

# 1. General features

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## A. PEACE AS AN IDEAL AND A REALITY

War is a perennial feature in the lives of peoples; peace, by contrast, is an ideal.<sup>1</sup> Recorded history is replete with a range of tensions thrown up by the opposition between the two. The devotees of war tend to be hard-headed and earth-bound, whereas those of peace sometimes seem, by contrast, almost to be floating in the empyrean. Violent perorations from the earth are answered by irenic orisons from the heavens, and yet the two polar opposites remain eternally lashed together, like the inseparable Castor and Pollux.

Peace is, first and foremost, an ideal, a very powerful one which humanity, though endlessly striving for it, can never fully attain. In Isaiah we find a vision of peace at the end of time,<sup>2</sup> the work of divine justice. 'And the work of righteousness shall be peace; and the effect of righteousness quietness and assurance for ever.'<sup>3</sup> Here, then, the ideal of peace is a distant prospect, in a world no longer human, but divine,<sup>4</sup> less

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<sup>1</sup> On the definitional elements of war, see S. C. Neff, *War and the Law of Nations*, Cambridge, 2005, pp. 14 et seq. The main elements are the following: (i) the collective and public character of violence; (ii) taking place against a foreign State or political entity; (iii) the fact of being a rule-governed, disciplined and rational enterprise; and (iv) the existence of rules about the formal beginning of war, which allows the separation of war from peacetime.

<sup>2</sup> Isaiah 2, § 2–4, § 4: 'And he shall judge among the nations, and shall rebuke many people: and they shall beat their swords into ploughshares, and their spears into pruning hooks: nation shall not lift up sword against nation, neither shall they learn war any more.'

<sup>3</sup> *Ibid.*, chap. 32, § 17.

<sup>4</sup> Whereas human justice rewards good with good and evil with evil, divine justice rewards both with good: cf. Godefridus Admontensis (or perhaps Irimbertus Admontensis), *Homiliae dominicales*, chap. LII, in: J. P. Migne (ed.), *Patrologia latina*, vol. 174, pp. 350–351, cited in: G. del Vecchio, *La giustizia*, Rome, 1946, p. 30: 'Justitia Dei est reddere bonum pro malo; justitia hominis est reddere bonum pro bono, malum pro malo; justitia diaboli est reddere malum pro bono' – The justice of God returns good for evil; the justice of men, good for good, evil for evil; the justice of the devil, evil for good.

a fact than an idea to be realised only in an other-worldly utopia. Fundamentally, it is an aspiration that can never be satisfied: it transcends the realities of this fallen world.

Despite its quality as an ideal, peace is also a reality, worked for tirelessly by political forces, peace movements and institutions both national and international. In the 20th century, through the prohibition against the use of force enshrined in the United Nations Charter, humanity as a whole finally fixed its gaze firmly on Isaiah's distant vision. The delicate plant of peace was encouraged to grow by fencing it off from justice, so that, for a long period, the UN's unofficial motto became 'peace before justice'. Nevertheless, and unsurprisingly, the political reality of peace has hardly measured up to the aspirations of mankind. International relations remain too anarchic, and the reason is obvious: the attachment of governments and peoples to the common good is simply far too feeble. If only the attachment could grow stronger, humanity might succeed in penning war back into its last redoubts. 'There are very few people with a proper awareness of the sacrifices that need to be made for the preservation and defence of peace. It seems as if most people come to set a high value on peace only when their homeland is actually threatened with invasion. By then it is too late; blinded by their passions, they allow themselves to be tumbled into war.'<sup>5</sup> The modern 'war against terror' since the Twin Towers attack of 2001 has added momentum to the unbridled use of force throughout the world.<sup>6</sup> Facing such experience, some commentators have concluded that the provision in the Charter outlawing the use of force is wholly or partially a dead letter.<sup>7</sup> But it has, in truth, been clung to, with great tenacity, through all the international storms since its adoption; in our own times it faces fresh challenges and still attempts to resist.

In the 20th century, humanity did make a concerted political effort to establish an organisation that would create and preserve international peace. As a result, the concept of peace has become something of a hybrid. No longer can it be seen as merely a utopian ideal, without any real impact on political realities, as in the days of the 19th-century pacifist associations. It has now become a fact, in spite of recurrent

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<sup>5</sup> C. De Visscher, *Théories et réalités en droit international public*, 2nd edn, Paris, 1955, p. 85.

<sup>6</sup> See e.g. H. Duffy, *The 'War on Terror' and the Framework of International Law*, 2nd edn, Cambridge, 2015.

<sup>7</sup> Since the famous article of T. Franck, 'Who Killed Article 2(4)? Or: Changing the Norms Governing the Use of Force by States', *AJIL*, vol. 64, 1970, pp. 809 et seq.

demonstrations of how feeble and precarious it is. A masterly and elegant exposition of this hybrid character – something of a chimera here, elements of genuine tangibility there – was provided by Maurice Bourquin, one of the great internationalists of the inter-war period:

Will the day come when the world is freed from the plague of war? Thousands of years of history suggest that this is a fragile aspiration. Even so, we are not prevented from attacking this evil, for there can be no doubt that soundly conceived policies really are capable of affecting the forces of violence, erecting barriers to pen them back, and reducing the frequency with which they explode into war; this more than justifies the effort that is required.<sup>8</sup>

The policies of the League of Nations, and now the United Nations, with their systems of collective security, constitute efforts of this kind which, despite all their weaknesses, have brought the maintenance of the peace down from the ivory towers of academe into the arena of active diplomacy.

## B. CHANGE OF LEGAL PARADIGM

The prohibition against the use of force by States, as codified in the United Nations Charter, reflects a change in the fundamental paradigm of public international law. The prohibition can be seen as the watershed between the classic public international law that applied from the 18th century until 1919, and modern international law, dating from 1919 and the establishment of the League of Nations. Classical public international law was characterised by the unfettered right or faculty of every State to make war, considered an inseparable attribute of sovereignty.<sup>9</sup> More

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<sup>8</sup> M. Bourquin, *Vers une nouvelle Société des Nations*, Neuchâtel, 1945, p. 85.

