Introduction

Humanity faces extraordinary challenges of major violence, environmental decline, human rights abuse, and economic deprivation. International law is one of the few tools for responding to these problems, a fact long motivating efforts to improve the effectiveness of international law.[1] This book is one of those efforts. It offers a distinctive approach, drawing on the arts and aesthetic philosophy.[2] These are largely untapped sources in responding to the persistent doubts that hinder confidence and participation in international law, weakening its support of flourishing around the globe.

The book began as the 2014 Sir Hersch Lauterpacht Memorial Lectures, titled, 'International Law and the Art of Peace'.[3] The lectures were inspired by two of Lauterpacht's own celebrated

[1] For past proposals aimed improving compliance, see A. Chayes and A. Handler Chayes, 'On Compliance', *International Organization*, 47 (1993), 175–205; T. M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990) and R. Fisher, *Improving Compliance with International Law* (Charlottesville, VA: University of Virginia Press, 1981).

[2] Aesthetic philosophy 'employs the term "aesthetic" to circumscribe' the following:

> The experiences that we have when we listen to music, read poetry and look at paintings or scenes in nature, have a distinctive immediate, emotional and contemplative character, and lead us to describe what we experience in a special vocabulary, and to use terms such as beautiful, exquisite, inspiring, moving and so on.

S. Gardner, 'Aesthetics', in N. Bunnin and E. P. Tsui-James (eds.), *The Blackwell Companion to Philosophy* 2nd edn (Oxford: Blackwell Publishing, 2003), 231–56, 231. See also Chapter 1.

[3] M. E. O'Connell, 'International Law and the Art of Peace', 17–19 February 2014, available at https://itunes.apple.com/us/itunes-u/lcil-international-law-seminar-series/id472214191?mt=10 (nos. 105–7).

publications: his 1933 book *The Function of Law in the International Community*[4] and his 1946 article 'The Grotian Tradition in International Law'.[5] In *The Function of Law*, Lauterpacht identifies the 'reign of law' as an essential condition in securing and preserving the ultimate good for which law is instituted, the attainment of peace.[6] Lauterpacht argued that courts are the best available means of incorporating international law into the life of the international community. Courts can uniquely mandate change while maintaining stability in ordering society through law.[7] He particularly advocated for international courts to have the compulsory jurisdiction typical of national courts.[8] Lauterpacht saw compulsory adjudication to be the *sine qua non* of a legal system.[9]

After World War II, during which he lost most of his family in the Holocaust, Lauterpacht wrote his inspirational article 'The Grotian Tradition'. He wrote to restore confidence in international law and to respond to the proponents of Realism who were blaming weak international law and institutions and the failure of military readiness for the outbreak of the war.[10] Lauterpacht provided a very different assessment. He described international law as built on the view of the seventeenth-century Dutch jurist, diplomat, and theologian Hugo Grotius that human beings are social, other-oriented, and thus willing and able to make the sacrifices of self-interest needed to live in peaceful community under law. Grotius saw people as 'intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principle and of learning from experience'.[11]

[4] Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933).
[5] Sir Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law*, 23 (1946), 1–53, 1.
[6] Lauterpacht, *The Function of Law* 1933 (n. 4), 346. [7] Ibid., 346.
[8] On the life of Sir Hersch Lauterpacht, see E. Lauterpacht, *The Life of Hersch Lauterpacht*, (Cambridge: Cambridge University Press, 2010) and P. Sands, *East West Street* (New York: Vintage Books, 2016).
[9] Lauterpacht, *The Function of Law* 1933 (n. 4), 438.
[10] See, e.g., E. H. Carr, *The Twenty Years' Crisis 1919–1939* (New York: Macmillan & Co, 1939) and H. J. Morgenthau, 'Positivism, Functionalism, and International Law', *American Journal of International Law*, 34 (1940), 260–84.
[11] Lauterpacht, 'The Grotian Tradition' 1946 (n. 5), 24.

By contrast, Grotius's contemporary, the British political commentator Thomas Hobbes, saw human beings as unable to act other than in self-interest unless coerced. Hobbes saw human beings as 'essentially selfish, anti-social, and unable to learn from experience ... the basis of political obligation is interest pure and simple; the idea of a sense of moral duty rising supreme over desire and passion is a figment of imagination ...'.[12] For Hobbes, law is impossible at the international level, beyond a national government's coercive reach. It is this Hobbesian world view that is imbedded in the theory of political Realism and gives rise to Realism's greater respect for military power in relations among states than law.

