RATIONAL CHOICE REALISM: THE EQUILIBRIUM OF ARMED CONFLICT

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I. INTRODUCTION

Public international law is a regulatory regime that establishes the rules regarding mutually accepted conduct among states. Just as domestic tort law has been regarded as a regulatory regime for the externalities of undesired behaviors in society,[1] public international law can be regarded as a regulatory regime for the undesired behaviors of states. This regulatory regime has been conceived of in terms of game theory, specifically a game in which states have incentives to collaborate and to cheat.[2] This suggests that there are Pareto-optimal and -suboptimal solutions for states' interactions—including for armed conflict. [3]

This Article advocates that the Pareto-optimal production of armed conflict among states is not zero because of the presence of non-collaborating states, that is, cheaters, but also because states are *sovereign*. Their interests will never completely align. International law attempts to set the Pareto-optimal point at an artificially low point. As a result, the game states play is complicated and emerges as a competition that can be described in the same terms as game theory in economic models, that is, a market.

This conception of public international law aligns with John Mearsheimer's offensive realism, which asserts that armed conflict is not a quirk,

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[1] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961); THE LOCKE INSTITUTE, THE ORIGINS OF LAW AND ECONOMICS: ESSAY BY THE FOUNDING FATHERS 18 (Francesco Parisi & Charles K. Rowley eds., 2005). An externality is a cost imposed on society that is not reflected in its price. *Id*. While externalities can be either positive or negative, I refer to them in the negative sense throughout this Article.

[2] Jack Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L. 271 (2007).

[3] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 9 (2014) ("'Equilibrium' . . . means a stable point, that is, a point at which, unless the conditions of demand or supply change, there is no incentive for sellers to alter price or output.").

but "an intrinsic element of life in the international system."[4] History supports this assertion, and also that law alone is inadequate to deter states' natural tendencies to maximize their relative power.[5] States that would produce unacceptable kinds and quantities of armed conflict can only be deterred by the power of other states. "Strength ensures safety, and the greatest strength is the greatest insurance of safety."[6] This leads to the inevitable conclusion: law requires an enforcement mechanism. Without enforcement, modern versions of Pompey the Great may well say: "Do not quote laws at us who carry swords!"[7]

Hypothetically, the pairing of law and enforcement should create security for states—small and great—and prompt collaboration in a positive-sum game, or a market, for a single good: survival.[8] This fits nicely within the international relations theory of defensive realism under which states prefer to maintain a status quo because they seek security, they seek survival.[9] However, state security is relative to that of other states. To maximize security, states seek to maximize their share of the market.[10] Therefore, it is only rational that "a state's ultimate goal is to be the hegemon in the system."[11]

This is the basis of Mearsheimer's theory of offensive realism in great power conflict. However, defensive and offensive realism are not mutually exclusive. Rather, they capture variation in states' behavior as rational actors. Some—like many weaker states—preserve power, while others—like in great power conflict—accrue power. I attempt to reconcile defensive and offensive realism with the language of rational choice theory to show that public international law serves as the rules for a competitive market that demands armed conflict. I call my addition to realism, rational choice realism.

Part II of this Article explains the theory of rational choice realism in terms of game theory, often applied to economics. Part III is a brief historical explanation of how the Westphalian system gave rise to modern public

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[4] JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 22 (2001). Mearsheimer defines his theory of offensive realism as tendency of states to "maximize relative power, with hegemony as their ultimate goal." *Id*.

[5] *See* Edwin L. James, *GERMANY QUITS LEAGUE; HITLER ASKS 'PLEBISCITE'; Berlin Orders Delegates to Leave Arms Conference as Britain and France Veto Rearming of Reich*, N.Y. TIMES, (Oct. 15, 1933), https://nyti.ms/47ZWgq2.

[6] MEARSHEIMER, *supra* note 4, at xi.

[7] PLUTARCH, LIFE OF POMPEY (Bernadotte Perrin, ed. 1917) ("Cease quoting laws to us that have swords girt about us!").

[8] This is not a classical realism paper that focuses on power. The human obsession for power is rooted in the human obsession to survive. The collective will to survive in a democracy is presented as the will of the sovereign state.

[9] MEARSHEIMER, *supra* note 4, at 19.

[10] *Id*. at 410.

[11] *Id*. at 21.

international law, sovereignty, and the state as a rational actor. This is critical to understanding how the rules of the market formed and why one can assume states to be rational actors. Part IV demonstrates the failure of states to set the equilibrium of armed conflict at an artificially low point during the conflicts of the twentieth century and how hegemony can produce positive externalities. Part V warns that unregulated space in the market for survival created by new technologies may result in a catastrophic disequilibrium. In Part VI, I explore implications of viewing survival as a market, and in Part VII, I conclude.

II. RATIONAL CHOICE REALISM

The reader, along with well-meaning liberal international relations thinkers, may advocate that the Pareto optimality of armed conflict is zero output because there is no demand for it.[12] This argument necessarily indicates that one believes that the demand for armed conflict is 0 and that the price elasticity of demand for armed conflict is high ($E_d > 1$).[13] These assumptions ignore ugly, fundamental truths behind state-on-state violence:

(1) there is demand for it (e.g., Russia's war of aggression against Ukraine), and
(2) an increase in the marginal cost of armed attack for aggressors does not result in substitution to diplomacy, economic relations, and interruption of means of communication.[14]

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[12] In fact, the reader would not be alone in such an assertion. That was the conclusion of 62 countries in 1928 when they signed the Kellogg-Briand Pact, which condemned war and "declare[d] in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another . . . the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS: WITH SOLUTIONS AND NOTES 103–4 (1929).

[13] POSNER, *supra* note 3, at 332. The price elasticity of demand is a metric that signals how much of a good a consumer is willing to purchase at a given price. It also signals how willing or able a consumer is to substitute the good. For example, a high elasticity of demand signals that there are close substitutes for the good and that if the price increases consumers will switch to a substitute. The more inelastic demand is the less willing the consumer will be to substitute for another good. Posner describes the price elasticity of demand as "the proportional effect on the quantity demanded of a proportional change to price. To illustrate, if a 1 percent price increase would cause the quantity demanded to fall by 2 percent, the elasticity of demand with respect to price is -2. If the elasticity of demand were -1, it would mean that a 1 percent increase in price would cause a percent reduction in quantity demanded, and thus that total revenue was unchanged." *Id*.

[14] U.N. Charter art. 41 lists alternative measures short of armed conflict: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Therefore, it is not for scholars or statesmen to impose a normative standard, that is, that no armed conflict ought to be produced, but to pragmatically ask, how much? Where is the Pareto optimum? The answer does not come from scholars but rather from states who, through state practice and *opinio juris,* create customary international law. If states neglect to set clear parameters, the threshold, or the Pareto optimum, will continue to shift creating uncertainty and opportunity for great powers to maximize their power by testing the limits of the game. As a result, armed conflict will shift the market to a new equilibrium point. By this reasoning, however, states can bring the equilibrium point back to a lower point of demand for and production of armed conflict—but how?

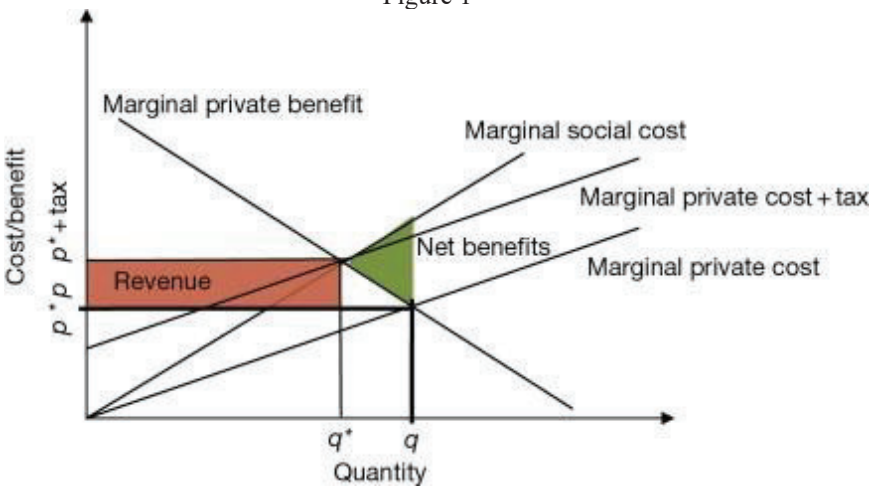
A. Law as a Tax

States are rational actors maximizing their security, and though some collaborate and some cheat, they all do so rationally.[15] In a domestic market, one way to internalize an externality—to force a good to reflect its true social cost—is to impose Pigouvian taxes on it.[16] A Pigouvian tax increases the price of the good, which in turn, and dependent upon the elasticity of demand for the good, reduces the quantity demanded and subsequent production to a socially acceptable point, as shown in Figure 1.

