroy its moral and rhetorical value. The Melians and Athenians manipulated conditional norms thousands of years ago much as politicians do today, and Aristotle's ethical and political writings reflect and elaborate attitudes towards enslavement by force that both the Melians and the Athenians already understood. To enslave those who should

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be free has been seen as unjust, and a violation of natural law for a very long time. The concepts of human rights and customary international law are neither new nor surprising.

Both the Melians and the Athenians also seem to have understood the importance of the state in defining and implementing universal human rights. Most slavery takes place in the context of state-sanctioned policies and most freedom survives in part because of state protection. The Melians knew this, and the world is not very different today. Rights are supported by the international law, and international law transcends state boundaries to apply equally to all people, but the state must implement or acknowledge such rights for rights to be enjoyed in fact.

Aristotle's description of positive law is no different than ours today. That is, he distinguishes natural and positive law in more or less the same way that we do today, although the philosophical underpinnings may be different.⁶⁸ Aristotle describes a comprehensive biological, ethical, and political philosophy that includes something I would argue is very similar to today's "human rights." Aristotle

⁶⁸ For examples of how Aristotle's thought on law has influenced contemporary legal and political theory, see ST. THOMAS AQUINAS ON POLITICS AND ETHICS (Paul E. Sigmund, tr. & ed., 1988); John Finnis, NATURAL LAW AND NATURAL RIGHTS (1980).





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recognized the pro-found importance of autonomy in a social organism. He may have balanced the interests of the individual and the state differently than we do (his system allowed slavery), but his belief that the highest end of states and their leaders is to provide the conditions for life to flourish, is mirrored, albeit in somewhat reduced form, in our human rights ideals. Amartya Sen and Martha Nussbaum have reintroduced Aristotelian norms through their advocacy for “development as freedom” and “capabilities.”⁶⁹

The commonalities between what we understand as rights today and what the Greeks of Thucydides’ and Aristotle’s time understood as natural law are far from trivial and suggest that Aristotle was right to pursue a comprehensive system that would link individual biological man with ethical ideals, and the community as state, for this offers an explanation of why the fundamental tensions between individuals and communities organized as states are the same today as they were some 2,500 years ago. There is no need to invoke Nature or God to explain these continuities, which anyone can find through self-examination and sensitivity to the patterns that define our lives.

⁶⁹ See e.g., *THE QUALITY OF LIFE (WIDER STUDIES IN DEVELOPMENT ECONOMICS)* (Martha Nussbaum & Amartya Sen, eds., 1993); Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999); Martha Nussbaum, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).





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III. THEORIES OF JUSTICE AND WORLD COMMUNITY

Aristotle has given us a comprehensive theory of justice that can be applied in any circumstance, although as in all cases in which there is no positive law, the means and ends he provides require an element of interpretation. But where there is law, either constitutional or law by agreement, such as in a treaty, then reaching a consensus should not be as difficult. One way to think of justice, in this context and consistent with Aristotle's idea of justice as constitution and law, is that if we find a system of justice then we have also found a state. This may not be a state that has been formally constituted in all its details, but rather the real sense of a group of people that they share a common location for the purposes of preventing mutual wrongdoing, exchanging goods, and for the benefit of individuals and families, so that every citizens of the state can live a self-sufficient and complete life.⁷⁰

There are now thousands of extant and active treaties covering the entire globe with an intricate web of duties and obligations, solving the thousands of practical day-to-day problems of global society. This web of treaties is a system of justice, revolving around

⁷⁰ POL, at 1280b39-1281a1.





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central treaties that have some characteristics of constitutions: the Charter of the United Nations, the IBHR, the World Trade Organization documents, the World Health Organization, and so on.⁷¹ Although we have trouble with particular problems of justice, these difficulties are not conceptual, but are practical. Decent men and women the world over would insist on the right of the poor to be assisted by their wealthier neighbors. There would be disagreement about the mechanisms and rules through which to manifest this right/duty, but not on the principle or the human right that hungry people should be fed and that hungry people have a claim on a virtuous society to the conditions in and with which to flourish. It may even be, that as Aristotle, Marx, and many others recognized, injustice for some is part of nature, and inescapable, structural.⁷² It

⁷¹ See Henkin, *Elements of Constitutionalism*, *supra* note 64.

⁷² See e.g., Nussbaum in *ESSAYS ON ARISTOTLE*, *supra* note 26; Karl Marx, *Capital*, v. 1, in *THE MARX-ENGELS READER* 429-431 (Robert Tucker, ed., 1978). LAW, JUSTICE, AND POWER: BETWEEN REASON AND WILL (Sinkwan Cheng, tr., 2004). For this observation by social epidemiologists, see B.G. Link and J. Phelan, *Fundamental Sources of Health Inequities*, in *POLICY CHALLENGES IN MODERN HEALTH CARE* (ed. D. Mechanic, L.B. Rogut, D.C. Colby, J.R. Knickmam, 2005); J.W. Lynch, G.D. Smith, G.A. Kaplan, J.S. House, *Income Inequality and Mortality: Importance to Health of Individual Income, Psychosocial Environment, or Material Conditions*, 320 *BRITISH MED. J.* 1200 (2000); M. Marmot, *The influence of income on health: Views of an epidemiologist*, 21 *HEALTH AFFAIRS* 31 (2002); Richard Wilkinson, *Putting It All Together*, in *SOCIAL DETERMINANTS OF HEALTH* (ed. Michael Marmot and Richard Wilkinson, 1999); J.W. Lynch, G.D. Smith, G.A. Kaplan, J.S. House, *Income Inequality*





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should be recognized that human decency is also natural and structural.

We already have a world government for many purposes, and the natural framework for even stronger international rules, in increasing complex and comprehensive institutions of the United Nations system. Naming and blaming, as practiced both by the Melians and by Human Rights Watch, is still a primary way that problems of justice are addressed. Moral degradation may still be the primary effect of injustice (with regard to the perpetrator), but the norms are articulated and decent people are keeping their eyes open. *Inter arma silent leges* was never a convincing argument.

International law should be obeyed, not only because it is just to obey the law, but because it causes degradation of character not to obey the law. The important dispute is about justice. There are strong disagreements about the nature of international law, but the widespread insistence that international law ought to be obeyed assumes that international law exists, whatever it may require in practice.⁷³ That the question must be

and Mortality: Importance to Health of Individual Income, Psychosocial Environment, or Material Conditions, 320 BRITISH MED. J. 1200 (2000).

⁷³ I refer to the Austinian arguments made by some members of the Federalist





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asked is itself evidence of the dispute about the character of international law.

Human beings, as individuals and members of various social entities, seek justice in their affairs. Dependence on law as a trope for justice is the norm, but justice is too easily reduced to law, and thus when a law is disputed, the conclusion is drawn that justice is also disputed, when such a conclusion is not always warranted. This line of confusion is reinforced by scholarly speculation about the relationship between morality and law. Morality and justice are conflated and perceived to be subjective, uncertain, and subject to individual bias. This need not be the case. A just person is capable of discerning how justice can be achieved in circumstances in which the law is absent or disputed. Often the argument could have been made in terms of morality or right, but the language is not as important as the solutions to the problems. *Realpolitick* is not necessarily the same as unvarnished self-interest. The Athenians' offer to the Melians may have been just, in the context of Athenian politics. Striving to obey the law will never solve all of our legal problems.

Society in the United States, that international law does not exist because there is no means of enforcement. This argument obviously ignores the efficiencies of private international law and much public international law, without which global society could not function on a day to day basis. Two examples out of thousands are financial markets and the postal system.

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Truth versus Justice: A Tale of Two Cities?

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A struggle was evidently in his face;
A struggle with that occasional look
Which had a tendency in it
to dark doubt and dread.¹

Most violent conflicts and human rights abuses now take place within state boundaries, among fellow citizens.² Thus, conflict-torn societies provide the most important battleground in the struggle to protect human rights.

Measures taken to protect human rights may

¹ Charles Dickens, *A Tale of Two Cities*, London: Penguin 1859/1994, p. 138.

² An earlier version of parts of this article, focusing on the general features of truth commissions and courts of law with respect to reconciliation in post-conflict situations (and less on the legal and philosophical reasoning underlying the choice of institution, which the current article sets out to contemplate) had been submitted to the conference on “Pathways to Reconciliation and Global Human Rights,” held in Sarajevo, Bosnia and Herzegovina, August 16th–19th, 2005. It has now been published as “Coping with Peace: Truth Commissions, Courts of Law, and the Pursuit of Justice,” pp. 33-44 in: *Local-Global: Studies in Community Sustainability*, Vol. 2 (2006).





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have serious implications for the long-term viability of peace. Lasting peace often depends on reconciliation between formerly contending parties, on overcoming the festering resentment produced by war. I shall call this “coping with peace.” Both truth commissions and criminal trials have been put forward as methods of reconciliation, which structure the conditions of peace and establish foundations for stability in the aftermath of a violent conflict.

The choice between these institutions may depend on which we consider to be more important, truth or justice. These choices are to some extent analogous to the two worlds described in Charles Dickens’ classic *Tale of Two Cities*. The two primary available options seem very similar, but their implications and effects could be quite different. The choice is very hard to make.

I. INTRODUCTION

Violent conflicts and human rights abuses that are committed within a country,³ whether by its

³ According to the *Conflict Barometer* published by the Heidelberg Institute on International Conflict Research (HIIC), of all the 36 violent conflicts in 2004 (3 classified as “wars,” 33 as “severe crises”), none were international ones. In this classification, however, it is important to take into account that the US-Iraq war has been considered a domestic one with the handing over of power to an





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state leaders, rebels, or factions, create long-term problems of hostility and reconciliation, which may have lasting consequences for the national welfare.

The measures a given state takes with respect to protecting human rights and punishing the perpetrators of grave human rights abuses, such as genocide, crimes against humanity, and war crimes, are likely to have effects on the social order within that state which, in turn, affects the prospects for peace.

