

Recent Publications

Slavery in International Law: Of Human Exploitation and Trafficking. By Jean Allain. Leiden: Martinus Nijhoff, 2013. Pp. xi, 428. Price: \$220.00 (Hardcover). Reviewed by Joseph Saei.

Jean Allain's work is primarily a chronological exposition of the legal norms and formulations that first justified and then eventually criminalized slavery, from Aristotle to modern day conventions. Allain's ambition is to lead social scientists and legal practitioners out of a "definitional quagmire" and into a "shared understanding" of what he believes to be the ultimate definition of slavery, from article 1(1) of the 1926 Slavery Convention: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (pp. 109, 112). Whether and to what extent he succeeds will not be entirely clear to readers unfamiliar with the pre-existing literature on slavery and international law, but signs of defeat surface toward the end of the work. The most argumentative and therefore fascinating portion of Allain's book is its penultimate chapter, in which he applies the hoary legal doctrine he tries to modernize in the earlier chapters to a modern-day situation: the civil war in Sierra Leone (1991-2002).

Before arriving at the case of Sierra Leone, the work draws particular attention to a legacy of legal and doctrinal uncertainty left by slavery on modern international courts and codifying-bodies. These bodies have struggled to marshal the doctrine to prosecute the full spectrum of coerced labor and servitude present in modern societies. The *Brima* case of the Special Tribunals in Sierra Leone is therefore a key data point that provides Allain with a concrete example of how one court wrangled with international slavery law. In this situation, the factual context is the phenomenon of "bush marriages," a type of forced labor and sexual violence perpetrated against kidnapped women in the conditions of civil war.

The Special Court for Sierra Leone was formed in 2002 to consider, among other things, the crime against humanity of enslavement, and in 2007 the Trial Chamber heard the *Brima* case, in which it convicted three leaders of the Armed Forces Revolutionary Council, one of several factions active during the war (p. 289). The phenomenon of "bush wives" or "rebel wives" is a universally condemned practice in which soldiers capture women and—under the threat of extreme violence—subject them to rape and compel them to perform household and other field duties, sometimes including participation in live combat. In the *Brima* Case the Appeals Chamber disagreed with the Special Trial Chamber over how such "bush marriages" ought to be characterized. Allain claims that the disagreement between the trial and appellate courts is indicative of a broader conflicted understanding in international law when it comes to applying the legal doctrine of slavery.

At issue is why the Trial and Appellate Chambers in the *Brima* case di-

vided over whether to categorize the “bush wife” phenomenon under the heading of sexual slavery (an “outrage against human dignity” and so a war crime) or the heading of forced marriage (an “inhumane act” and so a crime against humanity) (pp. 303-04) (citing the language employed by the tribunals). The trial court decided to classify forced marriage as a type of sexual slavery, in effect putting the phenomenon into the war crimes category. The Appeals Chamber then reversed, opting to classify forced marriage separately as a crime against humanity (p. 304).

Having explained this procedural history, Allain begins an attack on the Appeals Chamber, agreeing with the trial court that forced marriage should be categorized as slavery. Allain relies on a bizarre assertion that the Appeals Chamber was somehow sanctioning the bush marriages as legitimate marriages by its disposition of the case. However, this reasoning elides a crucial distinction; the court was not trying to rule on whether “bush marriages” count as slavery writ large, but whether they constituted a type of *sexual* slavery, a much narrower category with its own distinct features, and a war crime. It seems that Allain unfairly attacks the court for not determining a broader academic question that it was never tasked with deciding. His acknowledgement that the mistake may have originated with the prosecution’s failure to make their accusation of slavery a separate count further undermines his broad reading of the court’s decision as forever foreclosing the possibility of understanding forced marriage as sexual slavery.

Allain believes that the relevant challenge faced by the court was to apply old slavery doctrine (according to his understanding, rooted in the 1926 definition) to novel iterations of human oppression, which mix the old forms to create new species of atrocity. This understanding of what the court sought to accomplish errs by implicitly favoring reification and codification of doctrine over evolution and flexibility of application. Allain wishes to anchor the modern definition in the old doctrine and “provide a foundation not only for legal cases to move forward, but for a shared understanding of slavery across the social sciences[,]” a reference point “much needed within the context of the study of contemporary slavery.” (p. 109). Allain never explains why it is necessary or even desirable to synchronize social science with (a presumptively valid) legal formalism in the face of variegated and shifting types of oppression. He frequently merges legal and social-science questions without indicating that the two types of inquiry have distinct aims. Allain hints at the positive practical effects of his preferred definition but never states outright what these might be. One is left asking what, from the perspective of a victim, is the practical value of a unified definition.

The court’s real struggle to categorize a new kind of atrocity was in fact a fascinating exploration of the boundaries and possible overlap of slavery and other forms of forced labor. To his credit, Allain does set out these boundaries early in the book, but he brushes them to the side in the case study. What makes bush wife status a form of servitude distinct from those previously considered is that it is a class of servitudes attached to a particular gender. These servitudes have the added complexity of using socially sanctioned forms of labor division

to achieve greater legitimacy and social sanction. Allain mentions this tension in passing, but his analysis is strained by an incongruous and vague defense of the institution of marriage, which he believes to be under attack in the Appeals Chambers.

Allain impugns the motives of the court without explaining to readers why such suspicions are justified. This space would have been better spent exploring the more interesting question of *why* the court opted for one categorization when other options were available. Allain argues:

Protection should have been afforded to the victims of such “forced marriages” through the disavowing of the language of the perpetrators, in recognizing that the crime was in no way conjugal association or a marriage in the sense of a unit which is fundamental to building a family and, by extension, to a society worth living in (p. 308).

This reaction to the Appeal Chamber’s ruling is confusing on multiple levels. First, it erroneously suggests that the court’s distinction between forced marriage and sexual slavery amounts to sanctioning forced marriage by equating it with the broader concept of marriage. It seems more likely that the perpetrators would have simply said “wife” or “marriage.” The adjective “forced,” as employed by the court, serves as an adequate indicator of the coerced and violent nature of the relation. Second, Allain implies that the Appellate Chamber foreclosed the possibility of forced marriage ever rising to the level of slavery. However, the court could have elected to find multiple convictions under the same facts, but it simply opted not to rule on that issue. Opting not to rule on one crime because of prosecutorial fumbling is distinct from issuing a decision that forecloses that crime arising under similar facts ever again.

An alternate view that Allain never explores is that the Appeals Chamber chose to distinguish forced marriage from sexual slavery for compelling reasons. If, for example, the court had agreed with Allain and found that forced marriage was a kind of sexual slavery and thus a war crime, then the precedent might have applied narrowly to situations of war and conflict. The court’s choice to characterize forced marriage as a human rights violation may have been an attempt to broaden the scope of application of the holding. Allain could have expounded a number of interesting alternate theories, but he eschews a more nuanced discussion in favor of a bizarre tirade against the court and in defense of the institution of marriage: “the Special Court for Sierra Leone has . . . done a disservice to the institution of marriage by labeling what transpired during the Civil War in Sierra Leone as forced marriage” (p. 307). Again, Allain assumes without apparent justification the worst of the appellate court. It would be more interesting to think about whether, and to what extent, marriages may be legally indexed as “forced” outside the context of a war zone, and whether the “institution of marriage” is not also used to create effective situations of slavery even in times of relative peace.

