

# Article

## The Crime and Punishment of States

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### I. INTRODUCTION

In March 2011, the United Nations Security Council (UNSC) used its Chapter VII powers under the United Nations Charter to authorize “all necessary measures” to protect civilians under threat of attack in Libya.<sup>1</sup> Notably, the resolution was careful to cabin its instructions to the use of preventive measures to protect civilians from harm, opting not to authorize the use of force against the state of Libya or even the Qaddafi regime. When, in January 2012, the European Union (EU) approved an unprecedented package of sanctions against Iran, European leaders were careful to note, “[w]e have no

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1. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973, at 3 (Mar. 17, 2011).

quarrel with the Iranian people,” but then added, “[u]ntil Iran comes to the table, we will be united behind strong measures . . . to demonstrate the cost of a path that threatens the peace and security of us all.”<sup>2</sup> While this may seem obvious today, justifying international coercive measures against states in terms of prevention of threats, rather than as punishment for transgressions, was by no means inevitable.

Until not very long ago, international law used the language of reprehension and blame, referring to state action in violation of international law as a “crime” warranting retributive “punishment.”<sup>3</sup> Since World War I, however, the moral rhetoric of state “crime and punishment” has been excised from the lexicon of international law. Any notion of “guilt” belonging to the state has been replaced with the more benign conceptions of “responsibility” and “threat.” Correspondingly, coercive action against states can no longer be justified by any punitive urge but instead must be couched in terms of regulatory or preventive action.

Thus, the use of military force—at one point, the ultimate measure of punitive justice for an injury suffered by a sovereign—is now permitted only in individual or collective self-defense or under a UNSC Resolution in response to a “threat to international peace and security.” No conduct in war may be justified by the urge to “punish the enemy.” Sanctions imposed by the UNSC against rogue countries are never labeled “punishment”; they are seen instead as preventive acts or regulatory action. In 2001, the U.N. International Law Commission, author of the Draft Articles on State Responsibility for International Obligations, renamed the Chapter once entitled “international crimes” as “serious breaches of essential obligations to the international community” and eliminated punitive damages as a form of permissible reparation altogether.<sup>4</sup>

As an alternative to state punishment, international law has channeled all punitive sanctions to individuals. Indeed, before even authorizing “preventative” use of force in Libya, the UNSC referred the situation in Libya to the International Criminal Court for the indictment of Qaddafi, and placed travel restrictions on other high level officials in the Qaddafi regime.<sup>5</sup> Under

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2. Press Statement, United Kingdom, Germany & France, PM, Chancellor Merkel and President Sarkozy Statement on Iran Sanctions (Jan. 23, 2012), <http://www.number10.gov.uk/news/iran-sanctions> [hereinafter Statement on Iran Sanctions].

3. For the purposes of this Article, I consider the term “punishment” to denote a sanction imposed on an actor as a result of moral condemnation of prior prohibited conduct by that actor. For a classic treatment of this definition, see Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958). Of course, the just aims of punishment have been heatedly debated for centuries. I do not engage this debate here, but I do assume retribution to be a legitimate aim of punishment. For a concise overview of the debate, as well as a defense of the retributive model, see Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 80 PROC. & ADDRESSES AM. PHIL. ASS’N 45, 46-49 (2006).

4. See Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, at 245-46, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) (explaining that compensation is not intended to “punish the responsible State, nor does compensation have an expressive or exemplary character”); *Summary Records of the Meetings of the 52nd Session*, [2000] 1 Y.B. INT’L L. COMM’N 392, U.N. Doc. A/CN.4/SER.A/2000.

5. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

present international law, only individuals can “commit crimes” and be subject to criminal accountability in domestic and international tribunals. This is the case even though most international crimes committed by individuals could not have been committed outside the framework of a state or collective action.

All of this is true as a theoretical matter. In practice, of course, many coercive measures against states cannot but be viewed, at least in part, as a form of punishment. Examples range from U.S. engagement in armed reprisals against Libya (1986) and Sudan (1998), to the UNSC’s economic sanctions on Iraq following the expulsion of weapons inspectors (1998), or on North Korea following a nuclear ballistic test (2009), to the Israeli blockade on Gaza since the Hamas takeover (2006). In fact, statements by individual political leaders, media accounts, and scholars have often identified a punitive drive as a motivation for coercive action.<sup>6</sup> Following the EU’s announcement of its sanctions on Iran, *The Christian Science Monitor* was quick to observe that these sanctions were “aimed at seriously punishing Iran over questions about the nature of its nuclear program, delaying military action, and, however likely or unlikely, spurring talks.”<sup>7</sup>

If so, a more accurate portrayal of the international trend may be not that present-day international law does not permit the punishment of states, but that it does not permit admitting to it within the legal context.<sup>8</sup> Accordingly, this Article seeks to explore two questions. First, why does international law stick to the disguise of value-neutral “prevention,” when in practice, it still actually intends to assign blame and engage in retribution—the two elemental components of punitive action? Second, does this rhetorical disguise of punishment-as-prevention have any practical effects, and if so, what might they be? Ultimately, this inquiry should lead us to consider the implications of relying on conceptual-rhetorical frameworks for international relations more broadly.

A prolific international law and international relations literature has already grappled with the question of why international law should have moved away from state punishment. Ontological inquiries have doubted whether a “state,” an abstract entity, can commit crimes, suggesting that state criminality is a misguided personification that draws on tortured analogies from the conduct of human beings.<sup>9</sup> Conceptual discussions have centered on the

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6. See, e.g., NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 167-86 (2000).

7. Robert Marquand, *Iran Oil Embargo: How Tough Are the EU Sanctions?*, *CHRISTIAN SCI. MONITOR*, Jan. 24, 2012, <http://www.csmonitor.com/World/Europe/2012/0124/Iran-oil-embargo-how-tough-are-the-EU-sanctions>.

8. See JØRGENSEN, *supra* note 6, at 167-68 (arguing that despite formal distinctions between “punishment,” “sanctions,” “countermeasures,” and “measures,” which may be exercised by the United Nations, or by states acting individually or collectively, there seems to be broad agreement in the existing literature that states can, and in fact do, commit crimes, and that the notion of “punishing states” should be recognized and addressed).

9. Harry D. Gould, *International Criminal Bodies: Conceptual Clarification of the Ideas of State Criminality and International Punishment*, 35 *REV. INT’L STUD.* 701 (2009) (rejecting the notion of state criminality on ontological grounds); see also HARRY D. GOULD, *THE LEGACY OF PUNISHMENT IN INTERNATIONAL RELATIONS* 109-35 (2010) (arguing that it is “untenable to treat [states] *legal and*

incongruence of a concept of punishment in a system of equally sovereign states and asked by what standards “crimes” are distinguishable from other types of offenses.<sup>10</sup> Pragmatic debates have addressed what forms the punishment of states might take, especially considering its collective adverse effects on the state’s nationals, as well as what institutional framework could be employed to mete out such punishment.<sup>11</sup>

This Article suggests that these various explanations, while each having some bite, are but mere elements of a broader agenda driving the flight from state crime and punishment—namely, a strong overarching preference for peace and stability over justice in interstate relations.<sup>12</sup> Rather than discrete ontological, conceptual, or pragmatic considerations, what has been driving the changes in international law is the belief that a seemingly value-neutral prevention paradigm is more conducive to peaceful coexistence than the moral-laden concepts of punishment and retribution.

To support this claim, the Article first offers a historical account of the shift from the language of “guilt” and “punishment” to the language of “threat” and “prevention” in four areas of international law: the use of force (*jus ad bellum*), the conduct of hostilities (*jus in bello*), the imposition of non-military sanctions, and the international rules on state responsibility. While existing literature has already noted the shift away from punishment in each of these fields separately,<sup>13</sup> I demonstrate how they all fit within a broader trend of disguising punishment and retribution within a conceptual framework of “prevention.”

The historical account suggests that, far being from accidental, or a mere rhetorical or stylistic move, the flight from state crime and punishment has been a deliberate choice, linking a preference for peace with a preference for prevention. Yet why such a negative correlation should be made between peace and punishment is not self-evident. Drawing on the historical account, the Article then gleans four possible justifications for this negative correlation: (1) the fear that punishment may invite revenge and further violence; (2) an aversion to collective punishment; (3) the principle of sovereign equality as an organizing principle of the international system; and (4) the absence of international mechanisms to enforce a rule of international law. All four

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*moral* personality as anything other than metaphorical”); FARHAD MALEKIAN, INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES: A STUDY ON THE EVOLUTION OF STATE RESPONSIBILITY 177-78 (1985); Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 528 (1956) (noting that the “idea of a criminal state has in fact largely disappeared”). *But see* Anthony F. Lang Jr., *Crime and Punishment: Holding States Accountable*, 21 ETHICS & INT’L AFFAIRS 239, 242-45 (2007) (disputing the argument that abstract entities cannot commit crimes); David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299 (2012) (discussing whether punishment could constitute just cause for war); Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EUR. J. INT’L L. 425, 432 (1999) (claiming that states can and should be punished under some circumstances).

10. *See, e.g.*, Gould, *supra* note 9, at 718.

11. Anthony F. Lang Jr., *Punitive Justifications or Just Punishment? An Ethical Reading of Coercive Diplomacy*, 19 CMB. REV. INT. AFF. 389-403 (2006).

12. Whether the international community prefers peace over justice in the context of individual criminal responsibility is a separate question, which much scholarly literature has addressed. *See infra* note 16 and accompanying text.

13. *See infra* Part II and accompanying notes.

justifications have some bite. And yet, when tested against the existing international practice of “prevention,” none is sufficient in and of itself to justify the emerging aversion to retributive punishment in the name of peace.

In its final part, the Article moves beyond the analytical account to the normative: I suggest that even if we were to accept a general preference for peace over justice, there is little reason to believe that the elimination of state punishment and the focus on prevention best serves this preference.

To support this claim, I borrow from a similar tendency in recent decades toward prevention in U.S. domestic criminal law. The rise of the “preventive state”<sup>14</sup> and the use of penal sanctions for ostensibly preventive purposes have been a cause for serious concern among scholars and practitioners, including the dangers of overuse, perverse sentencing, and lack of due process guarantees.<sup>15</sup> These concerns, I argue, might lend themselves, *mutatis mutandis*, to the international sphere. While the analogy is at best imperfect, and its empirical examination difficult, it is nonetheless sufficiently plausible to suggest another angle from which to assess the fading conception of state crime and punishment.

The main conclusion from bridging the domestic and international is that there is little reason to believe that the insistence on a preventive rhetoric necessarily allows for *less* international violence than would a guilt-based rhetoric; it only allows for violence under different circumstances or, even more accurately, under different rhetorical justifications. Overall, it may be that both paradigms are sufficiently malleable in their application to justify coercion under similar conditions, with only the rhetorical justification to distinguish them from each other. If so, the rhetorical shift may be of no consequence.

But it may also be, as domestic criminal law scholars have observed, that even though prevention may sound like a less oppressive policy than punishment, it may in fact be far less constrained and more ruthless. It may also be open-ended, unbounded by principles of proportionality. Worse yet, the absence of a paradigm of crime and punishment obscures any normative judgment of the act in question; the “international community” does not stand against the deviant state as its accuser, only as a regulator. At the same time, by demanding a show of threat to others, a preventive paradigm might be paralyzed from operating where there is a crime that does not immediately threaten other international actors. In other words, once the focus of the sanction is on “threat” rather than on “guilt,” a preventive paradigm might sometimes allow for and invite more violence than would a punitive one, but might also suppress violence where it is otherwise warranted. To demonstrate both these possibilities, I invoke the contemporary debates over anticipatory self-defense and humanitarian intervention.

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14. See, e.g., Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998) [hereinafter Steiker, *Limits*].

15. See, e.g., Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003); Steiker, *Limits*, *supra* note 14; Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) [hereinafter Steiker, *Punishment*].

It is not my intention to make an ultimate prescriptive claim about the desirability of punishing states under international law. Making such a claim would require an elaboration of arguments which I merely note but do not develop here, and which are not the primary purpose of this project. The purpose, rather, is to demonstrate the historical trend of suppressing the concept of punishment in interstate relationships, to reexamine its analytical premises, and to suggest some under-appreciated possible consequences of it.

More broadly, the Article seeks to invite further inquiry into the normative and pragmatic foundations of international law's present preference for peace over justice as far as states are concerned. While this Article's focus is on the supposed correlation between peace and a paradigm of prevention, it suggests a reexamination of the tradeoff, real or imagined, between punishment as a mechanism of upholding the rule of international law and the prevention of interstate conflict. While the "peace versus justice" debate has long been raging in discussions of transitional justice and individual punishment under international criminal law,<sup>16</sup> it has had far less resonance in discussions of state crime and punishment.

The Article is organized as follows: Part II outlines the historical shift from moral "guilt" to amoral "threat" in four areas of international law, demonstrating the difficulty in drawing a practical line between acts of punishment and acts of prevention. In so doing, the section suggests that the historical shift has been driven by a preference for peace over justice. Part III both considers and questions the possible justifications for the correlation between prevention and peace. When tested against the prevention paradigm, these justifications lose much of their force. Part IV borrows from domestic criminal law to suggest possible distortions the doctrine of prevention may have in international relations. To do so, it presents two contemporary debates over international coercion, namely anticipatory self-defense and humanitarian intervention. Part V concludes.

## II. FROM PUNISHMENT TO PREVENTION: A SHORT HISTORY

This section seeks to demonstrate how the acknowledged prominence of "guilt" has declined, replaced by references to "threats" as the formal justification for sanctions or coercive conduct. The historical survey offered here is by no means definitive or exhaustive; parts of it are also debatable.<sup>17</sup> It is intended only to demonstrate the efforts within the legal context of eliminating the concept of punishment and disguising retribution as prevention,

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16. As far as individuals are concerned, the debates over the tension between peace and justice in international criminal law are prolific. See, e.g., Mirjan Damaška, *The Henry Morris Lecture: What is the Point of International Criminal Justice?* 83 CHL.-KENT L. REV. 329 (2008); Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499 (2009).

17. A historical account of the shift from the former to the latter is complicated by the difficulty in drawing a clear line between retribution and prevention. The same indistinctness also explains how an ongoing practice of punishment can effectively hide behind the rhetoric of prevention. It is also, of course, possible to view "guilt" and "threat" as points on a continuum, or as existing side by side, so that an emphasis on one does not necessarily exclude the other. Nevertheless, this Article seeks to draw out the general trend away from the former, and toward the latter.

all in the name of greater peace and security. It is also intended to demonstrate how state leaders and prominent scholars outside the legal context continue to use the language of punishment, at times resisting and at times succumbing to the legal structure's clear preference for prevention.<sup>18</sup>

A. *War-as-Punishment: Jus ad Bellum*

Although the outlawing of wars of aggression is a twentieth-century development, some regulation of the right to resort to war existed in many recorded ancient, classical, and pre-modern societies. War was always legitimate in defense against an aggressor. Its legitimacy also included a restitutionary logic of self-help to regain people or property wrongfully captured, to collect a debt, or to force a wrongdoing sovereign to make compensatory reparations.<sup>19</sup> Until recently, war also had a retributive face to it, of just punishment for wrongdoing. However, as this section will demonstrate, beginning after World War I the international community turned away from this notion of war as justice, choosing instead to adopt a paradigm that allows defensive wars only, emphasizing peace and stability.

To trace the history of the role of punishment in the justification for war it is best to start off with the Christian Just War tradition, which dominated Western legal thought from the fourth century onwards and which is very much at the basis of the modern international law of *jus ad bellum*.<sup>20</sup> Earning his place as the most influential among the early Christian writers on the just cause of war,<sup>21</sup> St. Augustine held that war was a sin if it was waged with “[t]he desire for harming, the cruelty of revenge, the restless and implacable mind, the savagery of revolting, the lust for dominating and similar things.”<sup>22</sup> However, “often, so that such things might also be justly punished, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.”<sup>23</sup> Writing in the fifth century, Augustine’s consideration of war was theological rather than legal. His account of war was meant to reconcile the strategic necessities of the

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18. Naturally, not all instances of international coercion are either threat-based or guilt-based; some are merely exercises in arm-flexing, intended to induce states to act in a way favorable to the coercer. I bracket out these types of coercive measures, and focus only on those where the justification for coercive action relies on a legal claim, within the accepted international order.

19. On the evolution of the use of force in these contexts, see MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* (2004). See also Luban, *supra* note 9; Joachim van Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 667 (1939).

20. For a discussion on overlaps between Christian and Muslim conceptions of just war, including those of Averroes, see Mohamed Abdel Dayem & Fatima Ayub, *In the Path of Allah: Evolving Interpretations of Jihad and Its Modern Challenges*, 7 UCLA J. ISLAMIC & NEAR E.L. 67, 91 (2009). See also HIMLI M. ZAWATI, *IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW* (2001).

21. See JOHN MARK MATTOX, *ST. AUGUSTINE AND THE THEORY OF JUST WAR 1-4* (2006).

22. Augustine, *Against Faustus the Manichean*, bk. XXII, chap. 74, reprinted in *THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS* 73, 73 (Gregory M. Reichberg et al. eds., 2006) [hereinafter Reichberg].

23. *Id.*

Roman Empire with the early Christians' embrace of pacifism.<sup>24</sup> For this reason, he cautioned against violence motivated by *libido dominandi*, or in self-interest.<sup>25</sup> Rather, to set the warrior's conscience at peace, Augustine ordered that wars be "loving acts" of punishment, intended to save the transgressor from injury to himself and others.<sup>26</sup> Divine intervention ensured that the just party emerged victorious.<sup>27</sup>

The scholastics and canonists followed Augustine's formulation of just war. Gratian adopted the divine judicial model of war in the twelfth century,<sup>28</sup> and a century later, Thomas Aquinas demanded a subjective element of guilt that justified the punitive act of war.<sup>29</sup> In the sixteenth century, Cajetan (Thomas de Vio) reiterated the punitive measure of war, noting that the Commonwealth was entitled to wage war not only in self-defense, "but also to exact revenge for injuries to itself or its members."<sup>30</sup> In equating war with a criminal proceeding, he noted: "That [war] is a criminal matter is clear from the fact that it leads to the killing and enslavement of persons and the destruction of goods."<sup>31</sup> Following the Reformation, the punitive theory of war persisted among Protestants and Catholics alike. Calvin asserted that "kings and people must sometimes take up arms to execute such public vengeance," and that wars were lawful to "punish evil deeds."<sup>32</sup> Luther, too, asked rhetorically, "What else is war but the punishment of wrong and evil?"<sup>33</sup>

After "the last of the scholastics" of the sixteenth century,<sup>34</sup> just war theory took a more secular turn. For Alberico Gentili, Hugo Grotius, Christian Wolff, and Emmerich de Vattel, natural law determined the justness of war, rather than the judgment of a priest or church.<sup>35</sup> Religious justifications for war (especially for wars in Western Europe) subsided, leaving only punishment for injury to the sovereign or his nationals as the legitimate cause for war. "Injury" was broadly defined to include not only harm suffered by the war-waging state, but also transgressions that "grossly violate the law of nature or of nations in

24. Van Elbe, *supra* note 19, at 667.

25. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS 593 (Henry Bettenson trans., Penguin Books 1972) (translating *libido dominandi* as "lust for domination").

26. *Id.* at 556-58.

27. Van Elbe, *supra* note 19, at 667.

28. Gratian, *Decretum*, pt. II, causa 23, question II, canon 1, *reprinted in* Reichberg, *supra* note 22, at 113.

29. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. II-II, question 40, art. 1, *reprinted in* Reichberg, *supra* note 22, at 177.

30. CAJETAN, COMMENTARY TO SUMMA THEOLOGIAE, pt. II-II, question. 40, art. 1, *reprinted in* Reichberg, *supra* note 22, at 242.

31. *Id.* at 247.

32. John Calvin, *Institutes of the Christian Religion*, bk. IV, ch. 20, at 11, *reprinted in* Reichberg, *supra* note 22, at 276.

33. Martin Luther, *Whether Soldiers, Too, Can Be Saved*, *reprinted in* Reichberg, *supra* note 22, at 269.

34. These were Francisco de Vitoria and Francisco Suarez, who maintained the judicial model of war as vindictive justice, and held fast to the belief that God awarded victory to the righteous sovereign while guaranteeing the due process of war to the injuring sovereign. See Arthur Nussbaum, *Just War: A Legal Concept*, 42 MICH. L. REV. 453, 458-62, 464-69 (1943).

35. *Id.* at 464-69.



regard to any person whatsoever.”<sup>36</sup> As examples of such transgressions, Grotius named “those who act with impiety towards their ancestors,” “those who feed on human flesh,” and “those who practise piracy.”<sup>37</sup>

Punitive wars under the Just War tradition were not only an international political inevitability; they were the ultimate measure of both justice and peace, necessary to safeguard the rights of individual sovereigns as well as to preserve the stability of the international system. For Francisco Suarez, “the only reason for [war] is that an act of punitive justice is indispensable to mankind, and that no more fitting means for it is forthcoming within the limits of nature and human action.”<sup>38</sup> With the turn to a secular conception of Just War, religious sensibilities gave way to concerns about the honor and dignity of injured sovereigns. War may be waged to avenge an injury received, argued Gentili, “because he who fails to avenge one injury provokes another. And to remedy loss is beneficial. Kings and kingdoms stand by names and reputation. Their good name must be protected.”<sup>39</sup> Grotius, too, believed that war as punishment was essential for the international system, serving the good of the offender, the good of the enforcer, and the good of men at large, “by the protection afforded by the fear of punishment,”<sup>40</sup> i.e., deterrence.

Importantly, just punishment had its limits, as the Just War tradition distinguished between legitimate punishment and ruthless vengeance. There were important restrictions on what measures could be used during the war and even greater limits on punishment after the war. Like the decision to go to war, the determination of what constituted a just post-conflict punishment was also an adjudicative process, with the punishing victor expected to act not as a vengeful party, but as an impartial judge. Such “impartial” punishment, however, allowed not only for the reversal of the injury (including recovery of what was unlawfully taken), but also for recovery of the expenses of war (often, a considerable amount) as well as some measure of punitive reparations for purposes of future individual or general deterrence.<sup>41</sup>

There were undoubtedly important nuances among the writers of the period with regard to the origins and contours of what constituted a just cause for war, what goals were served by punishment, and from whom derived the authority to punish (God or sovereign).<sup>42</sup> It is also the case that war-as-

36. Grotius, *De iure belli ac pacis*, bk. 2, chap. 20, sec. 40, reprinted in Reichberg, *supra* note 22, at 407.

37. *Id.*

38. Alexis Blane & Benedict Kingsbury, *Punishment and the Ius Post Bellum*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE* 241, 243-44 (Benedict Kingsbury & Benjamin Straumann eds., 2010) (quoting Francisco Suarez, *De Triplici Virtute* (1621)).

