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BOOK REVIEW

WHAT NATURAL LAW TEACHES ABOUT THE RIGHTS OF WAR

THE RIGHT TO WAGE WAR (*JUS AD BELLUM*): THE
GERMAN RECEPTION OF GROTIUS 50 YEARS AFTER DE
IURE BELLI AC PACIS. By Andreas Harald Aure. Berlin,
Ger.: Berliner Wissenschafts-Verlag. 2015. Pp. 220.
\$31.99.

Reviewed by Jeremy A. Rabkin*

At first glance, the title of this book looks inflammatory, or at least belligerent. Is there really a “right” to “make war”? Major states had agreed to “outlaw war” some ninety years ago, in the Kellogg-Briand Pact. The United Nations (“U.N.”) Charter allows only a limited “right of self-defense.”

At second glance, the subtitle might suggest the book is a highly specialized, technical study. It focuses on the writings of three German scholars of the late 17th century: Konrad Friedlieb (1633-1713) of the University of Griefswald; Valentin Alberti (1635-1697) of the University of Leipzig; and Johann Wolfgang Textor (1637-1701)

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of the University of Heidelberg. None of the three achieved much recognition at the time. Nor do they seem to have aroused much posthumous interest in the centuries since then. Who now would care what they said, other than specialists in intellectual history working on that precise era?

Yet Aure's short book does offer rewards for readers who simply have a general interest in international law or international relations. As explained in the opening pages, the book grew out of the author's doctoral dissertation in legal studies at Humboldt University in Berlin. Aure, himself, is from Norway and composed the work in English. His English is always comprehensible, though occasionally a bit clumsy or deficient in word choice. That weakness is more than compensated by his other language skills, enabling him to study the original texts (almost all in Latin), along with current scholarship in German, French, Dutch, and Norwegian, as well as English.

Aure sometimes invokes modern scholarship to illuminate the context of these writings, but here that means philosophical context—comparisons with other thinkers and scholars. He provides cursory biographical sketches of the German scholars he discusses. He offers no thematic analysis of European politics in that era. Aure keeps his focus on the actual arguments of the writers, starting with the great Dutch jurist of the early 17th century, Hugo Grotius. He then offers a brief look at the most prominent natural law thinker in late 17th century Germany, Samuel Pufendorf, before moving on to the three, lesser known German scholars of that period.

Aure does not assess how much the views of these scholars comport with prevalent doctrines today. He leaves that to the reader. But Aure remains aware of contemporary debates regarding justice and order in international affairs, as indicated by asides in the text and references in the footnotes. History, he says in a "methodological remark," can be "of value to us in various ways, even in providing

material for helping us to solve perennial or timeless questions.”¹ That awareness no doubt influenced the choice of topics treated here.

Grotius caught the attention of scholars in his time and has remained a fixture in scholarly discussion. The Dutch jurist has been called the father of international law, since his great treatise *De Jure Belli ac Pacis* ("On the Law of War and Peace") was the first work offering a systematic analysis of how law between states could be identified and recognized as binding. When that work was first published (in Latin) in 1625, the Protestant Dutch were still fighting to establish their independence from the Spanish empire, as they had been for six decades. Meanwhile, the Dutch struggle had become one front in a more general war pitting small Protestant states against the Catholic empires of Spain and Austria—a conflict that came to be known as the Thirty Years War.

The Thirty Years War finally ended with the Peace of Westphalia (1648). Since that settlement established mutual recognition of sovereign states, without regard to religion, it has come to be seen as the foundation of modern international politics. It put an end to wars of religion in Europe. The text of Grotius could be seen as an anticipation or justification for a world in which wars could no longer be justified by papal endorsement or by opposition to papal rulings.

The scholars at the heart of Aure’s book were writing about half a century after Grotius, a few decades after the Peace of Westphalia. It was still a time of tension and insecurity in Central Europe, so they remained intensely interested in arguments about war. These scholars were professors at universities in Protestant states of Germany, so they had reasons to embrace the Grotian promise of a law transcending sectarian differences between Catholics and

¹ ANDREAS HARALD AURE, *THE RIGHT TO WAGE WAR (JUS AD BELLUM): THE GERMAN RECEPTION OF GROTIUS 50 YEARS AFTER DE IURE BELLI AC PACIS* 32 (2015).

Protestants. But they could not simply treat arguments of Grotius as settled law, since their world remained fraught with ideological tensions.

We might say the same of our world today. Aure's scholars stimulate thought on questions that are no longer so actively discussed in our time, but may remain quite relevant and revealing. The rest of this review will demonstrate the latter claim by comparing the issues discussed in Aure's 17th century treatises with disputed practices or doctrines of recent decades.

WHAT IS A JUST WAR?

With each of the writers he discusses, Aure starts with a definitional question: what is war? Grotius distinguishes private war and public war. His treatise acknowledges a place for legitimate war, even when the fighting is not officially authorized by sovereign authority (or not conducted between sovereigns on both sides).² A half century later, all three of Aure's German scholars insist that war, in the proper sense, is only a contest between sovereign princes or independent commonwealths.