Another problem with Allain’s analysis is that the markers “slavery” or “sexual slavery” alone do not capture the complexity of the relation between

the soldiers and the captured women. His critique treats the court's choice of words as a distortion of what marriage is normally like. Allain remarks: "A second justification for rejecting the nomenclature of "marriage" in "forced marriage" is that there exists an international legal obligation, under Article 23 of the International Covenant on Civil and Political Rights, to protect the family, of which the entry point is deemed marriage" (p. 307).

Allain does not explain why the special tribunals in Sierra Leone would have been concerned with the civil right of marriage or with protecting the positive right to marry, when the question with which they were presented in the *Brima* case was rather how to condemn, in the strongest terms possible, an oppressive practice which was described by the oppressors as marriage in order to feign legitimacy. One is left wondering why, rather than attacking the court for finding a new crime against humanity called "forced marriage," Allain did not congratulate the court for understanding that the term marriage is frequently used to sanction slavery-like practices in both war and peace. Contrary to Allain's claim, it is more likely that the new crime of "forced marriage" will give courts increased flexibility in determining when a crime has been committed. The slavery threshold is not foreclosed, but it is not deemed necessary for the crime of forced marriage. This means that there is a new crime with broader application that does not require the stricter scrutiny of slavery, traditionally defined, but which may nevertheless reach that level as well. Allain's analysis fails to contemplate the argument that the court's characterization of the crime as "forced marriage" is a more nuanced and realistic one that captures the unique power dynamics and psychological manipulations particular to this offense.

Allain's treatment of the *Brima* case is difficult to follow and it is full of contradictions. The most glaring contradiction is his defense of the institution of marriage in the context of a discussion of the legal doctrine that criminalizes slavery. This doctrine, as Allain repeats throughout his book, is based on a stable definition of slavery as the exercise of any or all of the powers attaching to the right of ownership over a person. It is difficult to understand why Allain neglects to acknowledge that even "legitimate" marriages are used in other contexts to effect a kind of permissible forced and sexual labor and why he does not think there is a tension between the institution of marriage and slavery doctrine. For example, the phrase "marital rape" is a contradiction in terms in many societies. We might ask why law regarding consent to marriage tends to focus on a discrete act of consent at the beginning of a relation but does not conceptualize consent as an ongoing phenomenon. Is a marriage initially consented to capable of evolving into a forced marriage? Finally, we could explore whether the international law of slavery, forced labor, and lesser servitudes is a primarily male-driven doctrine that fails to adequately address gendered forms of servitude and labor.

War and War Crimes: The Military, Legitimacy and Success in Armed Conflict.
By James Gow. New York, NY: Columbia University Press, 2013. Pp. vii, 211. Price: \$37.50 (Hardcover). Reviewed by Ben Picozzi.

In contemporary conflicts, neither the international tribunals that apply principles of international criminal law nor the public that sends troops to war actually participate in warfare.¹ This is significant, James Gow argues, because the military's ethical beliefs differ fundamentally from the beliefs of those who judge its members and do not share their wartime experience. Their disregard for its beliefs erodes the military's confidence in those who legitimate their conduct.

Gow's *War and War Crimes* attempts to correct this by giving voice to the concerns of military officers who struggle with moral and professional dilemmas in the conduct of their duties. To accomplish this, Gow conducts interviews with senior military practitioners and presents their responses alongside the theory and history of international criminal law. He concludes that "[n]o issue of criminality relating to the conduct of military operations can, or should, be understood without reference to the specifics of the context in which an event occurred" and that "[t]he judgement [sic] of military professionals . . . is the appropriate way to determine the point at which issues of criminality should be assessed" (p. 140). Gow's argument, however, suffers from his failure to connect theory and history to practice. This is evident not only in his failure to apply this theory and history to contemporary examples, but also in his failure to apply them in his discussion of the interviewees' responses.

Gow's argument is strongest when its connection to his interviewees is greatest. Chapters Four and Five report the participants' responses to general and specific questions concerning the contradictions between justice and strategy. Generally, participants were highly sensitive to war crimes accusations. Rightness of action, they argued, depends on the military context (pp. 77-80). Actions impermissible in one context may be permissible in others. Although participants did not agree on the appropriate course of conduct in some hard cases, for example, whether issues of force protection might require the killing of prisoners of war, they agreed that the moral rules of necessity and proportionality are affected by strategic concerns (pp. 94-98).

However, participants argued that the non-military public did not share this belief. They expressed dissatisfaction with the failure of the public to understand the difficulties of wartime decisionmaking and its contextualist ethics. As one participant argued, "[t]he societies who send people to war have no idea what war is about. They want to apply their ethics" (p. 73). Similar concerns arose with respect to war crimes prosecutions, which often do not apprehend military considerations. Instead, they argued, their conduct should be judged by fellow professionals. Judgment requires experience, and only those with that experience can reliably evaluate this conduct given its contexts (pp. 83-84).²

1. See Allison Danner & Erik Voeten, *Who Is Running the International Criminal Justice System?*, in *WHO GOVERNS THE GLOBE?* 35, 54-55 (Deborah D. Avant et al. eds., 2010). No International Criminal Tribunal for the former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR) judges were career military professionals prior to election. *Id.*

2. Gow does not disclose the participants' biographical information, but claims that the participants represented roughly all areas of all continents, and that their responses did not vary significantly by nationality (pp. 19-20). Notwithstanding this, the reported responses appear to represent institutions with high levels of organization and professionalism and formal procedures for prosecuting war

Unfortunately, the remaining chapters are less interesting. Gow's argument weakens as he strays into the theoretical. Chapter Two introduces the Multidimensional Trinity Cubed Plus, on which Gow heavily relies. The concept, inelegantly abbreviated as the Trinity³(+), describes the political environment in which modern wars are waged. The legitimacy of modern wars, Gow argues, depends not only on the trinitarian relationship between the government, military, and people in the warring party, but also similar relationships between groups in the opposing party and third parties (p. 37). Military professionals must manage their relationships to all other groups in this environment to legitimate their conduct.

Gow's description of the political environment is potentially powerful because it suggests the difficulty of this task. However, he rarely applies the concept to specific situations and, consequently, misses opportunities to strengthen his argument. For example, Gow invokes the concept to discuss problems of legitimacy that arise when military and non-military groups disagree, but does not consider disagreements between multiple non-military groups. Yet, the latter are potentially more interesting in terms of the dilemmas that they create for military practitioners. In the United States, for example, war-making powers are often divided among political actors.³ Disagreements between these actors were manifest in partisan disputes over the Afghanistan and Iraq conflicts. After the 2006 elections, a Democrat-controlled Congress challenged the Bush Administration by holding hearings on Iraq and American foreign policy generally.⁴ The Obama Administration has since faced similar challenges, including challenges to the military's treatment of enemy combatants.⁵ How would military practitioners respond when a war-opposing legislature attempts to oversee the conduct of a military commanded by a war-supporting executive? Would this change if the public overwhelmingly favored one side? Gow does not address these or similar questions.

