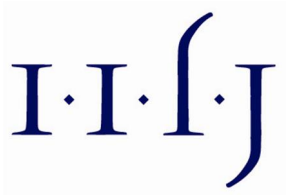

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9	Yitzhak Benbaji, *Bar-Ilan University* "The Moral Power of Soldiers to Undertake the Duty of Obedience"
February 16	Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law* "Can the Good Guys Win"
February 23	No Colloquium
March 2	Doreen Lustig, *NYU School of Law* "Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"
March 9	Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law* "States' Crime and Punishment"
March 16	No Colloquium – SPRING BREAK
March 23	Matthew C. Waxman, *Columbia Law School* "Regulating Resort to Force: Form and Substance of the UN Charter Regime"
March 30	Paul Kahn, *Yale Law School* "Imagining Warfare, or I know It When I See It"
April 6	David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan* "The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"
April 13	Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law* "Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"
April 20	No Colloquium
April 27	J.H.H. Weiler, *NYU School of Law* "Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello"

STATES' CRIME AND PUNISHMENT

Gabriella Blum

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STATES' CRIME AND PUNISHMENT

Gabriella Blum[*]

The rhetoric of "crime" and "punishment" of states has been excised from mainstream international law, and replaced with the rhetoric of "threat and prevention." Today, individuals alone are subject to international punishment, while states are subject only to preventive, regulatory or enforcement measures.

Through a historical survey of the shift from punishment to prevention in international law, I argue that the shift from punishment to prevention in international law has been motivated by a strong preference for peace over justice as the ultimate goal of the international system. I suggest that a correlation between peaceful coexistence and an aversion to punishment may rest on the decentralized structure of the international system, concerns about collective punishment, and a fear that punishment breeds humiliation and revenge.

I ultimately challenge this alleged correlation and claim that even accepting the preference for peace, the elimination of a punitive paradigm from international law may have distorted effects for international peace and security themselves. By drawing on debates over preventive sanctions in U.S. domestic criminal law, I argue that even though prevention may sound like a less oppressive policy than punishment, it may in fact be far less constrained and more ruthless than punishment. 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.

I demonstrate both possibilities using the contemporary debates over anticipatory self-defense and humanitarian intervention.

I. INTRODUCTION

Until not very long ago, international law had deemed certain state actions in violation of international law "crimes" that warranted "punishment." Now, these same actions are considered "threats" to the international order or mere "violations of obligations," which call for preventive, regulatory, or enforcement measures.

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 else under a United Nations Security Council (UNSC) Resolution in response to a "threat to international peace and security."[1] Sanctions imposed by the UNSC against rogue countries are never labeled "punishment," only "prevention" or

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[1] U.N. Charter, art. 51. Further discussion below.

"coercion mechanisms." Wartime conduct among states must never take the form of punishment, although a host of preventive security measures, including those that inflict collective harm, are permissible. In 2001, the U.N. International Law Commission, author of the Draft Articles on State Responsibility for International Obligations, renamed a section entitled 'international crimes' as 'serious breaches of international obligations,' and eliminated punitive damages as a form of permissible reparation altogether.[2]

In a movement that began at the end of World War I, the rhetoric of states crime and punishment has been excised from the lexicon of international law, and any notion of state "guilt" has been replaced with the more benign terms of "responsibility" or "threat:" Coercive action against states seems to have been stripped of any retributive logic, retaining only defensive action, prospective deterrence, or enforcement as justifications. Even though such non-retributive justifications are often considered sufficient to warrant "punishment" in the domestic sphere, the formal international legal arena resists employing any punitive rhetoric at all, couching all measures as 'preventive'.

International punishment, instead, has been channeled from states to individuals. Under present international law, individuals alone 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.

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 2006 Hamas takeover. In fact, statements by political leaders outside the formal legislative processes, media accounts, and scholars have often identified a punitive drive as a motivation for coercive action.[3]

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. The questions this article seeks to explore, therefore, are why international law should stick to the disguise of punishment-through-prevention, whether this rhetorical disguise has any practical effects, and if so, what such effects may be.

Naturally, there is a significant challenge in drawing a sharp line between punishment and prevention. As a conceptual matter, punishment is imposed after the fact, while prevention is only effective ex ante; but more often than not, a sanction is imposed after one act has already been committed, and there is a justified fear of further acts. Another differentiating line may be moral blame: punishment denotes blame, while prevention may be morally-neutral; but rare is the case where sanctions are imposed only

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[2] *See Report of the International Law Commission on the work of its fifty-third session*, at 111, U.N. Doc. A/56/10 (2001); *Summary Records of the meetings of the fifty-second session,* [2001] 1 Y.B. INT'L L. COMM'N 416, U.N. Doc. A/CN.4/SER.A/2000.

[3] *See, e.g.*, "Punishing a State" in NINA H. B. JØRGENSEN, THE RESPONSIBILITY OF STATES TO INTERNATIONAL CRIMES 167-186 (2000).

as retribution for bad past behavior or only to prevent some future harm without signifying any moral judgment.[4] Indeed, conventional justifications for punishment recognize future-looking goals (deterrence, incapacitation, rehabilitation) alongside backward-looking retribution.[5]

For purposes of this present study, however, it is not crucial to draw that line, precisely because both prevention and punishment often serve similar purposes, namely affecting future conduct. Both also coexist in every legal system. The inquiry here is only why the concept of prevention is readily-acknowledged by international law, while the concept of punishment is suppressed or disguised. This inquiry then leads us to consider the implications of this conceptual-rhetorical framework for international relations.

To set the stage for these questions, the article 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, I demonstrate how they all fit within a broader trend of the flight from state crime and punishment and the disguise of punishment within a conceptual framework of prevention.

The historical account suggests that far from accidental, or a mere rhetorical or stylistic move, the flight from state crime and punishment has been an informed and deliberate choice. Motivating this choice is an overarching preference for peace over justice as a goal for international law, and the belief that prevention is more conducive to peaceful coexistence than punishment. Yet, why a preference for peace should be correlated with a preference for prevention is not self-evident.

Drawing on the historical account, the paper gleans four possible explanations for this supposed correlation: 1) the principle of sovereign equality; (2) the fear that punishment may invite revenge and further violence; (3) an aversion to collective punishment; and (4) the institutional structure of the international system and its implications for an international rule of law. While all four explanations have some bite, when tested in light of existing international practice, none is sufficiently determinative to support an aversion to punishment in the name of peace.

In its final part, the article moves beyond the explanatory to suggest that the elimination of state punishment in the name of peace and the focus on prevention may have distorted effects on international relations, even accepting that peace and security are the paramount goals of the international system. Naturally, any attempt to prove that conceptual paradigms, and even more so, rhetoric, have practical consequences is a tricky task that might invite warranted skepticism. Nonetheless, the mere insistence, deliberate

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[4] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1441 (2001).

[5] On the debates over the justifications for punishment, see H. L. A. HART, LAW, LIBERTY AND MORALITY (1963); H. L. A HART, The Presidential Address: Prolegomenon to the Principles of Punishment, *in* 60 Proceeding of the Aristotelian Society 1-26 (1959-1960); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEM. PROBLEMS 401-441 (1958). For support of the retributive model, see *e.g.,* Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, CRIM. L. & PHIL. 5 (2007); JEFFRIE G. MURPHY, FORGIVENESS AND ITS LIMITS (2003).

and conscious, to forego the paradigm of punishment suggests that relevant actors in the international community believe that rhetorical and conceptual paradigms *are* consequential. I follow their intuition about consequences, but show how the full consequences of this shift may be different from, or supplementary to those heretofore assumed.

To show what such consequences may be, I borrow from a similar tendency towards prevention in U.S. domestic criminal law, where the rise of the "preventive state"[6] and the use of penal sanctions for ostensibly preventive purposes have raised serious concerns, including the dangers of over-use, perverse sentencing, and lack of due process guarantees.[7] These concerns, I argue, might lend themselves, *mutatis mutandis,* to the international sphere. And while the analogy is at best imperfect, and its empirical examination impossible, it is 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 preventative rhetoric has necessarily allowed for *less* international violence than would have 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.

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, and free from any normative judgment of the act in question (after all, one may have legitimate preventive interests even in the face of a morally-benign threat). 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 "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.

It is not my intention to make an ultimate prescriptive claim about the desirability of punishing states. 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. That 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 possible under-appreciated consequences of it.

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

[7] *See e.g.,* Robinson, *supra* note 4; Steiker, *Limits*, *id.*; Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. J. L. 775 (1997) [hereinafter *Punishment*]; Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

More broadly, the paper 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 individual punishment under international criminal law,[8] it has had far less resonance in discussions of states' crime and punishment.

The article is organized as follows: Part II outlines the historical shift from "guilt" to "threat" in four areas of international law, demonstrating the difficulty in drawing a practical line between acts of punishment and acts of prevention. Part III suggests that the historical shift has been driven by a preference for peace over justice. It offers possible explanations for the correlation between prevention and peace, testing their mettle against the contemporary and acknowledged practice of coercion. Part IV borrows from domestic criminal law to suggest what possible distortions the doctrine of prevention may have in international relations. To do so, it offers two contemporary debates over international coercion, anticipatory self-defense and humanitarian intervention. Part V concludes.

II. FROM PUNISHMENT TO PREVENTION – A SHORT HISTORY

It is the difficulty in drawing a clear line between punishment and prevention that complicates the historical account of shift from the former to the latter. The same indistinctness also explains how an ongoing practice of punishment can effectively hide behind the rhetoric of prevention. It is, 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. Still, this section seeks to demonstrate how the acknowledged prominence of the first has declined, while channeling formal justification for sanctions or coercive conduct to the latter.

The historical survey offered here is by no means definitive or exhaustive; parts of it are also debatable. It is intended only to demonstrate the efforts at the rhetorical elimination of the concept of punishment and the disguise, where necessary, of punishment as prevention.

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.

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[8] As far as individuals are concerned, the debates over the tension between peace and justice in international criminal law are prolific. *See, e.g.*, Tom Ginsburg, *The Clash of Commitments at the International Criminal* Court, 9 CHI. J. INT'L L. 499 (2009); Mirjan Damaska, *The Henry Morris Lecture: What is the Point of International Criminal Justice?* 83 CHI.-KENT L. REV. 329 (2008); Danilo Zolo, *Peace through Criminal Law?* ICJ 2 3 (727) (2004); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,* 14 EUR. J. INT'L L. 481 (2003).

A. *Wars as Punishment – the 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.[9] But war also had a vindictive face to it, of just punishment for wrongdoing.

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 is very much at the basis of the modern international law of the *jus ad bellum.*[10]

Earning his place as the most influential among the early Christian writers on the just cause of war,[11] 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."[12] 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." Writing in the fifth century, Augustine's consideration of war was theological rather than legal, and his account of war was meant to reconcile the strategic necessities of the Roman Empire with the early Christians' embrace of pacifism.[13] For this reason, he cautioned against violence motivated by *libido dominandi*, or in self-interest.[14] Rather, to set the warrior's conscience at peace, Augustine ordered that wars were a "loving act" of punishment, intended to save the transgressor from

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[9] 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* Joachim van Elbe, *The Evolution of the Concept of the Just War in International Law,* 33 AM. J. INT'L L. 665 (1939); David Luban, *War as Punishment,* International Law and Ethics Conference, Belgrade, June 2010 (draft on file with author). I'm indebted to Luban for many of the citations and references that follow, and follow his example in citing to the edited volume, THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS (Gregory M. Reichberg et al., eds., 2006) (hereinafter "Reichberg").