The complication is worth noticing. At first sight the position of the German scholars seems rather contradictory. Sovereign states, they all agree, can make war to defend themselves against an aggressor. So, too, they agree, states can make war to take back what is rightly theirs but has been wrongly withheld, such as territorial possessions or rights of access to the sea. Why, then, can't private citizens fight their government when it disregards their rights? Or at least when it

² HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. I, ch. iii, at § 2 (Francis Kelsey trans., 1925) ("[A]ccording to the law of nature not all private war is impermissible."); *id.* at bk. I, ch. iii, at § 3 ("[P]rivate war in some cases is permissible even according to the law of the Gospel.").

disregards agreed limits on governmental authority, limits that might be regarded as fundamental elements of the “social contract”?

These scholars were, of course, well aware that people had often taken up arms without public authority to do so—as in revolutions or civil wars. The question for all of them was the definition of a just war, a war which would be acceptable or proper. For Grotius, it was still plausible to claim some sort of legal right to act without authorization—or even against authorities.³ Even Grotius, however, goes to some trouble to limit resort to force to situations in which the internal law acknowledges competing authorities.⁴ He denies that there is any general right of citizens to take up arms against their government, even if it is abusive, and (though Aure does not mention it), he went so far as to deny that there is a universal obligation for governments to act in the interest of those they govern.⁵ From what Aure says about them, the German writers seem to take for granted that war is a unique prerogative of the sovereign. Put more succinctly: they do not recognize any inherent right of resistance among the governed.

That seems directly at odds with the doctrines of writers better known to us today, most notably the English philosopher John Locke. The American Declaration of Independence invokes Locke’s central doctrine, regarding a right of revolution.⁶ But the 17th century writers

³ *Id.* at bk. I, ch. iii, at § 2 (“[A]ccording to the law of nature, not all private war is impermissible [even] since the establishment of courts.”).

⁴ *Id.* at bk. I, ch. iv, at § 2 (“[A]s a general rule rebellion is not permitted by the law of nature.”).

⁵ *Id.* at bk. I, ch. iii, at § 8 (“The opinion that sovereignty always resides in the people is rejected.”); *id.* (“But it is not universally true, that all government was constituted for the benefit of the governed.”).

⁶ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 149 (1689) (“And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish or so wicked, as to lay and carry on designs against the liberties and properties of the subject: . . . they will always have a right to preserve, what they

were still struggling to define and defend limits on the right to war. A sharp version of the question might be: what does an oppressed people—or at least, a disgruntled people—have to show to claim that its resort to arms against its own government is a just war? And when the revolt is just, does that mean that resistance by the previously established government is not just?

The assumptions of Aure's scholars may not, after all, be so remote from generally prevailing views in our time. The U.N. Charter seems to side with existing governments. It requires member states to "refrain from the threat or use of force against the territorial integrity or political independence of any state."⁷ That seems to prohibit states from deploying (or threatening) force on behalf of rebellions within another state, regardless of how well justified the rebel claims. On the other hand, that prohibition applies only to actions of states "in their international relations"—so it does not restrain existing governments from deploying force to suppress rebellions. Indeed, the text of the Charter seems to indicate that the use of force against a rebellion is excluded from the U.N.'s jurisdiction: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"⁸

Even humanitarian law, regarding the conduct of war, distinguishes international armed conflicts from internal force. The Geneva Conventions on prisoner of war status of 1929 and 1949 applied only to international conflicts: signatories were required to provide humane treatment to enemy soldiers captured in such

have not a power to part with, and to rid themselves of those, who invade this fundamental, sacred, and unalterable law of self-preservation, for which they entered into society.").

⁷ U.N. Charter art. 2, § 4.

⁸ U.N. Charter art. 2, § 7.

conflicts and release them at the end of the conflict.⁹ In domestic rebellions, states remained free to impose harsher penalties on rebel fighters. Even the most recent major conventions on the law of armed conflict distinguish “international armed conflicts” (“Additional Protocol I” or “AP I”) from “non-international conflicts” (“Additional Protocol II” or “AP II”).¹⁰

AP II appears to authorize more destructive measures to suppress internal uprisings than AP I allows in international conflicts. As a notable example, AP I forbids attacks which “may be expected to cause . . . injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”¹¹ There is no counterpart restriction in AP II, which is less than half as long as AP I. A comparison of the two conventions suggests that the world finds it easier to agree on close regulation of international conflicts. Perhaps that reflects the view that suppression of domestic uprisings is more urgent. Or perhaps it simply reflects the priority given to preserving international peace, by limiting interference with internal actions of sovereign states.

It is true that the U.N. has sponsored international conventions on human rights which might seem to limit what

⁹ “When belligerents conclude a convention of armistice, they must, in principle, have therein stipulations regarding the repatriation of prisoners of war.” Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929. “Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.” Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75, U.N.T.S. 135. Article 3 offers a brief list of prohibitions applying to non-international conflicts but does not mention release of prisoners at the conclusion of the conflict. *Id.* at art. 3.