Peace itself is hard to define. Perhaps it can “like heaven... only be negatively described.”⁴ A positive definition of peace would be more variable. “[T]here are infinite shades of peace and conflict, from the absolute peace of reciprocated love in domestic security, to the internecine hatreds of

interim government in Iraq on June 28th, 2004, well aware of the fact that the US led coalition forces still exert a paramount influence in the country, as opposed to being mere supporters of the new Iraqi authorities. If low intensity and non-violent conflicts are included, 2004 was the stage for a total of 230 conflicts, 164 of which classified as internal, only 66 as interstate ones. As for 2005 the total number of violent conflicts went down to 24. None of the two wars and 22 severe crises has taken place between states, all of them being intrastate. Cf. *Conflict Barometer*, available at: http://www.hiik.de/en/index_e.htm [accessed 06/20/2006].

⁴ Roger Scruton, *A Dictionary of Political Thought*, London: Macmillan 1996, p. 410.





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civil war.”⁵

The conduct of *war* represents organized violence.⁶ War denotes forcible contention between states or between factions inside states with the purpose of overpowering each other by armed forces in order to secure certain demands or aims. *Peace*, in the narrow sense of the word, amounts to the absence of war. However, in legal and political philosophy, and in neighboring fields of thought, the lack of belligerency is (nothing) but a necessary condition for peace.

A sufficient condition needs to include peace in a broader sense, indicating “a state of harmony between people or groups,” or “law and order within a state,” which, in Michael Walzer’s words, means “not the mere absence of fighting, but peace-with-rights, a condition of liberty and security that can exist only in the absence of aggression itself.”⁷ Ultimately, peace alludes to the absence of anxiety, or even pure personal tranquility, the feeling that everything is in its proper place. As Augustine put it, “[P]eace, in its final sense, is the calm that

⁵ *Ibid.*

⁶ Raino Malnes, *Kant om krig og fred: fortolkning og kritikk* [Kant on War and Peace: Interpretation and Critique], Oslo: University of Oslo 2002, p. 1.

⁷ Michael Walzer, *Just and Unjust Wars*, New York: Basic Books 1977, p. 51.





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comes of order.”⁸ “The wretched, however, insofar as they are wretched, are clearly not in a condition of peace. Therefore, they lack that tranquillity of order in which there is no disturbance.”⁹

There are many reasons that people may be in a state of misery, whether from personally experienced suffering, dissatisfaction with the present situation, the feeling of not getting what one claims as one’s right—or perhaps not having the opportunity to articulate one’s dissatisfaction. In such circumstances, people will not feel that they enjoy an “ordered equilibrium.”¹⁰ They will aspire to attain what they perceive as just, and to claim their rights, which will make reconciliation more difficult. Since “peace between man and man consists in regulated fellowship,”¹¹ true peace will require a peace of mind which is not attainable, so long as injustices continue.

If violations of human rights are left unrecognized and uncorrected, then “peace” will not be attainable

⁸ Augustine, in Vernon J. Bourke, *The City of God/Saint Augustine*, New York: Doubleday 1958, p. 456.

⁹ Augustine, in R. W. Dyson, *The City of God against the Pagans/Augustine*, Cambridge: Cambridge University Press 1998, p. 938.

¹⁰ Augustine, cf. *supra*, fn. 8.

¹¹ *Ibid.*





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in this stronger sense of the word. So long as there is mental anguish, there will not be peace or true reconciliation. In such cases, the end of open war will still persevere festering resentments, the sense of unsettled scores and a deeply felt need for individual or collective revenge. Thus, the danger of reprisal will always remain to threaten or undermine any truce between the parties.

Peace is, to be sure a very good thing, even in its weakest sense as the temporary cessation of hostilities. But the chance of achieving a lasting and deeper peace can pass, if the armistice is ill-considered or unjust. This is particularly true of long-lasting conflicts. Groups of people who have been fighting for a long time need to be (re-)socialized, to become accustomed (again) to spending their days in a state of peace with their previous enemies. “Coping with peace” in such circumstances, may be very difficult.

The question presented is how best to structure the response to widespread human rights abuses in internal conflicts, so as to achieve the deeper and more comprehensive values of peace, without promoting dangerous reactions or too much violence, either from the former perpetrators of human rights abuses, or from the victims themselves.





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Basically, there are two different approaches towards facing that challenge: employing truth commissions or leaving the task to tribunals and courts of law.

A. Truth Commissions and Courts of Law

Truth commissions are temporary bodies, usually with an official status, set up in order to investigate a past history of human rights violations that took place within a country during a specified period of time. In contrast with (*ad hoc*) criminal tribunals and (permanent) law courts, truth commissions do not possess prosecutorial powers to bring cases to trial, nor do they act as judicial bodies to investigate individuals accused of crimes. Their main role is truth finding, *i.e.* documenting and acknowledging a legacy of conflict and human rights abuses as a step towards healing wounds.¹²

Truth commissions are supposed to offer a “third way,” a compromise between the Nuremberg trials at the end of World War II and blanket amnesty and national amnesia.¹³ The significance of truth commissions is generally seen in their ability to establish the basis for a shared future. That

¹² Priscilla B. Hayner, “Fifteen Truth Commissions—1974 to 1994: A Comparative Study,” *Human Rights Quarterly* 16: 597-655, at 597ff.

¹³ Desmond Tutu, *No Future without Forgiveness*, London: Rider 1999, p. 30.





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task requires coming to terms with the past, and since it has often proven difficult to prosecute the architects and perpetrators responsible for political violence and human rights abuses, particularly where large numbers of people are involved,¹⁴ truth commissions have been put forward as a suitable remedy.

Truth commissions are said to be, at least potentially, capable of providing a more comprehensible record of past history than the trial of particular individuals. In contrast to permanent courts of law, the purpose of a truth commission is to provide an authoritative account of a specific period or regime, determine the major causes of the violence, and make specific recommendations about measures that are liable to prevent a recurrence in the future.

Whereas the main form of accountability provided by courts of law is the imposition of sentences, truth commissions are chiefly concerned with rendering moral judgments about what, in general, was wrong and unjustifiable, and thus to help “frame the events in a new national narrative of acknowledgment, accountability, and civic

¹⁴ As Müller-Fahrenholz (1997:IX) remarks, even in the case of Nazi war crimes fewer than 6,500 of the 90,000 cases brought to the court resulted in convictions.





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values.”¹⁵ Both approaches share the recognition that reconciliation is a necessity for coming to terms with a dreadful past and being able to move on with the future.

Whether reconciliation is best accomplished by pursuing truth or justice, the former is generally considered to be the strength of truth commissions, and the latter to be the primary attribute of war tribunals and courts of law. There is also a lively debate whether the national or the international level is the right arena for that purpose. Which is the appropriate institution for “coping with peace?”

II. WHICH IS THE APPROPRIATE INSTITUTION FOR COPING WITH PEACE?

Generally, it has to be assumed that a state in which serious human rights violations have occurred lacks in some fundamental way appropriate, viable institutions, to deal with or prevent the recurrence of such abuses. Usually, such states need to go through a process of transition in which to enhance or rebuild its faulty institutions.

The use of the word “institutions” here applies

¹⁵ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press 1998, p. 78.





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to “entities for dealing with (past) crimes in a formally regulated manner,” such as war crimes tribunals, truth commissions, and the like. They should also aim at “efforts of peace-building,”¹⁶ by which I mean any “action taken after a problem or crisis in order to help ensure that there is no recurrence of the problem: it may involve rehabilitation and reconstruction assistance generally, support of various kinds of institution-building, and specific practical programs like de-mining.”¹⁷ It covers establishing or strengthening democratic governmental as well as non-governmental organizations and “promoting formal and informal processes of political participation.”¹⁸ In that sense, “peace-building” alludes to the institutionalization of democracy, a process of socialization, and immersion in human rights norms.

Such a process includes the establishment and presence of international and transnational organizations such as Amnesty International, Helsinki Committee,¹⁹ and Human Rights Watch in

¹⁶ A term coined by former United Nations Secretary-General Boutros Boutros-Ghali in *An Agenda for Peace*, New York: United Nations 1995.

¹⁷ Gareth J. Evans, *Cooperating for Peace: The Global Agenda for the 1990's and Beyond*, St. Leonards, NSW, Australia: Allen & Unwin 1993, p. 39.

¹⁸ Cf. fn. 16, p. 32.

¹⁹ *i.e.*, a committee which is a member of the International Helsinki Federation for Human Rights.





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which most develop local branches that are able to help a given society to resist future threats to democracy and human rights, without international intervention. This process is consolidated:

when under the given political and economic conditions a particular system of institutions becomes the only game in town, when no one can imagine acting outside the democratic institutions, when all the losers want to do is to try again within the same institutions under which they have just lost. Democracy is consolidated when it becomes self-enforcing, that is, when all the relevant political forces find it best to continue to submit their interests and values to the uncertain interplay of the institutions.²⁰

Thus, in the ensuing sections I will proceed by underlining the importance of viable institutions for the attainment of lasting peace, with a special emphasis on the usefulness of truth commissions and tribunals, and how these each relate to the two primary values of truth and justice, and assist in the aim of coping with peace.

²⁰ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge: Cambridge University Press 1991, p. 26.





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A. The Importance of Viable Institutions

All states which are in the process of transition from a military rule to democracy have to face, at some point, the question of how to deal with human rights crimes committed under the previous regime. “For some [people] the punishment of perpetrators of past human rights crimes was not just a moral obligation and a matter of justice but also an essential act of deterrence against the repetition of such crimes.”²¹ Others “claimed that ultimately everybody was guilty, if not of human rights crimes as such, at least of political mistakes that led to violence and authoritarianism” and that, “rather than by bringing to justice military and police officers, the consolidation of a democratic regime was the only guarantee of avoiding new human rights violations in the future.”²²

While none of these claims may be given (*a priori*) preference, both depend on viable institutions, the former mainly in the narrow sense of the word, the latter in the broader. Concerns for impunity have to be adequately channeled into demands for

²¹ Francisco Panizza, “Human Rights in the Process of Transition and Consolidation of Democracy in Latin America,” pp. 168-188 in David Beetham (ed.), *Politics and Human Rights*, Oxford and Cambridge: Blackwell Publishers 1995, p. 170.