<sup>9</sup> This view has sometimes been doubted: see e.g. A. Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis', *Journal on the Use of Force and International Law*, vol. 1, 2014, pp. 223 et seq. The claim is two-fold: (i) that the use of force was already prohibited in the 19th century as a consequence of the equal sovereignty of States and the protection of their territorial integrity flowing from it; and (ii) that States often used some justification for their use of force – under some heading of self-preservation – which shows that they did not consider possessing an unbridled right to use force. These arguments do not reflect the positive law of the 19th century on the use of force. First, territorial integrity was protected only against peacetime forcible measures short of war, such as

precisely, international law did not positively confer a right or a faculty to proceed to war. The point was rather that international law remained silent on the subject matter (or 'indifferent'), since States did not accept any positive law restrictions on their right to declare war. The States could thus, on the basis of their sovereignty, declare war without breaching any international legal rule. The whole issue was based on the sovereignty-oriented *Lotus* principle,<sup>10</sup> prevalent at that time, according to which what is not prohibited remains allowed. The waging of war was thus a matter situated outside the law and at the same time not prohibited by the latter. Conversely, forcible measures short of war, such as reprisals or self-help, were limited by the ordinary rules of international law. For so long as war had not been declared, the rules on the protection of territorial integrity applied. Consequently, such measures short of war could be lawful only if they complied with a series of conditions, for example strict necessity and proportionality.<sup>11</sup>

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reprisals, but not against fully fledged war; the sources mentioned that also include war in the prohibition are extremely tenuous. Second, the many justifications given by States when using force are mistakenly considered to reflect an *opinio juris*. This is not the case. States always justify their use of force, if only for internal and international public opinion. The claim is then that their war is 'just' under some political-moral just war doctrine. But legally the States did not feel constrained at that time. The reasons invoked were moreover fully discretionary, which is also hardly compatible with the conception of legal restraints of the use of force by war. Third, the author quotes the Hague Conventions of 1899/1907, for example the Drago-Porter Convention. The fact that this treaty prohibited the recourse to war for recovering debts except under certain conditions (the arbitration is accepted and the award is executed) clearly shows that *a contrario* war was considered to be a legal faculty of the aggrieved State in all other situations. The true position thus remains that international law did not positively allow the recourse to force in the 19th century; but that it was indifferent on the subject matter, i.e. that it was erected around a qualified silence allowing warfare on the basis of a unilateral declaration. See G. Abi-Saab, 'Cours général de droit international public', *CCHAIL*, vol. 207, 1987-VII, pp. 357–358.

<sup>10</sup> According to the famous finding of the PCIJ in the *Lotus* case of 1927, ser. A, no. 9, p. 19: 'In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.'

<sup>11</sup> On these measures short of war, see A. E. Hindmarsh, *Force in Peace, Force Short of War in International Relations*, Cambridge, 1933. For further bibliographic indications, see R. Kolb, 'De la SDN à l'ONU en matière de

The coming of modern international law involved a major change of direction. The unlimited and unfettered *jus ad bellum*, derived from State sovereignty, gave way to a *jus contra bellum*, a prohibition against recourse to war, the latter concept progressively gaining weight and substance in the period between the turn of the century and the coming of the UN Charter.<sup>12</sup> This book shall offer a careful analysis of the new rules which thus developed.

### C. THE PROHIBITION AGAINST THE USE OF FORCE AS A NORM OF THE INTERNATIONAL ORDER

The new prohibition on the use of force took its place at the very heart of the renewed corpus of international law. It thus became *par excellence* a *constitutive* norm, a peremptory norm of international law (*jus cogens*).<sup>13</sup> In the traditional scheme of things, international law, as an inter-State system, had been confined to the regulation of the bilateral relations between entities ('subjects-of-law') that were considered to be of equal status. For the purposes of international law, these subjects-of-law were States. Classical international law thus tended to be exclusively 'private' in nature, governing, as it did, the coordination of relations between independent subjects-of-law. It focused on sovereignty, contracts, property and obligations. International law was conceived of as stemming from agreement between sovereigns, thereby further accentuating the 'horizontal' of its effects, and the associated tendency to particularism. Classical international law was thus not a truly objective system; fundamentally, it was an interactive network of subjective rights and obligations. Unlike systems of municipal law, it paid very little attention to the concept of the common good, a dimension that requires not only rules of public law but also the creation of collective institutions to enforce them. Save for exceptional cases involving certain evils which required collective action (such as slavery and public health), and a number of technical

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maintien de la paix', in: R. Kolb (ed.), *Commentaires sur le Pacte de la Société des Nations*, Brussels, 2015, p. 1356.

<sup>12</sup> Cf. R. van Steenberghe, 'The Law Against War or Jus Contra Bellum: A New Terminology for a Conservative View on the Use of Force?', *Leiden Journal of International Law*, vol. 24, 2011, pp. 747 et seq.

<sup>13</sup> On this new international legal order, see B. Simma, 'From Bilateralism to Community Interest in International Law', *CCHAIL*, vol. 250, 1994-VI, pp. 217 et seq.; and U. Fastenrath (ed.), *From Bilateralism to Community Interest (Essays in Honor of B. Simma)*, Oxford, 2011.

developments (such as postal and telecommunication services), there had been no real conception of common interests transcending those of the particular State. The First World War has been described from this vantage point as 'overturning the Universe'.<sup>14</sup> At any rate, it was in the early 20th century that, for the first time, war began to be seen as an evil afflicting humanity collectively, an evil that must now finally be eradicated. The effort to achieve that end was therefore undertaken as a collective interest, for the benefit of all States. The prohibition against recourse to war was thus the first important norm of this collective type, a rule not of merely private but of public law, binding on all States equally, because all of them had an interest in it. Article 11 of the League of Nations Covenant therefore provided: 'Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League ... .' Here, then, was a new type of norm, applicable to all States in equal measure; they were to have no right to opt out by means of private law techniques such as inter-State agreements to the contrary, and came under a universal obligation to assist in the work of ensuring that the norm was respected.

This norm's 'collectivisation' element was more important than the corresponding element in 19th-century norms against other evils (for example on health issues) or relating to technical fields such as universal postal communications. This time, what was involved was the expropriation of a sovereign right or faculty hitherto considered by States to be essential for their own self-preservation. Also, the expropriation was not exclusively normative in character. It did not stop short at the injunction: 'Thou shalt not have recourse to war or the use of force', but added an institutional aspect, i.e. an international organisation created to be the guardian of the prohibition. Ultimately, and in the same way as any other norm designed to protect collective interests, this implied the existence and/or required the establishment of one or more centralised 'governmental' collective organisations to see to its implementation. Where private norms are concerned, individual parties can largely be left to see to their application, because it is only their individual subjective interests that are in play. But the position is different as regards norms of public law. In these cases, an individual party will not be well placed to enforce them, if only because to do so would tend to confuse that party's individual interests with those of the public. That in turn could tend to

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<sup>14</sup> N. Politis, *Les nouvelles tendances du droit international*, Paris, 1927, p. 17.

discredit the public norm itself, if its application were seen as biased or too obviously selective, or if it were in some other way to become entangled with particular interests. For this reason, global organisations were called into being, and given very extensive competences, in order to ensure the enforcement of the prohibition against the use by States of violence for their own particular ends. These global organisations had to be first-order political institutions, and they have changed the face of international law. First came the League of Nations, then the United Nations. The rule of public international law prohibiting States from recourse to the use of violence thus rests not only on a normative collectivity, but also on an institutional one. Mankind's sense of the ideal international community, once the strength of feeling in its favour had matured, brought forth the real, in the form of the present international community, centred upon the existing international institutions.