39. THOMAS ALFRED WALKER, *A HISTORY OF THE LAW OF NATIONS* 256 (photo. reprint William S. Hein & Co. 2004) (1899).

40. *Id.* at 305.

41. Blane & Kingsbury, *supra* note 38, at 260-63; Stephen C. Neff, *Conflict Termination and Peace-Making in the Law of Nations*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* 77, 80-81 (Carsten Stahn & Jann K. Kleffner eds., 2008).

42. For an elaborate study of the different conceptions of war as punishment in the writings of Vitoria, Gentili, and Grotius, see Blane & Kingsbury, *supra* note 38. See also RICHARD TUCK, *THE*

punishment was only one element in a broader conception of war as a dispute settlement mechanism, in which an injured party, having exhausted all other means of recovery, could avenge its cause through war.<sup>43</sup> In fact, according to some legal historians, such as Peter Haggenmacher, just war theory was about property rights much more than about criminal law and punishment.<sup>44</sup> Still, the general view that just war theory included an element of retributive punishment has persisted in many contemporary accounts.<sup>45</sup>

The late eighteenth and nineteenth centuries witnessed a transformation of the international system, and with it, of international legal thought. With the Peace of Westphalia, the principalities and small states of 1648 unified into larger nation states, and national rulers superseded dynastic ruling families.<sup>46</sup> The limited wars of the eighteenth century gave way to ideological total wars, and small professional armies, motivated mainly by monetary gain, yielded to Napoleon's Grand Armée marching on nationalistic zeal. The international system became an anarchic amalgamation of equally sovereign states, which could not be subjected to any external constraint in the form of divine order or natural justice. Instead, "sovereign states [had] an unqualified right to resort to war."<sup>47</sup>

Interestingly, during this time, wars were neither about retribution nor prevention, but merely a matter of national expediency and ideological urge. It was not that states did not invoke legal, moral or pragmatic justifications when waging wars, nor that the question of the right to resort to force was left entirely unaddressed by scholars of the period.<sup>48</sup> For the most part, however, the legal status of war under various circumstances was the result of a positivist, inductive study of state practice more than an engagement with its

RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 158-62 (1999) (discussing Pufendorf's criticism of Grotius's view of a natural right of punishment).

43. Neff, *supra* note 41, at 78.

44. PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* 308 (1983).

45. See Blane & Kingsbury, *supra* note 38, at 244; see also Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 966 (2008).

46. For a wonderful historical account of the wars in that period, see MICHAEL HOWARD, *THE INVENTION OF PEACE* 16-31 (2000).

47. Inis L. Claude, Jr., *Just Wars: Doctrines and Institutions*, 95 POL. SCI. QUART. 83, 88-89 (1980) (citing Josef Kunz, *Sanctions in International Law*, 54 AM. J. INT'L L. 324, 325 (1960) ("[U]nder general international law, as it stood up to 1914, any state could at any time and for any reason go to war without committing an international delinquency. The *jus ad bellum* [right to resort to war] remained unrestricted.")).

48. When justifications for war were offered, they sometimes took the form of quasi-judicial or policing operation. For instance, against the background of the British-French-German aggression against Venezuela, Theodore Roosevelt stated in his 1904 Annual Message to Congress:

All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship . . . Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and . . . may force the United States . . . to the exercise of an international police power.

President Theodore Roosevelt, Annual Message to Congress (Dec. 6, 1904) (transcript available at <http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm>).

normative underpinnings. Wars were a phenomenon not to be morally judged, but only explained. This position was best captured by Carl Von Clausewitz, who described wars as a “true political instrument, a continuation of political intercourse, carried on with other means.”<sup>49</sup>

World War I, however, was a transformative event that demonstrated the perils of Clausewitz’s vision of total wars and the extension of politics into battle. The international community thus sought to regulate war once more; it was here that the focus of war began turning from the implementation of justice to the preservation of peace. This renewed interest in the legal regulation of wars was expressed in two instruments, both part of the postwar Treaty of Versailles. One was the coercive victors’ justice embodied by the “War Guilt Clauses” (to which I return later in this article);<sup>50</sup> the other was a blueprint for a first attempt at an international institution with the power to regulate, and hopefully, prevent wars—the League of Nations. Punishment and prevention were thus both still at play. From here onwards, the tension between the punitive urge and the preventive ideal were constantly present in the development of international law and institutions.

The framers of the League of Nations envisioned their project as the guardian of world peace, under the Westphalian principles of respect for territorial integrity and non-interference in internal affairs. International disputes were to be resolved through arbitration, judicial settlement, or inquiry by the League’s Council. League members agreed that “[a]ny war or threat of war . . . is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.”<sup>51</sup> The right to engage in war was not, however, abolished; it was simply subjected to a procedural mechanism of consultation,<sup>52</sup> which, so it was hoped, could avert the war.<sup>53</sup>

The 1928 Kellogg-Briand Pact represented further steps toward regulation. The pact constituted a bolder effort to prevent wars by restricting the legal right to wage them. It condemned “recourse to war for the solution of international controversies” and renounced the use of war “as an instrument of national policy.”<sup>54</sup> However, it did not outlaw all uses of force, nor did it explicitly prohibit violence in self-defense.

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49. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

50. Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, arts. 231-47, 2 Bevens 43, 137-59 [hereinafter Treaty of Versailles].

51. *Id.* art. 11, at 51-52.

52. League of Nations Covenant art. 12.

53. In 1931, League members also signed a General Convention to Improve the Means of Preventing War, which empowered the League Council, in the face of a threat of war, to “fix lines which must not be passed by [the potential belligerents’] land, naval or air forces.” General Convention to Improve the Means of Preventing War art. 3, para. 1, League of Nations Doc. C.658(1).M.269(1).1931.IX (1931).

54. General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

Diplomats in subsequent years worked to make the Pact more comprehensive. In particular, they sought to broaden the terms of the Pact to cover unilateral armed reprisals, previously recognized as legitimate means of avenging wrongs without waging a full-fledged war. They also sought to limit the permissible scope of self-defense. In 1933, the League of Nations convened a Preliminary Study Conference on Collective Security to address preventive measures to avert the threat of war.<sup>55</sup> The Austrian delegation to the Study Conference suggested it would be “[a] tremendous step forward” if “all acts committed in self-defence were prohibited, with the exception of acts of self-defence in cases of emergency in the technical sense of the expression, that is, for the purpose of repelling an attack on national territory.”<sup>56</sup> Even more restrictively, a French delegate at a subsequent League of Nations conference insisted that “it is of paramount importance that peace be maintained, whatever may be the wrongs endured by the State which has been attacked.”<sup>57</sup>

Nonetheless, even here, retribution and punishment had not been entirely excised from the legal framework. The aim of establishing an impartial justice system for the international community required League delegates to define and criminalize aggression.<sup>58</sup> In a move away from earlier notions of war-as-punishment, the League now sought punishment-for-war:

Why is the need felt of determining the guilty party? It is not for the pleasure of attributing blame or praise; it is because the point of departure is the idea that the aggression must be repressed, that sanctions must be applied to the guilty and aid brought to the victim or victims.<sup>59</sup>

Notably, unlike the present-day effort of defining the crime of aggression for purposes of the Rome Statute of the International Criminal Court,<sup>60</sup> the crime of aggression that the League considered was attributed to the *state*, not to an individual. For all their good intentions, however, the interwar efforts at abolishing the unilateral use of force and preventing wars more generally failed to thwart the 1931 Japanese invasion of Manchuria, the 1935 Italian invasion of Abyssinia, the German invasion of Czechoslovakia in 1938, or the German

55. LEAGUE OF NATIONS, PERMANENT CONFERENCE ON INTERNATIONAL STUDIES, A SHORT RECORD OF PRELIMINARY STUDY CONFERENCE ON “COLLECTIVE SECURITY” HELD IN PARIS ON MAY 24-26, 1934, at 9 (International Institute of Intellectual Cooperation ed., 1934) [hereinafter LEAGUE OF NATIONS STUDY CONFERENCE]. As it was broadly conceived, prevention included “the peaceful alteration of the status quo in order to remove the causes of international disputes by rectifying economic and political inequalities and injustices between nations.” *Id.* at 24.

56. *Id.* at 41.

57. INTERNATIONAL INSTITUTE OF INTELLECTUAL CO-OPERATION, COLLECTIVE SECURITY: A RECORD OF THE SEVENTH AND EIGHTH INTERNATIONAL STUDIES CONFERENCES, PARIS 1934-LONDON 1935, at 298 (Maurice Bourquin ed., 1936) (remarks of A. Camille Jordan) [hereinafter COLLECTIVE SECURITY]. He then added: “Thus the Conventions of London condemn the forcible methods hitherto frequently employed as sanctions for the repression of infractions of international law. What the signatories wished to obtain was, in the words of M. Politis, ‘that the idea of peace be recognised as having a sort of priority. . . .’” *Id.*

58. See, e.g., Convention for the Definition of Aggression, July 3, 1933, 147 L.N.T.S. 67.

59. COLLECTIVE SECURITY, *supra* note 57, at 329 (remarks of A. Camille Jordan); see also *id.* at 333 (remarks of Robert Forges-Davanzati) (“Certainly, if we cannot determine the aggressor, if we do not know who is qualified to decide who is the aggressor, all discussion about the prevention of aggression and about the sanctions to be applied to the aggressor loses its value.”).

60. ICC Review Conference of the Rome Statute, Resolution RC/Res.6 (June 11, 2010).

invasion of Poland a few months later, an act which heralded the worst war in human history.<sup>61</sup>

At the close of the Second World War, peace and security from war became the paramount interest of the new international order. The Allies set out to establish a reformed model of the failed League of Nations, one that would guard against a recurrence of a world-war catastrophe. The United Nations Charter, concluded in 1945, stated as its first and foremost goal “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>62</sup> To this end, the signatories sought “to unite [their] strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.”<sup>63</sup>

The regulation of the use of force under the U.N. Charter was in many ways a continuation of the prewar efforts toward collective security. This time, however, it provided a clearer prescription of obligations and prohibitions, ultimately creating a preventive regime for the use of force. A three-tier system explicitly outlawed any threat or use of force,<sup>64</sup> leaving two narrow exceptions. The first is the use of force in individual or collective self-defense by states in response to an armed attack, under Article 51 of the Charter. Under this exception, the use of force was to be defensive only, with the sole aim of preventing further violence. Indeed, in the International Court of Justice’s (ICJ) subsequent interpretation of Article 51, the court noted that to use force in self-defense, not only must the victim state experience an armed attack, but its response must be “necessary and proportionate.”<sup>65</sup> The requirement of proportionality “limits a response to what is needed to reply to an attack.”<sup>66</sup> Conceived in this way, the use of force could only be preventive, not retributive.

The second exception to the prohibition on use of force is military action authorized by the UNSC. Under Chapter VII of the Charter, the UNSC is entrusted with “[determining] the existence of any threat to the peace, breach of the peace, or act of aggression and . . . mak[ing] recommendations, or decid[ing] what measures shall be taken . . . to maintain or restore international

61. These efforts did, however, lay the foundation for the subsequent indictment and conviction of Nazi and Japanese officials for crimes against the peace in the Nuremberg and Tokyo Tribunals, respectively. See 12 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 60 (1947-1948); see also Int’l Military Trib. for the Far E. Judgment, Annex “B” (Relevant Treaties, Conventions, Agreements, and Assurances Upon Which the Charges were Based), <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-B.html>.

62. U.N. Charter pmb.; see also BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 792 (2d ed. 2002) (claiming the Charter intended “to restrict as far as possible the use of force by the individual State”).

63. U.N. Charter pmb.

64. *Id.* art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

65. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶41 (July 8).

66. *Id.* ¶5 (Higgins, J., dissenting); see also Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INT’L L. STUD. 7, 27-28 (2002).

peace and security.”<sup>67</sup> The terms “a threat to the peace,” a “breach of the peace,” or “an act of aggression” were nowhere defined or elaborated in the Charter. The UNSC was hence left with maximum flexibility to determine when and how it was necessary to address a particular situation. Among the measures it was empowered to authorize were non-military sanctions,<sup>68</sup> and if those failed, “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>69</sup>

The Charter’s innovation was to recognize the inevitability of war, with the hope that the collective security design would deter and preempt the unilateral use of force. Delegates to the Dumbarton Oaks and San Francisco conferences were explicit about the possible need to use force to prevent worse force: “We now see that measures of conciliation and appeasement are not enough, that war has to be prevented at all costs, even at the cost of war itself, if necessary.”<sup>70</sup> Delegates also emphasized the Charter’s Chapter VII vision, though never fulfilled, of U.N. armed forces and their hoped-for deterrence effects:

If called upon to do so by the Security Council, the entire force will march against a State convicted of aggression, in accordance with the provisions for enforcement as laid down for the Security Council . . . . the certainty of defeat will most probably discourage any aggressor from starting a fight.<sup>71</sup>

The Charter thus initially intended to achieve peace through a combination of prevention and punishment, if necessary, by war. Yet, while the emphasis on prevention was clear (the Charter emphasized “threats to international peace and security”), the language of punishment and guilt was entirely ambivalent. Even the inclusion of the term “act of aggression” was hotly debated.<sup>72</sup> Suggestions to define the term were rejected as impractical, likely under-inclusive and open to manipulation by would-be aggressors. Opponents further held that the determination of whether aggression has

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67. U.N. Charter art. 39.

68. *Id.* art 41.

69. *Id.* art 42.

70. Field Marshal Jan Christian Smuts, Prime Minister and Chairman of S. Afr., Address Before the Sixth Plenary Session of the United Nations Conference on International Organization (May 1, 1945), in 1 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, 1945, at 423 (William S. Hein & Co. 1998) (1945) [hereinafter UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION]. The continuation of the quote reads: “The Covenant did not undertake to prevent war at all costs but merely to create measures of delay and attempts at arbitration and negotiation and conciliation and finally to invoke economic sanctions to frighten off the aggressors. The Dumbarton Oaks Charter, on the other hand, realistically recognizes that war must be prevented at the start, and that no half measures to that end will suffice.” *Id.*

71. Joseph Paul-Boncour, Acting Chairman of the French Delegation, Address Before the Closing Session of the United Nations Conference on International Organization (June 26, 1945), in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, *supra* note 70, at 699-700.

72. Under Soviet pressure, it was ultimately inserted, even though the United States considered the phrase “breach of the peace” broad enough to cover aggression. PAGE WILSON, AGGRESSION, CRIME AND INTERNATIONAL SECURITY: MORAL, POLITICAL AND LEGAL DIMENSIONS OF INTERNATIONAL RELATIONS 73 (2009).

occurred and how it should best be dealt with should be left for the UNSC as the need arose.<sup>73</sup>

One might argue, of course, that the concept of aggression belongs in the category of threat rather than guilt. However, there is substantial evidence to suggest that U.N. members viewed “aggression” as connoting guilt as well, and that this sensitive association is what often impeded agreement over what “aggression” meant.<sup>74</sup> In 1974, the General Assembly finally reached an agreement over a proposed definition of “aggression,”<sup>75</sup> but even that definition was never invoked or referenced by the UNSC in any subsequent determination.<sup>76</sup>

These debates over the definition of aggression were but a reflection of a broader ideological dispute about whether the U.N. should be in the business of assigning blame at all. Certainly, some states held onto a state-oriented punitive mindset at San Francisco, relying, in part, on the dismal record of the former institution entrusted with preventing wars:

Only if conditions are created such as will guarantee that no violation of the peace or the threat of such violation shall go unpunished, and the adoption of necessary punitive measures is not too late, will the organization of security be able to discharge its responsibility for the cause of peace.<sup>77</sup>

Ultimately, however, the U.N. Charter system reflected the belief that if peace is to be preferred, the UNSC must be endowed with maximum flexibility to order actions to restore or promote peace and security; and that this was especially the case given the difficulty of agreeing on what the “crime of aggression” actually meant. Effective policing and prevention was thus preferred to judicial-like punishment. As Oscar Schachter explained in 1965,

[t]his is evidenced, in some measure, by the fact that, even when complaints and charges of violations are made, the organs are usually reluctant to decide the issue of responsibility; they tend to adopt recommendations or decisions which avoid judgments on the charges made and seek to bring about a settlement or adjustment of the dispute without determining guilt or innocence of any party. Their objective is a resolution which will be acceptable and therefore likely to be implemented by the governments directly concerned; it

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73. LELAND GOODRICH, EDVARD HAMBRO & ANNE SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 263-64 (2d ed. 1969).

74. *Id.* at 47-48. *See also* G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/8082 (Oct. 24, 1970) (“A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.”).

75. G.A. Res. 3314 (XXIX), at 142, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

76. *See* Elizabeth Wilmschurst, *Definition of Aggression*, U.N. AUDIOVISUAL LIBR. INT’L L. 3 (2008), [http://untreaty.un.org/cod/avl/pdf/ha/da/da\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/da/da_e.pdf) (“Paragraph 4 of resolution 3314 (XXIX) drew the attention of the Security Council to the Definition and recommended that the Council ‘should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.’ The Definition has rarely if ever been used for that purpose.”).

77. Address by V. M. Molotov, Chairman of the Delegation of the U.S.S.R., Address Before the First Plenary Session of the United Nations Conference on International Organization (Apr. 26, 1945), in *UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION*, *supra* note 70, at 135; *see also* Dr. T. V. Soong, Chairman of the Delegation of the Republic of China, Address Before the First Plenary Session of the United Nations Conference on International Organization (Apr. 26, 1945), in *UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION*, *supra* note 70, at 129-30.

will often not serve this end to decide whether the charges and counter-charges of illegality are well founded.<sup>78</sup>

The new use-of-force regime's focus on prevention was especially apparent in its attempt to ban armed reprisals, or the use of force short of war—a prevalent state practice. As the design of the U.N. Charter's collective security architecture was meant to discourage vigilantism, reprisals no longer fit. In 1964, UNSC Resolution 188 explicitly condemned reprisals as "incompatible with the purposes and principle of the United Nations,"<sup>79</sup> and in 1970, the U.N. General Assembly adopted its Declaration on Friendly Relations,<sup>80</sup> noting that "States have a duty to refrain from acts of reprisal involving the use of force."<sup>81</sup> To the extent that a meaningful distinction could be drawn between reprisal and self-defense, particularly given that both kinds of actions are typically taken *after* an attack is suffered, the difference has been commonly framed in terms of the actions' purposes; the former is retributive, whereas the latter is preventive:

Measures of self-defense are not considered as sanctions; though taken in response to, or in anticipation of, unlawful behavior, they do not have a punitive character. Instead, self-defense is considered to have a strictly protective or preventive purpose. By contrast, reprisals are considered as sanctions and are judged to have a punitive character.<sup>82</sup>

The logic of the ban on reprisals was summed up by Bruno Simma: "[I]t cannot be overlooked that, being caught in the 'dilemma between security and justice[,] the UN Charter deliberately gives preference to the former.'<sup>83</sup>

Nevertheless, the Charter's very narrow construction of when force could be used,<sup>84</sup> coupled with the general ineffectiveness of the U.N. collective security system, has not stopped states from engaging in armed reprisals.<sup>85</sup>

78. Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 961 (1964).

79. S.C. Res. 188, U.N. Doc. S/5650 (Apr. 9, 1964). The Resolution was adopted when Yemen submitted a complaint to the Security Council over a British air attack on Yemeni territory on March 28, 1964.

80. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nation, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/8082, at 122 (Oct. 24, 1970).

81. *Id.*

82. Robert Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 589 (1972); see also SIMMA ET AL., *supra* note 62, at 805 ("[L]awful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for the defence have to be strictly necessary for repelling the attack."); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972).

83. SIMMA ET AL., *supra* note 62, at 792 (citation omitted).

84. Further limiting the right to use force was the high threshold placed by the International Court of Justice to what would amount to an "armed attack" that would justify the use of defensive force. See *id.* at 792-93 ("[A] State is bound to endure acts of force that do not reach the intensity of an armed attack, thus remaining devoid of any effective protection until the [Security Council] has taken remedial measures. [I]t cannot be overlooked that being caught in the 'dilemma between security and justice,' the UN Charter deliberately gives preference to the former.')

85. See Tucker, *supra* note 82, at 595 ("A narrow interpretation of self-defense . . . must generate considerable, and, in the end, irresistible, pressures to effect some kind of rehabilitation of armed reprisals.')



Indeed political speeches addressed to the domestic population often used the language of retribution and punishment when justifying such actions. For example, in 1986 the United States struck targets in Libya in Operation *El-Dorado Canyon*. The strikes followed a Libyan-backed terrorist attack on La Belle discotheque in West Berlin, which resulted in two fatalities and hundreds of injuries, many of whom were American military personnel. In justifying the strikes, President Reagan laid out the evidence that linked the terrorists to Libyan leader, Colonel Muammar Qaddafi.<sup>86</sup> The evidence, he claimed, was “direct . . . precise . . . [and] irrefutable.”<sup>87</sup> He spoke of the advance warnings that were given to Qaddafi, promising to hold the latter’s regime accountable for any terrorist attack launched against American citizens, warnings which Qaddafi did not heed. Reagan also charged that Qaddafi’s actions required putting him “outside the company of civilized men.”<sup>88</sup> However, conscious of the mixed audience he was addressing—the American voter and the international community—the punitive rhetoric was nonetheless carefully accompanied by a reference to Article 51 of the Charter and the right of self-defense against terrorism.<sup>89</sup>

Thus, after long struggles between the punitive and preventive paradigms in justifying wars, the present-day international community has opted for the latter. As the international community’s focus has turned toward peace and stability under the U.N. Charter, this preference for preventive paradigms has crystallized. U.N. Security Council resolutions authorizing the use of force under Chapter VII never invoke the language of punishment, but only the rhetoric of combating threats to peace and security.<sup>90</sup> Nevertheless, individual leaders do speak of “punishment” when addressing their domestic populations. It is only in the international context that they are careful to link their actions to the right of self-defense under Article 51.

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86. Ronald Reagan, President of the United States, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986), <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>.

87. *Id.*

88. *Id.*

89. *Id.* (“Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter.”).

90. For example, the UNSC’s Resolution authorizing the use of force against Iraq in 1990: Resolution 678 stated:

The Security Council,

...

Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990)... Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security

.....

Authorizes Member States . . . to use all necessary means to uphold and implement resolution 660 (1990) . . . and to restore international peace and security in the area.