²² *Ibid.*, p. 171.





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institutional reform, including the security forces and, above all, the judiciary.²³ Likewise, democracy in itself provides no protection against future crimes; some human rights abuses continue, even after more than a decade of democracy, because of the weakness of existing democratic institutions.²⁴

Sometimes a country, especially a country in transition to democracy, cannot provide the needed institutions on its own. The judiciary (for example) might be politicized without real independence, and turning the law into an instrument of domination rather than a guarantee of justice. Civil society is often too weak, unused to exercising a controlling function in alliance with international and transnational organizations. In these circumstances, there may be a need for help of internationally administered or at least supervised institutions.

B. Institutional Characteristics of Truth Commissions and Courts of Law

²³ Cf. Jon Elster's admonition that "the perceived justice of social institutions and policies is a precondition for their long-term viability!" Jon Elster, "Arguments for Constitutional Choice: Reflections on the Transition to Socialism," chap. 10 in Jon Elster & Rune Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press 1988, p. 316.

²⁴ Panizza, cf. fn. 21, p. 178.





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B.1. Delimiting “Spheres of Responsibility”

(The) International institutions that help emerging democracies fall naturally into two classes: those that consider questions of state responsibility and those that relate to individual responsibility. The former include among others the Permanent Court of International Justice (PCIJ), established by the League of Nations in 1921, and its successor, the International Court of Justice (ICJ), “established by the Charter of the United Nations as the principal judicial organ of the United Nations”²⁵ in the aftermath of World War II.

According to Article 34 of the Statute of the ICJ, “[o]nly states may be parties in cases before the Court.” Furthermore, the Court’s jurisdiction is limited to those cases, which the parties refer to it. Thus, even in cases of massive abuses of rights in which one state has legal standing due to the *erga omnes* nature of the rights being violated, it cannot take the offending state to the ICJ if the latter does not consent to the ICJ’s jurisdiction in that case. And only those states honestly convinced that their conduct does not run counter to international law would be willing to subject themselves to that kind

²⁵ Article 1, Statute of the International Court of Justice, 26 June 1945.





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of jurisdiction.²⁶

But the main objection to institutions that can only consider state responsibility arises from the general characteristics of crimes as well as the special circumstances of our time: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can provisions of international law be enforced.”²⁷ Since the most serious crimes now mostly occur within a country, and are committed by state leaders against their own population, or by individuals against their fellow citizens, we need to turn our attention to institutions of individual responsibility.

B.2. Establishing Individual Responsibility

Institutions dealing with individual responsibility may roughly be divided into truth commissions, and courts of law. Furthermore, one may distinguish *ad hoc* from permanent institutions, and international from national ones. However, due to the nature of the crimes and the often serious institutional shortcomings of a regime

²⁶ Kriangsak Kittichaisaree, *International Criminal Law*, New York: Oxford University Press 2001, p. 13.

²⁷ Judicial Decisions (1947:221), International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946.





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in transition, national courts of law will often disqualify themselves from fulfilling this role.

The ensuing discussion will begin with truth commissions, followed by an introduction to *ad hoc* tribunals and permanent criminal courts. The implications and achievements of the diverging approaches will be pointed out in concluding remarks at the end of each section.

B.2.a. Truth Commissions

Over the past two decades, the call for truth commissions has been an often recurring event, usually in reaction to some more or less widespread, and more or less well-known cruelties that a sitting or former regime cannot deny anymore. According to Steiner,²⁸ the expression “truth commission” usually refers to a state organ set up in order to establish an overview over a past characterized by grave abuses of human rights through manslaughter, rape, torture, imprisonment without law and trial, mass murder, or disappearances. With respect to their characteristic time of genesis, truth commissions are generally also truly *ad hoc* bodies.

²⁸ Henry Steiner et al., *Truth Commissions: A Comparative Assessment. An Interdisciplinary Discussion held at Harvard Law School in May 1996*, Cambridge: Harvard Law School, Human Rights Program 1997, pp. 7-9.





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More than half of these truth commissions were established in Latin America²⁹ but countries as diverse as Germany, South Africa and the Philippines have established truth commissions, and others are likely to do so in the future.

B.2.a(1) Collapse versus Transaction

Truth commissions are usually the result of a transition from an authoritarian regime to democracy. The way in which those transitions take place often determines the competence any resulting truth commission will have. In a typology that has had a broad influence, Guillermo O'Donnell³⁰ distinguishes between transitions that occur by collapse and transitions that occur through transaction (also referred to as “pacted transition,”³¹ a situation where

²⁹ Argentina, Bolivia, Brazil, Chile, El Salvador, Guatemala, Honduras, Paraguay, Uruguay.

³⁰ Guillermo O' Donnell, “Transitions to Democracy: Some Navigation Instruments,” pp. 62-75 in Robert A. Pastor (ed.), *Democracy in the Americas: Stopping the Pendulum*, New York and London: Holmes and Meier 1989, pp. 63-64.

³¹ Cf. David Gairdner, “*Sannhet og regimeendring: Sannhetskommisjoners rolle i overgang fra autoritært til demokratisk styre*” [“Truth and Regime Change: The Role of Truth Commissions in the Transition from Authoritarian to Democratic Governance”], pp. 135-175 in Bård-Anders Andreassen & Elin Skaar (eds.), *Forsoning eller rettferdighet? Om beskyttelse av menneskerettighetene gjennom sannhetskommisjoner og rettstribunaler* [Reconciliation or Justice? On the Protection of Human Rights by Truth Commissions and Criminal Tribunals],





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the elites agree upon a compromise³²). In the former case, successive crises and failures of the authoritarian regime lead to an accumulation of pressure, until the rather sudden emergence of active and massive opposition or defeat in an external war compels the armed forces to a hasty retreat to the barracks, leaving neither time nor occasion for stipulating extensive “special arrangements” in exchange for their stepping back. Transitions by collapse are short; the incumbents have comparatively little control over who will become the main actors in the future and are thus unable to extract guarantees from the opposition not to investigate their crimes. Here, relatively “powerful” truth commissions, equipped with far-reaching powers of investigation competence may develop.

Transitions by transaction occur when the incumbents of the authoritarian regime are more sensitive to the “winds of change” and decide to open up the situation more gradually, in due time. In the ensuing negotiations with the opposition, the armed forces usually retain a considerable

Oslo: Cappelen Akademisk Forlag 1998, p. 150.

³² Terry Lynn Karl & Philippe C. Schmitter, “Modes of Transition in Latin America, Southern and Eastern Europe,” *International Science Journal*, No. 128: 269-289, at 275.

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degree of control over the situation and thus are able to impose certain conditions for surrendering office. Frequently, the crucial stipulation is that the coming democratic government will not investigate the authoritarian past. While democratic governments resulting from a transition by collapse have fewer policy constraints than those arising from a transacted transition, the former tend to be more seriously threatened in their survival by powerful, disaffected actors, who, in contrast to the transacted cases, have not had their crucial interests adequately accommodated in the new situation.³³

B.2.a(2) International vs. National Appointment

Another distinguishing feature of truth commissions is whether they have been set up by international or national authorities. Only four truth commissions have so far been internationally appointed: Brazil, El Salvador, Paraguay, and Uruguay. However, the terms “national” and “international” should not be restricted to states. A national commission may be appointed by a president or the executive power of a state, or independent national

³³ O’ Donnell, cf. *supra*, fn. 30.





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organizations.³⁴ International actors include the United Nations, the World Council of Churches (for example), but representatives of other countries' governments may also serve as initiators and sponsors of truth commissions.³⁵ Sometimes interaction across the levels of investigation takes place, diluting the division even more. The Guatemalan truth commission had been supported by the United Nations, but was appointed by the Guatemalan president.

B.2.a(3) Starting Points and Objectives

Despite the numerous and diverging approaches, most truth commissions have common starting points from which they have achieved their objectives. Often the right to justice was blocked by the not so residual powers of the military during the process of transition and by governments either unwilling or unable to risk challenging them. Thus, truth commissions became the main instrument in the inquiry in-

³⁴ Cf. the (unofficial) report issued in 1985 by the archdiocese of Sao Paulo: Arquidiocese de Sao Paulo, *Brasil Nunca Mais*, in Joan Dassin (ed.), *Torture in Brazil: A Report by the Archdiocese of Sao Paulo*, New York: Random House 1986.

³⁵ Elin Skaar & Bård-Anders Andreassen, "Oppgjør med alvorlige menneskerettighetsovergrep ved overgang til demokrati" ["Dealing with Serious Violations of Human Rights in the Transition to Democracy"], pp. 10-49 in Andreassen & Skaar (eds.) (cf. *supra*, fn. 31), p. 25.





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to the fate of all those “disappeared,” extrajudicially executed, tortured or denounced in the years of the authoritarian regime.³⁶

The first official report of that kind was that of the Argentinean National Commission on the Disappeared Persons, *Comisión Nacional Sobre la Desaparición De Personas*, CONADEP, which in 1984 published its report “Never Again,” “*Nunca Más*.” CONADEP catalogued 8961 “disappearances,” drew up testimonies of people released from secret detention centers and statements from members of the security forces who had participated in the repressive activities described in the report. After having established a precedent, similar reports with objectives reaching beyond the Argentine example were to follow.

In Chile, an officially appointed Commission for Truth and Reconciliation investigated human rights violations resulting in deaths or disappearances. Its findings were published in the so-called “Rettig Report” (named after the commission’s president) in 1991.³⁷ In contrast to the Argentine case, the Chilean truth commission was established by President Aylwin while the military, under

³⁶ Panizza, cf. *supra*, fn. 21, pp. 173 ff.

