The United Nations Charter and the Delusion of Collective Security

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I. Just War Theory, International Relations, and Rules of War

The Rise of Positive Law

In the 17th century, the transition from older views on states, war, and peace to a new paradigm, which centered on sovereign states as sources of law and final judges in their own cause, was completed. New theorists shoved aside the older Just War theory grounded in natural law, while sometimes retaining some of the earlier language. The trajectory Suárez-Grotius-Pufendorff-Vattel sums up this development, with each writer more tied into legal positivism than his predecessor. Machiavelli, Bodin, and Hobbes must be thrown in the balance, as well, but entirely on the sovereign state side of the argument, with emphasis on the heroic unity of the sovereign Will.

When more popular forms of government came on the scene, they inherited from kingly states the whole ideological apparatus of unbounded sovereignty and positive law. This inheritance duly passed from republicanism to liberalism and then to mass democracy.[1] Perhaps the last serious resistance to the ideological victory of sovereign states was found in the work of Erasmus of Rotterdam in the 16th century.[2]

Unfortunately, Erasmus was seriously hampered by a belief in the necessity, in the end, of states. He himself saw the problem:

"Once you have granted imperial rule, you have granted at the same time the business of collecting money, the retinue of a tyrant, armed force, spies, horses, mules, trumpets, war, carnage, triumphs, insurrections, treaties, battles, in short everything without which it is not possible to manage the affairs of empire."[3]

José A. Fernández comments: "Acceptance of the state, then, is the doom of pacifism."[4] Short of adopting the fundamentally radical posture of the near-anarchist Étienne de la Boétie,[5] those who acknowledged the manifold evils of war were reduced to advocating practical adjustments within the prevailing system of nation-states. LaBoétie's path, which promised little practical influence for critics, was not taken.

"Civilized Warfare"

In addition, many 17th and 18th-century exponents of (a reformulated) natural law adopted the discourse of sovereignty, and took law to be "the command of a superior" (e.g., Pufendorf and Thomasius).[6] Nevertheless, much practical and useful work could be done

from within the modernist perspective to define laws of war and rules for international relations. Hence, these centuries saw the development over time of a body of customary and treaty law seen as the law of nations. In effect, rather than pursue the seemingly futile job of assessing *jus ad bellum* – the justice of a particular war on either side – the applied international jurists began focusing on *jus in bello*: the rightfulness of the *means* employed by any party, once a war had come into being. Edwin M. Borchard noted that: "Since the Armed Neutralities of 1780 and 1800, in which neutral nations first sought armed organized protection for their rights, steady progress had been made by international agreement in limiting belligerent claims to interfere with neutral rights, and in enabling neutrals to escape ruination from wars in which they had no part or interest."[7]

According to the classic study by F. J. P. Veale a code of civilized warfare "won general acceptance in Europe from about the beginning of the eighteenth century…." Central to this code was the "*principle… that hostilities between civilized peoples must be limited to the armed forces actually engaged*. In other words it drew a distinction between combatants and non-combatants by laying down that the sole business of the combatants is to fight each other and, consequently, that non-combatants must be excluded from the scope of military operations."[8]

Thus, for at least two centuries, European nations broadly accepted restrictions on the methods of war, which bettered the situation of the societies whose states were at war, as well as that of neutral powers. In 1854, the Belgian economist Gustave de Molinari discussed this progress in an essay on "Progress Realized in the Usages of War."[9] Economic progress, Molinari wrote, has resulted from the separation of the personnel and materials of war from those of peace, as symbolized by the contrast of open cities and fortified towns. With the growth of peaceful occupations, came respect for the productive and commercial sectors and a desire to disrupt their activities as little as possible in war. The utility of this policy had been shown by practice; such practices had been codified in the law of nations.

"Unfortunately," writes Molinari, "the new practices which the properly understood interest of the belligerents introduced into war in accord with the general interest of civilization did not prevail always during the great struggle of the Revolution and the Empire" (1789-1815). He praised Wellington, the Iron Duke, for adhering strictly to the rules of civilized warfare and treating civilians well. Wellington's forces took nothing from the people for which they did not pay. By contrast, Russian forces in Wallachia and Moldavia paid for their acquisitions in "depreciated paper money"![10]

So far, rules protecting commerce and private property only applied on land. At sea, seizure and destruction of property were normal, even menacing neutral shipping. Molinari mentions a 1780 draft treaty between Sweden, Denmark, the US, Prussia, Austria, Portugal, and the Two Sicilies intended to rectify matters.

Murray Rothbard's discussion of US diplomacy under the Confederation provides interesting support for Molinari's account. Rothbard notes that in April 1783 Benjamin Franklin had negotiated a treaty with Sweden "based on the Libertarian American Plan of 1776," that is, "freedom of trade and the safeguarding of neutrals' rights: in particular, restricting contraband that might be seized by belligerent powers; the freedom of neutral

shipping between belligerent ports; and [the principle that] free ships make free goods. The Swedish treaty made the further liberal addition of agreeing to convoy each other's ships in time of war."[11]

Congress appointed a new treaty commission, headed by Thomas Jefferson, in 1784. The commission was to work toward treaties grounded on the logic already adopted. Congress sought agreements "prohibiting privateering between the parties in case of war between them; and restricting the scope of blockades." Further, a new rule should be introduced that "now contraband was to be purchased rather than seized. (John Adams, indeed, wished to abolish the contraband category altogether, and thus preserve neutral rights totally.)"[12]