S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

### B. *Punishment in War: Jus in Bello*

For centuries, the sovereign, state, and people, comprised a single unified entity; punishing the sovereign therefore entailed punishing her state and subjects as well. Vendetta against the populations of defeated countries, even if not unbounded, was a legitimate means of allocating justice, and often included murder, rape, and enslavement. However, in modern times, this form of “punishment” has also faded from the international scene, being replaced by a humanitarian law regime that focuses on the threats posed by individuals in war, not the guilt of the state as such. Here too, violence can be used preventively, but never as punishment.

The long-standing dependence of the justness of harm *in* war on the justness *of* the war meant that when sovereigns waged war in the name of justice, force used during this war against the defending people as a whole was also generally considered just. With the secularization of political rule in the early modern period, however, the sovereign no longer embodied the state, and the people were no longer her property. As Hugo Grotius, and then Immanuel Kant, developed the distinction between *jus in bello* and the *jus ad bellum*, the justification for employing force against the sovereign could extend only to justify deliberate harm to combatants, acting as agents of the sovereign. Violence could no longer be waged against the population as a whole.

The independence of the *jus in bello* from the *jus ad bellum* and the distinction between the sovereign and people were eventually codified into the present-day principle of distinction found in the Geneva Conventions.<sup>91</sup> Under the Conventions, the fate of individuals came to depend on their contribution to the war effort and the military necessity of killing or disabling them. Replacing “guilt” with “threat” in this way more easily justified the infliction of harm on enemy nationals.<sup>92</sup> All able combatants are thus targetable as fighting agents of their governments, while all other individuals, including disabled combatants, are to be spared. Those who are to be spared are sometimes referred to as “innocent,” not because they are morally not guilty, but because they are non-threatening. Interestingly, the term “innocent” has never appeared in modern international treaties, but is commonly invoked in commentary and rhetoric, suggesting, perhaps, an intuitive association between fighting and guilt.

In accordance with this principle, the wagers of contemporary western wars take care, in spelling out their targets, to distinguish among rogue leadership that must be stopped and the people that must be protected.<sup>93</sup> The

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91. See, e.g., Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 75 U.N.T.S. 973 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, 51(3), June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art 13(3), June 8, 1977, 1125 U.N.T.S. 17513 [hereinafter APII].

92. See OLIVER O'DONOVAN, *THE JUST WAR REVISITED* 36-42 (2003).

93. In his address to the nation justifying the 1986 attack on Libya, President Reagan added: Before Qaddafi seized power in 1969, the people of Libya had been friends of the United States, and I'm sure that today most Libyans are ashamed and disgusted that this man has

state itself is hardly ever an “enemy.” In this vein, NATO leaders, for example, made a point of singling out Milošević and his forces as the intended targets in their 1999 military campaign for Kosovo, and emphasized the need to distinguish between “innocent” civilians and “enemy” forces within the people of Serbia.<sup>94</sup> Recall also the EU’s statement, “[w]e have no quarrel with the Iranian people.”<sup>95</sup>

The shift away from the use of punishment in war has been most pronounced in the evolution of two interrelated prohibitions: the ban on all forms of collective punishment and the subsequent prohibition on belligerent reprisals. The Hague Regulations of 1907<sup>96</sup> and the Third and Fourth Geneva Conventions of 1949<sup>97</sup> codified the earlier customary prohibitions on imposing sanctions on civilians and prisoners of war for offenses they did not personally commit. The 1977 Additional Protocols reiterated this prohibition,<sup>98</sup> and its official Commentary explained: “The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.”<sup>99</sup> Numerous international human rights instruments included similar prohibitions in regulating the relationship between governments and their own people.<sup>100</sup>

Yet a comprehensive ban on collective punishment faces unique conceptual and practical challenges regarding war. War is collective violence. It is violence between or among collectives, exercised in the name of those collectives, for the (supposed) benefit of collectives. By its very nature it entails harm of every kind to wide populations, including the innocent. Any attempt to

made their country a synonym for barbarism around the world. The Libyan people are a decent people caught in the grip of a tyrant.

Reagan, *supra* note 86.

94. See, e.g., STEVEN HALLOCK, REPORTERS WHO MADE HISTORY: GREAT AMERICAN JOURNALISTS ON THE ISSUES AND CRISES OF THE LATE 20TH CENTURY 262 (2009) (“As a result, NATO forces were able to hold civilian casualties to a very low level while concentrating on the military targets.” (citing *Kosovo After the Strikes: Secretary Cohen, General Wald and General Shelton Brief Reporters* (CNN television broadcast June 10, 1999))); William Cohen, Secretary of Defense, et al., *Defense Department Briefing on Serb Withdrawal from Kosovo and NATO Bombing Pause*, PENTAGON FED. NEWS SERVICE, June 10, 1999 (“It’s a fight against ethnic and religious hatred, the lack of tolerance for others, and the right to live in peace. The United States and NATO used force as a last resort and only after Milošević refused to respond to diplomatic initiatives. And when diplomacy failed, NATO used force judiciously and effectively to achieve its goals.”).

95. Statement on Iran Sanctions, *supra* note 2.

96. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 50, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV].

97. Geneva IV, *supra* note 91, art. 33.

98. API, *supra* note 91, arts. 75(1), 75(4)(b); APII, *supra* note 91, arts. 4(2)(b), 6(2)(b).

99. ICRC, *Part IV: Civilian Population #Section III—Treatment of Persons in the Power of a Party to the Conflict #Chapter I—Field of Application and Protection of Persons and Objects*, ¶ 3055 (1978) (Commentary to Additional Protocol I), <http://www.icrc.org/ihl.nsf/com/470-750096?open=document>.

100. The prohibition against collective punishment within the human rights regime is primarily associated with due process guarantees, including the right to a fair trial and the presumption of innocence. See, e.g., International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 1916 U.S.T. 521; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 6, Sept. 3, 1953, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 11, U.N. Doc A/810, at 71 (1948).

fully protect the innocent from the engulfing nature of the war is bound to fail. The laws of war are thus left to manage the tension between the need to allow for the conduct of war, which will inevitably result in some harm to the innocent, and the need to protect the innocent from such an excessive degree of harm that even war cannot justify.

The current humanitarian law regime therefore strives to strike a balance between the acceptable harm associated with collateral damage and preventive action, and the unacceptable harm associated with collective punishment. But it is an uneasy balance. Alongside absolute prohibitions on targeting or terrorizing the civilian population, the law allows for the unintentional (even if foreseen) and proportionate infliction of “collateral damage.”<sup>101</sup> Alongside the prohibition on collective punishment, the laws of war do allow, implicitly or explicitly, a host of permissible measures, such as curfews, searches, and other impediments to movement or breaches of privacy, even where such measures inevitably harm the innocent.<sup>102</sup> Such dualism exists with regard to property as well: pillaging is absolutely prohibited, but a belligerent party may destroy or seize enemy property if “such destruction or seizure be imperatively demanded by the necessities of war.”<sup>103</sup> In occupied territory, “[r]equisitions in kind and services shall not be demanded . . . except for the needs of the army of occupation,”<sup>104</sup> and “[a]ny destruction by the Occupying Power of real or personal property . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations.”<sup>105</sup> The line distinguishing permissible from impermissible harm is thus an opaque and easily manipulable, dual-head test of intent and proportion: (1) A permissible security measure must be motivated by a legitimate security need, which means it must be preventive in its motivation; and (2) It must meet a needs-harm proportionality test of being either “limited strictly to military objectives” or not “excessive” in relation to the anticipated military advantage.<sup>106</sup>

From an observer’s point of view, it is often difficult to tell whether a collective measure is a permissible security tool, withstanding the test of legitimate intention and proportionate harm, or whether it is an impermissible act of collective punishment. Evidently, the dual test of intent and proportionality allows any belligerent or occupier much room for both

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101. See, e.g., Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia PR/P.I.S./510-E (June 13, 2000), ¶¶ 28, 51 [hereinafter Final Report].

102. See, e.g., Hague Convention IV, *supra* note 96, art. 43 (“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”); see also Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119, 135 (2005) (“Villagers were required to come and go according to a strict curfew and acquire numbered identification cards to leave and reenter the village. Yet the coalition states did not purport to derogate from any provision of the ICCPR. . . .”).

103. Hague Convention IV, *supra* note 96, art. 23(g).

104. *Id.* art. 52.

105. Geneva IV, *supra* note 91, art. 53.

106. API, *supra* note 91, arts 51(5)(b), 52(2).

legitimate and illegitimate means of subordinating the local population to its will.<sup>107</sup> Intentions, after all, are what actors declare them to be. And more often than not, especially when dealing with a hostile population, intentions are mixed. Proportionality, too, is far from an objective and easily measurable standard, especially as the values weighed to measure it are incommensurable.

Several recent and contemporary examples demonstrate the difficulty in distinguishing unlawful punishment from lawful prevention. In all these cases, it would be virtually impossible to trace the “real” intention behind the measures imposed; nor is there necessarily a single intention motivating them. What is obvious, however, is that any party who wishes to employ such means must invoke the language of prevention, and never of retribution or punishment, if it seeks legitimacy under international law.

For example, when demolishing houses of suicide bombers, Israel often stated its intention is the legitimate goal of deterring future terrorists from similar attacks on Israeli citizens.<sup>108</sup> To others, however, it appeared an illegitimate act of revenge upon the terrorist’s family. Similar debates surround the Israeli-imposed closure of the past four years on Hamas-led Gaza. Is it an act driven by genuine security concerns, a legitimate measure between two warring entities, or a means of collective punishment of the population of Gaza, in part, for voting Hamas into power? Similar controversies also surrounded military operations elsewhere. In May 2007, American forces imposed a curfew on 300,000 residents in Samarra, Iraq, after a terrorist bomb attack killed twelve Iraqi police officers. The American forces cited the prevention of further attacks and the protection of reconstruction projects in the area as their purpose; yet after twelve days, with food and other supplies beginning to wane, the NGO Doctors for Iraq declared the curfew to be collective punishment.<sup>109</sup> The only thing that remains clear is that in each case, the acting state sought to legitimize its actions by invoking the language of prevention.

The focus on “threats,” and general aversion to “guilt,” within the laws of war also prompted a prohibition on belligerent reprisals.<sup>110</sup> Throughout most of history, the primary mechanism for the enforcement of the laws of war was self-interest, reinforced through reciprocity. A party was obliged to comply with agreed-upon humanitarian rules only to the extent that its enemies also complied. Warring parties were allowed to engage in belligerent reprisals—acts that would have been unlawful had there not been a preceding violation by the enemy that justified such unlawful behavior—mostly against civilians or

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107. Final Report, *supra* note 101, ¶ 48.

108. See, e.g., Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT’L L. 1, 31 n.153 (1994) (noting that the Court “conclude[d] that Article 119 serves as a deterring punitive measure” (quoting *Al Gamal v. Military Commander of Judea and Samaria Region* HCJ 542/89 (1989))).

109. *Iraqi Town Struggles Under Curfew*, BBCNEWS, May 18, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6671075.stm](http://news.bbc.co.uk/2/hi/middle_east/6671075.stm).

110. This focus on belligerent reprisals in the *jus in bello* context should not be confused with armed reprisals in the *jus ad bellum* context.

POWs.<sup>111</sup> Reprisals were lawful means of forcing the enemy into compliance, and were therefore not subject to the emerging prohibition on collective punishment. Indeed, their non-retributive nature was a condition for their lawfulness. Once compliance had been achieved, no further violation was permitted.<sup>112</sup>

The Lieber Code of 1863<sup>113</sup> and the 1880 Oxford Manual on the Laws of War on Land<sup>114</sup> explicitly admitted reprisals, though subject to limitations. Several attempts at restricting reprisals between the late 1800s and World War I failed, with the first ban—on reprisals against POWs—adopted in 1929. The post-World War II war crimes trials jurisprudence on the customary norms governing belligerent reprisals recognized their legitimacy and upheld their legality under certain conditions.<sup>115</sup> The four 1949 Geneva Conventions failed to include a general prohibition of the practice, but each did contain a ban on reprisals against a specific category of protected entities—*hors de combat* (on land, at sea, and POWs) and civilians at the hands of an enemy power.<sup>116</sup>

However, with the adoption of Additional Protocol I in 1977, an increased humanitarian drive and expansion of human rights norms further diverted the focus of the laws of war from the rights of states to the rights of individuals, so that the protection granted to individuals under the law was viewed as their own, and not their country's to trade in. Under the Protocol, reprisals against the civilian population in the territory of the enemy as well as against most other targets were outlawed (leaving narrow room for reprisals against able soldiers on the battlefield).<sup>117</sup> Under the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in the late 1990s, the prohibition on reprisals in non-international armed conflict crystallized.<sup>118</sup>

As a general matter, present-day reprisals against civilians and other protected individuals and objects are prohibited. The United States, the United Kingdom, Italy, and several other countries have reserved a right to engage in reprisals in extreme circumstances.<sup>119</sup> Nonetheless, the Rome Statute of the

111. See Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 187 (2003).

112. *Id.* at 187.

113. U.S. Dep't of Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 28 (Gov. Printing Office 1898) (1863) [hereinafter Lieber Code], reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 1988).

114. INSTITUTE OF INTERNATIONAL LAW, *Oxford Manual of the Laws of War on Land*, in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 25 (1916).

115. United States of America v. Wilhelm List et al., Judgment, Case No. 7, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757, at 1248-51 (1948).

116. See SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 113-46 (2007).

117. API, *supra* note 91, arts. 51-56.

118. See, e.g., Prosecutor v. Martić (Rule 61), Case No. IT-95-11-R61, Decision (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 1996) (Jorda, J. (presiding); Odio Benito, J.; Riad, J.); Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (Cassese, J. (presiding); May, J.; Mumba, J.); see also Darcy, *supra* note 111, at 231-43.

119. Italy reserves the right to "react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means

International Criminal Court (ICC) makes no exception for reprisals;<sup>120</sup> the Draft Rules on State Responsibility also prohibit any countermeasure that violates basic humanitarian guarantees;<sup>121</sup> and the International Criminal Tribunal for the Former Yugoslavia has rejected all possible justifications for reprisals, finding that the prohibition on reprisals was now a customary norm of the highest order (*jus cogens*).<sup>122</sup>

Following the trend of channeling punishment away from states and toward individual defendants, violations of the rules of lawful warfare can now, as a matter of international law, be dealt with only through individualized punishments,<sup>123</sup> which can include public shaming and individual criminal prosecutions. Whether such post-conflict measures could ever serve as a real inducement for compliance with the rules during the war is debatable. This point was not lost on the negotiating parties to the Additional Protocol. During the 1974-1977 Diplomatic Conferences, the French delegate, in introducing a limited right of reprisals, observed:

From the point of view of effectiveness, [the French] delegation doubted whether the existing system of penal sanctions provided a true safeguard against violations of the Conventions. During a period of armed conflict it was not after the event that the machinery of sanctions should come into action but at the time when the rule was broken, and when that breach could cause a serious and perhaps decisive upset in the balance of forces.<sup>124</sup>

Still, opponents of the proposal feared that reprisals would be punishment “wrongly applied” insofar as they usually fall upon the innocent,<sup>125</sup> and that a

admissible under international law in order to prevent any further violation.” API, Ratifications and Reservations, Italy Reservation Text, <http://www.icrc.org/ihl.nsf/NORM/E2F248CE54CF09B5C1256402003FB443?OpenDocument>. The UK holds similarly. API, Ratifications and Reservations, United Kingdom Reservation Text (2002), <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>; see also INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT—THE JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK 20 (Jeanne M. Meyer & Brian J. Bill eds., 2002).

120. Rome Statute of the International Criminal Court art. 8(2)(b), July 1, 2002, 2187 U.N.T.S. 90.

121. Int’l Law Comm’n, State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, art. 50, U.N. Doc. A/CN.4/L.600 (Aug. 11, 2000), reproduced at [http://www.lcil.cam.ac.uk/projects/state\\_responsibility\\_document\\_collection.php](http://www.lcil.cam.ac.uk/projects/state_responsibility_document_collection.php) [hereinafter Draft Articles].

122. Prosecutor v. Kupreskic, Case No. IT-95-16-T, ¶ 511.

123. See George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 15-17 (1991).

124. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Volume IX, Third Session, 46th Meeting, at 58 (CDDH/I/SR.42-65) (summary of the statement of Mr. Girard, France). For similar positions by Belgium, see *id.* at 65 (summary of the statement of Mr. de Breucker, Belgium); and *id.* at 73 (summary of the statement of Mr. Draper, United Kingdom).

125. See *id.* at 75 (summary of the statement of Mr. Eide, Norway) (“It should be noted that reprisals represented collective sanctions, and not repressions of breaches in the sense used in articles 74 to 78. The aim there was to pin responsibility on a guilty individual, in which case there would be such legal safeguards as presumption of innocence. It was considered that the relationship between guilt and punishment might have a certain restraining effect. But in the French proposal those who committed the original breach were not necessarily those who suffered from the reprisals . . .”).

right of reprisal would lead to escalating cycles of violence.<sup>126</sup> The aversion to any form of punishment in war, its effects on the “innocent” and its risk of inviting further violence, has thus lead to a significant curbing of anything that might resemble collective punishment, including the ostensibly forward-looking mechanism of reprisals.

### C. *Sanctions Outside of War*

Since ancient times, states and other sovereign entities have employed a host of military and non-military sanctions against each other, outside the framework of war. They do so with the purpose of redressing an injury or enforcing a legal right. Yet, while previously such sanctions were openly referred to as punitive, following the First World War, the international community has couched them only as preventive action.

In what has been described as “the earliest recorded instance of economic sanctions,” in 432 B.C., Athens imposed an import ban on products from Megara to compel the release of three Athenian women who had been kidnapped.<sup>127</sup> Kidnapping of citizens was itself a favorite mode of sanctions and counter-sanctions throughout the ancient and medieval eras.<sup>128</sup> Seizure of foreign property was another familiar mechanism of international coercion, often with the formal authorization of the sovereign whose citizens suffered earlier capture of their own property by foreign nationals.<sup>129</sup> Pacific blockades, maritime embargoes, and seizure of foreign vessels were likewise acceptable means of enforcing international rights and obligations.<sup>130</sup>

In the nineteenth century, sanctions were referred to as “measures of constraint short of war,” “compulsive means of settlement of state difference,” and “methods of applying force which are held not to be inconsistent with the continuance of peaceful relations between the powers concerned.”<sup>131</sup> As far as international legal doctrine went, sanctions were sometimes classified under the laws of peace, sometimes under the laws of war. The general understanding was that sanctions were a permissible measure, short of warfare, to settle a dispute which could not be resolved by non-coercive means.<sup>132</sup> Of course, sanctions often had the opposite effect, triggering or lengthening a war rather than preventing it.<sup>133</sup>

The League of Nations’ collective security system included the right of member states to impose sanctions against states that had resorted to war in

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126. *See id.* at 60 (summary of the statement of Mr. Arebi, Libyan Arab Republic); *id.* at 61-62 (summary of the statement of Mr. Rechetniak, Ukrainian Soviet Socialist Republic); *id.* at 63 (summary of the statement of Mr. Kakolecki, Poland); *id.* at 76 (summary of the statement of Mr. Eide, Norway).

127. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 45 (2007) (citing ROBIN RENWICK, ECONOMIC SANCTIONS 1 (1981)).

128. *Id.* at 46.

129. *Id.*

130. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 139-50 (H. Lauterpacht, ed., 7th ed. 1952).

131. FARRALL, *supra* note 127, at 47-48.

132. *Id.*

133. *Id.* at 52.



violation of the Covenant and its dispute settlement system. Sanctions, under the Covenant, included the severance of all relations on both governmental and private levels.<sup>134</sup> The wording of the sanctions provision suggested that sanctions were automatically triggered in the case of war. In fact, this was the original understanding of President Woodrow Wilson in his support of the League:

Suppose somebody does not abide by these engagements, then what happens? An absolute isolation, a boycott. The boycott is automatic. There is no “if” or “but” about it. . . . It is the most complete boycott ever conceived in a public document, and I want to say with confident prediction that there will be no more fighting after that. There is not a nation that can stand that for six months.<sup>135</sup>

Quickly, however, it became evident that Wilson’s vision was not shared by the League Members. In 1921, the League adopted a resolution leaving each member state to decide for itself whether a breach of the Covenant had occurred and whether sanctions were in order.<sup>136</sup> The one concrete experience of the League’s sanctions, imposed on Italy following its invasion of Abyssinia, proved ineffective in compelling a withdrawal.<sup>137</sup> Instead, Mussolini partnered with Hitler.<sup>138</sup>

Whether sanctions under the League of Nations were designed to serve as punitive measures was a subject of debate at the time. Indeed, the Royal Institute of International Affairs, in its 1938 report, denied any such role for sanctions.<sup>139</sup> Subsequent commentators, however, argued that the League system sought to establish an international order resembling, as much as possible, a domestic one, with rules laid out by a competent authority and transgressions punished by sanctions.<sup>140</sup>

The debate over whether international sanctions should be viewed as a mode of punishment continued after the League of Nations era. Under the U.N. Charter, the UNSC was entrusted with the power to order such measures as were necessary to restore international peace and security, including “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>141</sup> Military action was to follow only if these less violent steps proved ineffective. Fredrik Hoffman and David Leyton-Brown both argued that sanctions were intended to draw the lines between acceptable and unacceptable behavior, and that it was implied in the very term “sanction” that it was not merely a political action, but was meant to serve as punishment for

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134. League of Nations Covenant art. 16, para. 1.

135. See FARRALL, *supra* note 127, at 53 (citing M.S. DAOUDI & M.S. DAJANI, *ECONOMIC SANCTIONS, IDEALS AND EXPERIENCE* 26 (1983)).

136. League Assembly Res. 4, League of Nations Doc. A.1921.P, 453 (1921).

137. FARRALL, *supra* note 127, at 54-56.

138. *Id.* at 57.

139. ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, *INTERNATIONAL SANCTIONS* 13 (1938).

140. Kim Richard Nossal, *International Sanctions as International Punishment*, 43 *INT’L ORG.* 301, 310 (1989).

141. U.N. Charter art. 41.

nations that deserved it.<sup>142</sup> Kim Nossal has similarly asserted that, especially when imposed and maintained despite any real prospect of effecting change in the target state's behavior, sanctions must be understood as punishment, serving both retributive and symbolic functions.<sup>143</sup>

As a practical matter, in its first forty-five years of operation, the UNSC ordered sanctions in only two cases: Southern Rhodesia (comprehensive sanctions, 1966-1979) and South Africa (arms embargo, 1977-1994).<sup>144</sup> With the end of the Cold War and its attendant gridlock in the UNSC, however, resolutions imposing sanctions expanded exponentially, addressing situations in the Former Yugoslavia (1991-1996), Serbia-Montenegro (1992-1996), Somalia (1992-present), Libya (1992-1999), Liberia (1992-2000), Haiti (1993-1994), Angola (1993-2002), Rwanda (1994), Sudan (1996-2001), Sierra Leone (1997), Taliban-led Afghanistan (1999-2001), North Korea, Iran, and Libya (all still present).<sup>145</sup> Sanctions have comprised total or partial economic embargo, travel and immigration restrictions, blockades, assets freeze, and severance of diplomatic relations.<sup>146</sup> Individual countries, too, have imposed a range of unilateral sanctions on target countries and regimes, including for systematic violation of human rights (Burma<sup>147</sup>) or extra-constitutional changes of power (Zimbabwe<sup>148</sup>).