Lauterpacht linked the noted Realist Hans Morgenthau to Hobbes and Hobbes's exclusion of international law from a role in restraining the use of force. Morgenthau similarly viewed military affairs as beyond the capacity of international legal influence. For Morgenthau, military matters raise non-justiciable political questions that must be resolved by national executives, not judges. He also saw executives as having a duty to amass and use military assets to maintain the freedom that comes with the ability to coerce others. This, he argued, is the national leader's higher moral duty, certainly higher than compliance with international law.[13] He encouraged this position by pointing out that, in his view, international law has no sanctions sufficient to compel a leader to take principles on the use of force seriously.

Lauterpacht pushed back against arguments he found to be 'the work of international lawyers anxious to give legal expression to the State's claim to be independent of law'.[14] He objected to arguments on the use of force that depicted legal restrictions as illusory.[15] He also rejected self-serving arguments designed to avoid resort to binding dispute resolution, arguments like Morgenthau's that some disputes are too important, grave, political, or military in nature to be proper subjects of dispute resolution. For Lauterpacht, it was 'the refusal of the State to submit the dispute to judicial settlement, and not the intrinsic

[12] Ibid., 24–5.
[13] Hans Morgenthau deserves credit as an originator of the theory of political Realism. See H. J. Morgenthau, *Politics Among Nations, The Struggle for Power and Peace* (New York, NY: Alfred A. Knopf, 1948). See, also, Chapter 1.
[14] Lauterpacht, *The Function of Law* 1933 (n. 4), 6. [15] Ibid., 180.

nature of the controversy, which makes it political'.[16] No activity is strictly either legal or political. Judges and lawyers are capable of focusing on the legal aspects of questions, even those considered to be issues of sovereignty or security.

Lauterpacht could take these strong, principled positions in support of the rule of law over the will of sovereign states because he was a natural lawyer. Other international lawyers of his time were losing the ability to argue that the promotion of law is the superior moral activity to amassing and projecting military force. They were relying not on natural law but positivism alone. Positivism requires material proof of state acceptance, whether express or tacit.[17] It lacks a normative hierarchy or moral basis for law beyond consent.[18] Because consent may be withdrawn, positive law can be seen as inferior to the sovereign state's will. Positivism is thus consistent with Realist political theory holding that the only actual fetter on state action is coercive power, especially an opponent's superior military strength.

Positivists could hardly argue otherwise than Morgenthau – if state will is the source of law and states prefer to be free of legal restraint in military affairs, their will is determinative. For Lauterpacht, however, 'the will of States cannot be the exclusive

[16] Ibid., 164. See also, M. Koskenniemi, 'Introduction', in H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011), 30.

[17] Lauterpacht, *The Function of Law* 1933 (n. 4), 3.

Positive law is the law that emerges from the voluntary or consensual sources of law, whether national legislation, treaty, or practice. It involves action that can be confirmed with material evidence. For two views of positivist theory relevant to the sources of international law, see D. Lefkowitz, 'Sources in Legal Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017), 323–42 and J. Kammerhofer, 'Sources in Legal Positivist Theories: The Pure Theory's Structural Analysis of the Law', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017), 343–63.

The two main forms of positive international law are treaties, international agreements that bind on the basis of consent, and customary international law, principles that reflect general practice undertaken out of a sense of legal obligation. See Statute of the International Court of Justice, Art. 38(1)(a) & (b), icj-cij.org.

[18] For a comparison of positive law rules to the rules of a game, see J. Gardner, 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence*, 46 (1) 1 January 2001, 199–227.