¹⁰ See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977.

¹¹ Additional Protocol I, *supra* note 10, at art. 51, ¶ 5b.

governments can do to their own citizens. But it is notable that none of the international human rights conventions expressly stipulates—as the American Declaration of Independence does—a right of people to overthrow their government when it acts oppressively. The Covenant on Civil and Political Rights of 1966 starts by asserting not the rights of individuals but the right of "peoples" to "self-determination:" "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹² This seems to mean that organized states may "freely" (without outside interference) infringe the rights of individuals (as regards rights to liberty and private property, for notable examples), even if other states regard such "political" or "economic" measures as oppressive. The least one can say is that human rights conventions do not provide reliable measures to enforce the rights they proclaim.

Nor does the U.N. Charter. The Security Council, established by the U.N. Charter as the primary enforcement arm of the U.N., is given authority to impose sanctions and ultimately to authorize military measures "to maintain or restore international peace and security,"¹³ but not to defend the human rights of individuals. When the Charter was drafted, the Soviet Union was recognized as a totalitarian state, which accorded no respect to individual rights in the western understanding of the term.¹⁴ Even so, it was given a permanent seat on the Security Council, assuring it the capacity to veto any Council resolution of which it disapproved.¹⁵ Authoritarian

¹² International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

¹³ U.N. Charter art. 42.

¹⁴ On May 13, 1945, a week after Germany's surrender, at a time when diplomats were still negotiating the Charter of the United Nations in San Francisco, Winston Churchill made a public speech, broadcast by the BBC, warning that territories occupied by the Soviet Union were in danger of falling under "totalitarian or police governments ... to take the place of the German invaders." MARTIN GILBERT, WINSTON S. CHURCHILL, VOL. VIII: NEVER DESPAIR 1945-1965 13 (1988).

¹⁵ U.N. Charter art. 23, ¶ 1; *id.* at art. 27, ¶ 3.

Russia and Communist China retain this veto power on the Council to this day.

There are still armed uprisings against established governments, of course, and they still sometimes lead to civil wars. Since the advent of the U.N. system, there have been far more civilian deaths from internal than international conflicts.¹⁶ Sometimes, outside powers intervene—as Britain, France, and the United States recently did in Libya, and as Russia and Iran have done in Syria.

Is the world as comfortable with major states taking sides in internal conflicts as in defending allies against external aggression? The U.N. Charter authorizes member states to participate in "regional arrangements or agencies for dealing with . . . the maintenance of international peace and security."¹⁷ States are authorized, that is, to coordinate regional military capacities to maintain "*international* peace" but not to uphold domestic authority against internal rebels. The intervention of North Atlantic Treaty Organization ("NATO") states in Libya on the side of the rebels provoked much protest from Russia. The Russian and Iranian interventions in Syria, on the side of the established government, provoke disapproving comments in western capitals.

So, the modern view may not be quite so removed from that of Aure's 17th century scholars. There are always plausible claims that a particular situation should be seen as an exception—on humanitarian grounds or security grounds or some other special

¹⁶ See generally Human Security Report Project, *Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation, and Contestation* (Vancouver, Human Security Press 2013) (reporting studies estimating 80 per cent of deaths attributed to armed conflicts since 1945 have occurred in internal (non-international) conflicts).

¹⁷ U.N. Charter art. 52, ¶ 1.

grounds. Do we trust the claims of states when they invoke special circumstances?

THE OBLIGATION TO ACT WITH GOOD INTENTIONS

Aure gives separate attention with each of his scholars to the question of whether states are obligated to act with the right intention. Thomas Aquinas emphasized this obligation in defining just war: it matters why a state decides to act (and whether its ruler is sincere in his claims).¹⁸ Aure notes that Texor and Friedlieb rejected this element of the Thomistic definition. Grotius also did so, though with much more equivocation.¹⁹

Of the scholars surveyed by Aure, only Alberti still retained this concern. As Aure explains, he held to a much more explicitly religious view, disavowing the notion that sinful men could find their way to rules independent of biblical authority.²⁰ Aure's other two scholars seem to have had more confidence that accepted rules could replace inner searching of conscience: outsiders can assess whether a state's resort to war is justified by looking at the actual circumstances, rather than speculating about intentions.

From Aure's account, most 17th century scholars had come to regard "war" as closer to action within a legal system than a crusade for justice in the fullest sense. They did not insist that war be seen as a contest between the righteous and the wicked. They depicted war, at least in many situations, as something akin to the vindication of rights against the denial or impairment of rights. What lay juries are asked to decide in complicated disputes, third party states might be asked to judge when other states resorted to war: who was in the right

¹⁸ THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-II, at Q 40.

¹⁹ GROTIUS, *supra* note 2, bk. II, ch. xxii, at § 17 ("[W]hen a justifiable cause is not wanting, bad motivations "do indeed convict of wrong the party that makes war, yet they do not render the war itself, properly speaking, unlawful.").

