

THE INTERNATIONAL LEGAL JURISTS, MORALITY, AND THE REALIST PERSPECTIVE IN INTERNATIONAL RELATIONS

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I. INTRODUCTION

The international legal perspective is characterized by the normative potential of international relations. Modern international law has been defined as the “rules, procedures and practices that regulate the behavior of various actors within a world political system dominated by sovereign states of unequal power, wealth and prestige.”¹ This contemporary concept was based on the framework of seventeenth-century Dutch legal jurist Hugo Grotius, who is considered to be “the father of international law.”² Grotius’s treatise, *De Jure Belli ac Pacis* (“On the Law of War and Peace”), was impelled by the devastating effects of the Thirty Years War waged in Europe between Catholics and Protestants.³

Grotius was considered the first to define a worldwide system of jurisprudence based on natural law, which would serve as a guide for international relations based on right and reason.⁴ Written in 1625, the text of *De Jure Belli ac Pacis* drew from the thinkers of antiquity, namely Aristotle, Cicero, St. Isidore of Seville, St. Augustine, and

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¹ INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al. eds., 1985).

² *Id.* This title is not without dispute. *Id.* However, “Grotius seems to have been the first who attempted to give the world anything like a regular system of natural jurisprudence, and *De Jure Belli ac Pacis* with all its imperfections, is perhaps at this day the most complete work on this subject.” Benedict Kingsbury & Adam Roberts, *Introduction to Grotian in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 3 (Hedley Bull et al. eds., 1992) (quoting Adam Smith’s 1762 lectures).

³ Kingsbury & Roberts, *supra* note 2, at 1.

⁴ *See id.* at 3-4.

Thomas Aquinas.⁵ The focus of *De Jure Belli ac Pacis* was on the legal responsibilities of human society and the method of enforcing law and punishing its violators.⁶ While Grotius was a peaceful and spiritual individual,⁷ he viewed war as a means of enforcing legal rights⁸ and believed that *Jus belli*—the laws of war—should be centered on principles rooted in the laws of nature.⁹ Grotius's objective in writing this treatise, in part, was to argue that a war based on religious identity—the Thirty Years War—was not just.¹⁰ Accordingly, states are subject to moral obligations and there is a punishment for breaching law.¹¹

According to Grotius, the doctrine of justice lies at the foundation of legal right—"the most important of cardinal virtues [if not] the sum of all virtues."¹² This doctrine is predicated on Aristotle's definitions of Expletory and Attributive Justice.¹³ Expletory Justice requires that man has a right to what belongs to him and this right may be invoked

⁵ W. S. M. Knight, *Introduction to HUGONIS GROTII, DE JURE BELLI AC PACIS: LIBRI TRES 5, 9* (W. S. M. Knight trans., Sweet and Maxwell, Ltd. 1922) (1625).

⁶ See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 19-52 (1946). In his work, *De Jure Belli ac Pacis*, Grotius discusses his belief that men possess an element of morality and can appeal to morality "without interfering decisively with the legal character". *Id.* at 25. Additionally, Grotius speaks of the different ways to settle disputes besides waging war which include negotiation and arbitration. *Id.* at 47.

⁷ See *id.* at 25.

One of the salient characteristics of *De Jure Belli ac Pacis* is . . . the frequency of the reliance on an appeal to the law of love, the law of charity, of Christian duty, of honour, and of goodness, and to the injunctions of divine law and the Gospel: the element of morality and the appeal to morality are, without interfering decisively with the legal character of the exposition, a constant theme of the treatise.

Id.

⁸ G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas about War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 194 (Hedley Bull et al. eds., 1992). "In order that a war may be 'just' there must be, in Grotius' view, a 'just' and lawful 'cause,' on the analogy of a 'cause of action' which would be recognized as affording a remedy before a municipal court of law." *Id.*

⁹ *Id.* at 195. "Grotius advanced to the key proposition that a war initiated without a basis in strict justice is an 'unjust war.' These 'just causes' are based on natural law and the law of nations." *Id.*

¹⁰ See *The Grotian Moment*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al. eds., 1985). "Grotius was especially eager to argue that the particular religious identity of a state was not a 'just cause' of war." *Id.*

¹¹ See Knight, *supra* note 5, at 10.

¹² See *id.* at 9.

¹³ See *id.* at 10.

in a court of law, with the aim of rewarding the afflicted their due.¹⁴ Attributive Justice—administered by society at large—determines what actually belongs to man.¹⁵ The essential principle of Attributive Justice is that members of society should each enjoy their “desserts”—not only their moral worth, but also a share of the general public welfare resulting from their personal contribution to society.¹⁶ Grotius’s reliance on classical writers provided evidence that natural justice was embedded in the practice and customs of ancient states.¹⁷ Consequently, it is the cornerstone of state conduct in international affairs.

Grotius’s normative tradition, which depends on rules to govern inter-state relations,¹⁸ is more pacifistic than the principles of classical realism (“*realpolitik*”). Under the realist perspective, power is the ultimate end and institutions are viewed as mere extensions of the most powerful states in the international system.¹⁹ Further, realists argue that “international law [is] simply incapable of effectively restraining the never-ending struggle for power in the international arena.”²⁰ Realists, discrediting Grotius’s ideals, would agree that he “liv[ed] in and wr[ote] for the ancient world rather than in and for the world of his day [or the future].”²¹

This Article aims to debunk the realist contention that power politics trumps diplomacy and argues that Grotius’s international law *does* exist and has a profound impact on inter-state relations. Part II of this Article focuses on the philosophers of antiquity who Grotius based his work on and will also delve into the beginnings of realism. Part III compares and contrasts Grotian ideals and realism while discussing ethical standards in global trade relations. Part IV shifts the focus of the Article to the present and highlights the key features of the international economic system, while explaining its relevance through modern day trade disputes and game theory. This analysis will be illus-

¹⁴ See *id.* at 10.

¹⁵ See *id.* at 10.

¹⁶ See *id.* at 10.

¹⁷ See David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli ac Pacis*, 10 EMORY INT’L L. REV. 1, 4 (1996).

¹⁸ Knight, *supra* note 5, at 9-10.

¹⁹ See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 27 (5th ed. 1973). “International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim.” *Id.*

²⁰ Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1408 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

²¹ Knight, *supra* note 5, at 17-18.

trated by an economic study of global trade relations with a focus on the World Trade Organization (WTO) as the cornerstone for defining international law in global commerce. The final section concludes that realism's narrow view of power is useful in understanding international relations, but, ultimately, international law is relevant and plays a critical role in the international system.

II. THE THINKERS OF ANTIQUITY

Grotius elaborated on established principles of common law, which stem from natural law and ultimately bind humanity.²² Grotius's conception of international law was preceded by earlier philosophies, such as those of the sixth century Archbishop St. Isidore of Seville, who divided human law into civil law and *jus gentium*—the law of nations.²³ Although St. Isidore did not explicitly define *jus gentium*, he enumerated topics—occupation, war, and treaties—that require governance by universal juridical principles.²⁴ In a similar vein, Francisco Suarez, a late sixteenth century priest and philosopher, maintained that law is commonly observed in nearly all societies.²⁵ Akin to man, a state is an entity which needs the support of society and interaction with other states.²⁶ Thus, laws—drawn from international usage and

²² See Lauterpact, *supra* note 6, at 21.

With the affirmation of the rule of law as extending to the totality of the relations of states there is connected the second feature of the Grotian tradition, namely, the view that the law thus binding upon states is not solely the product of their express will. Grotius accepted as self-evidence the proposition that the sovereign—the state—is bound by the law of nations and the law of nature.

Id. (citation omitted).

²³ Knight, *supra* note 5, at 13.

²⁴ JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* 18 (The Law Book Exchange, Ltd. 2000) (1934).

The law of nations concerns the occupation of territory, building, fortification, wars, captives, enslavements, the right of return, treaties of peace, truces, the pledge not to molest embassies, the prohibition of marriages between different races. And it is called the 'law of nations' (*ius gentium*) because nearly all nations (*gentes*) use it.

Id.

²⁵ Knight, *supra* note 5, at 16.

²⁶ *Id.* Suarez contended that no people are entirely self-sufficient; they need help of other people. *Id.*

tradition—are needed to govern members in a worldwide community of states.²⁷

Grotius applied justice to the global realm through the universality of human reason, based on the body of laws derived from nature.²⁸ Thus, the rules governing state relations were both universal and rational.²⁹ From natural law evolved *jus gentium*, the common law inherent in the character of humanity.³⁰ The unanimous endorsement of differing states throughout the world defines the law of nations in the context of no society having a legal advantage over another.³¹ Mankind is bound to the same law by virtue of nature and as a result, “wise [leaders] regard themselves as entrusted with the care of not one na-

²⁷ *Id.*

²⁸ *Id.* at 11-12.

²⁹ *Id.* at 12.

³⁰ See Kingsbury & Roberts, *supra* note 2, at 30-31.

Grotius saw the sources of the law of nations as natural (manifest in nature but discerned by human reason), divine volitional (the law of God), and human volitional. This last category comprises law made by civil powers and law made by the will of nations. These human volitional laws supplement (but do not, in general, override) the divine law and the law of nature; they exist through human will, but their binding force comes from the law of nature. They are often difficult to distinguish in practice from natural law, as the widespread practice of nations is also used as an important source of evidence as to the content of the law of nature. Grotius also allowed for rules of international obligation based on express consent (most commonly in the form of a promise), but these rank below rules founded upon the other (higher) sources. In this respect the natural law conception commonly associated with Grotius appears antithetical to positivist consent-based accounts of international regulation.

Id.

³¹ See generally Bederman, *supra* note 17, at 4-18 (discussing Grotius’s citation to classical writers).

The reason for [Grotius’ citations to classical sources] was that Grotius sought to use classical materials not so much to provide authority for fine legal points, but, instead, to offer evidence of the practice and customs of ancient States. For the principles of natural justice, which he believed guided State conduct in international affairs, Grotius resorted to using scriptural interpretation. But for his account of State practice, Grotius did not rely solely on Roman juriconsults, who were relatively thinly represented in his text. Indeed, Grotius seemed to have a definitive bias against using, as authority, the texts of leading legal schools, including the more contemporaneous civil and canon lawyers. In short, Grotius was not so much writing a legal treatise as he was drafting a compendium of the rules of international law as reflected in actual State conduct.

Id. at 4.

tion only but of all mankind.”³² Grotius drew from Cicero’s notion of *humani generis societas*, a “society of mankind rather than of states.”³³ Cicero defined man’s primary instinct as self-preservation, meaning that man will do whatever he can to maintain himself and to avoid destruction.³⁴ If the object of war is preserving life and limb, or retaining or acquiring necessities, then realizing these objectives through the use of force is not wholly challenged by man’s primary instinct.³⁵

However, Grotius claims that human reason and nature prohibit any force that is “repugnant” to society and which invades the right of another.³⁶ This follows Cicero’s supposition that it is contrary to nature to take from another to enrich oneself.³⁷ Grotius believed that this is proven; for were it not the case then human society would have destroyed itself by now.³⁸

³² Knight, *supra* note 5, at 13 (quoting Grotius).

³³ Bederman, *supra* note 17, at 6 (quoting JULES BASDEVANT, LES FONDATEURS DU DROIT INTERNATIONAL 254 (1904)).

³⁴ HUGONIS GROTII, DE JURE BELLI AC PACIS: LIBRI TRES bk. I, ch. II § I(1), 44 (W. S. M. Knight trans., Sweet and Maxwell, Ltd. 1922) (1625).

³⁵ *Id.*

³⁶ *Id.* at bk. I, ch. II § I(5), 45.

³⁷ NEAL WOOD, CICERO’S SOCIAL & POLITICAL THOUGHT 105 (1988). According to Cicero,

[o]ur natural instinct for self-preservation forces us to acquire possessions for the survival and well-being of ourselves and our families. Human reason not only guides man in his pursuit of possessions by enabling him to determine what is necessary and how it can most satisfactorily be gained, but also serves as a moral regulator, prohibiting the individual in his drive for accumulation from making it the *summum bonum* and from injuring his fellows in the process and violating their properties or interfering with their acquisitive activities.

Id.

³⁸ 1 THE RIGHTS OF WAR AND PEACE bk. I, ch. II § I(3), 184-85 (Richard Tuck ed., Liberty Fund 2005).

So if every Man were to seize on the Goods of another, and enrich himself by the Spoils of his Neighbour, human Society and Commerce would necessarily be dissolved. Nature allows every Man to provide the Necessaries of Life, rather for himself than for another; but it does not suffer any one to add to his own Estate, by the Spoils and Plunders of another.