Similarly, Gow does not consider problems that arise when groups in the warring party disagree with their counterparts in third parties about their military's conduct—for example, when the military's conduct is domestically popular but internationally unpopular. Again, the Iraq conflict is exemplary. In

crimes. Specifically, the United Kingdom, the United States, and former Yugoslavian republics appear disproportionately represented. Further research disaggregating responses by institution could reveal how national and organizational factors influence military personnel's attitudes. Indeed, there are good reasons to believe these dependencies might exist. In countries with weak civilian control, militaries are shielded from civilian oversight. Hence, civilian inquiries into the ethics of their wartime conduct may not arise. See, e.g., Aurel Croissant et al., *Beyond the Fallacy of Coup-ism: Conceptualizing Civilian Control of the Military in Emerging Democracies*, 17 *DEMOCRATIZATION* 950, 962 (2010) (“[W]eak civilian control will . . . undermine . . . institutional checks-and-balances . . . [M]ilitary dominance over decision-making areas shields those policy matters from civilian oversight. That is, even if there are autonomous civilian agencies these cannot function as institutional counterweights in those areas which are exclusively dominated by the military.”).

3. James M. Lindsay, *The Shifting Pendulum of Power: Executive-Legislative Relations on American Foreign Policy*, in *DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY* 223, 225-26 (James M. McCormick ed., 6th ed. 2012).

4. James M. McCormick, *Introduction: The Domestic Sources of American Foreign Policy*, in *DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY* 1, 9 (James M. McCormick ed., 6th ed. 2012).

5. *Id.*

coalition countries, large majorities believed that their militaries tried very hard to avoid civilian casualties.⁶ However, these opinions were not shared globally. By contrast, most Muslim countries believed that the coalition forces' conduct was inadequate.⁷ Similar differences existed with respect to whether Iraqis were better off as a result of the intervention.⁸ How do military practitioners measure legitimacy and legality under these circumstances? Although accountability to both domestic and international societies may be important, military practitioners may feel more beholden to the former.

Gow also occasionally loses his argument in the Trinity³(+)'s abstractness. In an especially troublesome passage, Gow refers to the Trinity³(+)'s "honeycombed triangles and multiple three-dimensional diamond rhomboids" (p. 134). Although such passages are not outright misleading, they do nothing to further his argument, suggesting that the concept's utility is not worth the layer of indirection it creates. Gow's argument would be easier to follow if he described these relationships between parties in concrete, historical terms.

The greatest failing of the Trinity³(+), however, is that it is irrelevant for much of the book. Gow does not discuss the concept with participants and rarely references it in his analysis of their responses. When he does, it does not provide any insight that could not be provided by reference to a simpler concept, such as "context," without the difficulties that the neologism creates. For example, Gow writes that "the conceptualization involved in strategy, transmitted to operations and tactical action, is all about context, that is, it is always part of the Trinity³(+)" (p. 89). But this reference to the Trinity³(+) is unnecessary, since "context" already supplies its meaning.

Another failing of the book is that Gow's historical analysis of war crimes is poorly integrated. Chapter Three describes the development of the laws of war and the tribunals established to enforce them. Gow's analysis, however, is burdened by his discussion of these bodies' procedural details. Gow does not return to these details in his analysis of the participants' responses. Chapter Six describes several weaknesses with tribunals based on the participants' responses, but does so ahistorically. Are these weaknesses inherent to the tribunals' institutional structure or a product of the evolution of war crimes? Or do they merely arise from the peculiarities of the individual participants' situations? If the tribunals' interaction with the military is problematic, Gow does not make the nature of the problem explicit.

This is a missed opportunity; Gow's historical account of war crimes could have been a rich source of analysis. His history suggests that the modern absolutist morality defining war crimes, which conflicts with military practitioners' preferred contextualist morality, might have arisen in response to twentieth-century experiences with genocide and other crimes against humanity. Gow acknowledges the modern blurring of humanitarian law with an absolutist human rights law (p. 130). However, his own history suggests that the

6. PEW RESEARCH CTR., VIEWS OF A CHANGING WORLD 24-25 (2003).

7. *Id.*

8. *Id.* at 25-26.

trend towards absolutism occurred much earlier and, as a result, the conflict may be more fundamental and, hence, difficult to solve.⁹ If this is true, then better integrating military practitioners into the existing tribunal framework may not be sufficient. It may be necessary to rethink the moral and legal assumptions that underlie that framework.

Despite these shortcomings, *War and War Crimes* presents a compelling account of military concerns with the war crimes regime. The importance of understanding these concerns extends beyond their relevance for legal institutions. Such concerns are representative of the larger cultural gap that exists between military and non-military communities. Although reconciliation on a single issue or set of issues will not close the gap, it is nevertheless necessary for maintaining a healthy civil-military relationship, upon which military effectiveness and national security depend.¹⁰

Ending Wars Well: Order, Justice, and Conciliation in Contemporary Post-Conflict. By Eric D. Patterson. New Haven, CT: Yale University Press, 2012. Pp. ix, 206. Price: \$55.00 (Hardcover). Reviewed by Steven Levy & Britta Redwood.

In his musings on human nature and the stabilization of (re)conquered territories Niccolò Machiavelli wrote that “men should either be caressed or crushed; because they can avenge slight injuries, but not those that are very severe. Hence, any injury done to a man must be such that there is no need to fear his revenge.”¹¹ Essentially, Machiavelli advocated for two mutually exclusive post-bellum policies designed only to ensure Order—act with utter mercy or practice total subjugation—and warned that the middle path was a road to ruin. Throughout *Ending Wars Well: Order, Justice, and Conciliation in Contemporary Post-Conflict* Eric D. Patterson explicates a Machiavellian (in the literal rather than the pejorative sense of the word) post-war model that, in its pragmatic, amoral, and regime-agnostic approach, bears important similarities to its progenitor. Although Patterson does not cite Machiavelli, both their models prioritize Order above all else and recognize that wounding the conquered without permanently crippling them is a recipe for disorder. Moreover, aside from Patterson’s contention that Order should be pursued because it is a moral good in and of itself, both models are explicitly amoral. But it is crucial to note that although Patterson cloaks his arguments in amorality, he is proposing poli-

9. Gow argues that “Nuremburg began a blurring of boundaries that has continued to mark the realm of international criminal law” (p. 52). However, this blurring refers to the blurring of state and individual responsibility.

10. Peter Feaver and Richard Kohn argue that “at present the gap between the military and society in values, attitudes, opinions, and perspectives presents no compelling need to act to avert an immediate emergency. However, there are problems that, if unaddressed, will undermine civil-military cooperation and hamper military effectiveness. The result might well harm the national security of the United States.” Peter D. Feaver, Richard H. Kohn & Lindsay P. Cohn, *The Gap Between the Military and Civilian in the United States in Perspective*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 1, 11 (Peter Feaver and Richard H. Kohn eds., 2001).