[15] The author concedes that this is a contested premise, that many actors may not be rational, and that there is substantial research to the contrary. *See, e.g.*, Kruis, J. et al., *Deviations of Rational Choice: An Integrative Explanation of the Endowment and Several Context Effects*, 10 SCI. REP. 16226 (2020), https://bit.ly/47YoVLR; Beard, *supra* note 2.

[16] "A Pigouvian tax, named after 1920 British economist Arthur C. Pigou, is a tax on a market transaction that creates a negative externality, or an additional cost, borne by individuals not directly involved in the transaction." Tax Foundation, *Pigouvian Tax*, https://taxfoundation.org/taxedu/glossary/pigouvian-tax/.

Figure 1[17]



Now, instead of a tax, imagine that a state's government passed new laws impacting the components of a good, its packaging, or the age at which individuals can purchase it. These laws would impose real costs on the producer of the good, who then passes those costs to the consumer. These hypothetical laws would increase the price and lower the quantity demanded much like a tax. Law imposes obligations on producers and consumers that forces them to internalize the cost of their choices in the market.

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[17] Steffen Kallbekken, *Public Acceptability of Incentive-Based Mechanisms*, 3 ENCYC. ENERGY, NAT. RESOURCE, & ENV'T ECON. 306 (2013), https://bit.ly/4dD8XrY. Kalbekken explains:

> The figure shows that the marginal private benefit of consuming the good decreases with the quantity demanded, while the marginal private cost of supplying the good increases with the quantity supplied. In an efficient market, the market clears when marginal private benefits equal marginal private costs. In the figure, this occurs when quantity equals *q* and costs and benefits equal *p*. This is the market equilibrium. However, assume that the consumption of the good has a negative externality (e.g., consuming gasoline produces local air pollution). The line 'marginal social cost' shows the marginal external cost added to the marginal private cost of supplying the good. The externality can be internalized by imposing a tax on purchases of each unit of the good (see the line 'marginal private cost + tax'), with the tax rate set equal to the marginal external cost at the social optimum. Imposing such a tax would shift the market equilibrium to the point p^*q^*. This is socially optimal as the externality is fully internalized.

Id.

In much the same way, public international law is a tax on states' actions in their game for survival.[18] The law imposes obligations on states in an effort to internalize the costs of starting conflict (*jus ad bellum*) and the costs of their conduct during conflict (*jus in bello*).[19] These costs serve as significant barriers to entry into the market for armed conflict because not all states have the administrative, legal, and technical expertise to satisfy those high legal hurdles. Intuitively, that is what law has always done. It seeks to impose an equilibrium point—whether dealing with production of goods, civil rights, behavior, or, in the instant case, armed conflict.

B. Hegemony as Enforcement

The integrity of public international law is conditioned on voluntary submission. By definition, only states can make international law.[20] However, by itself, law can only raise costs as long as it is followed. Fortunately, the law is not, nor should it be, the only tool that regulates the market. There exists another tool that can raise the cost of impermissible aggression, intervention, and armed conflict. I refer to this in the context of monopoly. In international relations, this kind of monopoly is referred to as hegemony.

To understand this point we can examine how a monopolist behaves in a domestic market. Calabresi states:

> For, generally, sellers in relatively monopolistic industries sell at higher price to cost ratios than sellers in relatively competitive industries. As a result, fewer goods are demanded from monopolistic industries than is in fact warranted by their true cost. It is this idea that economists and antitrust lawyers have in mind when they speak of the misallocation of resources caused by monopoly.[21]

In a domestic market this misallocation of resources bears a negative connotation. It hamstrings the production of goods. However, in the case of state production of armed conflict, a higher price to cost ratio and less armed conflict produced is a positive externality. Because the price is set higher, less armed conflict is demanded. The result is a misallocation of the market's resources. This

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[18] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 183 (Richard Tuck ed., Jean Barbeyrac, trans., Liberty Fund 2005) (1625). The struggle for resources and survival has long been recognized as the purpose of war. "The end of war (being the preservation of life or limbs, and either the securing or getting things useful to life)." *Id*.
[19] Joel Hood, *The Equilibrium of Violence: Accountability in the Age of Autonomous Weapons Systems*, 11 BYU INT'L LAW & MGMT. R. 12 (2015).
[20] *See* Statute of the International Court of Justice, art. 38, P 1, June 26, 1945, 832 U.S.T.S. 993.
[21] Calabresi, *supra* note 1, at 504.

is a boon, a positive externality to monopoly, to hegemony. One might even be tempted to call it a "peace dividend."

Originally, the United States was not the only hegemon envisioned for the post-World War II world. President Franklin Roosevelt envisioned "the Four Policemen," comprised of the United States, the United Kingdom, the Soviet Union, and the Republic of China.[22] They "would have the power to deal immediately with any threat to the peace and any sudden emergency which requires action."[23] They would be geopolitical hegemons—a cartel—exercising monopolistic control of the *jus ad bellum* and *jus in bello*. The fact that this four-way division of world policing never materialized does not negate the fact that their purpose was intuitive and crucial to the new legal regime embodied in the United Nations.

While monopoly—or hegemony—seems distasteful, it is the crucial complement to the metaphorical taxation the international legal regime imposes on states' propensities toward armed conflict. In fact, the United Nations (U.N.) Charter attempts this very thing by enabling the U.N. Security Council to be the sole actor in the international market that can authorize offensive military action.[24] By contrast, a market for armed conflict in perfect competition where there are no barriers to entry will, by definition, produce the greatest quantity of violence at the lowest cost. This may explain the immense tragedy of great power competition in World War I.

While the U.N. Charter may authorize force, the U.N. has no standing force of its own.[25] Because of this, it is inherently a reactionary organization. It puts out fires; it cannot prevent them. A true monopoly on armed conflict requires the ability to establish and even increase barriers to entry in the market. The United Nations is clearly not that hegemon, and the market equilibrium of armed conflict continues well above zero, as demonstrated by Russia's continued war of

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[22] *The Tehran Conference, 1943*, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *Tehran Conference*], https://bit.ly/4eS6r1R.
[23] *Id*.
[24] Article 42 of the U.N. Charter states:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id. However, states retain their right for self and collective defense under Article 51. *Id*.
[25] *Id*. Article 43 has never been implemented.

aggression against Ukraine.[26,] Currently, the hegemonic power of the United States provides some positive externalities. These wax and wane, as the degree to which the United States employs its hegemonic deterrence is subject to the rationale of political administrations that alternate between liberal and realist philosophies.

These philosophies are the product of hundreds of years of development, by which states gained international legal personality and became rational actors.

III. WESTPHALIAN SOVEREIGNTY

Concluded in 1648, "the Congress of Westphalia, brought the Thirty Years' War to an end and was one of the most memorable events in European history, marking the real beginning of international law."[27] The Holy Roman Emperor Charles V and Martin Luther ushered in this era following their historic confrontation at the Diet of Worms.[28]

> The Emperor was not only the greatest monarch of his day, but the autocratic ruler of territorial domains hardly equalled in extent by any sovereign of ancient or modern times—Emperor of Germany, King of Spain in the era of her greatest power, of the Netherlands, the greater part of Italy, various other principalities of Europe, and of the far-off dependencies of Mexico, Peru, and the other vast regions beyond the seas—the most magnificent empire on earth. Added to these unrivalled possessions, the Emperor cherished an ambition to be the arbiter, if not the actual ruler, of the entire civilized world . . . . But an unexpected obstacle arose in the person of the obscure Augustinian monk, whose preaching against the practices of the Roman Church had brought down upon him the fearful excommunication of the Pope. Yet, notwithstanding this

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[26] Erik Larson, *How War Crimes and the Crime of Aggression Are Being Pursued Against Russia*, BLOOMBERG (Dec. 6, 2022, 12:23 AM), https://bloom.bg/4gSlKcS. Article 8 of the Rome Statute defines "crime of aggression" as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State . . . the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90.

[27] John W. Foster, *The Evolution of International Law*, 18 YALE L.J. 149, 153 (1909).

[28] *Id*.