#### D. THE PROGRESSIVE 'JURIDICALISATION' OF INTERNATIONAL LAW

There was a legal paradox about the freedom to make war possessed by States until the dawn of the 20th century. What other legal system worthy of the name could have permitted each subject-of-law the discretionary right to resort to violence against another, or even, according to the circumstances of the case, to annihilate that other? All a State had to do was to pass from the legal regime applicable to peace, which did protect the territorial integrity (and thus also the existence) of its putative enemy, to the regime of war, which did not. And all that was needed to pass from one regime to the other was a formal and entirely subjective act, namely a declaration of war. With the adoption of the *jus contra bellum*, international law took a giant step forward, perhaps even towards the status of a free-standing and fully fledged legal system. For henceforward, for better or for worse, it would fulfil the essential function of law, namely to safeguard the peace, to restrain violence, and to create a monopoly control over the use of legitimate force by limiting the right of States to engage in its unilateral use in their own interests. The States of medieval times had in fact undergone a similar experience several centuries earlier. In those days too, the question was how to impose some limits on the anarchy of private warfare, which, to be blunt, is simply a system of 'law' under which the strongest prevails. In medieval times, private war had given rise to escalating levels of violence, and was at the same time highly favourable to abuses such as extortion, backed up by

the threats of violence made by men, sometimes little better than thugs, who had private armies at their beck and call.

The prohibition against individual recourse to violence is thus the first condition – a necessary but by no means sufficient one – for the creation of a society governed by the rule of law. It is not the means to that end, but it is a *sine qua non* of any legal system worthy of the name, as opposed to one merely serving as a convenient tool to be used in the service of individual States' foreign policies. It is therefore not surprising that this prohibition has been called the 'heart of modern international law', the 'corner-stone of international law', the 'cardinal rule of international law', and so on. In the elegant words of Maurice Bourquin:<sup>15</sup> 'The limitation and prevention of war is the *sine qua non* of progress.' Everything turns on that, and without it the whole system collapses. The simple test of this proposition is to imagine the reintroduction of private justice into municipal law. Your neighbour, with whom you are in dispute, could then enter your property at will and there carry out acts of violence. This kind of arrangement has been experienced both within States and, at the international level, where it has unleashed two gigantic World Wars.

Similarly, the prohibition against resorting to force is a condition of international cooperation, the importance of which in the interdependent modern world has already been stressed. To quote Bourquin again:

An atmosphere of peace and security is essential so that nations can devote themselves to the work of civilisation and progress. Anxieties are a distraction. They harden mistrust and entrench peoples' positions so that they draw backwards and inwards on themselves, mobilising their strength with a view to facing down the trials that threaten them.<sup>16</sup>

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<sup>15</sup> In 'Règles générales du droit de la paix', *CCHAIL*, vol. 35-I, 1931, p. 174. In context, the passage appears as follows [our translation from the original French] under the heading 'The outlawing of war' (pp. 173–174): 'Here we are touching at the very heart of the international problem. When this question comes up, everything reverts to the second level, because it is, in truth, impossible to create any solid organisation for the international community. A resort to arms means tearing up the parties' legal weaponry. When the violence ends, it leaves in its train memories and fears that will continue to poison the atmosphere. There can be no decisive result while the world remains bowed down under the threat of war. The entire history of humanity proves it: private wars, civil wars, international wars, the type of war matters little. The limitation and prevention of war is the *sine qua non* of progress.'

<sup>16</sup> M. Bourquin, *Vers une nouvelle Société des Nations*, Neuchâtel, 1945, p. 82.

Could there be any better description of what we see before us in the modern world whenever there is a crisis?

There are therefore good reasons to try to preserve the peace. The issue is not only one of irenicism or an idealistic search for some form of heaven on earth. There are more material reasons to undertake strenuous efforts in the direction of peace: first, in a world which needs and longs for strong international cooperation in order to tackle many global problems, the return to patterns of violence sows the seeds of discord, mistrust and hatred, thus hampering or disrupting the necessary cooperation; second, violence tends to escalate and to unleash significant destruction, taking lives, bringing sorrow, destroying goods, disrupting economies; third, war and force do not ensure justice, since they progressively reinstall the 'law of the jungle', where those who are stronger exert their will over the weaker members of society. Modern civilisation is based on the rejection of these scourges.

## E. CHANGING INTERNATIONAL POLITICS: *PARA PACEM OR PARA BELLUM?*

Almost from the first, these changes in international law were accompanied by a number of new political developments. For our present purposes, one in particular was important. After World War II, a changed conception of international relations took root in Europe, the continent where the two great wars had originated. Until 1939, Europe had been a cockpit of historic nationalisms competing bitterly among themselves in defence of blood and soil, *sang et sol, Blut und Boden*. In much of the continent, the troubled masses, emerging in 1945 from the war, faced upheavals beyond their capacity to control, and were subjected to totalitarian systems that treated international violence as a normal feature of political life. In such a predatory environment, it was felt that security could be found only through alliances; but these in turn destabilised international security by giving rise to growing strategic imbalances. The changing alliance structure gave rise to power blocs, and the tensions between them caused various conflicts. The ruling maxim of the European political environment thus became: 'If you desire peace, prepare for war', *si vis pacem para bellum*. If, and only if, you are stronger than he is, will your enemy not dare to attack you. Naturally, the difficulty of this attitude is that, if you build up your martial spirit and prepare yourself for war, war may ultimately result. It is not so much that the maxim is in itself a bad one, as that it is inadequate if taken in isolation. The governments of post-war Europe had the wisdom to realise that they

could not go on living under this eternally self-renewing system, which at each turn of fortune's wheel would produce fresh tensions leading to new wars. So they adopted a new maxim: 'If you desire peace, design for it – *si vis pacem para pacem*.'<sup>17</sup> This new maxim had, and could have, a significant chance of succeeding only in a situation in which people were ready, willing and able to meet the necessary preconditions – in other words they were ready for historic reconciliations and for the necessary degree of cooperation these entailed. In the aftermath of the war years, the time was ripe. Hence the emergence of the European Communities or Union, whose objective of cementing European peace has been successfully achieved. Never before had the continent as a whole experienced such a long peace, and never has the very idea of an armed clash between (Western) European States seemed more preposterous than it does today. At the global level, the United Nations is inspired by the same maxim; hence the importance attached to economic and social cooperation in the hope of reinforcing the peace, and to the idea of collective security, of which the Security Council is supposed to be the guardian. Naturally, the maxim '*para pacem*' has not and could not completely oust the '*para bellum*' limb: in a still violent world, the idea is inconceivable. But a change had occurred: minds were now open to another way, a supplemental way forward. It is impossible to over-emphasise the importance of the spirit of peace. Like any delicate plant, it requires careful nurturing. The Preamble to the UNESCO Constitution does well to state '[t]hat since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed'. In a simple phrase, we can say that policies must concentrate at the same time on *para bellum* and on *para pacem*; and as the way proceeds, the latter can eventually take the lead.