Importantly, the UNSC never invoked the explicit language of punishment in any of its resolutions under Chapter VII. Formal justifications for sanctions, even when citing present or past bad practices, are always articulated as forward-looking, invoking the interests of enforcement, but never of retribution. For example, following a nuclear test by North Korea in May 2009, the UNSC condemned the nuclear test (but not the country of North Korea), added a long list of sanctions, and concluded with the following statement:

[The UNSC e]xpresses its commitment to a peaceful, diplomatic and political solution to the situation and welcomes efforts by Council members as well as other Member States to facilitate a peaceful and comprehensive solution through dialogue and to refrain from any actions that might aggravate tensions; . . . Affirms that it shall keep the DPRK's actions under continuous review and that it shall be prepared to review the appropriateness of the measures [heretofore approved] . . . as may be needed at that time in light of the

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142. Fredrik Hoffman, *The Function of Economic Sanctions: A Comparative Analysis*, 4 J. PEACE RESEARCH 140, 144 (1967); David Leyton-Brown, *Lessons and Policy Considerations About Economic Sanctions*, in THE UTILITY OF INTERNATIONAL ECONOMIC SANCTIONS 303 (David Leyton-Brown ed., 1987).

143. Nossal, *supra* note 140, at 315-21.

144. FARRALL, *supra* note 127, at 247-61.

145. For these sanctions regimes, see FARRALL, *supra* note 127, at 282-320, 326-68, 374-95, 452-63.

146. *Id.* at 124-26, 220, 353.

147. See Press Release, Capitol Hill, Biden Applauds Additional Economic Sanctions on Burma's Leaders (Oct. 19, 2007).

148. Sam Coates & Jonathan Clayton, *Britain Leads Call for Zimbabwe Sanctions To Punish Mugabe for Stealing Election*, TIMES (LONDON), June 16, 2008, <http://www.thetimes.co.uk/tto/news/world/africa/article259369.ece>.

DPRK's compliance with relevant provisions of resolution 1718 (2006) and this resolution.<sup>149</sup>

Individual leaders, however, and especially Americans, veered closer to punitive rhetoric, although for the most part, still in suggestive terms.<sup>150</sup> For example, in 1979, the United States imposed unilateral sanctions against the Soviet Union, following the latter's invasion of Afghanistan. President Jimmy Carter, in justifying the sanctions, stated, "The world simply cannot stand by and permit the Soviet Union to commit this act with impunity."<sup>151</sup> Later, in his memoirs, he explained that he "was determined to make [the Soviets] pay for their unwarranted aggression."<sup>152</sup> In his Nobel Peace Prize acceptance speech in December 2009, President Barack Obama called on world powers to join hands in sanctions that would "exact a real price" from "nations that break rules and laws."<sup>153</sup> Secretary of State Hillary Clinton later added that nations that tried to disrupt the U.S.-European efforts to isolate Iran risked punishment, although she did not specify what form punishment might take.<sup>154</sup> On the other side, Russian foreign minister, Sergei Lavrov, criticized western powers for promoting U.N. sanctions against Iran that introduced an unwarranted "element of punishment."<sup>155</sup>

In legal and political commentary, scholars have often criticized sanctions as collective punishment, harming the populations of non-democratic regimes who could have done little to induce a change in their government's policies. Sanctions, so it is claimed, have often resulted in direct hardship, impeded longer-term development, and produced adverse externalities for neighboring countries.<sup>156</sup> Against such criticism, the UNSC as well as individual countries have attempted to design "smart sanctions" that targeted individual regime members instead of countries as a whole.<sup>157</sup> Yet, even as applied to individual leaders, however, the international community was hesitant to invoke any explicit punitive language, although the punitive urge was highly visible and acknowledged in public commentary.<sup>158</sup>

149. S.C. Res. 1874, ¶¶ 31-32, U.N. Doc. S/RES/1874 (June 12, 2009).

150. It is possible that Americans are quicker to invoke the language of punishment, given their social and cultural attitudes toward the concept that differ from some other countries. For discussion on that point, see JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

151. Nossal, *supra* note 140, at 320 (citing Carter's speech).

152. *Id.* (quoting JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT*, 471-72, 476 (1995)).

153. Barack Obama, President of the United States, *A Just and Lasting Peace* (Dec. 10, 2009), [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html).

154. Paul Richter, *U.S. Signals New Sanctions Against Iran*, L.A. TIMES, Dec. 12, 2009, <http://www.latimes.com/news/nation-and-world/la-fg-iran-sanctions12-2009dec12,0,1287854.story> (paraphrasing Secretary Clinton's quoted statement: "And I think that if people want to flirt with Iran, they should take a look at what the consequences might well be for them").

155. *Russia Says West Trying To Punish Iran in UN Resolution*, RADIO FREE EUROPE: RADIO LIBERTY, Dec. 20, 2006, <http://www.rferl.org/content/article/1073580.html>.

156. Margaret P. Doxey, *Sanctions Through the Looking Glass: The Spectrum of Goals and Achievements*, 55 INT'L J. 207, 208 (2000).

157. FARRALL, *supra* note 127, at 242.

158. In 2007, President George W. Bush announced additional economic sanctions to be imposed on Burma's leaders. President Bush did not say anything explicit about punishment, but

To sum up, non-military sanctions have been growing in number and expanding in their justifications, with both the UNSC and individual countries finding them a useful tool of international relations. Formal justifications for sanctions, even when citing present or past bad practices, are always articulated as forward-looking, invoking the interests of enforcement or deterrence, but never of retribution. Nonetheless, for many outside observers, as well as for leaders speaking outside of the formal international legislative process (as opposed to domestic policy-making), these sanctions, as the term itself suggests, serve as backward-looking punishment no less than a future-oriented prevention.

#### D. *Rules on State Responsibility*

The history of the Draft Articles on Responsibility of States for International Wrongful Acts (“Draft Articles”) demonstrates more than any other legal doctrine the explicit and growing aversion in mainstream international law to the concept of state crime and punishment. From its inception in 1949, the International Law Commission (ILC) identified the question of state responsibility for breaches of international obligations as one that should be on the ILC’s agenda.<sup>159</sup> Over the next several decades, its members produced numerous reports and several different versions of the Draft Articles, the most recent one in 2001.<sup>160</sup>

Essentially, the Draft Articles espouse that when a state wrongs other states, any injured state is entitled to engage in countermeasures (short of the use of force) against the violating state until the violating state ceases to commit the wrong. The injured state may also be entitled to reparations from it. Among the contested sections of the Draft Articles have been the consequences of certain grave wrongs, the availability of punitive damages as an acceptable form of reparations and the types of countermeasures that a state can employ.

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Senator Joseph Biden applauded the decision “to punish eleven more senior Burmese government officials personally responsible for the violence in Burma.” Press Release, Capitol Hill, Biden Applauds Additional Economic Sanctions on Burma’s Leaders (Oct. 19, 2007); see also *Australia Tables Bill To Boost Sanctions Against Zimbabwean Leaders*, BBC MONITORING INT’L REPORTS (June 12, 2010) (offering a media account of an Australian bill imposing sanctions on the leaders of Zimbabwe, Burma, Fiji, North Korea, former Federal Republic of Yugoslavia, and Iran, which described the bill as intending “to punish leaders of countries like Zimbabwe for undermining the rule of law, corruption and human rights violations”); see also *Autonomous Sanctions Act 2011* (Cth) (Austl.), <http://www.comlaw.gov.au/Details/C2011A00038>. Britain engaged in efforts in 2008 to coordinate sanctions on Zimbabwe leader, Robert Mugabe, if the latter refused to step down following loss of power in elections: Britain reportedly urged South Africa to cut of electricity supplies, worked to persuade Zimbabwe’s allies to mount an economic blockade, and to convince others to place a ban on the children of the elite from attending school in Europe, if Mugabe “stole the elections.” The media labeled the sanctions as punishment for Mugabe. Sam Coates & Jonathan Clayton, *Britain Leads Call for Zimbabwe Sanctions To Punish Mugabe for Stealing Election*, TIMES (London), June 16, 2008, <http://www.timesonline.co.uk/tol/news/world/africa/article4144270.ece>.

159. Summary: State Responsibility, INT’L LAW COMM’N (July 12, 2006), [http://untreaty.un.org/ilc/summaries/9\\_6.htm](http://untreaty.un.org/ilc/summaries/9_6.htm).

160. Some sections of the Draft Articles are considered customary international law, but others are still debated, precluding consensus that would allow codifying the text in a binding instrument. LORI F. DAMROCSH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 686 (2001).

1. *From “International Crimes” to “Serious Breaches”*

The concept of “international crimes of state” was first incorporated into the first Draft Articles in 1976. Draft Article 19 defined international crime as “[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.”<sup>161</sup> Until then, the prevailing approach had been the one adopted at Nuremberg—namely, that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>162</sup> Later described by Crawford as “the single most controversial element in the draft articles on State responsibility,”<sup>163</sup> Article 19 was met with disapproval, from its very inception, for its circularity, its vagueness, and its failure to stipulate meaningful consequences in case of violation.<sup>164</sup>

Indeed, notwithstanding Draft Article 19’s use of the word “crime,” there were no accompanying stipulations of punishment in the traditional criminal sense.<sup>165</sup> The only difference between international crimes and other breaches of international law was the removal of some restrictions on claims of injury in cases of crimes and the imposition of obligations on all states to stop “crimes,” neither of which could plausibly be thought of as “punishment.”<sup>166</sup> Even those governments that did support the retention of Article 19 did not advocate a regime of criminal responsibility and punishment of states.<sup>167</sup>

If it had any purpose at all, the labeling of “international crimes” was thus mostly symbolic, emphasizing the “specially dangerous character of the delinquency.”<sup>168</sup> It was this exact symbolism that troubled Crawford:

[T]o the extent it is intended to reflect a “criminalization” of the state (akin to the international criminalization of individuals before the Yugoslav or Rwanda Tribunals, or the *de facto* criminalization of Iraq, Libya and Yugoslavia in

161. Draft Articles, *supra* note 121, art. 19. For a detailed historical account and the debates surrounding Article 19, see INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph Weiler, Antonio Cassese & Maria Spinedi eds., 1989).

162. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 465 (1948).

163. James Crawford, *First Report on State Responsibility*, ¶ 43, U.N. Doc. A/CN.4/490/Add.1 (1998) [hereinafter Crawford, *First Report*].

164. *Id.* ¶¶ 46-48.

165. See Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT’L & COMP. L.Q. 345, 366-67 (1990) (“Academics can generalise about[,] and Article 19 can even attempt to create international crimes, but until breach thereof gives rise to different forms of liability it adds nothing to the development of any new trend in State responsibility.”).

166. Derek William Bowett, *Crimes of State and the 1996 Report of the International Law Commission on State Responsibility*, 9 EUR. J. INT’L L. 163, 171-72 (1998); see also Special Rapporteur, *Seventh Report on State Responsibility*, U.N. Doc. A/CN.4/469 (May 9, May 24, May 29, 1995) (prepared by Gaetano Arangio-Ruiz), reprinted in [1995] 2 Y.B. INT’L L. COMM’n 44, U.N. Doc. A/CN.4/SER/A/1995/Add.1 (Part 2).

167. Crawford, *First Report*, *supra* note 163, at 9.

168. GRIGORII IVANOVICH TUNKIN, THEORY OF INTERNATIONAL LAW 404 (William E. Butler trans., 1974).

recent practice), then issues of structure and organization, of due process and dispute settlement clearly must be addressed. Otherwise, the language of “crime” degenerates into name-calling, and will tend only to accentuate the power of the powerful, and especially of the Permanent Members of the Security Council, acting as such or in their considerable individual capacities.<sup>169</sup>

Article 19 was ultimately replaced in the 2001 Draft with the more benign term “Serious Breaches of Obligations under Peremptory Norms of General International Law.” The consequences of “serious breaches” remained as they were for “international crimes.” Nonetheless, the change could not be dismissed as merely rhetorical:

In fact, the connotations conveyed by words have profound repercussions, which explains the mistrust displayed towards “crime”—that “troublesome word”—especially in political circles. Since Dostoevsky, it has been a tough task to dissociate crime and punishment[.]<sup>170</sup>

Joseph Weiler has gone even further in rejecting the possibility that the debate over Article 19 was either cosmetic or semantic, locating it, instead, in the wider controversy over the real purpose of the U.N. system. Supporters of the concept of international crimes, according to Weiler, sought to rely on it as a natural law paradigm that could prevail over the U.N. system, with which they were disillusioned, while objectors believed that any attempt to bypass that system was dangerous and illegitimate.<sup>171</sup>

Jettisoning the concept of “international crimes” and replacing it with “serious breaches” does not, of course, resolve the debate, even if it exemplifies the symbolic preference for peace and the aversion to what Crawford termed “name-calling” or, more generally, blaming. The elimination of “international crimes” from the 2001 Draft Articles did not suppress intuitions about the criminal responsibility of states, in scholarship or politics. In June 2010, U.S. officials were quoted as referring to North Korea as “a criminal state” following allegations that North Korea was stealing South Korean television signals of World Cup Soccer matches.<sup>172</sup> A few months earlier, Iranian leader Mahmoud Ahmadinejad accused the United States itself of being “a criminal state” for supporting Israel.<sup>173</sup> Crawford himself, in his remarks above, referred to “the *de facto* criminalization of Iraq, Libya, and Yugoslavia;” and, after having decided to make away with the concept of “international crimes” in the

169. James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT’L L. 435, 443 (1999) [hereinafter Crawford, *Revising the Draft Articles*]; see also JØRGENSEN, *supra* note 6, at 183 (claiming that the resistance to “international crimes” arose from “the penal implications of the term” and the stigma attached to it).

170. Eric Wyler, *From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law,’* 13 EUR. J. INT’L L. 1147, 1160 (2002).

171. Joseph H.H. Weiler, *On Prophets and Judges*, in INTERNATIONAL CRIMES OF STATES, *supra* note 161, at 319, 328-29.

172. See *US Calls NKorea a “Criminal State,”* FOX NEWS, June 15, 2010, <http://www.foxnews.com/world/2010/06/15/calls-nkorea-criminal-state>.

173. *Iran Leader Vows to “Cut the Hands” of Enemies*, ALARABIYA.NET, Feb. 23, 2010, <http://www.alarabiya.net/articles/2010/02/24/101367.html>.

Draft Articles, nonetheless stated that his decision should not rule out the future development of state criminal responsibility.<sup>174</sup>

## 2. *Punitive Damages*

For centuries, punitive damages were a common type of reparation for internationally wrongful acts, especially following wars. Under Just War doctrine, victorious sovereigns were allowed to exact payment in money and kind from their defeated adversaries as part of the *jus victoriae*.<sup>175</sup> Postwar reparations were not to assume a vindictive mode or be odious and it was important that they be exacted in moderation so as to allow for the restoration of peaceful relations following the war.<sup>176</sup> Nonetheless, for wars to effectively restore peace there was a need to deter those who sought to destabilize the international order. Reparations, therefore, even if not vengeful, still had to reflect the interest in both specific and general deterrence, allowing for harsher treatment of the vanquished than a compensatory interest alone would.<sup>177</sup> Deterrence also allowed for some differentiation in the treatment of different defeated parties: barbarians were subject to harsher treatment, according to conventional wisdom at the time that a gentler form of reparation was likely to prove ineffectual if applied to them.<sup>178</sup>

The claim that post-conflict reparations should not assume a form of punishment was reiterated by a number of writers, most of them French, during the nineteenth century.<sup>179</sup> In the background were two post-conflict settlements—the 1815 Treaty of Paris following the defeat of Napoleon Bonaparte<sup>180</sup> and the 1871 Treaty of Frankfurt concluding the Franco-Prussian war<sup>181</sup>—both imposing considerable monetary sanctions on defeated France. Even more consequential than the monetary reparations was the 1871 Treaty's ceding of Alsace-Lorraine to Germany. It was not just the French who viewed this transfer of territory to Germany as punitive; Germans, too, were divided as to the potential hazardous effects of this arrangement on the future of German-French relations.<sup>182</sup>

174. Crawford, *Revising the Draft Articles*, *supra* note 169, at 443.

175. See, e.g., Allen S. Weiner, Book Review, 101 AM. J. INT'L L. 241, 245 (2007) (reviewing STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005)) (“[A] prominent role was played by one of the components of traditional just-war doctrine’ in the imposition of reparations on Germany. . . .” (quoting NEFF, *supra*, at 287)).

176. See Carsten Stahn, ‘Jus Ad Bellum’, ‘Jus In Bello’ . . . ‘Jus Post Bellum’?—*Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 939-40 (2006) (“[D]evelopments in international law point to the emergence of a rule that prohibits indiscriminate punishment of a people through excessive reparation . . .”).

177. Blane & Kingsbury, *supra* note 38, at 260-62.

178. *Id.* at 261.

179. Neff, *supra* note 41, at 84.

180. Treaty of Paris art. 4, Nov. 20, 1815, 65 Consol. T.S. 251, 304. War indemnity was set at seven hundred million francs.

181. Treaty of Frankfurt, May 10, 1871, 143 Consol. T.S. 164. German occupation was to continue until the war indemnity was paid in full.

182. Chancellor Otto von Bismarck was among the most vociferous opponents of the arrangement.

More than the Treaty of Frankfurt, however, it was the Treaty of Versailles at the close of World War I that was to become a symbol of the possible uses and abuses of punitive damages. The Treaty ordered the arraignment of the defeated Kaiser, Wilhelm II, for “a supreme offence against international morality and the sanctity of treaties,” before a representative tribunal of the victorious allies.<sup>183</sup> While channeling criminal liability to the political leader, other Treaty clauses reflected the perceived guilt of the nation in its entirety. The so-called “War Guilt clauses” affirmed Germany’s responsibility for the war and its losses, and required it to pay reparations on that basis.<sup>184</sup> In a countermove to the Treaty of Frankfurt, large parts of German territory along with their inhabitants were transferred to other countries, mostly to the re-established Polish state, as well as to Czechoslovakia, France, Belgium, and Denmark.<sup>185</sup>

The initial amount of reparations was set by the Inter-Allied Reparations Commission at 269 billion gold marks (about thirty-two billion U.S. dollars). Notwithstanding subsequent debates over whether the original sum was punitive or merely compensatory (considering the vast damages the war had inflicted),<sup>186</sup> at the time it was widely viewed as punitive.<sup>187</sup> Among those condemning it as prohibitively high was the principal representative of the British Treasury at the Paris Peace Conference and subsequent Nobel Laureate, John Maynard Keynes, who resigned in protest from the Treasury.<sup>188</sup> The sum was reduced under the 1924 Dawes Plan, and the 1932 Lausanne Treaty sought to eliminate it altogether. With the rise of Adolf Hitler to power in 1933, the question of reparations became moot. By then, Germany had paid only one eighth of its debt.<sup>189</sup>

Toward the close of World War II, the initially envisioned Morgenthau Plan for postwar Germany sought to avoid a staggered payment system like the one conceived by the Versailles Treaty, which was considered unreliable and

183. Treaty of Versailles, *supra* note 50, art. 227.

184. *Id.* arts. 231-247.

185. *Id.* arts. 27-115.

186. See M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT’L L. & POL’Y 244, 256 (2002); James Nicholas Boevig, *OTE: Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT’L L. 557, 605-06 (2005).

187. See, e.g., Detlev Vagts, Book Review, 81 AM. J. INT’L L. 517, 518 (1987) (reviewing FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* (1985)) (“The examples since the turn of the century in which reparations have been imposed upon a state, in particular those imposed upon Germany by the Treaty of Versailles after World War I, have clearly demonstrated that the punitive compensatory measures imposed by the victorious upon the defeated could not have been deterring . . .”).

188. See generally DONALD MARKWELL, JOHN MAYNARD KEYNES AND INTERNATIONAL RELATIONS: ECONOMIC PATHS TO WAR AND PEACE 54 (2006) (noting Keynes’s belief that reparations should be kept “within Germany’s moral obligation and capacity to pay”).

189. West Germany undertook to make further payments on its Versailles debt in 1953 and, after the fall of the Berlin Wall, the unified Germany continued all payments with interest. The last installment was on October 3, 2010. See Olivia Lang, *Why Has Germany Taken So Long To Pay Off Its WWI Debt?*, BBCNEWS, Oct. 2, 2010, <http://www.bbc.co.uk/news/world-europe-11442892>.



reversible. In a section dedicated to “Restitution and Reparation,”<sup>190</sup> the Plan ordered the transfer of German land, resources, and dismantled industries to invaded countries, the confiscation of all German assets outside of Germany, and forced German labor outside of Germany.<sup>191</sup> In early 1947, four million German soldiers were still serving as forced laborers in the United Kingdom, France, and the Soviet Union.<sup>192</sup> All of these forms of reparations were eliminated under the subsequent Marshall Plan, which substituted a vision of reconstruction for the punitive Morgenthau Plan.

Outside the context of war, punitive damages were also ordered in the settlement of a variety of international disputes throughout the twentieth century. In the *I’m Alone* case, the United States was ordered to pay \$25,000 in reparation to Canada for having sunk a Canadian vessel; the award was linked to the indignity suffered by Canada and not to the material value of the boat or its cargo.<sup>193</sup> In the *Janes* case,<sup>194</sup> Mexico was ordered to pay \$12,000 to the United States for having failed to apprehend the murderers of an American citizen. In the *Rainbow Warrior* arbitration, France was ordered to pay New Zealand thirteen million N.Z. dollars in compensation for the “public outrage”<sup>195</sup> committed on its territory by French agents who blew up a Greenpeace vessel mooring in the Auckland harbor. In all these cases, the damages were understood to include a punitive element.<sup>196</sup> Furthermore, the Iran-U.S. Claims Tribunal, established in 1981 in conjunction with the resolution of the Iranian hostage crisis, explicitly included punitive damages in its awards.<sup>197</sup>

Building on this practice, during the late 1980s and early 1990s, the reparation section of the ILC’s Draft Articles permitted, alongside restitution or compensation, some elements of punitive damages within the concept of

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190. *Program To Prevent Germany from Starting a World War III*, reprinted in HENRY MORGENTHAU, JR., *GERMANY IS OUR PROBLEM: A PLAN FOR GERMANY*, at v (1945).