For more on the limits of positivism as a comprehensive theory of law, see Chapters 1 and 2.

or even, in the last resort, the decisive source' of international law.[19] He accepted the essential role of positive law and positive law theory but within a more complete theoretical concept of law that included natural law and the legal process. Lauterpacht understood that all law consists of mostly positive law within a frame of natural law but argued that while this fact could be merely assumed with national legal systems, it had to be openly acknowledged in the case of international law. International law lacks the government institutions for lawmaking that exist in national systems. How law is made without them needs explaining. Natural law theory does in fact explain that some norms remain binding with or without consent. Lauterpacht looked to natural law as the 'ever-present source for supplementing the voluntary (consent-based) law of nations'.[20]

He said little more in 'The Grotian Tradition' about natural law.[21] Positivism was already dominant by the 1930s,[22] but he could assume lingering understanding of what natural law entailed as the basis for his appeal for confidence in world law. More than three generations later, knowledge of natural law has all but disappeared.[23] To understand law beyond positivism, to find law once again, as Lauterpacht did, superior to the consent of states and their will to military power and avoidance of international courts, is to understand natural law. Natural law is needed for concepts such as universality and equality to have a solid place in international relations. Natural law supports the search for what Philip Allott has called 'a revival of the ancient idea of the essential unity of humanity'.[24]

[19] Lauterpacht, 'The Grotian Tradition' 1946 (n. 5), 22. [20] Ibid., 21–2.

[21] Koskenniemi surmises that Lauterpacht had no well-developed theory of natural law. Koskenniemi, 'Introduction', (n. 16), 27.

[22] Ibid.

[23] Interest in natural law is again on the increase, however, see, e.g., M. Koskenniemi, 'Transformations of Natural Law, Germany 1648–1815', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 59–81; A. Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium 2nd edn (Leiden: Martinus Nijhoff, 2013), 139 and C. G. Weeramantry, *Universalizing International Law* (Leiden: Martinus Nijhoff, 2004). See also M. E. O'Connell and C. Day, 'Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017), 562–80.

[24] P. Allott, 'Towards Utopia – Rethinking International Law' *German Yearbook of International' Law*, 60 (2017), 269–312.

Positivism lacks a universal perspective that considers the whole of the international community.[25] Chapter 1 provides a detailed discussion of the limits of positivism and the need for natural law explanations of why law binds sovereign states, even when leaders find a rule not in their nation's interest.

The theory of international legal process is also in need of renewal. The situation has been transformed since Lauterpacht assessed it in 1933. From the few international courts and tribunals in existence when *The Function of Law* was written, today there are dozens. Yet, international law still lacks courts with general compulsory jurisdiction, which Lauterpacht considered essential.[26] States still resist judicial settlement. More remarkably, the global popular movement that once promoted courts and legal mechanisms of dispute resolution to serve as a substitute for war has all but vanished.[27] The success of Realist thinking has helped create a world with greater confidence in military force than in mechanisms for the peaceful settlement of disputes. A contemporary response is needed that can re-ignite the appeal of international legal process for peace with a new emphasis on the International Court of Justice and compulsory jurisdiction.[28]

[25] '[I]n the nineteenth century, the law of nations, which had been universal in the sixteenth, seventeenth and eighteenth centuries, abandoned the centuries-old universalist tradition based on natural law theory and "narrowed" [itself] to a regional (purely European) legal system.' C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations of the East Indies (16th, 17th, and 18th Centuries)* (Oxford: Clarendon Press, 1967), 2.

[26] Lauterpacht, *The Function of Law*, 1933 (n. 4), 437–8.

[27] See Chapter 6.

[28] The International Court of Justice (ICJ) is the 'principal judicial organ of the United Nations'. United Nations Charter, Art. 92, un.org. The ICJ is the only permanent adjudicative body with authority to hear cases on any subject of international law brought between any states that are members of the United Nations. See also, the Statute of the International Court of Justice, icj-cij.org; V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996); A. Zimmerman, C. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice, A Commentary* 2nd edn (Oxford: Oxford University Press, 2012), and G. I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford: Oxford University Press, 2014). For a comparison of the ICJ and other courts for the settlement of interstate disputes, see S. D. Murphy, 'International Judicial Bodies for Solving Disputes Between States', in C. P. R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), 181–204.

Martti Koskenniemi has diagnosed the fading of Lauterpacht's vision to the ascension of a view that there is 'no such "ultimate" place from which authoritative direction could be received for any and all disputes'.[29] Koskenniemi is correct that no single religious belief can serve in such a role. A turn to aesthetic philosophy and the arts, however, reveals a source of knowledge that is universally shared. Aesthetics explores ethical questions in a way independent of material, positive evidence. Aesthetics draws on knowledge gained through reason applied to the universal human reaction of pleasure in the beautiful, perceived through the senses.[30] It is a transcendent source that aesthetic philosophers observe demonstrates the deep human appreciation for harmony as well as the human capacity to live in community, to be moved to action wholly on behalf of others, regardless of self-interest. Aesthetic philosophy teaches, as do many religious faiths, the good of empathy, selflessness, generosity, and love. Aesthetic philosophy is secular but also compatible with theological approaches. Chapter 1 draws on these insights to supplement the traditional religious aspects of natural law with a secular component for a new approach to natural law as part of an international legal theory that supports the rule of law in the world.