[10] For a discussion on overlaps between Christian and Muslim conceptions of just war, including those of Averroes, see, *e.g.*, Mohamed Abdel Dayem and 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* ZAWATI, HILMI M., IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW (2001).

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

[12] Reichberg, *supra* note 9, at 73.

[13] Van Elbe, *supra* note 9*,* at 667.

[14] AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS 556-558 (Henry Bettenson trans., 1972)

injury to himself and others,[15] and divine intervention ensured that the just party emerged victorious.[16]

The scholastics and canonists followed Augustine's formulation of just war. Gratian adopted the divine judicial model of war in the twelfth century,[17] and a century later, Thomas Aquinas demanded a subjective element of guilt that justified the punitive act of war.[18] 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…."[19] 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."[20]

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."[21] Luther, too, asked rhetorically, "What else is war but the punishment of wrong and evil?"[22]

It was only after "the last of the scholastics" of the sixteenth century[23] that a more secular turn was taken. For Alberico Gentili, Hugo Grotius, Christian Wolff and Emmerich de Vattel, it was natural law that determined the justness of war, rather than the judgment of a priest or church.[24] 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 just cause for war.

"Injury" was broadly defined to include not only harm suffered by the war-waging state, but also transgressions which "grossly violate the law of nature or of nations in regard to any person whatsoever."[25] As examples of such trasngerssions, Grotius named "those who act with impiety towards their parents," "those who feed on human flesh" and "those who practise piracy."[26]

Punitive wars under the Christian 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 Francesco Suarez, "the only reason for [war]

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[15] *Id.*
[16] Van Elbe, *supra* note 9*,* 667.
[17] Gratian, *Decretum*, Question II, Canon 1, in Reichberg, *supra* note 9, at 113.
[18] Summa Tehologiae II-II, Question 40, in *Id.* at 177.
[19] Cajetan, Commentary to Summa Theologiae II-II, q. 40, a. 1, in *Id*. at 242.
[20] Cajetan, *Summula,* "When war should be called just or unjust, licit or illict," *Id*. at 247.
[21] John Calvin, *institutes of the Christian Religion,* bk IV, Ch. 20, 11, in *Id.* at 276.
[22] Martin Luther, *Whether Soldiers, Too, Can be Saved* in *Id.* at 269.
[23] These were Francisco di Vitoria and Francesco Suarez, who maintained the judicial model of war as vindicative 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, 458-462, 464-469 (1943).
[24] *Id,* at 464-469.
[25] Grotius, in Reichberg, *supra* note 9, at 407.
[26] *Id*..

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."[27] 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."[28] 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."[29]

Importantly, just punishment was not without its limits, ensuring the distinction between legitimate punishment and ruthless vengeance. There were 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 punishment, however, did allow 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.[30]

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).[31] It is also the case that war-as-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.[32] 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.[33] Still, the general view that just war theory included an element of punishment has persisted in contemporary accounts.[34]

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[27] Francisco Suarez, De Triplici Virtue (1621), *quoted in* Alexis Blane and 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, 243-244 (Benedict Kingsbury and Benjamin Straumann, eds., 2010).

[28] THOMAS ALFRED WALKER, A HISTORY OF THE LAW OF NATIONS 256 (1899).

[29] *Id.*, at 305.

[30] 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 80-81(Carsten Stahn & Jann K. Kleffner eds., 2008).

[31] For an elaborate study of the different conceptions of war as punishment in the writings of Vitoria, Gentili, Grotius, and Vattel, see Blane and Kingsbury, *supra* note 27. See also RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 158-62 (1999).

[32] Neff, *supra* note 30, at 78.

[33] PETER HAGGENMACHER, GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE (1983).

[34] See Blane & Kingsbury, *supra* note 27; see also Jasmine Moussa, *Can jus ad bellum Override jus in bello? Reaffirming the Separation of the Two Bodies of Law,* 90 ICRC Review (2008), 963, 966.

The late eighteenth and nineteenth centuries witnessed a transformation of the international system, and with it, of international legal thought. The principalities and small states of 1648 were unified into larger nation states, and dynastic ruling families were superseded by national rulers. The limited wars of the eighteenth century had given way to ideological total wars, and small professional armies, motivated mainly by monetary gain, were substituted by 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."[35]

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.[36] 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 normative underpinnings. Wars were a phenomenon not to be morally judged, but only explained. They were neither about punishment nor prevention, but merely a matter of national expediency and ideological urge. This position was best captured by Carl Von Clausewitz, who described wars as a "true political instrument, a continuation of political activity by other means."[37]

With the *jus ad bellum* left to power politics, international legal attention shifted to the *jus in bello*, the regulation of the conduct of hostilities.

World War I was a transformative event, which demonstrated the perils of Clausewitz's vision of total wars and the extension of politics into battle. It also reawakened the normative interest in the *jus ad bellum,* to the point of questioning the sovereign equality model that signified the unchecked right of sovereigns to wage wars. Morality was back in business, and so were the legal rules expressing it. The renewed interest in the legal regulation of wars was expressed in two instruments, both part of the post-war Treaty of Versailles. One was the coercive victors' justice embodied by the "War Guilt Clauses" (to which I return later in this article);[38] 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.

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[35] Inis L. Claude, Jr., *Just Wars: Doctrines and Institutions,* 95 POL. SCI. QUART. 83, 88-89 (1980) (also citing Josef Kunz: "under 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.")

[36] 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 (1904), *available at* http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm.

[37] CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret ed. and trans., 1976) (1832).

[38] Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany), Jun. 28, 1919, 3 U.S.T. 3714 [hereinafter Treaty of Versailles].

The League of Nations was envisioned as the guardian of world peace, under the Westphalian principles, reincorporated into the League's 1923 Covenant, 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 "Any 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."[39] The right to engage in war was not, however, abolished; it was simply subjected to a procedural mechanism of consultation[40] which, so it was hoped, could avert the war.[41]

The 1928 Kellogg-Briand Pact constituted a bolder effort to prevent wars by restricting the legal right to wage them. The Pact was pursued outside the confines of the League and was eventually signed by 65 countries. It condemned "recourse to war for the solution of international controversies" and renounced the use of war "as an instrument of national policy."[42] However, it did not outlaw all uses of force, nor did it explicitly prohibit violence in self-defense.

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, as well as 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.[43] 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."[44] 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."[45]

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[39] *Id*. art. 11.

[40] League of Nations Covenant art. 12.

[41] 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." See General Convention to Improve the Means of Preventing War art. 3, League of Nations Doc. C.658(1).M.269(1).1931.IX (1931).

[42] Kellogg-Briand Pact art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[43] LEAGUE OF NATIONS, PERMANENT CONFERENCE ON INTERNATIONAL STUDIES, PRELIMINARY STUDY CONFERENCE ON "COLLECTIVE SECURITY" 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.

[44] *Id.* at 41.

[45] Remarks of A. Camille Jordan, LEAGUE OF NATIONS, COLLECTIVE SECURITY: A RECORD OF THE SEVENTH AND EIGHTH INTERNATIONAL STUDIES CONFERENCES, PARIS 1934 – LONDON 1935, at 298 (Maurice Bourquin ed., 1936) [hereinafter Bourquin ed.]; 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.*

If justice was required, it would be attained through the arbitration of claims in an impartial manner: "Since it is justice that settles disputes, there is no need to seek, whether in good faith or bad, their settlement by force… Indeed, the progress of justice appears to be the logical condition of the decline of force."[46] If the Just War theorists analogized international war to a process of domestic adjudication of right and wrong, the League delegates deployed the domestic analogy to celebrate impartial justice and warn against vigilantism: "Domestic law does not allow the individual to take the law into his own hands by violent means. The same principle should be followed in the international field."[47]

The aim of establishing an impartial justice system for the international community required League delegates to define and criminalize aggression.[48] In a move away from earlier notions of war-as-punishment, the League now sought to punish 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."[49]

Notably, unlike the present-day effort of defining the crime of aggression for purposes of the Rome Statute of the International Criminal Court,[50] 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 its invasion of Poland a few months later, an act which heralded the worst war in human history.[51]

With that war coming to a close, 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

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[46] LEAGUE OF NATIONS STUDY CONFERENCE, *supra* note 43, at 69; and elsewhere the Study argues: "Recourse to force which was originally a necessity if right was to be protected, becomes useless as the rôle of justice develops, provided justice is properly impartial and strong" *Id.* at 60.

[47] Remarks of A. Camille Jordan, Bourquin, *supra* note 45, at 298.

[48] *See, e.g.,* Convention for the Definition of Aggression, July 3, 1933 (signed by several Eastern European and Central Asian states) *available at* http://www.letton.ch/lvx_33da.htm.

[49] Remarks of A. Camille Jordan, Bourquin ed., *supra* note 45, at 329. And see also 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." *Id.* at 333.

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

[51] 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* German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others, United States Military Tribunal, Nuremberg, 30th December. 1947 - 28th October, 1948. Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XII, London, HMSO, 1949. *See also* IMTFE Judgment, Annex "B" (Relevant Treaties, Conventions, Agreements and Assurances upon which the Charges were Based) *available at* http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-B.html.

foremost goal "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[52] 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."[53] Peace and security from war became a paramount interest of the new international order.

The regulation of the use of force under the UN Charter was in many ways a continuation of the prewar efforts toward collective security, only this time, with a clearer prescription of obligations and prohibitions. A three-tier system explicitly outlawed any threat or use or force,[54] leaving two narrow exceptions: The first is a military action authorized by the UNSC, which under Chapter VII of the Charter was entrusted with "[determining] the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken…to maintain or restore international peace and security."[55] The second 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, and even then only until the United Nations Security Council (UNSC) could take necessary measures.[56]

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,[57] and if those failed, "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[58]

For all its idealism, the UN Charter was nevertheless more pragmatic than its League Covenant predecessor. If the League's effort was to force states to follow a procedural mechanism that would hopefully avert war, the Charter's effort 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

[52] U.N. Charter, Preamble; 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").
[53] U.N. Charter, Preamble.
[54] U.N. Charter art. 2, para. 4. ("threat or use of force 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").
[55] U.N. Charter, art. 39.
[56] The full text of art. 51 is: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
[57] *Id,* art 41.
[58] *Id.,* art 42.

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."[59]

Delegates also emphasized the Charter's Chapter VII vision, though never fulfilled, of UN 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.""[60]

Deterrence, therefore, was to be achieved through the combination of prevention and punishment, if necessary, by war. Yet, while the emphasis on prevention was clear (the Charter emphasizing "threats to international peace and security,") the rhetoric on punishment and guilt was far more ambivalent. Even the inclusion of the term "act of aggression" was hotly debated.[61] 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 occurred and how it should best be dealt with should be left for the UNSC as the need arose.[62]

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 UN members viewed "aggression" as connoting guilt as well, and that this sensitive association is what often impeded agreement over what "aggression" meant.[63] It was only in 1974 that the General Assembly finally reached an agreement over a proposed definition of "aggression,"[64] but that definition was never invoked or referenced by the UNSC in any subsequent determination.[65]

These debates over the definition of aggression were but a reflection of a wider ideological dispute, over whether the UN should be in the business of assigning blame at

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[59] Address by Field Marshal Jan Christian Smuts, Second Plenary Session, San Francisco Conference, Apr. 27, 1945. The Charter of the United Nations with Addresses Selected from the Proceedings of the United Nations Conference, San Francisco, April-June 1945 (1945), at 68. 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."