Id. (quoting Tully).

A. *Foundations in Morality*

St. Augustine once declared that “to fight is the happiness of the wicked but the necessity of the good.”³⁹ As a profoundly religious man, Augustine saw a moral method of conduct directed by God.⁴⁰ He credited Cicero’s *Hortensius*—which praised the development of reason and the overcoming of passion as the only way to achieve true happiness—as instrumental in his conversion to Christianity.⁴¹

Augustine looked at the internal workings of the state and at relations between individuals in society.⁴² A coherent society depends on a system of law and interdependence. Reaching a high moral ground with the grace of God is the ultimate goal.⁴³ Norms take shape as rules

³⁹ GROTH, *supra* note 34, bk. II, ch. XXIV § X(1) at 67 (quoting Augustine).

⁴⁰ According to Augustine, “the eternal law is the divine reason or the will of God, which commands that the natural order be preserved and forbids it to be disturbed.” *I/20 Answer to Faustus, A Manichean*, in THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY 317 (Boniface Ramsey ed., Roland Teske trans., 2007). For Augustine, “the eternal law as the ideal universal order becomes the principle of morality.” I JOHANNES HIRSCHBERGER, THE HISTORY OF PHILOSOPHY 330 (RT. Rev. Anthony N. Fuerst trans., 1958).

⁴¹ SAINT AUGUSTINE, THE CONFESSIONS 40-42 (Maria Boulding trans., Vintage Books 1998).

In the customary course of study I had discovered a book by an author called Cicero, whose language almost universally admired, though not its inner spring. This book of his is called the *Hortensius* and contains an exhortation to philosophy. The book changed my way of feeling and the character of my prayers to you, O Lord, for under its influence my petitions and desires altered. All my hollow hopes suddenly seemed worthless, and with unbelievable intensity my heart burned with longing for the immortality that wisdom seemed to promise. I began to rise up, in order to return to you.

Id. at 41.

⁴² See generally INTERNATIONAL RELATIONS IN POLITICAL THOUGHT: TEXTS FROM THE ANCIENT GREEKS TO THE FIRST WORLD WAR 102 (Chris Brown et al. eds., 2002).

Augustine’s political thought can be divided up into five distinct areas: (1) the Roman empire and its place in the divine plane and relationship to Christianity, (2) human nature and relationships in society, (3) the church and its relations with the secular world, (4) religious coercion, and (5) the just war.

Id. (citation omitted).

⁴³ See SAINT AUGUSTINE, CITY OF GOD bk. XIX, ch.13, 870 (David Knowles ed., Henry Bettenson trans., Penguin Books 1972) [hereinafter CITY OF GOD].

The peace of body and soul is the duly ordered life and health of a living creature; peace between mortal man and God is an ordered obedience, in faith, in subjection to an everlasting law; peace between men is an ordered agreement of mind with mind; the peace of a home is the ordered agreement

that explain what ought to exist.⁴⁴ Augustine described a *City of God* within the Christian international system as something towards which every man must strive.⁴⁵ Deviation from the norm results in a lack of virtue.⁴⁶ Like Cicero, Augustine related Roman loss of moral bearings to its collapse—Rome fell because it was not godly.⁴⁷ Augustine saw

among those who live together about giving and obeying orders; the peace of the Heavenly City is a perfectly ordered and perfectly harmonious fellowship in the enjoyment of God, and a mutual fellowship in God; the peace of the whole universe is the tranquility of order—and order is the arrangement of things equal and unequal in a pattern which assigns to each its proper position.

Id.

⁴⁴ See generally 1 WILHELM WINDEL BAND, A HISTORY OF PHILOSOPHY: GREEK, ROMAN, AND MEDIEVAL 279 (1958) (describing Augustine's emphasis on God in his philosophical and political works).

Such norms of reason assert themselves as standards of judgment in doubt as in all activities of consciousness; but they transcend, as something higher, the individual consciousness into which they enter in the course of time: they are the same for all who think rationally, and experience no alteration in this their worth. Thus the individual consciousness sees itself attached in its own function to something *universally valid* and far reaching.

Id. (citation omitted).

⁴⁵ See generally *Christianity*, in ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/115240/Christianity/67577/Church-and-state#ref301670> (last visited October 3, 2009).

From Augustine's perspective the "splendid vices" of the pagans had led inexorably to the fall of an idolatrous world. In sharp contrast to this "earthly city," epitomized by Rome but everywhere energized by the same human desires for praise and glory, Augustine projected the "most glorious city" of praise and thanks to God, the heavenly Jerusalem. However, Augustine did not simply identify the state with the earthly city and the church with the city of God. He perceived that the state existed not simply in opposition to God but as a divine instrument for the welfare of humankind. The *civitas dei* ("city of God") and the *civitas terrena* ("earthly city") finally correspond neither to church and state nor to heaven and earth. They are rather two opposed societies with antagonistic orders of value that intersect both state and church and in each case show the radical incompatibility of the love of God with the values of worldly society.

Id.

⁴⁶ AUGUSTINE: POLITICAL WRITINGS xvii (E.M. Atkins & R.J. Dodaro eds., 2001) (arguing the necessity of virtue within society). "Civic virtues are necessary for well-being as Cicero himself thought; they are best secured, however, in Augustine's view, by the Christian churches, in which public exhortations to peace can regularly be heard." *Id.* (citation omitted).

⁴⁷ CITY OF GOD, *supra* note 43, at bk. II, ch. 21-23, 72-77 (discussing Cicero's prediction to the fall of Rome due to a decay in morals and the Roman gods who were not concerned with moral corruption) "I am now concerned with the poisoning

war as if conducted in the name of God.⁴⁸ When a moral state adhering to the word of God is attacked, it has the right to defend itself.⁴⁹

Classical and medieval political thought has long espoused the notion that wherever justice was established, unity would exist, and peace would inevitably follow.⁵⁰ Morality was tied to canonical ethics, deriving their authority from scripture—essentially, the will of God.⁵¹ It was not until the thirteenth century—at the time of the fourth crusade—

of morals, which first decayed slowly and then suffered a headlong plunge. As a result such ruin came upon the commonwealth, even though buildings and walls stood unharmed, that their eminent writers have no hesitation in pronouncing the commonwealth lost.” CITY OF GOD, *supra* note 43, at bk. II, ch.22, 76.

⁴⁸ JOHN MARK MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR 164 (2006). “Since Augustine accepts as fundamental the idea that obedience to God’s commands is always justifiable and that, by definition, any war which God ordains is just, then one can rest assured that he is justified in fighting a war that God has ordained.” *Id.*

⁴⁹ Augustine believed that any state, even a tyrannical state, had the right to defend itself. To Augustine, those in power received their power from God, and “[o]nly God or His earthly delegate, the sovereign head of state, can declare war.” *Id.* The state existed to minimize disorder. *See id.* Therefore, “Augustine enjoined defence of the state by violent action when so directed by competent authority, and completely proscribed all violent action—even by the elect—for the purpose of self-defence.” *Id.* at 168.

⁵⁰ Knight, *supra* note 5, at 19.

⁵¹ This was the case before the Papal Revolution. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 115-16 (Harvard Univ. Press 1983).

From early centuries on, the church accumulated a great many laws—canons (that is, rules) and decrees of church councils and synods, decrees and decisions of individual bishops (including the Roman pontiff), and the laws of Christian emperors and kings concerning the church. The church in the West also produced many Penitentials (handbooks for priests), containing descriptions of various sins and the penalties attached to them. All these laws were considered to be subordinate to the precepts contained in the Bible (both the Old and New Testament) and the writings of the early church fathers . . .

These authoritative writings, in which the canons were merged, had contributed to the gradual establishment throughout the Western Christendom, between the sixth and tenth centuries, of a common body of theological doctrine, a common worship service (in Latin), a common set of rules concerning major sins (such as killing, breaking oaths, stealing), and a common ecclesiastical discipline and structure.

Id. After the Papal Revolution, the canon law was used to find the “right order in the world.” *Id.* at 118 (“‘Right order’ signified a new division of society into separate ecclesiastical and secular authorities, the institutionalization of the ecclesiastical authority as a political and legal entity, and the belief in the responsibility of the ecclesiastical authority to transform society.”).

that the absolute authority of faith institutions was challenged.⁵² The crusade towards Jerusalem deviated from its path by heading towards wealthy Constantinople instead.⁵³ During this time, Thomas Aquinas came to understand the value of wealth and power.⁵⁴ Contrary to Augustine, he concluded that the perfect state is not simply based on beliefs.⁵⁵ This was the beginning of a departure from religion and opened

⁵² ROBERT CHAZAN, *DAGGERS OF FAITH: THIRTEENTH-CENTURY CHRISTIAN MISSIONIZING AND JEWISH RESPONSE* 27 (1989).

Greater sensitivity to the inner workings of the human soul similarly provoked new questions and doubts. Disquiet on the part of individuals inevitably coalesced into broader societal concern and doubt, and, not surprisingly, the century of impressive church organization and intellectual strength was also a century of significant heresy. Throughout western Christendom, but particularly in the Mediterranean areas, the flood of new perceptions and ideas resulted in the development of strikingly innovative teachings. As the agency responsible for monitoring the spiritual climate of western Christendom, the Church had to assess these teachings. On occasion, they were successfully assimilated into the body of existing doctrine and into the organized life of the Church. More often, the conclusion was that the new ideas crossed the limits of the permissible and had to be rejected. Such rejection meant inevitably that these ideas had to be fought and repressed. Thus, the apparent strength and well-being of the Church was balanced by uncertainty and anxiety. Neither for the first time nor for the last, a period of vigor and progress was also a period of insecurity and concern.

As the ecclesiastical leadership of western Christendom marshaled its forces to confront the dangerous developments of the thirteenth century, the highest priority had to be assigned to combating internal heresy.

Id.

⁵³ See A HISTORY OF THE CRUSADES, VOLUME 3: THE FOURTEENTH AND FIFTEENTH CENTURIES 29-30 (Harry W. Hazard & Kenneth M. Setton eds., Univ. of Wisconsin Press 1975).

⁵⁴ See E.K. HUNT, *PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES* 8-9 (5th ed. 1986).

Tradition was upheld in [Aquinas's] insistence that private property could be justified morally only because it was a necessary condition for almsgiving. The rich, he asserted must always be "ready to distribute, . . . [and] willing to communicate." Aquinas believed, with the earlier fathers, that "the rich man, if he does not give alms, is a thief." The rich man held wealth and power for God and for all society. He administered his wealth for God and for the common good of mankind. Wealth that was not properly used and administered could no longer be religiously and morally justified, in which case the wealthy man was to be considered a common thief.

Id. at 8.

⁵⁵ For example, in *Summa Theologica*, he wrote:

[S]ince God created the first things not only for their own existence, but also that they might be the principles of other things, so creatures were pro-

the window for secular thought into morality and law. It represented a shift back towards Aristotelian thought and the use of *logos*—by questioning through logic, a high moral ground can be reached.⁵⁶ Morality is not simply based on blind faith. Aquinas believed that challenging authority was man's God-given right and does not represent a loss of virtue.⁵⁷ Aquinas' approach, merging Aristotelian thought with Christianity, was influential in establishing common law.

B. Morality, Religion, and International Rights

For Grotius, contracts played an essential role in defining international right, by declaring that the law of nature governs members of society.⁵⁸ This is consistent with Immanuel Kant's belief that social

duced in their perfect state to be principles as regards others. Now man can be the principle of another man not only by generation of the body, but also by instruction and government. Hence, as the first man was produced in his perfect state, as regards his body, for the work of generation, so also was his soul established in a perfect state to instruct and govern others.

THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS: VOL. I, 504 (Fathers of the English Dom. Province trans., Encyclopaedia Britannica 1952).

⁵⁶ 8 THE ENCYCLOPEDIA OF PHILOSOPHY 105 (Paul Edwards ed., 1967) (emphasizing that Aquinas's philosophy is largely a rethinking of Aristotelianism).

⁵⁷ See generally Stephen J. Pope, *Overview of the Ethics of Thomas Aquinas*, in THE ETHICS OF AQUINAS 30, 41 (Stephen J. Pope ed., 2002) (discussing Aquinas's view of justice).

Human laws ought to serve the common good, and that is why violations of right always attack the common good, either directly or indirectly. Aquinas had . . . "a great awareness of the communal contexts of the moral life, and more specifically, of the ways in which one can injure another through damaging her standing within the community." Yet for all the significance of the common good, the individual cannot be treated unjustly for the benefit of the wider community. Inherently wrong legal arrangements cannot be made just simply by the arbitrary declarations of those in power; hence, the famous axiom that an unjust law is not law at all.