²⁰ AURE, *supra* note 1, at 107-09.

and who was not as judged by outward facts rather than inner intentions.

In today's world, this may seem a naive or reckless approach. We may be most inclined to that dismissive view if we forget that, without using the term "war," contemporary states still do deploy armed forces to protest legal delinquencies by other states. For example, President Clinton used cruise missile strikes against Iraq to protest Saddam Hussein's refusal to cooperate with U.N. weapons inspectors, as required by the 1991 ceasefire agreement.²¹

Perhaps more striking, however, is the recurrence, in our world, to diplomatic measures designed to demonstrate good intentions. The Clinton administration was anxious to show that attacks on Serbia were endorsed by "NATO nations," though few members of NATO contributed any quantum of force that could not be readily supplied by the U.S. military on its own.²² The Bush administration touted 49 "partners" supposed to be cooperating in action against Saddam's regime in 2003, though most such allies made contributions that were so limited they could be fairly described as "symbolic."²³ The Obama administration, when intervening against Muammar Gadhafi in 2011, touted a resolution of the Arab League urging protection for civilians in Benghazi.²⁴

In all such cases—and others that could be cited—appeals to the endorsement of other states were not, strictly speaking, legal arguments. If the interventions were not lawful, the approval of

²¹ On acceptance of such measures by European governments in the 1990s, despite questioning from European scholars, see Lothar Brock, *The Use of Force in the Post-Cold War Era: From Collective Action to Pre-Charter Self-Defense*, in MICHAEL BOTHE ET AL., *REDEFINING SOVEREIGNTY* 33-34 (2005).

²² STEPHEN SESTANOVICH, *THE MAXIMALIST: AMERICA IN THE WORLD FROM TRUMAN TO OBAMA* 267-69 (2014).

²³ Press Release, The White House, Operation Iraqi Freedom, Coalition Members (Mar. 27, 2003).

²⁴ President Barack Obama, Address to the Nation (Mar. 28, 2011).

additional states (not themselves victims of the original delinquency) could not make them so. Rather, endorsements from third-party states performed much the same function as character witnesses in a lawsuit. They were deployed as evidence of good intentions on the part of the main power (in these cases, the United States) or at least of its incumbent administration at the time of the action.

That we still see the potential advantage of such diplomatic measures should remind us that there was practical logic in medieval concerns about good intentions. One who acts from good intentions may sometimes act wrongly, but may be less blameworthy than if he acted with brazen contempt for law or justice. Among other things, a government that cares about law and justice in general—one that acts from good intentions—will usually be thought more trustworthy. At least, it will seem less threatening to other governments.

That tempered assessment could apply, even when other states think the intervening government relied on false or mistaken claims for its intervention. Many western governments criticized the U.S. decision to invade Iraq in 2003, even with four dozen partners. These censorious governments did not act, however, as if they feared the Bush administration would turn its military forces on their territories in reprisal. The Bush administration was seen as badly mistaken, even on the relevant legal issues, but not irrational or malevolent. Probably that was because the Bush administration tried to reassure critics of its sincerity and good intentions, and the United States had a proven record of self-restraint.

Our domestic law recognizes the distinction when, in most circumstances, we require *mens rea* for criminal conviction. An action that hurts others is usually unlawful but not usually criminal unless undertaken from bad motives or in willful disregard of ordinary obligations of care. So it might seem quite natural and reasonable to stress the intentions of states when sorting through the rights and wrongs of their disputes, particularly when they resort to force.

Except that citizens within a state are bound to trust each other to some degree, because they are obligated to accept a common authority and a very detailed and comprehensive set of common laws. We can talk of the "international community" (or as Grotius and his successors did, the "great society of states"²⁵) but it is not a "community" in the same sense. There is bound to be less trust among members, when all are sovereign and many are heavily armed.

Aure's 17th century scholars seem to have relied on that distinction when they viewed "war" (or as we would now say, "armed conflict") as an expected and frequently lawful and just element in the relations between states—but as presumptively unlawful and unjust within an established state.

If that is right, then it might be more reasonable to think of disputes between states as akin to tort claims: victims are entitled to claim compensation, perpetrators should be liable to pay it, because otherwise there will be no end to lawless infliction of injuries. But because there is no deeply shared sense of community among states, it would be straining analogies to think that states or nations can be subject to criminal punishment. International law cannot, on this view, impose "moral correction," let alone "penance" in the sense that our domestic criminal justice systems aspire to do (with "penitentiaries," "departments of corrections," and prisoner "rehabilitation" programs).

Aure's German scholars in the 17th century assumed that the international community did not have the moral authority to impose punishments. Yet that was not, even then, a conclusion that all commentators took for granted. That conclusion is not entirely accepted today.

A RIGHT TO PUNISH?

²⁵ GROTIUS, *supra* note 2, at Prolegomena, ¶ 17.