A treaty negotiated with Prussia in 1785 "not only provided for neutral convoys, but also for purchase of contraband and abolition of all privateering between the two countries, even if they were at war. Jefferson explained, on behalf of the American commissioners, that these provisions were 'for the interest of humanity in general, that the occasions of war, and the inducements to it, should be diminished.' The ultimate goals were to be 'the total emancipation of commerce and the bringing together of all nations for a free intercommunications of happiness.'"[13]

These attempts to protect commerce, even during war, did not prevail. Instead, as Molinari noted, the powers had gone beyond the "active" pursuit of plunder at sea to the "passive" policy of injuring an enemy's productive enterprises through general blockades. Of the two, the latter might well be more damaging and counterproductive, having the opposite of the desired effect.[14]

Thus the allied coalition (from 1793) sought to impose a starvation blockade on France. This strengthened the Revolution, delayed peace, and "exasperated national animosities." It was no accident, Molinari wrote, that the coastal regions of France showed the greatest hatred for England. One might well compare the World War I blockade of the Central Powers by the Allies.[15]

Molinari now turned to the Eastern (Crimean) War, which had begun in March of 1854. Here, too, was found counterproductive economic warfare. He remarks rather dryly that something was wrong when the Czar, hoping to punish his enemies, prohibited the export of Russian cereals and metals, while England sought to punish Russia by preventing the movement of the same exports![16]

Other misbegotten policies accompanied the Eastern War. English attacks on Finnish private property had driven the normally anti-Russian Finns into Russia's arms. Such destruction of property underlay most national hatreds. This made lasting peace more difficult - and, implicitly, set the stage for new wars.[17]

Molinari recommended a distinction between strategic and commercial blockades. It made sense to blockade an enemy port that was primarily a naval base.[18] General commercial blockades were an attack on prosperity and civilization. The problems arising from blockades in the War of 1812, the War for Southern Independence, 1861-1865,[19] and World War I, 1914-1919, bear out Molinari's reasoning.

Molinari notes that the real interest of all in respecting commerce and property is "no less real for not being immediately obvious to the eyes."[20]

Balance of Power

Other themes ran alongside the pragmatic development of civilized warfare. One of these was the notion of the "balance of power" – a rationalization, it would appear, of British *practice* from the 16th century forward.[21] The German political historian Otto Hintze commented on that policy in 1916: "England's conception of the European balance of power was to the effect that it should be the means of increasing and maintaining her maritime ascendancy. It meant that the Continental Powers should destroy each other by constant warfare, in order that England might have a free hand at sea and in the colonies. Throughout the centuries of modern history it has been the relentless principle of British policy to fight the strongest Power of the Continent by means of the others."[22]

As we shall see shortly, Britain's posture had some bearing on the downfall of civilized warfare.

II. The Idea of a League to 'Enforce' Peace

World War I and the Reversion to Barbarism

Veale characterized civilized warfare "as the product of belated common sense. At long last, the fact dawned on the human understanding that it would be for the benefit of all in the long run if warfare could be conducted according to tacit rules, so that the sufferings, losses and damage inevitable in warfare might be reduced, so far as possible."[23] In the frenzy of World War I, the powers involved increasingly departed from the code of civilized warfare – with the British starvation blockade of Germany, unrestricted German submarine warfare, poison gasses, senseless mass slaughter on the Western Front, and the first experiments with air power. The war proved so destruction of life, property, and civilized values, that to many observers it seemed that only an international system built on totally opposed principles could avert another such disaster.

Thus was hatched the notion of a League to Enforce Peace - if necessary by military means. As far back as 1735, Jules Cardinal Alberoni proposed a league of Christian princes to adjudicate their differences, keep the peace – and, make war on the Turks![24] Some contemporary writers even see in Immanuel Kant's essay *On Perpetual Peace* a charter for present-day global democratic crusading. [25]

The distinguished diplomatic historian Roland N. Stromberg has noted an array of problems inherent in the whole notion of a league for "enforce peace" by making war. He notes that the usual reading of the history of the League of Nations is that there were a number of suggestions from 1915 forward, which all amounted to the same idealistic package to which the statesmen of the day were unable fully to commit themselves. This is said to have been tragic.

Roland Stromberg disagrees, saying that there were many plans precisely because the whole idea was so half-baked (my term) and riddled with inner contradictions.

The great ideal of a league to enforce peace had grown up in reformist circles well placed at the top of the British Empire. After all, if a league could actually work, it would help preserve the British and other European Empires more cheaply than resorting to general war as in August 1914. These reformers (among them Robert Cecil of the very important Tory Cecils) passed the idea along to the cousins in Washington. Wilson, the greatest Anglophile of them all, was smitten, as were his associates like Colonel House and a number of his partisan Republican enemies. All could agree it was a jolly good idea. Then they all drew up wildly divergent plans to be put into operation as soon as the terrible Germans were beaten.

Inner Contradictions of the League Ideal

The fundamental question was "whether the League would be in the nature of a world state, or an old-fashioned alliance, or whether there was anything in between."[26] The *New Republic* opined on March 30, 1915 that, "The League of Peace would either be the old imperialistic alliance under a dishonest name, or else it would be a highly conservative federation which would keep its members in a very straight pacifist jacket.... There is no stopping point at a league to prevent war. Such a league would either grow to a world federalism, or it would break up in civil war."[27]

On the conservative end of the pro-league spectrum were those like Nicholas Murray Butler and Elihu Root, who "put their trust in international law and a world court as the slow but sure path toward eventual world government" by the path of "organic growth."[28] Others, less patient, demanded action and plans spelling out the brave, new world in detail. In practice, their plans took shape in a kind of muddled middle ground.