Id. (citations omitted).

⁵⁸ Knight, *supra* note 5, at 19-20.

According to Grotius, every political society is based upon contract between its members, the first contract of all, one, simply declaratory of the law of nature, by which its members emerge from the state of nature. These members, too, move amongst themselves within their society by contract. So can and should move all the political societies within the great human society; for the plan of the world includes societies or States, as well as individuals or citizens, with all the relative inequalities of the latter, and contract involves the idea of the right, of justice, and always of obligation and good faith. Wherever, therefore, in international affairs there is an absence

contracts are established to punish the evil, protect individual property, and establish order amongst members of society.⁵⁹ Grotius believed that if individuals could come together for the greater good of the state, then this should move “all the political societies within the great human society [towards unity]; for the plan of the world includes societies, states and their citizens.”⁶⁰ Grotius’s ideal is based upon the dictates of natural law, which is common to all nations.⁶¹ Nature is the creation of God and natural law is the dictate of right reason.⁶² Acts are morally right or wrong based on their relationship with nature.⁶³ However, Grotius reasoned that “the power of natural law is so immutable that even God himself cannot change it.”⁶⁴ Although Grotius acknowledged that God is the “Author of Nature,”⁶⁵ there are certain areas where the power of God does not extend; he cannot lawfully order someone to be murdered, or for his goods to be stolen.⁶⁶ “As it is impossible even for God so to make it that twice two are not four, so He cannot make that which is intrinsically bad not to be bad.”⁶⁷

Grotius’s ideas of international law were an amalgamation of thoughts expressed by great thinkers of the past. Francisco de Vitoria’s sixteenth century school of international law described secular rights to freedom and property as well as their censure of slavery.⁶⁸ These

of contract, or, there being contract, justice is wanting and bad faith prevails, anarchy or war alone will exist.

Id.

⁵⁹ Frederick Rauscher, *Kant’s Social and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., July 24, 2007, <http://plato.stanford.edu/entries/kant-social-political/> (describing Kant’s view and philosophy regarding social contracts).

⁶⁰ Knight, *supra* note 5, at 19-20.

⁶¹ *Id.*; EARLY MODERN NATURAL LAW THEORIES: CONTEXTS AND STRATEGIES IN THE EARLY ENLIGHTENMENT X (Tim J. Hochstrasser & Peter Schröder eds., Kluwer Academic Publishers 2003). “[A]s Grotius maintained, . . . ‘one reaches the conclusion, if not with definite certainty, at least with probability, that a precept belongs to natural law because it is viewed as such among all nations, or at least the civilised nations: for an universal effect presupposes a universal cause.’” *Id.*

⁶² See STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 138-49 (1993). “The law of nature is a dictate of right reason.” *Id.* at 140.

⁶³ GROTIUS, *supra* note 34, at bk. I, ch. I §X(2) at 40.

⁶⁴ *Id.* § X(5) at 41.

⁶⁵ *Id.* § X(1) at 40.

⁶⁶ *Id.* § X(5) at 41.

⁶⁷ *Id.*

⁶⁸ JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS 137-62 (The Law Book Ex-

elements of basic secular law, which protect the rights of the individual, fit in with Grotius's concept of justice based on natural law. Is this not an affirmation that morality can be separated from Christianity and, further, that common law does exist?

Scholars have attempted to explain Grotius's rise to prominence and why his ideas were embraced and treated as novel rather than his predecessors'. Sir Hirsch Lauterpacht cites external factors accounting for the particular success of Grotius's teachings.⁶⁹ First, Lauterpacht states, is timeliness.⁷⁰ *De Jure Belli ac Pacis* was published during the historic disintegration of the political society in Europe.⁷¹ Grotian ideas were "consummated" by the subsequent rise of the sovereign state in the Peace of Westphalia in 1648.⁷² Second, the unity once provided by religion was eroding.⁷³ Faith served as the safeguard that controlled the French and Spanish rivalry for 300 years.⁷⁴ Third, the downfall of the feudal system gave greater significance to the sovereign state.⁷⁵ The latter two were the primary reasons for the establishment of a system of law.⁷⁶ An international legal structure would "govern the relations of independent states . . . [and] replace the legal and spiritual unity of Christendom."⁷⁷ If Grotius is to be credited for founding international law, the necessity for an international connection at the time cemented his relevance in history.⁷⁸

change, Ltd. 2000) (1934) (describing Spanish international law theorist Victoria's analysis of the Spanish's right to travel to the New World and the native's right to be respected).

We need only turn again to a single sentence in Victoria's text, to see that equality of peoples and of States is the very life and soul of his scheme of international relations. 'Although, then, this title,' Victoria says, speaking of discovery, 'when conjoined with another'—such as occupation, for example—'can produce some effect . . . yet in and by itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us'—the 'us' being not merely Spain and France but the Christendom of the day.

Id. at 137.

⁶⁹ Lauterpacht, *supra* note 6, at 16.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See id.* at 16-17.

⁷³ *Id.* at 16.

⁷⁴ *Id.*

⁷⁵ *Id.* at 17.

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

C. Power in Antiquity

International law is not synonymous with power politics. Morality—which derives its authority from natural law—posits that states cannot justify warfare from calculations of advantage.⁷⁹ There is a moral code of conduct that must be adhered to in interstate conduct, for it is part of human nature. In *De Jure Belli ac Pacis*, Grotius put forward four guidelines for the guarding of society.⁸⁰ First, one must abstain from that which belongs to another.⁸¹ Second, one must restore that which one has taken from another.⁸² Third, reparation must be made for wrongdoing.⁸³ And fourth, punishment may be deserved by those who commit wrongful acts.⁸⁴

By contrast, the realist paradigm obeys no moral code of conduct—for a realist, the means justify the ultimate end, the pursuit of power.⁸⁵ In the *Prolegomena* to his treatise, Grotius acknowledged that in the past there had been those who “despised this branch of law as though it were nothing more than merely an empty name.”⁸⁶ He quotes Thucydides: “a king, or a state, can do nothing unjust when acting in his or its own interest.”⁸⁷ Essentially, those who enjoy the supreme power have right on their side. Grotius lays out the criticism of his argument yet does nothing to forestall the attack. This is where the Grotian theory of international law begins to show its indefensibility when taken into the actual context of international state conduct.

Realist theory is entrenched in history and political thought. It dates as far back as Thucydides’ documentation of the Peloponnesian War between Athens and Sparta, beginning in 432 B.C.⁸⁸ Pericles, a prominent statesman and general of Athens, was the first to evoke pa-

⁷⁹ Augustine’s just war theory is an example of this. Augustine required a just cause in order for war to be just. MATTOX, *supra* note 48, at 74-75. In particular, he held “that the maintenance of national honour cannot serve as a pretence for unjust causes, such as wars of national expansion.” *Id.* at 75. For an example of how Augustine intertwined eternal law, natural law, and morality, see footnote 40.

⁸⁰ Lauterpacht, *supra* note 6, at 7.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See generally TONY SMITH, *AMERICA’S MISSION: THE US AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* 351-52 (Princeton Univ. Press 1994).

⁸⁶ GROTH, *supra* note 34, *Prolegomena* § 3 at 29.

⁸⁷ *Id.* (citation omitted).

⁸⁸ See *id.*

triotism and the notion of valor in sacrificing an individual's life in battle for the sake of state survival.⁸⁹ He declared the state much larger than the individual and defined statehood and citizenry.⁹⁰ Pericles gave people something to fight for—a sense of belonging.

During the war, Athens invaded the island of Milos, which was strategically located in the naval power's direct path towards the Spartans.⁹¹ The Athenians were faced with a controversy, now known as the Melian Debate, when the islanders asked for reprieve from Athenian domination.⁹² The islanders made their request on the basis of shared Athenian and Melian values embracing freedom.⁹³ They asked that their way of life be preserved, and in return would vow to remain neutral and not act against their Athenian invaders.⁹⁴

Power politics as a zero-sum game prevented this from occurring. Neutrality did not exist in that situation, for there was a clear winner and clear loser. If they failed to act, Athens would be perceived as

⁸⁹ THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 144-51 (Rex Warner trans., Penguin Group 1972). In Pericles' funeral oration, he rejected the idea that honor was bestowed on the fallen soldiers due to a speech, but stated it was bestowed in describing their courageous actions. *Id.* at 144.

These men have shown themselves valiant in action, and it would be enough, I think, for their glories to be proclaimed in action Our belief in the courage and manliness of so many should not be hazarded on the goodness or badness of one man's speech.

Id. He then praised the cause they fought for and their courage in doing so.

This, then, is the kind of city for which these men, who could not bear the thought of losing her, nobly fought and nobly died. It is only natural that every one of us who survive them should be willing to undergo hardships in her service. And it was for this reason that I have spoken at such length about our city, because I wanted to make it clear that for us there is more at stake than there is for others who lack our advantages I have sung the praises of our city; it was the courage and gallantry of these men, and of people like them, which made her splendid

[I]n fighting, they thought it more honourable to stand their ground and suffer death than to give in and save their lives

What I would prefer is that you should fix your eyes every day on the greatness of Athens as she really is, and should fall in love with her. When you realize her greatness, then reflect that what made her great was men with a spirit of adventure, men who knew their duty, men who were ashamed to fall below a certain standard.

Id. at 148-49.

⁹⁰ *Id.* at 144-51.

⁹¹ *Id.* at 400.

⁹² *Id.* at 400-07.

⁹³ *See id.* at 402-03.

⁹⁴ *Id.* at 402.

weak; they would lose and potentially trigger their own downfall. A show of force was vital, and backing out could have consequences worse than actual physical defeat. The Athenians saw only one way to resolve the Melian Debate: they had to destroy the island inhabitants and force them to surrender unconditionally.⁹⁵ Not doing so would threaten their own national security. The first lesson of *realpolitik* can be understood as survival of the fittest: the strong do as they choose and the weak suffer as they must.⁹⁶

Similarly, Machiavelli's *The Prince* was essentially a rulebook for preserving monarchical strength.⁹⁷ He wrote it at a turning point in Italian history, feeling it was important for instructing a prince on how he should govern.⁹⁸ Machiavelli saw the state as a dynamic and expansive force.⁹⁹ Little faith was placed in the progress of mankind.¹⁰⁰ In this sense he is a modern thinker, his ideas resembling *realpolitik*. He

⁹⁵ This one resolution was exactly what they carried out. *Id.* at 408. "[T]he Melians surrendered unconditionally to the Athenians, who put to death all the men of military age whom they took, and sold the women and children as slaves." *Id.*

⁹⁶ This is demonstrated by the Athenians' argument in the debate. *Id.* at 401-02.

Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think; since you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.

Id.

⁹⁷ See NICCOLO MACHIAVELLI, *THE PRINCE* (Harvey C. Mansfield trans., 2d., The Univ. of Chicago Press 1998).

⁹⁸ Daniel Donno, *Introduction* to NICCOLO MACHIAVELLI, *THE PRINCE* 6 (Harvey C. Mansfield trans., 2d., The Univ. of Chicago Press 1998). "*The Prince* is a desperate effort to find a remedy for the wretched conditions into which his country had fallen. 'I love my country more than my soul,' Machiavelli wrote, and *The Prince* reflects this." *Id.*

⁹⁹ MACHIAVELLI, *supra* note 97, at ch. I-X, 13-42 (describing the different ways a ruler comes to power and how to keep power).

¹⁰⁰ See *id.* at ch. XV, 56.

I deem it best to stick to the practical truth of things rather than to fancies. Many men have imagined republics and principalities that never really existed at all. Yet the way men live is so far removed from the way they ought to live that anyone who abandons what is for what should be pursues his downfall rather than his preservation; for a man who strives after goodness in all his acts is sure to come to ruin, since there are so many men who are not good. Hence it is necessary that a prince who is interested in his survival learn to be other than good, making use of this capacity or refraining from it according to need.