191. *Id.*

192. JOHN DIETRICH, *THE MORGENTHAU PLAN: SOVIET INFLUENCE ON AMERICAN POSTWAR POLICY* 123 (2002).

193. S.S. “I’m Alone” (Can./U.S.), 3 R.I.A.A., 1609, 1618 (Can.-U.S. 1935). Note, however, that the case came under criticism as the commissioners that awarded the damages judged the case *ex aequo et bono* and not under strictly legal terms. See PHILIPP WENDEL, *STATE RESPONSIBILITY FOR INTERFERENCE WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW* 190, 191 (2007).

194. *Laura. M.B. Janes et al. (U.S.) v. United Mexican States*, 4 R.I.A.A. 82, 90 (U.S.-Mex. 1925).

195. *Rainbow Warrior Affair (N.Z./Fr.)*, 20 R.I.A.A. 215, 267 (N.Z.-Fr. 1990). The explosion killed a photographer on board the ship.

196. See 1 OPPENHEIM’S *INTERNATIONAL LAW* 533 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); JØRGENSEN, *supra* note 6, at 188-89, 200-01 (2003) (claiming that although the tribunal in the *Janes* case did not explicitly label the award as punitive, such purpose can be inferred).

197. In a concurring opinion at the Iran-United States Claims Tribunal, Judge Brower stated that “punitive or exemplary damages might be sought” in that tribunal “for unlawful expropriation, for otherwise the injured party would get only what it would have gotten by lawful expropriation and would receive nothing additional for the enhanced wrong done and the offending state would experience no disincentive for the repetition of the unlawful conduct.” *Sedco, Inc. v. NIOC*, 10 Iran-U.S. Cl. Trib. Rep. 180, 205 (1986) (Brower, J., concurring).

satisfaction.<sup>198</sup> Reviewing the “crucial question” of “whether satisfaction is punitive or afflictive, or compensatory in nature,”<sup>199</sup> Special Rapporteur Gaetano Arangio-Ruiz concluded in 1989 that “[t]he predominantly afflictive and not compensatory role of satisfaction is . . . widely recognized and indisputably emphasized by long-standing diplomatic practice.”<sup>200</sup> Implicitly evoking the notion of retribution, he also determined that “[r]elated to the idea of its afflictive or punitive nature is the idea that satisfaction should be proportioned to the seriousness of the offence or to the degree of fault of the responsible State.”<sup>201</sup>

Notwithstanding Arangio-Ruiz’s thorough analysis, many scholars disagree with his conclusions on both positive and normative grounds. Some have questioned his analysis of the case law itself, arguing that the available body of jurisprudence does *not* demonstrate the acceptability of punitive damages.<sup>202</sup> Others have contended that the notion of punitive damages was incompatible with the concept of reparations, which was in itself, they argued, grounded in a non-penal civil law paradigm.<sup>203</sup>

By the time the final version of the Draft Articles was approved in 2001, these dissenting voices had overcome those favoring punitive damages. The term “punitive damages” was replaced by the phrase, “damages reflecting the gravity of the infringement,”<sup>204</sup> and the Commentary on the 2001 Draft made it clear that no concept of punishment or punitive damages was now recognized with regard to states, thereby rejecting any and all suggestions to recognize

198. See *Second Report on State Responsibility*, U.N. Doc. A/CN.4/425, at 56 (June 9, June 22, 1989) (prepared by Gaetano Arangio-Ruiz), reprinted in [1989] 2 Y.B. Int’l L. Comm’n iii, U.N. Doc. A/CN.4.425; Stephan Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, 3 AUSTRIAN REV. INT’L & EUR. L. 101 (1998).

199. Arangio-Ruiz, *supra* note 198, at 32.

200. *Id.* at 40.

201. *Id.* at 33. He does, however, later qualify the concept of punitive damages by noting that the “punishment” is not imposed by an outside party, but rather depends on the volition of the offending state itself:

Although the demand for satisfaction will normally come—unless felicitously preceded by the offending State’s own initiative—from the injured State, the satisfaction to be given consists of actions to be taken by the offender itself. There is no need to fear, therefore, that satisfaction will entail the notion of a sanction applied by one State against another, and thus constitute a serious encroachment upon the offending State’s sovereign equality. In the measure, surely relative, in which one can speak of a sanction, it is not so much a question of a sanction inflicted upon the offending State. It is rather a matter of atonement, of a “self-inflicted” sanction, intended to cancel, by deeds of the offender itself, the moral, political and/or juridical injury suffered by the offended State.

*Id.* at 42.

202. Wittich, *supra* note 198, at 118-31; see also *Factory at Chorzow (Ger. v. Pol.)*, Indemnity, 1928 PCIJ (ser. A) No. 17, at 47 (Sept. 13) where the Permanent Court of International Justice proclaimed the purpose of international reparations to be to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” The PCIJ named restitution in kind or compensatory damages as the primary modes of reparation and kept silent about punitive damages. See also the *Lusitania* cases, in which Umpire Parker declared that injury was subject to reparation but not as a penalty. *Lusitania (U.S./Ger.)*, 7 R.I.A.A. 32, 35 (U.S.-Ger. 1923), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_VII/32-44.pdf](http://untreaty.un.org/cod/riaa/cases/vol_VII/32-44.pdf). But see 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 196, at 533 (claiming that punitive damages are part of international law).

203. See Arangio-Ruiz, *supra* note 198, at 32 nn.257-60.

204. Wittich, *supra* note 198, at 152.

mild forms of such damages.<sup>205</sup> Even the more traditional use of the remedy of satisfaction—namely, acknowledgment of injury and public apology—was discouraged by the drafters of the 2001 version, as it has been used in the past in a punitive manner.<sup>206</sup>

The reluctance to award punitive damages against states has not been confined to claims brought by states. Human rights tribunals have generally been disinclined to award aggravated or exemplary damages to individuals bringing claims against states for violations of human rights,<sup>207</sup> thereby leaving claimants with a more limited recourse to remedies.

Nonetheless, according to some commentators, punitive damages have not been altogether eliminated in practice, but only hidden under a purportedly compensatory scheme.<sup>208</sup> Testing this proposition empirically is likely to prove impossible, as the line between compensatory and punitive damages, especially where the former are aggravated to reflect the seriousness of the offense, is difficult to draw.<sup>209</sup> For instance, the United Nations Compensation Commission established after the 1991 Gulf War allowed claims to be made for moral damages, enabling the Commission to award high damages even without acknowledging their punitive character.<sup>210</sup> Moreover, in at least one human rights litigation,<sup>211</sup> the Inter-American Court of Human Rights awarded compensation for non-pecuniary damages, in a step view[ed] by some observers as a move toward “recognition that full reparation in some cases involved not only compensation but punishment.”<sup>212</sup>

The questions then remain why it is that the ILC sought to eliminate punitive damages from the realm of acceptable forms of reparations, and why it is that even if awarded indirectly in practice, tribunals are hesitant to give any formal recognition to the punitive character of reparations awarded.

### 3. *Countermeasures*

The Draft Articles initially did not include the term “countermeasures.” Instead, the ILC’s Special Rapporteur, Roberto Ago, proposed Draft Article 30,

205. *Report of the International Law Comm’n* 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/CN.4/SER.A/2001/Add.1 pt. 2 (2001), reprinted in [2001] 2 Y.B. INT’L L. COMM’N 1, at 99, 107, 111; see also Stephan Wittich, *Punitive Damages*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 667 (James Crawford et al. eds., 2010).

206. Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT’L L. 833, 838 (2002).

207. HELMUT KOZIOL & VANESSA WILCOX, *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES* 24 (2009) (noting that punitive damages are not at all awardable under the European Convention on Human Rights); DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 360 (2005).

208. See, e.g., *THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES* 745 (H.W. Briggs ed., 2d ed. 1953) (arguing that many awards contain a strong punitive element, even if that element is usually covert).

209. JØRGENSEN, *supra* note 6, at 201.

210. *Id.* at 195.

211. *Myrna Mack-Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 101, ¶ 301 (15) (Nov. 25, 2003).

212. SHELTON, *supra* note 207, at 361.

which permitted a state to apply “a *sanction* against [another] State, in consequence of an internationally wrongful act committed by that other State.”<sup>213</sup> The ILC subsequently opted to replace the term “sanction” with the word “measure,” entitling the Article “Countermeasures in respect of an internationally wrongful act.”<sup>214</sup>

The permissible scope of countermeasures was left undefined, until the subsequent Rapporteur, James Crawford, published another draft in 1994. In explaining the effort, Crawford noted,

[T]he approach taken to countermeasures is an instrumental rather than a punitive one. Countermeasures are measures taken not with a view to the punishment of the state which committed the internationally wrongful act, but with a view to ensuring that the state ceases the internationally wrongful act (if it is a continuing act) and provides reparation.<sup>215</sup>

Crawford aversion to the term “punishment” might have rested on two points he then emphasized. One was the ability to reverse the unlawful behaviour that gave rise to the countermeasure, “leav[ing] questions of punishment or reprisal to one side.”<sup>216</sup> Another was the fact that punishment must be inflicted by a competent social organ, while countermeasures are employed by states in vindicating their own (or shared) rights.<sup>217</sup>

Another set of limitations that Crawford added to permissible countermeasures, beyond an appropriate motivation by the party employing them, was a substantive list of prohibited countermeasures. In conformance with the efforts to ban armed reprisals (under the *jus ad bellum*) or belligerent reprisals (under the *jus in bello*), Draft Article 50 prohibited those countermeasures involving the threat or use of force according to the principles of the U.N. Charter, those affecting humanitarian protections, those affecting fundamental human rights, and those affecting other obligations arising under peremptory norms of international law.<sup>218</sup> Draft Article 50 sparked heated debates among states and delegates over its necessity, language, and scope. The ILC commentary explained that countermeasures are necessary in a “decentralised system by which injured States may seek to vindicate their rights,”<sup>219</sup> suggesting that countermeasures are a safety valve that allow states to enforce their rights while keeping those enforcement efforts at bay.

In his commentary on the Draft Articles, Antoine Ollivier observes, “The object of countermeasures is strictly limited to ensuring the performance by the

213. Special Rapporteur, *Eight Reports on State Responsibility*, U.N. Doc. A/CN.4/318 and Add.1 to 4 (Jan. 24, Feb. 5, June 15, 1979) (prepared by Robert Ago), reprinted in [1979] 2 Y.B. INTL. L. COMM’N pt. 1, at 47, U.N. Doc. A/CN.4/Ser. A/1979/Add. 1 (Part 1).

214. For the commentary on the article, see 2 Y.B. Int’l. L. Comm’n, *supra* note 205, pt. 2 at 115-22. Ago’s proposed title had been “Legitimate application of a sanction.”

215. James Crawford, *The Relationship Between Sanctions and Countermeasures*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 57, 60-61 (V. Gowlland-Debbas ed., 2001) [hereinafter Crawford, *Sanctions and Countermeasures*].

216. *Id.* at 61.

217. *Id.*

218. Draft Articles, *supra* note 120, art. 50. The original text in 1994 was slightly modified in the 2001 draft, but both embodied the same principle.

219. *Report of the International Law Comm’n*, *supra* note 205, at 128.

wrongdoing State of its secondary obligations (cessation, reparation), and cannot include punishment of that State.”<sup>220</sup>

The central conceptual enterprise of the regime, David Bereman suggests, was “the search for a polite international society,”<sup>221</sup> one that would ultimately do away with the need for any coercive action.<sup>222</sup> For such a polite society, “measures,” in their benign connotation, were a more appropriate term than “sanctions,” even though as a pragmatic matter, nothing else has changed.

### III. POSSIBLE JUSTIFICATIONS FOR THE SHIFT FROM PUNISHMENT TO PREVENTION

The preceding historical account has demonstrated the efforts that have been made over the past century to eliminate the concept of state crime and punishment from international law altogether. Far from accidental or stylistic, these efforts have been a conscious and deliberate association of peace with prevention, forcing any act of punishment to be disguised as an act of prevention, even as leaders’ statements and public commentary suggested that punitive urges continued to motivate some coercive action.

In this section, I build on this historical account in imagining what associated considerations may have served to support the perceived correlation between a preference for peace and an aversion to punishment. These include: (a) the concern that state punishment breeds humiliation, revenge, and further violence; (b) the moral and pragmatic aversion to collective punishment; (c) the belief that punishment suggests some normative superiority of the punisher over the punished, which might undermine the basic organizing principle of the international system, namely sovereign equality; and (d) the fear that in a system that lacks the institutional mechanisms for adjudication and enforcement, a paradigm of punishment would lend itself too easily to power politics.

While each of these considerations has some explanatory force, when testing them against the existing practice of coercion-as-prevention, none, I argue, is sufficiently convincing to eradicate the notion of state punishment altogether.

#### A. *Revenge and Violence*

The term punishment, especially if understood as retribution, runs the risk of blurring the lines between legitimate vindication and visceral revenge.<sup>223</sup> Vengeance, by nature, risks being disproportionate to legitimate punishment,

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220. Antoine Ollivier, *International Criminal Responsibility of the State*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 703, 707 (James Crawford et al. eds., 2010).

221. David J. Bederman, *Counterintuiting Countermeasures*, 96 *AM. J. INT’L L.* 817, 819 (2002).

222. *Id.* at 831 (“The countermeasure clauses . . . feature a profound impulse toward social engineering for international relations. In this respect, the articles are forward-looking, imagining a time in international life when unilateral and horizontal means of enforcement through robust self-help will be a thing of the past.”).

223. See Luban, *supra* note 9, at 318-25.

and then quickly invites retaliatory vengeance. A conception of state punishment may have been appropriate in a religious age, where punishment was inflicted by God, whether directly or through intermediaries, or where the sovereign, personifying the state, sought to protect his or her honor. It has no place, however, in an enlightened, secularized international system, which envisions the creation of a solidarist, polite international society.<sup>224</sup>

Moreover, the concept of punishment suggests a relationship of domination and submission and invites a world order divided into “friends” and “foes.” Punishment places the punished outside civilized community. And once outside civilized community, they may be subject to the infliction of unlimited and indiscriminate violence. If, to borrow from Martti Koskenniemi, international law is the gentle civilizer of nations,<sup>225</sup> punishment is neither gentle nor necessarily civilized. In an anarchic system that is constantly on the verge or beyond the verge of violence, punishment that harbors revenge is an especially perilous paradigm.<sup>226</sup>

Indeed, the historical experience of the nineteenth and early twentieth centuries lends support to the fear of punishment-as-revenge and counter-revenge. According to some accounts, the 1871 loss of Alsace-Lorraine in the Franco-Prussian War did polarize French policies toward Germany for the next forty years, as was initially feared by some Germans. Reconquering the “lost provinces” became a French obsession, generating revanchism which strongly pushed France to join World War I,<sup>227</sup> and eventually win back the territories under the terms of the Treaty of Versailles.

The longer-term political consequences of the Treaty of Versailles, and especially its War Guilt Clauses, were feared even as the Treaty was being negotiated. Harold Nicolson, a British delegate at Versailles, declared the Treaty “neither just nor wise,” and proclaimed that “future historians will come to the conclusion that we were very stupid men.”<sup>228</sup> In his recollection of the signing ceremony he recounted, “we kept our seats while the Germans were conducted like prisoners from the dock, their eyes still fixed upon some distant point of the horizon.”<sup>229</sup> The Treaty seemed to be the exact kind of postwar punishment that Gentili, Grotius, and their contemporaries had cautioned

224. Andrew Hurrell, *Conclusion: International Law and the Changing Constitution of International Society*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 327, 336 (Michael Byers ed., 2000) (advancing the term “solidarist” international society); see also Bederman, *supra* note 221 (discussing the effort to create a “polite” international society).

225. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2004).

226. See Blane & Kingsbury, *supra* note 38, at 242 (“But giving punishment as a justification for forcible measures against states or peoples is nowadays so rare in international legal discourse, that any claim to act on the basis of such a justification, certainly to contemplate the use of force for such reasons of punishment, would strike a sharply discordant note. This reflects the general orientation of international law thinkers toward de-escalation of violence and the institutionalization of peace.”).

227. See, e.g., Mark Hewitson, *Germany and France Before the First World War: A Reassessment of Wilhelmine Foreign Policy*, 115 *ENG. HIST. REV.* 570, 598 (2000).

228. HAROLD NICOLSON, *PEACEMAKING 1919: BEING REMINISCENCES OF THE PARIS PEACE CONFERENCE 186* (1933).

229. *Id.* at 369.

against; the kind that inhibited the restoration of longer-term peace and stability, and which sought to restructure the preexisting order instead of merely restoring it at the close of hostilities. With multitudes of humiliated Germans turning to extreme nationalism and to a leadership that promised to restore their pride and honor less than two decades later, the Treaty became a lesson against the politics of victors' justice.<sup>230</sup> A further cautionary note was struck when, after the League of Nations' one and only experiment with collective sanctions, Mussolini joined Hitler,<sup>231</sup> and World War II was neither prevented nor mitigated.

The United States initially paid these concerns no heed when it came to determine Germany's post-World War II fate. The 1945 Morgenthau Plan for postwar Germany deemed Versailles inadequate, not because it was punitive, but because it was not punitive enough. Through occupation and partition, the Plan sought to "convert Germany into a country primarily agricultural and pastoral in its character."<sup>232</sup> Alongside complete demilitarization, the Morgenthau Plan, promulgated as Joint Chiefs of Staff (JCS) Directive 1067, sought an "industrial disarmament" and economic stagnation, ensuring that the German standard of living was no higher than in any of its neighbor states and equal to what it was during the Great Depression.<sup>233</sup> The justification offered by JCS 1067 was the following:

It should be brought home to the Germans that Germany's ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves.<sup>234</sup>

Soon, however, it became apparent that the punitive Morgenthau Plan would be detrimental to the Western Allies' own interests: even before the war ended, the leaked plan served Germany's Propaganda Minister, Joseph Goebbels, in his efforts to muster German resistance on the western front.<sup>235</sup> After the war, economic depression in Germany hindered the entire reconstruction of free Europe and threatened to drive Western-occupied and dishonored Germany to Communism. In June 1947, the Morgenthau Plan was substituted by the Marshall Plan, which sought to rebuild Germany—and by extension, Western Europe—as quickly and effectively as possible.<sup>236</sup> Any

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230. See, e.g., WILLIAM L. SHIRER, *RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 142 (1990).

231. See *supra* note 137.

232. HENRY L. STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 577 (1948), quoted in Wolfgang Schlauch, *American Policy Towards Germany, 1945*, 5 *J. CONTEMP. HIST.* 113, 115 (1970).

233. Joint Chiefs of Staff (JCS) Directive 1067, *reprinted in* U.S. DEPARTMENT OF STATE, *GERMANY 1947-1949: THE STORY IN DOCUMENTS* 22-28 (1950), <http://germanhistorydocs.ghi-dc.org/pdf/eng/Allied%20Policies%205%20ENG.pdf>.

234. *Id.* art 4.

235. See JOHN DIETRICH, *THE MORGENTHAU PLAN: SOVIET INFLUENCE ON AMERICAN POSTWAR POLICY* 70-71 (2002) ("German Propaganda Minister Joseph Goebbels did not waste time capitalizing on the news of the Morgenthau Plan . . .").

236. MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952*, at 29, 427 (1987).

retribution to be had was channeled into trying and punishing individual German (and Japanese) leaders. The German nation, “guilty” as it may have been, was to be spared.

With peace becoming the paramount interest of the postwar world order, punishment that threatens humiliation, revenge, and further violence would have no place in justifying the use of interstate force; it would never be employed to account for the conduct of war, and there could be no mention of it in decisions to impose unilateral or collective sanctions. The fear of the consequences of punishment of humiliating a fellow state also featured in the much later ILC’s decisions to do away with the concept of international crimes (with Crawford’s cautioning against “name-calling”<sup>237</sup>) and with punitive reparations, as well as to rename “sanctions” as “countermeasures.” Recall that the desire to avoid any appearance of shame or disgrace was so strong that the Draft Articles made it clear that even apologies or the promise of non-repetition of the violation, both traditional forms of “satisfaction,” “may not take a form humiliating the responsible State.”<sup>238</sup>

Even in the most egregious of contemporary cases, as when the ICJ found Serbia responsible for not stopping the genocide in the Bosnian town of Srebrenica (and indirectly, for the first time, determined that a state could be held liable for the crime of genocide<sup>239</sup>), the court was reluctant to impose any form of punishment on the Serbian state itself. Instead, it ordered Serbia to punish or transfer individuals accused of genocide to trial by the International Criminal Tribunal for the Former Yugoslavia. Finding that monetary compensation or the guarantee of non-repetition were not appropriate remedies for this type of a case, the Court nonetheless concluded that bringing several identifiable individuals to trial would “constitute appropriate satisfaction.”<sup>240</sup>

Unlike punishment, the rhetoric of prevention appears to promise a pragmatic debate, which can mask deep value divisions. As Dan Kahan has shown in the domestic sphere, people often justify their positions on punishment or regulation (death penalty, gun control, etc.) in consequentialist terms, e.g., deterring and frustrating future crime. They persist in invoking such justifications even when they are presented with empirical evidence that refutes the consequential assessment.<sup>241</sup> Kahan argues that this phenomenon is best explained by the wish to avoid a head-on clash over morals and values that must occur if debates are to take a deontological, moralist angle.<sup>242</sup> By using the language of threat rather than guilt, the international community can

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237. Crawford, *Revising the Draft Articles*, *supra* note 169, at 443.

238. Draft Articles, *supra* note 120, art. 37(3).

239. For an excellent historical account of the debates around state responsibility for genocide and a critique of the ICJ’s decision, see Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 327 (2009). Mohamed also notes that even this very tame decision was criticized as a “dangerous step towards energizing the concept of collective guilt.” *Id.* at 350.

240. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 464 (Feb. 26).

241. Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

242. *Id.* at 418.



similarly avoid the assigning of moral blame or engaging in name-calling, and remain within an ostensibly more neutral and pragmatic frame of prevention.

That seemingly neutral frame of prevention thus promises to act as a balancing formula between securing countries' rights and protections while avoiding cycles of spiraling violence. While revenge can never lead to peace, the morally benign nature of prevention, under current logic, is more likely to. In an imperfect analogy, the avoidance of punishment allows a greater focus on the "rehabilitation" of the offending state, bringing it back into compliance and into the "community of states." To the extent retribution is a necessary component in the healing of the injured party, it can be achieved, so it is believed, through the prosecution of individuals.