The war was allegedly being fought on the part of the allies for high ideals. After US entry even more was heard of high ideals, since that is an inseparable feature of US wars. Now it was said that the war was being waged for the "national self-determination" of captive peoples - specifically, those held captive by the German, Austrian, and Ottoman empires. Not so much was heard of those held captive by the British, the French, the Dutch, and other worthy empires.

Yet self-determination for even this self-serving shortlist of would-be nations would create more national sovereignties in the world, while the league idea necessarily required renunciation of sovereignty to some unknown degree. How to sort that out? Was the war being fought, at the same time, *for and against* nationalism and self-determination? This was a contradiction the league planners and theorists could never overcome.

Another matter of quaint dispute was whether or not the league should be formed before

German defeat so as to wage the war better. (This was the model adopted in World War II.)

The League in Practice

In the end, the League of Nations had to await the end of World War I. The various Anglo-American drafts of its Charter left the ambiguities in place. Article X spelled out "collective guarantees of the independence and existing boundaries of all states. Yet Wilson himself took back this inelastic guarantee, by saying that it did not rule out boundary changes or constitute a status quo imprisonment."[29]

But the existing boundaries themselves rested on earlier successful warfare and the League looked more and more like an agreement among the victors to hold onto what they had grabbed. The Treaty of Versailles, of which the League formed a part, created enough new grievances for a series of new wars. Given all this, it was a quite mad to think that the League could be a force for "peace" - even a peace to be enforced by "sanctions," or *a blockade*, as more honest generations put it (and itself an act of war), or full-scale war.

The most the League accomplished was to give the appearance of international cooperation - the cause of all mankind - to some policies adopted by certain powers against other powers in the aftermath of the unfinished disaster called World War I. Where the League could not be used, it was largely ignored.

League enthusiasts saw in it the germ of a new world order. But as the *New Republic* warned, *"such a league would either grow to a world federalism, or it would break up in civil war*." Actually, we may remove the "or": a league, world federalism, whatever we may call it, would necessarily be oppressive and lead to the result mentioned. The worst part is that under such an arrangement, enemies who would otherwise be foreign powers with some rights under the laws of war become "rebels" with no rights at all.

There were many League enthusiasts in the US: Americans are often sentimental about setting up and preserving wider unions to guarantee peace. This has to do with the way they learn American history. For some, world federation would work just as well as the American confederation did after 1789, *provided you don't count that big war between 1861 and 1865* with the 620,000 military deaths on both sides and the 50,000 or so missing Southern civilians. The analogy breaks down precisely because you must count that big war.[30] World government or World Empire, if we should ever enjoy such, would be the material cause of world civil war.

"Leaguism" – as we might name the ideology of collective security - was meant, one supposes, to overcome what international political theorists call the "self-help" dilemma under international "anarchy." But so, too, were the big alliances at the beginning of the 20th century. They succeeded in making World War I possible. Thus the League of Nations and the later UN might reasonably be seen as the Entente Cordial writ large.

As Murray Rothbard liked to point out, the logical outcome of collective security was to ensure that no war could remain limited – i.e., confined to two parties and fought over limited issues; instead, the demand that the true "aggressor" be named and that all Good powers rally to the defense of the injured party, stood guarantee that future wars would be as broad in scope as possible.[31]

III. Kellogg-Briand Pact, World War II, United Nations, and Nuremberg

War "Outlawed"

The rather innocent looking Kellogg-Briand Pact of 1928 committed the nations signing it to the assertion that war was obsolete as a positive instrument of foreign policy.[32] Since at the same time, the contracting powers reserved the "right" to resort to self-defense when attacked, a deep contradiction arose, that could not be papered over by rational means.

Even so, the pact stands as a landmark in the rise of the New International Law of "collective security" because so much ideological hay was made from its supposed implications. In truth, a number of sovereignties, severally and under their own power, had ratified a vague agreement, enforcement of which was left to the imagination. Shortly thereafter, advanced thinkers began proclaiming that those states had *unanimously* committed themselves to an entirely new legal order from which they might not now recede.

No less than Quincy Wright, a paladin of the new order, wrote: "The law of the pact will not work unless the parties can agree at once on the position of the belligerents. Under the old law of war and neutrality, the obligations of neutrals flowed from the fact of war and not from the conditions of its origin. Under the new law, the obligations of non-participants depend, not upon the fact of war, but upon the position of the belligerents as is determined by its origin…. It is believed that the legal case against war and armed violence in international affairs is complete. War cannot occur without violation of the Pact, and armed violence cannot be justified except within the legal concept of self-defense. Neutrality posited upon isolation and impartiality has lost its legal foundation."[33]

War, now "outlawed," was a *crime*: and the analogy with domestic jurisprudence came into full view.

In the words of the old-line international lawyer Edwin M. Borchard, the new gospel took "sustenance from the extraordinary view that the system of international relations that prevailed before 1914 was 'international anarchy,' and that what we now have represents 'law and order.' Perhaps it is not unnatural, therefore, that the evangelism of the new 'new order' is directed toward a disparagement of the international law which sustained the 'old order' – an attack which indiscriminately characterizes 'war' as a common-law

crime and would therefore deprive the laws of war of all legal standing, regards neutrality as 'immoral,' if not 'illegal,' and insists that collective intervention and force will, or should, alone assure 'peace.'"[34]

Given the supposed "outlawry" of war, the main task now became one of stipulating Good vs. Bad nations, "aggressors" vs. defenders, and deciding the best means of bringing agressors to heel, whether by boycott, embargo, or stronger measures. Together with the League of Nations Charter, the Kellogg Pact was taken to have overturned the Old International Law in favor of a brave new order. The sect that believed this happy doctrine was especially strong in the United States.