Id.

claimed that war is unavoidable and is an affirmation of the constant struggle for power that exists between states.¹⁰¹ Although some of his remedies are presently antiquated—gaining principedom through heredity may be the simplest way, but it does not apply in modern times—his general guidelines fall in line with power politics:¹⁰² a prince must know the topography and overall makeup of his terrain, for familiarity with the physical nature of a prince's land is critical to ruling it effectively.¹⁰³ In defending a principedom, Machiavelli advocated the annihilation of enemies to end the fear of retaliation.¹⁰⁴ He warned against trusting and relying on others, for they will require repayment in the future.¹⁰⁵ Believing dependency would only weaken a prince's power in the long run,¹⁰⁶ he promoted the creation of a territorial army and decried the use of mercenaries—who are disloyal and disunited.¹⁰⁷

¹⁰¹ See MACHIAVELLI, *supra* note 97, at ch. III, 18 (praising the Romans' war mentality). "Thus the Romans, foreseeing difficulties, always remedied them. And they never allowed them to persist in order to avoid a war, for they knew that wars cannot be avoided and can only be deferred to the advantage of others." *Id.*

¹⁰² Donno, *supra* note 98, at 7. "His aim in *The Prince* was to describe the rules of power politics based upon his analysis of history." *Id.*

¹⁰³ For this reason, Machiavelli advocated that the prince should hunt in his province in order to understand its terrain. MACHIAVELLI, *supra* note 97, at ch. XIV, 54.

Knowledge of [the topography] is useful to him in two ways. First of all, he becomes acquainted with the nature of his country and learns how it can be defended; secondly, by means of this acquaintance, he can the more readily understand the nature of any other place which he may subsequently have to reconnoiter. . . . The prince who lacks this ability lacks the first requirement of a commander, for by this he learns how to locate the enemy, how to deploy his soldiers, and how to lay siege to cities with advantage.

Id.

¹⁰⁴ *Id.* at 24. "Anyone who becomes master of a city accustomed to freedom and does not destroy it may expect to be destroyed by it; for such a city may always justify rebellion in the name of liberty and its ancient institutions." *Id.*

¹⁰⁵ *Id.* at ch. XVII, 60.

For this can be said about the generality of men: that they are ungrateful, fickle, dissembling, anxious to flee danger, and covetous of gain. So long as you promote their advantage, they are all yours, as I said before, and will offer you their blood, their goods, their lives, and their children when the need for these is remote. When the need arises, however, they will turn against you. The prince, who bases his security upon their word, lacking other provision, is doomed; for friendships that are gained by money, not by greatness and nobility of spirit, may well be earned, but cannot be kept; and in time of need, they will have fled your purse.

Id.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at ch. XII, 46-47.

For Machiavelli, perception was a key component in the preservation of power.¹⁰⁸ This concerns the idea of relative gains: allowing another principedom to become—and to be viewed—as more powerful than yours will lead to ruin. Consistent with Thucydides's theory, Machiavelli felt that increasing power of one entity sparks fear in another.¹⁰⁹ After the defeat of the Persian Empire at the hands of the Greek city-states, Athens was entrusted with defending the newly established Delian League from Persian naval attacks.¹¹⁰ The Athenians rose to the occasion, sensing an opportunity to maximize their capabilities through an expanded role.¹¹¹ Consequently, panic set in for the Lacedaemonians, caused by the growing relative power of Athens.¹¹²

[A]ny ruler who keeps his state dependent upon mercenaries will never have real peace or security, for they are disorganized, undisciplined, ambitious, and faithless. Brave before their allies, they are cowards before the enemy. They show no fear of God, no faith toward men. A prince who employs them will stave off ruin only so long as he can stave off action. In peace he will be despoiled by them; in war he will be despoiled by his enemies. The reason for all this is that they have no tie of devotion, no motive for taking the field except their meager pay, and this is not enough to make them willing to die for him. They are quite anxious to be his soldiers so long as he avoids war, but let war come and they will either desert or flee.

Id.

Instead of mercenaries, Machiavelli recommended that the prince ought to take personal charge and serve as commander; a republic ought to appoint one of its citizens. If the person appointed should prove incompetent, he ought to be replaced; if he should prove successful, there ought to be laws to keep him in bounds. Experience shows that only princes and republics with troops of their own have accomplished great things, while mercenary forces have brought nothing but harm.

Id. at 47.

¹⁰⁸ This is demonstrated in his discussion of whether it is better to be loved than to be feared.

A prince, therefore, must be indifferent to the charge of cruelty if he is to keep his subjects loyal and united. Having set an example once or twice, he may thereafter act far more mercifully than the princes who, though excessive kindness, allow disorders to arise from which murder and rapine ensue. Disorders harm the entire citizenry, while the executions ordered by a prince harm only a few individuals.

Id. at ch. XVII, at 59.

¹⁰⁹ THUCYDIDES, *supra* note 89, at 49. "What made war inevitable was the growth of Athenian power and the fear which this caused in Sparta." *Id.*

¹¹⁰ *See id.* at 92.

¹¹¹ *See id.*

¹¹² This is demonstrated by the first open fight between Athens and Sparta during Sparta's war in Ithome.

War resulted.¹¹³ As an observer of history, Machiavelli saw that power could not be sustained in such a situation for competition and expansion lead to war.¹¹⁴

D. Power in Modernity

Although Thucydides and Machiavelli were among the earlier thinkers to discuss power politics, perhaps no one has had as profound an influence in the field as the political scientist Hans J. Morgenthau. Morgenthau's work, *Politics Among Nations*, was the driving force in the post-World War II paradigm shift in American diplomacy that embraced classical realism under the bipolar international system.¹¹⁵

Morgenthau's realist theory contains six basic principles.¹¹⁶ First, actions in international relations are governed by rules rooted in human nature.¹¹⁷ These rules must be understood so that decisions can be made on how to conduct policy.¹¹⁸ Morgenthau states that "[h]uman nature, in which the laws of politics have their roots, has not changed since the classical philosophies of China, India, and Greece endeavored to discover these laws."¹¹⁹ For this reason, historical data is used to analyze past political acts and their outcomes.¹²⁰ By examining cir-

The Spartans, failing to capture Ithome by assault, grew afraid of the enterprise and unorthodoxy of the Athenians; they reflected, too, that they were of a different nationality and feared that, if they stayed on in the Peloponnese, they might listen to the people in Ithome and become the sponsors of some revolutionary policy. So, while keeping the rest of their allies, they sent the Athenians home again, not saying openly what their suspicions were, but merely declaring that they had no further need of Athenian help. The Athenians, however, realized that they were not being sent away for any such honourable [sic] reason as this, and saw that in fact they had become in some way suspect. They were deeply offended, considering that this was not the sort of treatment that they deserved from Sparta, and, as soon as they had returned, they denounced the original treaty of alliance which had been made against the Persians and allied themselves with Sparta's enemy, Argos.

Id. at 95.

¹¹³ See *id.* at 96-98.

¹¹⁴ See FREDERICK G. WHELAN, HUME AND MACHIAVELLI: POLITICAL REALISM AND LIBERAL THOUGHT 209 (2004).

¹¹⁵ JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 14 (2001).

¹¹⁶ MORGENTHAU, *supra* note 19, at 4-16.

¹¹⁷ *Id.* at 4.

¹¹⁸ See *id.*

¹¹⁹ *Id.*

¹²⁰ See *id.*

cumstances and rational alternatives facing political actors, one can begin to formulate an understanding of historical patterns of action.¹²¹

Morgenthau's second principle is that politics is the concept of interest defined in terms of power.¹²² International politics is a process whereby national interests are determined on the basis of diplomacy or war.¹²³ This assumes that "continuous conflict and [the] threat of war [are] to be minimized through the continuous adjustment of conflicting interest by diplomatic action."¹²⁴

Morgenthau's third principle aims to clarify the idea of interest defined as power.¹²⁵ Realists see the global setting as one of international anarchy in which there is no overarching central authority that must be obeyed.¹²⁶ States vie for power without the aid of a structure—a safeguard—to protect them; states must protect themselves.¹²⁷ Consequently, a balance of power emerges preventing any single state from achieving universal dominion and lessening the possibility of worldwide conflict.¹²⁸ In such a system, survival is the minimum objective of foreign policy and serves as the focal point of national interest.¹²⁹ States protect themselves from the aggression of other states and survive by acquiring power. Morgenthau asserts that once a state has ensured its own survival, it may pursue other goals, but never at the cost of national interest—to do so would risk destruction.¹³⁰

The fourth principle of realist theory states that "universal moral principles cannot be applied to the actions of states in their abstract universal formulation but that they must be filtered through the concrete circumstances of time and place."¹³¹ Morgenthau makes a clear distinction between the morality of man and the morality of a state.¹³²

¹²¹ *Id.*

¹²² *Id.* at 5.

¹²³ See Hans J. Morgenthau, *Another "Great Debate": The National Interest of the United States*, 46 AM. POL. SCI. REV. 961, 978 (1952).

¹²⁴ *Id.*

¹²⁵ MORGENTHAU, *supra* note 19, at 8-10.

¹²⁶ MEARSHEIMER, *supra* note 115, at 30.

¹²⁷ *Id.* at 33.

¹²⁸ MORGENTHAU, *supra* note 19, at 202. "Throughout its history of more than four hundred years the policy of the balance of power succeeded in preventing any one state from gaining universal dominion." *Id.*

¹²⁹ MEARSHEIMER, *supra* note 115, at 31.

¹³⁰ JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, JR., *CONTENDING THEORIES OF INTERNATIONAL RELATIONS: A COMPREHENSIVE SURVEY 72* (4th ed. 1997).

¹³¹ MORGENTHAU, *supra* note 19, at 10.

¹³² *Id.*

With national interest at stake, states must look at political actions based on their outcomes and effects on inter-state relations.¹³³ Confusing individual morality and state morality could invite disaster.¹³⁴ Although he does not entirely disregard ethical considerations, Morgenthau made it clear what best served a state's national interest—power.¹³⁵ Fifth, there is no universal moral law that acts as a guideline for all states.¹³⁶ Realism does not equate the “moral aspirations of a particular nation with the moral laws that govern the universe.”¹³⁷ Sixth, political actions must be judged by appropriate criteria.¹³⁸

The relevant question in foreign affairs asks how the powers of nations are affected by policy implementation. Morgenthau isolates three methods of using and managing power: status quo maintains power, imperialism increases it, and prestige displays it.¹³⁹ Political decisions in the realist paradigm are viewed in these three schemes. It is critical for a state not to overuse its power through physical means. Excessive use of force makes a state vulnerable, and must be used only when it is absolutely necessary—such as when another state poses an imminent

Realism maintains that universal moral principles cannot be applied to the actions of states in their abstract universal formulation, but that they must be filtered through the concrete circumstances of time and place. The individual may say for himself: “*Fiat justitia, pereat mundus* (Let justice be done, even if the world perish),” but the state has no right to say so in the name of those who are in its care. Both individual and state must judge political action by universal moral principles, such as that of liberty. Yet while the individual has a moral right to sacrifice himself in defense of such a moral principle, the state has no right to let its moral disapprobation of the infringement of liberty to get in the way of successful political action, itself inspired by the moral principle of national survival.

Id.

¹³³

Id.

¹³⁴

DOUGHERTY & PFALTZGRAFF, *supra* note 130.

¹³⁵

See MORGENTHAU, *supra* note 19, at 5.

¹³⁶

Id. at 11.

¹³⁷

Id.

¹³⁸

See *id.* at 11-12.

Intellectually, the political realist maintains the autonomy of the political sphere, as the economist, the lawyer, the moralist maintain theirs. . . . The political realist is not unaware of the existence and the relevance of standards of thought other than political ones. As political realist he cannot but subordinate these other standards to those of politics. And he parts company with other schools when they impose standards of thought appropriate to other spheres upon the political spheres.

Id.

¹³⁹

MARTIN GRIFFITHS, FIFTY THINKERS IN INTERNATIONAL RELATIONS 37 (1999).

threat to survival.¹⁴⁰ For this reason, Morgenthau's method of prestige—use of the perception of power—gives a state authority in interstate relations.

III. CONTRASTING REALISM AND GROTIAN LEGALISM

Grotian legalism operates on the notion of *jus gentium voluntarium*, a voluntary law of nations.¹⁴¹ The principles he sets as societal safeguards are based on individual beliefs. In comparison, although Morgenthau believes the acts of leaders in international relations are rooted in human nature, he does not apply these rules as collective guidelines for state conduct. Instead, he argues that human nature is the cause of man's lust for power.¹⁴²

For the political realist, there is no common moral thread—states do not volunteer based on altruism. Acts that may be seen as unselfish or done for the collective good, are actually done with the intention of increasing power in some way.¹⁴³ A weak state may offer to send its troops into battle alongside the troops of a powerful state. Is this done out of solidarity? A strong state may open up negotiations with a weaker state, involving them in a military or economic capacity. Is this done in the name of brotherhood or with the goal of diffusing their shared virtue? Realists answer such questions in the negative, finding

¹⁴⁰ See MORGENTHAU, *supra* note 19, at 145.