The instrumental logic of the aversion to punishment—fearing it will breed more revenge and violence—is questionable, however. For one thing, not all cases of in-conflict or post-conflict punishment have led to cycles of revenge and hostility. While unilaterally imposed sanctions sometimes bred more violence, Japan, which suffered the most notorious form of injury in modern history, adopted an explicitly peaceful attitude to foreign relations in its constitution and subsequent foreign affairs.

Additionally, while it is possible that punishment breeds sentiments of humiliation and an urge for revenge—because of both its potentially over-harsh disciplinary character and its connotation of moral blame—it is unclear that the rhetorical disguise of prevention has different effects. A sense of humiliation following punishment may be replaced by a sense of injustice or helplessness in the face of coercive prevention, neither of which is necessarily more conducive to international peace and security. Populations of countries that are subject to sanctions may view such sanctions as harmful and unfair, even if they understand or agree with the motivations behind them. The population of North Korea, for instance, may have no more sympathy for Kim Jong-Il than does the UNSC, and yet may resent the UNSC for further burdening it, albeit indirectly, by imposing sanctions on the North Korean regime.

In addition, whether the channeling of retribution to individual leaders indeed protects the broader domestic population from a sense of humiliation is similarly an open question. One may reasonably hold that while the distinction between leaders and populations is convincing in tyrannical regimes, it is probably less so where indicted leaders enjoyed broad popular support. If so, the rationale of avoiding violence and preferring peace may already be compromised by the project of international criminal law, further weakening its instrumental logic against the punishment of states.

The broader point here is that the avoidance of humiliation and cycles of revenge for the purposes of peaceful relations may or may not prove ultimately beneficial to peace. Trite as the argument may be, this is ultimately an empirical question. Moreover, if prevention is the operating paradigm of the system, there may be a constant sense of anxiety about the possibility of being subjected to "preventive measures" by another state or a group of states. This

is, in essence, the international relations realists' understanding of the "security dilemma."<sup>243</sup> the race to arm and rearm in the face of threats from others.

And finally, to the extent that the fear of revenge and violence rests on the possible hazards of the expressive power of the paradigm of punishment for international relations, there is no reason to deny the possibility that this expressive power may serve positive goals as well; or, for that matter, that avoiding the paradigm of punishment has no expressive repercussions itself. I return to the point of what is lost by avoiding the language of punishment later in this Article.

### B. *Collective Punishment*

Clearly, any punishment of the "state" would necessarily result in collective harm to its population. Could such collective punishment ever be justified, or is it only the harm that is inflicted in the course of prevention efforts that could be? Present-day leaders take care to emphasize that their actions are not intended as collective punishment, even as they do inflict collective harm. NATO's 1999 statement on Kosovo clearly singled out Milošević and his regime as the target of its operation and insisted that it was never meant as a collective punishment on the people of Serbia.<sup>244</sup> President Bush repeatedly distinguished Afghans from Al Qaeda and the Taliban, Iraqis from Saddam Hussein, and Muslims from terrorists.<sup>245</sup> Israeli leaders, too, insisted that their military strikes in Lebanon ended up harming innocent Lebanese only because the latter were effectively held hostage by Hezbollah and were the inadvertent victims of otherwise legitimate operations.<sup>246</sup> NATO's recent operation in Libya was justified as protecting the Libyans from their tyrannical government.<sup>247</sup> It is the same sensitivity to claims about collective punishment that has driven countries and organizations to attempt to

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243. Charles L. Glaser, *The Security Dilemma Revisited*, 50 *WORLD POL.* 171 (1997); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POL.* 169 (1978).

244. North Atlantic Treaty Organization [NATO], *Statement on Kosovo Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington, D.C.*, ¶ 3, [http://www.nato.int/cps/en/natolive/official\\_texts\\_27441.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/official_texts_27441.htm?selectedLocale=en) (last updated Sept. 25, 2009) [hereinafter *Statement on Kosovo*] ("Our military actions are directed not at the Serb people but at the policies of the regime in Belgrade . . .").

245. See, e.g., Edward Cody & Molly Moore, *Bomb Kills Four Afghan Civilians; Aid Officials Urge Greater Care After Accidental Hit at Land-Mine Office*, *WASH. POST*, Oct. 10, 2001, at A14 (discussing the "Bush administration's pledge that U.S.-led attacks would target Taliban government and military infrastructure, along with bin Laden's training camps and headquarters, [but] spare the Afghan people further suffering").

246. See, e.g., Joel Greenberg, *Rights Group Accuses Israel of War Crimes*, *CHI. TRIB.*, Aug. 24, 2006, [http://articles.chicagotribune.com/2006-08-24/news/0608240171\\_1\\_hezbollah-civilians-as-human-shields-lebanon](http://articles.chicagotribune.com/2006-08-24/news/0608240171_1_hezbollah-civilians-as-human-shields-lebanon) ("An Israeli Foreign Ministry spokesman rejected the findings asserting that the sites struck in Lebanon were legitimate military targets under international law because they were used by Hezbollah guerrillas who operated from civilian areas and who, he said, used civilians as human shields.").

247. S.C. Res. 1973 1, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (noting "the responsibility of the Libyan authorities to protect the Libyan population" before authorizing a no-fly zone and arms embargo).

devise “smart sanctions” that would target leaders and regimes while minimizing collateral harm to citizens.

In this section I trace two possible objections to the state punishment paradigm on the grounds that it constitutes collective punishment—first, that the regime offends basic liberal notions of justice, namely, individual responsibility; and second, that collective punishment is pragmatically dangerous, especially given the goal of peace and security in international relations.

Indeed, few concepts evoke such powerful negative intuitions as “collective punishment.”<sup>248</sup> Lessons from Nazi Germany, Soviet Russia, and other tyrannical and colonialist regimes over the length and breadth of history have joined the ever-growing liberal celebration of individual autonomy to ban all forms of collective punishment under both domestic and international law. Once the unified entity comprising the state, sovereign, and people disintegrated, collective punishment against the innocent lost much of its moral and political justification and instead became synonymous with that which was evil, vindictive, and purposelessly harmful. Accordingly, present-day international law sanctifies the principles of individual accountability and responsibility, limiting both the responsibility of individuals to acts of others as well as the responsibility of the state to acts of its individual citizens.<sup>249</sup>

Moreover, collective harm in the form of reprisals or punishments in war has been feared for its potentially counterproductive pragmatic implications, not only for its immorality or injustice. Indeed, it was pragmatics, rather than morality, that ultimately brought the United States to forego the Morgenthau Plan’s punitive scheme and opt for reconstruction: under the initially conceived plan, there was no—and there could be no—distinction between the state and its people. Recall JCS 1067, which held the entire German people responsible for the war. The plan even included a “nonfraternization” policy, under which American servicemen were not to engage in any normal intercourse with Germans, including by shaking hands, visiting private homes, playing games, or conversing or arguing with them. German churches were segregated and American worshipers were to confine themselves to Americans-only pews. The army newspaper *Stars and Stripes* ran many anti-fraternization slogans and statements, such as: “Don’t fraternize. If in a German town you bow to a pretty girl or pat a blond child . . . you bow to Hitler and his reign of blood.”<sup>250</sup> More than a thousand Americans were arrested by the Military Police for violating

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248. See, e.g., Irwin Lipnowski, *A Partial Rehabilitation of the Principle of Collective Punishment*, 8 CAN. J. L. & SOC’Y 121, 121 (1993) (noting that “the principle of collective punishment is not one that commands much respect in either moral philosophy circles or the legal community” and that “the principle of collective punishment has met with universal rejection and condemnation in all liberal democratic states”).

249. For a discussion of the optimal allocation between individual and state responsibility, see Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AM. L. & ECON. REV. 72 (2007).

250. EUGENE DAVIDSON, *THE DEATH AND LIFE OF GERMANY: AN ACCOUNT OF THE AMERICAN OCCUPATION* 54 (1959).

these orders.<sup>251</sup> However, the non-fraternization policy, along with the other punitive elements of the Morgenthau Plan, was forgone under the Marshall Plan. It was not so much Karl Jasper's moral cry for a distinction between the legal guilt, the political guilt, and the metaphysical guilt of the German nation that had won the day.<sup>252</sup> It was, rather, a strategic interest in rebuilding Germany and a fear that collective penalties would promote a cohesive opposition to the Allies' occupation, driving Germans to the arms of the Soviet Union.

Nonetheless, the doctrinal commitment to the prohibition on collective punishment is only near-absolute, with some notable exceptions, such as criminal corporate responsibility or conspiracy crimes. Moreover, while doctrine has followed a general ban on collective punishment, academic scholarship is rife with debates over the moral and pragmatic justifications for the ban and its exceptions.<sup>253</sup> Alongside the individualistic commitment of present-day international and domestic law, there are those who believe that dividing and segregating responsibility where the act is collective by its very nature is no less immoral than holding the innocent guilty.<sup>254</sup>

This notion of collective responsibility, especially where there is freedom of action, is often invoked as a critique of the project of international criminal law: indicting and punishing individuals for actions that clearly required a collective enterprise, or in other words, allowing the state to avoid the "conspiracy-like character" of its actions that had set the background for the individual conduct.<sup>255</sup> By punishing the individual, the collective cleanses itself from its own responsibility and rewrites its own biography. Even in terms of its expressive functions, international criminal law's aversion to collective punishment might hinder a sense of justice and closure for victims, whose attackers were ultimately a collective, much more than several individuals.

In the case of democracies, especially, there is reason to suggest that the collective citizenry is responsible for its leadership's actions. Michael Walzer cites with agreement J. Glenn Clay, who argued that "[t]he greater the possibility of free action in the communal sphere, the greater the degree of guilt for evil deeds done in the name of everyone."<sup>256</sup> Walzer himself is hesitant to

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251. *Id.* at 55.

252. See George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1530 (2002).

253. See generally CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (1996); Fletcher, *supra* note 252; John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1340 (2009); Daryl Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 370, 398 (2003).

254. See, e.g., KUTZ, *supra* note 253, at 270; Fletcher, *supra* note 252, at 1543.

255. LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 146 (2005); see MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 15 (2002); cf. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 276 (1963) (conceding that it is society that made it "well-nigh impossible for [the perpetrator] to know or feel that he is doing wrong," but stopping short of advocating collective punishment of societies).

256. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 298 (1975).

state exactly under what circumstances he would be willing to consider an entire society collectively “guilty,” but he suggests that such circumstances could exist.<sup>257</sup> If we are to take the concept of popular sovereignty seriously—and be true to the view that democracy legitimates political rule by putting the people in authority—then it quickly becomes questionable why we cannot also hold the people accountable for their representatives’ actions.

Others have pointed out that collective sanctions permeate our legal and social norms, leaving no place for a uniform objection to their employment.<sup>258</sup> Beyond moral questions, those more tolerant of collective punishment also note its instrumental benefits: A group is often better positioned to police itself than any external force,<sup>259</sup> and groups are better able to make reparations than any individual and have a harder time escaping judgment.

It may be that much of the aversion to collective punishment is fueled by past images of mass murder, torture, and other forms of indiscriminate and arbitrary violence.<sup>260</sup> Indeed, even though the legal prohibition is articulated in much broader terms, the historical precedents that were feared often involved such wide-scale atrocities. Such was the case with Osama Bin Laden’s proclaimed justification for the September 11th attacks:

The American people should remember that they pay taxes to their government and that they voted for their president. Their government makes weapons and provides them to Israel, which they use to kill Palestinian Muslims. Given that the American Congress is a committee that represents the people, the fact that it agrees with the actions of the American government proves that America in its entirety is responsible for the atrocities that it is committing against Muslims.<sup>261</sup>

But there is no necessary correlation between the idea of punishment and indiscriminate atrocities. Punishment, instead, could be inflicted through a much milder action, such as punitive damages, trade boycotts, cessation of air or sea traffic, suspension of participation in international organizations or world summits, etc. Some scholars who support the resurrection of states’ punishment have suggested even possible dissolution as a punitive measure.<sup>262</sup>

All of these forms of punishment (but for dissolution) have some precedent in the practice of “preventive measures,” with equally harmful collective impact.<sup>263</sup> Such collective harm is often inflicted even where there is

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257. *Id.* at 302-03.

258. Levinson, *supra* note 253, at 359-60.

259. *Id.*

260. Montesquieu, criticizing earlier theorists who advocated reprisals against the people of the vanquished party, nonetheless believed in the conceptual ability to punish the state without punishing its individual people: “[F]rom the destruction of the state it does not at all follow that the people who compose it ought to be also destroyed. The state is the association of men, and not the men themselves; the citizen may perish, and the man remain.” 1 BARON DE MONTESQUIEU (BARON DE), *THE SPIRIT OF LAWS* 135 (Thomas Nugent trans., The Colonial Press, 1900) (1750).

261. MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 140-41 (Bruce Lawrence ed., James Howarth trans., 2005).

262. Luban, *supra* note 9, at 327 (citing as punishments “turning over culpable leaders for criminal trials, or in extreme cases regime change”).

263. Most recently, several small states argued that by imposing an embargo on Iranian oil, the United States and its allies “are not punishing Iran, but us . . . the small countries.” *US Sanctions on Iran Punishing Small States: Sri Lanka*, PRESS TV, Feb. 1, 2012, [www.presstv.ir/detail/224334.html](http://www.presstv.ir/detail/224334.html).

a genuine attempt to target only the regime and not the state and its population as a whole.<sup>264</sup> Certainly, nothing inflicts greater collective harm than war itself, which under present-day international law can be carried out in self-defense. As Hans Kelsen pointed out:

The sanctions of international law, especially war, it is true, are usually not interpreted as punishments; but they have nevertheless, in principle, the same character as the sanctions of criminal law—forcible deprivation of life and freedom of individuals. . . .<sup>265</sup>

Even more benignly, collective harm is suffered *de facto* even when there are no sanctions or preventive means, but when there are merely compensatory reparations for a wrong committed by the state under the general rules of state responsibility.<sup>266</sup> It is ultimately the citizenry, not the abstract entity of the state, who ultimately pays the compensation. A striking example of this collective harm was provided by Security Council 687, which established the United Nations Compensation Commission (UNCC).<sup>267</sup> Under the UNCC, Iraq was ordered to pay reparations for all damages incurred by both foreign states and foreign nationals as a result of the 1990-1991 Gulf War. Naturally, it was the Iraqi population that bore the brunt of these payments.

Moreover, while punishment, under conventional principles, must be proportionate to the crime, it may be much harder to calibrate the proportionality of prevention or policing efforts, for how does one know how much force is really needed in order to prevent some future action? In other words, punishment may actually be more limited in its adverse collective effects than its prevention.

264. See Press Release, General Assembly, Delegates Argue Legitimacy of Targeted Sanctions as Legal Committee Concludes Debate on Special Charter Committee; Crimes by Officials Undermine Trust in Organizations, Speakers State As They Take Up Criminal Accountability, Need for International Convention, U.N. Press Release GA/L/3438 (Oct. 12, 2012), <http://www.un.org/News/Press/docs/2012/gal3438.doc.htm> (reporting arguments that even targeted sanctions harm innocent people); David Shariatmadari, *Sanctions and Dr Strangelove: What if Efforts To Stop the Spread of Nuclear Weapons Only Made Countries Like Iran and North Korea More Likely To Want Them?*, GUARDIAN (London), July 22, 2010, <http://www.guardian.co.uk/commentisfree/2010/jul/22/nuclear-sanctions-north-korea-iran> (“And sanctions, apart from inflicting hardship on the entire population, directly or indirectly, may also make it slightly easier (though still very difficult) to obtain nuclear weapons, by enhancing regime control.”).

265. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 106 (1949).

266. See, for example, Commissioner Vicuna in *In Re Letelier and Moffitt*, warning that an award of disproportionate amount of compensation will result in the *de facto* punishment of the state’s population, whether or not it is labeled “punitive.” Dispute concerning responsibility for the deaths of Letelier and Moffitt (U.S. v. Chile), 25 R.I.A.A. 1, 15 (Perm. Ct. Arb. 1992) (opinion of Vicuna, C.). In the case of *Myrna Mack-Chang v. Guatemala*, Judge Sergio Garcia Ramirez, suggesting that punitive reparations should be considered, cautioned that such reparations should not be monetary in form, as “it corresponds more to the idea of a fine than to that of the reparation of damage and, in any case, it would be payable by the Treasury, which implies an additional burden for the taxpayer and also a reduction in the resources that should go towards social programs.” *Myrna Mack-Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 101, ¶ 101 (46) (Nov. 25, 2003); see also WALZER, *supra* note 256, at 296-97 (noting that after the close of war, citizens are “political and economic targets . . . that is, they are the victims of military occupation, political reconstruction, and the exaction of reparative payments. We may take the last of these as the clearest and simplest case of collective punishment.”).

267. See S.C. Res. 687, ¶ 18, U.N. Doc. S/RES/687, at 7 (Apr. 8, 1991).

It would exceed the scope of this Article to offer a comprehensive theory of permissible and impermissible collective punishment. Obviously, many distinctions in law and morality are based on intent as the dividing line between permissible or prohibited action, even when actions seem objectively identical to the outside observer. If so, the fact that many permissible acts result in unintentional collective harm may not be a convincing reason to relax the prohibition on intentional collective punishment. And without such relaxation, any paradigm of state crime and punishment would be hard to sustain.

The point worth emphasizing here, however, is that certain types of legitimate actions, such as non-military sanctions, make the distinction between collective punishment and inadvertent collective harm especially fuzzy in practice. Moreover, if sanctions are imposed, at least in part, to generate pressure on a rogue regime via its distressed population, the difference between the instrumental use of the population for compellence, deterrence, or mere revenge is increasingly hard to discern, either on practical or conceptual grounds. If by naming such measures “sanctions” rather than “collective punishment” the current international system tolerates harm to collectives, the revulsion to state punishment on the ground of collective harm, even where it takes the same exact form, may have a weaker moral ground to rest on.

### C. *Sovereign Equality*

The principle of sovereign equality has been a foundation of international law for many centuries. It first received formal recognition in the 1648 Peace of Westphalia, and was subsequently reiterated in numerous instruments, including the U.N. Charter.<sup>268</sup> Formally, the principle dictates that all states enjoy equal status as a matter of law, regardless of relative population, territory, resources, etc. A direct implication of the principle is that no state has the right to intervene in another state, nor impose its will or interests on another.

Sovereign equality has often been invoked by international lawyers as a reason to deny the concept of state punishment, which inherently assumes a hierarchical order between the punisher and the punished.<sup>269</sup> If all states enjoy equal sovereignty, how could one sit in judgment over, let alone punish, another?<sup>270</sup> Naturally, all coercive action, whether punitive or preventive, interferes with the subject’s independence and free will in a way that challenges its “sovereignty.” And yet, the concept of punishment evokes psycho-theological sentiments of a higher moral authority, and as such, it can have no place among states in a modern secular world, where there is no recognized superior entity. As one commentator put it, “the very idea of punishing States is (indeed) completely alien to the contemporary international legal order based

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268. U.N. Charter art. 2, para. 1.

269. OPPENHEIM’S INTERNATIONAL LAW § 156 (4th ed. 1925) (“The nature of the Law of Nations as a law between, not above, sovereign states, excludes the possibility of punishing a state for an international delinquency and of considering the latter in the light of a crime.”).

270. See Luban, *supra* note 9, at 314-16. For a discussion about the fetishism of states, see FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 59 (2d ed. 1997).

on the sovereignty of States. The term ‘international crimes’ is only and simply used for labeling a certain kind of internationally wrongful acts [sic] of an extremely grave nature.”<sup>271</sup> In an anarchic system that is constantly on the verge or beyond the verge of violence, punishment that denotes superiority, especially moral superiority, is an especially perilous paradigm. In comparison, the evolution and expansion of international criminal law raised no such concerns, as there was never a question about the hierarchy between a state or international body and an individual.

Sovereign equality, however, is not an entirely convincing reason to avoid the punishment of states. It is true that the justification for war as punishment did not accidentally subside in the late eighteenth and nineteenth centuries, just as the nation state succeeded the princely state and sovereign equality gained a central and more universal power.<sup>272</sup> Also true is that it was then that sovereign equality became synonymous with a lack of any normative evaluation of international relations, including war, as best demonstrated by Clausewitz. And yet, neither the concept of sovereignty nor that of sovereign equality currently mean what they had meant in the nineteenth century, and it is exactly the development in the international community’s willingness to engage in a normative evaluation of states’ behavior that has driven their new meaning.

In fact, any argument about sovereign equality as a safeguard from punishment runs up against one of the presumably greatest achievements of international law in the twentieth century, namely the principle’s waning effectiveness as a shield from external intervention. Numerous human rights, environmental, labor, immigration, and other conventions have made the domestic actions of any state the business of the international community. True, the U.N. Charter still forbids countries from intervening in each other’s internal affairs, and the Declaration on Friendly Relations similarly views such intervention suspiciously.<sup>273</sup> However, the international legal establishment has sought to distinguish prohibited meddling from a welcomed upholding of internationally-accepted values against recalcitrant members. The modern ideal of international law, in other words, has reread sovereignty as responsibility, not immunity. When states fail egregiously to discharge their responsibilities, punishment—precisely with its normative evocation—should be restored from its hiding place under the veil of prevention. As for the practical aspects of sovereign equality, here, too, the principle of sovereign equality has been compromised by the very structure of contemporary international institutions. The U.N. Charter gave the five World War II allies special powers as permanent members of the Security Council over all others, especially in the

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271. Manfred Mohr, *The ILC’s Distinction Between ‘International Crimes’ and ‘International Delicts’ and its Implications*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 115, 139 (Marina Spinedi & Bruno Simma eds., 1987); see also Wyler, *supra* note 170, at 1160 (asserting that crimes are divided into serious and non-serious breaches).

272. GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL SYSTEM 30-37 (2004).

273. U.N. Charter, art. 2, para. 7.



sphere of peace and security. The same five powers are members of the exclusive club of lawful possessors of nuclear weapons under the Non-Proliferation Treaty.<sup>274</sup> In other fora, such as the World Bank or the International Monetary Fund, the votes of certain countries carry more weight than others, allowing them greater influence over the institutions' decisionmaking in exchange for their greater contribution to these selfsame institutions.<sup>275</sup> Sovereign immunity of foreign states in domestic courts has been eroding in juridical scope and application, allowing courts to pass judgments on the actions of foreign states.<sup>276</sup> In this state of affairs, sovereign equality is more of a rhetorical tool that is conveniently employed or dismissed, as the interest may be.

Naturally, a pragmatic concern derives from such practical compromises over sovereign equality, and even more broadly, from the exact realization that sovereign equality is a legal fiction that merely brushes over fundamental differences among states. The ability of states to employ sanctions against other states is not equal and uniform; the more powerful states are in a position to inflict harm on others while remaining fairly immune to harm from others. If a rule of law demands equality before the law, power disparities in the system threaten a selective and self-serving infliction of punishment, which would then be devastating to any notion of a rule of law.