Acting on the newer conception of international law, US Secretaries of State Henry Stimson and Cordell Hull "repeatedly talked as if the renunciation of war was one of the fundamentals – one of the 'pillars' – of American foreign policy."[35]

Outlawry of War Followed by World War II

For the new school, neutrality had become "obsolete" – a reactionary vestige of the bad old days, which, if practiced by any modern power, stood as an affront to the all-encompassing logic of the new order. Among the many spokesmen for the new outlook were such people as Quincy Wright, Dena Frank Fleming, various US Secretaries of State, and Soviet foreign minister Maxim Litvinov. World War II became the proving ground of the new viewpoint via such pronouncements as the Atlantic Charter and other wartime agreements between the Allied Powers, culminating in the UN Charter.

Thus a not-very-subtle "antifascist" theme resonated within the new international law. Only "fascist" disrupters were to blame for World War II, or any other disasters of the first half of the 20th century. To prevent future outbreaks of fascism and war, an international body with power of *enforcement* was needed, and it is no accident that Franklin Roosevelt and others began referring to their war-making coalition as the "United Nations."

As Charles G. Fenwick writes, "It was only with the adoption of the Atlantic Charter and the wider Declaration of the United Nations that it came to be realized that the hope of a new political order was dependent upon *removing the economic causes of war and setting up an ideal of social reconstruction. The barriers to the trade and raw materials of the world must be removed; labor standards must be improved, and social security assured to the people of all countries*."[36]

These conceptions, it is worth remarking, looked forward to some undefined degree of socialism and social democracy, with the principle of the Open Door thrown in for the benefit of politically well-connected American capitalists. The new order would alleviate those "economic" conditions, which had uniquely *caused* fascism, thus assuring peace and preventing war via an evermore-leftward drift of policy – imposed from the top down.

A New World of Institutionalized Peace

The United Nations Charter reads like a weird combination of the US Constitution, an old-fashioned treaty, a utopian manifesto, and a set of rules for a private club, as the distinguished jurist Hans Kelsen, a legal positivist, more or less said in a critical essay on the Preamble.[37] The new international law provided justification for the Nuremberg tribunal. According to the Allied prosecutors, planning, preparing, and carrying out the elements of an "illegal" war of "aggression" were separate counts, and something like an endless, upward plea-bargaining process entered the picture.[38] The Korean War, too, was claimed as an instance of international police work in the interest of collective security, although the war's actual implementation showed, if anything, that the Charter did not work as planned.

A fairly straightforward analogy, mooted earlier, construes world federalism as the cure for mankind's ills on the basis of a particular reading of US history. Just as Messrs. Madison's and Hamilton's centralizing Constitution – "saved" by Lincoln in its greatest crisis – freed Americans from such perils as war (oddly enough, by having One Big War), so too would an increasingly sovereign world organization deliver humanity from the perils of major war between nation-states.

One of the great partisans of internationalism, Mr. Quincy Wright, writing in 1956, made precisely this comparison:

"It may be noted that in the theory of the United States Constitution the military measures undertaken by the Federal Government in the South, usually designated as the Civil War, were not considered in Constitutional law action to coerce the Southern States as such, but action to stop the illegal conduct of the governments of those States in nullifying Federal legislation, preventing the functioning of Federal services, and attempting to secede from the Union. The Southern States, said the Supreme Court after the war, had never been out of the Union, and the unconstitutional acts of their governments were null and void. If this were otherwise, 'the war must have become a war for conquest and subjugation.'"[39]

Certainly, on Lincoln's *theory* of the Union (and therefore of the war), all the above might follow, but I leave to one side whether his theory was a very good one. Wright's argument by internal American historical analogy naturally turns toward the asserted need of the putatively "superior" to act directly upon *individuals* guilty of "crimes" as part of their cooperation with others in the larger "crime" of undertaking "aggressive war." As Wright expressed it: "Crime, as indicated in the trials after World War II, is thought to be committed only by individuals. Delinquency by a state creates liabilities of civil rather than of criminal character."[40]

Referring to the UN Charter and the Universal Declaration of Human Rights, Charles G. Fenwick writes: "Here, for the first time in the history of international law, was an act of the whole community of states, looking behind the formal organization of their

governments to the individual human beings who constitute the legal body of the state. It creates, in a sense, a bond of unity cutting across state lines and restricting the sovereignty of the state in a vital area of its domestic life. The individual has thus been accepted as a subject as well as an object of international law…."[41]

These views amount to a projection of the theoretical premises of municipal (state) law onto the world stage. The shadow of a global Social Contract theory hangs over what might otherwise be seen as mere cooperation of a number of states in pursuit of their power-political goals under cover of internationalist ideology. There is also an odd conflation of the notions of legislation, law, and jurisprudence at the level of mankind – a body that cannot actually be shown to exist.

Within certain limits the federal-international analogy "works," as does the related federal-feudal one, but not necessarily in quite the way progressive thinkers would have us believe. Perhaps, indeed, the original political sin is that anyone ever delegated power upward at all. On second thought, the whole notion of voluntary "delegation" seems intended to obscure the actions of those at higher levels who successfully seized power from lower levels at some time in the past, or to obscure future actions of those who aspire to global "governance."

IV. Persistence of an Older School

The intellectual victory of the new outlook on international law remained incomplete for some decades. An older school continued to set forth their ideas, albeit with a decreasing audience, into the 1950s. Thus, criticizing a peculiarly Wilsonian notion, John Bassett Moore could write in 1933:

"The President of the United States has no power, either under the Constitution or under international law, legally to decide the question whether a foreign government is *de jure*, or, in other words, established in conformity with the constitution and laws of the country over which it actually rules."[42]

Nor - in Moore's view - did the US Congress or Courts have such a power under the Constitution or international law, although Congress could make specific rules about retaliation, property seizures, etc., once a state of war had come into being.

