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Straightening the "Timber": Toward a New Paradigm of International Law

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ESSAY

Straightening the "Timber": Toward a New Paradigm of International Law

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Immanuel Kant once remarked: "Out of timber so crooked as that from which man is made, nothing entirely straight can be built."[1] Understood in terms of international law, this philosopher's wisdom points toward a far-reaching departure from traditional emphases on structures of global power and authority. Newly aware that structural alterations of international law are always epiphenomenal, ignoring root causes of international crimes in favor of their symptomatic expressions, we could craft from this departure a new and promising jurisprudence. Acknowledging that human transformations must lie at the heart of all world-order reform, we could build upon the knowledge that international law never can be improved by

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1. The original German is: "Aus so krummem Holze, als woraus der Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden." *See* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY xi (Henry Handy ed., 1991) (quoting IMMANUEL KANT, IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBURGERLICHER ABSICHT (1784)).

institutions alone and that the record of "civilization" reveals persistent degradation and willful destructiveness.[2]

Today, as we near the middle of the last decade of the twentieth century, this record is actually worsening. Whether we look toward Iraq, Bosnia, Somalia, or South Africa—or, for that matter, toward virtually any nook and cranny on earth—humankind is enthusiastically refining its capacity to inflict harms. As for international law, humankind sometimes struggles valiantly to improve itself, especially within the expand-

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2. For the future, such destructiveness could extend to nuclear war. On the "nuclear regime" under international law, including the anti-proliferation measures, see Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; Memorandum of Understanding Regarding the Establishment of a Direct Communications Link, June 20, 1963, U.S.-U.S.S.R., 14 U.S.T. 825, 472 U.N.T.S. 163 (Hot Line Agreement); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (Partial Test Ban Treaty); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (Outer Space Treaty); Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 326 (Treaty of Tlatelolco); Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (NPT); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *opened for signature* Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115 (Seabed Arms Control Treaty); Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1590 (Accident Measures Agreement); Agreement on Measures to Improve the U.S.A.-U.S.S.R. Direct Communications Link, Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1598 (Hot Line Modernization Agreement); Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 (ABM Treaty); Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462; Declaration of Basic Principles of Relations, May 29, 1972, U.S.-U.S.S.R., 66 DEP'T ST. BULL. 898 (1972); Treaty on the Limitation of Underground Nuclear Weapon Tests, July 12, 1974, U.S.-U.S.S.R., 71 DEP'T ST. BULL. 217 (1974); Protocol to the Treaty on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, U.S.-U.S.S.R., 27 U.S.T. 1645; Joint Statement Concerning Negotiations on the Limitation of Strategic Offensive Arms, Apr. 29, 1974, U.S.-U.S.S.R., 70 DEP'T ST. BULL. 677 (1974) (Vladivostok Agreement); Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, U.S. DEP'T OF STATE, PUB. NO. 8826 (Gen'l Foreign Serv. 298), 14 I.L.M. 1292 (Helsinki Accords); *Draft Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, U.N. GAOR, 34th Sess., Annex Z, Supp. No. 20, at 33, U.N. Doc. A/34/20 (1979) (Moon Treaty); South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440; Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., 88 DEP'T ST. BULL. 24 (1988) (INF Treaty). *See also* Treaty on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, U.S.-U.S.S.R., 74 DEP'T ST. BULL. 802 (1976); Treaty on the Limitation of Strategic Arms (SALT II), June 18, 1979, U.S.-U.S.S.R., S. EXEC. DOC. Y, 96th Cong., 1st Sess. 37 (1979).

ing operations of the United Nations,[3] but the struggle never can succeed apart from antecedent transformations of human behavior.[4] Faced with ongoing and unpunished[5] crimes of war, crimes against peace, and crimes against humanity,[6] thoughtful people everywhere are apt to recall Voltaire's cynical assessment in *Candide* of international law as consisting of righteous

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3. *See generally* U.N. CHARTER. The Charter was signed in San Francisco on June 26, 1945. It entered into force on October 24, 1945. United Nations Charter, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

4. As an example of the difficulties in protecting human rights under existing international law, all major human rights treaties require that periodic reports be submitted to supervisory bodies. In this connection, the Centre for Human Rights in Geneva is the main organizational entity for carrying out the United Nations human rights program. The Centre in Geneva services the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. *See* U.N. Centre for Human Rights/U.N. Institute for Training and Research (UNITAR), MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, U.N. Sales No. E.91.XIV.1 (1991). However, states in violation of human rights norms are most unlikely to report unfavorably upon themselves.

5. The imperative to punish crimes was reaffirmed in Principle I of the Nuremberg Principles: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." THE NUREMBERG PRINCIPLES (1946), *reprinted in* CRIMES OF WAR 107 (Richard A. Falk et al. eds., 1971). Punishment is, quite plausibly, the original meaning of justice and is assuredly one of its essential components. For comprehensive consideration of these concepts and their vital interdependence, see the Israel Law Review's special double issue, *Justice in Punishment*, 25 ISRAEL L. REV., Summer-Autumn, 1991, and ROBERT C. SOLOMON & MARK C. MURPHY, WHAT JUSTICE: CLASSIC AND CONTEMPORARY READINGS (1990).