> malediction, the common people heard him gladly, and presently nobles and princes rallied to his crusade against the Mother Church. In time the mighty monarch, inspired by the Holy Father and disturbed by threatened political revolt against his authority, summoned the audacious monk to appear before him to recant his heresies, and cease to disturb the peace of Europe. In that great convocation in the Cathedral at Worms, as he stood before the Emperor, surrounded by the princes, nobles and hierarchy of his empire, Luther little foresaw the effect of his attitude. It was an appeal to reason and the conscience. His was intended as a religious reformation, but his preaching proved a most powerful political propaganda.
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> The closing declaration of his defense before the Emperor: "Here I stand, I cannot otherwise; God help me!" rang throughout Europe. It kindled the fires of the *autos de fe* in Spain. It brought to France the St. Bartholomew massacre and the struggle of the Huguenots. It divided Germany into two warring camps. It changed the faith and politics of all Scandinavia. It inspired the heroic revolt of the Netherlands. It made England, under Elizabeth, the bulwark of Protestantism. It drenched Europe in blood for many years, but out of the long and bitter struggle was to come the triumph of reason and conscience upon the ruins of the mighty and dominating empire over which Charles V once reigned supreme.[29]

The ensuing religious reform, political upheaval, and violence throughout Europe lasted for much of the next one hundred years, culminating in the Thirty Years' War.[30] In 1555, the Peace of Augsburg ended the original war between German Lutherans and Catholics, stipulating that the 224 German states could rule their realms according to their conscience.[31] This established the first instance of *cuius regio, eius religio*.[32] However, the treaty did not prohibit the intervention of sovereigns in the internal affairs of individual realms. In the years to come, rulers instigated wars and invasions upon defense of their fellow-sectarians, though political motives were very often at the root.[33] The Thirty Years' War was one of the bloodiest of the European wars to date, lasting from

[29] *Id*. at 150–51.
[30] PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 109–10 (2002).
[31] *Id*. at 105.
[32] *Id*. Literally: "Whose realm, his religion."
[33] *Id*. at 106–7.

1618 to 1648 and claiming the lives of between four and twelve million people.[34] Germany suffered enormously:

> The close of the struggle found Germany exhausted and ruined. Three-fourths of the population had perished. Three-fourths of the houses were destroyed, together with five-sixths of the cattle. Commerce had well-nigh disappeared. Some arts had perished entirely. Manufacturing skill had been forgotten amid the ravages of warfare. Science and literature had almost departed from the land.[35]

During the early years of that savage war, Hugo Grotius published the first serious attempt at codifying international law based on the Bible and the law of nature: *De Jure Belli ac Pacis–On the Law of War and Peace*.[36] The work appealed to reason and conscience, argued for a more humane method of conducting war, and advocated the sovereignty of independent states.[37]

> Enlightened rulers like Gustavus Adolphus, at once accepted its principles and sought to put them into practice. Although the war went on to the limit of exhaustion of the combatants, when at last their representatives came together to consider terms of peace, they instinctively turned to Grotius' great work to guide them to a just conclusion. It has been well said that it is one of the few books that have changed the history of the world.[38]

It was in these circumstances that the Congress of Westphalia met in 1648 and ended the Thirty Years' War.[39] It stipulated that all parties would recognize the Peace of Augsburg, granted limited religious freedom, and, perhaps most importantly, recognized the exclusive power of the sovereign over his lands and people.[40] It established the modern parameters of sovereignty.

By establishing the modern parameters of sovereignty, the Peace of Westphalia established a new model within which states would act—the rules of the game had changed. The right of exclusivity over one's territory was the beginning of what we now refer to as international legal personality. Each state

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[34] Pascal Daudin, *The Thirty Years' War: The first modern war?*, HUMANITARIAN LAW AND POLICY (May. 23, 2017), https://blogs.icrc.org/law-and-policy/2017/05/23/thirty-years-war-first-modern-war/
[35] BOBBITT, *supra* note 30, at 105.
[36] Foster, *supra* note 27.
[37] *Id*.
[38] *Id*.
[39] BOBBITT, *supra* note 30, at 109–10.
[40] *Id*. at 20.

became an actor participating on the world stage, leveraging its interests and building its resources to remain independent and sovereign in the face of the great empires.

The Westphalian system became a legal regime in which states exercised the monopoly of violence within their political borders.[41] Any violence emanating from the state was now assumed to be an act of that state.[42] Max Weber defined the modern state as a "human community that successfully claims the monopoly of the legitimate use of physical force within a given territory."[43] Without this

[41] In the United States, that monopoly and sovereignty rests with the people, and the people invest officials with those powers through regular elections. In this way, the state's competition for survival is an aggregate of the enfranchised populace's desire for survival, as expressed by the equation: $\sum_{i=1}^{population} x_i = y$, where *y* is the aggregate desire for survival. This may explain why democracies rarely, if ever, go to war against each other. However, in a dictatorship, the equation changes to $\sum_{i=1}^{1} x_i = y$. It expresses the desire of just one person. Oligarchy represents the aggregate of but a few, for example, $\sum_{i=1}^{5} x_i = y$. This models the difference between defensive realism and offensive realism, and why defensive realism describes states that seek the status quo while offensive realism describes gambling with the disenfranchised whose aggregate desire for survival is not factored into the equation.

[42] G.A. Res. 56/83, U.N. DOC. A/RES/56/83 (Jan. 28, 2002); Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. DOC. A/56/10 (2001). The Responsibility of the State for Internationally Wrongful Acts is a direct outgrowth of the Westphalian model. In relevant part, those articles state that international law governs wrongful acts, that the conduct of official state organs is considered an act of the state, as are the actions of persons or entities that are empowered by a state to act (e.g., *Tadic*), actions under the instruction of or direct control of a state, and by lack of action, i.e., omission (*Corfu Channel*). It bears mentioning that not every action is directly attributable to the state. As stated in Chapter II, note 2 of the above-referenced articles:

> In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.

Id. no. 2.

[43] *See Generally,* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., The Free Press 1965); MAX WEBER'S COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 156 (John Dreijmanis ed., Gordon C. Wells trans., Algora Publishing 2008). I will not attempt to give an exhaustive definition of the state here, but I find Weber's sociological perspective compelling:

> What, though, from the sociological point of view, is a political association? What is a "state?" This cannot be defined sociologically on the basis of what it

fundamental characteristic of international legal personality—legitimate monopoly on violence within a territory—public international law could not exist because only states make international law. The monopoly on force allows the state's government to speak as the sole organ of foreign affairs.[44]

Thus, the monopolist of internal state violence has the de facto legitimacy to bind the state to action or inaction.[45] And yet, not every state has an equal market share of survival, that is, each state's resources and military force are not equal. Thus, every state's sovereignty, their monopoly on domestic physical force, is in some sense a function of one or more other states' willingness to allow it to exist. Herein lies the distinction between de facto sovereignty and de jure sovereignty.[46] De facto sovereignty, carried to its logical conclusion, means that only a state that is beholden to no other states for its existence is truly sovereign, truly secure. This is why Mearsheimer posits that a state's ultimate goal is to the hegemon of the system.[47]

> does. There is almost no task that has not at some time been taken on by a political association. At the same time, there is also no task of which it could be said that it is always and exclusively to be performed by those associations that are termed political, or by states, in today's language, or by the historical precursors of the modern state. Rather, one can ultimately only define the modern state sociologically by reference to a specific means that is proper to it, as it is to every political association, namely, physical force. "Every state is founded on force," as [Leon D.] Trotsky once said in Brest-Litovsk. That is indeed true. If there had existed social structures for which force as a means was unknown, then the concept of the "state" would have lapsed; then something that would be called "anarchy," in this particular sense of the word, would have emerged.
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> Force is not the normal or sole means available to the state. There can be no question of that. It is, however, specific to it. Today, the relationship of the state to force is a particularly intimate one. In the past, many different associations, from the clan onward, have regarded force as a quite normal means. Today, by contrast, we must say: The state is the human community that, within a defined territory—and the key word here is "territory"—(successfully) claims the monopoly of legitimate force for itself. The specific characteristic of the present is that the right to use physical force is only granted to any other associations or individuals to the extent that the state itself permits this. The state is seen as the sole source of the "right" to use force. For us, therefore, "politics" means the attempt to gain a share of power or to influence the distribution of power, whether it be among states or among groups of people living within a state.

Id.

[44] *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[45] *See, e.g.*, George Washington, President, United States, The Proclamation of Neutrality (1793), https://bit.ly/3NeZ4WI.

[46] *See* U.N. Charter art. 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members.").

[47] MEARSHEIMER, *supra* note 4.

States require resources—human, technological, natural—to survive among other states and to extend their production possibilities frontiers.[48] Their continued existence is predicated upon securing their relative sovereignty in relation to other states. This is the key to understanding states as rational actors. Sovereignty is fundamentally an existential question. This is no doubt what Brazil had in mind when it responded to the Dumbarton Oaks Proposals with an amendment to what is now U.N. Charter 2(4), which would have included a prohibition on the use of economic measures in any way inconsistent with the purposes of the United Nations.[49]

A. Jus ad Bellum

The law regarding a state's legal recourse to armed conflict has changed since Westphalia. However, some canons of public international law are still employed.[50] Until recently, one might have assumed that the U.N. Charter had laid to rest the Machiavellian myth that "for a King or sovereign city nothing profitable is unjust."[51]

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[48] Andrew Bloomenthal writes:

> This technique can be used by economists to determine the set of points at which a country's economy is most efficiently allocating its resources to produce as many goods as possible. If the production level is on the curve, the country can only produce more of one good if it produces less of some other good. If the economy is producing less than the quantities indicated by the curve, this signifies that resources are not being used to their full potential. In this case, it is possible to increase the production of some goods without cutting production in other areas. The production possibility frontier demonstrates that there are limits on production, given that the assumptions hold. Therefore, each economy must decide what combination of goods and services should be produced to attain maximum resource efficiency.