When Grotius set out the possible grounds for a just war, he included—apart from claims to self-defense against injury and recovery of rights—a separate right to punish those who act wrongly. As Grotius explains it, the right applies to anyone who wants to punish malefactors. It is not necessary, in his account, for a state to claim that it is punishing abuses from which it has, itself, suffered. The avenging state does not even have to claim that it is acting at the request of (or at least, on behalf of) an ally or client-state which has suffered by the perpetrator's wrongful acts. All of these justifications would be more aptly invoked for wars grounded in self-defense. Grotius went out of his way to indicate that there was an entirely separate claim to resort to war simply to punish a state that is guilty of wrongful conduct.²⁶

Modern readers might be tempted to see this doctrine as somehow a secular version of doctrines associated with medieval Crusades. In fact, it was, as Aure says, "one of the most innovative novelties within Grotius' system of thought."²⁷ Grotius himself cautions that it should not be exercised unless the wrongfulness of conduct was very clear—so it should not, he says, be used against people who adhere to mistaken religious doctrines.²⁸ On the other hand, Grotius does regard the doctrine as applicable to abuses that, while very widely condemned, might not seem to present any immediate threat to neighboring states—such as "impiety toward parents" or "adultery" (regarding marriage).²⁹

²⁶ GROTIUS, *supra* note 2, bk. II, at ch. xx-xxi (elaborating natural law theory of punishment at great length).

²⁷ AURE, *supra* note 1, at 165.

²⁸ GROTIUS, *supra* note 2, bk. II, ch. xx, at § xlviii ("Wars cannot justly be waged against those who are unwilling to accept the Christian religion."); *id.* bk. II, ch. xx, at § xlviii ("Wars may not be justly waged against those who err in the interpretation of Divine Law").

²⁹ GROTIUS, *supra* note 2, bk. II, at ch. xx, xl ("[W]ars are justly waged against those who act with impiety toward their parents."); *id.* at bk. II, at ch. xliii ("against those who feed on human flesh" and "accepting marriage we cannot admit adultery"); *id.* ("adultery is punished everywhere").

The next impulse of a modern reader might be to dismiss the whole doctrine as something idiosyncratic to one Dutch jurist of the early 17th century. But that is also wrong. As Aure points out, the doctrine was embraced by John Locke. Locke deployed it to lend credibility to his social contract doctrine. If individuals in a state of nature (that is, prior to the establishment of government) have a general right to punish offenses against natural law, then it makes sense that they can establish government by delegating this power to a common authority.³⁰

With a bit more reflection, even skeptical modern readers might notice that something not so different does still appeal to the moral intuition of many contemporary scholars and even some government officials. To take the most obvious example, in 1994 the government of Rwanda incited mass murder against the minority Tutsi tribe.³¹ The resulting death toll reached close to a million people.³² There was much recrimination about the failure of the United States and other western governments to intervene to stop this attempted genocide. This terrible episode helped spur proposals for a new doctrine, the "Responsibility to Protect." The "Responsibility to Protect" doctrine posits that if a state fails in its responsibilities to repress or resist the most terrible human rights abuses, other states should feel authorized—or morally obliged—to intervene.³³

Talk of a "responsibility to protect" might sound quite different from a "right to punish." But even Grotius acknowledged

³⁰ LOCKE, *supra* note 6, at § 7 (everyone in state of nature has the right to punish violations of the law of nature); *id.* at § 11 (from the "right of punishing the crime for restraint [of perpetrators] . . . comes it to pass that the magistrate . . . hath the common right of punishing put into his hands").

³¹ See generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (2000).

³² *Id.*

³³ See generally Alex J. Bellamy, *The Responsibility to Protect: A Wide or Narrow Conception*, in THE RESPONSIBILITY TO PROTECT: A NEW PARADIGM OF INTERNATIONAL LAW? 38 (Peter Hilpold ed., 2014).

that no state could be obligated to intervene when it was doubtful about its capacity to prevail: the claim to punish was contingent on favorable circumstances, so closer to a right (an acceptable choice) than a "responsibility."³⁴ It would be hard to "protect," moreover, without at least displacing the murderous government that was the target of the intervention. The targeted tyrants would surely see that result as punishment. It would likely lead to more serious personal consequences for them than peaceful retirement.

In fact, as some advocates have argued for military interventions on humanitarian grounds, others in our time have argued that bystander states should have the right to pursue criminal proceedings in their own courts against the worst violators of human rights. Advocates of the latter kind insist that there is universal jurisdiction to try perpetrators of the worst human rights abuses, so any state that gains custody of the abuser can put him on trial. Desire to uphold or strengthen international human rights norms is, under this theory, sufficient basis to organize a trial, even if there is no other connection between the trying state and the crimes or the home state of the accused.³⁵ Does it make sense to authorize subsequent criminal liability while repudiating any right of intervention to stop horrendous abuses while they occur?