³⁷ Secretaría General de Cultura, Secretaría General de Gobierno, “*Informe de la Comisión Nacional de Verdad y Reconciliación*,” Santiago de Chile, 1991.





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General Pinochet, was still in power; it therefore met in camera and failed to name the members of the military regime responsible for deaths and disappearances.³⁸ However, the report went beyond the investigation of past crimes in that it also analyzed the causes of human rights violations, the behavior of the security services, the armed forces as well as the judiciary, and proposed a series of measures to ensure that there would be no recurrence of the massive human rights violations.³⁹

The case of South Africa added a further twist to the concept of truth commissions: conditional amnesty. According to the Promotion of National Unity and Reconciliation Act 34 of 1995, a “Committee on Amnesty” should assist the Truth and Reconciliation Commission. This committee was entrusted with the task of considering applications for amnesty and could grant amnesty if it was satisfied that the applicant had committed an act constituting “a gross violation of human rights” and made “a full disclosure of all relevant facts,” and that the act to which the application

³⁸ John Dugard, “Reconciliation and Justice: The South African Experience,” pp. 399-431 in Burns H. Weston & Stephen P. Marks (eds.), *The Future of International Human Rights*, New York: Transnational Publishers 1999, p. 410.

³⁹ Manuel Antonio Garretón, “Human Rights in Processes of Democratization,” *Journal of Latin American Studies*, Vol. 26: 221-234, 227.





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related was “an act associated with a political objective committed in the course of conflicts of the past.”⁴⁰ The criteria for deciding whether an act is one “associated with a political objective” are drawn from the principles used in extradition law for deciding whether the offense in respect of which extradition is sought is a political offense. The criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed “in the course of or as part of a political uprising, disturbance or event;” the gravity of the act; the objective of the act, and, in particular, whether it was “primarily directed at a political opponent or State property or personnel or against private property or individuals.” Furthermore, the relationship between the act and the political objective pursued, and “in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued”⁴¹ was to be duly considered. But once a person is granted amnesty that person would not be criminally or civilly liable in respect of the act in question.⁴²

⁴⁰ Promotion of National Unity and Reconciliation Act 34 of 1995, §§ 19 (3) (b) (iii), 20 (1) (b)-(c), at: <http://www.parliament.gov.za/acts/1995/act95.034> [06/20/2006].

⁴¹ *Ibid.*, § 20 (3)(f).

⁴² *Ibid.*, § 20 (7)(a).





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B.2.a(4) Achievements

The most important achievement, brought about through the groundwork and findings of bodies like the CONADEP and the other truth commissions that followed in its wake, probably was the establishment of the right to truth, *el derecho a la verdad*, which, as such, is not codified in the main international human rights treaties. This right became a major element in future peace processes, processes of transition to democracy and, more generally, the struggle for human rights. Advocates of the “right to truth” base it on the “right to identity”, arguing that “while death is the end of human life, it is not the end of a person’s right to identity. This right includes the right to know how a person’s life came to an end.”⁴³ Furthermore, some claim the public disclosure of information about the fate of victims of human rights crimes represents a “right to information” as grounded in Article 19, Universal Declaration of Human Rights (UDHR): “Everyone has the right to freedom of opinion and expression; this right includes freedom [...] to seek, receive and impart information.”

⁴³ Panizza, cf. *supra*, fn. 21, p. 176.





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B.2.b. Ad Hoc International Criminal Tribunals

In the course of the past century, four *ad hoc* international criminal tribunals had been set up, *viz.*, the international military tribunal at Nuremberg, the Tokyo Tribunal, the international criminal tribunal for the former Yugoslavia, and the international criminal tribunal for Rwanda. Furthermore, hybrid courts, such as the one for Sierra Leone, might now be added to that list. The Special Court for Sierra Leone is not, however, a distinctively international court, having been established by agreement between Sierra Leone and the UN rather than by the UN Security Council exercising its enforcement power under Chapter VII. The Court is located in Freetown, Sierra Leone, and staffed with Sierra Leonean along with international officials, and is not a typical example of an international tribunal. Likewise, although the Iraqi Special Tribunal was not an entirely domestic creation, with the US led Coalition Provisional Authority contributing significantly to the establishment of this institution, it does not qualify as an international criminal tribunal or merit further discussion here.⁴⁴

⁴⁴ The name under which the Iraqi Special Court now strives to be known (“Iraqi Higher Criminal Court”) bears further witness of the fact that it was conceived of as a national court.





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One of the major achievements of the *ad hoc* international criminal tribunals as initiated with the Nuremberg Tribunal seems, at first glance, to have a rather doubtful merit. The Nuremberg Tribunal violated the principle of legality, enshrined in most countries' constitutions as well as in Article 11 (2), UDHR, which states that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

In order not to violate the principle of legality, prosecutions of individuals before an international criminal court would require the pre-existence of at least two things. First, there would have to be international recognition that an individual, as opposed to a state, could be subject to criminal punishment by an international tribunal. Second, the conduct for which the individual could be held responsible would have to be proscribed by the international community of states as a crime subject to international sanctions, with a clearly defined set of penalties.⁴⁵

⁴⁵ Kittichaisaree, cf. *supra*, fn. 26, p. 14.





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B.2.b(1) The Nuremberg and Tokyo Tribunals

The International Military Tribunal at Nuremberg was set up after WWII by the four victors to whom Germany had surrendered unconditionally—Great Britain, France, the Soviet Union, and the US. Subsequently nineteen other states⁴⁶ endorsed its Charter. The Tribunal had four judges appointed by each of the four powers. The prosecutors were in the same way provided. The Tribunal had difficulty finding precedents for its proceeding.⁴⁷ This led many

⁴⁶ Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

⁴⁷ One oft-cited precedent is the trial and execution of Sir Peter von Hagenbach in Breisach, Austria, in 1474. He was tried for atrocities committed against civilians in an attempt to force them submitting to the rule of Duke Charles of Burgundy. After deliberation of the town by Austria and its allies (Berne, France, and the towns and knights of the Upper Rhine), he was tried before a tribunal of twenty-eight judges from the allied states, constituted especially for his trial. The tribunal convicted him of murder, rape, perjury, and other crimes against the “laws of God and man,” stripped him of knighthood and sentenced him to death. Since all judges were drawn from the confederate entities of the Holy Roman Empire, the “international” character of the tribunal and, subsequently, of the law applied has been negated. Discussed in Timothy L. H. McCormack, “From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime,” chap. 2 in Timothy L. H. McCormack & Gerry L. Simpson (eds.), *The Law of War Crimes: National and International Approaches*, The Hague/London/Boston: Kluwer Law International 1997, pp. 37-39. Another classical example constitutes piracy under international law. In fact, any state may assert jurisdiction over piracy (although the elements of the offence of piracy under their respective national laws may vary). The rationale behind this (“universal jurisdiction”) being the *lacuna* in the jurisdiction on the high seas and a place outside jurisdiction of any state. “However, pirates are





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to suggest that in proceeding with international criminal prosecution, the Nuremberg Tribunal violated the principle of legality but also in doing so established international criminal law by asserting the (pre-)existence of an international criminal code. This was quite a bold approach, born out of the felt necessity to react somehow to the serious crimes committed in the course of the recent war. The Nuremberg Tribunal “set precedents for future criminal prosecution of individuals before an international tribunal applying international criminal law.”⁴⁸

The International Military Tribunal for the Far East, also known as the Tokyo Tribunal, was set up by the United States Supreme Commander-in-Chief in Japan, who also appointed the eleven judges of the Tribunal, including those taken from a list of names submitted by the signatories of the Japanese terms of surrender.⁴⁹ The Tokyo Tribunal followed the reasoning of the Nuremberg Tribunal in applying its own Charter, proclaimed in January 1946, and modeled on the Nuremberg Charter.

tried by municipal courts and punishable under municipal law, not international law,” Kittichaisaree, cf. *supra*, fn. 26, p. 15.

⁴⁸ *Ibid.*, p. 16

⁴⁹ Apart from the US, these were Australia, Canada, China, France, Great Britain, the Netherlands, New Zealand, and the Soviet Union. However, India and the Philippines also provided judges.





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Apart from the violation of the principle of legality, both tribunals have sometimes also been criticized for dispensing victor's justice. Japan, e.g., was not allowed to accuse US officials before the Tokyo Tribunal of the atomic bombings of Hiroshima and Nagasaki, or to accuse the Soviet Union for its violation of the neutrality agreement of 13 April 1941,⁵⁰ nor was Germany allowed to accuse those responsible for the Allied terror bombings of Dresden before the Nuremberg Tribunal. Also, "the objectivity of the judges, drawn from allied countries, was in question."⁵¹ None of these reproaches may be set aside easily. However, the most important justification for the Tribunals, in retrospect, was the *ex post facto* endorsement of the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal," unanimously adopted by the UN General Assembly in Resolution 95(1) on 11 December 1946. This precedent is probably the greatest achievement of the Nuremberg Tribunal, reinforced by the Tokyo Tribunal.

⁵⁰ Yasuaki Onuma, "The Tokyo Trial: Between Law and Politics," in Chihiro Hosoya et al. (eds.), *The Tokyo War Crimes Trial: An International Symposium*, Tokyo: Kodansha 1986, pp. 45 ff.

⁵¹ Jeffrey S. Morton, *The International Law Commission of the United Nations*, Columbia, South Carolina: University of South Carolina Press 2000, p. 31.





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B.2.b(2) The ICT for Yugoslavia and Rwanda

Both the International Criminal Tribunal for the Former Yugoslavia⁵² (ICTY) and the International Criminal Tribunal for Rwanda⁵³ (ICTR) were set up by the UN Security Council exercising its enforcement power under Chapter VII of the UN Charter to maintain international peace and security. Therefore, all members of the UN are obligated to cooperate with the ICTY and the ICTR. The tribunals also share a number of other features.