Beyond aesthetic philosophy, the arts themselves, including music, literature, visual art, and the performance arts, offer inspiration for renewing interest in the legal process. Law and the arts are interconnected in well-known ways: from the use of art to explain the law,[31] to creating opportunities for wide, popular discussion of legal issues,[32] to the training of lawyers in acting or writing with the aim of improving the quality of their practice.[33] The performance arts offer a new vocabulary leading to a more attractive perspective on legal process. As Chapter 6 will detail, people are drawn to participate in an audience or

[29] Koskenniemi, 'Introduction' 2011 (n. 16), 25.
[30] Gardner, 'Aesthetics' 2003 (n. 2), 231. See also Chapter 1.
[31] See, e.g., M. Landau, 'The Law as Expressed in Art', in V. Hösle (ed.), *The Many Faces of Beauty* (Notre Dame, IN: University of Notre Dame Press, 2013), 240–63.
[32] Consider the long tradition of plays on legal themes from the ancient Greeks and the work of Aeschylus to the contemporary British author David Hare. Hare's play *Stuff Happens* critiqued the US-UK-Australian invasion of Iraq in 2003. D. Hare, *Stuff Happens* (New York: Faber & Faber, 2004).
[33] See Chapters 1 and 6 for more examples.

a performance. Yet, courts are often depicted not as the scene of a drama but rather as a battle ground or game where only zero-sum outcomes are possible. A change of metaphor together with other incentives may serve to re-invigorate the long-dormant campaign for peace through law.

Methods of legal dispute settlement have been part of international law as long as the system has existed.[34] The drive to create formal standing institutions, courts, and tribunals, however, originated with religious pacifists, specifically eighteenth- and nineteenth-century refugees fleeing from religious persecution in Europe to the USA.[35] Their movement became a mass, secular campaign that advocated the use of courts and tribunals as substitutes for war. The United States Supreme Court was the model used to demonstrate that a court could resolve disputes among semi-sovereign states and keep the peace. The movement, however, came abruptly and nearly completely to an end with World War I. The Permanent Court of International Justice (PCIJ) was formed shortly after the war ended in 1920 and was endowed with compulsory jurisdiction only in cases where two states had agreed in advance to it on an optional basis. The PCIJ, therefore, lacked the most important authority enjoyed by the US Supreme Court. There has been no notable advance toward general compulsory jurisdiction since 1920.

Lauterpacht was one of the last international lawyers to make a theoretical argument in favour of compulsory jurisdiction.[36] In recent years, there has been energy for international criminal courts and dispute settlement mechanisms in specific subject matter areas, for example, in trade and maritime affairs, but thinking about dispute resolution to end and prevent war or for the further development of the international legal system is rare. The theatre and other performance arts offer ideas toward generating new interest in legal process – it should be possible to create a level of

[34] J. H. W. Verzijl, *International Law in Historical Perspective: Inter-State Disputes and their Settlement VIII* (Leiden: Brill Academic Publishers, 1976) and M. E. O'Connell, *International Dispute Resolution* 2nd edn (Durham, NC: Carolina Academic Press, 2008), 7–13.

[35] See L. S. Wittner, *Rebels Against the War: The American Peace Movement* (Philadelphia: Temple University Press, 1984) and M. Curti, *Peace or War: The American Struggle 1636–1936*, (New York: W.W. Norton, 1936).