A nation may try to play the role of a great power without having the prerequisites for doing so, and will court disaster, as Poland did in the interwar period. Or, being a great power, it may embark upon a policy of unlimited conquest, overtaking its strength; the unsuccessful world-conquerors, from Alexander to Hitler, illustrate that point.

Thus the national power available determines the limits of foreign policy. There is only one exception to that rule, and that is when the very existence of the nation is at stake.

Id.

¹⁴¹ Lauterpacht, *supra* note 6, at 16.

The law of nations proper—*jus gentium voluntarium*—is, of course, the product of consent as manifested in the practice of states. Grotius's *jus gentium* thus conceived is not synonymous with public international law. It is distinguished from municipal law (*jus civile*), which emanates from the civil power of one state; it embraces all law—public and private, international and other—which has been sanctioned by the practice of all nations or of many nations.

Id.

¹⁴² See GRIFFITHS, *supra* note 139, at 37.

¹⁴³ MEARSHEIMER, *supra* note 115, at 48-54.

states are united in the pursuit of power, not the universal belief in morality.¹⁴⁴

Realists argue that all states hold power maximization as their ultimate goal—for it ensures survival.¹⁴⁵ The balance of power exists because states work to collectively restrict an unequal balance where a single state amasses enough power to rule all others by both the threat and the actual use of force.¹⁴⁶ Nonetheless, states are in a constant struggle to attain supremacy.¹⁴⁷

Comparatively, Augustine saw a different kind of conflict existing in the world: one between good and evil, right and wrong. Good was defined by a steadfast commitment to ethical principles and an unwavering belief in God.¹⁴⁸ By acting solely on the moral doctrine of Christianity, an individual can become good.¹⁴⁹ Augustine also believed in the power of change. Prior to his conversion to Christianity, he lived a

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *See id.* at 3.

¹⁴⁶ MORGENTHAU, *supra* note 19, at 203.

The difficulties in assessing correctly the relative power positions of nations has [sic] made the invocation of the balance of power one of the favored ideologies of international politics. Thus it has come about that the term is being used in a very loose and unprecise [sic] manner. When a nation would like to justify one of its steps on the international scene, it is likely to refer to it as serving the maintenance or restoration of the balance of power. When a nation would like to discredit certain policies pursued by another nation, it is likely to condemn them as a threat to, or a disturbance of, the balance of power. Since it is the inherent tendency of the balance of power in the proper meaning of the term to preserve the status quo, the term has, in the vocabulary of status quo nations, become a synonym for the status quo and for any distribution of power existing at any particular moment. Any change in the existing distribution of power is therefore opposed as disturbing the balance of power. In this way a nation interested in the preservation of a certain distribution of power tries to make its interest appear to be the outgrowth of the fundamental, universally accepted principle of the modern state system and, hence, to be identical with an interest common to all nations. The nation itself, far from defending a selfish, particular concern, poses as the guardian of that general principle; that is, as the agent of the international community.

Id.

¹⁴⁷ *See* MEARSHEIMER, *supra* note 115, at 3.

¹⁴⁸ *See* JANET COLEMAN, *A HISTORY OF POLITICAL THOUGHT: FROM ANCIENT GREECE TO EARLY CHRISTIANITY* 327 (2000). Augustine “came to regard evil as non-being, a nothingness, a diminishing of the good that was created, and evil as a negation not caused by God. Souls become good or bad in the degree to which they adhere to, or depart from, the source of all goodness, God.” *Id.*

¹⁴⁹ *See id.*

life of sin.¹⁵⁰ If not for the mercy of God, he would not have been able to lead a virtuous and blessed life. If an individual can reach a moral high ground to be considered good, then society—a collection of individuals—has the potential for transcending its earthly status and becoming

¹⁵⁰ Augustine discusses his life of sin, particularly sexual sin, in the first seven chapters of his autobiography, SAINT AUGUSTINE, *supra* note 41, at 3-144. He discusses his conversion in chapter eight. *Id.* at 145-69.

ing a *City of God*.¹⁵¹ The good must preserve their status by battling evil—those who are immoral and non-Christian.¹⁵²

However, in a multi-cultured world with various religions, is it fair to judge right and wrong based on adherence to a specific creed? The selection of one dogma to dictate what is right and wrong throughout the world is purely inequitable. This subjective view of ethics was not a fair assessment of reality. Appropriately, it was challenged by eighteenth century Enlightenment thinkers who praised man's ability to

¹⁵¹ See CITY OF GOD, *supra* note 43, at bk. XV, ch. 4, 599. Augustine first describes the earthly city conflicts.

[The earthly city] desires an earthly peace, for the sake of the lowest goods; and it is that peace which it longs to attain by making war. For if it wins the war and no one survives to resist, then there will be peace, which the warring sections did not enjoy when they contended in their unhappy poverty for the things they could not both possess at the same time. This peace is the aim of wars, with all their hardships; it is this peace that glorious victory (so called) achieves.

Now when the victory goes to those who were fighting for the juster cause, can anyone doubt that the victory is a matter for rejoicing and the resulting peace is something to be desired? These things are goods and undoubtedly they are gifts of God. But if the higher goods are neglected, which belong to the City on high, where victory will be serene in the enjoyment of eternal and perfect peace—if these goods are neglected and those other goods are so desired as to be considered the only goods, or are loved more than the goods which are believed to be higher, the inevitable consequence is fresh misery, and an increase of the wretchedness already there.

Id. at 600. He goes on to describe the conflict between the earthly city and the heavenly city.

Thus the quarrel that arose between Remus and Romulus demonstrated the division of the earthly city against itself; while the conflict between Cain and Abel displayed the hostility between the two cities themselves, the City of God and the city of men. Thus the wicked fight among themselves; and likewise the wicked fight against the good and the good against the wicked. But the good, if they have reached perfect goodness, cannot fight among themselves. However, while they are on their way towards the perfection they have not yet attained, there may be fighting among them inasmuch as any good man may fight against another as a result of that part of him which makes him also fight against himself. And in the individual it is true that 'the flesh has desires which resist the spirit, and the spirit has desires which resist the flesh.' Accordingly, spiritual desire can fight against the carnal desire of another person, or carnal desire against another's spiritual desire, just as the good and wicked fight against one another. Or even the carnal desires of two good men (who have obviously not yet attained perfection) may fight, just as the wicked fight among themselves, until those who are on the way to recovery are finally brought to triumphant health.

Id. at 601.

¹⁵² See *id.*

reason and challenged tyranny and ignorance with the aim of building a better world.¹⁵³ Religion was the primary target.¹⁵⁴ The influence of this movement was drawn from a lengthy period of time between Augustine and Aquinas—known as the dark ages.¹⁵⁵ Aquinas' recovery of Aristotelian logic in the thirteenth century placed faith in the capabilities of the individual to know truth through reason.¹⁵⁶ Man's capacity

¹⁵³ Paul Brians, *The Enlightenment*, Mar. 11, 1998 (last rev. May 18, 2000), http://www.wsu.edu/~brians/hum_303/enlightenment.html.

¹⁵⁴ *Id.* Religion was targeted in particular because “[t]he despotism of monarchs exercising far greater powers than any medieval king was supported by the doctrine of the ‘divine right of kings,’ and scripture quoted to show that revolution was detested by God.” *Id.*

¹⁵⁵ *See id.*

During the late Middle Ages, peasants had begun to move from rural estates to the towns in search of increased freedom and prosperity. As trade and communication during the Renaissance, the ordinary town-dweller began to realize that things need not always go on as they had for centuries. New charters could be written, new governments formed, new laws passed, new businesses begun. Although each changed institution quickly tried to stabilize its power by claiming the support of tradition, the pressure for change continued to mount. It was not only contact with alien cultural patterns which influenced Europeans, it was the wealth brought back from Asia and the Americas which catapulted a new class of merchants into prominence, partially displacing the old aristocracy whose power had been rooted in the ownership of land. These merchants had their own ideas about the sort of world they wanted to inhabit, and they became major agents of change, in the arts, in government, and in the economy.

They were naturally convinced that their earnings were the result of their individual merit and hard work, unlike the inherited wealth of traditional aristocrats. . . .

But the chief obstacles to the reshaping of Europe by the merchant class were the same as those faced by the rationalist philosophers: absolutist kings and dogmatic churches. . . .

This is the background of the 18th-century Enlightenment.

Id.

¹⁵⁶ *See* ELLEN GOODMAN, *THE ORIGINS OF THE WESTERN LEGAL TRADITION: FROM THALES TO THE TUDORS* 212-15 (1995).

By drawing on the Aristotelian notion that a human can know truth by reason without reference to mysticism implicit in the revelation of divine truths and by distinguishing therefore between ‘natural truth’ and ‘truth of faith’ mediated through the grace of God, Thomas [Aquinas] ushers in a new attitude to philosophy; an attitude which renders philosophy independent from theology. By distinguishing between ‘citizen’ and Christian, between secular and ecclesiastical government and between, *inter alia*, divine and human law, Thomas paved the way for intellectual challenge to medieval perceptions of unity.

Id. at 214-15.

to learn through questioning was integral to a secular approach to the study of law and morality.¹⁵⁷

Though departing from the authority of religious doctrine, Aquinas' views on ethics and humanity were not radically different from Augustine. Grotius's definition of international law was based, in part, on the writings of both scholars, as universal norms are embedded in the natural law of humanity.¹⁵⁸ Grotius stated that if these laws were not common to all men, the world would have ceased to exist by this point—it would have been obliterated through war.¹⁵⁹

This moral plea confuses necessary and sufficient conditions. A necessary condition is vital in linking a cause and an effect, but on its own is not enough to guarantee a specific outcome. On the other hand, a sufficient condition is the definitive link between a cause and an effect, for a connection cannot exist without it. Grotius claims that the existence of the world alone is enough evidence that all people share a certain sense of morality.¹⁶⁰ This tells them that it is unnatural and inhuman to inflict pain upon or steal from others. While the fact that the world has not been entirely destroyed may be necessary to his claim, it does not establish sufficient grounds for stating that morality is the sole guiding force behind human action. The world may still exist, but the Grotian moral view discounts the fact that it has come to the brink of disaster on more than one occasion. Factors external to moral judgment may have diverted the world from a path that could potentially have led to human extinction. For example, a realist would likely argue that a decision not to launch a nuclear weapon against an adversary is not fueled by individual conscience, but by national interest. If firing that missile will serve the ends of the state, then that state will take action. This is not to say that realism is entirely devoid of conscience, but that states act rationally in attempting to maximize circumstances for their benefit.

¹⁵⁷ See *id.*

¹⁵⁸ See Knight, *supra* note 5, at 9 (discussing Grotius's view that justice was the foundation of international law and how Grotius's definition of justice originated in Aristotle, Augustine, Thomas Aquinas, and others).

¹⁵⁹ Grotius based his Natural Law on justice. Knight, *supra* note 5, at 11. The contract between a political society's members is "simply declaratory of the law of nature." Knight, *supra* note 5, at 19. Therefore, "[w]herever . . . in international affairs there is an absence of contract, or, there being contract, justice is wanting and bad faith prevails, anarchy or war alone will exist." *Id.* at 20.

¹⁶⁰ See Knight, *supra* note 5, at 11.

A. Ethical Standards and Global Relations

The norms initially described by Augustine, modified by Aquinas, and applied by Grotius to international law were intended to raise the quality of life worldwide.¹⁶¹ Yet the question remains: how applicable are ethical standards to actual events? The so-called morality of an internationally politicized action may appeal to the common individual's conscience on the surface. However, it is not the operating principle in international relations. Instead, what we see today are rather vague intentions of a scrupulous state. Appeals to the conscience are used more as a vehicle for garnering public support than as the true measuring stick of the intentions of a state. Is "State A" truly toppling the dictatorial regime in "State B" because unconscionable acts are being committed thousands of miles away? Or, does "State A" have a vested interest in supporting stability and ending oppression for security reasons—ensuring their own survival?

For a realist, the focus is only on the maximization of power.¹⁶² The world does not operate solely on the notion of justice.¹⁶³ While it

¹⁶¹ See, e.g., *id.* at 19-21.

The aim of Grotius is to develop and insist upon the idea of justice. So let there be an era of international contract and good faith; and then, with princes satisfied as to the moral and material expediency of peace, and determined not to resort to arms save reluctantly and for undoubted good cause, even the widest international differences may perhaps be composed, if not by the parties themselves, by mediators, arbitrators, or even international congresses. So war may become less and less frequent, and, if regard be had to his rules, less horrible.

Id. at 20-21.