At the same time, however, the exact same power disparities play out where sanctions are employed as means of prevention, rather than punishment; the more powerful states can "prevent," police, or compel others, while remaining themselves immune to such efforts by others targeting them. Unless we believe that a concept (or fiction) of equality before the law is more meaningful when it comes to punishment than when it concerns policing or prevention efforts, the concerns about sovereign equality and inequality are not very different whether our paradigm is one of guilt or one of threat. As Carl Schmitt has pointed out, "[t]he world will not become depoliticalized with the aid of definitions and constructions . . . ."<sup>277</sup>

#### D. *Institutional Considerations and the Rule of International Law*

Can we imagine an international institution entrusted with trying states for criminal behavior? Is the lack of such an institution a political inevitability in an anarchic system or a conscious choice to prefer peace over justice,

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274. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

275. Horacio Javier Etchichury, Book Note, 7 YALE HUM. RTS. & DEV. L.J. 188, 189 (2004) (reviewing MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (2003)).

276. See, e.g., Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?*, 21 EUR. J. INT'L L. 853, 861 (2011) (citing examples of domestic judgments that eschewed absolute sovereign immunity in such cases).

277. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 78 (George Schwab trans., 1996). Schmitt then criticizes the rhetorical and legalized masking of political self-interest in either preventive or punitive terms: "War is condemned but executions, sanctions, punitive expeditions, pacifications, protection of treaties, international police, and measures to assure peace remain." *Id.* at 79.

flexibility over judgment? Institutional considerations may be more of a derivative of the previous three than an independent explanation of the aversion to state punishment. Nonetheless, they deserve separate attention, as they affect both the conceptual and pragmatic implications of any critique of the abandonment of state punishment in modern international law.

The international system does not have and never has had a mechanism dedicated to criminal investigation, adjudication, or punishment of states.<sup>278</sup> The punitive model of the Catholic Just War theory was content to leave judgment of the justness of the war in the hands of the affected sovereign, with divine intervention (or, perhaps, chance<sup>279</sup>) ultimately vindicating or condemning the sovereign's judgment.

The secularization of international law meant that divine intervention could not be counted on in the design of a legal regime for the use of force. Historical experience has also shown that the judgment of sovereigns was, at best, precarious and self-serving. To have legitimate punishment meant, instead, that some institutional and procedural features had to be installed to distinguish legitimate punishment from mere vigilantism or international lynching. Without such structures in place, and given the foundational principle of sovereign equality, the concept of punishment threatened to be a disguise for self-interested brute force, applied by the strong against the weak, leaving the former immune from its reach.

Throughout the twentieth century there were several proposals to establish an international criminal court for states. In 1925, for instance, the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures adopted a report by Vespasien V. Pella on the possibility of collective criminality of states.<sup>280</sup> The report identified certain offenses, such as aggression or other offenses against the sovereignty or territorial integrity of other nations, which were by their nature offenses committed by states.<sup>281</sup> During World War II, Hans Kelsen sketched out his idea for an international judicial body to adjudicate state crimes and impose punishment, if necessary, through military means.<sup>282</sup> Sir Hartley Shawcross, the lead British prosecutor at Nuremberg, observed:

[T]here is not anything startlingly new in the adoption of the principle that the State as such is responsible for its criminal acts . . . the immeasurable potentialities for evil inherent in the State in this age . . . would seem to

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278. See GEORG SCHWARZENBERGER, *INTERNATIONAL LAW I: INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 673 (3d ed. 1957) (claiming that international tribunals have denied any jurisdiction to exercise quasi-penal powers).

279. See JAMES Q. WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* 50-55, 77-79 (2012) (claiming that wars in the eighteenth century were sometimes viewed as wagers, the outcome of which was accepted by the warring parties as determinative of rights and entitlements).

280. See U.N. Secretary General, *Historical Survey of the Question of International Criminal Jurisdiction*, 71 U.N. Doc. A/CN.4/7/Rev.1 (1949).

281. *Id.* at 72.

282. See HANS KELSEN, *PEACE THROUGH LAW* 19-23, 127-40 (1944). For Kelsen, a world court with compulsory universal jurisdiction was a centerpiece of any international order.

demand, quite imperatively, means of repression of criminal conduct even more drastic and more effective than in the case of individuals.<sup>283</sup>

All of those proposals were dismissed fairly quickly,<sup>284</sup> and the Nuremberg trials, although not without debate, ultimately addressed crimes committed by individuals only. Suggestions by some of the delegates to the negotiating conference on the 1948 Genocide Convention that genocide be treated as a crime committed by states and subject to the punishment of states by an international criminal court were similarly rejected.<sup>285</sup> The 1998 ICC Rome Statute limited its jurisdiction to natural persons, implicitly excluding states and corporations.<sup>286</sup> The few available courts that do have competence to pass judgment on the conduct of states, such as the International Court of Justice,<sup>287</sup> various regional courts of justice, or the World Trade Organization Dispute Settlement Body, have no authority to pronounce guilt or order punishment. At most, they pronounce “responsibility for breaches” and order reparations. In an international order that is more preoccupied with peace than with justice, as far as states are concerned, this is not surprising. It is this same rationale that housed the ICJ in The *Peace* Palace at The Hague. And, it is the same rationale that eliminated the concept of “international crimes” from the Draft Articles.

The avoidance of any punitive measures and the focus on compensatory reparations alone might well create incentives for efficient breach and encourage further violations of international law. The absence of any punitive measures in the sanctions available to international courts and tribunals also stands in clear tension with any ideal of an international rule of law, including one that is meant to serve as a check on violence. As Dinah Shelton critically observed with regard to the Draft Articles,

The near absence of deterrence and punishment in considering reparations . . . seems inconsistent with the expressed concern for restoring and upholding the rule of law in the interest of the international community. Remedies serve social as well as individual needs. Concern for the larger consequences of an internationally wrongful act may suggest a response that will deter the responsible state from repeating the breach and deter others from emulating the conduct. In this respect, the articles, by limiting themselves to remedial measures, seem to have missed an opportunity to strengthen measures to promote compliance.<sup>288</sup>

Beyond the conceptual and symbolic harm to the rule of law, as a practical matter, the institutional overview of international courts and tribunals misses the judicial functions already exercised by the UNSC, alongside its

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283. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: OPENING SPEECHES OF THE CHIEF PROSECUTORS 57-58 (1946).

284. Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 67 (1952).

285. See U.N. GAOR, 3d Sess., 97th Mtg. at 364, U.N. Doc. F/794, A/633 (Nov. 9, 1948).

286. ICC Statute, art. 25(1), 2187 U.N.T.S. 90.

287. For discussion about a possible reform of the ICJ to allow it to punish states, see Lang, *supra* note 9, at 249-50.

288. Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 845 (2002).

semi-executive and semi-legislative roles. Of course, from a perspective of a democratic constitutional order, having a judiciary which is indistinct from the other branches of government is a contradiction in terms. More importantly, under the terms of the Charter, the UNSC was intended more as a policing than an adjudicatory body. Recognizing the UNSC as a judicial body might thus seem to stand in dissonance with the UNSC's primary interest in peace, not justice. Recall Shachter's description of the UNSC's efforts to avoid any language of blame or punishment so as to have maximum flexibility in ordering measures to restore peace and security.<sup>289</sup> Kelsen, too, concluded that "the purpose of enforcement action under Article 39 is not: to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law."<sup>290</sup>

Schachter was correct in arguing that the Charter system intended to secure broad powers to the UNSC, and especially the permanent members, unrestrained by considerations of guilt or judgment in the legalistic sense of the word. Certainly, the United States' position has long been that issues relating to the use of force should remain within the exclusive consideration of the UNSC and not be addressed by the ICJ or any other organ, as according to the American claim, such issues were inherently "political" rather than "legal."<sup>291</sup>

Nevertheless, the description of U.N. practice as avoiding "charges and counter-charges of illegality," even if accurate in 1965, does not aptly reflect the more recent practice of the UNSC. Authorizations to use force under Chapter VII, decisions on sanctions under Chapter VII, and general resolutions addressing particular incidents or situations often read like courtroom judgments: evaluating behavior, finding violations, assigning responsibility, and prescribing action—all but using the terminology of blame and punishment (the Resolutions authorizing the use of force against Iraq in 1990 make a

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289. See *supra* note 78 and accompanying text.

290. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 294 (1950).

291. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J., 14, 26 (June 27); see also Abraham D. Sofaer, *The United States and the World Court*, 80 PROC. OF THE ANN. MEETING (AMER. SOC'Y INT'L L.) 204, 209 (1986) (stating, as legal counsel to the U.S. Dept. of State at the time of the *Nicaragua* Decision: "We believe that, when a nation asserts a right to use force illegally and acts on that assertion, other affected nations have the right to counter such illegal activities. The United States cannot rely on the ICJ to decide such questions properly and fairly. Indeed, no state can do so"), quoted in Andrew Srulevitch, *Non-Compliance with the ICJ: A Review*, CONF. OF PRESIDENTS OF MAJOR AM. JEWISH ORGS. (July 8, 2004), <http://www.conferenceofpresidents.org/ICJ%20Noncompliance%20Executive%20Summary%20Upload.doc>. Even with regard to the ICC, although accepting, in principle, the notion of indicting individuals for the crime of aggression, the American position has been that such indictments should only arise with the consent of the U.N. Security Council. See Harold Koh & Stephan Rapp, *Special State Department Briefing, U.S. Engagement with the International Criminal Court: Outcome of Recently Concluded Review Conference* (June 15, 2010) (remarks of Harold Koh) ("And while we think the final resolution took insufficient account of the Security Council's assigned role to define aggression, the states parties rejected solutions that provided for jurisdiction without a Security Council or consent-based screen. We hope the crime will be improved in the future and will continue to engage toward that end."); see also, Samson Ntale, *Former Nuremberg Prosecutor Chides U.S., China, Russia*, CNN, June 9, 2010, [http://articles.cnn.com/2010-06-09/world/uganda.international.criminal.court\\_1\\_nazi-war-crimes-aggression](http://articles.cnn.com/2010-06-09/world/uganda.international.criminal.court_1_nazi-war-crimes-aggression) (stating that the United States "wanted the crime of aggression defined and wanted to be sure that the U.N. Security Council will run the show when the ICC was implementing it").

particularly poignant example).<sup>292</sup> Thomas Franck has also offered a view of the UNSC as a judicial organ, suggesting that in their deliberations, the members of the UNSC act as a de-facto jury, assessing the factual and legal claims of states arguing about measures under Chapter VII.<sup>293</sup> James Crawford, too, remarked that “[a] determination under article 39 of the Charter that there has been an act of aggression entails what amounts to a binding judgment by an international executive organ.”<sup>294</sup>

If so, the UNSC is in practice not only policing, but also adjudicating charges and counter-charges of illegality, even if for the alleged purposes of prevention rather than punishment. Moreover, the preventive guise allows the UNSC to pass judgment and order action without the full institutional and procedural guarantees that would be required in an explicitly acknowledged punitive mode. And as noted earlier, while concerns about power disparity making a scarecrow of the concept of punishment are stronger when the legal concept of punishment is taken seriously, such concerns must persist when prevention or policing efforts are also confined to the weaker members of the international community.

An altogether different critique of institutional considerations barring state punishment is that even for a successful prevention regime, an appropriate institutional framework must be in place to ensure that prevention is carried out only where necessary, only to the extent necessary, and in an effective manner. Many of the critiques of the existing U.N. system, as well as of other international legal regimes, are over the impotence of existing regimes in preventing the harms they were ostensibly meant to fight.<sup>295</sup> As Michael Glennon observed with regard to the use of force,

Between 1945 and 1999, two-thirds of the members of the United Nations—126 states out of 189—fought 291 interstate conflicts in which over 22 million people were killed. This series of conflicts was capped by the Kosovo campaign in which nineteen NATO democracies representing 780 million people flagrantly violated the Charter.<sup>296</sup>

Of course, it is impossible to know how much use of force the world would have suffered from had the U.N. Charter not been in place, and consequently how effective it has been in curbing interstate violence. And still, any attempt to invoke the existing international institutional architecture as a

292. See, e.g., S.C. Res. 678, *supra* note 90; see also S.C. Res 1298, U.N. Doc. S/RES/1298 (May 17, 2000) (imposing sanctions on Ethiopia and Eritrea).

293. THOMAS FRANCK, *RECOURSE TO WAR: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 21, 67 (2002).

294. Crawford, *Sanctions and Countermeasures*, *supra* note 215, at 58.

295. Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 926-40 (2007); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y, 539, 540 (2001-2002); see also ZYGMUNT BAUMAN, *POSTMODERN ETHICS* 64 (1993) (asserting that human rights have “become a war-cry and blackmail weapon in the hands of aspiring ‘community leaders’ wishing to pick up powers that the state has dropped”), *quoted in* Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 125, 138 (1998).

296. Glennon, *supra* note 295, at 540.

reason for avoiding state punishment must be able to withstand the critique over this same architecture's (in)ability to engage in effective prevention.

In sum, as the foregoing sections have demonstrated, an underlying focus on peace and stability in international relations has been a strong driving force behind the elimination of state punishment in international law and emphasis on prevention. In imagining possible reasons for this belief, one might imagine that state punishment threatens to fuel revenge and violence, that it runs counter to the liberal commitment to freedom from collective punishment, and that it is difficult to reconcile with a system of sovereign equality that has no dedicated judicial organs to pass judgment or sentence. All of these concerns, however, are present to some degree or another when the international system engages in coercion under a paradigm of prevention. At the same time, the paradigm of prevention itself harbors its own perils, threatening distorted outcomes for peace and security. To these, I turn next.

#### IV. THE UNDERAPPRECIATED COSTS OF THE SHIFT FROM PUNISHMENT TO PREVENTION

In what follows, I turn to examine the broader normative implications of avoiding state punishment in the name of a preference for peace over justice. In particular, I examine the possible unintended or unacknowledged consequences that the shift from punishment to prevention may have had for international relations in the realm of peace and security themselves. I also consider what is lost by a reliance on a preventive paradigm, namely, the moral evaluation of state conduct. To reiterate, my ultimate claim is not a prescriptive call for the reintroduction of state punishment into international law. Such a claim requires much deeper exploration of what a system of punishment might look like, which I do not undertake here. My ambition here is a narrower one: to demonstrate that the elimination of any concept of state punishment may not necessarily be more conducive to international peace and security.

To do so, I borrow from U.S. domestic criminal law, where a similar tendency toward prevention has gained force from the 1950s onwards, with a wave of federal and state statutes expanding the sanctions available for the government in dealing with the *threat* of crime. Examples of this trend abound. The power to detain drug-dependents was added to the civil commitment of the mentally ill, a practice which existed since the late nineteenth century.<sup>297</sup> "Megan's Law" statutes, mandating the public registration of sexual offenders when they are released from prison, are now on the law books of most states.<sup>298</sup> In 1992, Washington was the first state to pass a "Sexual Predator" law,<sup>299</sup> mandating the continued incarceration of sex offenders after the conclusion of their criminal sentence; several states followed both before and after the

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297. Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 711-13 (1993).

298. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431 (2001).

299. WASH. REV. CODE § 71.09 (1992).

Supreme Court upheld a similar Kansas law as constitutional.<sup>300</sup> “Three-strikes” laws, introduced in 1993 (although with some far older historical origins), stipulate life sentences for repeat offenders.<sup>301</sup> Throughout the 1990s, “community policing” initiatives, coupled with new substantive offenses such as “drug loitering” or “gang loitering,” augmented police departments’ preventive role and authority.<sup>302</sup> The federal government has enacted laws authorizing civil forfeiture on the basis of “probable cause” alone, and the Supreme Court interpreted the Fourth Amendment to allow searches and seizures of persons, cars, and houses without any individualized suspicion at all.<sup>303</sup> By 1998, Carol Steiker observed that “[t]he preventive state is all the rage these days, and it can be seen in many different guises.”<sup>304</sup>

Despite the classification of such sanctions as preventive, none of them (but for the incarceration of the mentally ill) is, in fact, solely preventive. All have a measure of moral blame attached to them, one that is connected to past practices as well as to possible future conduct. For this same reason, one cannot simply classify these sanctions as civil or regulatory rather than criminal.<sup>305</sup>

The blurring of punishment and prevention in the use of domestic penal sanctions has been met with criticism on several grounds, even while acknowledging the legitimate benefits of preventive measures. While the Bill of Rights as interpreted by the Supreme Court offers important due process protections against excessive or undue *punishment*, far fewer protections exist with regard to excessive or undue *prevention*.<sup>306</sup> By cloaking punishment as prevention, the state can avoid many of the limitations on its punishing powers, including proportionality in sentencing, double jeopardy, and substantive and procedural due process guarantees, leaving those subject to preventive measures largely defenseless.<sup>307</sup>

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300. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

301. *See, e.g.*, 18 U.S.C. § 3559 (1994) (applying the life-sentence to serious violent felony convictions).

302. Steiker, *Limits*, *supra* note 14, at 774-75.

303. *Id.* at 775.

304. *Id.* at 774.

305. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”). For a discussion about the distinction between criminal and civil sanctions, see Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996).

306. Schulhofer, *supra* note 305, at 78-85; Steiker *Limits*, *supra* note 14, at 771-74; Steiker, *Punishment*, *supra* note 15; *see also* *United States v. Salerno*, 481 U.S. 739, 763-64 (1987) (Marshall, J., dissenting) (arguing that a preventative detention system runs contrary to American jurisprudential values, particularly the presumption of innocence).

307. *Salerno*, 481 U.S. at 763-64 (Marshall, J., dissenting); *see also* *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (holding that constitutional limitations on ex post facto laws only apply to penal statutes, which the Court defined as statutes that “impose[] a disability for the purposes of punishment”). Because statutes can have both penal and non-penal effects, however, the Court in *Trop* ruled that a statute’s controlling purpose drives the determination. And so, even if a statute does impose a disability, it will be considered non-penal if its controlling purpose is to accomplish some legitimate governmental purpose other than punishment.

A more scathing criticism voiced by criminal law experts is that conflating punishment with prevention leads to perverse outcomes: over-punishment of the not-guilty (such as in the “three-strikes” laws that are not limited to violent felonies) or the under-punishment of the guilty (sentencing guidelines that limit the punishment for some types of unsuccessful crimes).<sup>308</sup> Judges, too, expressed concerns about the mismatch between the sanction and its goal: In his dissent to *Schall*, Justice Marshall argued that the preventive detention of juveniles worked against the statute’s own preventive purposes,<sup>309</sup> driving juvenile detainees into a “downward spiral of criminal activity.”<sup>310</sup>

Of course, any analogy between the domestic and international realms is imperfect. The very different nature of actors (natural humans vs. constructed beings), the different modes of relevant “punishment” or “prevention” mechanisms (e.g., incarceration vs. monetary reparations), and the lack of centralized adjudication or enforcement mechanisms—all make the transposition from the domestic onto the international an approximation, at best.<sup>311</sup> Moreover, to the extent that prevention is a growing trend in domestic criminal law, it is one that complements—rather than replaces—a mainstream structure of punishment.

Nonetheless, many risks associated with a threat-based paradigm that have been identified in the domestic sphere do have resonance, *mutatis mutandis*, in international law. In the present discussion, I focus on the possible transposition of the concern about the mismatch between the gravity of the sanction and the purpose for which it is imposed. Particularly, I examine the possibility that the preventive paradigm may invite a greater degree of violence even against those who are not guilty (or necessarily threatening), and may at the same time also raise obstacles to violence even against those who are guilty (and threatening). Both possibilities are difficult to prove empirically; they may also be corrected against in various ways. But to the extent that a preference for prevention relies on an association between prevention and peace, the possibility that this association is wrong, or at least overestimated, must be considered.

To demonstrate this possibility, I discuss two issues of contemporary international concern, both drawn from the *jus ad bellum* field: the first is anticipatory self-defense and the second is humanitarian intervention.

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308. MODEL PENAL CODE § 5.05(2) (1962). The cases are limited to those “in which the actor’s conduct is so inherently unlikely to result or culminate in the commission of the crime that neither the conduct nor the actor presents a public danger sufficient to justify the normal application of Subsection (1).” *Id.* § 5.05(2) note. The emphasis, thus, is on dangerousness of the actor, rather than on his guilt.

309. *Schall v. Martin*, 467 U.S. 253, 291-97 (1984) (Marshall, J., dissenting).

310. *Id.* at 292.

311. Cf. Noam Zohar, *Collective War and Individualistic Ethics: Against the Constriction of “Self-Defense,”* 21 POL. THEORY 606 (1993) (criticizing the analogy to criminal law doctrines of self-defense when justifying the principle of distinction in war). See generally Paul H. Robinson & Adil Ahmad Haque, *Advantaging Aggressors: Justice & Deterrence in International Law*, 3 HARV. NAT’L SEC. J. 143 (2011) (discussing the possibilities and limits of transpositions from domestic law to international law and drawing on the domestic law of self-defense to analyze the international doctrine).



A. *Anticipatory Self-Defense and Preventive Wars*

The exact scope of Article 51 of the U.N. Charter has long been debated in the context of the right of states to respond with military force to the threat of armed attack from another state, but before having actually suffered one.<sup>312</sup> While the wording of Article 51 suggests that an actual armed attack must occur before a state can respond in self-defense, a broad consensus holds that where a threat is sufficiently grave and imminent, customary international law does allow a state to use proportionate and necessary force to fend off an imminent danger.<sup>313</sup> This understanding harks back to the doctrine first formulated by Daniel Webster who was Secretary of State during the *Caroline* incident of 1837. In his famous letter to the British governor of Canada, Webster posited that anticipatory self-defense was legitimate where a threat left “no choice of means, and no moment of deliberation.”<sup>314</sup>

No consensus, however, surrounds a more expanded understanding of preemptive wars in response to a non-imminent threat. Such preemptive force is especially controversial where the threat emanates from non-state actors. In the aftermath of the terror attacks of September 11th, President George W. Bush and his administration advocated a doctrine of preventive wars, in particular where the threat involved rogue regimes and their pursuit of nuclear proliferation.<sup>315</sup> Taking the idea of preemptive strikes farther away from Webster’s formulation, the doctrine was nonetheless supported by a number of contemporary scholars, some even calling for international recognition of “a duty to prevent.”<sup>316</sup>

Despite the habitual association of this expansive reading of the right to engage in anticipatory self-defense with President Bush, who became, on

312. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 165-69 (2005); MICHAEL DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* (2008).

313. U.N. High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* 54, U.N. Doc. A/59/565 (Dec. 2, 2004) (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it, and the action is proportionate”). See also DOYLE, *supra* note 312, at 3.