[60] Address by Joseph Paul-Boncour, Acting Chairman of the French Delegation, Final Plenary Session, San Francisco Conference, at 153-154.

[61] Under Soviet pressure, it was ultimately inserted, even though the U.S. considered the phrase "breach of the peace" broad enough to cover aggression.

[62] LELAND GOODRICH, EDVARD HAMBRO & ANNE SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 299 (3d ed. 1969).

[63] *Id.* at 47-48. Goodrich offers an example of this hesitation in his account of the General Assembly's deliberations over whether the intervention of China in the Korean conflict amounted to "aggression." *Cf.* 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."

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

[65] *See* http://untreaty.un.org/cod/avl/ha/da/da.html: "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."

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."[66]

Ultimately, however, the UN Charter system reflected the belief that if peace is to be preferred over justice, 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 was thus preferred to judicial-like punishment. As Oscar Schachter explained in 1965,

> "This 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 will often not serve this end to decide whether the charges and counter-charges of illegality are well founded." [67]

Tensions between prevention and punishment under the Charter manifested themselves not only with regard to the treatment of aggression, but also over the issue of armed reprisals, or the use of force short-of-war. As the design of the U.N. Charter's collective security architecture was meant to discourage vigilantism, reprisals could no longer easily fit in. In 1964, UNSC Resolution 188 explicitly condemned reprisals as incompatible with the principle and purposes of the United Nations,[68] and in 1970, the UN General Assembly adopted its Declaration on Friendly Relations,[69] noting that "States have a duty to refrain from acts of reprisal involving the use of force."[70]

Nonetheless, "what was taken away in the form of reprisals [was] retained in the form of self-defense."[71] To the extent that a meaningful distinction could be drawn between reprisal and self-defense, particularly given that both kinds of actions are

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[66] Address by V. M. Molotov, Chairman of the Soviet Delegation, First Plenary Session, San Francisco Conference, at 24. See also Address by Dr. T. V. Soong, Chairman of the Chinese Delegation, First Plenary Session, San Francisco Conference, at 19.
[67] Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 961 (1964).
[68] S.C. Res. 188, U.N. Doc. S/5650 (April 9, 1964). The Resolution was adopted when Yemen submitted a complaint to the Security Council over a British air attack on Yemeni territory on 28 March 1964.
[69] 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), at 122, U.N. Doc. A/8082 (Oct. 24, 1970).
[70] *Id.*
[71] Robert Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 587 (1972).

typically taken *after* an attack is suffered, the difference has been commonly framed in terms of the actions' purposes; the former is punishment, whereas the latter is prevention:

> "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.[72]"

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.[73] As Bruno Simma summed it up,

> …[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 SC 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.[74]

This very narrow construction, coupled with the general ineffectiveness of the UN collective security system, did not stop countries from engaging in unilateral armed reprisals, justifying them with the language of future deterrence and prevention.[75] To the outside observer, however, it was often difficult to tell punitive reprisals from preventive measures; nor was it always clear to the avenging power itself.

One example of such a case occurred in 1986, when the U.S. 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 three fatalities and hundreds of injuries, many of whom American military personnel.

In justifying the strikes, President Reagan laid out the evidence that linked the terrorists to Libyan leader, Colonel Muammar Qaddafi.[76] The evidence, he claimed, was "direct… precise… irrefutable…solid."[77] 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

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[72] *Id.,* at 589; *See also* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972); Simma et al., *supra* note 52, 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."

[73] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For criticism of the ICJ's ruling see Michael 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 (2002).

[74] Simma et al., *Supra* note 52, at 792.

[75] As Robert Tucker put it, "A narrow interpretation of self-defense… must generate considerable, and, in the end, irresistible, pressures to effect some kind of rehabilitation of armed reprisals." Tucker, *supra* note 71, at 595.

[76] President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986) *available at* http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm.

[77] *Id.*

also charged that Qaddafi's actions required putting him "outside the company of civilized men."[78]

Conscious of the mixed audience he was addressing – the American voter and the international community – the punitive rhetoric was nonetheless carefully accompanied by long references to Article 51 of the Charter and the right of self-defense against terrorism.[79] And yet, the lines between prevention and punishment became once again blurred, as the president continued to explain that preventive action was proven necessary by past crimes:

> "We believe that this pre-emptive action against his terrorist installations will not only diminish Col. Qaddafi's capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior."[80]

The international response to the American strikes was mixed. The General Assembly condemned the attack as a violation of the UN Charter,[81] and The Non-Aligned Movement, the Arab League, the African Union, Iran, China, and the Soviet Union all held the attack to be outside of permissible self-defense.[82] On the other hand, the U.K., France, Australia, and twenty-five other countries supported the American action, the first two joining the U.S. in vetoing a proposed UNSC resolution condemning the attack.[83]

The mix of guilt and threat as justifying coercive action was also apparent in the UNSC's Resolution authorizing the use of force against Iraq in 1990: Resolution 678 stated:

> "Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990)… in flagrant contempt of the Security Council,
>
> 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."[84]

In sum, after long struggles between a punitive paradigm and a preventive paradigm in justifying wars, the present-day international community has opted for the

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[78] *Id*.
[79] "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." *Id.*
[80] *Id*.
[81] G.A. Res. 41/38, ¶ 1, U.N. Doc. A/Res/41/38 (Nov. 20, 1986).
[82] *See e.g., Soviets Call off U.S. Talks,* CHICAGO TRIB., Apr. 16, 1986, at C1 ("China and the 101-nation Nonaligned Movement also condemned the U.S. bombing raid on Libya."). *See also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000) (117-119) (condemning the strikes as punitive reprisals rather than defensive measures, since the attacks that allegedly prompted the strikes had already taken place).
[83] Jonathan B. Schwartz, *Dealing with a "Rouge State": The Libya Precedent*, 101 AM. J. INT'L. L. 553, 556 (2007).
[84] S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

latter. UNSC 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. Where individual leaders do speak of "punishment," they are careful to link their actions to the right of self-defense under Article 51. Still, as all authorizations to use military force – multinational or national – refer back to past practice as evidence of the need to take prospective action, the practical lines between prevention and punishment are hard to discern.

It may therefore be that the overarching conceptual paradigm is of no practical significance. Still, the fact that the move away from punishment has been a conscious and deliberate one suggests that the international community believed that the conceptual paradigms do matter. As the foregoing historical overview shows, the designers of the UN Charter believed that to preserve peace and security, maximum flexibility must be given to the UNSC in determining courses of action. This flexibility cannot be reconciled with assigning blame and imposing punishment, but can exist comfortably within a paradigm of prevention.

B. *Punishment in War – jus in bello*

In a world in which the sovereign, state, and people comprised a single unified entity, punishing the sovereign entailed punishing her state and subjects as well. Vendetta against the populations of defeated countries, even if not unbounded, was a legitimate means of deterring future aggression or injurious conduct, and often included murder, rape, and enslavement, all "designed to strike terror into the defenders."[85]

The dependence of the justness of harm *in* war on the justness *of* the war remained a pillar of Just War theory until the seventeenth century. With the secularization of political rule, the sovereign was no longer an embodiment of the state and the people were no longer his property. With Hugo Grotius, and then Immanuel Kant, developing the distinction between *jus in bello* and the *jus ad bellum,* the justification of employing force against the sovereign extended to justify deliberate harm to combatants acting as agents of the sovereign, but not to others. The fate of individuals came to depend on their contribution to the war effort and the military necessity of killing or disabling them. "Guilt" was thus functionally replaced by "threat" to justify the infliction of harm on enemy nationals.[86]

This distinction between guilt and threat was the origin of the present-day principle of distinction: all able combatants are targetable as fighting agents of their governments, while all other individuals, including disabled combatants, are to be spared.[87] Those who are to be spared are sometimes referred to as "innocent," not

[85] *See* WALKER, *supra* note 28, at 52
[86] OLIVER O'DONOVAN, THE JUST WAR REVISITED (CURRENT ISSUES IN THEOLOGY) 58-61 (2003).
[87] *See e.g.,* Convention (IV) relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 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 [hereinafter API] art. 48, 51(3), Jun. 8, 1977, 1125 U.N.T.S 17512; Protocol Additional to the Geneva

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.

With the rise of the ideals of democracy, liberalism, and human rights, the tripartite entity of sovereign-state-people further disintegrated, requiring wartime actions to be tailored accordingly. 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.[88] The state itself is hardly ever an "enemy." In this vein, NATO leaders made a point of singling out Milosevic 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.[89]

The practical implications of the shift from punishment to prevention, coupled with the distinction between state, leadership, and people, have 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[90] and the Third and Fourth Geneva Conventions of 1949[91] 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,[92] 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

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Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter APII] art 13(3); Jun. 8, 1977, 1125 U.N.T.S 17513;

[88] 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 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 76.

[89] *See e.g.,* Kosovo After the Strikes: Secretary Cohen, General Wald and General Shelton Brief Reporters, CNN June 10, 1999; 4:00pm EST ("As a result, NATO forces were able to hold civilian casualties to a very low level while concentrating on the military targets."); Special Defense Department Briefing on Serb Withdrawal from Kosovo and NATO Bombing Pause, Briefers: Secretary of Defense William Cohen, General Hugh Shelton, Chairman, Joint Chiefs and Lieutenant General Charles Wald, The Pentagon Federal News Service Jun. 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 Milosevic refused to respond to diplomatic initiatives. And when diplomacy failed, NATO used force judiciously and effectively to achieve its goals").

[90] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land [hereinafter Hague Convention IV] art. 50, Oct. 18, 1907.

[91] Geneva IV, *supra* note 87, art. 33.

[92] API, *supra* note 87, arts 75(1)(d), 75(4)(b),; APII, *supra* note 87, arts 4(1)(b), 6(1)(b).

action or otherwise."[93] Numerous international human rights instruments included similar prohibitions in regulating the relationship between governments and their own people.[94]

Yet, a comprehensive ban on collective punishment faces unique conceptual and practical challenges at war, different from any peacetime corollary. 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 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 absolute prohibition on collective punishment is one of the means by which the law strives to balance acceptable harm. 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."[95] 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.[96] Such ambivalence 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."[97] In occupied territory, "[r]equisitions in kind and services shall not be demanded… except for the needs of the army of occupation,"[98] 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."[99]

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[93] Commentary to Protocol I, 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, *available at* http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument.

[94] 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, 999 U.N.T.S. 14668; European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) art. 6, Sept. 3, 1953, 213 U.N.T.S 2889; Universal Declaration of Human Rights art. 11, *available at* http://www.un.org/Overview/rights.html.

[95] *See e.g.,* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [hereinafter Final Report] PR/P.I.S./510-E (Jun. 13, 2000), at 14.

[96] *See e.g.,* Geneva IV, *supra* note 87, 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."); Hague Convention IV, *supra* note 90, art. 43. *See also* Michael. J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99(1) 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").

[97] Hague Convention IV, *supra* note 90, art. 23(g).

[98] *Id.,* art. 52.

[99] Geneva IV, *supra* note 87, art. 53.

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 preventative in its motivation; and 2) It must meet a needs-harm proportionality test of being either "strictly necessary" or "not excessive" in relation to the military advantage gained.[100]

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 legitimate and illegitimate means of subordinating the local population to its will.[101] 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. 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.[102] 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 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 12 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 12 days, with food and other supplies beginning to wane, *Doctors for Iraq* declared the curfew to be collective punishment.[103] Elsewhere, villagers in Waziristan were ordered by the Pakistani Secret Service to turn in suspects who were hiding within their community, or otherwise have their houses razed.[104] The villagers turned in most of the suspects. Was the threat itself an effective security measure or a collective penalty?