Moore's critique of the collective security outlook was systematic and total, as in the following passage:

"The tendency to confuse war and peace and to magnify the part which force may play in international affairs not unnaturally followed the so-called World War. During that great conflict there developed, in the ordinary course of things, a war-madness, manifested in the exaltation of force, and the belittling of the enduring legal and moral obligations which lie at the foundation of civilized life. Peaceful processes fell into disrepute. We began to hear of the 'war to end war'; and *pacifists*, enamored of this shibboleth,

espoused the shallow creed that international peace could best be assured by the use of force or threats of force. We were told that preëxisting international law had suddenly become obsolete, and that the world had entered upon a new era in which the general tranquility was to be maintained by 'sanctions,' by boycotts, and by war. But the final stage was reached in the spawning of the notion, now rampant, that peoples may with force and arms exterminate one another without breach of the peace, *so long as they do not call it war*. To this final stage belongs the supposition that the law of neutrality no longer exists, and that in future there will be no more neutrals."[43]

Edwin M. Borchard also contested the notion that neutrality was obsolete:

"The suggestion that it is not possible to remain neutral is negatived by the fact that countries much more closely affected by the late struggle than the United States, such as the Scandinavian countries and Holland, were perfectly able to maintain their neutrality. In all the wars fought since 1919, including that between Poland and Russia, Greece and Turkey, Japan and China, and those on this continent, the non-participating members of the League of Nations and the United States remained neutral. Neutrality has been stipulated in innumerable treaties since 1919, including treaties between European Powers and those concluded at Havana in 1928."[44]

Later stages of this battle were fought out, among other places, in the pages of the *American Journal of International Law* (AJIL), and certainly the broad outlines can be traced there. Suffice it to say that the new school had larglely triumphed by sometime in the 1950s.[45]

V. Ideological Trajectory of the Internationalist School

Peace, Properly Understood, Through Armed Intervention

As indicated, the successful trajectory of the New International Law, as interpreted (among others) by friends of an activist US foreign policy, can be followed in the AJIL. The writings of W. Michael Reisman, present editor of the journal, embody the transformations in question. An early piece (1968), written with the then editor Myres S. McDougal, justifying UN policy towards Rhodesia, is highly symptomatic of the evolving internationalist point of view.

The writers argued for a kind of "loose construction" of the UN Charter in order to bring the Rhodesian case under the notion of "threats to the peace" warranting UN action including "sanctions" (blockade) and the "authorizing" of Britain to use force against the white minority government of the secessionist colony. It was good, they wrote, that the Charter's "framers, *in rejecting all proposed definitions of the key terms* 'threat to the peace, 'breach of the peace and 'act of aggression'" had left to the Security Council "a large freedom to make ad hoc determinations of each specific situation of threat or coercion."[46]

International "law" thus becomes *legislation* by a fleeting majority of delegates to the

relevant UN bodies, a majority unconstrained by stable definitions of terms.

The writers deployed injured British sovereignty alongside various notions of international (UN) jurisdiction centering on the admittedly under-defined rubric of "threat to the peace." Anticipating later post-modernist moves, they advanced a subjective standard of harm: "the promulgation and application of policies of racism in a context as volatile as that of Rhodesia and South Central Africa must give rise to expectations of violence and constitute, if not aggression of the classic type, at least the creation of circumstances under which states have been customarily regarded as justified in unilaterally resorting to the coercion strategies of humanitarian intervention."[47]

Thus it followed that the events in Rhodesia were neither internal matters, nor a dispute between Britain and its former colony, as in 1776, because under present conditions "peoples interact… through shared subjectivities" and thus "other peoples of Africa have regarded themselves as affected by the authoritarian and racist policies of the Rhodesian elites." Even worse, the bad example of Rhodesia could "easily spread to other communities and become international."[48] Thus we have here, on the one hand, a kind of psychic Interstate Commerce Clause modeled on the failure of the US Constitution to limit central power and, on the other, a continuation of the founding antifascist theme of the United Nations.

Suppress Rhodesia, or Hitler will come back!

There is more but we must move along. Twenty years later we find Reisman, writing with James Silk, on the legal character of the ongoing war in Afghanistan between Soviet forces and the mujahidin. Unsurprisingly, the "law" was found to favor the positions then taken by the US government with respect to that war.[49] Some months before, Reisman had already issued a sort of Afghan Resistance Manifesto and recruiting poster, which claimed, on the basis of relevant law, that:

"(1) the Mujahidin are entitled to fight against the Soviet Union and the Soviet-supported Government in Kabul; (2) the Mujahidin are entitled to call upon third states for support in their struggle; (3) *third states are under an obligation* to provide such help to the Mujahidin in their resistance; and (4) neither the Soviet Union nor the Soviet-supported Government in Kabul is entitled to characterize the support that third states are obliged to and do, in fact, render to the Mujahidin as a violation of international law or in any way a violation of its own rights."[50]

Support Islamic fundamentalists, or "totalitarianism" will come back!

Since then, Reisman has addressed war powers under the US Constitution (1989) and the sovereignty of states in relation to asserted human rights (1990).[51] The former essay calls for better division of labor among the branches of US government – to facilitate more effective overseas interventions, while the second discovers that all recent US interventions have been on the up-and-up and fully consistent with international law. Now it is possible, I suppose, that in some of these cases Reisman has an argument, but the extreme "fit" between positions taken and the short-term needs of US foreign policy

does raise a question or two.