Both are bound to apply rules of customary international law, and their proceedings are governed by almost identical Statutes and Rules of Procedure and Evidence. Unlike the Nuremberg Tribunal, neither the ICTY, nor the ICTR provides for trial *in absentia*.

The ICTY considers itself to be the first truly international tribunal established by the

⁵² Set up in 1993, pursuant to Resolution 808 of February 22nd, 1993, and Resolution 827 of May 25th, 1993, considering the widespread violations of international humanitarian law within the territory of the former Yugoslavia, including the practice of “ethnic cleansing”, a threat to international peace and security.

⁵³ Set up in 1994 by Resolution 955 of November 8th, 1994, in response to genocide and other systematic, widespread, and flagrant violations of international humanitarian law that had been committed in Rwanda.





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United Nations to determine individual criminal responsibility under international (humanitarian) law, while it regards the Nuremberg and Tokyo Tribunals as merely “multinational in nature, representing only part of the world community.”⁵⁴ Whether this is a sound evaluation remains a matter of opinion. The tribunals set up in the wake of the World War II probably deserve just as much credit for establishing the principle of individual criminal responsibility in international law. What really distinguishes the ICTY as well as the ICTR from the previous *ad hoc* tribunals is the co-existence of both concurrent jurisdiction and primary jurisdiction *vis-à-vis* national courts. Neither the ICTY nor the ICTR has exclusive jurisdiction over crimes included in its mandate. Article 8(1) of the ICTR Statute recognizes, for example, the complementary nature of the ICTR’s jurisdiction with respect to national courts. However, according to Article 8(2), the Tribunal may at any one time formally request any national jurisdiction to defer investigations or ongoing proceedings, thus asserting primary jurisdiction.

⁵⁴ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, ICTY Trial Chamber II, 7 May 1997, para.1. <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> [accessed 05/20/2006].





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B.2.b(3) Achievements

Establishing individual criminal responsibility and the subsequent (*ex post facto*) endorsement of the principles of international law on which this precedent was founded represents one of the most significant achievements of the *ad hoc* tribunals. Their other important contributions to the development of international law is lifting the basis of international criminal trials from a multinational (Nuremberg and Tokyo) to an international level (ICTY and ICTR) and stipulating the tribunals' concurrent and primary jurisdiction with respect to national courts.

B.2.c. Permanent Criminal Courts

Due to the particular circumstances of an authoritarian regime or a country in the process of transition, functioning national institutions, and hence trials before national criminal courts, might not be promising, viable options. The judiciary is often ailing, biased, or lacking independence altogether. Thus, it is of great importance to establish an international alternative to national criminal courts.





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B.2.c(1) The International Criminal Court

Concrete plans for a permanent international criminal court have been circulating at least since the days of the League of Nations. The idea itself may be traced back even further to the 1860s and to Gustave Moynier, one of the founding fathers of the International Red Cross.⁵⁵ Today, following the ICTY and the ICTR, the International Criminal Court (ICC), seated in The Hague, is in force and has concurring as well as primacy jurisdiction. Currently, four situations have been referred to the Office of the Prosecutor. So far,⁵⁶ investigations have been opened into three of these situations: The Democratic Republic of Congo, The Republic of Uganda, and The Dafur, Sudan.

The ICC has the power to exercise jurisdiction over the most serious crimes of international concern, as referred to in Article 5 of the Statute,

⁵⁵ On 3 January 1872, Gustave Moynier presented his draft for the establishing of a permanent international criminal court at a meeting in the International Committee of the Red Cross. The proposal was published in the *Bulletin International des Sociétés de secours aux militaires blessés* on 28 January 1872. Pointed out in Morten Bergsmo, "Folkerettslig belysning av 'etnisk rensing' i det tidligere Jugoslavia" [Evaluating "Ethnic Cleansing" in Former Yugoslavia from the Point of View of International Law], pp. 75-133 in Andreassen & Skaar (cf. *supra*, fn. 31), p. 98.

⁵⁶ As of 1 May 2006.





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which are genocide, crimes against humanity, war crimes, and the crime of aggression (the latter is yet to be defined). This jurisdiction is complementary to that of national criminal courts, so that national courts are still the primary institutions for trying violations of international criminal law. But under Article 17 of the ICC statute, ICC jurisdiction may be “activated” if the international court has reason to doubt the efficiency, capacity or willingness of a state party to prosecute perpetrators of these international crimes. In order to determine unwillingness in a particular case, the ICC shall consider whether: one, the national proceedings or decision had the purpose of shielding the person concerned from criminal responsibility; two, there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or three, the proceedings were not or are not being conducted independently or impartially, but with the intent not to bring the person concerned to justice.

In order to determine inability in a particular case the ICC shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. By virtue of Article 27, official positions shall not





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bar the jurisdiction of the ICC, nor shall they constitute a ground for reduction of sentence in any way. The Statute particularly emphasizes that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility,” Article 27(1).

B.2.c(2) Achievements of the ICC

The primary benefit of the existence of the ICC is that it bypasses the cumbersome and time-consuming process of setting up *ad hoc* tribunals for each new violation.

Increasing Legitimacy: Furthermore, the notion of sovereignty had been sidelined by the four *ad hoc* tribunals due to the unconditional surrender of Germany and Japan, and the exercise of the enforcement power under Chapter VII of the UN Charter by the UN Security Council in the cases of former Yugoslavia and Rwanda. The ICC reflects more contemporary attitudes toward sovereignty by emphasizing that not even state leaders may be exempted from individual responsibility for acts that do not pertain to legitimate functions of government. The ICC statute states fundamental principles unambiguously and in advance, which advances the principle of legality, deters potential





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future crimes, and increases the legitimacy of international criminal law and the courts applying it. No one may in future plead ignorance about the existence of international crimes, proscribed by international law.

The importance of the codification of international criminal law may be gauged by the words of Lord Nicholls of Birkenhead, when the British Law Lords held by a three to two majority in the *Pinochet* case, that the immunity of former sovereigns does not apply to charges of torture or hostage-taking:

[T]orture of his own subjects, or aliens, would not be regarded by international law as a function of a head of state[...]. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence[...]. This was made clear long before 1973 and the events which took place in Chile then and thereafter.⁵⁷

Effects on the Future: These words were written after the adoption of the Rome Statute, but long before the ICC actually came into force in 2002. Thus, the significance of the ICC, and its legal value

⁵⁷ *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, exp. Pinochet Ugarte* (Amnesty International and others intervening), House of Lords, 25 November 1998, *The All England Law Reports* Vol. 4: 897-947, 939 f.





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as reflecting the legal views (*opinio juris*) of an overwhelming majority of states, were established even before the Court came into being. As the ICTY expressed in the *Furundzija* case, “Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any rate, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.”⁵⁸

But how does that help us deciding which kind of institution to promote in the pursuit of peace? How do truth commissions and courts of law affect the prospect of peace in the aftermath of a conflict?

III. HOW DO TRUTH COMMISSIONS AND COURTS OF LAW, RESPECTIVELY, AFFECT THE PROSPECTS FOR COPING WITH PEACE?

Ultimately, all the institutions discussed above have one goal in common: the attainment of lasting peace. Likewise, both approaches claim that their path to peace includes reconciliation as the

⁵⁸ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, 10 Dec. 1998, para. 227. <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.htm> [accessed 09/20/2006].





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necessary precondition for coping with peace and thus for obtaining lasting peace. However, when it comes to pursuing peace, there are significant differences. Truth commissions put great stress on the “right to truth,” whereas tribunals and other (international) courts of law emphasize the importance of individual criminal responsibility, by putting perpetrators of international crimes to trial, and bringing them to justice.

Thus, if peace is what we aim at, it must be decided which is better. How do truth commissions and courts of law, respectively, affect the prospects for coping with peace?

A. Truth Commissions versus Courts of Law

Truth commissions and courts of law have different approaches and different capacities, strengths and weaknesses, whether or not they are international in scope.⁵⁹ National and international truth commissions need not be distinguished in evaluating their central benefits, nor is it necessary to distinguish between *ad hoc* tribunals and courts of law.

Moreover, as truth commissions are usually set up

⁵⁹ The arguments pointing in favor of truth commissions or courts of law, respectively, are merely strengthened by adding the international level.





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precisely where viable democratic institutions are lacking (otherwise recourse could have been taken to existing national criminal courts), domestic courts are not usually a viable alternative. Hence, the choice is usually between (for the most part) national⁶⁰ truth commissions and (international) courts of law.

A.1. Political Realism

It may be stated, in line with the classical realist tradition, that state practice (always) accords with political realities, an argument that in particular points to the “praetorian problem”⁶¹ that a not-yet-fully-fledged new regime has to confront. “Where the new regime has cause to fear a military uprising if its members are prosecuted, it would be wise to avoid such a course and to seek some alternative method of acknowledging the crimes of the

⁶⁰ Only four truth commissions were internationally appointed, viz. in Brazil, El Salvador, Paraguay, and Uruguay. However, since their investigations and presentation of findings were not decisively different from the national ones, presented negligible differences as to the outcome, I will not treat them as a separate issue. As a notion in passing, the relative similarity between the national and international approaches should not come as a huge surprise, bearing in mind that “internationally appointed” might only point to who took the initiative – the tasks may still have been executed by nationals of the particular country.

⁶¹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, Oklahoma: University of Oklahoma Press 1991, p. 231.



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past.”⁶² ⁶³

Furthermore, it has been asserted that “[a]ll that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise *incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.*”⁶⁴

Hence, a truth commission, even where it entails the granting of immunity from criminal prosecution to offenders, is to be preferred over the alternative of keeping “intact the *abstract right to such a prosecution* for particular persons without the evidence to sustain the prosecution successfully[...].”⁶⁵ If you lack the evidence required by a court of law in order to (at least having a chance of successfully) proving the guilt of perpetrators, the institution of a truth commission

⁶² Dugard, cf. *supra*, fn. 38, p. 407.