## F. POLITICAL REGIMES AND THEIR INFLUENCE ON PEACE

Any number of political factors can lead to conflict, and many attempts have been made to identify the links between political regimes and peace. It is sometimes said that *democratic* or non-totalitarian regimes are, for

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<sup>17</sup> On the contribution of international organisations to that aim, see M. Köhler (ed.), *Si vis pacem, para pacem? Friede durch internationale Organisation als Option für das 21. Jahrhundert*, Frankfurt-am-Main, 2007.

numerous reasons, less inclined to war.<sup>18</sup> This belief can be traced back to Kant's philosophical sketch 'Perpetual Peace'. Various arguments are deployed. One is that freely informed citizens will not make war because their views are enlightened by a free press. Another contends that where there is true citizenship there will be no real feelings of enmity, even across borders. A third argues that parliamentary controls over the use of force hamper its effective use. A fourth maintains that in a democracy society avoids the situation in a dictatorship where the leader, in order to distract attention from internal problems, provokes conflict with foreign States. And so on. However, the existence of a strong correlation between democracy (however defined) and the non-use of force is, in truth, far from obvious. If it is true that wars break out less frequently between democracies than between democracies and dictatorships, or between dictatorships, nevertheless the fact that a State is a democracy in no way indicates its disinclination to use force at the international level. For example, the USA is unquestionably a democracy, but it is also the State which has made the greatest use of force in its international relations. Between 1946 and 1988, in the Cold War period, the USA used force 71 times. By comparison, the Soviet Union, which can scarcely be described as having been democratic, and whose policies can hardly be considered admirable, did so only 25 times. Between 1974 and 1988, democratic States carried out 141 military operations within the territories of other, weaker States, particularly in the Third World. It is, moreover, by no means clear that a free press will provide its readers with enlightening information on such subjects. More frequently than not, it inflames the atmosphere by chauvinistic reporting, thereby increasing popular support for the use of force. In such circumstances, citizens may be readier to indulge their sentiments of patriotic solidarity than to give expression to a relatively abstract sense of friendship with the citizenry of the neighbouring State. In times of crisis, parliaments, for their part, rarely refuse to authorise the use of force by their national governments: on the contrary, they usually emphasise and accentuate the sense of national solidarity this brings. Also, dictators are by no means the only politicians that create or exploit international crises in order to unite their populations, or that simply find it useful to resort to force in order to achieve national objectives. For these reasons, it is fairly difficult to see anything more than a weak correlation between States' political regimes and their

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<sup>18</sup> On this problem, see E. Roucouas, 'Diplomatie et démocratie', in: *Mélanges en l'honneur de Boutros Boutros-Ghali*, Brussels, 1998, pp. 1314 et seq.

propensity to use force. For peace to prevail, other factors also have to come into play.

There does, on the other hand, seem to be a much clearer link between regimes based on *aggressive nationalism* and warlike propensities. One has to recognise that such aggressive nationalism, often found in dictatorial regimes, can also be found in democratic ones. Aggressive nationalism is a cast of mind which glorifies the nation and sets it above all others, the idea being that the country in question is always in the right, and that any opposition must be treated as a threat to the country's vital interests and an unacceptable affront. The defence of 'blood and soil' requires violent action, the resort to arms being glorified as a necessary precondition of national survival. Aggressive nationalists are thus the sworn enemies of international organisations based on moderation and coexistence. This kind of ideology exacerbates tension by stigmatising the 'other' and flatly refusing to compromise. The resulting accumulation of tensions inevitably leads to violence. This ideology is thus closely linked to the use of force.<sup>19</sup> It sees war as almost a sacred right, by which the State enforces its 'legitimate rights', obtains and maintains its 'place in the sun', and will emerge in a dominant position from the nations' raw competitive struggle to survive.

There are plenty of examples of such thinking, the most familiar being Nazi Germany, militarist Japan, and Fascist Italy. We can also, however, identify many examples of nationalism with more insidious effects. In the affair of the *German deserters at Casablanca*, which caused considerable tension between Germany and France in the year 1909, the chauvinist press inflamed the issue to the point where there were serious fears of war.<sup>20</sup> In the Leipzig trial of Germans accused of war crimes after World War I, the facts were as follows. German submariners had fired on some defenceless British military personnel and crew whose ship had been sunk. The survivors were unarmed, adrift in a lifeboat, and were

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<sup>19</sup> It often glorifies war. In the eloquent words of a celebrated Italian politician of the inter-war years (a Catholic who had fled from the Fascist regime): '[W]ar is believed to be the sacrosanct right of States, to fight in battle is considered the duty of the citizen, and to die fighting is deemed glorious. Monuments are erected, hymns sung and mysteries celebrated, all in honour of the vast butchery of war, which destroys lives, property and the entire prosperity of peoples in the name of a right that is no true right, of a justice that is no true justice, of a rational humanity that is in substance neither rational nor human.' See L. Sturzo, *The International Community and the Right of War*, London, 1929, p. 152.

<sup>20</sup> See N. Politis, *La justice internationale*, Paris, 1924, pp. 117 et seq.

obviously in no position to fight. All of them were killed. At the court house, the German submariners accused of this war crime were feted like heroes by patriotically minded crowds, to the point where the British observers had to leave under a strong police escort, to save them from being lynched.<sup>21</sup> Subsequently, the 1930s provided a striking spectacle of what happens when the forces of nationalism are unleashed. And what can we say of the more recent situation, in the 1990s, in the former Yugoslavia, for example, where all the communities, Serbs, Croats, Muslims, Albanians, ended up embracing nationalisms of an excessive kind? That point is amply demonstrated by their attitude when war crimes prosecutions were contemplated or brought against their respective 'national heroes'.

It is also relevant to consider what happens when aggressive nationalism is abandoned or marginalised. As soon as Europe emerged from the thrall of nationalism and, with the coming of the European Communities (or now Union), organised itself on the basis of cooperation and integration, it ceased to experience armed conflict. Clearly, therefore, the building of international peace does involve a struggle against aggressive nationalism, unlimited unilateralism and the idea that any State can simply go it alone. Nicolas Politis put the point very well, as early as 1943:

Nationalism of an exaggerated, exclusive, aggressive sort, is a truly pathological element in international life ... Extreme nationalists think, as Barrès did in French revolutionary times, that even if the country does wrong, its deeds must be upheld. This is the negation of every moral code ... The principles of extreme nationalism have done no service whatever to the

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<sup>21</sup> The *Llandovery Castle* case, 1921: see *AJIL* vol. 16, 1922, pp. 708 et seq. German submariners were accused, and eventually found guilty, of firing on and killing the shipwrecked passengers and crew of a British hospital ship on the high seas. The German submarine, after sinking the vessel, had surfaced, and the German crew had opened fire on the small number of survivors who were floating adrift. When the accused were found guilty, a large number of people came forward from the crowd, which was entirely on their side, to congratulate them on their attitude in defence of the German nation. The small number of British observers present at the trial had to sneak out of the courtroom through a concealed door and under police protection. These events must be understood in the light of the nationalistic sentiments of the time, exacerbated by the war, and by the sufferings and privations of the German population during and after it, as well as by the feeling that there was a lack of reciprocity when it came to the prosecution of war crimes. On the subject of the Leipzig proceedings and the contemporary German attitude, cf. C. Mullins, *The Leipzig Trials*, London, 1921.

general interests of humanity; on the contrary, they have led to the anarchy of the present world.<sup>22</sup>

In this regard, the return to nationalistic policies – fuelled by a series of politicians in the second decade of the 21st century – is a matter of serious concern.