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 punishment, if it seeks legitimacy.

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[100] API, *supra* note 87, arts 51(5)(b), 57(2)(b).
[101] Final Report, *supra* note 95, at 14.
[102] *See e.g.,* Al Gamal v. Military Commander of Judea and Sumaria Region HCJ 542/89 (1989) ("We conclude that Article 119 serves as a deterring punative measure...") *cited in* Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 31 (1994).
[103] *Iraqi town struggles under curfew*, BBCNEWS, May 18, 2007, http://news.bbc.co.uk/2/hi/middle_east/6671075.stm
[104] Most of the wanted men were handed over. *See* Lakki Marwat, *A Wild Frontier*, ECONOMIST, Sept. 18, 2008.

The aversion to punitive measures in the laws of war has become so strong that it prompted not only the ban on any intentional punishment of individuals, but also the prohibition on what was previously the primary means of compelling prospective lawful behavior by the adversary, namely belligerent reprisals.[105]

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 POWs.[106] 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.[107]

The Lieber Code of 1863[108] and the 1880 *Oxford Manual on the Laws of War on Land*,[109] 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.[110] The post-WWII war crimes trials jurisprudence on the customary norms governing belligerent reprisals[111] recognized their legitimacy and upheld their legality under certain conditions.[112] The 1949 four 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.[113]

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).[114] The prohibition on reprisals in non-international armed conflict took two more decades to crystallize, mostly under the

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[105] Not to be confused with reprisals in the *jus ad bellum* context.
[106] Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 184 (2003).
[107] *Id.* at 187.
[108] 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(2) (Government 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).
[109] INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL (1880).
[110] *See* SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 132-138 (2007).
[111] *Id*. at 139-145.
[112] *United States of America v. Wilhelm List et al., Judgment*, 19 February 1948, Case No. 7, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757.
[113] Darcy, *supra* note 110, at 146.
[114] API, *supra* note 87, arts. 51-56,

jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in the late 1990s.[115]

The U.S., the U.K., Italy, and several other countries have reserved a right to engage in reprisals in extreme circumstances.[116] Nonetheless, as a general matter, present day reprisals against civilians and other protected individuals and objects are considered war crimes under the Rome Statute of the ICC;[117] the Draft Rules on State Responsibility prohibit any countermeasure that violates basic humanitarian guarantees;[118] 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*).[119]

Following the trend of channeling punishment to individuals, violations of the rules of lawful warfare can now, as a matter of international law, be dealt with only through public shaming and criminal prosecutions of individuals, but never through reciprocal conduct.[120] 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." [121]

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[115] *See e.g., Prosecutor v. Martic (Rule 61),* No. IT-95-11-R61 (Mar. 8, 1996) (Decision) (Jorda, J. (presiding); Odio Benito, J.; Riad, J.), 108 I.L.R. 39 (1996); *Prosecutor v. Kupreskic,* No. IT-95-16-T (Jan. 14, 2000) (Judgment) (Cassese, J. (presiding); May, J.; Mumba, J.); *see also* Darcy, *supra* note 110, at 156-166.

[116] 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 admissible under international law in order to prevent any further violation." Italy Reservation Text (to API), *available at* http://www.icrc.org/ihl.nsf/NORM/E2F248CE54CF09B5C1256402003FB443?OpenDocument. The UK holds similarly. United Kingdom Reservation Text (to API), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument; *See also* Operational Law Handbook (2002), Capt. Jeanne M. Meyer and CDR Brian J. Bill (eds.), International and Operational Law Department—The Judge Advocate General's School, U.S. Army, p 20.

[117] Rome Statute of the International Criminal Court art. 8(b), Jul. 1, 2002, A/CONF.183/9.

[118] Draft Articles on State Responsibility art 50, *available at* www.javier-leon-diaz.com/humanitarianIssues/State_Resp.pdf

[119] Prosecutor v.Kupreskic, Case No. IT-95-16-T (Jan. 14, 2000) (para. 511),

[120] *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).

[121] Mr. Girard, France. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977). Volume IX, Third Session (CDDH/I/SR.42-65), at 58-59. For similar positions by Belgium see Mr. de Breucker, Belgium. *Id.* at 65; and by the U.K., see Mr. Draper, United Kingdom. *Id.* at 73.

Still, opponents of the proposal feared that reprisals would be punishment 'wrongly applied' insofar as they usually fall upon the innocent,[122] and that a right of reprisal would lead to escalating cycles of violence.[123] 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 even the ostensibly preventive and forward-looking mechanism of reprisals.

C. *Sanctions Outside of War*

States and other sovereign entities have employed a host of military and non-military sanctions against each other since ancient times, with the purpose of redressing an injury or enforcing a legal right. 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.[124] Kidnapping of citizens was itself a favorite mode of sanctions and counter-sanctions throughout the ancient and medieval eras.[125] Seizure of foreign property was another familiar mechanism of international coercion, often with the formal authorization from the sovereign whose citizens suffered earlier capture of their own property by foreign nationals.[126] Pacific blockades, maritime embargoes, and seizure of foreign vessels were likewise acceptable means of enforcing international rights and obligations.[127]

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."[128] As far as international legal doctrine went, sanctions were sometimes classified under the laws of peace, and 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

[122] See statement by 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 he 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…." *Id*. at 75.

[123] See statements by the representatives of the Libyan Arab Republic (*Id*., at 60), Ukranian Soviet Socialist Republic (i*d.* at 61-62), Poland (*id.,* at 63), and Norway (*id.,* at 75).

[124] JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 45 (2007), citing ROBIN RENWICK, ECONOMIC SANCTIONS 1 (1981). Farrall's book offers a detailed history of the use of sanctions, as well as a comprehensive study of the contemporary use of sanctions in international law.

[125] *Id*. at 46

[126] *Id.*

[127] Oppenheim's International Law, Vol. II, 29-48.

[128] Farrall, *supra* note 124, at 47-48.

means.[129] Of course, sanctions often had the opposite effect, of triggering or lengthening a war rather than preventing it.[130]

The League of Nations' collective security system included the right of member states to impose sanctions against states that had resorted to war in 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.[131]

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."[132]

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.[133] The one concrete experience of League' sanctions, imposed on Italy following its invasion of Abyssinia, proved ineffective in compelling a withdrawal. Instead, Mussolini partnered with Hitler.[134]

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.[135] 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.[136]

Under the League's successor, it was the UNSC that 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."[137] Military action was to follow only if these less violent steps proved ineffective.

The debate over whether international sanctions should be viewed as mode of punishment continued from the League into the U.N. Charter era. Fredrik Hoffman and

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[129] *Id.*
[130] *Id.* at 52.
[131] League of Nations Covenant, art. 16, para. 1.
[132] Quoted in Farrall, *supra* note 124, 53 (citing DAOUDI AND DAJANI, ECONOMIC SANCTIONS 26 (1983).
[133] *League Assembly Res. 4*, League of Nations doc. A.1921.P, 453 (1921).
[134] Farrall, *supra* note 124, 54-56.
[135] ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (RIIA), INTERNATIONAL SANCTIONS 13 (1938).
[136] Kim Richard Nossal, *International Sanctions as International Punishment*, 43 INT'L ORG. 301, 310 (1989).
[137] U.N. Charter, art. 41.

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 nations that deserved it.[138] 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.[139]

As a practical matter, in its first 45 years of operation, the UNSC ordered sanctions in only two cases: Southern Rhodesia (comprehensive sanctions, 1966-1979) and South Africa (arms embargo, 1977-1994). Given the Cold War deadlock in the UNSC, most sanctions in this period were imposed by individual states or regional organizations. With the end of the Cold War, 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), Haiti (1993-1994), Angola (1993-2002), Rwanda (1994), Sudan (1996-present), Sierra Leone (1997-2010), Taliban-led Afghanistan (1999-2001), North Korea and Iran. Sanctions have comprised total or partial economic embargo, travel and immigration restrictions, blockades, assets freeze, and severance of diplomatic relations.[140]

Individual countries, too, have imposed a range of unilateral sanctions on target countries and regimes, including for systematic violation of human rights (Burma[141]) or extraconstitutional changes of power (Zimbabwe[142]).

In none of its resolutions under chapter VII did the UNSC ever invoke the explicit language of punishment. Individual leaders, however, and especially Americans, veered closer to punitive rhetoric, although for the most part, still in suggestive terms.[143] In 1979, the U.S. 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."[144] Later, in his memoirs, he explained that he "was determined to make [the Soviets] pay for their unwarranted aggression."[145] 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 Iran. Secretary of State Hillary

[138] Fredrik Hoffman, *The Function of Economic Sanctions: A Comparative Analysis,* 4 J. PEACE RESEARCH 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).
[139] Nossal, *supra* note 136, at 315-321.
[140] For a full list of all sanctions, see Farrall, *supra* note 124.
[141] *See* Press Release, Capitol Hill, Biden Applauds Additional Economic Sanctions on Burma's Leaders (October 19, 2007)
[142] Sam Coates & Jonathan Clayton, *Britain leads call for Zimbabwe sanctions to punish Mugabe for stealing election*, TIMES (Jun. 16, 2008) *available at* http://www.timesonline.co.uk/tol/news/world/africa/article4144270.ece
[143] It is possible that Americans are more quick to invoke the language of punishment, given their social and cultural attitudes towards the concept that differ from some other countries. On this point, see JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).
[144] Cited by Nossal, *supra* note 136, at 320.
[145] *Id.*

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.[146] On the other side, Russian foreign minister, Serge Lavrov, criticized western powers for promoting UN sanctions against Iran that introduced an unwarranted "element of punishment."[147]

In legal and political commentary, sanctions have often been criticized as collective punishments, 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.[148] 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.[149] This was one more move towards the disentanglement of the leader, the state, and the people. 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.[150]

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. All sanctions promise to stop once the reasons for imposing them cease, suggesting that they are intended for prevention. 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. True, there are few if any cases

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[146] Paul Richter, *U.S. signals new sanctions against Iran*, L.A. TIMES, Dec. 12, 2009., *available at* http://www.latimes.com/news/nation-and-world/la-fg-iran-sanctions12-2009dec12,0,1287854.story

[147] *Russia Says West Trying to Punish Iran in UN Resolution*, RFE/RL, Dec. 20, 2006.

[148] Margaret P. Doxey, *Sanctions through the Looking Glass the Spectrum of Goals and Achievements*, 55 INT. J. 207, 208 (2000).

[149] Farrall, *supra* note 124, at 242.

[150] 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 Senator Joseph Biden applauded the decision "…to punish eleven more senior Burmese government officials personally responsible for the violence in Burma." *See* Press Release, Capitol Hill, Biden Applauds Additional Economic Sanctions on Burma's Leaders (October 19, 2007). *See also* media accounts 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." *Australia tables bill to boost sanctions against Zimbabwean leaders,* BBC MONITORING AFRICA(June 12, 2010); Britain's 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 (Jun. 16, 2008) *available at* http://www.timesonline.co.uk/tol/news/world/africa/article4144270.ece

where a sanction has been employed after a one-time violation has already been completed. But in many cases, sanctions are inflicted and maintained even where they have little proven effect on the target's behavior.

If so, the question remains why formal international law avoids any explicit rhetoric of punishment and what the consequences of that avoidance may be.