11. NICCOLÒ MACHIAVELLI, *THE PRINCE* 9 (Quentin Skinner & Russell Price eds. & trans., Cambridge Univ. Press 1988) (1532).

cy recommendations to intervening parties (e.g., the West) that invariably claim to have moral justifications and motivations for their interventions. Patterson's writing style is characterized by accessibility, momentum, and brevity. He seeks to appeal to a wide audience, stating in his conclusion that the book will be a success if it proves equally useful to "a lieutenant in Kandahar, an aid worker in South Sudan, a diplomat in Sri Lanka, and a student at Oxford" (p. 178). By avoiding discipline-specific jargon, enlisting intelligible primary sources, and remaining concise, he has certainly accomplished this goal. Patterson's work reads like a manual—short chapters punctuated by signposts that signal to the reader what prong of his framework is being explored, and by what means. This is no small feat given how nuanced and example-rich his arguments are.

Patterson is inspired by what he calls "the defining conflict of our time:" the Iraq War (p. 1). The complexity of the conflict—which raises issues of preemption, terrorism, humanitarian intervention, multilateral involvement, and the obligations of post-war reconstruction—makes it an archetype for the host of complicated, protracted conflicts that the United States and other Western countries have led or participated in over the course of the last quarter century. The Iraq War is not only typical in the questions that it raises, but also typical of a certain kind of failure. Patterson's book seeks not to set out a systematic critique of these failures, but to provide a framework for thinking about what kinds of actions policymakers, aid workers, and military leaders need to take in order to ensure that wars end well.

Patterson's framework is threefold. The first priority in any post-conflict situation, he argues, is ensuring Order. Order is identified by Patterson as a moral good and an end in itself, as Order is the necessary basis for the flourishing of a number of other social goods. Justice is closely related to Order because a feeling of deep injustice may eventually upset Order, even if this occurs many years later. The Treaty of Versailles is one of history's most poignant examples of this idea. Even if the Allied Powers were justified in punishing Germany's belligerence to the extent that they did, their severe terms left Germany humiliated and hungry for vengeance. Germany—the paradigmatic case of Machiavelli's man dealt an injury strong enough to enrage him yet too weak to permanently cripple him—therefore moved to upset the post-war Order as soon as it could. Once Order has been established and steps toward Justice have been made (even if rather limited ones), Conciliation may occur. Patterson acknowledges that Conciliation is a rare occurrence, and may happen only many years after the conflict has formally ended. Conciliation is, however, the ultimate sign of a war ending well. Patterson portrays the concepts of Order, Justice and Conciliation as a diagram in the form of a pyramid of which Order is the base, Justice, resting on Order, is the middle level, and Conciliation, a rare and definitive sign of success, is the crowning peak (p. 162).

Throughout the book Patterson uses historical examples to illustrate his thesis; at certain points, however, Patterson is guilty of massaging facts to suit his ideas. For instance, during his discussion of Conciliation he states, "Reconstruction ended in 1876 as a result of political compromise" (p. 105). First of

all, this “political compromise” occurred in 1877 rather than 1876.¹² More significantly, however, framing this event as a “political compromise,” and thereby suggesting that it was a duly considered, formalized agreement between Democrats and Republicans, is misleading. This “political compromise” was in fact an informal, unwritten, backroom scheme engineered by a few actors in each party that furtively traded the freedom of southern blacks for Democratic acceptance of a Republican president.¹³

Patterson also cuts corners to suit the thesis when he argues that “the West still mistakenly thinks economic development is the root of Order when, in truth, it is the fruit of stability and security” (pp. 177-78). In reality, Order and economic development are locked in a reciprocal interrelationship in which economic development bolsters Order and vice versa. This distortion of bidirectional relationships also manifests itself in related parts of his analysis, such as his contention that “we fail to recognize that often what we think are the *seeds* of peace and security (access to water, sanitation, education) are actually the *fruits* of peace and security” (p. 10). Once again Patterson seems oblivious to the fact that these factors interact as either a vicious or virtuous cycle whereby the decline or ascent of one produces the decline or ascent of the other. This apparent nescience is particularly jarring given Patterson’s grasp of the similar reinforcing dynamic that exists between Order and Justice. It is conceivable that Patterson is making these claims neither out of ignorance nor to cut corners, but to bring his position in sharper contrast with the neoconservative architects of the wars in Afghanistan and Iraq, the foremost proponents of the notion that economic development produces Order. Whatever his motivation, his misrepresentation or flattening of the facts do more to distract than they do to bring his ideas into sharper relief.

Even setting aside certain oversights in the facts that Patterson makes, some aspects of Patterson’s central thesis concerning the dialectic between Order and Justice are deficient. In Patterson’s view, “sweeping efforts at Justice can be imprudent or even destabilizing, but in those cases where some Justice is possible, it can help found and sustain a deeper, richer peace” (p. 72). Thus, while Order must precede Justice, Order often depends in many ways on the feeling that Justice has been or is being done. The argument that Order and Justice are reliant on one another is intuitive—if one party to a conflict feels that they have been wronged, the ensuing peace may be only transient. In order to ensure that Justice does not come to threaten Order, Patterson cautions against fulfilling what may be the full demands of Justice. Justice should be a performance, the procedural and even substantive requirements of which remain loose.

These are valuable insights but Patterson concludes his analysis prematurely: he merely identifies some amount of Justice as a possible prerequisite for ending wars well without offering any guidance on *whose* Justice should prevail. This is inherently problematic because the kinds or content of Justice

12. C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3-4 (3d ed. 1967).

13. *Id.* at 3-21.

that is called for will vary tremendously based upon *whose* Justice is being executed. For instance, survivors of genocide may not, and likely will not, have synonymous notions of Justice, and by extension prefer the same legal prescriptions, as interveners from a completely different cultural context. Moreover, it is mistaken to assume that either the survivors or the interveners are monolithic groups ready to rally around a common conception of Justice and associated legal scheme. Patterson is silent on which species of Justice should be chosen when there are conflicts—as there almost certainly will be—between and even within groups like these.

These issues are instantiated in a particular example that Patterson explores in his work: the quest for Justice in the aftermath of the 1994 Rwandan genocide (pp. 87-93). Ultimately domestic and foreign policymakers chose to implement very different legal prescriptions: the Gacaca Court system and the International Criminal Tribunal for Rwanda (ICTR) respectively. The Gacaca Court system emerged in the wake of the Rwandan genocide as an alternative to traditional criminal trials; the fledgling government in Rwanda was simply unable to try the tens of thousands of people implicated in the atrocities. These courts were based on traditional, communally enforced law and overseen by locally appointed community leaders or elders. Even though the Gacaca Courts have prioritized Order over Justice by expediting the trial process, they have come under criticism of major international watchdogs such as Human Rights Watch. These organizations worry that the trials are unfair because the accused are tried without the benefit of lawyers, and that potential witnesses remain open to the threat of violence. The results of these trials have not yet passed into the realm of history, and therefore it is unclear whether these criticisms of Justice will eventually have a bearing on Order.