Andrew Bloomenthal, *Production Possibility Frontier (PPF): Purpose and Use in Economics*, INVESTOPEDIA (April 19, 2024), https://www.investopedia.com/terms/p/productionpossibilityfrontier.asp.

[49] U.N. Conference on International Organization, Dumbarton Oaks Proposals Comments and Proposed Amendments, *in* 3 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 243 (1945).

[50] Defense of nationals has been used by Nazi Germany, Russia in Georgia, and Russia in Ukraine. *See Chamberlain and Hitler 1938*, THE NATIONAL ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/chamberlain-and-hitler/source-2b/; Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L. L. 1 (2011); Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense,* ARTICLES OF WAR (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/.

[51] GROTIUS, *supra* note 18, at 76. Grotius writes:

B. Jus in Bello

Following Westphalia and Grotius's plea for a more humane conduct of warfare, states slowly transformed the *jus in bello*. Belligerents began to exchange prisoners, "the lawlessness of the soldiery was restrained; the sack of cities and the indiscriminate destruction of private property diminished; and through the eighteenth and nineteenth centuries steady progress was made in the amelioration of war."[52]

For example, during its Civil War in 1863 the United States adopted the Lieber Code.[53] It became the basis for further rules of armed conflict in that century and the modern law of armed conflict (LOAC) today.

In 1864, the International Committee for Relief to the Wounded—now known as the International Committee of the Red Cross—came into being and organized the first Geneva Conference. The first Geneva Convention "for the Amelioration of the Condition of the Wounded in Armies in the Field" stipulated that military hospitals and personnel were neutral and non-targetable, that wounded had to be cared for and repatriated, and that civilians were guaranteed protection if they too helped or sheltered the wounded.[54]

The St. Petersburg Declaration of 1868, which followed soon thereafter, developed the principle of limiting unnecessary suffering. It prohibited "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."[55] The Russian tsar also convened the 1899 Hague Convention whose participants prohibited launching projectiles from "balloons or

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> Cicero rightly commended the excellence of this science, in the business of alliances, treaties, conventions between states, princes, and foreign nations, and in short, in all affairs that regard the rights of war and peace. And Euripides prefers this science before the knowledge of all other things, whether divine or human, when he makes Helen to say thus to Theonoe: "Twould be a base reproach/To you, who know th' affairs present and future/of men and gods, not to know what justice is." And indeed this work is the more necessary, since we find some, both in this and in former ages, so far despising this sort of right, as if it were nothing but an empty name. The saying of Euphemus in Thucydides is almost in every ones mouth, to a King or sovereign city, nothing is unjust that is profitable. Not unlike to which is this, that amongst the great the stronger side is the juster side; and, that no state can be governed without injustice.

Id.

[52] Foster, *supra* note 27.

[53] Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 65 (1994).

[54] Convention for the Amelioration of the Condition of Wounded In Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361, https://bit.ly/3YaNzWy.

[55] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, https://bit.ly/3ZSV99B.

other similar new methods" for five years,[56] "the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases,"[57] and dum-dum bullets.[58] Each of these had as its principle aim to regulate excessive violence and further established the rules of the game.[59]

That first Hague Conference anticipated a second, which was held in 1907. Like its predecessor, the Second Hague Conference of 1907 attempted to regulate emerging technologies.[60] It saw a renewal of the moratorium on aerial bombardment.[61] However, the prohibition was only "until the next Peace Conference" instead of a set number years.[62] Germany, Russia, and France did not sign the declaration.[63] Furthermore, the outbreak of World War I interrupted the next scheduled Hague Conference and made the prohibition unenforceable as to the remainder of nations. Thus, there were fewer restrictions to aerial bombardment when World War I began. The rules of land warfare applied to

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[56] THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 & 1907 at 220 (James B. Scott ed., 1918).

[57] *Id*. at 224. Interestingly, the declaration states:

> The contracting Powers agree to abstain from the use of projectiles the sole purpose of which is the diffusion of asphyxiating or deleterious gases . . . it shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power.

Id. In 1907 Great Britain ratified the declaration, but the United States never did. *Id.* Thus, gas warfare between the belligerents before the entrance of the United States was illegal, but legal once the United States had entered the conflict. This is not to suggest that the United States could act with impunity, but rather that as early as 1899, and certainly earlier in the St. Petersburg Conference, reciprocity was the main enforcement mechanism of LOAC.

[58] Final Act of the International Peace Conference, The Hague, 29 July 1899, INT'L HUMANITARIAN LAW DATABASES, https://bit.ly/3BJACtN.

[59] *See* GROTIUS, *supra* note 18, at 163. Grotius prophetically dictated how the principle of unnecessary suffering and other provisions of customary international law must come about, that is, state practice and *opinion juris*:

> But the more extensive right, is the Right of Nations, which derives its authority from the will of all, or at least of many, nations. I say many, because there is scarce any right found, except that of Nature, which is also called the Right of Nations, common to all Nations. Nay, that which is reputed the Right or Law of Nations in one part of the world, is not so in another, as we shall shew hereafter, when we come to treat of Prisoners of War, and Postliminy or the Right of Returning. Now the proofs on which the Law of Nations is founded, are the same with those of the unwritten Civil Law, *viz*. continual use, and the testimony of men skilled in the laws. For this law is, as Dio Chysostom well observes, the Work of Time and Custom.

Id.

[60] 1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCE OF 1907 at 678 (1James B. Scott ed., 1920).

[61] *Id.*

[62] *Id*.

[63] THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 & 1907, *supra* note 56, at 237.

aerial bombardment at least in one sense: undefended cities and towns were still non-targetable.[64] However, cities like London were technically defended and, therefore, the zeppelin raids of World War I violated no laws.[65]

Submarines were discussed at length in the 1907 Conference, but emerged practically untouched.[66] The 1899 Hague Conference had addressed the topic of submarines and torpedo boats, but the delegates were only presented with a vote on the issue of the "prohibition of submarine or diving torpedo-boats."[67] They did not address submarine operations, assuming that law customary to the conduct of naval operations would apply.[68] Many of the delegates expressed the sentiment that if the proposed ban on submarines were unanimous, they would acquiesce.[69] Needless to say, the delegates did not establish a prohibition, and the law of war regarding submarines was not taken up seriously again until the Washington Conference in 1921.

Such was the state of the market at the beginning of the twentieth century—the *jus in bello* and *jus ad bellum* providing the regulatory regime for the market of armed conflict. As the next section will demonstrate, this feeble regulatory regime was not sufficient to curtail the externalities of armed conflict in a market in perfect competition.

IV. THE MARKET FROM WORLD WAR I TO PRESENT

A. World War I – A Market in Perfect Competition

Leading up to World War I, the rules imposed low costs on states that wished to participate in the market for armed conflict. As discussed, the *jus in bello* and *jus ad bellum* were comparatively underdeveloped by modern standards. Additionally, the market of armed conflict was operating at high, if not optimal, efficiency. The European colonial powers had a high demand for resources, their economic production possibilities frontiers were expanding, and their war-making

[64] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 13 (1992).
[65] *Id*. It was technically considered "defended" because it had a wall around it.
[66] *See also id*. at 18.
[67] PROCEEDINGS OF THE HAGUE PEACE CONFERENCE OF 1899 at 299 (James B. Scott ed., 1920) [hereinafter HAGUE PEACE CONFERENCE OF 1899].
[68] TAYLOR, *supra* note 64, at 17.
[69] HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 367. German delegate, Captain Siegel, stated "that if all the other Governments agreed not to adopt vessels of this kind, Germany would join in this understanding." *Id*. This of course was mooted by the delegate from France's assertion "that the submarine torpedo has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country." *Id.* Contrast this serious political jostling with the pompous statement from the delegate from the Netherlands: "the submarine torpedo is the weapon of the weak." *Id*.

capability was expanding due to new technologies and booming populations.[70] Thus, low barriers to entry, coupled with the high demand for expansion, enabled a greater quantity of armed conflict demanded at a catastrophically low price.