D. *Rules on State Responsibility*

The history of the Draft Articles on Responsibility of States for International Wrongful Acts (hereinafter, "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 must be on the ILC's agenda.[151] Over the next several decades, its members produced numerous reports and several different versions of the Draft Articles, the most recent one in 2001. 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.[152]

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

1. Countermeasures

The Draft Articles initially did not include the term "countermeasures." Instead, the ILC's Special Rapporteur, Roberto Ago, proposed Draft Article 30, which permitted a state to apply "a *sanction* against [another] State, in consequence of an internationally wrongful act committed by that other State."[153] The ILC subsequently opted to replace the term "sanction" with the word "measure," entitling the Article "Countermeasures in respect of an internationally wrongful act."[154]

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,

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[151] Summary: State Responsibility, International Law Commission (Jul. 12, 2006), *available at* http://untreaty.un.org/ilc/summaries/9_6.htm.
[152] LORI F. DAMROCSH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 686 (2001).
[153] Robert Ago, Eighth Report, *ILC Ybk* 1979 vol 2, part 1, 47 (emphasis added).
[154] For the commentary on the article, see *ILC Ybk, supra* note 155, at 115-122. Ago's proposed title had been "Legitimate application of a sanction".

> "[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."[155]

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, "[leaving] questions of punishment or reprisal to one side."[156] 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.[157]

Another set of limitations added by Crawford, beyond an appropriate motivation by the party employing countermeasures, was a substantive list of prohibited countermeasures. Draft Article 50 prohibited 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.[158]

Draft Article 50 sparked heated debates among states and delegates about the necessity, language, and scope of the Article. The ILC commentary, almost apologetically, explained that countermeasures are a necessary evil in a "decentralised system by which injured states may seek to vindicate rights,"[159] suggesting that countermeasures are a safety valve that allow states to enforce their rights while keeping those enforcement efforts at bay.

As earlier noted in the discussion of punishment in *jus ad bellum* and *jus in bello*, the limitations introduced by Draft Article 50 corresponded to the efforts to ban armed or belligerent reprisals under the U.N. Charter and IHL. More broadly, David Bederman suggested that,

> "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."[160]

The central conceptual enterprise of the regime, he suggests, was "the search for a polite international society."[161]

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[155] James Crawford, *The Relationship between Sanctions and Countermeasures,* in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 57-68 (V Gowlland-Debbas ed. 2001), at 59.
[156] *Id*.
[157] *Id.*
[158] Draft Article 50. The original text in 1994 was slightly modified in the 2001 draft, but both embodied the same principle.
[159] *Report of the International Law Commission of the General Assembly on the work of its fifty third session*, reprinted in [2001] 2 Y.B. INT'L L. COMM'N 128, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2.
[160] David J. Bederman, *Counterintuiting Countermeasures,* 96 AM. J. INT'L L. 817, 831(2002).
[161] *Id.*, 819.

But Bederman was also quick to observe that states are "still quite desirous of preserving freedom of action with respect to self-help."[162] As was shown earlier, despite the efforts to ban reprisals under the Charter system and the Draft Articles, states did, and still do preserve that freedom of action.[163]

2. 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."[164]

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."[165] Later described by Crawford as "the single most controversial element in the draft articles on State responsibility,"[166] Article 19 was met from its very inception with disapproval for its circularity, its vagueness, and its failure to stipulate meaningful consequences in case of violation.[167]

Indeed, notwithstanding Draft Article 19's use of the word "crime," there were no accompanying stipulations of punishment in the traditional criminal sense.[168] 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."[169] Even those governments that did support the retention of Article 19 did not advocate a regime of criminal responsibility and punishment of states. [170]

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[162] *Id.,* 832.

[163] For additional examples of the use of armed reprisals, see NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW, ch. 6 (2007) (". . .all such activities were understood in the interwar period to be 'measures short of war' and of doubtful legality"). *See also* MARK OSIEL, THE END OF RECIPROCITY (2009).

[164] 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, and Maria Spinedi eds., 1989).

[165] TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, Vol. 22, 466 (1948).

[166] James Crawford, *First Report on State Responsibility*, UN A/CN.4/490/Add.1 (1998) (hereinafter, "First Report").

[167] *Id.*

[168] In the words of Geoff Gilbert, "Academics can generalize 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." Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L. Q. 345, 366-67 (1990).

[169] 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* Gaetano Arangio-Ruiz, *Seventh Report on State Responsibility,* UN A/CN.4/469 (1995).

[170] Crawford, First Report, *supra* note 166, at 9.

If it had any purpose at all, the labeling of "international crimes" was thus mostly symbolic, emphasizing the "specially dangerous character of the delinquency."[171] It was this exact symbolism that troubled Crawford:

> "…to 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 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 capacity."[172]

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…"[173]

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.[174]

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.[175] A few months earlier, Iranian leader Mahmoud Ahmadinejad accused the United States itself of being "a criminal state"

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[171] GRIGORII IVANOVICH TUNKIN, THEORY OF INTERNATIONAL LAW 404 (William E. Butler trans., 1974).
[172] James Crawford, *Revising the Draft Articles on State Responsibility,* 10 Eur. J. Int'l L. 435, 443 (1999). *See also* JORGENSEN, *supra* note 3, at 5 (claiming that the resistance to "international crimes" emanated from "the penal implications of the term" and the stigma attached to it).
[173] 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).
[174] Joseph H. H. Weiler, "On Prophets and Judges," in INTERNATIONAL CRIMES OF STATES, *supra* note 164, at 329.
[175] *See US Calls NKorea a "Criminal State*," Fox News (June 15, 2010), http://www.foxnews.com/world/2010/06/15/calls-nkorea-criminal-state.

for supporting Israel.[176] 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 Draft Articles, nonetheless stated that his decision should not rule out the future development of state criminal responsibility.[177]

3. Punitive Damages

For centuries, punitive damages were a common type of reparations 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*.[178] Post-war 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.[179] 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.[180] Deterrence also allowed for some differentiation in the treatment of different defeated parties: barbarians were subject to harsher treatment, as according to contemporary thinking, a gentler form of reparation was likely to prove ineffectual if applied to them.[181]

The claim that post-conflict reparations should not assume a form of punishment was reiterated by several writers, mostly French, during the nineteenth century.[182] At the background were two post-conflict settlements – the 1815 Treaty of Paris following the defeat of Napoleon Bonaparte[183] and the 1871 Treaty of Frankfurt concluding the Franco-Prussian war[184] – both imposing considerable monetary sanctions on defeated France. More consequential than the monetary reparations, the 1871 Treaty also ceded Alsace-Lorraine to Germany.

The Treaty of Versailles at the close of World War I was to many a symbol of the possible uses and abuses of punitive damages. The Treaty ordered for 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.[185]

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[176] *Iran Leader Vows to "Cut the Hands" of Enemies*, AlArabiya.net (February 23, 2010).
[177] Crawford, *First Report*, *supra* note 166, at 10.
[178] *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")
[179] *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").
[180] Blane & Kingsubry, *supra* note 27, at 260-262.
[181] *Id.*, at 261.
[182] Neff, "Conflict Termination and Peace-Making in the Law of Nations," *supra* note 30, at 84.
[183] Treaty of Paris, 20 November 1915, 65 CTS 251, art. 4. War indemnity was set at 700 million francs.
[184] Treaty of Frankfurt. War indemnity was set at 5 billion francs, and German occupation was to continue until the sum was paid in full.
[185] Treaty of Versailles, art. 227.

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.[186] Large parts of German territory along with its inhabitants were transferred to other countries, mostly to the re-established Polish state, as well as to Czechoslovakia, France, Belgium and Denmark.[187]

The initial amount of reparations was set by the Inter-Allied Reparations Commission at 269 billion gold marks, about 32 billion USD. Notwithstanding subsequent debates over whether the original sum was punitive or merely compensatory (considering the vast damages inflicted by the war),[188] it was widely viewed as punitive at the time it was set.[189] 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.[190] 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.[191]

As World War II was coming to a close, 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 reversible. In a section dedicated to "Restitution and Reparation,"[192] 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.[193] In early 1947, four million German soldiers were still serving as forced laborers in the U.K., France, and the Soviet Union.[194] All of these forms of reparations were eliminated under

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[186] *Id.*, arts. 231-248.
[187] *Id.*, arts. 27-115.
[188] *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 Boeving, *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).
[189] *See, e.g.*, Detlev Vagts, Book Review, 81 Am. J. Int'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…")
[190] *See generally* DONALD MARKWELL, JOHN MAYNARD KEYNES AND INTERNATIONAL RELATIONS: ECONOMIC PATHS TO WAR AND PEACE (2006).
[191] 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) *available at* http://www.bbc.co.uk/news/world-europe-11442892.
[192] "Program to Prevent Germany from starting a World War III," available at: http://www.cpgg.info/docs/morgenthau_plan.htm
[193] *Id.*
[194] JOHN DIETRICH, THE MORGENTHAU PLAN: SOVIET INFLUENCE ON AMERICAN POSTWAR POLICY 123 (2002).

the subsequent Marshall Plan, which substituted the punitive Morgenthau Plan with a vision of reconstruction.

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 U.S. 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.[195] In *The Jane* case,[196] Mexico was ordered to pay $12,000 to the U.S. for having failed to apprehend the murderers of an American citizen. In the *Rainbow Warrior* arbitration, France was ordered to pay New Zealand NZ$13,000,000 in compensation for the "criminal outrage"[197] 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.[198] 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.[199]

Building on this practice, during the late 1980s and early 1990s, the reparation section of the Draft Articles permitted, alongside restitution or compensation, some elements of punitive damages within the concept of satisfaction.[200] Reviewing the "crucial question" of "whether satisfaction is punitive or afflictive, or compensatory in nature,"[201] 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."[202] 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."[203]

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[195] The "I'm Alone" case (United States / Canada) (5 January 1935), 5 RIAA pp. 1609, 1616; 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 191-192 (2007).

[196] *Janes Claim (United States v. Mexico)* (16 November 1925), 4 RIAA, pp. 82, 90.

[197] *Rainbow Warrior Arbitration (New Zealand v. France)* (30 April, 1990) 82 ILR 499, 575. The explosion killed a photographer on board the ship.

[198] *See* Jorgensen, *supra* note 3, at 188-189, 200-201 (2003) (claiming that although the tribunal in the *Janes* case did not explicitly label the award as punitive, such purpose can be inferred); OPPENHEIM'S INTERNATIONAL LAW, VOL I (PEACE) (R. Y. Jennings & A. Watts, eds., 9th edn., 1992) at 533.

[199] 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)

[200] *See* 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); Gaetano Arangio-Ruiz, *Second Report on State Responsibility*, UN A/CN.4/425 (1989), at 56; Draft Article 10 (19XX).

[201] Arangio-Ruiz, *id.*, at 32.

[202] *Id.* at 40.

[203] *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

Notwithstanding Arangio-Ruiz's thorough analysis, however, many scholars disagreed 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.[204] Others 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.[205]

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 more euphemistic phrase, "damages reflecting the gravity of the infringement,"[206] 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.[207] 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.[208]

The reluctance to award punitive damages against states has not been confined to claims among 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,[209] 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

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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." Arangio-Ruiz *supra* note 200, at 42.