The Gacaca Court system, intimate, traditional, communally enforced, stands in stark contrast to the other method of seeking Justice employed in the wake of the genocide—the ICTR. The ICTR was established by the United Nations Security Council and is located not in Rwanda, but across the border in Tanzania. The court's judges come from around the world. So far, the ICTR has indicted only 95 individuals and finished proceedings against 31. While the ICTR is more likely to escape certain criticisms of the international community, the trials have been lengthy, expensive, and remote, far from the sightline of those who were wronged.

The concept of Justice demands its content to be meaningful. Even Rwanda's case, a relative success, raises important questions about how Justice should be administered and facilitated in cases in which the international community has intervened. Whose Justice will prevail? Are crimes properly viewed as transgressions against a particular community (the Hutus), or as crimes against humanity? Patterson tells us that Justice both depends upon and supports Order, but in the difficult case of intervention—the very case he is trying to address in his book—we are not given a metric for that Justice. The policymaker, deciding in the moment on one option over another, cannot know whether his choice of kilograms will be delegitimized when, in two generations, the progeny of those who have been held to that measure protest that it

should have been conducted in pounds.

Patterson's discussion of Conciliation, like his analysis of Justice, is also incomplete. The ultimate sign that a war has ended well is a conciliatory gesture performed on behalf of a sovereign party. But, for reasons addressed below, the significance of such a gesture becomes complicated when third parties intervene and have stakes in the conflict. According to Patterson, in cases of intrastate conflict, conciliation might take the form of amnesty and truth commissions. In an international conflict, the parties must show "costly, novel, voluntary and irrevocable signals" of good will and willingness to negotiate (p. 117). Conciliation is rare because it is an innovative act, one that may help to sustain peace and sovereignty, but is not necessary to do so. It is generous, reflective, and idealistic.

If conciliation is the true measure of a war ended well, what should be the role of a third party to a conflict that may have helped resolve it? If conciliatory actions gain their power and legitimacy from the sincerity of their performance, are they compromised by the presence of a third party agenda? Numerous ceasefires were signed by Israelis and Arabs in cities around the world as third parties played mediator, yet their conflict remains unresolved to this day. Patterson properly points to Conciliation as the ultimate mark of success, but makes no recommendations for how third parties intervening in complicated, protracted conflicts can reliably ensure that Conciliation is genuinely achieved.

Despite these problems, or perhaps in part because of them, Patterson's task is extremely ambitious. To his credit, he does not pretend to have all the answers. Like Bruce Ackerman at the end of his article *The Emergency Constitution*,¹⁴ Patterson invites scholars to expand upon his ideas. Academics should accept this request; Patterson's model might fail to give precise prescriptions to policymakers, but he has unearthed something immensely valuable: the long-forgotten Machiavellian notion that Order is the key to any effective post-war transition. By exhuming this idea, skillfully adapting it to the present day, and emphasizing how Justice and Conciliation can and must serve Order, Patterson has set the stage for an intellectual revolution. If that revolution spreads from the ivory towers of academia to the realm of policy, the ramifications could be significant indeed.

In particular, this intellectual revolution could manifest itself by shifting American foreign policy from its idealistic, liberalizing Wilsonian focus toward a more humble, Jacksonian aim, interested in achieving political objectives without refashioning nations in America's self-image. Since the Second World War, the United States has fought to spread capitalism and liberal democracy throughout the world. It has sought to do this directly through regime change and indirectly by pragmatically supporting the illiberal enemies of its ideological foes. The former often failed when the United States initiated economic and political liberalization at the expense of establishing Order; the latter often resulted in the proliferation of disorder that in turn fueled the rise of extremist so-

14. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1091 (2004).

cial movements like the Taliban. Despite this problematic history, our last two presidents have embraced this Wilsonian tradition, consistently championing war-induced transitions to liberal democracy and allying themselves with illiberal groups and regimes with whom they share a common enemy. Perhaps the next president, armed with the fruits of Patterson's labor, and recognizing the immense danger of disregarding Order and propagating disorder, will institute a more Jacksonian foreign policy instead.

Economic Foundations of International Law. By Eric A. Posner & Alan O. Sykes. Cambridge, MA: Belknap Press, 2013. Pp. 2, 372. Price: \$65.00 (Hardcover). Reviewed by Jayoung Jeon & Tanya Kapoor.

Self-interest and cooperation rarely go hand in hand. Yet both terms frame Eric Posner and Alan Sykes's arguments in *Economic Foundations of International Law*. In their book, Posner and Sykes apply economics to international law based on the premise that states are "self-interested agents" that use international law to obtain the benefits of international cooperation: "[E]ach state that becomes party to an agreement must perceive itself better off than by refusing to participate" (p.21), and "[s]tates enter into treaties and remain in them only when doing so advances their interests. . . . States pay their debts because if they did not, they would be shut out of the credit market in the future" (p. 49). According to the authors, international agreements are like contracts: negotiated and designed for efficient breach, but usually not enforced by third parties with coercive powers (pp. 24-27). Here, Posner and Sykes state a striking claim: Many international agreements are self-enforcing (p. 27). Unlike contracts, which are legally enforceable, international law has no exogenous enforcement mechanism (p. 27). No global police force exists to enforce international agreements; states that defect from agreements face few legal costs.

Although the authors fully support their assertion that international law is self-enforcing, their economic analysis falls short. In applying game theory to enforcement, Posner and Sykes focus solely on interactions between two parties: if one nation defects in a bilateral agreement, the other can retaliate, and vice versa (pp. 27-30). Thus, Posner and Sykes do not extend their analysis to multilateral agreements, which take place far more frequently than do bilateral agreements.

More seriously, however, the authors fail to clarify how different economic principles can work together to strengthen or weaken nations' incentives to enforce agreements; instead, economic principles and concepts are analyzed separately. Concepts such as transaction costs, arbitration, and hegemony—richly discussed in the first half of the book—are not explicitly synthesized in later parts of the book. Thus, the reader is left to grapple with several questions that seemingly conflict with the authors' principles: Why are certain multilateral agreements still enforced if they do not fit within the authors' framework? Why do hegemonic powers enforce agreements or engage in sanctions even if doing so increases free ridership? Can Posner and Sykes's economic principles work in tandem with each other to increase nations' incentives to enforce international law?

Interested readers can conceivably discover answers through their own synthesis of the material presented. In the first half of the book, Posner and Sykes present economic principles, most of which illustrate the difficulties of enforcing multilateral agreements. Yet for the remainder of the book, the authors present examples that seemingly contradict the principles that they delineated earlier in the book. For example, the authors discuss the depletion of the ozone layer, a classic collective action problem, and its successful resolution through a multilateral treaty, the Montreal Protocol (pp. 229-30). To enforce the treaty, developed nations paid off developing nations, facilitating access to ozone-friendly technologies and thus avoiding breach (p. 229). Interestingly, earlier in the book, the authors briefly discuss side payments—often given by one nation to another to facilitate negotiation—but never fully explain how side payments could be employed to strengthen enforcement (p. 21). Therefore, Posner and Sykes are adept at describing what may result under default rules in economics, but are not forthcoming on how policies have been shaped, or on how economics can be used to create more binding international law. The unconnected discussion leaves readers trying to deduce how to apply Posner and Sykes's framework in practice.