¹⁶² See MORGENTHAU, *supra* note 19, at 27. "International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim." *Id.* It is for this very reason that Hans Morgenthau did not support the Vietnam War and would not likely have supported a mission to Iraq—whether for peacekeeping purposes or for the potential of acquiring wealth. It is not feasible for a realist to over-extend power in order to preserve international legal norms or economic interest. By concentrating its efforts abroad for any other purpose other than its own security, a state lessens its capabilities for defense domestically and renders itself vulnerable. Action may be taken in an area as far away as Iraq only if it poses a direct threat to survival.

¹⁶³ See MORGENTHAU, *supra* note 19, at 10.

Realism maintains that universal moral principles cannot be applied to the actions of states in their abstract universal formulation, but that they must be filtered through the concrete circumstances of time and place. The individual may say for himself: "*Fiat justitia, pereat mundus* (Let justice be done, even if the world perish)," but the state has no right to say so in the name of those who are in its care. Both individual and state must judge po-

may be a noble goal for a moralist to strive for, it is not in every state's interest to act in the name of evenhandedness.¹⁶⁴ International laws are either ratified when they are in the best interest of the most powerful states or they are established *de facto* when powerful states set a precedent for international conduct.¹⁶⁵

According to realists, good intentions are not the motives of the strong, nor are they a measure of political success. Morgenthau asks: "how often have statesmen been motivated by the desire to improve the world, and ended by making it worse? And how often have they sought one goal, and ended by achieving something they neither expected nor desired?"¹⁶⁶ He pointed to British Prime Minister Neville Chamberlain's failed policy of appeasement to preserve peace.¹⁶⁷ The Prime Minister had signed peace pacts with Hitler and Mussolini that were aimed at ameliorating social conditions.¹⁶⁸ However, in signing these peace pacts, he "[made] the Second World War inevitable, and [brought] untold miseries to millions of men."¹⁶⁹ Morgenthau respects Churchill's scope which was "much less universal [yet] more narrowly directed toward personal and national power."¹⁷⁰ This policy—which

litical action by universal moral principles, such as that of liberty. Yet while the individual has a moral right to sacrifice himself in defense of such a moral principle, the state has no right to let its moral disapprobation of the infringement of liberty get in the way of its successful political action, itself inspired by the moral principle of national survival.

Id.

¹⁶⁴ See *id.*

¹⁶⁵ See MEARSHEIMER, *supra* note 115, at 49.

¹⁶⁶ Morgenthau, *supra* note 19, at 5.

¹⁶⁷ See *id.*

¹⁶⁸ Lionel D. Warshauer, Note, *The Munich Pact of 1938: ADR Strategies for Our Time?*, 5 CARDOZO J. CONFLICT RESOL. 247, 247-48 (2004).

Fresh off the peace agreement that was negotiated at Munich on September 29, 1938, British Prime Minister Neville Chamberlain proclaimed to the crowd assembled at No. 10 Downing Street: "My good friends, for the second time in our history, a British Prime Minister has returned from Germany bringing peace with honor. I believe it is peace for our time . . . Go home and get a nice quiet sleep . . ." Instead of "a nice quiet sleep," Britain and the continent of Europe were plunged into six years of devastating war when Adolf Hitler invaded Poland on September 1, 1939, thus forcing Britain and France to declare war on Germany. A world war was exactly what Chamberlain was trying to avoid when he, along with Edouard Daladier, Adolf Hitler and Benito Mussolini reached a negotiated settlement at Munich.

Id.

¹⁶⁹ MORGENTHAU, *supra* note 19, at 6.

¹⁷⁰ *Id.*

sprang from less ethically ambitious and peaceful motives—was superior in moral and political quality than his predecessor's for its less violent outcome.¹⁷¹

IV. RATIONAL ACTORS AND GROTIAN INTERDEPENDENCE IN PRESENT DAY INTERNATIONAL ECONOMIC RELATIONS

Realists posit that states are rational actors with preferred activity based on a process of optimization.¹⁷² This rationality and self-serving purpose is evidenced in global trade relations—in particular, subsidies. Political economists believe that barriers to the free flow of trade are imposed in the best domestic economic interest of the nation-state.¹⁷³ By relieving the pressures of international competition on national industry, local firms can prosper.¹⁷⁴ This form of assistance can only be provided to industry through the auspices of government intervention.¹⁷⁵ Subsidies and tariffs are designed by domestic authorities to enable effective and efficient competition.¹⁷⁶ This, however, conflicts with the essence of free trade theory, which advocates unencumbered commerce and the absence of artificial—government-imposed—barriers to trade among individuals and firms in different nations.¹⁷⁷

Proponents of free trade generally argue that unencumbered trade increases the standard of living through the theory of comparative advantage and economies of scale.¹⁷⁸ Thus, a rational actor may circum-

¹⁷¹ *Id.*

¹⁷² See DOUGHERTY & PFALTZGRAFF, *supra* note 130, at 58. “Central to realist theory are several assumptions that shaped the paradigm which formed the basis for much of the theoretical development of that period . . . that states are rational actors characterized by a decision-making processing leading to choices based on maximizing the national interest.” *Id.*

¹⁷³ BRADLEY A. HANSEN, *THE NATIONAL ECONOMY* 138 (2006).

¹⁷⁴ *Id.*

¹⁷⁵ See *id.* (discussing tariffs, quotas, and regulation implemented by government).

¹⁷⁶ *Id.*

¹⁷⁷ JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* 12 (2005). “The notion that trade—free trade, unencumbered by government restrictions — is welfare-enhancing is one of the most fundamental doctrines in modern economics, dating back at least to Adam Smith (1776) and David Ricardo (1816).” *Id.*

¹⁷⁸ *Id.* at 24-25.

In the basic economic model, trade is beneficial because it allows each country to specialize in the goods that they produce relatively efficiently. This principle of ‘comparative advantage’, established by the nineteenth-

vent international law in favor of the most advantageous course of action. What recourse do aggrieved states have when this occurs? Without a central authority in the international system, are states obligated to obey specific rules? Can international institutions impose law on sovereign states, or are these rules “toothless?”

A. *The GATT/WTO System*

A commitment to multilateralism and free trade trace back to eighteenth century French slogans of *laissez faire* and the British movement toward freer trade following the Napoleonic Wars.¹⁷⁹ The intent of trade liberalization at the time was to reduce export prohibitions on agricultural products.¹⁸⁰ The ultimate goal of the state was to achieve a favorable trade balance, using profits from exports to finance imports.¹⁸¹ After decades of shifting between cooperative international trade and protectionism, the international economic community made its most promising show of solidarity in 1948 by negotiating the Gen-

century economist David Ricardo, is the core of trade theory and is the foundation of its normative implication in favour of free trade.

In addition to the gains from specialization according to comparative advantage, trade may deliver benefits and costs through four other channels. Trade liberalization opens foreign markets, expanding the demand for domestic firms' goods and enabling them to serve a larger market and realize gains from economies of scale. Trade liberalization may make available a range of inputs at lower prices, lowering costs of product. Liberalization may also introduce more competition from foreign firms to the domestic economy, which may result in improvements to the efficiency of local production. Finally, trade liberalization may, through various channels, affect the rate of economic growth.

Id. See also Appendix A.

¹⁷⁹ C. Kindleberger, *The Rise of Free Trade in Western Europe*, in *INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH* 73 (Jeffrey A. Frieden & David A. Lake, eds., 2000).

¹⁸⁰ CHARLES P. KINDLEBERGER, *COMPARATIVE POLITICAL ECONOMY: A RETROSPECTIVE* 76 (MIT Press 2000).

¹⁸¹ See, e.g., PAUL BUTEL, *THE ATLANTIC* 146 (Geoffrey Scammell ed., Iain Hamilton Grant trans., Taylor & Francis e-Library 2002).

After 1705, [English] parliament voted in a law subsidizing imports from the naval stores in the North American colonies. By 1740, London tried to subsidize the production of British linen in Scotland and Ireland, in order to replace imports of this textile from central Europe, and to export the necessary linen for clothing slaves in the American plantations.

Id.

eral Agreement on Tariffs and Trade ("GATT").¹⁸² This was a great feat and has been called "the most important mechanism for promoting and regulating world trade" from 1947 through 1994.¹⁸³

The purported aim of the United States and its primary trading partners in the GATT was to support a qualitative advancement in free trade.¹⁸⁴ While the principle of trade liberalization had been understood and implemented for centuries,¹⁸⁵ it often clashed with nationalistic tendencies aimed at preserving sovereignty.¹⁸⁶ Furthermore, nations had economic motives to deter foreign competition and decrease dependence on foreign resources.¹⁸⁷

The GATT was premised on the notion that trade rules would be extended without prejudice to its members—all of whom agreed to reductions of formal tariffs.¹⁸⁸ Governed by the notion of reciprocity, rules were to be agreed on by "mutual balance concessions" and the treatment of all trading partners under most favored nation ("MFN") status.¹⁸⁹ Provisions for the impartial arbitration of disputes were also included.¹⁹⁰ These were intended not only to offer a mechanism of settlement, but also as a means of reducing global conflict and pacifying inter-state rivalry.¹⁹¹

¹⁸² CAROLYN RHODES, *RECIPROCITY, U.S. TRADE POLICY, AND THE GATT REGIME* 13-14 (Cornell Univ. Press 1993).

¹⁸³ A. LEROY BENNETT & JAMES K. OLIVER, *INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES* 298 (7th ed. 2002). For more information on the GATT/WTO system, see Appendix B.

¹⁸⁴ See Press Release, World Trade Organization, Golden Jubilee of the Multilateral Trading System (Feb. 5, 1998), http://www.wto.org/english/news_e/pres98_e/pr88_e.htm ("[The GAAT] contained tariff concessions agreed to during the first multilateral trade negotiations and a set of rules designed to prevent these concessions from being frustrated by restrictive trade measures.").

¹⁸⁵ ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY* 89-92 (2002).

¹⁸⁶ See *id.* at 92-93 (discussing the reasons of opponents of free trade).

¹⁸⁷ See *id.* "Alexander Hamilton . . . wrote a 1791 defense of protecting American manufacturers, 'Not only the wealth but the independence and security of a country appear to be materially connected to the prosperity of manufactures.'" *Id.*

¹⁸⁸ See ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* 219 (2001) [hereinafter *GLOBAL POLITICAL ECONOMY*].

¹⁸⁹ MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 23-27 (2d ed. 1999). MFN refers to nondiscriminatory status in trade. Essentially, MFN is the status representing the best tariff treatment that countries can award one another. *Id.*

¹⁹⁰ *GLOBAL POLITICAL ECONOMY*, *supra* note 188, at 218 (citing JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* (1991)).

¹⁹¹ See *id.* at 219.

As an international regime—a globally organized set of rules to administer conduct—the GATT was founded on the principles of nondiscrimination, unconditional reciprocity, and transparency.¹⁹² In multilateral negotiations, GATT members formulated rules of commerce and reduced trade barriers.¹⁹³ GATT members created regulations to further liberalize exchanges and ultimately allow markets to determine trade patterns.¹⁹⁴ Rather than being directed by unilateral action by preponderant states, markets were opened and agreements were embraced by the international community.¹⁹⁵ Furthermore, consensus was reached on the basis of general reciprocity.¹⁹⁶ According to Robert Gilpin, the GATT founders wanted “a steady progression toward an open world economy, with no return to the cycle of retaliation and counter-retaliation that had characterized the 1930s.”¹⁹⁷

Following World War II, each round of official GATT meetings became longer and more involved.¹⁹⁸ Among these, the most prominent was the sixth—the Kennedy Round—which was initiated by the United States in 1964 as a response to the growth and prominence of the European Economic Commission.¹⁹⁹ The subjects discussed included the traditional tariff cuts to new trade rules—such as those on

[B]ecause potential losers would strongly oppose lifting trade barriers, proponents of free trade have to confront a mercantilist attitude that believes exports are good and imports are bad. This attitude is revealed when trade agreements are characterized as “concessions” to a foreign government. Because of this prevalent attitude, and for other political reasons, negotiated reductions of trade barriers based on the principle of reciprocity are necessary. The political logic of the GATT/WTO is that because liberalization harms certain interests that will inevitably oppose trade liberalization, it is necessary to liberalize in a coordinated way with concession for concession, thus making it easier to defeat protectionists. Once trade barriers have been lowered, a framework of agreements makes it quite difficult to raise them again.

Id. at 219.

¹⁹² *Id.* at 218-19. The term “transparency” includes the use of formal tariffs and the publication of trade regulations. *Id.* at 219.

¹⁹³ *Id.*

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Specific reciprocity refers to a more micro product-by-product approach, whereas as general—or unconditional—reciprocity does not distinguish particular goods. *See id.* at 218. “A system of specific reciprocity . . . requires that quite specific rather than general concessions must be made.” *Id.*

¹⁹⁷ *Id.* at 220.