6. For definition of such crimes, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal were affirmed by the U.N. General Assembly. *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946). This Affirmation was followed by General Assembly Resolution 177 (II), adopted November 21, 1947, directing the U.N. International Law Commission to "[f]ormulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and . . . [p]repare a draft code of offences against the peace and security of mankind. . . ." *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, G.A. Res. 177(II), U.N. GAOR, 2d Sess., at 111, 112, U.N. Doc. A/519 (1947).

brutality on a grand scale and of simple suffering on a human scale: these are the so-called "laws of war."[7]

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7. An essential element of all legal systems is the ancient principle, *Nullum crimen sine poena*, "No crime without a punishment." Yet, it is apparent that this expectation is seldom fulfilled, especially in the most egregious violations of international law. Consider, for example, that Saddam Hussein has yet to be sought, apprehended, and prosecuted for a myriad of crimes of war, crimes against peace, and crimes against humanity. See, in this regard, the *1973 Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973). Other resolutions affirm that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law." *See* G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971). *See also* G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, U.N. GAOR, 1st Sess., pt. 2, at 188, U.N. Doc. A/64 (1946). As to the responsibility of states toward Geneva Law in particular, Common Article 1 of the Geneva Conventions addresses the obligation of all signatories "to respect and to ensure respect" for the Conventions "in all circumstances." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288. Common Article 146 of the Geneva Civilian Convention recognizes that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches. . . ." *Id.*, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

Voltaire's Candide, the youthful disciple of Dr. Pangloss (based upon the philosopher Leibniz) describes the battle between the Bulgarians and the Abares:

> There was never anything so gallant, so spruce, so brilliant, and so well disposed as the two armies. Trumpets, fifes, hautboys, drums, and cannon made music such as Hell itself had never heard. The cannons first of all laid flat about six thousand men on each side; the muskets swept away from this best of worlds nine or ten thousand ruffians who infested its surface. The bayonet was also a sufficient reason for the death of several thousands. The whole might amount to thirty thousand souls. Candide, who trembled like a philosopher, hid himself as well as he could during this heroic butchery.
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> At length, while the two kings were causing Te Deums to be sung each in his own camp, Candide resolved to go and reason elsewhere on effects and causes. He passed over heaps of dead and dying, and first reached a neighboring village; it was in cinders, it was an Abare village which the Bulgarians had burnt *according to the laws of war*. Here, old men covered with wounds, beheld their wives, hugging their children to their bloody breasts, massacred before their faces; there, their daughters, disembowelled and breathing their last after having satisfied the natural wants of Bulgarian heroes; while others, half burnt in the flames, begged to be despatched. The earth was strewed with brains, arms and legs.

VOLTAIRE, CANDIDE 5 (Stanley Appelbaum ed., Dover Publications, Inc. 1991) (1759) (emphasis added). The Abares were a tribe of Tartars settled on the shores of the Danube, who later lived in an area of Circassia. *Id.* Characterized by unflagging irony, *Candide* was originally published in 1759 and is largely a parody

Voltaire's description, for all of its horror, could describe what now happens daily throughout much of the world. It is hyperbole neither for the eighteenth century nor, most assuredly, for the twentieth century. Indeed, Voltaire speaks essentially of only one category of what are now called Nuremberg-type crimes; that is, crimes of war. Twentieth-century humankind has expanded the sphere of this sort of large-scale wrongdoing to include terrorism,[8] crimes against humanity, genocide, and other similar crimes.[9]

Of course, nothing in *Candide*'s ironic reference to the "laws of war" suggests that the remediation of human barbarism in armed conflict necessarily requires reformation of human nature. Although it is more than likely that Voltaire himself did accept such a requirement, a reasonable reading of the text, especially by international law professionals, is apt to lead to a less ambitious conclusion. Human inclinations to transgress may or may not lie recognizably at the core of war crimes, but one expects these inclinations to yield to more enforceable customary and conventional norms. The preferred focus therefore is not on human transformations, but upon improved structures of legal

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of German philosopher Gottfried Wilhelm Leibniz' *Theodicee*, published in 1710. When Voltaire (Francois-Marie Arouet) died in Paris in 1778, he was the foremost French writer of his day.

8. For current conventions in force concerning terrorism, see the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 13 I.L.M. 43 (entered into force for the U.S., Feb. 20, 1977); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the U.S., Dec. 13, 1972); Convention on Offenses and Certain Other Acts Committted on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 294, 704 U.N.T.S. 219 (entered into force for the U.S., Dec. 4, 1969) (Tokyo Convention); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force for the U.S., Oct. 14, 1971) (Hague Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (entered into force for the U.S., Jan. 26, 1973) (Montreal Convention); *International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979) (entered into force for the U.S., Dec. 7, 1984). On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking, and attacks on internationally protected persons that were criminalized by previous custom and conventions. *See Measures to Prevent International Terrorism*, G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985).

9. For the characterization of genocide-like crimes, see Louis R. Beres, *Genocide and Genocide-Like Crimes*, *in* 1 INTERNATIONAL CRIMINAL LAW 271-79 (M. Cherif Bassiouni ed., 1986).

power and authority. As for the laws of war in particular, they should make perfectly clear that atrocious behavior in any form always must be illegal.

On this last point, Voltaire, to the extent that he believed atrocious means of armed conflict could be undertaken in a fashion consistent with humanitarian international law, was simply incorrect. This belief is even more incongruous for contemporary jurisprudence. Especially with the appearance of the so-called Martens Clause[10] and the Nuremberg Principles, armies no longer can claim immunity for barbarous activities on the grounds that these activities have not been explicity criminalized.[11]

What about improved structures of legal power and authority? Do international crimes essentially result from historic decentralization, a disastrous Westphalian legacy of the seventeenth century?[12] Empirical information, as well as reasoned deductive argument, suggest otherwise. Clearly, an age

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10. Barrister De Lupis describes the Martens Clause as follows:

> The so-called Martens Clause, which had been included in the Preamble of the 1899 and 1907 Hague Conventions, has been given a higher status in the 1977 Protocol I by being included in the main text of Article I. The clause provides that in situations not covered by the Protocol or by other international agreements "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

INGRID D. DELUPIS, THE LAW OF WAR 156 (1987).

11. Samuel von Pufendorf provided an early expression of limits under the law of war:

> As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

See 2 SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW (*De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo*) 139 (Frank G. Moore trans., Oceana Publications 1964) (1682).