The *jus in bello* was similarly permissive, as discussed in Part III. The market was in equilibrium among the great powers. Yet, by the end of the war there was great public demand and renewed interest "in the use of multinational treaties not only to limit armaments, but also to govern their use."[71]

This outcome is not surprising. The equilibrium of any market is only achieved after failure, often repeated failures. In fact, equilibrium may well be thought of as the sum of all failures. This is due to the fundamental information problem at the center of supply and demand—the optimal allocation of resources.[72]

In the context of armed conflict, this means that the market had created the ideal situation for the maximum quantity of armed conflict to occur. This momentum made the war almost inevitable. Poor diplomatic relations were the final blow because diplomacy is collaboration, the alternate paradigm to attaining security. In fact, one might well say that armed conflict is simply the basest form of communication—the belligerents expressing their will via force of arms in a Clauswitzian wrestle. The relatively low elasticity of demand for security via armed conflict was increased incrementally over the course of the Great War, finally imposing sufficient cost that diplomacy prevailed in the eleventh hour on the eleventh day of the eleventh month in 1918.

During the Great War, the weak legal regimes began to collapse. The 1899 Hague Convention's prohibition on the use of asphyxiating gases was breached with horrendous results. On 22 April 1915, a thick yellow smoke was seen bellowing from the German trenches between Langemarck and Bixschoute near Ypres, Belgium.[73] This was the first use of modern chemical warfare. "Soon a gas wall of chlorine two miles long and a hundred feet high began to drift toward the French positions at Langemarck."[74] Five thousand soldiers died in that first attack.[75]

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[70] HAGUE PEACE CONFERENCE OF 1899, *supra* note 67 (submarines, machine guns, aircraft, asphyxiating gas). Europe's population doubled from 200 million to 400 million in the nineteenth century. Krishan Kumar, *Modernization*, ENCYC. BRITANNICA, https://bit.ly/4exykwD.
[71] TAYLOR, *supra* note 64, at 19.
[72] The marginal cost per one unit increase of armed conflict versus the marginal utility gained.
[73] Major Joseph Burns Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 3 (1960).
[74] *Id*.
[75] *Id*. at 6.

During the course of the year, the Germans, followed by the French and the British, continued to use gas clouds in an effort to break the lines of the entrenched enemy.[76] In 1917, artillery shells containing gas began to compliment the yellow clouds of chlorine and the smell of old hay that accompanied phosgene.[77] By the end of the war, phosgene would account for eighty percent of all military personnel gas deaths.[78]

The German forces first used mustard gas on 12 July 1917.[79] It was much more effective than other gases, producing eight times as many casualties.[80] Its main advantage was its persistence and potency.[81] Contact with the skin produced blisters and it could remain on the ground for days after the attack.[82] It became the chemical weapon of choice throughout that year and into the next.[83] The last gas was an American invention—lewisite.[84] Whereas chlorine gas caused many casualties but few deaths, lewisite was potent enough to "penetrate the pores and poison the body."[85] While each of the gases were grisly in their effects and placed enormous numbers of soldiers *hors de combat*,

> it must be noted that its victims were confined to troops in the field. It was not directed against nor did it affect the civilian population. This fortunate result was aided by the fact that the airplane was not used as a means of disseminating gases. Despite the escape of the civilian population in World War I it was fear for their safety from gas that preoccupied the states in the inter-war period.[86]

The vague customary international law governing submarines proved to be insufficient to restrict their more abusive uses. In 1917, Germany declared the area surrounding the British Isles a war zone into which merchant vessels entered at their own peril. In reality, the German navy had been practicing unrestricted submarine warfare since 1915 with the sinking of the *RMS Lusitania*, which later contributed to the United States' entrance into World War I.[87]

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[76] *Id*. at 8, 9.
[77] *Id*. *at* 9; *Smells Like Musty Hay-Phosgene*, U.S. ARMY WWII POSTER, https://bit.ly/4eSS1i5.
[78] Kelly, *supra* note 73, at 11.
[79] *Id*. at 10.
[80] *Id*. at 10–11.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] Kelly, *supra* note 73, at 11.
[86] *Id*. at 12.
[87] *Sinking of the Lusitania: Topics in Chronicling America*, LIBR. CONG., https://bit.ly/4gVmBJD (last visited Oct. 18, 2024).

This economic warfare at sea attempted to both deny the enemy material and to starve the enemy into submission.[88] In fact, "[n]either side denied using starvation as a method of warfare."[89] Consequently, there was widespread humanitarian and governmental outcry against submarine warfare.[90] Perhaps one of the most egregious violations of the law of war by use of unrestricted submarine warfare was the sinking of a British hospital ship and the destruction of both lifeboats and survivors.[91]

Aircraft too had evolved. Gone were the days Captain Crozier described during the 1899 Hague Conference: "[I]t can carry but little; it is capable of hurling, only on points exactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and non-combatants alike."[92] The dirigible changed the quantities of explosives that an airborne vessel could carry. By 1915, one would be hard-pressed to find someone in London arguing that the bombs descending from German dirigibles were "like useless hailstones."[93] Rather, "by the end of the year over 200 civilians had been killed and many were terrorized."[94] The deliberate targeting of steel and munitions factories by both sides of the conflict demoralized the enemy "consistent with the theory of collateral casualties."[95]

These few examples of the failure of the *jus in bello* to stanch violations of distinction highlight the status of the market for armed conflict at that time. It was laissez-faire—a time of recklessness. The information problem prevailed. How could the belligerents know that each unit of security produced by armed conflict was overwhelmed by the marginal cost per unit?

B. Accountability and Finding Equilibrium

Not only did the victors of the Great War demand accountability for violations of the laws and customs of war, but the populations of the former belligerent states demanded a more efficient legal regime.

> [T]he enormous carnage of World War I stimulated public demand for measures to prevent a recurrence of such slaughter

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[88] Lieutenant David A. Melson, *Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I*, ARMY LAW., Jul. 2009, at 44, 47.
[89] *Id.* at 47.
[90] TAYLOR, *supra* note 64, at 18.
[91] *Id*. at 17. Lieutenant Patzig and his subordinate officers, Lieutenants Dithmar and Boldt, were charged in the Leipzig Trials, but Patzig fled the country and, although convicted, Dithmar and Boldt escaped from prison after only a few months. *Id*.
[92] HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 354.
[93] *Id*.
[94] TAYLOR, *supra* note 64, at 12.
[95] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 22 (1990).

> and destruction. Military and diplomatic interest was rekindled in the use of multinational treaties not only to limit armaments, but also to govern their use. The airplane, the submarine, and poison gas had profoundly affected the conduct of the war, and it was to these relatively new weapons, largely untouched by the Hague Conventions, that attention now turned.[96]

The Treaty of Versailles established the League of Nations, whose Preamble read as follows:

> THE HIGH CONTRACTING PARTIES, In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another Agree to this Covenant of the League of Nations.[97]

The Treaty of Versailles nominally held the offending parties accountable. Article 227 stated that William II of Hohenzollern, formerly German Emperor, would be publicly arraigned, "with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."[98] Articles 228 through 230 gave the Allied and Associated Powers the right to "bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[99] They formed the basis of the Leipzig Trials.[100] In fact, the officers of the submarine that sank a British hospital ship—Lieutenant Patzig and his subordinate officers, Lieutenants Dithmar and Boldt—were each charged during the Liepzig trials.[101]

Article 8 of the Treaty anticipated the reduction of national armaments as a move toward peace. Articles 10 through 17 regulated disputes between states

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[96] TAYLOR, *supra* note 64, at 19.
[97] Treaty of Peace between the United States and Germany, pmbl., June 28, 1919, 42 Stat.1939 [hereinafter Versailles Treaty], https://bit.ly/3ZQdK5V. The United States never joined the League of Nations, even though it was first proposed by President Woodrow Wilson "as part of his Fourteen Points plan for an equitable peace in Europe." *The League of Nations, 1920*, U.S. DEP'T. STATE: OFF. HISTORIAN, https://bit.ly/3Nd051c.
[98] Versailles Treaty, *supra* note 97, art. 227.
[99] *Id*. arts. 228–300.
[100] TAYLOR, *supra* note 64, at 17.
[101] *Id*. The inefficacy of the Leipzig Trials is indisputable. However, the fact remains that there were clear notions of who should be held accountable and why.

and required that disputes likely to lead to war be submitted to the members of the League of Nations for arbitration. An act of aggressive war would "*ipso facto* be deemed to have committed an act of war against all other Members of the League."[102]

Additional treaties followed. In the interwar period, there were five conferences that attempted to regulate naval warfare: the Washington Naval Conference from 1921 to 1922, the Geneva Naval Conference in 1927, the Second Geneva Naval Conference in 1932, the London Naval Conference in 1930, and the Second London Naval Conference in 1935. The State Parties created law, as only states can do, to raise the cost of armed conflict and thereby reduce the externalities of its use.