Posner and Sykes's focus on theory also leaves readers confused as to how their framework would apply to or explain recent international developments. For example, the authors do not explain why certain countries tend to enforce agreements or intervene militarily despite the potential to encourage free-riding. Posner and Sykes only devote a short passage to these concerns, and in their study, they only analyze what could happen if a hegemonic power were to enforce international law (p. 186). Moreover, if free-riding were an issue, countries that are not directly involved in the conflict would reasonably be in favor of, or neutral toward, military interventions; a country could benefit from other countries' military intervention, without expending any of its own resources. History, however, shows that countries' responses to military intervention in other countries have not been uniform. For example, in August 1992, the United Kingdom and France did not favor NATO's large-scale military intervention in Bosnia-Herzegovina.¹⁵ On the other hand, the United States favored the intervention even though non-NATO member nations would free ride from its actions.¹⁶ The authors do not posit convincing explanations, economic or otherwise, that could account for such different responses.

Other scholarly work offers stronger explanations for the division. For example, one account suggests that the United States's desire to remain a global power prompted it to favor intervention.¹⁷ In other words, the United States might be willing to bear the cost of free-riding because it receives significant benefits from maintaining its hegemony. Although Posner and Sykes mention cost-benefit analysis, they do not make explicit that the cost of free-riding is not

15. SONIA LUCARELLI, EUROPE AND THE BREAKUP OF YUGOSLAVIA: A POLITICAL FAILURE IN SEARCH OF A SCHOLARLY EXPLANATION 36 (2000).

16. *Id.*

17. DAVID N. GIBBS, FIRST DO NO HARM: HUMANITARIAN INTERVENTION AND THE DESTRUCTION OF YUGOSLAVIA 16 (2009).

constant across all nations, nor do they explain how their cost-benefit analysis interacts with the unique circumstances of different nations.

Posner and Sykes write in a manner that is accessible even to those who do not have backgrounds in economics or international law. This makes *Economic Foundations of International Law* a useful guide to both law students and scholars, the book's intended audience (p. 3). Perhaps the insufficient elaboration of how the economic principles they expound explain international legal behavior arises because Posner and Sykes aim for "breadth, not depth" in their book (p. 4).¹⁸ The book, which is structured like a textbook, inherently lacks sufficient leeway to explore certain examples in depth.

However, for those students or scholars who wish to analyze or suggest policy changes, the book is informative, though not thorough. Posner and Sykes demonstrate how international law can be structured, but only in terms of singular economic principles and concepts. They do not explain how a synthesis of various economic principles can shape international law. Because the authors discuss and analyze economic principles separately, the book is unable to fully explain recent events in international law. The book also fails to elucidate how and why nations have enforced multilateral agreements. And the book remains silent on what seems to be a central principle of law and economics: how incentives can be shifted in favor of or against enforcing international law.

War from the Ground Up: Twenty-First-Century Combat as Politics. By Emile Simpson. New York, NY: Oxford University Press, 2013. Pp. 1, 285. Price: \$32.50 (Hardcover). Reviewed by Megan Braun.

In April 1975, as American officials made a last-ditch effort to negotiate an end to the ill-fated Vietnam War, U.S. army officer Colonel Harry Summers told his North Vietnamese counterpart Colonel Tu, "You never beat us on the battlefield" (p. 36). Tu replied, "That may be so, but it is also irrelevant" (*Id.*). Saigon fell to the North Vietnamese the following week. This episode illustrates the great irony of modern warfare: it is possible to win militarily but still lose the war. In *War From the Ground Up*, Emile Simpson describes how this perverse logic has "totally unhinge[d] strategic theory," and attempts to revitalize the field by offering a new paradigm for thinking about twenty-first century conflicts (p. 138).

Simpson, a former infantry officer in Britain's elite Royal Gurkha Rifles, draws on his experiences in Afghanistan to argue that modern conflicts sharply depart from traditional conceptualizations of warfare and represent a more overtly political form of conflict. Carl von Clausewitz, widely credited as the father of classical military strategy, argued that although war's function is to provide a military victory that establishes the conditions for a political solution, war itself is apolitical. In his famous tome, *On War*, Clausewitz writes, "The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."¹⁹ Although the political objec-

18. *Id.* at 4.

19. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Pare eds. & trans., Prince-

tives might vary in war, military victory is the means for achieving those objectives.²⁰ Up until the end of the Second World War, this was largely true. However, after 1945, insurgencies replaced interstate war as the dominant mode of conflict and, as in the Vietnam anecdote above, military victory ceased to be synonymous with political success.²¹

Beginning with the Malayan Emergency in 1948, Western powers increasingly found themselves drawn into counterinsurgency wars where the objectives were more focused on political exchange than military victory. Simpson calls these conflicts armed politics. While traditional wars had sought to achieve a military victory that would serve as a basis for realizing other political goals, in the Vietnam War, and in the more recent conflicts in Iraq and Afghanistan, “armed force was used as a direct extension of political activity outside of war” (p. 63). In each of these conflicts, the United States sought to repel one particular political ideology, be it communism, authoritarianism or Islamic fundamentalism, and establish a democratic government to its liking. What is the difference between setting the conditions for a political solution and directly effecting political outcomes? Simpson argues that in the latter “armed forces are required to have effect in an environment in which actors use an eclectic range of means, violent and nonviolent, to compete vis-à-vis one another for political advantage” rather than military advantage (p. 102).

Importantly, Simpson’s argument is not a complete departure from Clausewitz’s theory of war; rather, it attempts to build on it by focusing on an area of conflict on which *On War* is largely silent. Clausewitz understood that war was a spectrum marked by total war on one extreme and limited wars on the other. While total wars are fought to achieve complete military victory, limited wars are fought for a restricted set of political ends. As Clausewitz notes, limited wars are not merely less intense, they also exhibit a strong tension between the desired “political directives” and the “military’s natural tendency towards violence.”²² In these circumstances, Clausewitz argues, “war will be driven further from its natural course . . . and the conflict will seem increasingly *political* in character.”²³ Despite this prescient observation, which seems to anticipate the emergence of armed politics, *On War*’s primary focus is on total war. Simpson’s contribution is to identify the shift towards the other end of the spectrum, and to offer a new theoretical framework that explains how armed politics is different from total war, and how it ought to be conducted.

The corollary to Simpson’s claim that modern conflicts are a direct extension of political activity is the observation that the array of parties has become much more complex. Total wars have traditionally been bipolar conflicts where the parties to the conflict are either allies or enemies. However, in armed politics, force is intended to influence a much wider array of audiences. The war in Afghanistan, for example, is not a polarized battle with the International Secu-

ton Univ. Press 1989) (1832).

20. *See id.* at 647.

21. *See* Thomas X. Hammes, *Why Study Small Wars?*, 1 SMALL WARS J. 1, 2 (2005).