314. See *The Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), 2 MOORE, *DIGEST OF INTERNATIONAL LAW* 409, 412 (1906). For the view that the Webster formulation survived the Charter, see THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 107 (2002); cf. CHRISTINE D. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112 (2004) (claiming that even anticipatory self-defense is of “doubtful status”).

315. THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15 (2002) (“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”).

316. See generally Anne-Marie Slaughter & Lee Feinstein, *A Duty to Prevent*, 83 *FOREIGN AFF.* 136-50 (2004) (arguing in favor of states’ duty to prevent security and humanitarian disasters, even if at the expense of others’ sovereign integrity); Matthew C. Waxman, *The Use of Force Against States that ‘Might’ Have Weapons of Mass Destruction*, 31 *MICH. J. INT’L L.* 1, 3 (2009) (arguing that preemptive force “is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary”).

account of it, the focus of harsh criticism from around the globe, American presidents before Bush, as well as leaders of other countries have long advocated similar views.<sup>317</sup> At the NATO summit in Prague in November 2002, NATO adopted Military Committee (MC) 472, “*NATO’s Military Concept for Defense Against Terrorism*,” a document that implicitly supported the option of preemptive strikes against terrorist threats.<sup>318</sup> Even the European Council’s Security Strategy report asserted that, “we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early.”<sup>319</sup> And in a section of the document titled, “Policy Implications for Europe,” it added:

[We need to be m]ore active in pursuing our strategic objectives. This applies to the full spectrum of instruments for crisis management and conflict prevention, including political, diplomatic, military and civilian, trade and development activities . . . . We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention.<sup>320</sup>

The U.N. High-Level Panel on Threats, Challenges, and Change, on the other hand, claimed that “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.” The rationale, explained the Panel, is that “in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention . . . is simply too great for the legality of unilateral preventive action . . . .”<sup>321</sup>

Surely, any debate over the legitimate scope of preemptive or preventive force under international law is not limited to a preventive paradigm, but could easily arise under a punitive paradigm as well. In domestic criminal law, different choices are made across systems and jurisdictions with regard to the punishment of inchoate crimes, conspiracy, or threats—all of which do not necessarily progress to more egregious offenses.<sup>322</sup> Debates also abound over the question of preemptive self-defense and the right of a would-be victim to act against a would-be assailant prior to any actual physical violence.<sup>323</sup>

317. Delahunty, *supra* note 295, at 876; *see also* ALAN DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* (2006).

318. The document stated that “NATO’s actions should . . . work on the assumption that it is preferable to deter terrorist attacks or to prevent their occurrence rather than deal with their consequences.” International Military Staff, *NATO’s Military Concept for Defence Against Terrorism*, North Atlantic Treaty Organization, Jan. 4, 2011, <http://www.nato.int/ims/docu/terrorism.htm>.

319. Javier Solana, *A Secure Europe in a Better World: European Security Strategy*, EUROPEAN UNION INST. FOR SEC. STUDIES 7 (Dec. 12, 2003), <http://www.iss.europa.eu/uploads/media/solanae.pdf>.

320. *Id.* at 17.

321. U.N. High-Level Panel, *supra* note 313.

322. *See* Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1022 (1961) (“Prevailing law reflects no general or coherent theory in determining the sanctions that are authorized upon conviction of attempt, solicitation, or conspiracy.”).

323. *See, e.g.*, Martin E. Veinsreideris, Comment, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-defense by Battered Women*, 149 U. PA. L. REV. 613 (2000) (discussing the debate surrounding preemptive self-defense in the context of Battered Woman’s Syndrome).

Moreover, even the punitive framework of classical Just War theory recognized some room for preemptive use of force. Gentili held that as the preservation of the state should be a primary concern, sovereigns were entitled to use force to deter threats even before they had fully materialized.<sup>324</sup> Grotius forwarded a yet more expanded view of preventive action, holding that war might be justified not only as punishment for past wrong but also preemptively, “to prevent some future Mischief.”<sup>325</sup>

Undoubtedly, rare would be the case where a threat is not accompanied by a past transgression, further justifying the need to “prevent some future mischief.” The lines between punishment and prevention are further blurred when one considers that under the U.N. Charter, the *threat* of use of force is itself a violation of international law,<sup>326</sup> even if it does not justify the use of force under Article 51.

And still, overall, a punitive framework is generally more restrictive in what it allows by way of sanctions in anticipation of crimes. Thus, criminal law does not allow punishment for acts of preparation alone; and the punishment of inchoate crimes (conspiracy, attempt, or solicitation) requires proof of *mens rea* as well as of some overt action or substantial step in the direction of completing the crime. In a similar vein, Grotius warned that “war is not to be waged for an offence merely inchoate, unless the matter affected be of great concern, and some injurious consequences or some great peril *have already ensued*.”<sup>327</sup> Conversely, prevention can justify a defensive action against any threat, even one that does not constitute a “crime,” opening up for retaliation against state actions that would not constitute, under Grotius’s formulation, “injurious consequences” or “great peril.” Preemptive strikes and preventive wars—and debates about them—could thus conceivably exceed the literal scope of Article 51 or the customary principles of anticipatory self-defense, and beyond what would otherwise be plausible under a punitive model.

To make this possibility more concrete, consider the case of a preemptive strike against a rogue regime that we fear might become violent and/or has demonstrated itself to be violent in the past. A punitive model would allow for a preemptive strike only if the rogue regime violates international obligations, such as developing WMDs in violation of treaty or customary obligations. The development of such weapons could be considered a crime for which punishment may be inflicted, regardless of whether these weapons are thereafter used. The development of most other types of weapons, however, is not banned under international law, nor is amassing troops along the border. Recall that under the League of Nations, there was some effort to prohibit not only the threat of use of force, but also preparatory acts such as arms procurement.<sup>328</sup> But this effort never materialized, either under the League or

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324. Blane & Kingsbury, *supra* note 38, at 251.

325. *Id.* at 252.

326. U.N. Charter art. 2, para. 4.

327. THOMAS ALFRED WALKER, A HISTORY OF THE LAW OF NATIONS 256 (1899).

328. COLLECTIVE SECURITY, *supra* note 57, at 330-31 (remarks of Professor René Cassin) (“The question is what the Council . . . can do regarding a State which, without committing an

under its successor organization. As such, a punitive model would not allow for a preemptive strike before an actual “armed attack” has occurred (unless we were to choose an expansive paradigm of threat *as* guilt), or before the threat becomes very imminent; a preventive model, on the other hand, might allow a risk-averse state to preempt more remote prospects of a future attack.

Prevention, moreover, is more susceptible to over-use simply because it is harder to assess what is necessary for “prevention” than what is necessary for “punishment.” In domestic law, sentencing guidelines restrict judges’ discretion in punishing the guilty, but fewer guidelines constrain preventive measures. The principles of necessity and proportionality guide the use of force on the international plane, but it is presumably easier to apply them with regard to an act of aggression that has already occurred than against an uncertain act of aggression that may or may not occur and that would be of one or another magnitude. The war in Afghanistan which began in response to the attacks of September 11th continues to this day with the justification of preempting further attacks, with much controversy over whether the continued use of force is in fact necessary or effective for such preemption.<sup>329</sup>

Given these considerations, the preventive model of international law might encourage or at least sustain greater levels of initial violence than a punitive model would, and to borrow from the domestic criminal law analogy, result in the over-punishment of those both not guilty and not immediately threatening. In addition, if threats warrant a defensive violent action, perception and misperceptions of threats invite a spiraling reactionary vision of threats, thereby risking more violence and hostility.

Because a preventive model forces us to contemplate sanctions before an injury occurs, moreover, it lends itself to backdoor determination of certain acts as “threats to peace and security,” even where there is no international consensus that the acts in question are a violation of international law. An unresolved debate over whether there are any limits to the UNSC’s legislative or sanctioning powers offers supporting evidence for this point.<sup>330</sup> If the UNSC’s powers are boundless, it would be legitimate for the UNSC to deem climate change or the financial crisis “global threats to peace and security,” which warrant a defensive action as stipulated by the UNSC. Absent multiparty treaties that impose clear obligations in the spheres of environmental protection or financial regulation, no country could be found in breach of the law; but it could be found posing a threat to the international community. While any assertion of preventive powers in these areas would be limited to collective decisionmaking by the UNSC (as opposed to any single state), it nonetheless

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aggression, should perform repeated acts in violation of international engagements, notably of a collective engagement concerning armaments. It will be necessary to provide special sanctions for this offence . . .”).

329. See Eric Schmitt & Scott Shane, *Crux of Afghan Debate: Will More Troops Curb Terror?*, N.Y. TIMES, Sept. 7, 2009, <http://www.nytimes.com/2009/09/08/world/asia/08terror.html>.

330. For discussion of the limits of the U.N. Security Council’s legislative powers, see Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175 (2005).

suggests that prevention may sometimes be subject to fewer limitations than punishment.

B. *Humanitarian Interventions*

For some classical just war theorists, the injury that justified punishment included not only injuries suffered by a wronged sovereign or his subjects, but also injuries inflicted by a sovereign against his own subjects. Gentili wrote that “the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world;”<sup>331</sup> and both he and Grotius cited with agreement Seneca’s claim from the first century that “[i]f a man does not attack my country, but yet is a heavy burden to his own, and although separated from my people he afflicts his own, such debasement of mind nevertheless cuts him off from us.”<sup>332</sup>

The legal right to punish offenses committed toward others was once a functional and moral imperative. It was necessary to preserve order in a society lacking any higher authority other than God. Gentili thus introduced the concept of accountability by the sovereign, which was essential “unless we wish to make sovereigns exempt from the law and bound by no statutes and no precedents.”<sup>333</sup> It was also a moral, natural right of sovereigns to punish an offender for “sins against human nature.”<sup>334</sup> Grotius also believed that in practice, this form of punishment would likely be more moderate, as the punisher acts as a disinterested arbiter of a legal dispute rather than as an immediately affected and partial party.<sup>335</sup>

Any assertion of a right to intervene on behalf of oppressed citizens faced increasing challenges as the norms of sovereign equality and non-intervention gained increasing traction during the eighteenth and nineteenth centuries. With the rise of positivism and the decline of natural law, and the replacement of ruling dynasties with national leaders, the normative status of humanitarian interventions grew more contested, sparking debates among scholars and policymakers over its juridical basis and practical manifestation.<sup>336</sup>

Similar debates continued into the early twentieth century, with critics opposing the newly-introduced term, “humanitarian interventions,” either on the jurisprudential ground that no right for such interventions existed or on the pragmatic grounds of its questionable utility. Notwithstanding many gradations, to support a right of humanitarian intervention most writers demanded a nexus

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331. Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AM. J. INT’L L. 110, 115 (1991) (quoting Gentili).

332. *Id.* at 112 (quoting Grotius’ wording; both Grotius and Gentili attributed this sentiment to Seneca, though with different phrasings).

333. *Id.* at 115.

334. Blane & Kingsbury, *supra* note 38, at 252.

335. *Id.* at 255.

336. For a discussion of the emergence of the terminology of “humanitarian intervention” and similar concepts in the nineteenth century, see SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 23-26 (2001), which argues that military interventions in the late nineteenth and early twentieth centuries, although sometimes portrayed as early forms of humanitarian interventions, were nothing of the like.

between the rights violated and an internal conflict that constituted a general danger to others outside the boundaries of the state.

Debates over the legitimacy and desirability of humanitarian interventions as well as the emphasis on prevention persisted into the U.N. Charter era, following much the same path as their predecessors. Opponents of humanitarian interventions continued to question their practical sensibility,<sup>337</sup> while proponents continued to emphasize the pragmatic risk to outsiders from the continued abuse of domestic rights, through, for instance, the flow of refugees and/or destabilization of adjacent countries.<sup>338</sup> Moral arguments for or against intervention, independent of instrumental evaluations, have been marginalized.

This couching of debates about humanitarian interventions in instrumental terms is paradigmatic of the decline of the punitive framework and the rise of the preventive one. Instrumental arguments may be made sincerely, with the belief that such benefits or risks would actually materialize; or they can be made tactically, i.e., with the belief that a discussion of risks and benefits would prove more palatable to domestic and international audiences than arguments about just desert or other moral claims. What is evident, in any case, is that when suggesting to engage in humanitarian interventions, policymakers feel the need to justify such actions in pragmatic, rather than normative terms. This, again, resonates of Kahan, who argues that consequentialist debates about coercion are often more attractive because they avoid deeper moral controversies over whether punishment is deserved.<sup>339</sup>

Take, for example, NATO's justification for Operation Allied Hope in Kosovo. An excerpt from an April 23, 1999 press statement claims the following:

1. The crisis in Kosovo represents a fundamental challenge to the values for which NATO has stood since its foundation . . . . It is the culmination of a deliberate policy of oppression, ethnic cleansing and violence pursued by the Belgrade regime . . . .
2. NATO's military action against the Federal Republic of Yugoslavia (FRY) supports the political aims of the international community . . . : a peaceful, multi-ethnic and democratic Kosovo where all its people can live in security and enjoy universal human rights and freedoms on an equal basis . . . .
8. The long-planned, unrestrained and continuing assault by Yugoslav . . . forces on Kosovars . . . are aggravating the already massive humanitarian catastrophe. This threatens to destabilise the surrounding region . . . .

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337. See, e.g., Robert L. Phillips, *The Ethics of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM 1, 3 (Robert L. Phillips & Duane L. Cady eds., 1996) ("There is often a very large gap between the (sometimes) good intentions of the interveners and the carrying out of an operation."); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 121 (1991) ("The nub of the matter . . . is that if one deems the original intention of the founding members to be controlling with respect to the legitimate occasions for the use of force, humanitarian intervention is illegal.")

338. Yonatan Lupu, *Rules, Gaps and Power: Assessing Reform of the U.N. Charter*, 24 BERKELEY J. INT'L L. 881, 906 (2006); see also CHESTERMAN, *supra* note 336, at 132-33.

339. See *supra* notes 241-242 and accompanying text.

17. It is our aim to make stability in Southeast Europe a priority of our transatlantic agenda . . . .<sup>340</sup>

A purely punitive paradigm would have found the claims made in paragraph (1) sufficient to warrant intervention. Grotius, one might imagine, would have supported intervention to punish Milošević and protect the human rights of the oppressed Kosovars. Some contemporary writers have, in fact, argued that the strategic bombings in Serbia should be considered a legitimate punishment of the state.<sup>341</sup> But the drafters of the statement believed that given the international legal climate, any portrayal of the bombings as a punitive measure against Serbia would not do. Instead, the goals of security, regional stability, and prevention of refugee flows had to be invoked in order for the military campaign to be considered just and legitimate under existing legal and social paradigms.

A similar trend is apparent from reviewing Security Council Resolution 1973, authorizing NATO's use of force in Libya: The Preamble finds that the attacks by the regime on the population "may amount to crimes against humanity," but also that the "plight of refugees and foreign workers" is a cause of concern and that the "situation in [Libya] continues to constitute a threat to international peace and security."<sup>342</sup>

It is hard to assess what pragmatic implications, if any, this observation has. It may be that as long as all relevant actors understand the need to articulate their claims in functional-preventive terms, whether sincere or not, there are no practical consequences to the avoidance of a punitive rhetoric whatsoever. It is nonetheless possible, however, that the current preventive paradigm tolerates fewer interventions than would a punitive one, for instance, in cases where there is no mass flow of refugees, no danger of destabilizing adjacent countries, and no overt civil war, and yet the population suffers dearly (examples would include North Korea or Burma). If so, the preventive paradigm of international law, borrowing once again from domestic criminal law, may result in the under-punishment of the guilty.

Moreover, Ryan Goodman has argued that justifications do matter when it comes to humanitarian interventions.<sup>343</sup> Goodman claims that by framing the cause of war as humanitarian, rather than as self-interested, the humanitarian justification operates to facilitate hostilities and encourages alternative paths to war.<sup>344</sup> While Goodman's focus is on humanitarian versus non-humanitarian justifications, his argumentation suggests that punitive and preventive

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340. *Statement on Kosovo*, *supra* note 244.

341. Lang *supra* note 11, at 253. Note that Lang views the bombings as both deterrent and retributive.

342. S.C. Res. 1973, *supra* note 1, paras. 7, 15, 21.

343. See Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

344. See *id.* at 126-27.

justifications may also have a different impact on the willingness and scope of using force.<sup>345</sup>

Beyond the pragmatics, however, there is an underlying moral tone of the turn from punishment to prevention, especially in the context of humanitarian interventions. Articulating mass human rights abuses as a “threat” rather than as a “crime” comes at a cost to the international community’s own self-identity. The avoidance of a moral confrontation about what constitutes a “crime,” of what constitutes just desert, and of how just punishment can and should be inflicted, all sacrifice the ability of the international community to place moral blame.

This point relates to the broader theme of the expressive power of the law, and of criminal law and criminal punishment in particular.<sup>346</sup> Others have pointed out that the criminal trial and punishment is intended to serve an expressive, symbolic role in drawing the line between permissible and impermissible behavior and in asserting a moral stance of the community charging the criminal. Labeling an act “a crime” serves a shaming function that the label of “violation” is devoid of. With the suppression of the concept of state crime and punishment in international law, “we the people of the international community” may have lost a unified moral claim against any transgressor, leaving only a self-interested, defensive posture. Contemporary theologian Oliver O’Donovan has aptly captured this consequence of the preventive paradigm in his work:

But the attempt to privilege the defensive aim exclusively is a significant retreat from the spirit of the juridical proposal. It withdraws from the concept of an international community of right to the antagonistic concept of mortal combat; correspondingly, it is formally egoistic, protecting the rights of self-interest while excluding those of altruistic engagement . . . . Its effects, in other words, are wholly demoralising.<sup>347</sup>

Moralizing language, of course, has its perils, especially when one considers moral relativism and the bleak historical record of using violence in the name of moral (or ideological, or religious) claims. But if the international community has any claim to being a community, it must rest on some normative principles, even if those meet some resistance or contestation from within. De-moralization or a-moralization runs its own risks.

A striking example of such risks was offered not long ago by UNSC Resolution 1888 (2009) that dealt with sexual war crimes. The Resolution’s operative paragraphs are preceded by the UNSC “[r]eiterating its primary responsibility for the maintenance of international peace and security and, in

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345. Because, under existing practice, explicitly punitive rhetoric is couched in preventive terms, it is highly problematic to put this suggestion to an empirical test.

346. For a discussion about the expressive power of criminal law and punishment, in particular, see generally Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006); and Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

347. O’DONOVAN *supra* note 92, at 55.



this connection, its commitment to continue to address the widespread impact of armed conflict on civilians, including with regard to sexual violence . . . .”<sup>348</sup>

The first operative paragraph then proceeds to state that the UNSC

[r]eaffirms that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security . . . .<sup>349</sup>

Other paragraphs of the decision speak to the need to fight impunity and bring perpetrators to justice.<sup>350</sup> The wrong committed against the victims, however, remains largely implicit; the focus of the decision remains on sexual violence not as an inherent evil against its victims, but as an impediment to peace.

## V. CONCLUSION

In the 1760s, Blackstone defined war as “an appeal to the God of Hosts, to punish such infractions of public faith as are committed by one independent people against another; neither State having any superior jurisdiction to resort to upon earth for justice.”<sup>351</sup> International law no longer relies on God to mete out punishment, nor does it accept claims of punishment in the name of God as a just cause for war. But international law did, for a time, recognize both religious and secular conceptions of state punishment, within and outside of wars, for breaches of international law. It has now ceased to do so. Instead, it replaced punishment with prevention, and guilt with threat, as justifications for any action against states.

States now enjoy a conceptual normative immunity, granted to them as political entities. The culpability of states is neither a necessary nor sufficient ground to mete out punishment; and any notion of state culpability itself is unrecognized by international law. There are no “guilty states,” only guilty individuals or guilty regimes. The project of international criminal law has channeled all explicit punitive urges to individuals, keeping the state protected from punishment. States today may only be prevented, regulated, or compelled to act. The fact that a host of permissible measures that may be inflicted under a preventive paradigm often has the same practical effects as under a punishment paradigm makes no difference to international law.

A strong motivating force behind the channeling of all international punishment to individuals and away from states has been the promotion of peace and security on the international stage. A preference for peace has been correlated with a preference for prevention. Punishment, conversely, even if necessary for justice, has been feared as exacerbating international conflict. But it is unclear whether the elimination of state punishment is necessary or even

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348. S.C. Res. 1888, U.N. Doc. S/RES/1888, at 3 (Sept. 30, 2009) (emphasis omitted).

349. *Id.* ¶ 1, at 3 (emphasis omitted).

350. *Id.* ¶ 7, at 4.

351. ROBERT PHILLIMORE, 3 COMMENTARIES UPON INTERNATIONAL LAW 50 (1857).

useful for the promotion of either peace or security. Despite the conventional international wisdom, and as has been shown in domestic law debates over criminal law, prevention is not necessarily more benign than punishment. It is simply more flexible, and flexibility might itself be a perilous thing when sanctions and coercion are at stake: flexibility can avoid an underlying agreement on whether the act feared is a transgression of the law, it can escape due process expectations, and it is potentially more open-ended in its coercion. At the same time, by requiring a demonstration of clear threat to others, prevention risks paralyzing the international community from taking action where the threat to others is marginal, but a crime is nonetheless committed.

All of these possible pragmatic effects of reliance on prevention compound the costs of the elimination of a punitive paradigm to a commitment to a rule of law or to international justice more generally; indeed, it is somewhat ironic that the decline of the paradigm of punishment for transgressions occurred at the same time that multilateral treaties, *jus cogens* or *erga omnes* obligations have risen and spread, claiming a universal law for the international community. In requiring coercive action to be framed as preventive rather than punitive, the prevention paradigm allows the international community to escape the underlying question whether certain acts are in fact universally condemned.

Naturally, punishment has its own perils, of which the international community is clearly aware. It is also demanding of all those things that prevention allows us to avoid—impartial justice, due process guarantees, agreement on what constitute proportionate sentencing—and which are hard to secure in the international system. But in punishing under the guise of preventing, these demands do not become nullified; they are simply ignored.

It may ultimately be the case that the shift from punishment to prevention is purely rhetorical, and that there is no coercive action that can be justified under one paradigm that cannot be easily justified under the other. Indeed, most coercive action is taken after there is some tangible exhibition of transgression. And yet, if this is true, the insistence on a paradigm of prevention and the elimination of all punitive rhetoric from international documents is puzzling. Moreover, as this Article suggests, rhetoric matters, both for pragmatic and moral reasons; and it is possible that the insistence on a preventive paradigm for all international coercive action shapes the international community's pragmatic and moral stance on various issues without our full conscious consideration of it.