The Washington Conference involved nine nations, seven treaties, and thirteen resolutions.[103] The general purpose of each treaty was to "prevent the possibility of another war" and engage naval competitors in negotiations.[104] During the course of the conference, British delegate Lord Balfour called for a prohibition on the use of submarines, reasoning:

> Is there any man who doubts that if they are once let loose to deal with merchantmen their powers will not in the stress of war be abused in the future as they have been so grossly abused in the past? I do not think, as I have already indicated, that it is the fighting use of the submarine which is really before us now. The question before use now is whether you are going to encourage an instrument of war which, if it be encouraged, if indeed it be permitted at all, will undoubtedly be used in the illegitimate destruction of commerce.[105]

Balfour drew upon the recent memory of German U-boat attacks during the war. His reasoning reflected Great Britain's strategic vulnerability to blockade. France's delegates stringently opposed the proposal, and this led to an impasse.[106] The British delegation had this statement formally placed on the record of the conference: "[T]he use of submarines, whilst of small value for defensive

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[102]Versailles Treaty, *supra* note 97.
[103] NAVAL WAR COLLEGE, CONFERENCE ON THE LIMITATION OF ARMAMENT OF 1921 vii (1923).
[104] *The Washington Naval Conference, 1921–1922*, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *Washington Naval Conference*], https://bit.ly/4eVnRLh. The invitation to the conference read: "It may also be found advisable to formulate proposals by which in the interest of humanity the use of new agencies of warfare may be suitably controlled." *Id*.
[105] *Id*. at 73–74.
[106] *Id*. at 54 ("France believes that the submarine is the only weapon which at present permits a nation scantily supplied with capital ships to defend itself at sea. For France, therefore, the submarine is an essential means of preserving her independence which she can not give up.").

purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of humanity, and the delegation desires that united action should be taken by all nations to forbid their maintenance, construction, or employment."[107]

Notwithstanding the failure of the conference to come to a consensus on submarines, the Five-Power Treaty was signed by the United States, Great Britain, Japan, France, and Italy.[108] It required the countries to set a lower ratio of warship tonnage and reduce the size of their navies by scrapping older ships, and outlawed expansion of bases in the Pacific.[109] These treaties expired in 1936.[110]

The Washington Conference also addressed aircraft, concluding "that it is not at all practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military."[111] Furthermore, the committee stated:

> [T]he use of aircraft in war should be covered by the rules of warfare as adapted to aircraft, by a further conference which should be held at a later date. . . the late war had revealed the imperative necessity for the adoption of new rules of warfare, and that these new rules of warfare should be framed so as to take into account the development of the science of aeronautics and its application to war.[112]

A committee met as per Resolution I of the Conference, but the *Hague Rules of Aerial Warfare,* although drafted, were never presented to the international community for official acceptance or discussion.[113] Thus, aerial

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[107] *Id*. at 93. Captain Mahan made a similar argument—though unconvincingly—in the 1899 Hague Conference. The Conference reports:"[H]e thinks . . . it is no more cruel to asphyxiate one's enemies by means of deleterious gases than with water, that is to say, by drowning them, as happens when a vessel is sunk by the torpedo . . . he does not deem it logical to permit the use of submarine and submergible boats and to prohibit the use of shells filled with asphyxiating gases." HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 283, 328.
[108] *Washington Naval Conference*, *supra* note 104.
[109] *Id*.
[110] *Id*. Perhaps the treaties limited tenure is why Taylor refers to them as a failure, TAYLOR, *supra* note 64, at 18.
[111] *Washington Naval Conference*, *supra* note 104, at 229.
[112] CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 103, at 229.
[113] HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 374 (1993); Taylor writes:

> For air warfare there were no further treaty developments, and in retrospect it is easy to see why the 1923 draft failed to win adherents. In 1921, the Italian air general Giulio Douhet had published a widely read book, *Command of Air*, preaching the doctrine that in future years air power would be decisive . . . Public opinion, during the years between the two world wars, settled into a

warfare continued to operate largely under only customary international law through both World Wars.[114]

U.S. President Calvin Coolidge convened the Geneva Naval Conference in 1927 to address classes of vessels not covered by the Five-Power Treaty in 1921.[115] These classes of vessels included cruisers, destroyers, and submarines.[116] The parties failed to form a treaty due to U.S. and British disagreement over cruiser limitations.[117]

The London Naval Conference in 1930 was a new attempt to revise and extend the terms of the Five-Power Treaty of 1921 and avoid a naval arms race.[118] Specifically, a Joint Statement of the President of the United States and the British Prime Minister on October 10, 1929 expressed hope for the conference "not only to review the conversations on a naval agreement . . . but also to discuss some of the more important means by which the moral force of our countries can be exerted for peace."[119] The tone of the conference was one of establishing peace in light of the then-recent Kellogg-Briand Pact,[120] but the terms of the treaties were much more pragmatic.[121]

It limited the tonnage of auxiliary ships, granted the Japanese a higher ratio of tonnage for non-offense ship categories, and ended the impasse on cruiser vessels that halted the first Geneva Naval Conference.[122] All of the provisions of the treaty, except article 22, were set to expire 31 December 1936.[123] Article 22

> fatalistic acceptance that future wars between great powers would surely involve urban infernos produced by bombers, and that nothing could be done about it.

TAYLOR, *supra* note 64, at 19.

[114] *Id*. at 10, 20.

[115] *The Geneva Naval Conference*, 1927, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *Geneva Naval Conference*], https://bit.ly/4dDvjt8.

[116] *Id*.

[117] *Id*.

[118] International Treaty for Limitation and Reduction of Naval Armament, *opened for signature* Apr. 22, 1930, 46 Stat. 2858 [hereinafter London Conference].

[119] *Id*.

[120] NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS: WITH SOLUTIONS AND NOTES 103-4 (1929). The *Kellogg-Briand Pact* condemned war "as an instrument of national policy." It further stipulated that the "contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be which may arise among them shall never be sought except by pacific means." *Id*.

[121] *Id*. at 210–11.

[122] *Geneva Naval Conference*, *supra* note 115.

[123] *The London Naval Conference, 1930*, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *London Naval Conference*], https://bit.ly/3YaSrLf. In 1935, the United States, Great Britain, Japan, and France met to renegotiate the Washington and London Treaties before they expired the following

required submarines to follow the same standards of international law as applied to surface vessels. Specifically,

> (1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[124]

This article of the 1930 London Treaty became known as the London Submarine Protocol of 1936, and over 35 nations eventually subscribed to it.[125] Subsection two directly addressed the issue of unrestricted submarine warfare.[126] Notwithstanding these protections, "German submarines frequently sunk British and other merchant ships without warning" during World War II.[127] Balfour had been prophetic in 1921.[128] No measures of law or accountability had reined in the new technology.

The Second Geneva Naval Conference formed a part of the League of Nations World Disarmament Conference, which failed when Adolf Hitler withdrew Germany from the Conference and the League of Nations in October 1933.[129] Japan withdrew that same year,[130] and Italy in 1937.[131]

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year. Japan withdrew from the conference and the remaining powers agreed to a six-year moratorium on building large light cruisers. *Id*.

[124] London Conference, *supra* note 118, art. 22.

[125] Kelly, *supra* note 73, at 107; TAYLOR, *supra* note 64, at 87, 400. During the Nuremberg Trials, Admiral Karl Doenitz was prosecuted for unrestricted submarine warfare (among other things) in violation of this precedent. *Id.*

[126] *Id*. Though this was not a sufficient deterrent to Nazi Germany or the United States in the Pacific theater.

[127] *Id*. at 399.

[128] CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 103, at 73–74.

[129] James, *supra* note 5.

[130] *Japanese Decide to Quit the League*, N.Y. TIMES (Feb. 20, 1933), https://nyti.ms/4evAbC9. BOBBITT, *supra* note 30, at 40.

[131] Arnaldo Cortes, *Italy is Prepared to Leave League; Fascist Grand Council Called for Tomorrow*, N.Y. TIMES (Dec. 10, 1937), https://nyti.ms/4eyLtFu.

The League of Nations had failed to prevent or resolve armed conflict on numerous occasions, such as: the invasion of Albania by Serbia and Greece,[132] the Japanese invasion of China (the Manchurian incident),[133] the Chaco War between Bolivia and Paraguay,[134] terrorism on the Hungarian-Yugoslav frontier,[135] and Italy's invasion of Ethiopia.[136] Moreover, it permitted the rearmament of Germany.[137] The League of Nations was weak because it was divided. The Manchurian incident was illustrative of this division:

> [T]he real cause of the war lay in the subsequent failure of diplomacy to prevent the tragic consequences of that act in the breakdown of the structure of peace. In 1914 it was the state system of Europe, based on the balance of power, which in the face of determined aggression had been so definitely provoked. It was to prevent such confusion among the nations anxious for the preservation of peace that the League of Nations was established, with its provision for collective security. But in 1931, almost the same kind of confusion prevailed at Geneva as had been the case in the tragic days of August, 1914. This, however, was not merely to the inadequacy of the machinery of the League of Nations, but also to the fact that the United States was not a member of it. With the best will in the world toward the League, Secretary Stimson found himself in the critical opening hours of the crisis more or less in the position of a rival to the League Council.[138]

The League of Nation's many failures were a signal to aggressor states that the cost for engaging in armed conflict was low and decreasing in comparison to the cost of diplomacy, which had been difficult and costly during the interwar period. It was predictable that if the marginal cost for engaging in armed conflict was low, rational state actors would engage in armed conflict.