12. The Peace of Westphalia ended the Thirty Years War in 1648 and consecrated the emergence of the modern state system. After the peace, which signalled the end of the medieval Holy Roman Empire, power and sovereignty were no longer concentrated in the hands of the Hapsburg emperor, but were decentralized among the imperial princes.

of atrocity did not commence with the collapse of the Holy Roman Empire. Moreover, it is perfectly obvious that even the creation of an authentic world state, the most centralized expression of world law, could not end crimes of war and crimes against humanity.[13] Finally, even if greater centralization of world security processes were desirable in principle, its feasibility would remain in serious doubt.[14]

Evil seemingly is not only an integral component of international criminality, but a component whose impact cannot be relieved via structural reconfigurations of power and sovereign authority. One must, therefore, confront evil directly, with a productive view toward human transformation that takes account of primary and even primal causes. The feasibility of such a confrontation, to be sure, is problematic, perhaps even more so than that of creating more centralized systems of world law, but it is an undertaking that simply cannot be avoided. As long as the most hurtful forms of human behavior are potentially remediable, no matter how difficult this remediation may be in practice, efforts at understanding and implementing human transformations must be attempted.

One must precede these efforts, with a historical awareness of crimes and with an attempt to understand the core causes of human cruelty. How, for example, may one understand the mass rape and torture of almost forty thousand Bosnian Muslim females, ages seventeen through eighty-nine, by Serbian soldiers during 1992 and 1993? What can one learn from the Holocaust, from the Cambodian "autogenocide" under the Khmer Rouge, the killing of up to one million Tibetans by Chinese troops beginning in 1950, or from the disappearances and murders caused by the Pinochet regime in Chile after 1973? The list of crimes seems endless and monstrous; the list of behavioral explanations remains essentially blank.

Should students of international law be content with fine-tuning a system that never can succeed? "In a dark time," said the poet Theodore Roethke, "the eye begins to see," but yet society seems to grow ever blinder with the increasing darkness. The scholarly output of international law is massive and erudite; the world, however, goes along its established ways, opening and

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13. For a comprehensive consideration of the world state idea, together with an exhaustive listing of world state proposals through the ages, see LOUIS R. BERES, PEOPLE, STATES, AND WORLD ORDER (1981).

14. For more on the shortcomings of greater centralization by this author, see 10 LOUIS R. BERES, THE MANAGEMENT OF WORLD POWER: A THEORETICAL ANALYSIS (1972); Louis R. Beres, *Preventing the Final Epidemic*, *in* NUCLEAR WEAPONS AND THE FUTURE OF HUMANITY 407, 407-24 (Avner Cohen & Steven Lee eds., 1986).

closing the killing fields without as much as a glance into libraries. Frankly, in a world that continues to revolve around the creation of corpses, international law has made no real progress. Indeed, beginning with the Holocaust, our species has carried genocide and crimes against humanity to new heights of perfection, purposefully rejecting old-fashioned methods of face-to-face cruelty with more automated, dispassionate systems of destruction. Significantly, in implementing these more "civilized" systems of killing, "ordinary" members of distinguished professions sometimes perceive only profitable business opportunities.[15]

For the future, students of international law must team up with psychologists, sociologists, and child development scholars to find a means of reducing international criminal conduct. To a considerable extent, the State is the human individual writ large, a corporate manifestation of will, fear, and anxiety that commands institutional misdeeds because of its component human misfortunes. A vehicle designed not merely to protect persons, but also to assuage doubts about "belonging" and immortality,[16] the State is always preparing to accept the Apocalypse as liberation. Granted, these preparations are hardly ever openly acknowledged, especially in the "secular," scientific West, but they operate nonetheless.

The dominant orthodoxy among students of international law is that world politics consists of a struggle for power. This thinking is certainly correct, but also trivial. The struggle for power in the world legal order is always epiphenomenal. What

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15. Devoid of rudimentary hatreds, for instance, different engineering concerns in Nazi Germany returned the following bids for construction of gas chambers and crematoria:

1. A. Tops and Sons, Erfurt, manufacturers of heating equipment: "We acknowledge receipt of your order for five triple furnaces, including two electric elevators for raising the corpses and one emergency elevator."
2. Vidier Works, Berlin: "For putting the bodies into the furnace, we suggest simply a metal fork moving on cylinders."
3. C. H. Kori: "We guarantee the effectiveness of the cremation ovens, as well as their durability, the use of the best material and our faultless workmanship."

ISRAEL W. CHARNY, HOW CAN WE COMMIT THE UNTHINKABLE? 185 (1982) (quoting Harry H. Shapiro).

16. One is reminded, in this regard, of Heinrich von Treitschke, in his published lectures on *Politics*, citing approvingly to Fichte: "Individual man sees in his country the realization of his earthly immortality." HEINRICH VON TREITSCHKE, POLITICO (Blanche Dugdale & Torben de Bille trans., 1916).

underlies this struggle, what animates competition between states and human rights violations within states, represents the problem of international crimes. What underlies the struggle is the individual's private apprehensions, needs, and terrors, including the all-consuming fear of death and the overriding search for immortality.

Dreading, perhaps more than anything else, animality, decomposition, and decay, humankind ironically perceives salvation in world politics. As this salvation requires an endless commitment to holy wars (however much they might be disguised as natural competition between states), world politics only ensures the very harms that it has been invented to dispel. While interstate wars, as well as intrastate excursions into barbarism, are designed to express personal potency and overcome intolerable earthly limitations, they inevitably make human rights[17] and a decent world order impossible. Whether visible or not, ideology in world politics largely has become theology, and opposition to particular policies of states represents not dissent, but blasphemy.

In its response to the depravities of world politics, the world today displays neither civilization nor certitude; rather, it looks more like the anarchic world prophesized by the poet Yeats in the

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17. *See Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (This Convention should be read in conjunction with the *Protocol Relating to the Status of Refugees*, G.A. Res. 2198(XXI), U.N. GAOR, 21st Sess., Supp. No. 16 (1966); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); International Convention on Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; *International Covenant on Economic, Social and Cultural Rights, opened for signature* Dec. 19, 1966, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); *International Covenant on Civil and Political Rights, opened for signature* Dec. 19, 1966, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967); American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights—known collectively as the International Bill of Rights—serve as the touchstone for the normative protection of human rights.