At all events, the right to try is inextricably connected with a right to punish: the main purpose of a criminal trial, in a just legal system, is to determine whether it is lawful to impose punishment. The right to try may also be inextricably connected with a right to deploy force. When there is a right to try, we normally think there is

³⁴ GROTIUS, *supra* note 2, bk. III, ch. xxiv, at § ii ("Especially the right to inflict punishment ought to be given up in order to avoid war" (that is, "at times")); *id.* at § vii ("He who is not much the stronger ought to refrain from exacting penalties.").

³⁵ See generally UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephan Macedo ed., 2003); LUC REYDAM, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2004).

a right to apprehend, so that the trial may go forward. We might say that association does not apply when apprehension requires the exercise of force in a foreign jurisdiction. But even proceeding with a trial will often affront the home state of the accused or the home state of the crime. What if the home state threatens to retaliate for the trial? Perhaps the right to punish is inherently entangled with a right to make war or at least a right to deploy military force to secure this right to punish.

These considerations might suggest that the Grotian doctrine in this area is not unthinkable, even today. As Aure points out, however, it was "not widely received" even when Grotius was at the height of his prestige.³⁶ In particular, the three German scholars at the heart of Aure's study each rejected this doctrine. They endorsed "wars of vengeance"—inflicting harm in retaliation for harms received. They even endorsed such measures as preemptive defense against a would-be aggressor. But as Aure argues, war for security or for "restitution or recovery of loss" was different in their eyes: "They all denied that punishment could serve as a primary cause, or as a justification for intervening in other states."³⁷

Aure does not speculate about their reasons for breaking with Grotius. But an obvious consideration might be that the Grotian doctrine assumes too much consensus about the sorts of evils that would justify intervention. Or to put the point another way, the Grotian doctrine assumes that other states would accept the claim of an intervening state to be acting on behalf of shared norms—rather than some particular, self-serving scheme. Aure's scholars seem to have placed a higher priority on preserving peace.

Perhaps that looks selfish. But most governments still seem to think that way. The "Responsibility to Protect" doctrine has not

³⁶ AURE, *supra* note 1, at 166.

³⁷ *Id.*

been widely endorsed—if one takes governments as the authorized electors.³⁸ It has been acted on even less often. One of the very few applications of the doctrine was the intervention of western states to protect civilians in Libya in 2011.³⁹ It was authorized by the Security Council as a humanitarian measure for threatened civilians in Benghazi, and then it somehow shifted into an intervention aimed at overthrowing the government of Muammar Gadhafi and installing rebel forces in its place.⁴⁰ The aftermath has not inspired trust in the motives or the capacities of outside interveners.

INNOCENT PASSAGE

Aure also devotes attention to another specialized question where the comparisons look somewhat different. Grotius had argued that each state is, in general, obliged to let others pass through its territory, when the passage is merely for the sake of transit and not a direct threat to the "host" state.

It is not, even today, an altogether anachronistic issue. The U.N. Convention on the Law of the Sea sets out a right of innocent passage through coastal waters and then enumerates permissible grounds on which the coastal state can deny such passage (principally when it might threaten the peace and order of the coastal state).⁴¹ But 17th century writers had a broader view. They envisioned a right to

³⁸ Oliver Diggelmann, *Ethical Dilemmas Connected with the "Responsibility to Protect,"* in *THE RESPONSIBILITY TO PROTECT: A NEW PARADIGM OF INTERNATIONAL LAW?* 405 (Peter Hilpold ed., 2014).

³⁹ Alan J. Kuperman, *Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFFAIRS (2015).

⁴⁰ *Id.*

⁴¹ United Nations Convention on the Law of the Sea art. 19, Dec. 10, 1982, 1833 U.N.T.S. 397 ("Meaning of innocent passage," specifying limitations on maritime transit to ensure it is "not prejudicial to the peace, good order or security of the coastal State").

march an army through a neutral state to reach the borders of a state they wanted to attack in wartime.

Even that sort of claim is not unknown to the modern world. In 1942, the United States landed troops in Morocco and Algeria, the former a colonial dependency of France, the latter a full colony of France.⁴² The United States was not at war with France and did not officially declare war against it, even then.⁴³ The idea was to march armies through French North Africa to engage the German forces then fighting in Egypt or Libya.⁴⁴ U.S. forces took care not to enter Spanish Morocco, evidently to avoid antagonizing more neutrals than necessary.⁴⁵ But it was surely relevant that France was not able to resist, while the Allies worried that Spain might respond to such provocation by inviting German forces to oust British control on Gibraltar.⁴⁶

On the other hand, in 1973, when the United States sought to use European air bases to refuel cargo planes delivering military supplies to Israel during the Yom Kippur war, governments in Western Europe, fearful of offending Arab governments, refused to cooperate.⁴⁷ The United States arranged for refueling at Portuguese

⁴² For a detailed and colorful account of the initial military operations, the first great venture of American land forces in the Second World War, see RICK ATKINSON, *AN ARMY AT DAWN* 21-160 (2002).