The Treaty of Versailles, the Kellogg-Briand Pact, and numerous other treaties had attempted to set an artificial market equilibrium at an internationally approved point by declaring war illegal. It was an attempt to tax armed conflict out of existence. However, the general misunderstanding of that market—the low

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[132] JAMES T. SHOTWELL & MARINA SALVIN, LESSONS ON SECURITY AND DISARMAMENT FROM THE HISTORY OF THE LEAGUE OF NATIONS 50 (1949).
[133] *Id*. at 81.
[134] *Id*. at 68.
[135] *Id*. at 72.
[136] *Id*. at 73.
[137] *Id*. at 75.
[138] SHOTWELL & SALVIN, *supra* note 132, at 82.

cost of entry caused by the ineffective League of Nations—led to the next great externality: World War II.

C. World War II—The League of Nations Fails

The Treaty of Versailles did more than raise the costs on going to war; it forced Germany to pay reparations, severely restricted its military, and established the League of Nations. Reparations, coupled with the "guilt clause,"[139] served to lay the blame for the Great War solely upon Germany's shoulders. The Allied powers almost certainly viewed this form of taxation as a punishment—a disincentive to future aggression. However, they did not understand the nature of the state as the aggregation of all individuals' existential need for security. This is the fundamental need that politicians capitalize on.

The term "security" aggregates many of the statistical and historical factors that led to the rise of Hitler and the Third Reich. Inflation, poverty, a sense of being treated unfairly by other nations—all diminished Germany's de facto sovereignty.[140] It is all too obvious that the German people's collective need for security was easily manipulated.

The greatly weakened League of Nations lacked the power and cohesion to stop the rising Germany. By 1935, France concerned herself with her security in the face of a re-arming Germany.[141] Cracks traced through the structure of the League of Nations. The Soviet Union invoked defense of nationals to invade Poland,[142] and invaded Finland soon thereafter.[143] On December 14, 1939, the League of Nations expelled the Soviet Union.[144]

The purpose of this section is not to give a history of World War II or of violations of the laws of war, but rather to explain the development of the market for armed conflict. Even before the end of the war, Roosevelt and Winston

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[139] Versailles Treaty, *supra* note 97, art. 231.
[140] It is helpful for the reader at this point to review the author's concept of sovereignty. A state's existence and ability to exercise personality is contingent upon other states allowing it to exist. While *de jure* still sovereign, Germany was financially weak, diplomatically had no leverage, and was de facto less sovereign. A state accrues resources and military force until the marginal cost per unit of sovereignty equals the marginal utility gained.
[141] SHOTWELL & SALVIN, *supra* note 132, at 93.
[142] G.E.R. Gedye, *German Officers Arrive in Moscow,* N.Y. TIMES (Sept. 21, 1939), https://nyti.ms/4eQrKRB. The Soviet government reported that it had followed the German advance closely and had only invaded because "the Polish state had ceased to exist." *Id*.
[143] G.E.R. Gedye, *In Finland the Soviets Reveal Their Real Aims,* N.Y. TIMES (Dec. 3, 1939), https://nyti.ms/4eRkFjH.
[144] G.E.R. Gedye, *Moscow Ridicules League Expulsion,* N.Y. TIMES (Dec. 17, 1939), https://nyti.ms/3BuGMxQ.

Churchill were shaping it.[145] At a meeting with "Chiang Kai-shek, Roosevelt and Churchill agreed to a pre-eminent role for China in postwar Asia."[146] At the Tehran Conference in 1943, Roosevelt and Joseph Stalin began to secretly discuss the composition of the United Nations.[147] Roosevelt envisioned that the "United Nations would be dominated by 'four policemen' (the United States, Britain, China, and Soviet Union) who 'would have the power to deal immediately with any threat to the peace and any sudden emergency which requires action.'"[148]

In August 1944, delegates from the United States, Great Britain, and China met at Dumbarton Oaks, in Washington, D.C., to draft the proposed collective security charter.[149] The Dumbarton Oaks proposals envisioned a General Assembly of all member states and a Security Council "consisting of the Big Four plus six members chosen by the Assembly."[150] At the Yalta Conference in 1945, France was included as one of the "policemen" on the Security Council.[151] The United Nations formally came into existence on October 24, 1945.[152] As a result, the League of Nations dissolved itself soon thereafter on April 18, 1946.[153]

Unlike the League of Nations before it, the United Nations was premised on its ability to substantially raise the barriers for entry into the market for armed conflict . The U.N. Charter strengthened the *jus ad bellum* by prohibiting the use or threat of force as an offensive measure and limiting the legitimate use of force to U.N. Security Council Resolutions under article 42 and self-defense under article 51. However, relations between the United States and the Soviet Union had been deteriorating since the Potsdam Conference.[154] China was embroiled in a brutal civil war, which Chiang Kai-shek and the nationalist lost in 1949.[155]The People's Republic of China would not be recognized by the U.S. government for decades to come.[156] These issues prevented Roosevelt's four/five policeman vision from going into effect.

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[145] *Wartime Conferences, 1941-1945*, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *Wartime Conferences*], https://bit.ly/3ZSsRf6.
[146] *Id*.
[147] *Tehran Conference*, *supra* note 22.
[148] *Id*.
[149] *The Formation of the United Nations, 1945*, U.S. DEP'T. STATE: OFF. HISTORIAN [hereinafter *Formation of the United Nations*], https://bit.ly/3zAKqpC.
[150] *Id*.
[151] *The Yalta Conference, 1945*, U.S. DEP'T. STATE: OFF. HISTORIAN, https://bit.ly/3ZSh40o.
[152] *Formation of the United Nations*, *supra* note 149.
[153] Resolution for the Dissolution of the League of Nations (1946), Covenant of the League of Nations art. 3(3); 1 Int'l Org. 246 (adopted by the Assembly on Apr. 18, 1946) (1947).
[154] *Wartime Conferences*, *supra* note 145.
[155] *The Chinese Revolution of 1949*, U.S. DEP'T. STATE: OFF. HISTORIAN, https://bit.ly/3zR8TqQ.
[156] *Id*.

D. United Nations—Legal Monopoly on Armed Conflict

Regardless the divisions within the Security Council, the United Nations Charter provided very clear guidelines on the use of state-actor armed force in the post-war era. The most pertinent articles are 2, 42, and 51.

Article 2(4) reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[157] However, this charter went much further than the Covenant of the League of Nations. In article 2(5) member states are required to give assistance in any action taken in pursuance of the charter, in article 2(6) non-member states are bound—ostensibly as a matter of customary international law—to the principles of the Charter, and article 2(7) preserves the Westphalian right of states to control their domestic affairs.[158]

Article 2(5) anticipates several actions the Security Council can take pursuant to the charter, but of particular importance is its authority in chapter VII regarding "threats to peace, breaches of the peace, and acts of aggression."[159] The League of Nations required states to bring complaints to the assembly for arbitration;[160] the United Nations is not so limited. The Security Council: (1) determines whether threats to the peace, breaches of the peace, or acts of aggression exist; (2) may disrupt economic relations, communications, or sever diplomatic relations; and (3) may use military force by "air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . includ[ing] demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[161]

The Security Council is limited only by article 51, which preserves the pre-U.N. right to self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense."[162] Even still, member

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[157] U.N. Charter art. 2(4). Contrast this language with that of the Covenant of the League of Nations: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." League of Nations Covenant art 11, para. 1.

[158] U.N. Charter art. 2.

[159] *Id*.

[160] League of Nations Covenant art 12, para. 1.

[161] U.N. Charter ch. VII.

[162] U.N. Charter art. 51. In recent years the definition of self-defense has been expanded to include anticipatory, interceptive, and preemptive defense. *See* Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1 (2008); Captain Sean M. Condron, J*ustification for Unilateral Action in Response to the Iraqi*

states must report self-defense measures to the Security Council and abide by any action it deems necessary.[163]

From the forgoing it is clear that the United Nations Charter establishes the Security Council as the *de jure* the legal monopolist of armed conflict. The competition among the great powers on the Security Council prevents it from exercising that prerogative. The result is an incentive for member states to collaborate or cheat, as they see fit to provide for their own security. This may, in some measure, explain the Cold War.