Second Coming.[18] Who are "the worst" of whom Yeats speaks? Conventional wisdom suggests that the worst are the most obvious and odious of international criminals, the Adolph Hitlers and Saddam Husseins, whose celebrations of aggression[19] and of mass killing make them defining culprits of our Age of Atrocity.[20] While few would argue with this answer, one must acknowledge that without the raw material of SS murderers and Baghdad's internal security apparatus, Hitler and Saddam would have been impotent actors on the world stage. Even more importantly,

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18. Yeats wrote:

> Turning and turning in the widening gyre
> The falcon cannot hear the falconer;
> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world,
> The blood-dimmed tide is loosed, and everywhere
> The ceremony of innocence is drowned;
> The best lack all conviction, while the worst
> Are full of passionate intensity.

W.B. YEATS, *The Second Coming*, *in* THE LETTERS OF W.B. YEATS 94 (Allan Wade ed., 1954).

19. For the crime of aggression, see *Resolution on the Definition of Aggression*, G.A. Res. 3314(XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975). For pertinent codifications of the criminalization of aggression, see U.N. CHARTER art. 2, ¶ 4; the Kellogg-Briand Pact, Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 U.N.T.S. 57 (Pact of Paris); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131(XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1956); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970); *Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons*, G.A. Res. 2936(XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, at 5, U.N. Doc. A/8730 (1972); Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279; *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946). *See also* Convention on the Rights and Duties of States, Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, 165 L.N.T.S. 19 (Montevideo Convention); Pact of the League of Arab States, Mar. 22, 1945, art. 5, 70 U.N.T.S. 237; Charter of the Organization of American States, Apr. 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, 119 U.N.T.S. 3; Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607 (Protocol of Buenos Aires); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 121 U.N.T.S. 77 (Rio Pact); American Treaty on Pacific Settlement, Apr. 30, 1948, 30 U.N.T.S. 55 (Pact of Bogota); Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

20. For this term I am indebted to a book of the same name by LAWRENCE L. LANGER, THE AGE OF ATROCITY: DEATH IN MODERN LITERATURE (1978).

perhaps, without the millions of "ordinary" individuals who may resist inflicting direct harms upon others, but who remain passively silent in the presence of terrible crimes, the principal directors of genocide and similar harms would have been limited to killing in effigy.

"Everything in this world exudes crime," says Baudelaire, "the newspapers, the walls, and the face of man." Yet, this face does not belong solely to what Grotius, citing to prominent theologians, labelled "men of deplorable wickedness."[21] The real problem of international law enforcement is not that of *hostis humani generis*,[22] or "common enemy of mankind," but the "normal" human being, the one who adheres closely to societal expectations while secretly dreaming of corpses. It was this human being, not the wicked monster of traditional international law, who made possible the Armenian genocide, the Holocaust, the mass murders of the Khmer Rouge, and the mass killings of the Hutu in Burundi, the Ibo in Nigeria, the Ache Indians in Paraguay, the Buddhists in Tibet, the Moslems, Croats, or Serbs in Bosnia, and so on and so forth.

To be sure, "bad people" do exist, and they do play a special and necessary role in most international crimes as prime movers. For these persons, international law always has urged general condemnation and even extermination. As Blackstone stated in reference to *hostis humani generis*:

> As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community has a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.[23]

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21. *See* HUGO GROTIUS, *De Iure Praedae Commentarius*, [COMMENTARY ON THE LAW OF PRIZE AND BOOTY] 90 (G.L. Williams trans., Oceana Publications 1964) (1604).

22. Under traditional international law, this term is applied primarily to pirates. According to Blackstone, whose *Commentaries on The Laws of England* is the starting point for understanding our common law: "The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (photo reprint Univ. of Chicago Press 1979) (1769).

23. *See id.* at 66. According to de Vattel:

> But this principle also makes it clear that while the jurisdiction of each State is in general limited to punishing crimes committed in its territory,

Before international law can work, however, society must look beyond "inhuman" cruelties to the common human predilection to do harm, to what Nietzsche called the "all-too-human."[24] Altogether banal,[25] this predilection escapes detection and understanding everywhere, but it is the indispensable starting point for the most egregious international crimes. Spawned by the relentless drive to escape from individuality, the predilection to do harm is the mark of a timeless and universal "sickness of soul,"[26] of a delirious collectivism of robots that identifies life with the perpetual killing of "outsiders."

There is another underlying problem of international law enforcement: the curious assumption that all human beings possess reason,[27] and that reason inevitably will guide our

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an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who by profession are poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.

3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 93 (C.G. Fenwick trans., Carnegie Institution 1916) (1758). Significantly, Vattel extended the principle of "enemies of the human race" from individuals to states, and insisted that such collective wrongdoers be dealt with in exactly the same fashion. He argued that:

> [n]ations which are always ready to take up arms when they hope to gain something thereby are unjust plunderers; but those who appear to relish the horrors of war, who wage it on all sides without reason or pretext, and even without other motive than their savage inclinations, are monsters, unworthy of the name of men. They should be regarded as enemies of the human race, just as in civil society persons who follow murder and arson as a profession commit a crime not only against the individuals who are victims of their lawlessness, but against the State of which they are the declared enemies. Other nations are justified in uniting together as a body with the object of punishing, and even of exterminating, such savage peoples.

Id. at 245-46.

24. *See* NIETZSCHE, MENSCHLICHES, ALLZUMENSCHILICHES [HUMAN ALL TOO HUMAN] (1878).

25. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

26. This phrase is adopted from the views of both Kierkegaard and Nietzsche.

27. Consider, here, Dostoyevsky's comment in NOTES FROM UNDERGROUND:

> [M]an, always and everywhere, prefers to act in the way he feels like acting and not in the way his reason and interest tell him, for it is very possible for a man to feel like acting against his interests and, in some instances, I say that he *positively* wants to act that way—but that's my personal opinion.

DOSTOYEVSKY, *Notes from Underground*, *in* DOSTOYEVSKY 90, 110 (Andrew R. MacAndrew trans., 1961).

species toward correct behavior and progress. Based largely upon the natural law[28] origins of international law,[29] the very same origins of United States law[30] found in Blackstone's *Commentaries*,[31] this assumption is contradicted by millennia of

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28. In his famous passage of *De Republica*, Cicero sets forth the classic statement of Reason and natural law:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations, and all times. . . .

Marcus T. Cicero, *The Republic*, *in* SOCIETY, LAW, AND MORALITY 35, 25-26 (Frederick A. Olafson ed., 1961).

29. For more than two thousand years, the idea of natural law has served as the ultimate standard of right and wrong, as the final determinant of true law as opposed to edicts based upon raw power. Already apparent in the *Antigone* of Sophocles and the *Ethics* and *Rhetoric* of Aristotle, this idea—tied closely to theology for many centuries—has effectively placed law above lawmaking. At the same time, it is obvious that humankind has not only been indifferent to the law of nature, but has often even coupled this indifference with adherence to undiscovered "laws" that reject justice. In this connection, we recall Pascal's observation: "It is odd, when one thinks of it, that there are people in the world who, having renounced all the laws of God and nature, have themselves made laws which they rigorously obey. . . ." A.P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 4 (1951) (citing Pascal).

30. According to Clinton Rossiter, there exists a

> deep-seated conviction [among Americans] that the Constitution is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of what Blackstone saluted as "the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover so far as they are necessary for the conduct of human actions."

EDWARD S. CORWIN, THE HIGHER LAW: BACKGROUND OF AMERICAN CONSTITUTIONAL LAW vi (1928).

31. According to Blackstone, all law "results from those principles of natural justice, in which all the learned of every nation agree. . . ." BLACKSTONE, *supra* note 22, at 62. On the incorporation of international law (which is drawn from natural law) into United States domestic law, the key case has been *The Paquete Habana*, wherein the United States Supreme Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

historical data and by daily recitations of new crimes. Indeed, there is compelling evidence that human movement as a species is not only not forward, but decidedly retrograde. During the last years of the twentieth century, one witnesses the steady transformation of violence as passion to violence as automated, technologically-assisted acts of depersonalized destruction—to bureaucratic, dispassionate forms of brutality that are not only uncivilized, but unauthentic. However loathsome one feels were the more primal forms of human barbarism, these at least were rooted in genuine feelings of hate, fear, hunger, lust, avarice, and uncertainty.

Reason is at the very heart of international law, yet it is almost nowhere to be found. Satisfying the universal wish to remain unaware of one's own subconscious, seekers of an improved world order are still imprisoned by assumptions describing an idealized humanity, by assumptions so erroneous that they effectively prevent the construction of a workable system of international law. Before this difficulty can be overcome, students of international law must erect their system upon firmer foundations, ones that acknowledge the generally contrived polarities of good and evil and the widespread irrelevance of reason to human decisionmaking.[32] Faced with a world that now plays havoc with some of our most cherished beliefs—that some humans are "good," others "evil" and that Cartesian rationality describes human calculations in matters of jurisprudence—one is hardly stunned to find reason yielding to pure irrationality and visions of cosmopolis and human oneness overwhelmed by powerful eruptions of fragmentation and disunity.[33] A student's task, however, is not to go on founding legal hopes and expectations upon notions of incorrectness, but

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The Paquete Habana, 175 U.S. 677, 700 (1900).

32. No one, I think, has made the latter point more convincingly than Milan Kundera. Referring to the "drivel of propaganda" that nobody seriously believes, he describes a sheer force of violence that wills to assert itself as force:

> Force is naked here, as naked as in Kafka's novels. Indeed, the Court has nothing to gain from executing K., nor has the Castle from tormenting the Land-Surveyor. Why did Germany, why does Russia today want to dominate the world? To be richer? Happier? Not at all! The aggressivity of force is thoroughly disinterested; unmotivated; it wills only its own will; it is pure irrationality.

MILAN KUNDERA, THE ART OF THE NOVEL 10 (Linda Asher trans., 1988). The passage, of course, was written before the end of the Cold War and the collapse of the Soviet Union.

33. In philosophy, the connection between Reason and Cosmopolis was already made by Heraclitus: "When you have listened, not to me, but to the Law *Logos* [Reason], it is wise to agree that all things are one." ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS 28 (Kathleen Freeman trans., 1948).

to change these notions so that they can give rise to a productive system of international law.[34]

It is necessary but insufficient for scholars to change their assumptions about human behavior and international law. Once these changes are in place—changes that recognize that evil is commonplace and that reason yields regularly to passion—scholars must seek to change the object of their altered assumptions. In the final analysis, the seriousness with which one may approach international law will depend upon the extent to which one has changed the "all-too human." The task will be long and difficult. After all, the task is nothing less than undoing (or at least modifying) what has been with humankind from the beginning. In the words of Chapter VI of Genesis, when God "saw how great man's wickedness on the earth had become," He lamented what He had created, "and his heart was filled with pain."[35]

At the same time, however, humankind really has no choice. Either humans learn how to change the raw material of international interaction at its source, namely the individual human being, or they continue to operate within a system of international law that is inoperable. Here the significance of the term individual lies not only in the essential level of jurisprudential transformation, but also in the identification of what must be restored. More than anything else, human transformation must signal a retreat from what Heidegger called *das Mann*, the anonymous mass or crowd that suffocates private growth and personal responsibility. Aware that the "crooked timber of humanity" has been forged from the death of Self, which, in turn,

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34. In this connection, one might begin with the significant observation of a distinguished earlier legal scholar, Samuel von Pufendorf. In his *On the Duty of Man and Citizen According to Natural Law*, he detaches Natural Law from standard presumptions of reason.