Clearly on a roll, Reisman is next seen – in 1994 - calling for establishment of a UN war college to train staff officers and organize command structures.[52] Naturally, the task will be to "wage peace" since, by ideological definition, the UN never makes war, just as the US never does wrong. Reisman's post-9/11 statement calls on the US to defend "world public order."[53]

The "Right" to Obey the Hegemonic Power

Another writer of similar tastes is Thomas M. Franck. In an essay published in 1992, he announced "the emerging right to democratic governance." On the strength of a piece of revolutionary propaganda issued issued in1776, he derives in Straussian fashion a "democratic entitlement" of universal reach. Repackaging the Wilsonian claim that democracy is the only legitimate form of government, he somehow connects that form to the rule of law. The sleight of hand is dazzling.[54]

Since its feeble beginnings at Versailles, the democratic entitlement has risen above mere self-determination and become a fundamental right – a right duly severed, however, from "any entitlement to secede." It has so risen on the basis of the usual international agreements, held by Franck to apply as "customary law" even to those who have not ratified them. As he puts it: "The Covenant thus foresees a continuing, growing body of law made by means of the interpretation and applications of its provisions by an expert, independent, quasi-judicial body."[55]

Coupled with this universal Fifteenth Amendment comes "the right of free political expression" which "originated conceptually in the antitotalitarianism born of World War II…."[56] A cynic might say that Franck's problematic is situated in the (brief) transition from War Liberalism to Cold War Liberalism, which entailed a redefinition of Soviet communism as "Red fascism" so as to preserve the continuity of "antifascism" so dear to American corporate liberals and their European social democratic allies. After some discussion of visionary schemes mooted in 1990 in Paris and Copenhagen, Franck informs us that local sovereignty is dead and buried.

There can be no legitimate objection against intervention by the powerful armed with slogans about human rights.

Having blithely noted "three generations of democratic entitlement" (which calls to mind the famous judge's remark about "three generations of imbeciles"), Franck announces that the Genocide and Racism Conventions "qualify as rules of deportment imposed on all states by the community of nations."[57] This genial conceit presupposes a world constituency – voting by states or as individuals? – which *imposes* rules on existing states, neatly recapitulating the American experience. The global Constitution awaits its John Marshall and Earl Warren.

Franck reasons that in light of "the natural right of all people to liberty and democracy" (and note the assumption that these are compatible), the older international law "principle of noninterference" has fallen by the wayside. At the same time, "established rights and duties implicitly validate a *penumbra* of unenunciated, yet legitimate, means necessary to give them effect." The evolved new order is praiseworthy because "it opens the stagnant political economies of states to economic, social and cultural, as well as political, development." Finally, an implication of these newfound rights is "that legitimate governments should be assured of protection from overthrow by totalitarian forces": a letter-perfect "antifascist" prohibition on "right-wing" political activity, including, one suspects all strivings for local autonomy and freedom which are not of the Left.[58]

There is indeed something for everyone here: the inevitable Open Door for US business and endless social work for the reformist, bureaucratic wing of the bourgeoisie. It is a hard thing to pronounce Hans Kelsen naïve, but the readings of the Charter, which I have just canvassed, clearly refute his assertion[59] that no one would ever seriously make such claims.

VI. Present Trends (Their Master's Voice)

All the high-toned internationalist doctrine surveyed above tacitly depends for its fulfilment on military violence directed against designated threats to the peace. Absent any genuine world political community, the US has stepped into the breach to provide an imperial substitute or equivalent. The idea that the UN is, today, the *source* of such international law as there is, is a delusion that has much appeal. For many people, if the UN "approved" a war, that would make the war "just" *ipso facto* - without further discussion.

This is about as true as the related idea that a state is the *source* of law in a given territory. If the one isn't true, neither is the other. It may be that neither is true, but that discussion must wait for another time.

The rhetoric of collective security has done well, but the wielders of the notion are operationally split between those who really *believe* in it as an ideology and those who know that it operates as a good ideological cover for the US *Griff nach der Weltmacht* – the present US rulers'grasp at total power. For the latter practitioners, the "law" can always be reckoned on to legitimate US military intervention anywhere.

In practice, the two groups are hard to tell apart. Present Court Intellectuals are more than happy to proclaim the relativization of "sovereignty" except for that of the US and its few faithful allies. The obvious danger - for everyone else - is one of great power hegemony in the name of international "law."[60] And it is precisely the would-be hegemon – Britain in previous centuries and the United States at the beginning of the 21st – that breaks the "rules" and drives the law in its preferred direction. In 1805, James Madison protested just such encroachments on neutral rights in a state paper: "An Examination of

the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace."[61]

Veale observed that, "so long as the British Navy commanded the sea, the British people had no reason to fear a reversion of warfare to the methods of primitive times. If defeated in a war, a continental people faced the prospect of being dealt with in accordance with the standards then prevailing. To a continental people, therefore, it was a matter of vital concern whether these standards were civilized or barbarous. The people of Britain on the other hand, enjoyed the comforting knowledge that, so long as their Navy ruled the waves, defeat at the worst would only mean a withdrawal for the time being from the Continent. In fact, until the conquest of the air, Great Britain could hardly be regarded politically as a part of Europe…."[62]

In our time, the hegemonic power partly justifies its activities under a "living" UN Charter. This is held to be necessary lest the Bad should shelter themselves under narrow readings of settled law. At other times, the same power asserts its separate sovereignty and superpowerhood, with little apparent sense of incongruity.