⁴³ "Vichy France was a neutral country and during the entire period of the war [up until November 1942] the United States had maintained diplomatic connection with the French Government. Never, in all its history, had the United States been a party to an unprovoked attack upon a neutral country and even though Vichy was avowedly collaborating with Hitler, there is no doubt that American political leaders regarded the projected operation, from this viewpoint, with considerable distaste." DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* 86 (1948).

⁴⁴ On the larger strategic considerations leading to this action, see WINSTON S. CHURCHILL, *THE HINGE OF FATE, VOL. IV OF THE SECOND WORLD WAR* 432-51 (1950).

⁴⁵ BASIL LIDDEL HART, *HISTORY OF WORLD WAR II* 333 (1970).

⁴⁶ EISENHOWER, *supra* note 43, at 79-80; CHURCHILL, *supra* note 44, at 528, 544.

⁴⁷ HENRY KISSINGER, *YEARS OF UPHEAVAL* 708-18 (1982).

islands in the Atlantic and avoided flying through the air space of protesting states.⁴⁸ In 2003, when the United States was organizing an invasion of Iraq, it sought Turkish permission to deploy troops for an invasion from the north.⁴⁹ When the Turks refused, all the invading forces were launched from Kuwait, which did agree to cooperate.⁵⁰

If we don't recognize a general right of innocent passage—that is, a duty to provide it, even on land, even to armies preparing for battle—the reason is probably that the modern world takes for granted that such "passage" will generally present a threat to the state asked to "host" such passage. Large contingents of young men, perhaps not very well disciplined, can inflict damage and inflame local feelings, quite apart from the aims of the governments involved. The larger problem is a state which makes its territory available to an attacking force, or a force assisting an attacking force, is taking sides in the conflict, inviting retaliation from the opposing side in that conflict.

As Aure reports, the most influential German thinker of the late 17th century, Samuel Pufendorf, rejected the notion of a right of innocent passage on the ground that it was asking the would-be host to accept too much risk.⁵¹ So it is notable that lesser scholars in that era did embrace this right.

Why? Aure does not report their reasoning in much detail but it seems, from what he says, that his 17th century scholars thought all states had some stake in helping victims of aggression defend themselves. They did not think all other states were obligated to rush

⁴⁸ *Id.* at 709

⁴⁹ Dexter Filkins, *Threats and Responses: Ankara; Turkish Deputies Refuse to Accept American Troops*, N.Y. TIMES (Mar. 2, 2003), <http://www.nytimes.com/2003/03/02/world/threats-and-responses-ankara-turkish-deputies-refuse-to-accept-american-troops.html>.

⁵⁰ DOUGLAS FEITH, *WAR AND DECISION: INSIDE THE PENTAGON AT THE DAWN OF THE WAR ON TERRORISM 200* (2008).

⁵¹ AURE, *supra* note 1, at 164-65.

to the aid of victims. They did not think it was reasonable for a state to take great risks on behalf of others. But they thought third-parties had some obligation to help victims defend themselves, especially when there was not too much risk to the third-party state in doing so.

Part of the reason, it seems, is that the scholars assumed the world would be safer—or at least, end up with more reliable rules—if aggression could be confronted with effective force. That meant, of course, that they also assumed bystanders could be relied on to recognize, in any particular conflict, which side was the aggressor and which the victim.

Still, it is notable where their priorities were. The scholars did not assume that the world could reliably judge when revolution was a justified resort of oppressed people and when it should be seen as a reckless scheme of power-seeking adventurers. They saw potential for mischief if states interfered in each other's internal affairs. Yet they thought states could judge which side to take in international conflicts. They thought states would usually do so on the merits, not simply on the basis of which side they hoped would prevail, given the resulting advantage for their own interests. States would make themselves more secure, the scholars thought, by refraining from interference in the internal affairs of other states, while maintaining solidarity with states that were victims of aggression. Is that the prompting of reason or merely of contingent calculations of advantage?

NATURAL LAW AND THE LAW OF NATIONS

Aure devotes much attention to the background understandings of his writers, when it comes to the grounding and the implications of natural law. They all assumed a fundamental analogy between the interactions of states and the interactions of individual human beings. Put succinctly, they assumed that basic legal norms—property, contract, tort—could be applied to the rights and duties of states.

We still reason that way, at least some of the time. If one looks at the Vienna Convention on the Law of Treaties, for example, many provisions track the law of contract—just as Grotius proposed in the 17th century.⁵²

We make exceptions and qualifications, as did they. It is a fair question whether we have as much confidence, even in domestic law, that the rules (or the exceptions and qualifications) are grounded in reason and justice. Were the 17th century scholars naive? Smug? Self-serving or self-deluded?

At least when it comes to international relations or international law, we are apt to be blinded or distracted by one or another of the quick answers that have become prevalent in our own time, even though they inhibit honest and serious thought. Or perhaps we embrace these "answers" precisely to avoid the burden of honest thought.