## G. DOES THE USE OF FORCE HAVE POSITIVE RESULTS?

In the era of cabinet wars, limited in their objective and extent, and in terms of participants, it was not unreasonable to see the use of force as a means of dispute resolution. With only a certain amount of exaggeration, it could be said that the cabinet wars of the 18th century were not really dramatic events (except, of course, for those killed or wounded on the battlefield). These wars resolved public disputes between States, almost all of which were monarchies, in much the same way as private disputes between gentlemen were settled by means of duels. The kings and princes of the time usually felt little or no personal enmity for their opponents; indeed most of them were related by dynastic and family ties. They were fighting over very precise issues – such and such a territory, or the succession to such and such a State or ruler. Their peoples, too, felt little personal hostility to the ‘enemy’ population. The actual fighting was done by professional armies, or even by mercenaries owing no personal loyalty to the State that employed them. There could be no more striking justification of Rousseau’s assertion that ‘war, far from being between man and man, is a state of affairs as between State and State, so that individuals are only accidentally enemies, enemies not as men, not as citizens, but as soldiers ...’.<sup>23</sup> The point is reinforced by a passage in a biography of Joseph Haydn. When Napoleon’s troops entered Vienna at the start of the 19th century, towards the end of the composer’s life, a French colonel, passing through a certain village, learning that Haydn was living there, and being one of the composer’s admirers, ordered his troops to halt, so that he could pay the great composer a visit.<sup>24</sup> This lack of personal enmity was buttressed by the fact that the battles of the

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<sup>22</sup> N. Politis, *La morale internationale*, Neuchâtel, 1943, pp. 78–79.

<sup>23</sup> J. J. Rousseau, *Du Contrat Social*, I, IV [our translation]. Cf. in this regard also R. Derathé, *Jean-Jacques Rousseau et la science politique de son temps*, 2nd edn, Paris, 1974, pp. 192 et seq.

<sup>24</sup> L. Nowak, *Joseph Haydn*, Zurich, 1959, p. 455.

period took place over quite limited areas, so that even a mile or so behind the battlefield one might find villagers leading their beasts out to pasture. In other words, very few members of the civil population suffered directly from the hostilities. At worst, they suffered from the fall-out, as in the famines that resulted from the anti-Napoleonic blockade in the context of what had become a pan-European war. In short, this kind of war had, in the final analysis, little effect on society at large.

By the time we come to the wars of the 20th century, especially the two World Wars, the situation is totally different. There were several reasons why these wars became so cataclysmic. *First*, new weaponry and new technologies had much greater destructive power. *Second*, deep hatreds were thus created between peoples now organised in nation States and thinking of their interests as questions of national life and death, and of the nation and its interests as the supreme consideration. *Third*, the overlapping of interests and the increasing interdependence of the economic world tended to draw in third States, thus turning initially limited wars into great conflagrations. Even where modern war remains relatively localised, neutral third States suffer from the effects – their trade is affected and they are consequently impoverished. The effects of war thus go far beyond the actual belligerents. *Fourth*, industrialisation makes economic power an essential precondition of a State's political (including military) power, and, in consequence, industrial plant and other economic assets have inevitably become military targets. Since these are generally the property of civilians, on the one side the whole of society is drawn into active participation in the war effort, and thus, on the other side, the entire population becomes the target of enemy military operations. In this way total war<sup>25</sup> gradually came to be substituted for limited war. This situation was very well described by Bourquin in a typically elegant and at the same time harrowing observation: '[War became a cataclysm] that left behind it only ruins, where victors and vanquished, belligerents and neutrals, all contended for mastery in the same futility and anguish.'<sup>26</sup> A short visit to the war memorials in Belgium, or in the Marne, is an edifying experience. One senses the abomination that was 20th-century warfare, as if one could almost touch

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<sup>25</sup> Warfare between nation States became a struggle for the survival of the State's historic integrity. It followed that the entire internal strength and abilities of the State had to be mobilised for the war effort; every civilian was assigned various duties by the State, and/or was at least required to deny himself certain things for the benefit of the war effort.

<sup>26</sup> M. Bourquin, 'Le problème de la sécurité internationale', *CCHAIL*, vol. 49, 1934-III, p. 475.

its gruesome residue. The still shocking photographs of the Ethiopian war, published in the *League of Nations Official Journal* for 1936, expose the stifling brutality of a type of warfare that was swollen beyond measure, pushing its destructive power to the last extremity. Obviously it is impossible, faced with these facts, to see modern war as a means of resolving disputes, far less an efficient or effective one.

One of the characteristic and most worrying facts of current international politics is that we are witnessing the reintroduction into international relations of what may be called some culture of force.<sup>27</sup> One question that naturally arises is whether it is possible to think that the use of force in recent years has been effective in achieving its intended objectives. Has the application of force succeeded in producing reasonable resolutions of the disputes concerned? These questions are pertinent ones, because one might be tempted to argue that academic argument about the illegality or immorality of war must give way in the face of the list of its positive results. *Quod fieri non debet, factum valet*. If it could be shown that terrorism can be defeated by military action; or that the grave threats to the security of nations represented by weapons of mass destruction can be neutralised by force; or that an oppressed and suffering population can be saved by military action, is it not short-sighted to insist, in the teeth of such facts, on sticking to abstract principles and legal and moral formalism, and indeed, does one have the right to do so? Let us take up the challenge and do our best to examine the question as open-mindedly as we can.

What benefits have resulted from the use of force in recent years?<sup>28</sup> In the present context, we can of necessity only provide a summary

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<sup>27</sup> Thus, it is common for journalists (and many policy-makers) to consider that the use of force is a policy option (and even to call for its use) without considering any legal constraints. This has been the case, for example, in the context of the Syrian civil war, which has raged since 2011. See e.g. *NZZ* (*Neue Zürcher Zeitung*), 8 April 2017, p. 1; or *NZZ*, 1 October 2016, p. 3.

<sup>28</sup> On the question to what extent the use of force is an effective tool of conflict resolution or for obtaining certain results (see e.g. the so-called war on terror), cf. E. W. Goepner, 'Measuring the Effectiveness of America's War on Terror', *Parameters*, vol. 46, 2016, pp. 107 et seq. See more generally also X. Pacreau, *De l'intervention au Kosovo en 1999 à l'intervention en Irak de 2003: analyse comparative des fondements politiques et juridiques*, Paris, 2006; and from a US perspective R. N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World*, Washington DC, 1994; J. D. Meernik, *The Political Use of Military Force in US Foreign Policy*, Aldershot, 2004; R. J. Art (ed.), *The Use of Force: Military Power and International Politics*, Lanham, 2009. For an assessment of the 'weight' of the rules on the non-use of force, see

assessment, but that in itself does not make the exercise valueless. *First*, we can at least assert with confidence that the use of force has not resolved the problems in question, and has frequently made them worse.<sup>29</sup> *Second*, we can say that the more unilateralist the use of force has been, and the less it has had the general support of the international community, the more meagre the results have been. *Third*, we must say that in some instances the use of force was unavoidable, as, for example, against the Islamic State in Syria and Iraq, but at the same time that the use of force is not in itself sufficient to solve the problems posed by such terrorist organisations.