Frédéric Mégret observes, in the manner of Carl Schmitt, that "an interesting spin-off from the argument that the UN Charter is a global constitution, is whether the US might not also portray itself as accomplishing for the rest of the world and the UN Charter a decentralized version of what the executive may see itself as doing for the US and the American Constitution, namely, *breaching the 'constitution'* (or at least going against its spirit) in order to better defend its ordinary function."[63]

Recent wrangles over Iraq suggest that the UN is best seen, not as the source of law or as the genuine organ of an incipient world society, but as a *military alliance*, whose operational membership may vary depending on circumstances, such as bribery and genuine underlying interests. With its verbal claims to represent all of humanity, it is an unusual military alliance, to be sure.

Perhaps the central fallacy has been to assume that "law" – international or otherwise – is only law, when it can be equated with *force* or the "*will* of a superior." From this comes the notion that international law consists, or should consist, of current *legislation* promulgated by a world body. This approach rests on a failure to specify levels of analysis, the nature of law, and other matters, and with that, a failure to see that an understanding of international conflict necessarily entails considerable casuistry, in the proper sense of that word.[64]

[1] See Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," *American Journal of International Law* [hereafter: AJIL], 33, 4 (October 1939), pp. 665-688, Albert Salomon, "Hugo Grotius and the Social Science," Political Science Quarterly, 62, 1 (March 1947), pp. 62-81, and Nicholas Greenwood Onuf, "Civitas Maxima: Wolff, Vattel, and the Fate of Republicanism," AJIL, 82, 2 (April 1994), pp. 280-303.

[2] José A. Fernández, "Erasmus on the Just War," *Journal of the History of Ideas*, 34, 2 (April-June 1973), pp. 209-226. Cf. Philip C. Dust, Three Renaissance Pacifists: Essays in the Theories of Erasmus, More, and Vives (New York: Peter Lang, 1987), p. 61: "Erasmus concludes that war should not even be waged against the Turks."

[3] Quoted in Fernández, p. 221.

[4] Ibid.

[5] Étienne de la Boétie, *The Politics of Obedience: The Discourse of Voluntary Servitude* (Montréal: Black Rose Books, 1997), with an introductory essay by the late Murray N. Rothbard.

[6] J. B. Schneewind, "Kant and Natural Law Ethics," *Ethics*, 104, 1 (October 1993), pp. 58-59.

[7] Edwind M. Borchard, "Restatement of the Law of Neutrality in Maritime War,' AJIL, 22, 3 (July 1928), p. 615. See also Guilio Marchetti Ferrante, "Private Property in Maritime War," *Political Science Quarterly*, 20, 4 (December 1905), pp. 696-717, and Philip C. Jessup and Francis Déak, "The Early Development of the Law of Neutral Rights," ibid., 46, 4 (December 1931), pp. 481-508.

[8] F. J. P. Veale, *Advance to Barbarism* (Appleton, Wisconsin: C. C. Nelson, 1953), pp. 57-58. See also Gunther Rothenberg, "The Age of Napoleon," in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven: Yale University Press, 1994), pp. 86-97, and John U. Nef, *Western Civilization Since the Renaissance: Peace, War, Industry and the Arts* (New York: Harper & Row, 1963).

[9] Gustave de Molinari, "Progrès Réalisé dans les Usages de la Guerre," in *Questions d' Économie Politique et de Droit Publique*, vol. II (Paris, Brussels: Guillaumin, 18610, pp. 277-325.

[10] Ibid., p. 285.

[11] Murray N. Rothbard, *Conceived in Liberty*, Vol. V [unpublished fragment on Confederation Period], p. 74 (and overleaf), Rothbard Papers.

[12] Ibid., pp. 74-75.

[13] Ibid., p. 75.

[14] Molinari, pp. 319-320.

[15] Molinari, pp. 296-298. Cf. Ralph Raico, "The Politics of Hunger: A Review," *Review of Austrian Economics*, 3 (1989), pp. 253-259.

[16] Molinari, pp. 309, 323-324; for the whole discussion see pp. 304-310.

[17] Ibid., pp. 313-317.

[18] Ibid., p. 320.

[19] Veale writes that the US war to suppress the South proved to be the major 19th-century departure from the rules of civilized war, as far as contests between parties of European descent were concerned: *Advance to Barbarism*, pp. 89-95.

[20] Ibid., p. 325.

[21] For critical views of the balance of power, see Isabelle Grunberg, "Exploring the 'myth' of hegemonic stability," *International Organization*, 44, 4 (Autumn 1990), pp. 431-477; Ron Hirschbein, "The Balance of Power: A Skeptical Appraisal," in Duane L. Cady and Richard Werner, eds., *Just War, Nonviolence and Nuclear Deterrence* (Wakefield, NH: Longwood Academic, 1991), pp. 233-243; and Paul W. Schroeder, "Did the Vienna Settlement Rest on a Balance of Power?", *American Historical Review*, 97, 3 (June 1992), pp. 683-706.

[22] Otto Hintze, "Germany and the World Powers," in *Modern Germany in Relation to the Great War*, tr. William Wallace Whitelock (New York: Mitchell Kennerley, 1916), pp. 27-28.

[23] Veale, p. 62.

[24] Mil. R. Vesnitch, "Cardinal Alberoni: An Italian Precursor of Pacifism in International Arbitration," AJIL, 7, 1 (January 1913), pp. 51-82.

[25] Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs*, 12, 3 (Summer 1983), pp. 205-235.

[26] Roland N. Stromberg, "Uncertainties and Perplexities About the League of Nations," *Journal of the History of Ideas*, 33:1 (January-March 1972), p. 141.

[27] Quoted ibid.