The first such answer invokes a version of legal positivism. The U.N. Charter, say many commentators, forbids resort to force in all but two circumstances: when authorized by the U.N. Security Council or in self-defense "when an armed attack occurs."⁵³ That's what it says, so that is the law. We might prefer different rules, but the rules we have are the rules we have.

Call it positivism. It can only stop appeals beyond the text for people determined not to listen or not to look. The very brief formulations in the text are subject to interpretation. One of many interpretive aids is to look at what states actually do. What they do both when resorting to force and when condemning or not

⁵² Compare Vienna Convention on the Law of Treaties art. 42-64, May 23, 1969, 1155 U.N.T.S. 331 ("invalidity, termination and suspension" of treaty provisions), with GROTIUS, *supra* note 2, bk. II, at ch. xii ("on natural law basis of contract obligation").

⁵³ See OLIVER CORTEN, *THE LAW AGAINST WAR* 402-70 (2010).

condemning resorts to force by others has not been consistent with the most literal readings of the Charter prohibitions. Some nonliteral readings are widely accepted by commentators. For notable example, many commentators embrace a right to preemptive defense when an attack is imminent.⁵⁴ If that is a reasonable interpretation, it is not because the language of the Charter requires it but because we read it with some sense of what is reasonable. It is not obvious where such appeals to reason should be closed off.

An alternative approach is to insist that there is a moral obligation to refrain from force and the hope for peace requires all states to embrace this moral imperative. A moral state must do so, on this view, as an example to others, even if it cannot be sure that others will follow. This kind of moralism is often called "Kantian" and seems to have much appeal to international law scholars.⁵⁵ The Prussian philosopher Immanuel Kant was quite insistent that true morality requires that we act on the basis of universal rules—with a sense of obligation that is "categorical"—so that we disregard likely consequences in any particular case.⁵⁶ Kant was quite explicit in decrying the most influential international law scholars (e.g., Grotius, Pufendorf, Vattel) as "cold comforters" whose prescriptions would not assure "perpetual peace" because they opened the way to so many exceptions and deviations from the path of peace.⁵⁷

Reasonable people may doubt whether this sort of moralism is at all reasonable, or even morally serious. Disregarding

⁵⁴ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE*, 194-98 (5th ed., 2011) (reviewing sources advocating for legality of preemptive action in self-defense); THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 97-108 (2002) (reviewing arguments with more sympathy than Dinstein).

⁵⁵ See generally Amanda Perreau-Saussine, *Immanuel Kant on International Law in PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas eds., 1998) (Kant is the only modern thinker treated at length and individually in this volume).

⁵⁶ *Id.* at 74.

⁵⁷ Immanuel Kant, *To Perpetual Peace in PERPETUAL PEACE AND OTHER ESSAYS* 116 (Ted Humphrey trans., 1983).

consequences may put a state at risk of utter destruction particularly today, with weapons of mass destruction in the hands of malevolent actors across the world. We do not, of course, rely on such moralism when we implement law in domestic settings. Instead, we rely on prosecutorial discretion, on an executive pardon power, on general standards rather than precise rules and many other devices that allow law to accommodate particular circumstances. The usual reason for such adjustments is to avoid unwanted consequences. If we reject Kantian moralism in international affairs, we must consider what rules would be best and when those rules should accommodate exceptions or authorized deviations.

When it comes to international affairs, some advocates are tempted to go to the opposite extreme—embracing a world without rules or standards, just "pragmatic" responses to circumstances, case by case. But it is hard to think of a particular challenge without thinking about general obligations and general constraints. At some point, a "pragmatic" approach to international law will degenerate into lawlessness. To defend any particular action, it is necessary to explain why it is (or can be seen as) proper—and that requires appeal to more general standards.

Aure's 17th century scholars called such general standards "natural law." The term was in general use into the late 19th century but dropped out of philosophical debate thereafter. Still, what the 17th century called "natural law" were conclusions drawn from "reason," which included a reasonable assessment of recurrent patterns in human affairs. Even if we decline to embrace the old terminology, we may still face the obligation to think. As Aure says, once we acknowledge that we cannot leave all questions to authority—whether of the U.N. Security Council (which is often paralyzed) or the International Court of Justice (often divided and politicized) or of academic scholars (ditto)—"it will again become necessary for anyone

and any nation to think for themselves about right and wrong."⁵⁸ He proceeds to explain how that will likely unfold:

In the process, they [those who think for themselves about right and wrong] will ask for orientation in other sources of authority and indeed in substantive moral principles based on empirical reality. And here the history of natural law, I believe, will be a rich source of inspiration and even have persuasive power. Historical ideas of natural law may not be adaptable one to one, but they serve as doctrines and reasoning that can fuel and inspire one's own thinking and discourse on moral ideas. Their ideas can help us (by the process of differentiation) to fully grasp (integrate) our own ideas.⁵⁹

The chief value of Aure's brief study is that it makes this claim plausible.



⁵⁸ AURE, *supra* note 1, at 158.

⁵⁹ *Id.*