> No animal is fiercer than man, none more savage and prone to more vices disruptive of the peace of society. For besides the desires for food and sex to which the beasts are also subject, man is driven by many vices unknown to them, such as, an insatiable craving for more than he needs, ambition (the most terrible of evils), too-lively remembrance of wrongs, and a burning desire for revenge which constantly grows in force over time; the infinite variety of his inclinations and appetites, and stubbornness in pressing his own causes. And man has such a furious pleasure in savaging his own kind that the greatest part of the evils to which the human condition is subject derives from man himself.

SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 133 (James Tully ed. & Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

35. *Genesis* 6:5-6 (New International Version).

is related closely to overriding fears of mortality,[36] students of international law must learn to accept the task of Nietzsche's Zarathustra, "to be called a robber by the shepherds."[37] Freud, too, understood the need for such learning. Examining, in *Group Psychology and the Analysis of the Ego*, Le Bon's description of the "group mind" and other accounts of "collective mental life," Freud recognized fully the dangers of the crowd, although he also acknowledged certain opportunities.[38]

Usually, of course, the direction of human morality in groups is distinctly downward.[39] "May fate preserve me from any kind of crowd," says the main character in Ionesco's *The Hermit*. But, we learn from Freud, there is an opposite direction; thus, hope lies not only in getting rid of the group, but also in re-orienting its passions. One must understand, from the start, that the crowd is always present; the crowd produces its effects, terrible or uplifting, with or without a physical coming together of peoples.

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36. In the words of Eugene Ionesco, "People kill and are killed in order to prove to themselves that life exists." See the dramatist's only novel, EUGENE IONESCO, THE HERMIT 102 (1973).

37. Nietzche narrated: "To lure many away from the herd, for that I have come. The people and the herd shall be angry with me. Zarathustra wants to be called a robber by the shepherds." Friedrich Nietzsche, *Prologue* to THUS SPOKE ZARATHUSTRA.

38. Freud wrote:

> In order to make a correct judgment upon the morals of groups, one must take into consideration the fact that when individuals come together in a group all their individual inhibitions fall away and all the cruel, brutal and destructive instincts, which lie dormant in individuals as relics of a primitive epoch, are stirred up to find free gratification. But under the influence of suggestion groups are also capable of high achievements in the shape of abnegation, unselfishness, and devotion to an ideal. While with isolated individuals personal interest is almost the only motive force, with groups it is very rarely prominent. It is possible to speak of an individual having his moral standards raised by a group. Whereas the intellectual capacity of a group is always far below that of an individual, its ethical conduct may rise as high above his as it may sink deep below it.

SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 17-18 (James Strachey,ed. & trans., 1922).

39. For example, Carl Jung observes:

> [I]f people crowd together and form a mob, then the dynamics of the collective man are set free—beasts or demons which lie dormant in every person till he is part of a mob. Man in the crowd is unconsciously lowered to an inferior moral and intellectual level, to that level which is always there, below the threshold of consciousness, ready to break forth as soon as it is stimulated through the formation of a crowd.

Carl G. Jung, *Psychology and Religion*, *in* 2 THE WORLD OF PSYCHOLOGY 469, 476-77 (G.B. Levitas ed., 1963).

The crowd is far less an assembly than a condition, a condition that may offer promise, but more often displays inconscience. A ritualized pattern of thoughtlessness, this condition reviles the "other" and even, in the case of states, lionizes all who would identify patriotism with slaughter.

The state, finally, is the crowd in one of its largest expressions, the crowd that is most intimately and obviously behind the operation of international law. As goes this crowd, so goes the world legal order. And how does this crowd "go?" For Nietzsche, the answer is clear and grotesque. "State," he says in that part of *Zarathustra* dealing with "The New Idol," is "the name of the coldest of all cold monsters. Coldly it tells lies too; and this lie crawls out of its mouth: 'I, the state, am the people.' That is a lie!" This state, continues Nietzsche, signifies "the will to death. Verily, it beckons to the preachers of death. . . . Only where the state ends, there begins the human being who is not superfluous: there begins the song of necessity, the unique and inimitable tune."

Where the state ends, says the philosopher, is the place to which we must look; there begins the authentic individual who rises up above the herd and offers hope for a world that has overcome the all-too-human. Yet, the remedy lies not in putting an end to states, but in creating conditions whereby citizens can become persons. Although Nietzsche is correct that it is "for the superfluous the state was invented," humankind may still (indeed, must still) develop into a functionally cooperative species within national boundaries. It is, in fact, through this development that states themselves may be changed, a metamorphosis that can then feed back and sustain a continuing series of personal and national transformations.

The true individual that students seek, the individual who is indispensable to world legal reform, is the irreconcilable enemy not of the state that seeks communion with all other states, but of the murderous herd that masquerades as a nation. This individual is an indispensable component of a new international law; without her this herd will continue to define and control a system of rules that subordinates order to power and justice to the presumed imperatives of *realpolitik*. Accepting the enormously difficult obligations of self-liberation,[40] this

40. On this concept, see generally MAX STIRNER, THE EGO AND HIS OWN: THE CASE OF THE INDIVIDUAL AGAINST AUTHORITY (James J. Martin ed. & Steven T. Byington trans., Dover Pub. 1973) (1845). A formidable assault on authoritarianism in the mid-nineteenth century, Stirner's book represented a "'third force' neither a defender of the theological or monarchical State, nor a protagonist of secular models advanced by the Liberals and socialists." James J.

individual could move nations to a new awareness of interrelatedness, an awareness not generated by familiar quests for trade benefits and personal enrichment, but by an unstoppable search for planetization.