[28] Ibid., pp. 141-142.

[29] Ibid., p. 142.

[30] As historian William Appleman Williams wrote: "… Americans remain haunted by the Civil War…. Underlying that persistent involvement is the realization that the war undercuts the popular mythology that America is unique. Only a nation that avoided such a conflict could make a serous claim to being fundamentally different. In accordance with the logic and psychology of myth, therefore, it has become necessary to turn the war itself into something so different, strange, and mystic that it could have happened only to the chosen people" (*The Contours of American History* [New York: New Viewpoints, 1973], p. 285).

[31] Kellogg-Briand Pact, text, http://www.yale.edu/lawweb/avalon/imt/kbpact.htm.

[32] Murray N. Rothbard, "War, Peace, and the State," in *Egalitarianism As A Revolt Against Nature and Other Essays* (Auburn, AL: Ludwig von Mises Institute, 2000), pp. 126 (note).

[33] Quincy Wright, "The Meaning of the Pact of Paris," AJIL, 27, 1 (January 1933), p. 61.

[34] Edwin M. Borchard, "The 'Enforcement' of Peace by 'Sanctions,'" AJIL, 27, 3 (July 1933), p. 519.

[35] Richard N. Current, "Consequences of the Kellogg Pact," in George L. Anderson, ed., *Issues and Conflicts: Studies in Twentieth Century American Diplomacy* (Lawrence: University of Kansas Press, 1959), p. 213.

[36] Charles G. Fenwick, "International Law: The Old and the New," AJIL, 60, 3 (July 1966), p. 481 (my italics).

[37] Hans Kelsen, "The Preamble of the Charter – A Critical Analysis," *Journal of Politics*, 8, 2 (May 1946), pp. 134-159.

[38] F. B. Schick, "The Nuremberg Trial and the International Law of the Future," AJIL, 41, 4 (October 1947), pp. 782-783.

[39] Quincy Wright, "The Prevention of Aggression," AJIL, 50, 3 (July 1956), p. 528.

[40] Ibid., pp. 528-529.

[41] Fenwick, "International Law," p. 482.

[42] John Bassett Moore, "The New Isolation," AJIL, 27, 4 (October 1933), p. 616. For another critique, see Edwin M. Borchard, "The Multilateral Pact: 'Renunciation of War,'" speech August 22, 1928, available at http://www.yale.edu/lawweb/avalon/kbpact/kbbor.htm .

[43] John Bassett Moore, ibid., p. 622 (my emphasis).

[44] Edwin M. Borchard, "The Arms Embargo and Neutrality," AJIL, 27, 2 (April 1933), p. 297.

[45] Edwin Borchard criticized early Cold War policies on the basis of the older view of international law: "Intervention – The Truman Doctrine and the Marshall Plan," AJIL, 41, 4 (October 1947), pp. 885-888; and see Earl C. Ravenal, "An Autopsy of Collective Security," *Political Science Quarterly*, 90, 4 (Winter 1975-1976), pp. 697-714, for an echo of the older school.

[46] Myres S. McDougal and W. Michael Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," AJIL, 62, 1 (January 1968), p. 7 (my italics).

[47] Ibid., pp. 10-11.

[48] Ibid., pp. 12-13.

[49] W. Michael Reisman and James Silk, "Which Law Applies to the Afghan Conflict?", AJIL, 82, 3 (July 1988), pp. 459-486.

[50] W. Michael Reisman, "The Resistance in Afghanistan Is Engaged in a War of National Liberation," AJIL, 81, 4 (October 1987), p. 909.

[51] W. Michael Reisman, "War Powers: The Operational Code of Competence," AJIL, 83, 4 (October 1989), pp. 777-785, and "Sovereignty and Human Rights in Contemporary International Law," AJIL, 84, 4 (October 1990), pp. 866-876.

[52] W. Michael Reisman, "Preparing to Wage Peace: Toward the Creation of an International Peacemaking Command and Staff College," AJIL, 88, 1 (January 1994), pp. 76-78.

[53] W. Michael Reisman, "In Defense of World Public Order," AJIL, 95, 4 (October 2001), pp. 833-835. The heroic freedom-fighters of 1987 and 1988 are not specifically mentioned in this piece.

[54] Thomas M. Franck, "The Emerging Right to Democratic Governance," AJIL, 86, 1 (January 1992), pp. 46-49. For a strong argument that democracy is incompatible with the rule of law, freedom, and order alike, see Hans-Hermann Hoppe, *Democracy: The God That Failed* (New Brunswick, NJ: Transaction Books, 2001).

[55] Ibid., pp. 58-59.

[56] Ibid., p. 61.

[57] Ibid., pp. 77-78.

[58] Ibid., pp. 82-83 (my italics) and 89-91.

[59] Kelsen, "The Preamble," *passim.*

[60] For some meditations on this problem, which show, perhaps, that the AJIL is not monolithic, see Detlev F. Vagts, "Hegemonic International Law," AJIL, 95, 4 (October 2001), pp. 843-848.

[61] Onuf, "'*Civitas Maxima*,'" pp. 300-301.

[62] Veale, p. 68; and, on related issues, cf. James P. Baxter III, "The British Government and Neutral Rights," *American Historical Review*, 34, 1 (October 1928), pp. 9-29.

[63] Frédéric Mégret, "'War?' Legal Semantics and the Move to Violence," *European Journal of International Law* (2001) (http://www.ejil.org/journal/vol13/No2/art1.pdf), p. 15 (my italics).

[64] Carl Watner, "International Law or International Brigandage?: A Libertarian Approach," unpublished typescript, 1980; and Rothbard, "War, Peace, and the State."