[36] Lauterpacht, *The Function of Law* 1933 (n. 4), 437–8.

engagement with international courts to rival the current obsession with military force.[37]

As Lauterpacht observed, the purpose of law is the attainment of peace.[38] International law has the specific purpose of preventing armed conflict – the most serious disruption of peace – by directly prohibiting the use of force and supplying alternative means for international actors to resolve their differences.[39] Despite the central importance of the prohibition on the use of force for the promotion of peace, the principle has been under sustained pressure.[40] The same challenges that Lauterpacht identified continue to weaken respect for law over war. Lawyers continue to argue on the basis of positivism for states to have maximum freedom from legal restraint.[41] As mentioned, Chapter 1 offers a new basis for generating respect for international law obligations. Building on Chapter 1, Chapter 2 offers a renewed understanding of natural law, using the prohibition on the use of force as a case in point. The prohibition on force is one of the *jus cogens* or peremptory norms that are only explainable through a legal theory other than positivism since they do not operate according to positive law method.[42] The only other explanatory account of substantive legal principles is found in natural law theory.

After setting out the aesthetics approach to law compliance and natural law, the discussion in Chapter 2 will continue with a detailed analysis of the prohibition on the use of force. Many comprehensive books on the positive law relevant to the use of force appear

[37] Among the authors writing eloquently on the undue faith in military force is Andrew Bacevich. A. J. Bacevich, *The Limits of Power: The End of American Exceptionalism* (New York: Henry Holt & Co, 2008). See also Chapter 6. Bacevich himself served for decades in the United States military and lost his son, who was fighting for the United States in the Iraq invasion of 2003.

[38] Lauterpacht, *The Function of Law* 1933 (n. 4), 346. See also L. N. Sadat, 'The Urgent Imperative of Peace', in L. N. Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force* (New York: Cambridge University Press, 2018), 548–77.

[39] International law supports peace in less direct ways, of course. See, e.g., the support for human rights and development in the United Nations Charter as part of the organization's approach to eliminating the causes of armed conflict. UN Charter, Chap. IX, un.org. See also Chapter 2.

[40] A recent study concludes that the prohibition on the use of force is 'under greater assault today than it has been in seven decades.' O. A. Hathaway and S. J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017), 417–18.

[41] For specific examples see Chapters 2–6. [42] Chapter 2.

every year.[43] These rely almost exclusively on positive law. The prohibition is certainly reflected in positive law, including, a treaty version in United Nations Charter Article 2(4) and a customary law version identified by the International Court of Justice in a seminal case brought by Nicaragua against the United States.[44] A contingent of scholars and government officials insist the prohibition is part of customary international law and on that basis argue for weaker rules, ones allowing an expanded right to resort to force by certain states.[45] The advocacy for weaker rules is only possible by ignoring natural law and asserting new interpretations of relevant positive law.[46] As Chapters 3 and 4 will recount in detail, however, these arguments for weaker rules not only disregard the peremptory status of the prohibition, they incorporate an 'unscientific' version of positivism to reach the intended conclusion.[47] By contrast to other areas of international law, the manipulation of customary law is not to expand the law. The aim has only been to weaken it.

[43] See, e.g., C. Henderson, *The Use of Force and International Law* (Cambridge: Cambridge University Press, 2018); C. Gray, *International Law and the Use of Force* 4th edn (Oxford University Press, 2018); K. Watkin, *Fighting at the Legal Boundaries, Controlling the Use of Force in Contemporary Conflict* (Oxford: Oxford University Press, 2016); O. Corten, *Le droit contre la guerre* 2nd edn (Paris: Editions A. Pedone, 2014); and Y. Dinstein, *War, Aggression, and Self-Defence* 5th edn (Cambridge: Cambridge University Press, 2011).

[44] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14.

[45] See, e.g., D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press/Frederick A. Praeger, 1958) and T. Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11', *American Journal of International Law*, 105 (2011), 244–86, 284. Respecting governments, see the official United States attempt to justify targeted killing using military force outside of armed conflict zones. United States Department of Justice, 'White Paper on Lawfulness of a Lethal Operation Directed against a US Citizen who is a Senior Operational Leader of Al-Qaida or an Associated Force' (February 2013) *NBC Media*, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), and *The National Security Strategy of the United States* 6 (September 2002), http://www.whitehouse.gov/nsc/nss.pdf. See also Chapters 2–5.

[46] Morgenthau, *Politics Among Nations* 1946 (n. 13).

[47] This loose approach to promoting exceptions that favour a state's interests is identified by Lauterpacht as 'unscientific'. Lauterpacht, *The Function of Law* 1933 (n. 4), 438.