[204] Wittich, *supra* note 200, at 118-131. See also Factory at Chorzow (Ger. v. Pol.), Indemnity, 1928 PCIJ (ser. A) No. 17 (Sept. 13), at 47, 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, 1 November 1923, p. 35 in which Umpire Parker declared that injury was subject to reparation but not as a penalty. Available at: http://untreaty.un.org/cod/riaa/cases/vol_VII/32-44.pdf. But cf. Oppenheim, who claims that punitive damages are part of international law, *see* Oppenheim, *supra* note 198, at 533.

[205] *See* Arangio-Ruiz, *supra* note 200, at 32, footnotes 257-260.

[206] Wittich, *supra* note 200, at 152**.**

[207] Commentary at 99, 107, 111.

[208] Dinah Shelton, *The ILC's State Responsibility Articles: Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 838 (2002).

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

scheme.[210] 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.[211] 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.[212] Moreover, in at least one human rights litigation,[213] the Inter-American Court of Human Rights awarded compensation for non-pecuniary damages, in a step viewed by some observers as a move towards "recognition that full reparation in some cases involved not only compensation but punishment."[214]

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.

III. POSSIBLE EXPLANATIONS FOR THE SHIFT FROM PUNISHMENT TO PREVENTION

A prolific international law and international relations literature has grappled with the question of state guilt and punishment on several levels. Ontological inquiries focus on whether a "state," an abstract entity, can commit crimes; otherwise, a notion of state criminality is merely a misguided personification, supported only by tortured analogies from the conduct of human beings.[215] Conceptual discussions grapple with the possible incongruence of a concept of punishment in a system of equally-sovereign states and inquire by what standards "crimes" are distinguishable from other types of offenses.[216] Pragmatic debates address 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.[217] All these

[210] *See, e.g.*, Briggs, who argues that many awards contain a strong punitive element, even if this element is usually covert: THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES (H. W. Briggs ed., 2nd edn. 1953), at 754.
[211] Jorgensen, *supra* note 3, at 201.
[212] *Id.*, at 207.
[213] Myrna Mack v. Guatemala**,** Case 10.636, Report No. 10/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 125 (1996).
[214] Shelton, *supra* note 209, at 361.
[215] *See* Harry D. Gould, *International Criminal Bodies: Conceptual Clarification of the Ideas of State Criminality and International Punishment*, 35 REV. OF INT'L STUDIES 701 (2009)(rejecting the notion of state criminality on ontological grounds); Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 528 (1956); FARHAD MALEKIAN, INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES 177-78 (1985) (all of whom reject any notion of state criminality). *But see* David Luban, "State Criminality and the Ambition of International Criminal Law" (draft, December 6, 2009, on file with the author); Anthony F. Lang Jr., *Crime and Punishment: Holding States Accountable,* 21 ETHICS & INT'L AFFAIRS 239, 242-245 (2007); A. Pellet, *Can a State Commit a Crime? Definitely, Yes!,* 10 EUR. J. INT'L L. 432 (1999) (all of whom claim that states can and should be punished under some circumstances).
[216] *See e.g.,* Gould, *id*., at 718
[217] Anthony F. Lang Jr., *Punitive Justifications or Just Punishment? An Ethical Reading of Coercive Diplomacy,* 19(3) CAMB. REV. INT. AFF. 389-403 (2006).

debates take place under the general recognition that the concept of state punishment is not currently acknowledged by mainstream international law.[218]

In what follows, I take a different angle to explore the case against state punishment. Instead of an independent theoretical inquiry into the concept of state punishment, I use the foregoing historical analysis to glean the possible motivations behind the shift from punishment to prevention in international law. I employ this method as it is the fact that punishment was once a central theme in international law, and no longer is, that I find particularly interesting. And while I cannot make any definitive causal claim about how this development came about, there are some common considerations that exhibit themselves in all four areas of international law earlier explored.

As I have noted throughout the preceding survey, a strong underlying preference for peace over justice has been a primary force behind the shift from punishment to prevention. Any concern about upholding the rule of international law through punishing violators must be, so the argument goes, inferior to a concern about maintaining a peaceful and secure international system. In the next section, I argue that this overarching preference for peace may have distorted consequences for international law and international relations, even if we do accept peace and security as paramount goals. For now, however, I explore why such a preference, to the extent it is correct, mandates the elimination of a paradigm of state crime and punishment paradigm. In other words, building on the historical study, I imagine what derivative or associated considerations may have served to support a correlation between a preference for peace and an aversion to punishment.

A. *Sovereign Equality*

The principle of sovereign equality has been a foundation of international law for many centuries, first receiving formal recognition in the 1648 Peace of Westphalia, and subsequently reiterated in numerous instruments, including the U.N. Charter.[219] 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.[220] If all states enjoy equal sovereignty, how could

[218] *Cf.* Jorgensen, *supra* note 3, at XX (arguing that despite formal distinctions between "punishment," "sanctions," "countermeasures" or "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, in fact do, commit crimes, and that the notion of "punishing states" should be recognized and addressed).

[219] UN Charter art. 2, para. 1.

[220] "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" (Oppenheim's International Law, 4th edn. 1925, §156).

one sit in judgment over, let alone punish, another?[221] As the concept of punishment evokes psycho-theological sentiments of a higher moral authority, it should have no place among states in a modern secular world, where there is no recognized superior entity.

Sovereign equality has thus been forwarded as justification for denying the right of states to use armed reprisals, for revoking the concept of "international crimes" from the rules on state responsibility, and for eliminating punitive damages as a legitimate type of reparations.[222] 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 an international body, and an individual.

Sovereign equality, however, is not an entirely convincing reason to avoid the punishment of states. Historically, punishment was an accepted mode of international relations even as sovereign equality began to emerge as an organizing principle of the international community (recall that the "war as punishment" formula continued well after the Peace of Westphalia of 1648). Granted, the punitive justification for war subsided in the late eighteenth and nineteenth centuries, as the nation state succeeded the princely states of the Westphalian system and sovereign equality gained a central and more universal power.[223] It was also at that time, however, that sovereign equality became synonymous with a lack of any normative evaluation of international relations, including war. If we are to have a normative yardstick for the use of force, whether threat- or guilt-based, then denying it in the name of sovereign equality is a self-defeating exercise.

Moreover, the principle of sovereign equality no longer enjoys the same omnipotence as it had in the nineteenth century. Pragmatically, it is compromised by the very structure of contemporary international institutions. The UN Charter gave the five World War II allies special powers as permanent members of the Security Council over all others, especially in the 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.[224] 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' decision making in exchange for their greater

[221] David Luban has critically suggested that it is a particular conception of sovereign equality – namely, the fetishism of states or the view of states as akin to the Olympic gods – that drives the international community's aversion to punishment. *See* Luban, *supra* note 195. On the fetishism of states, see also FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 59 (2nd ed, 1997).

[222] As one commentator put it, "the very idea of punishing States is (indeed) completely alien to the contemporary international legal order based 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." *See* Manfred Mohr, "The ILC's Distinction Between 'International Crimes' and 'International Delicts' and its Implications," UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 115, 139 (Marina Spinedi & Bruno Simma eds., 1987); *see* Wyler, note 173, at 1160.

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

[224] Treaty on the Non-Proliferation of Nuclear Weapons, T.I.A.S. No. 6839 (1970).

contribution to these selfsame institutions.[225] 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. In this state of affairs, sovereign equality is more of a rhetorical tool that is conveniently employed or dismissed, as the interest may be.

As a conceptual matter, too, 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 UN Charter still forbids countries from intervening in each other's internal affairs, and the Declaration on Friendly Relations similarly views such intervention suspiciously.[226] 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. With the shield of immunity pierced, punishment should have more room to enter.

Naturally, a pragmatic concern derives from the 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 uniquely positioned 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; the more powerful states can "prevent," police, or compel others, while remaining themselves immune to such efforts by others. 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 depoliticized with the aid of definitions and constructions…".[227]

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[225] Book Review, 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)).

[226] UN Charter, art. 2, para. 7.

[227] CARL SCHMITT, THE CONCEPT OF THE POLITICAL, 78 (George Schwab trans. 1996) [1932]. 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.*, 79.

B. *Revenge and Violence*

The term punishment, especially if understood as retribution, runs the risk of blurring the lines between legitimate vindication and visceral revenge.[228] Vengeance, by nature, risks being out of proportion to legitimate punishment, 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, state, and people were one unified entity that sought to protect its honor. It has no place, however, in an enlightened, secularized international system, which envisions the creation of a solidarist, polite international society.[229]

Moreover, the concept of punishment suggests a relationship of domination and submission and invites a world order of 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,[230] 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.[231]

Indeed, the historical experience of the nineteenth and early twentieth centuries seems to lend 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 polarized French policies towards Germany for the next forty years. Reconquering the "lost provinces" became a French obsession, generating revanchism which strongly pushed France to join World War I.[232] France did win the territories back under the terms of the Treaty of Versailles.

The longer-term political consequences of the Treaty, however, 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 declared his fellow delegates "very stupid men."[233] In his recollection of the signing ceremony he recounted, "we kept our seats while the Germans were conducted like

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[228] *See* Luban, *supra* note 195, at 19-27.

[229] The term solidarist international society has been forwarded by Andrew Hurrell, *Conclusion*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 327, 336 (Michael Byers ed., 2000). See also Bederman, on the effort to create a polite international society, supra note 161.

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

[231] *See* Blane & Kingsbury, *supra* note 27, 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.")

[232] *See, e.g.,* Mark Hewitson, *Germany and France before the First World War: A Reassessment of Wilhelmine Foreign Policy*, 115 ENGLISH HIST. REV. 570, 598 (2000).

[233] HAROLD NICOLSON, PEACEMAKING, 1919, 186 (1933).

prisoners from the dock, their eyes still fixed upon some distant point of the horizon."[234] The Treaty seemed to be the exact kind of post-war punishment that Gentili, Grotius, and their contemporaries had cautioned 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.[235]

A further cautionary note was struck when, after the League of Nations' one and only experiment with collective sanctions, Mussolini joined Hitler.[236]

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 post-war Germany deemed Versailles inadequate, not because it was punitive, but because it was not punitive enough. Through the occupation and partition, the Plan sought to "convert Germany into a country primarily agricultural and pastoral in its character."[237] Alongside complete demilitarization, the Morgenthau Plan, incorporated as Joint Chiefs of Staff (JCS) Directive 1067, sought an "industrial disarmament" and economic stagnation, ensuring that German standard of living was no higher than in any of its neighbor states and equal to what it was during the Great Depression.[238] 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."[239]

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.[240] 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.[241]

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[234] *Id*. at 369.
[235] *See, e.g.*, BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 47-48 (2000).
[236] See supra, note 134.
[237] Henry Morgenthau, Jr., *Postwar Treatment of Germany,* 126 ANNALS AM. ACAD. POL. & SOC. SCI (1946) *quoted in* Wolfgang Schlauch, *American Policy towards Germany, 1945*, 5 J. CONTEMP. HIST. 113, 115 (1970).
[238] Joint Chiefs of Staff (JCS) Directive 1067 *available at* http://usa.usembassy.de/etexts/ga3-450426.pdf.
[239] *Id.*, art 4.
[240] *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…").
[241] MICHAEL J. HOGAN, THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947–1952, 427-445 (1987).

Any retribution to be had was channeled to 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 as 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"[242]) as well as with punitive reparations. 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."[243]

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[244]), 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."[245]

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 evidence that refutes the consequential assessment.[246] 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.[247] By using the language of threat rather than guilt, the international community can similarly avoid the assigning of moral blame or engage in name calling, and remain within an ostensibly more neutral and pragmatic frame of prevention.