22. CLAUSEWITZ, *supra* note 19, at 88.

23. *Id.*

rity Assistance Force (ISAF) and Government of the Islamic Republic of Afghanistan (GIROA) on one side, and the Taliban on the other. Rather, it is a fragmented conflict with a multitude of parties. GIROA and ISAF also fight against the Haqqani network, Hizbi-i-Islami Gulbuddin and al-Qaeda. Like the Taliban, each of these groups is an internally divided organization that encompasses a variety of self-interested groups (p. 75). To complicate matters further, all of these parties vie for the support of a diverse and “politically kaleidoscopic” Afghan society (p. 88). Therefore, ISAF combat patrols aim both to ferret out insurgents and to safeguard the local population. They are intended to build public trust in ISAF and GIROA forces and undermine the Taliban’s political influence. In light of this dual purpose, military activity is often indistinguishable from political activity and the simultaneous pursuit of diplomatic and military means establishes a condition that is “neither war nor peace” (p. 2).

Ultimately Simpson vindicates Clausewitzian strategy by arguing that modern conflicts do not invalidate principles of conventional warfare; they simply need to be analyzed in a separate paradigm. He writes, “[t]he irony today is that we blame the failure of the Clausewitzian inter-state paradigm on the mechanism itself rather than on the contemporary circumstances in which it is used” (p. 234). It is a persuasive argument and has garnered lavish praise from strategists. The great military historian Michael Howard has said that Simpson’s work should be “compulsory reading at every level in the military” and “deserves to be seen as a coda to Clausewitz’s *On War*.”²⁴

However, the import of Simpson’s argument extends beyond military strategy. The fundamental transformation of armed conflict that he identifies also undermines core principles of International Humanitarian Law (IHL). This body of law, which is rooted primarily in the Geneva Conventions, the Hague Conventions, subsequent treaties and customary international law, is intended to regulate armed conflict.²⁵ Properly applied, IHL acts as a constraint on military strategy, limiting the weapons and actions that are available to belligerents and prescribing the responsibilities owed to civilians, as well as fellow belligerents. However, the relationship between strategy and law is not one-sided. Strategic principles also inform the construction of international law, by providing terminology as well as a set of assumptions about how conflicts function. Thus the new forms of conflict that are transforming strategic theory also influence the foundations of IHL. And as recent conflicts illustrate, distinction and proportionality, two of the fundamental principles for regulating the conduct of war, are both undermined by the armed-politics approach.

Alluding to the principle of distinction, which requires belligerents to distinguish between civilians and combatants,²⁶ Simpson points to the disconnect between modern conflicts and IHL: “[I]nternational law is constructed on the

24. Michael Howard, *Narratives of War*, TIMES LITERARY SUPPLEMENT (April 3, 2013), <http://www.the-tls.co.uk/tls/public/article1239841.ece>.

25. See FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 3-4 (4th ed. 2011).

26. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

basis that one can define specific ‘military’ targets. Yet the idea that one can distinguish between ‘military’ and ‘political’ targets, when strategy uses force directly for political effect, is problematic” (p. 235). This claim finds support in a recent study by Janina Dill, which argues that during the 2003 Iraq War the objectives pursued with U.S. air power were “primarily political rather than military in nature.”²⁷ Dill observes that in the initial weeks of the operation, air strikes were not confined to military targets but also targeted ten media installations, fifty-two regime leaders, and power generation and distribution facilities.²⁸ According to Dill, the United States attempted to legitimate the validity of these targets under international law on “the basis of the contribution their destruction or neutralization makes toward achieving the war’s political ends.”²⁹ However, this rationalization demonstrates that political ends have become incorporated into decisions about what qualifies as a civilian target.³⁰ Thus, armed politics introduces slippage into the definitions of civilian and combatant targets that underpin the principle of distinction.

The fusion of political and military objectives also undermines the law of proportionality, which incorporates the strategic objective of military advantage. According to the law of proportionality, the collateral damage caused by a use of force cannot be excessive in relation to the anticipated military advantage.³¹ The meaning of military advantage is perhaps the most complicated component of the definition of proportionality and it is widely understood to be a matter of military judgment.³² This is because the level of military advantage in any given operation depends on the strategic objectives that are defined and pursued by the military.³³ Thus assessing military advantage is primarily a question of strategy, not law. In a conventional conflict between two polarized parties, military advantage describes the contribution that a particular act of force will make towards achieving the larger strategic objective: military victory. In the context of ‘armed politics,’ when military means are being employed to pursue political objectives, rather than simply victory, military advantage as traditionally understood becomes an anachronism.

Perhaps the concept of military advantage can be refashioned to calculate the relationship between the use of force and an operation’s political objectives; however, this is unlikely for two reasons. First, as Clausewitz noted in his critique of limited war, political objectives and military means often work at cross-purposes. (Consider, for example, a drone strike that has the beneficial military effect of killing two suspected militants but the detrimental political

27. Janina Dill, *The Influence of Law on U.S. Air Targeting Practices in the Two Gulf Wars 22* (Jan. 29, 2009) (unpublished D.Phil. thesis, Oxford University) (on file with Bodleian Library, Oxford University), available at <http://isme.tamu.edu/ISME09/Dill09.pdf>.

28. *Id.* at 21.

29. JANINA DILL, *LEGITIMATE TARGETS? SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND US BOMBING* (forthcoming 2014) (manuscript at ch. 6, § 6.2) (on file with author).

30. *Id.*

31. Protocol I, *supra* note 26, art. 51(5)(b).

32. Henry Shue, *Proportionality in War*, in *THE ENCYCLOPEDIA OF WAR 1755* (Gordon Martel ed., 2012).

33. *Id.* at 1760.

effect of inciting anti-American sentiment and increasing political support for the Taliban.) Second, although military advantage has always proven difficult to quantify, calculating political advantage is considerably more challenging. The relationship between destroying a bridge that is necessary for an enemy to maintain his supply lines is a precise goal with a clear relationship to military victory. Political objectives tend to be less concrete; the connection between military action and the achievement of these goals is often unclear and it is difficult to say when a goal such as winning the hearts and minds of an Afghan village has actually been accomplished. This indeterminacy is not merely a problem for those attempting to craft a coherent military strategy; it also makes it nearly impossible for the principle of proportionality to determine the appropriate balance between civilian harm and military and/or political advantage. This problem is an apt illustration of Simpson's finding that "Clausewitzian paradigms of war stop working when they cannot invest the use of armed force with military significance" (p. 74).

The United States has consistently claimed that conflicts such as the ongoing counterinsurgency in Afghanistan can conform to traditional conceptions of international law, and it has attempted to adapt the principles of proportionality and discrimination to armed politics. However, some scholars have argued that from the perspective of international law, the entire premise of armed politics is inherently flawed. The IHL principle of military necessity, which was introduced in the St. Petersburg Declaration of 1868, established that "[t]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."³⁴ A strict interpretation of this principle would lead to the following conclusion: "If one has a political goal that one cannot achieve by means of a military victory gained in compliance with the St. Petersburg assumption, one simply has no permissible way of pursuing this goal with the use of military force."³⁵ If this line of reasoning is applied to the principles of distinction and proportionality, it suggests that the only legitimate targets are those which are directly related to defeating the enemy (i.e., not political targets) and the proportionality calculus should afford no weight to the pursuit of political advantage because only those operations that directly advance the objective of military victory are acceptable.