The Art of Law takes *jus cogens* status seriously and provides a thorough assessment of the prohibition on force from that perspective. For example, the doctrine of *jus cogens* forbids derogation. It is not possible, therefore, for new rules of customary law to develop that conflict with an established peremptory norm. Any contrary state practice violates these norms; it does not change them.[48] Equally, *jus cogens* norms must be interpreted strictly to avoid derogation. Courts may discern over time that peremptory norms reach more conduct; they may not be interpreted to reach less.[49]

The prohibition on the use of force incorporates two components long identified as exceptions; one concerns the United Nations Security Council's right to authorize force and the other concerns the right of self-defence, the topics of Chapters 3 and 4. Under standard rules of interpretation these exceptions need to be interpreted narrowly.[50] The case for narrow interpretation is even stronger when the norm is *jus cogens*. Some uses of force will meet the exceptions but will still be unlawful unless they meet additional restrictions in the form of certain general principles that are also explained by natural law. Principles such as necessity, proportionality, attribution, consent, and equality are reviewed in Chapters 2–4. These principles significantly restrict the right to resort to armed force by any international actor. They may only use force when no alternatives exist and the use has a high likelihood of accomplishing the legitimate military objective without disproportionate cost.[51]

[48] United Nations Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, *reprinted in* 8 ILM. 679 (1969), Arts. 53 and 64.

[49] Chapter 2.

[50] It is 'desirable' to interpret Article 2(4) 'widely enough to ensure that any significant use of military force is banned and to give the acknowledged exception created by Art. 51 a correspondingly narrow meaning'. B. V. A. Röling, 'The Ban on the Use of Force and the UN Charter', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff, 1986), 3–8, 4–5. See also, common legal maxims derived from Roman Law, such as *singularia non sunt extendenda*, which can be translated as exceptions should not be applied extensively, and *quae communi legi derogant stricte interpretantur*, derogations from the common law should be interpreted narrowly. W. E. Lattin, 'Legal Maxims, and Their Use in Statutory Interpretations', *Georgetown Law Journal*, 26 (1938), 1–16, 7–8.

[51] The ICJ Statute includes general principles among the sources of international law. See Statute of the International Court of Justice, Art. 38(1)(c), icj-cij.org.

These legal hurdles to resort to force tend to be overlooked due to the widespread confidence in military force that has resulted from the pervasive influence of Realist theory. This confidence has yielded far more than the failure to take the peremptory status of norms seriously. It explains why proponents of using military force resort to moral and ethical arguments to add weight to the thin evidence of legality in positive law. The moral claims have included assertions that certain norms are superior to and therefore trump the prohibition on force or that immoral or undemocratic governments lose the legal protections enjoyed by their states. The quixotic assertion is even made that the prohibition on force is somehow an unjust law if it prevents righteous actors from using force in causes they deem good. The argument is that unjust law is not law – *lex iniusta non est lex* – and, therefore, not binding. Law violation in the pursuit of higher moral principles or values is claimed to be justified or excused.[52]

Scholars and government officials are using such arguments to claim rights of military intervention either on behalf of a government or on behalf of a government's opponents seeking regime change or secession.[53] Advocates for broader rights to resort to force attempt to argue that international law does not apply to intervention with a state's or rebel movement's consent. Human rights law may apply but nothing more. Chapter 5 reaches a different conclusion. The case is made there that the prohibition may well apply to both situations. The prohibition on force of natural law is not restricted to the interstate use of force by UN member states. The first use of major armed force by any state or non-state actor is prohibited unless authorized by the UN Security Council.[54]

Moral arguments do not alter this conclusion. Arguments using moral justification omit the fact that the prohibition on the use of force is itself *jus cogens*, a higher ethical norm. The prohibition in Article 2(4) has equal status to the prohibition on genocide. It has

For the general principles at issue here see, J. Gardam, *Necessity and Proportionality*, (Cambridge: Cambridge University Press, 2004), 4–5 and B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens and Sons, 1953), 70–7, 71, 74.

[52] For several of these arguments, see H. H. Koh, 'The War Powers and Humanitarian Intervention', *Houston Law Review*, 53 (2016) 971–1033, 1004–15. See also Chapter 5.

[53] O. Corten, 'La Rebéllion et le Droit International: Le Principe de Neutralité en Tension', *Hague Recueil des Cours*, 374 (2015), 53–312.