What is this planetization? It is not merely one step further along the continuum of authority transfer from civilization; it is the very opposite of civilization. It must be the very opposite.[41] Planetization would be another story. Founded upon the requirements of the unique and fulfilled Self that is distanced from the herd,[42] planetization would acknowledge that no

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Martin, *Introduction* to *id.*, at ix. Conceived as *the* rejoinder to Hegel, it argued that all freedom is essentially self-liberation—an argument that influenced the dramatic writings of Henrik Ibsen. *Id.* at x-xi.

41. These requirements include diminished needs to "belong." *Id.*

42. *Notes from Underground* remind us:

> And what is it in us that is mellowed by civilization? All it does, I'd say, is to develop in man a capacity to feel a greater variety of sensations. And nothing, absolutely nothing else. And through this development, man will yet learn how to enjoy bloodshed. Why, it has already happened. Have you noticed, for instance, that the most refined, bloodthirsty tyrants, compared to whom the Attilas and Stenka Razins are mere choirboys, are often exquisitely civilized? . . . Civilization has made man, if not always more bloodthirsty, at least more viciously, more horribly bloodthirsty. In the past, he saw justice in bloodshed and slaughtered without any pangs of conscience those he felt had to be slaughtered. Today, though we consider bloodshed terrible, we still practice it—and on a much larger scale than ever before.

DOSTOYEVSKY, *supra* note 27, at 108.

This brings to mind the prospect of nuclear war. For assessments of nuclear weapons under international law, see GEOFFREY BEST, HUMANITY IN WARFARE (1980); FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR WEAPONS (1991); RICHARD FALK ET AL., NUCLEAR WEAPONS AND INTERNATIONAL LAW (1981); JAMES T. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (1981); NUCLEAR WEAPONS AND INTERNATIONAL LAW (Istvan Pogany ed., 1987); Daniel J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?*, 30 MCGILL L.J. 89 (1984); Francis A. Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 Nw. U. L. REV. 1407 (1986); Francis A. Boyle, *The Illegality of Nuclear Weapons: Statement of the Lawyer's Committee on Nuclear Policy*, 8 ALTERNATIVES: J. WORLD POL'Y 291-96 (1982); Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437 (1965); John H.E. Fried, *First Use of Nuclear Weapons—Existing Prohibitions in International Law*, BULL. PEACE PROPOSALS, Jan. 1981, AT 21-29; John H.E. Fried, *The Nuclear Collision Course: Can International Law Be of Help*, 14 DENV. J. INT'L L. & POL'Y 97 (1985); Matthew Lippman, *Nuclear Weapons and International Law: Towards A Declaration on the Prevention and Punishment of the Crime of Nuclear Humanicide*, 8 LOY. L.A. INT'L & COMP. L.J. 183-234 (1986); Elliott L. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111 (1987); Remarks of John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOK. J. INT'L L. 263 (1983); Eugene V. Rostow, *The Great Nuclear Debate*, 8 YALE J. WORLD PUB. ORD. 87 (1981); James A. Stegenga, *Nuclearism and International Law*, 4 PUB. AFF. Q. 69

productive concern for others can appear without prior love for oneself. The widespread failure to understand this acknowledgment has doomed innumerable plans for world order via some form of cosmopolis. Before humankind can create a global community based upon functional presumptions of singularity and oneness, self-determination in international law[43] will have to be rerouted. The first task is for humans to determine their private selves; not their collective selves. Once humankind has accomplished this aim, states themselves could become seriously attentive to international law, and Westphalian dynamics could yield to cosmopolis.

Not surprisingly, these assertions stand in marked contrast to both mainstream and nontraditional approaches to international law.[44] In part, the contrast lies in the difference between a normative system that is detached from actual human and state behavior and one that is self-consciously drawn from such behavior. For example, both traditional and nontraditional orientations to world law affirm and take for granted Vattel's notion of "mutual aid" as a useful peremptory norm.[45]

(1990); E.C. Stowell, *Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784 (1945); E.D. Thomas, *Atomic Bombs in International Society*, 39 AM. J. INT'L L. 736 (1945); Burns Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DENV. J. INT'L L. & POL'Y (1983); Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 543 (1983).

43. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, G.A. Res. 1541(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

44. I am aware, in this connection, that these assertions will not be popular. Scholars who are willing to step away from prudence and call things by their correct name invite professional censure and career difficulty. Here, Giacomo Leopardi's fascinating mental excursions are especially revealing: "... good and generous men are usually despised because they are naturally sincere, and because they call things by their real names—a crime mankind never pardons... . For men are willing to suffer almost anything from each other or from heaven itself, so long as *true words* do not touch them." GIACOMO LEOPARDI, PENSIERI 33 (W.S. DiPiero trans., La. St. Univ. Press 1981) (1953).

45. As noted in Vattel's *Law of Nations:*

> Since Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require. . . . The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the

Vattel derives "law" from an illusory model of human and state behavior, as do many other writers of general international law. This is not correct; instead, the required model should be one that reflects accurately the determining passions and principles of persons, emotions, and guidelines that are themselves the true determinants of national policy. Only when such a model is constructed and understood can society hope to progress to a point where each state will feel compelled to "contribute as far as it can to the happiness and advancement of other Nations."

Is this possible? Can one seriously imagine a greatly improved system of international law based upon an awareness of unreason and on progressive transformations of persons? Would it not be more realistic for society to confine its hopes to more centralized arrangements of global power and authority processes,[46] arrangements customarily described as variants of collective security or world government?

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end of the great society established by nature among all Nations is likewise that of mutual assistance in order to perfect themselves and their condition. The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations.

Albert de Lapradelle, *Introduction* to 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW at xii (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758).

According to Article 53 of the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 8 I.L.M. 679, 698 (1968). Even a treaty that might seek to criminalize forms of insurgency protected by this peremptory norm would be invalid. "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id.* The concept is extended to newly emerging peremptory norms by Article 64 of the Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* at 703.