In Kosovo (1999),<sup>30</sup> the overall result has not really been a positive one. The number of those killed by the NATO bombing, and the number of refugees displaced by it, was considerable; could things truly have been even worse if force had not been used? The region remains riven with tensions, and now has a new persecuted minority, namely the Serbs of Kosovo. A multicultural Kosovo, which was one of the objectives of the intervention, is far from being achieved. Albanian secessionism grows ever more pronounced, thus paving the way for future conflicts. The infrastructure of the Yugoslav era has been hard hit, bringing destitution to a great number of civilians. The use of depleted uranium weaponry has left the region with considerable environmental and health issues. On the other side of the balance, we can at least note that progress has been made on standards of human rights, economic recovery and modernisation of the State.

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A. van Staden, 'The Political and Legal Force of the Prohibition of Force: Assessing State Behavior', *Leiden Journal of International Law*, vol. 21, 2008, pp. 995 et seq.

<sup>29</sup> See M. G. Kohen, 'Recours à la force et valeurs universelles', in: Società italiana di diritto internazionale, *Ordine internazionale e valori etici*, Bari, 2004, pp. 30 et seq.

<sup>30</sup> On the recourse to force in Kosovo and its various effects, see L. H. Brune, *The United States and the Balkan Crisis, 1990–2005: Conflict in Bosnia and Kosovo*, Claremont, 2005; C. Bjola, *Legitimizing the Use of Force in International Politics: Kosovo, Iraq and the Ethics of Intervention*, London, 2009; A. Hehir, *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Statebuilding*, London, 2010; C. Moore, *Contemporary Violence: Postmodern War in Kosovo and Chechnya*, Manchester, 2010; D. L. Phillips, *Liberating Kosovo: Coercive Diplomacy and US Intervention*, Cambridge (Mass.), 2012; E. Schleicher, *Positive Peace in Kosovo: A Dream Unfulfilled*, Frankfurt-am-Main, 2012.

The armed interventions in Afghanistan (2002), and to a greater degree in Iraq (2003), have had even more problematical effects.<sup>31</sup> Afghanistan has broken into a series of territorial fiefs dominated by local warlords. Warfare continues at a level which although relatively low is rising. The Government installed by the allies hardly even controls Kabul. Opium production has grown substantially. The departure of the Taliban from the Government may be a happy event, but it would be dishonest to close one's eyes to the fact that nevertheless nothing has been resolved. Even graver is the situation in Iraq: the country remains in chaos. Since the US intervention, the terrorists who were supposed to be hunted down and dealt with, have taken a firm hold. Terrorist outrages occur daily. The endemic civil war, which has raged in Iraq ever since, daily increases the tally of death and destruction. Significant numbers of people in the Muslim Arab countries have been propelled into the arms of the terrorists, asking only to fight against the occupiers (seen as the USA or even the West generally). We must therefore expect intensified terrorist activity in the years to come. The rise of the so-called Islamic State is but a late avatar of the 2002 and 2003 wars.

In short, therefore, the use of force tends to engender further violence, and to multiply (or displace) the conflicts involved. It does not resolve the political problems of the modern world. On the contrary, it sometimes accentuates them or turns them from short-term into long-term issues. This does not mean that force should never be used. In certain situations it can be an effective means to defuse a grave situation, for example in

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<sup>31</sup> On these armed conflicts and their aftermath, see D. Malone, 'The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability', *Journal of International Law and International Relations*, vol. 2, 2006, pp. 1 et seq.; M. Weller, *Iraq and the Use of Force in International Law*, Oxford, 2010; B. R. Rubin, *Afghanistan from the Cold War through the War on Terror*, Oxford, 2013; C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law*, Oxford/New York, 2013; R. K. Bringham, *The United States and Iraq since 1990*, Chichester, 2014; H. Abbas, *The Taliban Revival: Violence and Extremism on the Pakistan-Afghanistan Frontier*, New Haven/London, 2014; J. Krieger, *The Oxford Companion to International Relations: Afghanistan-Kosovo War*, New York, Oxford, 2014; B. L. Bailey and R. H. Immerman (eds), *Understanding the US Wars in Iraq and Afghanistan*, New York/London, 2015. See also L. Moir, *Reappraising the Resort to Force*, Oxford/Portland, 2010, pp. 41 et seq.

the context of the freeing of hostages hijacked in some aircraft.<sup>32</sup> But, except in the case of self-defence, it does represent a last resort, so that a decision to use it should be pondered very carefully and, as much as is feasible, in a multilateral context.

## H. THE PROBLEM OF 'PSYCHOLOGICAL UNILATERALISM'

One of the most serious problems associated with the maintenance of peace arises in relation to the roles played, at any given moment, by reciprocity and unilateralism, and the relationship between them. Our treatment of this problem must perforce be a rather summary one, and doubtless needs to be understood in a nuanced manner. *Reciprocity* can be said to represent the rule of reason, taking into account the long-term effects on the international system of any given action: if I use force, others will do likewise. It also involves an element of ideological relativism, out of sensitivity to the complexity both of political and legal causes of war: when I do use force for x which is important to me, the other will use force for y which is important to him. Above all, it involves the practical application of the maxim 'don't do to others what you don't want them to do to you'. By contrast, *unilateralism* rests more often on egocentric and sentimental impulses. Unilateralist thinking is dominated by the idea of a special case, of *a priori* good and evil, thinking one has a divine or at any rate particular mission, and the like. It privileges the now over the tomorrow. It may end up accepting the idea that some people have greater rights than others precisely because of the justice of their cause and attitude. Here, then, there is an opposition between, on the one hand, formal equality based on pluralism, and, on the other, inequality based on a subjective view of the justice of the contending systems. The former is a rational conception placing the parties on an equal footing (equality); the latter is based on a faith which is believed to illuminate its adherents, which eliminates doubt, and which is conceived of as 'truth'.

'Reciprocity' presupposes a relatively dispassionate and deliberately analytical attitude, involving a calm and fairly 'high-level' view, a degree of clarity that is out of the ordinary, and a philosophy which is altruistic in the narrow sense of the term. It is therefore less powerful in times of

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<sup>32</sup> See the Entebbe, Mogadishu and Larnaca incidents. For an analysis of these incidents under international law, see e.g. F. A. Boyle, *World Politics and International Law*, Durham, 1985, pp. 75 et seq.

crisis and anguish, when short-term interests on vital questions hold centre stage.<sup>33</sup> Therefore, we have to candidly admit that this is most unlikely to correspond to the state of mind of the mass of a population or of the policy-makers at times of grave crisis,<sup>34</sup> such as normally precede armed conflict. For that matter, it seldom corresponds to the attitudes of governments concerned to protect vital national interests, where the greatest pressures are those of the moment. Thus, very often the long-term perspective regarding damage to the system of reciprocation by others, and the like, is sacrificed; as the German proverb has it, *Not kennt kein Gebot* – necessity knows no law.