¹⁹⁸ For more a more in-depth chronicle of the GATT and the WTO, please see Appendix B.

¹⁹⁹ *Id.*

the use of anti-dumping measures.²⁰⁰ Members agreed to reduce duties on particular products by certain percentages and make trade-offs across economic sectors.²⁰¹ The Tokyo Round (1973-1979) was the next major move to liberalize trade.²⁰² Such broader measures included substantial tariff cuts on industrial products, liberalization of agricultural trade, and reduction of non-tariff barriers.²⁰³ While the most noteworthy agreement came in determining “codes of conduct” to deal with unfair trade practices,²⁰⁴ these were only agreed to by a limited number of members.²⁰⁵

The GATT was a landmark agreement, offering a measure of support for trading states.²⁰⁶ The Kennedy and Tokyo Rounds were successful in promoting trade liberalization and offering a framework for trade discussions.²⁰⁷ However, it was not viewed as a true international organization in the eyes of the global community.²⁰⁸ It offered a forum for discussion and represented a growing worldwide consensus—a concern for all states—yet it lacked true legitimacy because it was not binding and not broad enough.

The primary deficiencies of GATT have been identified as its limited authority and scope of responsibilities, inadequate form of dispute settlement, and narrow jurisdiction.²⁰⁹ Such criticisms set the stage for

²⁰⁰ World Trade Organization, Ministerial Conference of 18 May 1998, The Multilateral Trading System: Fifty Years of Achievement, Slide 8: The Kennedy Round, Geneva, 1964-1967, http://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/slide009.htm. The round was named after President John F. Kennedy, in honor of his achievement of the 1962 U.S. Trade Expansion Act, “which authorized the US government to negotiate tariff cuts of up to 50%.” *Id.* The WTO credits this act for “allowing” the round to take place. *Id.*

²⁰¹ GLOBAL POLITICAL ECONOMY, *supra* note 188, at 220. Barriers to trade on manufactured goods were reduced by approximately 33%. *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ World Trade Organization, *supra* note 197. “[A]greements were reached on a number of non-tariff barriers, but were only signed by some participants—these were known as the Tokyo Round ‘codes.’” *Id.*

²⁰⁶ *See id.* at 218.

²⁰⁷ *Id.* at 218-20.

²⁰⁸ *Id.* at 218. “[I]ts authority and the scope of its responsibilities were severely limited; it was essentially a negotiating forum rather than a true international organization, and it had no rule-making authority.” *Id.*

²⁰⁹ *Id.* “The GATT did not have the authority to deal with agriculture, services, intellectual property rights, or foreign direct investment; nor did the GATT have sufficient authority to deal with customs unions and other preferential trading arrangements”. *Id.*

a strengthening of the multilateral system in the Uruguay Round of the GATT—which began in 1986 and concluded in 1994.²¹⁰ The negotiations included 123 countries and covered “almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments.”²¹¹ Quite simply, it was “the largest trade negotiation ever, and most probably the largest international negotiation of any kind in history.”²¹² Trade ministers heavily devoted themselves to the process, which ultimately took seven and a half years—almost twice as long as was originally intended.²¹³

In the name of multilateralism, intense efforts were made to accommodate states.²¹⁴ However, the “Quad”—the United States, the European Union, Japan, and Canada—weighed in most heavily²¹⁵ because, comprising the G8, they represent the bulk of international trade and are among the most powerful nations in the world.²¹⁶ Their web of

²¹⁰ World Trade Organization, Ministerial Conference of 18 May 1998, The Multilateral Trading System: Fifty Years of Achievement, Slide 13: The Uruguay Round, http://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/ur1.htm.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See GLOBAL POLITICAL ECONOMY, *supra* note 188, at 222. Examples of these accommodations: decrease or elimination of “many import quotas and subsidies,” reduction of trade barriers, and extension of trade rules “to a number of areas that included agriculture, textiles, services, intellectual property rights, and foreign investment.” *Id.*

²¹⁵ JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 178 (2000).

GATT rounds work by contracting parties making offers to liberalize trade. The major players—the US, the EC and Japan in the Tokyo Round (1973–79), the Quad of these three plus Canada in the Uruguay Round—define the industry sectors and types of trade barriers that should be the subject of offers. Iterated negotiation of these offers bilaterally ultimately puts the Director-General in a position where he or she can draft a text of the final agreement that meets the approval of the major players. Negotiation then proceeds more multilaterally around that text.

Id.

²¹⁶ GENDER EDUCATION AND EQUALITY IN A GLOBAL CONTEXT: CONCEPTUAL FRAMEWORKS AND POLICY PERSPECTIVES 53 (Shailaja Fennell & Madeleine Arnot eds., Routledge 2008).

[R]epresentatives of a small group of rich nations, and in particular the G8 countries, have always had a major influence on the formation and application of development policy orthodoxy. Such influence stems mainly from their economic power, their consequentially dominant voices and interna-

complicated laws accounted for a significant portion of the time and effort involved.²¹⁷ The United States and the European Union settled a major point of debate over differences in agriculture in what became known as the Blair House Accords.²¹⁸ Such an important resolution between the two most prominent trading members was integral in fostering the development of the next incarnation of the GATT—the World Trade Organization (“WTO”).²¹⁹

Labeled as the most significant accomplishment of the Uruguay Round, the creation of the WTO represented a major step toward completing a framework of international institutions originally planned at Bretton Woods (1944).²²⁰ The organization was prepared to take on a larger role in the international governance and facilitation of trade.²²¹ Primarily, its concern was the promotion of cooperation in the realm of economics.²²² Gilpin calls the WTO “essentially an American creation”—while the WTO’s predecessor, the GATT, served America’s “fading” mass-production economy, the WTO did not serve the emerging economy equally well.²²³

The WTO was given stronger authority than GATT members, particularly in dispute settlement.²²⁴ Under the GATT, disputing states

tional trade and debt negotiations, and their roles as main providers of international aid for development purposes.

Id. The G8 includes the United States, France, Germany, Italy, Japan, Russia, Canada, and the United Kingdom. United States Department of Justice, Meeting of G8 Justice and Home Affairs Ministers, http://www.usdoj.gov/criminal/cybercrime/g82004/g8_background.html (last visited Oct. 20, 2008).

²¹⁷ Typically, in international relations, the states with the greatest power are the most reluctant to forfeit their sovereignty and are less willing to rely on international compulsory jurisdiction over their own domestic jurisdiction. For this reason, it is in their best interest to have a hand in determining multilateral policy. They are reluctant to agree to any rules that erode their sovereignty. By helping create the rules, they can make sure that this is the case.

²¹⁸ James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT’L L. 531, 541 (1993). The Blair House Accord limited the amount of oilseeds the European Union was allowed to plant and a cap was placed on the duty paid import price of agricultural products. *Id.*

²¹⁹ See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 307 (2d rev. ed. 1999).

²²⁰ *Id.* at 222.

²²¹ *Id.*

²²² *Id.*

²²³ GLOBAL POLITICAL ECONOMY, *supra* note 188, at 222. The United States had become increasingly service-oriented and more reliant on advanced technology. *Id.* at 223.

²²⁴ *Id.*

were able to not only delay, but also deny the legal effect of panel reports by blocking their adoption by the trade organization council.²²⁵ This was made more difficult with the creation of the independent Appellate Body and Dispute Settlement Body (“DSB”).²²⁶ These groups may impose WTO-authorized sanctions in the form of compensation or trade retaliation.²²⁷ Thus, the WTO far enhanced the breadth of the legal capabilities of the regime. Whereas the GATT was supported by a secretariat, the WTO is an organization with increased legal coherence.²²⁸ It has wide-ranging rights and obligations and establishes a permanent forum for negotiation.²²⁹ Biennial ministerial meetings increase “political guidance” and ultimately install legitimacy.²³⁰

Under the GATT, delay tactics are used by trading partners to avoid the legal effect of an agreement, exemplified by the 1987 oilseeds debate between the U.S. and the European Community (“EC”).²³¹ In this discussion, a GATT panel ruled that subsidies made by the EC in oilseed production were harmful to the U.S. and violated duty-free tariff bindings on oilseeds under the GATT.²³² Following complaints by the U.S., the EC successfully deferred attempts at a solution.²³³ This lasted for years until they ultimately gave in to U.S. retaliation—in the form of two billion dollars in tariffs on European imports—and resolved the dispute in the Blair House Accord.²³⁴ The

²²⁵ Linda C. Reif, *NAFTA, WTO, and FTAA: Choice of Forum in Dispute*, in *NAFTA IN THE NEW MILLENNIUM* 450 (Edward J. Chambers & Peter H. Smith eds., 2002).

²²⁶ *Id.*

[I]t is now extremely difficult for a panel or Appellate Body report not to be adopted by the Dispute Settlement Body (DSB)—and thereby receive formal legal status—because of the creation of a “reverse consensus” process (that is, a consensus among all the members not to adopt the report must be obtained).

Id. For the agreement that set up the Dispute Settlement Understandings, see Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

²²⁷ Reif, *supra* note 225. This attached greater legitimacy to the organization for it sanctioned reprimands of its violations.

²²⁸ GLOBAL POLITICAL ECONOMY, *supra* note 188, at 223.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See Holbein & Carpentier, *supra* note 218, at 539-42.

²³² *Id.* at 539.

²³³ See *id.* at 540-41.

²³⁴ *Id.* at 541.

agreement stipulated that the U.S. could regulate the number of tons of oilseeds that the EC could subsidize by limiting the amount of hectares of oilseeds that could be planted.²³⁵

This, and other similar situations, prompted the establishment of Dispute Settlement Understandings (“DSU”) under the Uruguay Round of WTO.²³⁶ Although the creation of DSU is considered one of the breakthrough successes of the Uruguay Round, actors may still use delay tactics to evade punishment,²³⁷ which has been made more difficult now with the creation of the independent Appellate Body and the DSB.²³⁸ These groups may impose WTO-authorized sanctions in the form of compensation or trade retaliation.²³⁹

Ultimately, the rules imposed by any international institution cannot always be counted on to be enforced—for they preclude state sovereignty. By refusing to comply with regulations, states assert that the institutional structures may not serve their nation’s best interest. For this reason, the EC refused to comply with GATT recommendations.²⁴⁰ However, the U.S. threatened to boycott the EC, ending a five year battle against unfair trade policy.²⁴¹

²³⁵ *Id.*

²³⁶ *See* Reif, *supra* note 225.

Under the GATT, the dispute resolution system had been a blend of the diplomatic and legal aspects of dispute resolution, [sic] dispute resolution procedures were split up between the GATT and the Tokyo Round agreements, the disputing parties were able to block the adoption of panel reports by the Council (and thus deny them legal effect), and the losing party could easily delay the implementation of the report. With the advent of the WTO and its DSU, an integrated dispute resolution system was created, with many more legalistic and rule-oriented elements.

Id.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See generally* Sophie Meunier, *Divided but United: European Trade Policy Integration and EU-U.S. Agricultural Negotiations in the Uruguay Round*, in *THE EUROPEAN UNION IN THE WORLD COMMUNITY 199-208* (Carolyn Rhodes ed., 1998) (discussing the stalemate between the United States and the European Community from 1987 to 1992 and the internal struggles within the European Community).

²⁴¹ *See id.* at 201. “The United States responded to the failure of the negotiations by linking the oilseeds dispute to the ongoing discussions and by menacing the EC with a full-blown trade war.” *Id.* With the Blair House compromise,

European and American negotiators agreed to a “peace clause” that would exempt from trade actions those internal support measures and export subsidies that do not violate the terms of the agreement. A separate deal on oilseeds was also concluded, thus ending several years of EC-U.S. disputes

B. The Steel Dispute

The U.S. was recently involved in a similar controversy due to its protection of the steel industry. This was a form of “strategic trade” that eschewed the principles of tariff reduction as seen in the Bush administration’s steel tariffs in 2002.²⁴² After a comprehensive nine-month investigation, President Bush determined that safety measures were necessary to protect the overall strength and capacity of the steel industry.²⁴³ However, by ignoring the formal dispute settlement structure provided by the World Trade Organization (WTO) and resorting to tariffs, the administration set the wrong precedent for resolving international trade disputes—one of non-cooperation and unilateralism.²⁴⁴

On June 5, 2001, President Bush announced a three-part steel proposal that involved:

- (1) launching negotiations to establish disciplines on government subsidies and other market distortions in the steel sector,
- (2) working to reduce inefficient excess capacity in the global steel market,
- (3) requesting initiation of a Section 201 (“safeguard”) investigation to determine whether imports are seriously injuring the domestic industry.²⁴⁵

In March 2002, President Bush imposed an average 30 percent tariff on selected foreign steel that entered the country.²⁴⁶ Was the United

and GATT litigation and canceling the promised U.S. trade sanctions against the EC.