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[242] Crawford, *supra* note 189, at 443.
[243] Draft Article 37(3) (2001).
[244] 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 tamed decision was criticized as a "dangerous step towards energizing the concept of collective guilt" (at 350.)
[245] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J 91, 166 ¶ 464.
[246] Dan Kahan, *The Secret Ambition of Deterrence,* 113 HARV. L. REV. 413 (1999).
[247] *Id.*

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, because of its connotation of moral blame, breeds sentiments of humiliation and an urge for revenge, it is unclear that the rhetorical disguise of prevention has any 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 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:"[248] 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

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

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 the paper.

C. *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?

Few concepts evoke such powerful negative intuitions as "collective punishment." Lessons from Nazi Germany, Soviet Russia, 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.

As 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. Instead, 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.[249]

Moreover, and beyond the principled commitment, as the historical outline above shows, collective harm in the form of reprisals or punishments in war was feared not only for its immorality or injustice, but also for its potentially counterproductive pragmatic implications. It was pragmatics, rather than morality, that ultimately brought the U.S. 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 that held the entire German people responsible for the war. The plan thus 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, 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

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

blood."[250] More than a thousand Americans were arrested by the Military Police for violating these orders.[251]

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.[252] 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.

Whether moral or strategic driven, true to the commitment to distinguish the people from the ruler, 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 Milosevic and his regime as the target of its operation and insisted that it was never meant as a collective punishment of the people of Serbia.[253] President Bush repeatedly distinguished Afghans from Al Qaeda and the Taliban, Iraqis from Saddam Hussein, and Muslims from terrorists.[254] 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.[255] It is the same sensitivity to claims about collective punishment that has driven countries and organizations to attempt to devise "smart sanctions" that would target leaders and regimes while minimizing collateral harm to citizens.

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 (although the latter are peculiar to U.S. law).[256] Moreover, while doctrine has followed a general ban on collective punishment, academic scholarship is rife with debates over the ban's moral and pragmatic

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[250] Quoted in EUGENE DAVIDSON, THE DEATH AND LIFE OF GERMANY: AN ACCOUNT OF THE AMERICAN OCCUPATION 54 (1999)

[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] "Our military actions are directed not at the Serb people but at the policies of the regime in Belgrade" - Statement on Kosovo issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C., para. 3, *available at*: http://www.nato.int/cps/en/natolive/official_texts_27441.htm?selectedLocale=en.

[254] *See, e.g.,* Edward Cody & Molly Moore, *Bomb Kills Four Afghan Civilians; Aid Officials Urge Greater Care After Accidental Hit at Land-Mine Office* WASHINGTON POST (Oct. 10, 2001) (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").

[255] *See, e.g.,* Joel Greenberg, *Rights group accuses Israel of war crimes*, CHICAGO TRIBUNE (Aug. 24, 2006) ("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").

[256] *See* Daryl Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345,370, 398 (2003); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1340 (2009).

justifications.[257] 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.[258]

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.[259]

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, "[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."[260] Walzer himself is hesitant to state exactly under what circumstances he would be willing to consider an entire society collectively "guilty," but he suggests that such circumstances could exist.[261] 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 become 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.[262] Those more tolerant of collective punishment also note its instrumental benefits, as the group is often better positioned to police itself than any external force.[263] Other practical considerations also better position the state, rather than the individual, as a defendant in criminal trials. These include the ability to make reparations or the inability to escape judgment.[264] Collective punishment may also serve to bring the victim closer to forgiveness and reconciliation, as for the victim, without punishment – of the state, and not of individuals – a sense of closure is harder to attain.

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

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[257] *See, e.g.*, Fletcher, *supra* note 252; Levinson, *id.*; CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (1996).
[258] *See e.g.*, Fletcher, *supra* note 252, at 1543; Kutz, *id*, at 270.
[259] *See* LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 146 (2004); MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2006); Martti Koskenniemi, *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 stopped short of advocating collective punishment of societies).
[260] *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATION 298 (1975).
[261] *Id.* at 302-303.
[262] Levinson, *supr*a note 256.
[263] Levinson, *supra* note 256, at 359-60
[264] James Nicholas Boeving**,** *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT'L L. 557, 606-07 (2005).

violence.[265] Indeed, even though the legal prohibition is articulated in much broader terms, the historical precedents that were feared often involved such wide-scale atrocities. However, punishment may take the form of 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.[266] All of these forms of punishment (but for dissolution) have some precedent in the practice of "preventive measures," with equally harmful collective impact. Such collective harm is often inflicted even where there is a genuine attempt to target only the regime and not the state and its population as a whole.[267]

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."[268]

Even more benignly, collective harm is de facto suffered 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.[269] It is ultimately the citizenry, not the abstract entity of the state, that ultimately pays the

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[265] 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:
"…from 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." CHARLES DE SECONDAT MONTESQUIEU (BARON DE), THE SPIRIT OF THE LAWS, 135 (2002) [1914].

[266] Luban, *supra* note 9.

[267] *See e.g.,* Robert Bridge, *North Korea Testing Bombs - and Global Patience*, MOSCOW NEWS, Oct. 20, 2006 ("Furthermore, the United States learned through its Iraqi experience that sanctions only impose harm on the general population, as opposed to the rulers."); David Shariatmadari**,** *Sanctions and Dr Strangelove***,** GUARDIAN (London), Jul. 22, 2010 ("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. . .").

[268] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 106 (1946).

[269] *See, e.g.*, Commissioner Vicuna in *Re Letelier and Moffit,* 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 Mack 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." The Case of Myrna Mack-Chang v. Guatemala, 2003. Inter-Am. Ct. H.R. (ser. C) No. 101 at 46 (Nov. 25, 2003). *See also* WALZER, *supra* note 260, at 297 (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.").

compensation. A striking example of this collective harm was provided by Security Council 687, which established the United Nations Compensation Commission (UNCC).[270] 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. In other words, punishment may actually be more limited in its adverse collective effects than is prevention.

It would exceed the scope of this paper 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.

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, 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.

[270] *See* S/RES/687 (1991), *available at* http://www.fas.org/news/un/iraq/sres/sres0687.htm.

The international system does not have and never has had a mechanism dedicated to criminal investigation, adjudication, or punishment of states.[271] 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[272]) 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 must 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.[273] 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.[274] 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.[275] Sir Hartley Shawcross, the lead British prosecutor at Nuremberg, observed that "there 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 demand, quite imperatively, means of repression of criminal conduct even more drastic and more effective than in the case of individuals."[276]

All of these proposals were dismissed fairly quickly,[277] 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 to treat genocide as a crime committed by states and subject to the

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[271] *See* G. SCHWARZENBERGER, INTERNATIONAL LAW, VOL, I: INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 673 (3rd edn.1957) (claiming that international tribunals have denied any jurisdiction to exercise quasi-penal powers).

[272] See James Whitman, draft, on file with the author (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).

[273] *See* Historical Survey of the Question of International Criminal Jurisdiction, U.N. GAOR, Int'l Law Comm., U.N. Doc. A/CN.4/7/Rev.1 (1949) 71.

[274] *Id.*

[275] Kelsen further criticized the League of Nations for giving priority to a legislative role over a judicial one. This priority, he claimed, meant that the League issued normative statements instead of passing judgments grounded in international law. *See* HANS KELSEN, PEACE THROUGH LAW 127-140 (1944).

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

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

punishment of states by an international criminal court were similarly rejected.[278] The 1998 ICC Rome Statute explicitly limited its jurisdiction to natural persons, excluding states and corporations.[279] The few available courts that do have competence to pass judgment on the conduct of states, such as the International Court of Justice,[280] 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."[281]

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 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.[282] Kelsen, too, concluded that "the purpose of enforcement

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[278] *See* U.N.O.R. of the Third Session of the General Assembly, Part I. Legal Questions Sixth Committee, Paris, 1948. Ninety-Seventh meeting (E/794): Report of the Economic and Social Council (A/633), p. 364.
[279] ICC Statute, art. 25(1).
[280] On a possible reform of the ICJ to allow it to punish states, *see* Lang, *supra* note 215, at 249-250.
[281] Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 A.J.I.L. 833, 845 (2002).
[282] *Supra,* note 67 and text accompanying.

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."[283]

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'.[284]

Nevertheless, the description of UN practice as avoiding "charges and counter-charges of illegality," even if accurate in 1965, does not 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 (a particularly poignant example is the Resolutions authorizing the use of force against Iraq in 1990).[285] 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.[286] 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."[287]

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[283] HANS KELSEN, THE LAW OF THE UNITED NATIONS 294 (1950).

[284] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J., 14, 26 (June 27); *See also* Abe Sofaer, *The World Court*, 80 American Society of International Law Proceedings 201 (1986) (stating, as legal counsel to the U.S. Dept. of State at the time of Nicar. v. U.S.: "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*, Conference of Presidents of Major American Jewish Organizations, July 8, 2004, *available at* 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 UNSC. *See* Harold Koh and Stephan Rapp, Special State Department Briefing, U.S. Engagement with the International Criminal Court; Outcome of Recently Concluded Review Conference (Jun. 15, 2010) ("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 we'll continue to engage toward that end"). *See also*, Samson Ntale, *Former Nuremberg prosecutor chides U.S., China, Russia*, CNN.com (Jun, 9, 2010) (stating that the U.S. "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.")

[285] *See e.g.,* S.C. Res. 678, *supra* note 84; for another example, see also S.C. Res 1298, U.N. Doc. S/Res/1298 (May 17, 2000) (imposing sanctions on Ethiopia and Eritrea).

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

[287] Crawford, *Sanctions and Countermeasures*, *supra* note 155, at 1.

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 preventative 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 the 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.[288] 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."[289]

Of course, it is impossible to know how much use of force the world would have suffered 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 reason for avoiding state punishment must be able to withstand the critique over this same architecture's (in)ability to engage in effective prevention.

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

As the foregoing sections have demonstrated, an underlying preference for peace over justice in international relations has been a strong driving force, even if not the only driving force, behind the elimination of state punishment in international law. Such a

[288] Robert J. Delahunty, *Symposium on Reexamining the Law of War: Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System,* 56 CATH. U. L. REV. 871, 926-940 (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 (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, 139 (1998).

[289] 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 (2002).

preference for peace, so it is believed, cannot be realized through a paradigm of punishment, but must instead rest on one of 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. In fact, however, none of these possible explanations offers, in my mind, a clear-cut case for avoiding state punishment altogether.

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. 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 towards prevention has gained force from the 1950s onwards, with a wave of federal and state statutes expanding the penal 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.[290] "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.[291] In 1992, Washington was the first state to pass a "Sexual Predator" law,[292] mandating the continued incarceration of sex offenders after the conclusion of their criminal sentence; several states followed both before and after the Supreme Court upheld a similar Kansas law as constitutional.[293] "Three-strikes" laws, introduced in 1993 (although with some far older historical origins), stipulate life sentences for repeat offenders.[294] 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.[295] 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.[296] By 1998, Carol Steiker observed

[290] Paul H. Robinson, *Forward: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 711-13 (1993).
[291] Robinson, *supra* note 5, at 1431.
[292] WASH. REV. CODE § 71.09 (1992).
[293] Kansas v. Hendricks, 521 U.S. 346, 350 (1997).
[294] *See, e.g.,* 18 U.S.C. sec. 3559 (1994) (applying the life-sentence to serious violent felony convictions); some states apply the law to three convictions for any felony.
[295] Steiker, Limits, *supra* note 6, at 774.
[296] *Id*. at 775.

that "[t]he preventive state is all the rage these days, and it can be seen in many different guises."[297]

Despite the classification in both law and scholarship of such penal sanctions as preventative, 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.[298] Criminal punishment is thus de facto mixed with, or even worse – disguised as prevention.