The above problem becomes particularly serious when the people of a State have a sense that theirs is a ‘culture of superiority’, when for example the population has a general feeling that it has a divine mission, or when it considers that it has particular inalienable advantages in its international relations. In such cases, the pathology identified above, instead of being confined to periods of crisis, swells into a permanent state of affairs, penetrating into and contaminating all the State’s external relations. If the State is a Great Power (this is the case with particular frequency, because the two attributes go so readily together),<sup>35</sup> this attitude will tend to result in the State allowing itself, sometimes with the passionate support of its citizenry, a ‘special’ right to use force: one thinks at once of the ‘Brezhnev Doctrine’ and the ‘Reagan Doctrine’. Today, to highlight just one known example, the psychology of the US Government and a significant part of its population is affected by this

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<sup>33</sup> S. Hoffmann, ‘International Law and the Control of Force’, in: K. W. Deutsch and S. Hoffmann (eds), *The Relevance of International Law*, Cambridge (Mass.), 1968, pp. 36–38.

<sup>34</sup> It is quite normal, in a time of crisis, for both populations and individuals to loosen their grasp on the principle of reciprocity, in proportion as the ‘other side’ is identified in their minds as a fundamental enemy, expelled from the civil realm of justice into the realm of war. In modern society, humanity’s inherent aggression is usually held in check by the effects of education, culture and what psychologists call ‘sublimation’. But it breaks out again when the relations between groups of human beings start to become entrenched enmities. Probably this explains the capacity of ordinary people, who in civil society would probably never have become criminals, to commit acts of the most terrible savagery against ‘the enemy’ in time of war. In this connection, see the interesting short work of a psychologist, P. Reiwald, *Conquête de la paix*, Geneva, 1944, pp. 18 et seq.

<sup>35</sup> It has rightly been said that small States have an obvious interest in reinforcing respect for international law, since they have nothing to hope for from pure power politics, in which they inevitably emerge the losers.

psychological unilateralism. That is why arguments based on reciprocity, essential though they are to the critical mind, cut very little ice with Americans who share this psychology. How, they ask, could one possibly treat the USA, representative of the Good and of the struggle for liberty everywhere, *on an equal level* with evil empires working for oppression, terrorism and international instability? It is natural to feel that a just war (*bellum justum*) is not the same thing as an unjust one (*bellum injustum*), and a just cause (*justa contentio*) not the same as an unjust one (*injusta contentio*). In this way, there is often a deep divergence between the paradigms of opposing States, widening the chasm that already exists between their systems, to the point where it cannot be bridged. Here is one example.

The reason that the International Court of Justice decided what is usually referred to as the *Nicaragua* case (1986)<sup>36</sup> in the particular way it did was because, as a court of justice, it was obliged to apply the logic of reciprocity, and duly did so. Nicaragua, as a State, enjoyed the same legal rights as the USA under the principle of sovereign equality laid down in Article 2 § 1 of the United Nations Charter. It follows that, had the boot been on the other foot, the Court would, quite regardless of Nicaragua's political ideology, have found against Nicaragua if, disagreeing with the politics of the US Government, it had supported *contras* inside the USA, mined US ports and attacked US installations. The facts being the exact reverse, the Court had no option but to find against the USA, again in complete disregard for whatever sympathy the judges might or might not have felt for the US's political ideology. Before the Court, the principle of reciprocity applies impersonally, completely masking questions of ideology. The Court's justice must be deliberately blind to such considerations: it simply decides impersonally, according to law, between States which might as well be labelled State A and State B. Nevertheless, a whole series of US authors and commentators, and many US citizens, consider the International Court to have committed not only an injustice, but actual heresy.<sup>37</sup> For those in this frame of mind, the Court had no right and no business to treat good and evil equally, those fighting for and against Communism equally, the attitude of Nicaragua to El Salvador and the attitude of the USA to Nicaragua equally.

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<sup>36</sup> ICJ, *Reports*, 1986, pp. 14 et seq.

<sup>37</sup> For the criticisms of the Court's judgment, see the discussion in R. Kolb, 'Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) (1984–1986)', in: E. Björge and C. Miles (eds), *Landmark Cases in Public International Law*, Oxford/Portland, 2017, pp. 349 et seq.

Until this problem is better spotted, significant obstacles will continue to block the way to the maintenance of international peace. There is an urgent need for a change of paradigm, in the direction of greater reciprocity and a parallel rolling back of unilateralism, which in itself often reflects infantile or narcissistic psychology. This is essentially a task involving education and culture, one with which internationalists need to engage. Nevertheless, it would be mistaken to be optimistic on this score. There is always the dual perception of the 'me' and of the 'other', and concomitantly of seeing one's own reasons more clearly than those of the other, that is seeing the straws in the eye of one's brother much more readily than the beams in one's own eye.<sup>38</sup> The undoubted human capacity to repackage particular interests of a unilateralist nature in the garb of interests that are more generally and openly defensible, is a further poor harbinger of success.

## I. SHORT-TERM PEACE AND LONG-TERM PEACE

The experience of international anarchy, the generalised violence of wars, the loss and damage caused by modern conflicts, particularly in the age of weapons of mass destruction, all have tended, since the foundation of the UN, to reinforce the juridico-political view of peace as the highest value, often expressed in the maxim 'peace before justice'. International law bears many traces of this: in the powers of the Security Council, which tends to take holding action somewhat 'on the hoof', without any real in-depth examination of the justice of the disputes it deals with; in the rule requiring lines that *de facto* have been consolidated to be respected, as for example armistice lines, which cannot be controverted by the use of force; in the prohibition of enforcement or armed counter-measures, which are sometimes the only effective means of responding to a violation of international law; in the prohibition of the use of force for reasons such as humanitarian interventions, because of the excessive risks to international peace that would result; etc. Underlying these aspects, all deriving from the maxim 'peace before justice', is the idea that, when all is said and done, the international community overall – and thus also its individual members – has more to gain, globally and in the long run, by closing portals to violence than by

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<sup>38</sup> Luke, 6, 41–42. It has been known for a considerable time that humans are driven not only (and perhaps not mainly) by rational forces but by irrational ones: see S. Freud, *Civilization and its Discontents* (1930), London, 2002; and more recently P. Mishra, *Age of Anger*, New York, 2017.

opening them. Experience proves that every such portal unfailingly leads to regression, since there are always some States more inclined than others to plunge willingly into the breach; and when States are more readily resorting to the use of force, violence tends to escalate, so that the short-term gain hoped for by the opening of the portal turns, in the longer run, into a far greater loss.