[54] Chapter 5.

a higher status than other human rights. There is no justification for violating a peremptory norm, not even in the interest of trying to get compliance with another norm of equal status.

The moral arguments generally tend to be special pleading, attempting to privilege a particular state not all subjects of international law equally.[55] The arguments are invalid for this and many other reasons, including that in international law states have equal status before the law. Non-state actors also have equal rights and duties to others within their category. What sets international law apart, what makes it the law of an international community, is the absence of an imperial power with superior rights and privileges. As will be discussed in Chapter 3, critics often remark that the Permanent Members of the UN Security Council have the privilege of exercising the veto over decisions of peace and security. The veto represents authority within the UN to exercise deliberative judgment on behalf of UN members. It provides no higher status as states to these five members. It does, however, obligate the five to act in the promotion of peace.[56]

The Permanent Members have the duty to lead in promoting peace through law. Instead, all five take exceptionalist positions with respect to the prohibition on the use of force and the duty of peaceful settlement of disputes. Permanent Members are obligated not only to respect the negative obligations to refrain from resort to force but to model law compliance.[57] Only the United Kingdom still accepts the ICJ's compulsory jurisdiction, and its acceptance is hemmed in with reservations.[58] All five frequently resort to unlawful military force. To illustrate this central structural and political challenge to the law of peace, each chapter begins with a significant failure by a Permanent Member to comply with the law on the use of force or the peaceful settlement of disputes. Their conduct undermines the very source of prestige they value by remaining a P5 member.

[55] Cf. Lauterpacht, *The Function of Law* 1933 (n. 4), 6.
[56] See UN Charter, Chap. IV.
[57] M. E. O'Connell, 'Peace Through Law and the Security Council: Modelling Law Compliance', in J. Farrall and H. Charlesworth (eds.), *Strengthening the Rule of Law Through the UN Security Council* (New York: Routledge, 2016) 255–69.
[58] In 2018, only the United Kingdom continued to accept ICJ compulsory jurisdiction but with extensive reservations. The UK amended its acceptance again on 22 February 2017. The USA and France withdrew in 1984 and 1974 respectively. Russia and China never accepted compulsory jurisdiction. ICJ, 'Declarations Accepting the Jurisdiction of the Court as Compulsory', https://www.icj-cij.org/en/declarations.

The approach to these case studies of failure by the Permanent Members follows the classic international law analytic method of applying the law to concrete cases. International law is the legal category perhaps most open to philosophical reflection but rarely are these reflections abstract.[59] To see the importance of the natural law, peremptory norms, and general principles restricting resort to force is to apply them in real-world situations. International law relies as much as any law on informed public opinion. Analysis of the law violations by the Permanent Members in North Korea, Syria, Ukraine, Mali, and the South China Sea not only demonstrates the law of greatest concern in this book – the law of peace – but legal analysis of these cases also serves to inform the international community about non-compliance by actors with the highest duty to lead. It shows how far they stand from the ideal envisioned by Lauterpacht at the end of World War II.

The cases also underscore the limited utility of resort to military force. They contradict the promises of Realism. An armed conflict continuing for decades can only be assessed a failure.[60] The tragedy of such failure is all the greater given the available alternatives to the use of force. International law supports a variety of means for peaceful settlement of disputes, each with a better record of success than military force. Yet, through a confluence of factors, military force has achieved a dominant place in intellectual life on all continents but Antarctica.[61] Confidence in military force supports the

[59] M. Koskenniemi, 'International Law in the World of Ideas', in J. Crawford and M. Koskenniemi, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 47–63, 47.

[60] For just two examples, see, C. J. Chivers, 'Wars Without End', *New York Times* (8 August 2018), available at www.nytimes.com/2018/08/08/magazine/war-afghanistan-iraq-soldiers.html ('The Pentagon's failed campaigns in Iraq and Afghanistan left a generation of soldiers with little to fight for but one another.' Ibid.) And, 'Democratic Republic of Congo profile – Timeline', *BBC* (1 August 2018), available at www.bbc.com/news/world-africa-13286306. Ongoing conflict in the Democratic Republic of the Congo (formerly Zaire) began in 1996.