E. The Cold War—Hegemons of Peace?

At this point it is useful to reexamine a few key points. States are rational actors competing in a market for armed conflict/survival. State survival is based on its relative, or de facto, sovereignty in relation to other states. States have often engaged in armed conflict to secure their sovereignty. They do so based on the rational calculation that the marginal cost per act of armed conflict is less than the marginal utility gained. However, this calculation is flawed with an almost insurmountable information problem—the state can never be sure what the marginal cost will be.

The great powers in World War I, competed in a Pareto optimal market of armed conflict. This was because the *jus ad bellum* allowed easy access to the market, and the *jus in bello* was anemic and underdeveloped. The collective sense from states throughout the industrialized world was that the cost of war was too high. Yet, a weak and divided regulatory regime like the League of Nations did not have sufficient power to artificially set the "market" equilibrium at a different point. The U.N. Charter includes the provisions necessary for enforcing its determinations but cannot do so due to lack of cooperation. For example, article 43, which provides for member states to supply forces and resources directly to the United Nations, has never been implemented. And yet, for nearly seventy years there has not been another "world war." It has been an era of relative peace in world affairs. This seems counterintuitive. What could be the cause?

As in Part II, the great market power—hegemonic power—of the United States and the Soviet Union lowered the cost for actors in the marketplace for survival. We owe the continuity and legitimacy of the current legal regime to the hegemons that championed and cheated within that market.

Threat: A Critical Analysis of Operation Desert Fox, 161 MIL. L. REV. 115, 129 (1999); Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 64 (2010).

[163] U.N. Charter art. 51.

Hegemonic power is like monopolistic power. The hegemonic sovereign can set the cost of violence arbitrarily high because it has the force of arms to confront an entrant to the market on many fronts and in a variety of ways. In other words, the marginal cost to non-hegemon sovereigns increases to the unattainable point where they cannot overpower the hegemon. They must have the hegemon's acquiescence or blessing. To a certain degree, the U.N. Charter's prohibition on wars of aggression was maintained by hegemonic forces.

This may also explain the Cold War theory of deterrence and mutual assured destruction. The marginal cost of conventional armed conflict and nuclear weapons between the United States and the Soviet Union could not bring any additional sovereignty—no additional assurance of survival—only catastrophic loss. At this point, the participants in the market no longer suffered from an information problem. They knew exactly that they were at equilibrium—where cost equaled benefit. At this point of equilibrium, the only way to increase the state's relative sovereignty was to increase its resources, its economy, by shifting out its production possibilities frontier. In the capitalist United States, this was not only possible, it became a reality. The communist economy of the Soviet Union allowed no such expansion.

F. Post-Cold War and Market Vacuum

The breakup of the Soviet Union and the Warsaw Pact created a market vacuum. That vacuum could have resulted in new entrants into the market, as Mearsheimer states, seeking to become a new hegemon of the system.[164] Fortunately, most looked to the West for stability and respected the rule of law established by nearly fifty years of precedent for the reason noted earlier—that the new states became democracies.[165]

The United States was then the only hegemonic sovereign. The U.N. legal regime was robust, and force could be brought to bear against states in violation of the U.N. Charter who overproduced armed conflict, for example, Serbia. Since that time, however, these strong barriers to conventional military conflict have been challenged by new technologies within various operational domains, for example, information, cyber, and artificial intelligence. These new technologies largely operate unregulated by treaties or customary international law. It is an unregulated market—often referred to as operations below the threshold of armed conflict, or grey-zone conflict.

[164] Mearsheimer, *supra* note 4, at 21.
[165] *See* note 41.

V. THE GREY ZONE: UNREGULATED SPACE

The unregulated space created by the emergence of new technologies is reminiscent of the turn of the twentieth century. This is why this Article's exploration of that time period is so critical. The failure of the 1899 and 1907 Hague Peace Conferences to regulate emerging submarine, air, and chemical technologies was catastrophic. The interwar period was similarly marred by the idealistic Kellogg-Briand Pact and a host of similarly impotent efforts to eliminate armed conflict.

Despite the efforts of well-intentioned academics to suggest customary international law for operations within cyberspace, states have made no movement toward accepting those regulations.[166] Artificial intelligence and information operations now partner with cyber operations in increasingly sophisticated operations in grey zone conflict.[167] Space operations are regulated to a greater extent by five international treaties and five declarations and legal principles.[168] However, these treaties do not fully address the use of space-based assets in the conduct of cyber operations.

These, and other technologies yet to be developed, shift the equilibrium from the artificially low point currently set by international law and set the international system on the road to armed conflict. The unwillingness of states to convene and address these technologies as the great powers did during the Hague Conventions indicates an unwillingness to regulate the market. Time will tell what the consequences will be.

VI. IMPLICATIONS

There are voices within and without the United States that clamor for its departure from the world stage as a hegemon. This violates the theory of rational choice realism. The previous sections of this Article have shown that perhaps never before has the United States' hegemonic presence on the world stage been more necessary. Nature—and international relations, as it appears—abhors a vacuum.

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[166] *See The Tallinn Manual*, NATO COOP. CYBER DEFENSE CTR. EXCELLENCE, https://bit.ly/3BLkiJ4 ("The nature of the Tallinn Manual will remain unchanged; it will continue to be a non-legally-binding scholarly work by distinguished international law academics and practitioners intended to provide an objective restatement of international law as applied in the cyber context.").

[167] *See, e.g.*, Blessing Guembe et al., *The Emerging Threat of AI-driven Cyber Attacks: A Review,* 36 APPLIED A.I., 36:1 (2022), https://bit.ly/3BJzarq ("[A] malicious actor can obtain structural, operational, and topological data about the user's devices, network flows, and network infrastructure to identify a critical relationship with the intended targets.").

[168] *Space Law Treaties and Principles*, UNITED NATIONS OFF. FOR OUTER SPACE AFFAIRS, https://bit.ly/48dI2Sr.

The presence of the hegemon is a significant barrier for aggressor states to enter the marketplace for survival via armed conflict. Furthermore, the legal regime depends on it. Military force is the only check on states reshaping the rules-based order into rule by caprice and force—just as Germany, Japan, Italy, and the Soviet Union did with the League of Nations—and just as Russia and the People's Republic of China are doing now.

This is not to say that the United States must be the only hegemon in the world. Yet, it is the only state that has invested so heavily in the international legal regime.[169] President Ronald Reagan spoke the truth:

> History teaches that wars begin when governments believe the price of aggression is cheap. To keep the peace, we and our allies must be strong enough to convince any potential aggressor that war could bring no benefit, only disaster. So, when we neglected our defenses, the risks of serious confrontation grew.[170]

Rational choice realism posits that states view their interactions with other states as a positive-sum game in which diplomacy is the primary mechanism, or a zero-sum game in which armed conflict is inevitable. They do so based on their own self-interest. But there is evidence to suggest that states do not always act in their own self-interest. Some states stubbornly believe that the international system is always a positive-sum game, despite evidence to the contrary. For example, President Zelensky of Ukraine was adamant that Russia would not invade.[171] States that stubbornly persist in a positive-sum game while other states have a zero-sum mentality actually hasten the onset of armed conflict through their self-inflicted myopia.

VII. CONCLUSION

Armed conflict is not a quirk, but "an intrinsic element of life in the international system."[172] As a result, efforts to eliminate armed conflict altogether are not only misguided, they misunderstand the nature of the international system.

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[169] *See U.S. Participation in United Nations Reports*, U.S. DEP'T STATE, https://bit.ly/4eLQr1L.The United States provided more than $18 billion in 2022, which amounted to one-third of its entire budget. *Funding the United Nations: How Much Does the U.S. Pay?*, COUNCIL ON FOREIGN RELATIONS (Feb. 29, 2024), https://www.cfr.org/article/funding-united-nations-what-impact-do-us-contributions-have-un-agencies-and-programs

[170] Ronald Reagan, President, United States, Address to the Nation and Other Countries on United States-Soviet Relations (Jan. 16, 1984), https://bit.ly/40f5Svf.

[171] *Ukraine Crisis: Don't Create Panic, Zelensky Tells West*, BBC NEWS (Jan. 29, 2022), https://bbc.in/3BPmZJO.

[172] MEARSHEIMER, *supra* note 4, at 22.

That system is like a market in which states compete for survival as rational actors. Some are defensive, maintaining the status quo, others offensive and seeking greater power to ensure their sovereignty and survival. This is rational choice realism.

However, armed conflict can be regulated. Public international law regulates the overproduction and negative externalities of these inevitable armed conflicts. It attempts, with varying degrees of success, to hold states accountable and set an equilibrium for armed conflict. Sadly, but realistically, this equilibrium point is above zero. However, an artificially low equilibrium can only be enforced with the backing of a hegemonic, monopolistic power. Rarely has history shown a hegemon to benevolent. Yet, this is another positive externality of the United States' defense of the current rules-based order. This too is rational choice realism, for it is only rational that "a state's ultimate goal is to be the hegemon in the system."[173]

[173] *Id*. at 21.