Although important, that, however, is only one aspect of the problem. The *jus contra bellum*, being concerned with the short-term ban on the use of force cannot be effective in the long term unless accompanied by other rules and measures. In that longer run, there can be no peace without justice, as seven decades of conflict between Israelis and Palestinians amply demonstrate. A holding operation ordered 'on the hoof' cannot be enough, because it does not resolve the causes of the conflict and may even exacerbate them. To have any hope of harvesting the fruits of peace, you have to address the substantive causes of the conflict. If short-term peace is the fruit of the maxim 'peace before justice', long-term peace is the fruit of the complementary maxim 'peace through justice'.<sup>39</sup> A peace based purely on short-term considerations will be precarious and cannot endure. A painstaking and usually slow process of dispute resolution is required, accompanied by arrangements that can truly be said to constitute a strategy for long-term peace, including economic and social dimensions. The United Nations Charter faces up to this dimension in its Chapters VI and IX–X, while the short term is dealt with in Chapter VII.

These considerations require us to distinguish between negative and positive peace. Negative peace means the absence of violence, and is focused on the short term; here peace as a categorical imperative precedes justice. Positive peace, by contrast, concerns the elimination of the causes that have led to war or might lead to it, and focuses on the medium and long terms: in this field, peace is the governing concept, and is the fruit of justice. If, therefore, a *jus contra bellum* is to have any chance of succeeding, it cannot be founded solely on the prohibition against the use of force. That is merely the first link in a chain whose function is to deliver international justice. But it is precisely this long-term backdrop that most cruelly exposes the insufficiencies of international law. The sovereignty that States continue to insist upon has

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<sup>39</sup> See L. Legaz y Lacambra, *Rechtsphilosophie*, Neuwied/Berlin, 1965, p. 770: '[N]ur die Gerechtigkeit ist die Grundlage für eine dauernde Sicherheit und eine beständige Ordnung' [Justice is the only basis for lasting security and enduring order]. See also Ramon Llull (Lulle) (1235–1315), *Liber proverbiorum*, Pars III, Cap. L, III: 'Justitia procurat pacem et iniuria bellum.'

been maintained with the greatest tenacity in the field of dispute resolution, and likewise in the field of economic and social cooperation, which is more than just a matter of aid to the Third World. As a result, Chapters VI and IX–X of the Charter lag well behind the hopes they originally gave rise to, opening up a dangerous gap between negative peace and positive peace. Absent the latter, even negative peace tends to become more tenuous. If States realise that they cannot obtain satisfaction for their legitimate demands from a system blocked by States' claims to sovereignty, and if the causes of tension are unresolved and lead to stalemates, then, in the medium term, aggrieved States will be more inclined to seek do-it-yourself justice through the use of force. Situations that have been allowed to deteriorate lead to future conflicts as often as the effective treatment of tensions eliminates existing disputes. One of the greatest reasons why there is such a threat to the maintenance of the peace is the absence of international governmental institutions capable of taking effective action to resolve situations that bear the seeds of future frictions and crises.<sup>40</sup>

To sum up, then, the maintenance of international peace appears to depend upon three different programmes of endeavour:<sup>41</sup>

- *The repression of violence:*<sup>42</sup> The repression of violence (often as a provisional measure, without deciding the substantive merits of the dispute) is the primary duty of the organised community of States; all other duties are subordinate to it, because they all depend upon it. This state of affairs is built on the primary presupposition that the old legally-recognised right of each State to declare war or to engage in hostilities must be repudiated. A collective organ must take responsibility for maintaining the peace, subject however to the interim and subsidiary right of self-defence.

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<sup>40</sup> On the subject of peaceful change, see Part III, Chapter 13.

<sup>41</sup> See C. Fenwick: 'The Concept of Peace', in: *International Conciliation*, no. 369, 1941, pp. 390–393.

<sup>42</sup> *Ibid.*, pp. 390–391: 'As between citizens, so between nations the repression of violence must be the paramount obligation of the international community, to which all others are subordinate. The old right of each nation to be the judge of its own cause must be definitively repudiated; the old right to declare war at will must be rejected without compromise. Under no circumstances must a nation be permitted to take the law into its own hands.'

- *The peaceful resolution of disputes:*<sup>43</sup> If the community of States is incapable of arranging effective means for resolving disputes, violence will at best be only partially repressed, and even that only on a precarious basis. It is therefore extremely important that the procedures for dispute resolution, both diplomatic and jurisdictional, be organised, and be accepted by States, so that they can deal with the political and legal disputes that inevitably arise in any community. The acceptance of such procedures presupposes that the peoples concerned are willing to allow their sovereign right of free decision to be fettered to that limited extent. Such acceptance can be won only by working to educate public opinion. The short-term erosion of sovereign freedom is compensated by the long-term gains in stability and order. The fact that this point remains insufficiently understood by peoples and their governments is one of the causes of international disorder.
- *Ensuring that justice prevails, as a material condition of durable peace:*<sup>44</sup> In the medium and long term, the repression of violence will not be possible, and the procedures for dispute resolution will themselves be ineffective, if grave injustices are perpetuated, if the conditions of life of a part of humanity become intolerable, and if the applicable political and legal order is felt to be out of date and inequitable. For these reasons, peace as a value must be seen as having a dynamic quality. It presupposes the adjustment of situations and the endless renewal of the balance between legitimate

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<sup>43</sup> *Ibid.*, p. 391: [I]f the international community is to be able to repress violence successfully it must first of all make provision for the ordinary administration of justice, that is, it must set up agencies of pacific settlement competent to adjust the claims of States upon the basis of principles accepted as the law of the community.' On the present state of peaceful dispute resolution, see L. Caflisch, 'Cent ans de règlement pacifique des différends interétatiques', *CCHAIL*, vol. 288, 2001, pp. 245–467.

<sup>44</sup> *Ibid.* (Fenwick), pp. 391–392: '[I]t would be impossible to repress violence if grave wrongs are permitted to continue, if the conditions of life become intolerable for a large part of the community, if the distribution of the necessities of life becomes so inequitable as to create a deep sense of resentment ...'; 'Peace is thus ... something dynamic, something which can only be obtained by the constant effort of the international community to make the rules of its law correspond with changing conditions in the relations of States and the growth of the needs for which the existing law has made no provision ...'. 'A stable peace can only be built on justice, 'a peace in which the great majority of nations have such a stake that their overwhelming weight can be counted upon on the side of law and order'.

interests, themselves evolving as time goes by. It is therefore essential for an international law-making function to be available, so as to update the law, moving from the *status quo* to a situation in which the law adapts itself to new requirements. This is obviously the most difficult of the three programmes of endeavour, not only because the judgment of what is balanced and equitable is a very uncertain matter in a world divided on ideological grounds and riddled with thousands of interests that are often in competition and sometimes in conflict, but also because State sovereignty prevents the effective creation of an international law-making body with the power to make these changes. In truth, only a World State would have the necessary powers. But even if at the end of the day such a State were a desirable development, at the present time the idea is simply utopian. So it is that the repression of violence and the resolution of disputes continue to rest on precarious ground.