⁶³ Arguably, a regime that fears uprisings should it prosecute some of its own is not really a new regime properly so called. And if we take “its members” as referring to “members of the military,” then the “new regime” is indeed at least seriously weakened.

⁶⁴ Stated by Mahomed, Deputy President of the South African Constitutional Court, in *AZAPO and Others v. President of the Republic of South Africa*, 1996, para. 17, emphasis added. <http://www.doj.gov.za/trc/legal/azapo.htm> [accessed 08/02/2006].

⁶⁵ *Ibid.*



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becomes appealing as the only way to recognize and memorialize the crime.

The incentives which truth commissions provide in the absence of criminal sanctions, for truth-telling and truth-finding may outweigh the dangers of not prosecuting the perpetrators. Political realities may require certain compromises with absolute justice. Taking political realities into account constitutes a necessity, but we should not deceive ourselves into overemphasizing the “amount” of truth which truth commissions actually may yield or even into thinking that they always will result in “more” truth. Such considerations may yield quite opposing results.

As for the prospects of establishing truth “it is necessary to bear in mind that the very circumstances that prevent prosecution will place restrictions on the power of the truth commission.”⁶⁶ Thus, the truth commission for Argentina, set up by president Raúl Alfonsín in 1983 after the fall of the military *junta*, was able to carry out relatively thorough investigations—including holding public hearings and naming individual perpetrators—whereas the Chilean truth commission, established by president Aylwin while the military under Pinochet was still in power, was far

⁶⁶ Dugard, cf. *supra*, fn. 38, p. 409.





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more restricted in that respect.

José Zalaquett, leader of the Rettig-Commission in Chile, once claimed that it will always be so. Whenever there is a clear and distinct winner, there will be no truth commission. The winner will always put the losing side on trial.⁶⁷ Keeping that in mind, how much chance can there really be to establishing truth when a (relatively weak) truth commission is investigating a (still) strong and powerful (ex-)regime?

Even where there are prosecutions, state criminals often appear arrogant, bullying and self-righteous. They refuse to cooperate with the court, denying its jurisdiction and abusing the judges. As general Videla in the Argentine *junta* trial exclaimed: “Your Honours of this Court: You are not my natural judges. And for that reason you lack jurisdiction and legal authority to judge me.”⁶⁸ Former Yugoslav president Milosevic’s contempt of court in The Hague is just another example of this. Even under the threat of punishment for not cooperating perpetrators may refuse contributing to establishing the truth in order not to incriminate themselves. Most of the evidence leading to the

⁶⁷ Steiner, cf. *supra*, fn. 28, p. 70.

⁶⁸ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering*, Cambridge: Polity Press 2001, pp. 241-242.





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verdict could in any case have been established without any help from the accused. Securing cooperation may lead to greater speed or certainty, but it will also tend to diminish the punishment. Hence, when criminals refuse to contribute to establishing the truth even under the threat of punishment (for not cooperating), why should they behave differently in the face of a truth commission with no jurisdiction and enforcement power to back it up? And the difficult task is not alleviated by having to handle people who are “literally strangers to the truth,” as Lord Owen⁶⁹ characterized many of the people he had to deal with in the former Yugoslavia. What incentives do they really have for “norm-conforming behavior,” or for telling the truth?

Even with full awareness of the importance of taking political necessities into account, it is not obvious that truth commissions will yield better results. Establishing truth is not their distinguishing feature. The argument from political realism cuts both ways.

A.2. Truth as Acknowledgement

Sometimes, however, establishing truth is not

⁶⁹ Lord David Owen, *Balkan Odyssey: Experience the Struggle for Peace in Bosnia*, San Diego: Harcourt Brace 1995, p. 1.





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really at issue, because “everyone already knows the truth—everyone knows who the torturers were and what they did, the torturers know that everyone knows, and everyone knows that they know.”⁷⁰ Why, then, one might ask, is there any need at all for a truth commission? Weschler⁷¹ stresses the distinction between knowledge and acknowledgement. Acknowledgement is what happens to knowledge when it becomes officially sanctioned and thus converted into official truth. People do not necessarily want their former torturers to go to prison, but they want the truth to be formally recognized. A truth commission can do this.

A.3. The Naïveté of Truth Commissions

In 1995, the South African parliament enacted the Promotion of National Unity and Reconciliation Act⁷² which, in its preamble, deems it “necessary to *establish the truth* in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known *in order*

⁷⁰ Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers*, London: Penguin Books 1991, p. 4.

⁷¹ *Ibid.*

⁷² Cf. *supra*, fn. 40.





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to prevent a repetition of such acts in future."⁷³

Such considerations are founded on the “eternal hope that exposure of the past will be enough to prevent its repetition in the future.”⁷⁴ But is that in fact enough? Is it reasonable to expect the cycle of political violence to be broken under a regime of impunity?

In some cases, public hearings have resulted in “the emotional healing necessary to ‘turn the page without closing the book,’⁷⁵ as may be exemplified by the parents of murdered Human Rights worker Amy Biehl, who publicly forgave the Azanian People’s Liberation Army (APLA) killers of their young daughter.”⁷⁶ Broadcast coverage brought these revelations and acts of leniency into homes throughout South Africa. Knowledge of the past has surely contributed to heal the wounds of the past, “[b]ut it would be naïve to contend that truth has brought reconciliation with it. Many victims [still] demand retribution”⁷⁷ and the fact that Amy Biehl’s

⁷³ *Ibid.* Emphasis added.

⁷⁴ Cohen, cf. *supra*, fn. 68, p. 226.

⁷⁵ Panizza, cf. *supra*, fn. 21, p. 176.

⁷⁶ Cf. Renee Tawa, “Life after Death: For Amy Biehl’s Parents; Path to Forgiveness Leads to South Africa,” *L.A. Times*, August 1st, 1998, p. A 1.

⁷⁷ Dugard, cf. *supra*, fn. 38, p. 430 f.





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parents were seemingly able to forgive the killers is not necessarily connected with the revelation of the truth but rather due to some inherent qualities of the parents' character.

Another shortcoming of truth commissions is their potential of helping those responsible for terrible crimes to satisfy the public demand for investigations, while avoiding their own formal prosecution. Truth commissions may make it easier for members of the previous authoritative regime to stay in power. This might even foster a culture of impunity, in which "truth" actually undermines "justice." This may lead to a kind of false reconciliation with the past, the prevention of which was the very goal of establishing a truth commission in the first place.⁷⁸

Such limited intervention may not even succeed in preventing a repetition of past crimes. In Guatemala, after the government and the guerillas had negotiated an end to the civil war in 1997, two truth commissions, one sponsored by the United Nations and one by the Roman Catholic Church, were preparing their reports. The church published its findings in 1998 under the

⁷⁸ David Gairdner, cf. *supra*, fn. 31, p. 171.





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title *Guatemala: Nunca Más*,⁷⁹ documenting the extent, mechanisms, and impact of state terror. Shortly after the publication, Bishop Juan Gerardi, founder and director of the Archdiocesan Human Rights Office, and director of the project that was in charge of writing and publishing the *Nunca Más* report was murdered in his home.⁸⁰

The peace terms were negotiated independent of the outcome of the truth commission, thus (at least as in the Guatemalan case) the truth commissions did not result in peace by themselves. Truth commissions alone are seldom sufficient to dismantle the structures of power and impunity behind human rights violations. Nor can it be truthfully asserted that their reports contribute decisively to preventing the repetition or continuation of (political) murder and other serious violence.

Truth commissions do not always bring peace with them.

⁷⁹ Archbishopric of Guatemala, Office of Human Rights, *Guatemala: Nunca Más. Informe Proyecto Interdiocesano de Recuperación de la Memoria Histórica* [Guatemala: No More. Inter-diocesan Information Project for the Recovery of the Historical Memory], Guatemala City: ODHAG 1998.

⁸⁰ Stephen C. Ropp & Kathryn Sikkink, "International Norms and Domestic Politics in Chile and Guatemala," chap. 6 in Thomas Risse et al. (eds.), *The Power of Human Right: International Norms and Domestic Change*, Cambridge: Cambridge University Press 1999, p. 173.





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A.4. The Healing of Society

Archbishop Desmond Tutu continually referred to the cleansing power of truth and warned that if truth does not emerge, it will come back to “haunt” society.⁸¹

Taking for granted that truth and knowledge actually do contribute to the healing of a society that has suffered, it has been contended that truth commissions represent a better alternative for obtaining that knowledge. This depends, as already observed, on the perpetrator’s willingness to tell the truth, but in the end it is not any single individual confession, or cooperation that is of primary concern, but the total amount of information gathered through such a process, “explaining not only who did what and when, but also why.”⁸²

“The trial of selected individuals from the previous regime will *not necessarily* achieve this goal, as inevitably such trials will focus on individual guilt and not attempt to provide a comprehensive picture of the atrocities of the past or to expose the social and the political context of the crimes,”⁸³ which

⁸¹ Cohen, cf. *supra*, fn. 68, p. 236.

⁸² Dugard, cf. *supra*, fn. 38, p. 429.

⁸³ *Ibid.*; emphasis added.





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is assumed to be a precondition for reconciliation and the “healing of society.” There is a possibility, however, that courts of law could be just as effective in obtaining a comprehensive picture of the past as truth commissions.

Even if truth commissions are effective in uncovering the truth, they may not be successful in achieving reconciliation. Reconciliation is a separate question, and much more important, if the ultimate aim is lasting peace.

Stanley Cohen argues that “[w]hen the rhetoric of reconciliation is genuine, it looks for tolerance, forgiveness, social reconstruction and solution of social conflicts in ways other than punishment”⁸⁴ and yet, at the same time, Cohen stipulates that victims and survivors cannot be expected to forgive without *full* knowledge, which shall be more than just a matter of factual knowledge: “[I]t is impossible to expect ‘reconciliation’ if part of the population refuses to accept that anything was ever wrong, and the other part has never received an acknowledgement of the suffering it has undergone or of the ultimate responsibility for that suffering.”⁸⁵ But once perpetrators as well

⁸⁴ Cohen, cf. *supra*, fn. 68, p. 238.