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*.[299] 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.[300]

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).[301] Judges, too, expressed concerns about the mismatch between the sanction and its goal: In his dissent to *Schall*, Justice Marshall argued that the preventative detention of juveniles worked against the statute's own preventative purposes,[302] driving juvenile detainees into a "downward spiral of criminal activity."[303]

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[297] *Id.* at 774.

[298] See Henry Hart, supra note 5, at 404 ("What distinguishes a criminal from a civil sanction… is the judgment of community condemnation which accompanies and justifies its imposition.") On the distinction between criminal and civil sanctions, see Stephen J. Schulhofer, *Two Systems of Social Protection: Comment on the Civil-criminal Distinction, with Particular Reference to Sexually Violent Predator Laws,* 7 J. CONTEM. LEGAL ISSUES 69 (1996).

[299] Schulhofer, *id.,* 78-85; Steiker Limits, *supra* note 6, at 771-774; Steiker, *Punishment and Procedure, supra* note 7. *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)

[300] *Id.*; *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 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).

[301] MODEL PENAL CODE § 5.05(2) (1962); the Explanatory note to § 5.05(2) limits these cases "… 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)." The emphasis, thus, is on dangerousness of the actor, rather than on his guilt.

[302] Schall v. Martin, 467 US 253, 291-97 (1984) (Marshall, J., dissenting).

[303] *Id.* at 292.

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 (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.[304] 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 coercion even against those who are not guilty (or necessarily threatening), and may at the same time also raise obstacles to coercion 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 the shortcomings of such an association, 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.

A. *Anticipatory Self-Defense and Preventive Wars*

The exact scope of Article 51 of the UN 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.[305] 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.[306] This understanding harks back to the

[304] On the possibilities and limits of transpositions from domestic criminal law to international law, see *generally*, Paul H. Robinson and Adil Ahmad Haque, *Justice & Deterrence in International Law: Improper Limitations on Responses to Unlawful Aggression, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537326* (drawing on the domestic law of self-defense to analyze the international doctrine); *cf.* Noam Zohar**,** *Collective War and Individualistic Ethics: Against the Conscription of ´Self-Defense,'* 21 POLITICAL THEORY 606 (1993) (criticizing the analogy to criminal law doctrines of self-defense when justifying the principle of distinction in war).

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

[306] *See* U.N. High-Level Panel on Threats, Challenges & Changes, *A More Secure World: Our shared responsibility,* U.N. Doc. A/59/565 (Dec. 2, 2004)*:* "provided there is credible evidence of … an imminent threat and the threatened state has no obvious alternative recourse available, there is no problem – and

doctrine first formulated by then Secretary of State, Daniel Webster, in 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."[307]

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 nonstate actors. In the aftermath of the terror attacks of 9/11, 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.[308] 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."[309]

Despite associating President Bush with this expansive reading of the right to engage in anticipatory self-defense, and making him the target of sharp criticism from around the globe, American presidents before Bush, as well as leaders of countries such as Israel or Australia, have long advocated similar views.[310] 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.[311] 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."[312] And in a section of the document titled, "Policy Implications for Europe," it added:

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never has been – with that state, without first seeking Security Council approval, using military force "preemptively." *See also*, DOYLE, *id,*.

[307] *See The Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), Moore, 2 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); Christian J. Tam, *The Use of Force Against Terrorists,* 20 EUR. J. INT'L LAW, 359, 378-83 (2003). *Cf.* GRAY, *supra* note 82, at 112 (who believes that even anticipatory self-defense is of "doubtful status").

[308] U.S. Nat'l Sec. Council, The National Security Strategy of the United States of America 15 (2002), states: "We must adapt the concept of imminent threat to the capabilities and objectives of to day's adversaries... The United States has long maintained the option of preemptive actions to counter a sufficient threat ot our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case or taking anticipatory action to defend ourselvse, evn if uncertainty remains as ot the time and place of the enemy's attack."

[309] *See generally*, Anne-Marie Slaughter and Lee Feinstein, *A Duty to Prevent*, FOREIGN AFFAIRS (January, 2004); 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 pre-emptive force is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary").

[310] Delahunty, *supra* note 288, at 876 and references therein. *See also* ALAN DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).

[311] The document stated, "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." Available at: http://www.nato.int/ims/docu/terrorism.htm

[312] Javier Solana, "A Secure Europe in a Better World," European Council (Thessaloniki, Greece), 20 June

> "We need to be more 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."[313]

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 imply too great for the legality of unilateral preventive action."[314]

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.[315] 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.[316]

Moreover, even within the punitive framework of classical Just War theory, most writers 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; the threat of injury, like injury itself, was a just cause for war.[317] Grotius forwarded an even 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."[318]

Undoubtedly, rarely would there be a 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 UN Charter, the *threat* of use of force is itself a violation of international law,[319] even if it does not justify the use of force under Article 51.

2003, p. 7, *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/reports/76255.pdf

[313] *Id.*, at 11.

[314] High-Level Panel, *supra* note 306.

[315] *See* Herbert Wechsler, William Kenneth Jones and 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 ("Prevailing law reflects no general or coherent theory in determining the sanctions that are authorized upon conviction of attempt, solicitation, or conspiracy.").

[316] *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 pre-emptive self-defense in the context of Battered Woman's Syndrome).

[317] Blane & Kingsbury, *supra* note 27, at 251,

[318] Blane & Kingsbury, *supra* note 27, at 252.

[319] U.N. Charter art. 2, para 4.

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 recognize punishment for acts of preparation alone. 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*."[320] Conversely, a preventive model, by definition, forces us to contemplate sanctions before an injury – or another injury – occurs.

If so, the preventive commitment of existing international law may lend itself to debates over preemptive strikes and preventive wars that go further and further beyond 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.[321] But this effort never materialized, either under the League or 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.

If so, the preventive model of international law may 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 threat warrants a defensive violent action, perception and misperceptions of threats invite a spiraling reactionary vision of threats, thereby risking more violence and hostility.

Moreover, because prevention can justify a defensive action against any threat, even one that does not constitute a "crime," the paradigm of prevention lends itself to backdoor legislation that deems certain acts "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

[320] Cited by Walker, *supra* note 31, at 305 (emphasis added).
[321] Remarks of René Cassin, in Bourquin *supra* note 45, at 330-331: "The question is what the Council… can do regarding a State which, without committing an 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…"

sanctioning powers is evidence of this point.[322] 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 decision-making by the UNSC (as opposed to any single state), it nonetheless 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. Both Grotius and Gentili cited with agreement Seneca's claim from the first century that "the subjects of others do not seem to me to be outside of that of kinship of nature and the society formed by the whole world;"[323] and, 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."[324]

The legal right to punish for offenses committed towards others was at 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."[325] It was also a moral, natural right of anyone innocent to punish an offender for "sins against nature."[326] 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.[327]

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,

[322] On this debate, see Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).
[323] Quoted in Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez,* 85 AM. J. INT'L L. 110, 115 (1991).
[324] Quoted in Meron, *id.*, at 115.
[325] Quoted in Meron, *id.*, at footnote 17.
[326] Blane & Kingsbury, *supra* note 27*,* at 252.
[327] Blane & Kingsbury, *supra* note 27*,* at 255.

sparking debates among scholars and policymakers over its juridical basis and practical manifestation.[328]

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 between the rights violated and an internal conflict that constituted a general danger to others outside the boundaries of the state. This was, in essence, the move from a punitive view of humanitarian interventions to a preventative one.

Debates over the legitimacy and desirability of humanitarian interventions as well as the emphasis on prevention persisted into the Charter era, following much the same path as their predecessors. Opponents of humanitarian interventions continued to question their practical sensibility,[329] 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.[330] Moral arguments for or against intervention, inedpendent of instrumental evaluations, have been marginalized.

The 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. Intervention may or may not work; risks to others may or may not materialize. 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 pallatable 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's point about the appeal of consequentialist debates in avoiding deeper moral controversies over whether punishment is deserved.

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

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[328] On the emergence of the terminology of "humanitarian intervention" and similar concepts in the 19th century, *see* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001). Chesterman 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. *Id*. at 24-26.

[329] *See e.g.,* 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."); 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.") *quoted in* Yonatan Lupu, *Rules, Gaps and Power: Assessing Reform of the U.N. Charter,* 24 BERKELEY J. INT'L L. 881, 888 (2006).

[330] Lupu, *supra* note 329, at 906; *see also* Chesterman, *supra* note 328, at 132.

> "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. …
>
> 17. It is our aim to make stability in Southeast Europe a priority of our transatlantic agenda…."[331]

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 Milosevic 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.[332] 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.

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.[333] Goodman claims that by framing the cause of war as humanitarian, rather than as self-interested, the humanitarian justification operates to mitigate hostilities and encourage alternative paths to war.[334] While Goodman's focus is on humanitarian versus non-humanitarian justifications, his argumentation suggests that punitive and preventative justifications may also have a different impact on the willingness and scope of using force. Since under existing practice, explicitly punitive

[331] Statement on Kosovo, *supra* note 253.
[332] Lang *supra* note 195, at 253 (note that Lang views the bombings as both deterrent and retributive).
[333] Ryan Goodman, *Humanitarian Intervention and Pretexts for War,* 100 AM. J. INT'L L. 107 (2006).
[334] *See* summary of argument, *id.* at 126-127.

rhetoric is couched in preventive terms, putting this suggestion to an empirical test is highly problematic.

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 a "crime" comes at a cost to the international community's own self-identity. The avoidance of a moral confrontation over what constitutes a "crime," of what constitutes just desert, 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.[335] 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.[336]

Contemporary theologian Oliver O'Donovan has aptly captured this consequence of the preventive paradigm in his work:

> "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."

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 run their 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 "Reiterating its primary responsibility for the maintenance of international peace and security and, in this connection, its commitment to continue to

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[335] On the expressive power of criminal law and punishment, in particular, see Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism,* 42 AM. U. L. REV. 1393; 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); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate,* 54 VAND. L. REV. 2157 (2001).

[336] O'Donovan *supra* note 86, at 55.

address the widespread impact of armed conflict on civilians, including with regard to sexual violence."[337] The first operative paragraph then proceeds to state that the UNSC

> "Reaffirms 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."[338]

Other paragraphs of the decision speak to the need to fight impunity and bring perpetrators to justice.[339] 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 side having any superior jurisdiction to resort to upon earth for justice."[340]

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 ceased to do so. Instead, it replaced punishment with prevention and guilt with threat as justification 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 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

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[337] UNSC Resolution 1888, Sep. 30, 2009, page 3. (emphasis omitted). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/534/46/PDF/N0953446.pdf?OpenElement
[338] *Id*. (emphasis omitted), para 1, page 3.
[339] *Id.* para 6, page 4.
[340] Quoted in ROBERT PHILLIMORE, SIR., COMMENTARIES UPON INTERNATIONAL LAW 89 (1854).

exacerbating international conflict. But it is unclear whether the elimination of state punishment is either necessary or even 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: it 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, it 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 are in addition to 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, with a claim for 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. This is especially the case as most coercive action is taken after there is some tangible exhibition of transgression. And yet, if this is the case, 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 preventative paradigm shapes the international community's pragmatic and moral stance on various issues without our full conscious consideration of it.