[61] At time of writing, civil war looms in Venezuela and Nicaragua but the long civil war in Colombia is being ended through a model peace process. 'The Spector of Civil War in Venezuela', *Washington Post* (3 August 2017), https://www.washingtonpost.com/opinions/the-specter-of-civil-war-in-venezuela/2017/08/13/aaa07852-7ecd-11e7-a669-b400c5c7e1cc_story.html?utm_term=.e0acd112c2a9 and O. J. Pérez, 'Can Nicaragua's Military Prevent a Civil War?', *Foreign Policy* (3 July 2018), https://foreignpolicy.com/2018/07/03/can-nicaraguas-military-prevent-a-civil-war/. On Colombia's peace process, including agreements

vast spending on armed conflict and weapons technology, which, in turn, builds an industry with a profit motive to lobby for the purchase, use, and replacement of their products. A major effort is underway to create computers that select and destroy without human intervention in the 'kill' decision.[62] Resources are devoted to 'slaughterbots' rather than controlling greenhouse gases, a truly existential threat to the planet. Investment choices are driven by ideas. Ideas that can change.

Regenerating interest in the idea of prohibiting force through law and substituting peaceful dispute resolution requires persistence, creativity, and vision. Long-separated from the transcendent ideas that gave rise to them, interest in alternatives to war has declined dramatically. Peaceful settlement through international legal process is no longer promoted as a cause. The driving force behind the proliferation of courts and tribunals in the late twentieth and early twenty-first century has been interest in specific substantive areas. Arguments are no longer made in favour of the compulsory jurisdiction of the ICJ. Advocates do not pursue expanding the ICJ's jurisdiction or the scope of Article 2(4).

Lauterpacht wrote passionately of the ideas of transcendence integral to international law.[63] He invited the international community to embrace those ideas in the wake of world war. The international community is currently experiencing a 'piecemeal' World War III.[64] To exit this war requires, once again, a renewal of confidence in the law of peace. Philip Allott sees the possibility of at last making 'a world without war'.[65] This book contributes to his vision by restoring the ideas of transcendence at the heart of international law. It responds to what Allott

reached between the government and principal opposition groups, see http://colombiapeace.org/.

[62] On the basic facts and ethical challenges of lethal autonomous weapons systems, see D. Amaroso and G. Tamburrini, 'The Ethical and Legal Case Against Autonomy in Weapons Systems', *Global Jurist,* (2017), available at https://www.degruyter.com/view/j/gj.ahead-of-print/gj-2017-0012/gj-2017-0012.xml and R. Sparrow, 'Robots and Respect: Assessing the Case Against Autonomous Weapons Systems', *Journal of Ethics and International Affairs*, 30 (2016) 93–116.

[63] 'A stable law is rooted in passion, and does not transcend it.' P. Gewirtz, 'Aeschylus' Law', *Harvard Law Review*, 101 (1988), 1043–55, 1047.

[64] 'Pope Francis Warns on "Piecemeal World War III,"' *BBC* (13 September 2014), bbc.com/news/world-europe-29190890.

[65] Allott, 'Towards Utopia', 2017 (n. 24).

calls 'the sordid justifications of war [that] persist and, in the 21st century, are being strengthened by the emerging of new forms of old atavisms'.[66] These justifications rely on international law but do so erroneously. The chapters that follow explain why.

Law is more art than science; it is composed of theory, substance, and process, and draws on all sources of human knowledge – the rational, the emotional, and the spiritual. Promoting compliance requires understanding, coercive means of enforcement,[67] positive benefits,[68] and the conviction that compliance is a moral good, that it is doing the right thing. Revitalized natural law, supported by the insights of aesthetic philosophy, reveal the morality of law, the good of law compliance, non-violence, and peaceful settlement. Hersch Lauterpacht encouraged just such a holistic approach when he extolled Grotius's appeal 'to the law of love, the law of charity, ... and of goodness'[69] on behalf of the international community.

[66] Ibid.

[67] On the means of coercive enforcement in international law and their essential role in distinguishing law from other order systems, see M. E. O'Connell, *The Power and Purpose of International Law, Insights from the Theory and Practice of Enforcement* (New York: Oxford University Press, 2008).

[68] On the benefits of law compliance, see L. Henkin, *How Nations Behave* 2nd edn (New York: Columbia University Press, 1974).

[69] Lauterpacht, 'The Grotian Tradition' 1946 (n. 5), 25.