⁸⁵ Letter from Human Rights Watch (1992) to President de Klerk, in “South Africa: Accounting for the Past,” *Human Rights Watch Africa*, Vol. 4: 2.





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as bystanders have actually acknowledged what had happened, forgiveness and reconciliation is supposed to be possible, as exemplified by the response of a woman in Uruguay being counseled by a priest about the disappearance of her child: “Father, I am ready to forgive, but I need to know whom to forgive and for what.”⁸⁶

However, there are also voices to the contrary. They concede that some people might be able to forgive, but warn of the great demands it makes on the person who is supposed to be conciliatory, requirements that many victims, survivors as well as their relatives, find impossible to meet:

Reconciliation, however, does not follow automatically or even easily from knowledge. On the contrary, knowledge may produce bitterness and a desire for revenge⁸⁷ on the part of the victims, or, on the part of unknowing supporters of the previous

⁸⁶ Quoted in Alex Boraine, Janet Levy & Ronel Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa*, Cape Town: IDASA 1997, p. 121.

⁸⁷ As Hamlet exclaims, after having learned that his father’s death was caused by his uncle: “O God, I could be bounded in a nutshell and count myself a king of infinite space, were it not that I have bad dreams”, William Shakespeare, “The Tragedy of Hamlet, Prince of Denmark,” pp. 1-144 in W. Shakespeare, *Four Great Tragedies: Hamlet; Othello; King Lear; Macbeth*; London: Penguin Books 1601/1998), p. 48 (2.2.258-260).





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regime, resentment that blame is attached to silent acquiescence. Understanding and forgiveness, the hallmarks of reconciliation, are rare qualities. Some individuals may achieve this, but a collective display of understanding and forgiveness—reconciliation—on the part of a nation is more difficult to attain.⁸⁸

Another distinguishing feature of truth, put forward in support of truth commissions, is the alleged “cathartic effect of truth,”⁸⁹ the relief felt by people who finally were given the opportunity to tell their story,⁹⁰ to receive at least moral compensation after having lived in fear for years, been tortured or witnessed family members “disappear.”⁹¹ A Guatemalan victim of human rights abuses summed up the cleansing effect of telling the truth by emphasizing the importance of disclosing, revealing, exposing the lies of the criminal regime. He did not have any illusions that those responsible for his suffering would actually

⁸⁸ Dugard, cf. *supra*, fn. 38, p. 429; emphasis added.

⁸⁹ Steiner, cf. *supra*, fn. 28, p. 12.

⁹⁰ According to, e.g., Herman, the actual act of storytelling may contribute to psychological healing after a trauma. Cf. Judith Lewis Herman, *Trauma and Recovery*, New York: Basic Books 1992.

⁹¹ Skaar & Andreassen, cf. *supra*, fn. 35, p. 18.





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be brought to justice, but, at least, he wanted the world to know about his suffering, lest those who had made him suffer might be able to hide behind their lies and pretend they were honorable persons.⁹²

Yet, the arguments put forward in the previous paragraph weigh equally heavy with respect to the cathartic effect of truth-telling. Truth-telling may “work,” or do good for some people, giving them some kind of satisfaction and helping them to get over their dreadful experiences and move on. Many others, however, may not respond in the same way. For them any truth will be no substitute for seeing their oppressors punished and, disregarding the feasibility of prosecutions, which is not at issue,⁹³ telling one’s story in a court of law may provide just as good or even a better forum than a truth commission for those who have suffered injustice.

Furthermore, in addition to rendering moral compensation to the victims by convicting, sentencing and thus, inherently, publicly shaming perpetrators and deterring future crimes, trial may make reconciliation more likely, by establishing a foundation of justice for any new arrange-

⁹² Gairdner, cf. *supra*, fn. 31.

⁹³ Cf. rather above: political realism.





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ments. Almost any judgment entails matters of discretion, and “wherever there are discretionary powers there is room for forgiveness.”⁹⁴

B. Conclusion

Weighing truth commissions against courts of law does not yield any definite answer about which will best help societies to cope with peace, which should be their common goal. The argument from political realism makes clear, however, that sometimes there is no other option. Truth commissions will not always even be able to establish the truth, but they may help to do so, and that may be enough. This is important, because truth is a precondition for reconciliation and thus for lasting peace. Where the truth is already known, by virtually all, where knowledge of the truth is not at stake, but rather the need for acknowledgement, a truth commission may be the best option.

On the other hand, even though truth commissions try to reconcile at the expense of bringing perpetrators to justice, by granting impunity, peace does not always result. And where it does not, this is often precisely because justice has been neglected, denying victims an essential tool in coping with peace. Rendering justice may also be

⁹⁴ Skaar & Andreassen, cf. *supra*, fn. 35, p. 19 (my translation).





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a precondition for reconciliation and therefore for lasting peace. It is far from clear in any case that truth commissions are really more effective than courts of law in finding and establishing the truth.

The circumstances necessary for deciding such questions in courts will very often be absent at the time when decisions must be made as to how to assist regimes in transition. Truth commissions are more likely to be established and therefore often preferable to theoretically desirable but in fact nonexistent courts. Truth commissions are often the better option simply because they represent the only available solution. Truth commissions offer the possibility of taking some action, when action would be otherwise impossible. Put like that we are back to political realism, favoring the feasible, achievable, instead of the merely desirable.

However, this is hardly an answer to the general question; there will always be circumstances where the alternative of courts of law is, somehow, feasible, and even if it were not equally feasible we still would have to consider the implications of our choice.

Different circumstances will yield different answers, in weighing truth commissions against courts of law. It cannot be generally decided which institution is more conducive to the attainment





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of lasting peace. Ultimately, our answer seems to depend on which we consider to be more important, truth or justice. Deciding that abstract and quite elusive juxtaposition requires contemplating the subject under investigation from a detached point of view,⁹⁵ and a turn to philosophy for enlightenment.

IV. TRUTH VERSUS JUSTICE

Which should we prefer—truth or justice? This is the underlying question that will ultimately determine how best to cope with peace.

A. What Is Truth—And Is There?

“[I]f you want the truth rather than merely something to say, you will have a good deal less to say.”⁹⁶

What is it we are looking for when we talk about truth? Thomas Nagel sets the tone in observing that “the world is a strange place, and nothing but radical speculation gives us a hope of coming up

⁹⁵ Cf. Thomas Nagel, *The View from Nowhere*, New York: Oxford University Press 1986.

⁹⁶ *Ibid.*, p. 9.





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with any candidates for the truth.”⁹⁷ Truth is not entirely out of reach, but it is not instantly apparent either and it is only by constant aspiring beyond the moment that we may attain access to it.⁹⁸

A.1. The Nihilist Rejection

Nihilism bluntly rejects any aspirations of arriving at worthwhile results about truth, employing the faculty of thought, to achieve determinate ends. According to Friedrich Nietzsche, there are no truths, only interpretations.⁹⁹ Accepting this nihilist premise leads to the “liar paradox,” but disagreement seems meaningless, if perhaps impossible.

Does it really matter? Do not interpretations, as well as any evaluations, presuppose that we accept something as given, “true” in the sense of corresponding to the closest we can get to whatever we have reason to believe is true? The task of a judge is quite in line with such correspondence-theoretical reasoning. The judge must accept whatever “evidence” is presented, as representing

⁹⁷ *Ibid.*, p. 10.

⁹⁸ Roger Scruton, *Modern Philosophy: A Survey*, London: Arrow Books 1997, p. 224.

⁹⁹ *Ibid.*, p. 5 ff.





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a fact (“truth”) *as long as and to the degree that* the judge is convinced that the body of evidence corresponds to what really is the case. Only then may the judge use discretionary powers, to weigh one consequence against another, and “interpret” the truth. A judge may be wrong about his starting point, but that does not prove that truth does not exist.

A.2. Relativism

A similar objection to truth is attributed to what may be called relativism, the assertion that there is no trans-historical, probably not even “trans-individual,” inter-subjective truth about the human condition.¹⁰⁰ All truth is merely relative, depending on the various conditions at any one time and of any one person. What was true then is not true now, just as the earth was supposed to be flat—until it, overnight, as it were, unexpectedly “turned” into a sphere. Likewise, what seems true to you is not necessarily true to me. And thus we are back to the correspondence theory of truth, and the arguments employed to fight off the Nihilist rejection apply equally well to relativists. The fact that we disagree upon the content of truth does not mean that truth does not exist.

¹⁰⁰ *Ibid.*, p. 6.





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In our aspirations for the truth we may be relatively far from the goal, but that does not render truth a “merely relative” expression.

A.3. Pragmatism

[Pragmatists] view truth as, in William James’ phrase, what is good for *us* to believe[...]. They see the gap between truth and justification... simply as the gap between the actual good and the possible better. From a pragmatist point of view, to say that what is rational for us now to believe may not be *true*, is simply to say that somebody may come up with a better idea.¹⁰¹

Whether our beliefs actually are well-founded, correspond to some carefully executed line of reasoning and, ultimately, whether they really aim at or even result in truth bothers a pragmatist only peripherally—if at all. “We” are the final judges and “since truth, on this view, is indistinguishable from widespread agreement (or at least, widespread agreement among ‘us’), the pursuit of truth... is nothing but the attempt to spread agreement as far as we can.”¹⁰² But this is tantamount to signing our own declaration of bankruptcy, to admitting

¹⁰¹ Richard Rorty, *Objectivity, Relativism and Truth*, Cambridge: Cambridge University Press 1991, p. 22 f.

¹⁰² Scruton, cf. *supra*, fn. 98, p. 106.