46. An example of such an arrangement might be an international criminal court. The origin of the idea of an established international criminal court is embedded in the Hague Convention (I) for the Pacific Settlement of International Disputes, July 19, 1899, 32 Stat. 1779, *reprinted in* THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 41 (James B. Scott ed., 1918). For development of this idea, see generally, M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); Symposium, *Draft International Criminal Court*, 52 REVUE INTERNATIONALE DE DROIT PENAL 331 (1984); DRAFT STATUTE FOR AN INTERNATIONAL COMMISSION OF CRIMINAL INQUIRY, *reprinted in* INTERNATIONAL LAW ASSOCIATION,

The author's answer is at once "perhaps," "yes," "no." This author might, indeed, be dreaming, but wakefulness would be far more dangerous, condemning international law to increasing irrelevance and expanding impotence. Dreaming about an improved law of nations is indispensable to purposeful acts of implementation.

One can, indeed, imagine a new system of international law built upon empirically correct assumptions and upon incremental changes in human and state behavior. To be sure, these imaginings must have distant possibilities, and thoughtful near and intermediate-term remedies for international law will have to be fashioned if we are to survive as a species. Failing such imaginations of decisively new forms of legal order, humankind would continue to embrace atrocity as "normal." Moreover, scholars would remain content with a system that confuses ponderousness with merit and that substitutes a pretentious formality for utility. Timothy Walker's 1837 lecture on *The Dignity of the Law as a Profession* exhibits such false contentment. Referring to the "high moral sublimity" of international law, Walker inquires:

> Who, then, will question the dignity of this branch (international law) of legal study? Next to religion, I know not that the human mind can employ itself in contemplations more interesting or sublime; and if the law of nations be not as practical, as the branches which follow, it certainly makes up in grandeur, what it lacks in every day utility.[47]

"Grandeur," of course, is not what scholars seek. "Every day utility," on the other hand, is certainly their objective. To achieve this objective, scholars will have to move vigorously beyond legal argumentation that satisfies their aesthetic and narrowly professional demands—argumentation that adorns all orthodox scholarship in contemporary international law—at the expense of order and justice. This means, inter alia, moving beyond self-serving displays of erudition toward jurisprudential inventiveness and intellectual risk-taking.

As to more centralized arrangements of global power and authority, they are likely to be better than extant Westphalian dynamics.[48] But there is no logical reason to consider these ar-

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REPORT OF THE SIXTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 445 (1983).

47. Timothy Walker, Introductory Lecture on the Dignity of the Law as a Profession (Nov. 4, 1837), *in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 238, 243 (Perry Miller ed., 1962).

48. The essence of safety within these state-centric dynamics lies in self-defense. The right of self-defense should not be confused with *reprisal*. Although

rangements a distinct alternative to more far-reaching kinds of personal and national transformation. These arrangements and personal or national transformations are not mutually exclusive; therefore, the movement toward collective security, or even world government arrangements, can take place together with the search for behavioral changes. At a minimum, this movement can offer a short-term strategy, essentially buying time for the implementation of more consequential transformations.

All world politics move in the midst of death. Once students of international law recognize this, they can expose mercilessly the hollowness of current paradigms and move productively toward new frameworks of normative regulation. Failing such recognition, because individual scholars would prefer the "safety" of sterilized mainstream discourse, students of international law will condemn the field to well-deserved irrelevance, to the musty monographs of specialists, and to the sorrowful musings of Faustian professors.[49]

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both are commonly known as measures of self-help short of war, an essential difference lies in their respective purposes. Taking place *after* the harm has already been experienced, reprisals are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, is by its very nature intended to mitigate harm.

The problem of states using reprisal as a rationale for the permissible use of force has been identified by the U.N. *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) ("States have a duty to refrain from acts of reprisal involving the use of force."). For the most part, the prohibition of reprisal can be deduced from the broad regulation of force found at Article 2(4), the obligation to settle disputes peacefully at Article 2(3) and the general limiting of permissible force by states to self-defense. *Id.*

49. Faust inquires:

> I may not pretend, aught rightly to know,
> I may not pretend, through teaching,
> to find a means to improve or convert mankind.

GOETHE, *Faust*, *in* COLLECTION: GOETHE'S WORKS 5, 13 (George Barrie ed. & trans., 1885).

The Faust legend has its origins in the story of a practicing magician who allegedly worked sensational wonders and died scandalously in 1537. This sorcerer is the hero of the German *Faust-Book*, published fifty years after his death. Goethe did not see this book, but Christopher Marlowe did, and adapted it for his *Tragedy of Doctor Faustus*, "a study of the scholar in search of unlimited knowledge and the power that knowledge may confer." CHRISTOPHER MARLOWE, THE TRAGEDY OF DOCTOR FAUSTUS xviii (Louis B. Wright & Virginia A. Lamar eds., Wash. Square Press 1959) (1616). In modern literature, the Faust legend reached its highest form in Goethe's *Faust*. *Id.* at xix. Investing the legend with intellectual and spiritual values going far beyond the old crudities of devilry and punishment, Goethe created a dramatic poem exploring the troubled human soul common to us all, the soul that seeks comfort in the face of death.

It is time for a new form of insight in international law, not the assumed abstract human behavior that inhabits the structural debris of advanced scholarship, but the tragic insight that lies in suffering, blood, and the agony of expected nonbeing. Contemptuously rejecting legal optimism, this insight would be aware that anxiety and cruelty are imminent to existence, and that these elements must not be disregarded in the fashioning of world order. To straighten the "timber" and to create a purposeful paradigm of international law, therefore, scholars must understand first that the time for intellectual games is over, that pain is infinitely more explanatory than treaties, that cries of despair are more revealing than the most elaborate footnotes, and that tears always have deeper and more promising roots than learned smiles.