Military practitioners and strategists will actively debate Simpson's bold claim that there has been a tectonic shift in the defining attributes of modern armed conflict. However disciples of IHL should also take note. Strategic thought and IHL are deeply intertwined and the transition towards armed politics has the potential to undermine, or at the very least distort, key propositions regulating the conduct of armed conflicts.

The Future of International Law: Global Government. By Joel P. Trachtman.

34. Declaration of St. Petersburg, Nov. 29-Dec. 11, 1868, *reprinted in* CONVENTIONS AND DECLARATIONS BETWEEN THE POWERS CONCERNING WAR, ARBITRATION AND NEUTRALITY 6 (1915).

35. Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT'L AFF. 311, 327 (2012).

New York, NY: Cambridge University Press, 2013. Pp. xi, 302. Price: \$99.00 (Hardcover). Reviewed by Albert Pak.

Sometimes the law stands in the way of getting what we want. Or it demands that we do things that seem pointless, useless, or random. At worst, law requires us to participate in what we believe is bad public policy. It is tempting in such situations to disregard the law, particularly when we are so strongly opposed to the law that we would rather break it than avoid punishment.

So, too, is the case with nations and international law. International law can be just as cumbersome, annoying, and seemingly counterproductive to nations as domestic law can be to individuals. And in certain situations, nations will believe that they are better off breaking international law, and thereby risking sanctions, than following it.

What, then, do nations do? What, then, do *we* do?

With people, it seems we sometimes follow the law even when we find the law inconvenient and the risk of punishment low. Indeed that is precisely what we require of one another when we make law. We require ourselves to follow the law, period—not just when we find the law convenient.

Do nations similarly oblige one another? Will they?

Joel Trachtman's answer in *The Future of International Law: Global Government* might seem to be in the affirmative. After all, he predicts a world that will be increasingly governed by international law. He argues that globalization, technological growth, and democratization will "increase the scope and magnitude of international externalities and public goods." The world will become more interconnected, and more and more, public goods and externalities will be spread over multiple nations, such that their optimal regulation will require international effort—and international law (p. 292). The growth of international law, then, will not be planned, but will occur "bottom-up," where nations demand it (p. 291). This is because "[a]utonomous, sovereign states would be expected to enter into international law as an exercise of their efforts to maximize the achievement of their preferences" (p. 64).

Trachtman enriches his argument with illustrative models and case studies. For example, he develops a two-level game-theoretic model to specify just how new opportunities to join international agreements will affect key players in domestic politics (pp. 58-63, 141-44). He also examines specific areas of international law—including cybersecurity, human rights, and public health—with impressive sensitivity to detail. These case studies lead Trachtman to a further insight. As international law grows to meet nations' needs, "some of these needs will necessitate fortification of the power of international law" (p. 2). This is true especially, according to Trachtman, in global warming, where the incentive is great to defect from the established rule. In such situations, general compliance will require "significant punishments for failure to comply" (p. 165).

That last move shows just how much Trachtman's conception of international law focuses on traditional interests and incentives. He thinks that the increasingly international externalities will spur the growth of international law

precisely because the externalities will incentivize nations to create more international law. And he thinks that international law will be fortified with greater incentives because such fortification itself is in the nations' best interests—in being able to credibly commit to, and reasonably expect others' compliance with, international law.

But what about our standing question? Will nations simply view international law as a system of incentives and penalties that tend to incentivize compliance but also leave nations free to choose to pay the penalties rather than follow the law? Or will nations, like people, go further and *oblige* one another to follow law even when the costs of compliance outweigh the costs of sanctions?

H.L.A. Hart, writing in 1961, remarked that basic legal concepts cannot be understood without reference to the legal subjects' "internal point of view."³⁶ Where there is law, its subjects go beyond simply recognizing that there are punishments backing the law. They treat the law "as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment . . ."³⁷ It is not just that an expectation of punishment is attached to violations of law; rather, a violation of law is seen by society as the *just reason* for punishment. That is the sense in which laws *bind* us.³⁸

There is, then, a moral dimension to law. Laws in general create compliance obligations.³⁹ That is what we require of one another, and that is what generally overrides our temptations to break the law. Without this moral dimension, there is no law; there is simply an agreement to change the landscape of incentives in a particular way.

Harold Koh has demonstrated that international law already displays this moral dimension.⁴⁰ In 1985, the United States considered developing a missile defense system that amounted to a violation of the 1972 bilateral Anti-Ballistic Missile Treaty with the Union of Soviet Socialist Republics. To avoid such a violation, the United States proposed to reinterpret the treaty to allow for the desired missile system. This proposal instigated a national debate about whether or not to stick to the original interpretation of the treaty. In the end, the reinterpretation prevailed in 1985, only to be jettisoned in 1993 in favor of the original interpretation. Koh points out that, presumably, the United States' balance of incentives in developing the missile system did not change between 1985 and 1993.⁴¹ What led to the return to the original interpretation was key policymakers' internal acceptance of it. Koh concludes that the return marked not a

36. H.L.A. HART, *THE CONCEPT OF LAW* 98 (3d ed. 2012).

37. *Id.* at 90.

38. Hart goes on to further specify what constitutes law. In addition to the internal acceptance, there needs to be a rule of recognition by which laws are recognized to be laws. It is this rule of recognition that gives legitimacy to the law and therefore commands internal acceptance. *See id.* at 91-99.

39. The point here is general. I do not mean to address the difficult question of whether or not even immoral laws create compliance obligations.

40. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2645-46 (1997) (book review). In Koh's terms, the internalization of norms is what separates mere *compliance* from *obedience*. For Hart, this internal acceptance is constitutive of law. But for Koh, it seems, the internal acceptance distinguishes differing attitudes one might adopt towards law. *See id.* at 2599 (asking not whether international norms are law, but why nations obey (or disobey) international law).

41. *Id.* at 2648.

reflection of incentives, but rather the acceptance of law as binding.⁴²

Thus full-fledged law necessarily involves a moral component, and there is reason to think that morality is already embedded in international law. But where is this moral component of law in Trachtman's vision of the future of international law?

It is largely missing, or at best relegated to the sidelines. Perhaps Trachtman's view is that moral obligations are epiphenomenal to the changing landscape of incentives, such that increasing demand for international law gives rise to its internal acceptance as morally binding. But can expediency really be said to give rise to norms? Can a relationship consisting solely of the pursuit of utility-maximization inspire obligations?

More likely, the internal acceptance of law is a distinct phenomenon, separate from changing incentives. If that is correct, then internal acceptance of law is not simply reflective of incentives to comply with the law, but rather generative—of norms, obligations, and further incentives. This thought raises pressing questions. How did internal acceptance of domestic law develop? Will internal acceptance develop differently in international law? Once it is present, how will it fuel further growth of law?

With respect to these questions, Trachtman's pronouncement of the future of international law remains silent.

42. *Id.*