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that we no longer are interested in exploring the world, or revealing the truth. The pursuit of truth will degenerate into a complex game of coordination.¹⁰³

Pragmatism has little value in conversations about truth, because pragmatism neither negates nor engages in justifying truth. Pragmatists are happy to act so long as “we and lots of us” agree upon the “truth-value”¹⁰⁴ of something. But we should do so only as long as it is good for us to believe.

These limitations are precisely what renders pragmatism so attractive in the face of an uncertain, future alternative. Maybe we need to be pragmatic on the issue of truth, restrict our aspirations to the current good, and let the future take care of itself. But if so, we should not fool ourselves into thinking that we, by employing pragmatism, are in any way concerned with truth.

Transferring the abstract to the concrete, truth commissions may seem to be a form of applied

¹⁰³ Raino Malnes, *Materiell og mental virkelighet: Metafysiske emner*, [Material and Mental Truth: Metaphysical Topics], Oslo: Abstrakt Forlag 2002, p. 156.

¹⁰⁴ According to Frege, there are two “truth-values”: the true and the false, and a sentence, just as any statement, will refer to one or other of two things: truth (the true) or falsehood (the false). Gottlob Frege, “On Sense and Reference” in Peter Geach & Max Black (eds.), *Translations from the Philosophical Writings of Gottlob Frege*, Totowa, New Jersey: Barnes & Noble Books 1980, p. 63.





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pragmatism, seeking the achievable good at the expense of a distant better situation that may be achieved through courts.

A.4. Conclusion

There is something like truth in the correspondence between our beliefs and what really is, but this relation is hard to obtain and although neither nihilism, nor relativism succeeds in tearing down the concept of truth, pragmatism may be right to focus on the currently feasible good, rather than the future, possible better.

B. “Assertibility”

Maybe the gap between the actual good and the possible better is more than merely a matter of degrees, and qualification. Perhaps the truth, stated in general terms, does not deserve to be the center of our aspirations. “Some philosophers argue that truth is less important than ‘assertibility’.”¹⁰⁵ We might have no grasp of (transcendental) truth, but nor do we need it. Truth may not in fact be very useful. If we still want to aspire to make sense of truth we need to be more specific about the meaning we attach to it and “we could make do with another idea, according to which

¹⁰⁵ Scruton, cf. *supra*, fn. 98, p. 260.





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truth just *means* ‘assertibility’.”¹⁰⁶

Looked at from this point of view, truth is what we can assert, that is, what we can state clearly and forcefully (as the truth) and in that sense “prove.” This is precisely what occurs in courts of law. What matters in court is success in persuasion, not ultimate reality—guilt is proved “beyond reasonable doubt.” This is a procedural standard.

C. Justice—For Whom?

Procedural justice seems to be the standard that meets the pragmatic test best. Here too, however, the clash of human values can lead to confusion, complicated by the threat of punishment through the instrumentality of law.

C.1. The Sense and Nonsense of Punishment

Some justify punishment as the all-overriding, necessary means of reacting to a crime. Others would abolish the institution of punishment, and replace it with measures of re-socialization. Thus, Pius XII held that the societal order that had been disturbed by the “guilt-deed” had to be reestablished through punishment. Furthermore,

¹⁰⁶ *Ibid.*





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accepting one's punishment with the right attitude could elevate the criminal's suffering and thus lead the criminal to "moral heroism." Punishment is not only required as a form of retaliation for the prevention of further crimes, but ultimately also for the punished one's own good.¹⁰⁷

On the other hand, Anselm von Feuerbach emphasizes the psychological deterrence-aspect of punishment. The threat of punishment is what counts, not punishment itself. Actually inflicting punishment on somebody represents only an adjacent and necessary result of establishing the effectiveness of the threat (of punishment), and not an independent aim. Hence, punishment should only be inflicted to the degree that it is regarded as being necessary for upholding a credible threat of punishment.¹⁰⁸

Nietzsche negates the very foundation of any system of punishment. Instead, he proclaims a theory of the total irresponsibility of all human beings. In his eyes, people are not really free. Lacking free will, they are incapable of guilt. People

¹⁰⁷ Norbert Hoerster (ed.), *Recht und Moral: Texte zur Rechtsphilosophie* [Law and Morality: Writings on the Philosophy of Law], Stuttgart: Reclam 1990, pp. 222-224.

¹⁰⁸ Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts* [Text Book of the General Criminal Law in Germany], Giessen: Georg Friedrich Heyer 1847, p. 37 ff.





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were only thought to be free in order that they could become “punishable”—through attributions of guilt.¹⁰⁹

Yet others¹¹⁰ claim that what really prevents us from committing a crime is usually not the actual threat of punishment, but our own conscience and moral judgment. Punishment and retaliation, in contrast, merely represent a kind of apprehensive act of revenge and should be replaced by a therapeutic re-socialization program.

H.L.A. Hart acknowledges re-socialization as a possible ideal, yet denies it any prevalence with respect to punishment. Re-socialization is to be regarded as merely an aid, applicable only where the ultimate aim of punishment—to prevent the occurrence of the deed proscribed by law—has failed. Ultimately, the main purpose of punishing murder is to prevent murder, not educating the murderer. Hart realizes the dilemma which we are facing: (severe) punishment may turn a perpetrator into an even more embittered enemy of the society, applying too lax a measure of re-socialization instead may reduce the deterring effect of the

¹⁰⁹ Hoerster, cf. *supra*, fn. 107, p. 229 ff.

¹¹⁰ Cf., e.g., Karl Menninger, “Verdict Guilty—Then What?” pp. 757-769 in Bernard H. Hall (ed.), *A Psychiatrist’s World: The Selected Papers of Karl Menninger, M. D.*, New York: The Viking Press 1959, p. 757 ff.





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threat of punishment towards a third person. If we were convinced that the threat of punishment did not have any effect, then we could concentrate on the actual perpetrators—and criminal law would undergo some major changes. But, as of now, we cannot disregard the preventive effect and thus the value of punishment.¹¹¹

C.2. The Limits of Justice

Emphasizing the importance of punishing perpetrators does not remove the general, inherent problems adhering to the institution of punishment. There is a profound discontinuity of justice, “resulting from the fact that the accused is tried for an act he committed in a very different past. At the time of his trial, he seems to be another person”¹¹² and thus, “in some degree, punishment is always meted out to a stranger who bears the criminal’s name.”¹¹³

¹¹¹ Cf. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford: Clarendon Press 1968.

¹¹² Cohen, cf. *supra*, fn. 68, p. 241.

¹¹³ Harold Rosenberg in writing about Marcel Ophuls’ film *The Memory of Justice*, “The Shadow of the Furies,” *The New York Review of Books*, 20 January 1977, p. 47. Cf. Nietzsche’s words “[T]he one being punished is not the same anymore as the one committing the deed. He will always be the scapegoat,” Friedrich Nietzsche, *Man muß seine Augen auch hinten im Kopf haben* [You Need to Have Your Eyes in the Back of Your Head as Well], München & Wien: Carl Hanser Verlag 2000, p. 23.





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Especially when it comes to regimes in transition the question of the authority of the judges arises. Those in the dock often claim that today's criminal law does not apply to whatever they may have done in the past. This may be true in some circumstances and be covered by the *nulla poena sine lege* rule, forbidding the application of retroactive laws. The major crimes of international law do not, however, fall prey to this criticism, as the governing standards have been well established since the second World War.

The discontinuity of justice is just really a reflection of another well-known phenomenon: (personal) alienation, sometimes bordering on schizophrenia, vividly described (for example) by Émile Zola:¹¹⁴ “[I]t has not been himself anymore who was acting, but the other, he who he has that frequently been feeling moving at the bottom of his self, this unknown, who has come from far away, burning with the inherited desire to murder.”¹¹⁵ The one committing the deed is barely the same as the person prior to, or after having perpetrated a crime—and may already have been punished enough by his own actions, haunted by traumatizing memories. But this is a matter of psychology,

¹¹⁴ Émile Zola, *La bête humaine* [The Human Beast], Paris: Bookking International 1890/1993, p. 223.

¹¹⁵ My translation.





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depending on the particular circumstances of each single case.

C.3. Conclusion on the Concept of Justice

Objections to the concept of justice raised by the problems of a regime in transition and socio-psychological reservations do not negate the relevance of justice as the “better alternative.” These objections do not concern the “if” but the “how” of justice and remind us of the peculiarity of the individual case.

V. CONCLUSION ON THE QUESTION OF THE APPROPRIATE INSTITUTION FOR COPING WITH PEACE

What matters in the end is that equal things be treated equally, and different things receive different treatment, according to the particular circumstances of each case.

Thus, in as far as we may convincingly assert the (truth about the) guilt of perpetrators, especially when major crimes of international law are concerned, justice should prevail and courts of law are the better alternative for the attainment of lasting peace. Under such circumstances we should choose to act through courts of law, and





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there will be no conflict between truth and justice. “Assertibility” is more important than the amount of truth. The fact that, during a trial, not all aspects of the truth will be told, that not everybody may have his say, should not count as heavily as bringing the perpetrators of serious crimes to justice.

However, taking the restrictions of our time into account, these conditions of justice are not easily met. Perhaps this will change when the International Criminal Court starts prosecuting international crimes¹¹⁶ and the Rome Statute’s principles are actually practiced.

Yet, as of now, there may be cases in which nothing would be achieved by trials that would really advance human rights, or democratization, and thus the attainment of lasting peace. In such cases compromises with power, such as truth commissions, may achieve more in the short term than a regular judicial process. This does not preclude the possibility that in the future, when democracy and independent courts are better established, the perpetrators of human rights violations might be brought to justice. But justice

¹¹⁶ Currently, four situations have been referred to the Office of the Prosecutor. Though no situations have reached the trial stage yet, so far investigations into three of these situations have been opened, *i.e.* The Democratic Republic of Congo (06/23/2004), The Republic of Uganda (07/29/2004), and The Dafur, Sudan (06/06/2005).





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may sometimes need to wait for institutions to catch up with it. Perhaps the creation of international institutions, such as the ICC, will one day make this wait much shorter.





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