Id. at 202.

²⁴² See Kevin K. Ho, Note, *Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT’L L. 825, 825 (2003).

²⁴³ George W. Bush, Steel Products Proclamation, March 5, 2002, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020305-7.html>.

²⁴⁴ See Ho, *supra* note 242.

The resulting tariffs ran the risk of violating international law and of costing more jobs than they purposed to save domestically. . . . In the international arena, the steel tariffs alienated trade partners; they provided WTO critics additional support for their case against free trade and diminished U.S. trade negotiation credibility.

Id.

²⁴⁵ United States Trade Representative, Fact Sheet: The Determination on Steel, Dec. 4, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031204-6.html>. Section 201 refers to a section of the Trade Act of 1974.

Id.

²⁴⁶ Ho, *supra* note 242, at 826. This was ten percent less than the International Trade Commission initially recommended. *Id.*

States a victim of dumping, or was the situation distorted?²⁴⁷ What were the primary influences that entered into the administration's calculus? The administration's break from multilateralism in the case of the steel tariffs imposed constraints on society—domestically and globally—and failed its optimal outcome.

1. Analyzing the Dispute Through Game Theory

The game theory is a branch of the social sciences that examines interactions between people or groups, assuming the participants are rational actors.²⁴⁸ Ultimately, the game theory analysis shows that the United States, by violating the principles of free trade, failed to achieve the best global outcome and damaged the country's standing in the international economic community. The Bush administration incorrectly gauged its best possible outcome as being one that was geared towards domestic interests: garnering votes. Prioritizing local political concerns over the long-term global best interest thwarts the international effort towards greater efficiency in trade.

Examining this case through game theory demonstrates the failure on the part of the United States to work towards an eventual Pareto optimal outcome.²⁴⁹ A beneficial, or Pareto efficient, policy change makes at least one entity better off without making any other worse off.²⁵⁰ As such, imposing tariffs on steel for domestic political gain is clearly Pareto *inefficient*, for it comes at others' expense. A Pareto optimal outcome is a state of affairs from which it is impossible to make any change without making at least one entity worse off—the maximum point.²⁵¹

Trade relations constitute a Prisoner's Dilemma situation with a potential towards achieving Pareto optimality. In this hypothetical

²⁴⁷ Dumping is defined as selling far below cost to drive out competitors and bring costs down. See THEMISTOKLIS K. GIANNAKOPOULOS, A CONCISE GUIDE TO THE EU ANTI-DUMPING/ANTI-SUBSIDIES PROCEDURES 3 (2006).

²⁴⁸ THE SOCIAL SCIENCE ENCYCLOPEDIA 324-25 (Adam Kuper & Jessica Kuper eds., Routledge 2d ed. 1996).

²⁴⁹ This theory is the brainchild of Italian economist, Vilfredo Pareto. See GameTheory.net, Dictionary: People—Pareto, Vilfredo, <http://www.gametheory.net/dictionary/People/VilfredoPareto.html> (last visited Oct. 5, 2008).

²⁵⁰ NATHANIEL O. KEOHANE & SHEILA M. OLMSTEAD, MARKETS AND THE ENVIRONMENT 220 (Island Press 2007). For more on Pareto optimality, see Appendix C.

²⁵¹ THE MORAL DIMENSIONS OF PUBLIC CHOICE: BEYOND THE MARKET PARADIGM 314 (John M. Gillroy & Maurice L. Wade eds., Univ. of Pittsburgh Press 1992) [hereinafter MORAL DIMENSIONS].

scenario, two prisoners are put in separate rooms and asked to talk.²⁵² Players are assumed to be fully rational and choose a strategy that gives them the highest expected utility over time, given the expectations of what others will do.²⁵³ They may cooperate with one another—by not confessing—or they may defect from the game and confess.²⁵⁴ Each prisoner, or player, has an incentive to defect by confessing.²⁵⁵ Although defection has its rewards, if both players follow that path then each will end up worse off than if they had cooperated in the first place.²⁵⁶

This theoretical framework fits with the issue of international trade discussions.

The example in the chart below helps illustrate this concept. The vertical column represents U.S. actions, and the number to the left of the comma its potential price to pay—out of a maximum of ten. The lower the number, the better off one player will be. The idea underlying the Prisoner's Dilemma is the propensity towards self-interest and a resulting lack of trust among participants—in this case, trading partners.²⁵⁷ Even though both agree from the outset to cooperate with one another towards free and fair trade, self-interest comes into play and one partner may decide to disregard the rules—defecting from the game.²⁵⁸ Consequently, the cooperator would pay the full cost of ten

²⁵² See PATRICK M. MORGAN, THEORIES AND APPROACHES TO INTERNATIONAL POLITICS: WHAT ARE WE TO THINK? 122 (1972).

²⁵³ *Id.* at 121.

²⁵⁴ See THE ITERATED PRISONERS' DILEMMA: 20 YEARS ON 2-3 (Graham Kendall et al., 2007) [hereinafter PRISONERS' DILEMMA].

²⁵⁵ See *id.* at 3.

²⁵⁶ See *id.*

²⁵⁷ See MORGAN, *supra* note 252, at 123. "Prisoner's Dilemma can alert us to the fact that a conflict may make mistrust such perfectly rational behavior that in pursuing their individual interests the two sides produce mutual disaster." *Id.*; PRISONERS' DILEMMA, *supra* note 254, at 4.

Experiments, [sic] using human players . . . showed that they, generally, did not cooperate even when it should have been obvious that the other person was going to cooperate, just as long as you do. . . . If players would only cooperate then their payoff, over an indefinite number of games could be maximized, rather than tending towards defection and hoping the other play would cooperate.

Id.

²⁵⁸ See MORGAN, *supra* note 252, at 123.

Is there any situation you can think of in which if two nations trust each other and cooperate they both benefit but where if one cheats it gains a sizable advantage so that neither trusts the other? How about disarmament talks among the great powers? . . . Prisoner's Dilemma can alert us to the

while the defector would take advantage and walk away unharmed.²⁵⁹ Over time and after a series of dealings between the two, players become aware of this tendency and lose trust.²⁶⁰ This causes both players to end up in cell three, where they each pay five.²⁶¹ Not cooperating with trade rules initially hurts the opposite party and ultimately pits both partners in a cell where both are defectors. By agreeing to cooperate, the players move to cell one. Neither player benefits at the expense of another player. A move to cell one from cell three is Pareto efficient and is the optimal point for efficiency as well.

	Foreign Nations Cooperate with Trade Rules	Foreign Nations Disregard Trade Rules
United States Cooperates with Trade Rules	Cell 1 1,1	Cell 4 10,0
United States Disregards Trade Rules	Cell 2 0,10	Cell 3 5,5

The reality is that the United States is not the only state to engage in protectionist behavior, ignoring existing institutional arrangements, as other members of the WTO and the GATT have also engaged in such practices.²⁶² What this perpetuates, however, is tit-for-tat retaliation ("TFT").²⁶³ Robert Axelrod outlines the rules of TFT:

fact that a conflict may make mistrust such perfectly rational behavior that in pursuing their individual interests the two sides produce mutual disaster.

Id.; see also PRISONERS' DILEMMA, *supra* note 254, at 3.

But what if you think the other player will defect? If you cooperate, then you get the Sucker payoff of zero. If you defect than you would both receive the Punishment for Mutual Defection of [5] point[s]. Therefore, if you think the other player will defect, you should defect as well.

So, you should defect, no matter what option your opponent chooses.

PRISONERS' DILEMMA, *supra* note 254, at 3.

²⁵⁹ See *id.*

²⁶⁰ See MORGAN, *supra* note 252, at 123

²⁶¹ See PRISONERS' DILEMMA, *supra* note 254, at 3.

²⁶² A. Gary Shilling, *The Protectionist Threat*, FORBES.COM, Nov. 24, 2003, <http://www.forbes.com/forbes/2003/1124/268.html>.

²⁶³ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* VIII (rev. ed. 2006). "TIT FOR TAT is merely the strategy of starting with cooperation, and thereafter doing what the other player did on the previous move." *Id.*

- (1) continue cooperating after three mutual cooperations
- (2) defect when other player defects
- (3) accept apologies.²⁶⁴

The first rule demonstrates a positive outcome in the Prisoners' Dilemma. When both players choose cell one, then an arrangement of mutually beneficial cooperation exists with no need for change or improvement. It is the second rule that leads to a potentially harmful pattern of retaliation, as established by precedent.²⁶⁵ The WTO is an attempt to find a common ground in trade. If states could afford to close their borders, then they would do so. Thus, much like the Prisoner's Dilemma, cooperation is beneficial. If one state defects from the international standard, then other states—typically large and powerful ones—will likely do the same. This puts those countries—and consequently the world—on a path of non-compliance. This is clearly not a Pareto optimal situation.²⁶⁶ Nevertheless, defections are not entirely reversible, as Axelrod's third rule states. "Apologies" can be accepted by players in this game and a move can be made towards Pareto optimality in a manner that is Pareto efficient. This, however, rests entirely on the willingness of states to cooperate.

C. *The Reasoning Behind the Tariffs*

All states in the international system have their own national interest at stake. International relations theorists generally view it as the moral duty incumbent upon world leaders to safeguard this interest.²⁶⁷ As such, a commitment to multilateralism may be abandoned when that interest is at stake. For a nation such as the United States, the most prominent state in the system, the stakes are tremendously high—far more so than nearly all members of international organizations, such

²⁶⁴ See ROBERT M. AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 20 (1997).

²⁶⁵ For examples of this result, see *infra* nn. 179-241 and accompanying text.

²⁶⁶ A Pareto optimal state of affairs is one from which it is impossible to make any change without making at least one person worse off. MORAL DIMENSIONS, *supra* note 251. It is the maximum point. Once optimality has been reached, all options for Pareto optimal change are exhausted. *See id.*

²⁶⁷ ERIC LAFERRIÈRE & PETER J. STOETT, *INTERNATIONAL RELATIONS THEORY AND ECOLOGICAL THOUGHT: TOWARDS A SYNTHESIS* 88 (1999) (describing thoughts of Realist international theorists Morgenthau, Herz and Aron). According to Morgenthau, responding to another nation's quest for power "isn't a mere game of chicken, but the fulfillment of a moral duty—the duty to protect the national interest." *Id.*

as the WTO.²⁶⁸ It is this rationale that the Bush administration took in the stance to protect the steel industry.²⁶⁹ Once seen as a principal economic and social force, the American steel industry has been declining over the past thirty years.²⁷⁰ As Kevin Ho describes, while Japan and South Korea heavily “invested in large-scale, blast-furnace production facilities,” the United States focused on new technologies requiring heavy capital investment and an increased production capacity.²⁷¹ Thus, the industry began releasing workers and driving down costs to finance the technology-heavy method of production.²⁷² D’Costa illustrates:

The slow diffusion of modern technology and import competition in the US undermined the financial strength of American steel firms, leading to obsolete excess capacity. The industry responded with major restructuring at the plant level, reorganizing production assets by eliminating capacity and selectively modernizing plants. Unable to cope with the crisis, the industry also abandoned its self-regulatory approach in favor of a more cooperative business-government partnership.²⁷³

The weakening of the American steel industry that resulted has been grave. “Since 1997, more than thirty domestic steel companies have

²⁶⁸ See WORLDSTEEL ASSOCIATION, STEEL STATISTICAL YEARBOOK 2008, May 6, 2009, available at <http://www.worldsteel.org/index.php?action=publicationdetail&id=81> (documenting the U.S. as the third leading steel producer in the world).

²⁶⁹ President Bush recognized the serious injury to the domestic steel industry in his statement on lifting the temporary measures. George W. Bush, President’s Statement on Steel, Dec. 4, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031204-5.html>.

Prior to [the 2002 safeguard measures], steel prices were at 20-year lows, and the U.S. International Trade Commission found that a surge in imports to the U.S. market was causing serious injury to our domestic steel industry. I took action to give the industry a chance to adjust to the surge in foreign imports and to give relief to the workers and communities that depend on steel for their jobs and livelihood

Id.

²⁷⁰ Ho, *supra* note 242, at 830.

²⁷¹ *Id.* The American strategy made previously low-yield, electricity-hungry mini-mills more productive by drawing on large quantities of scrap metal. *Id.*

²⁷² *Id.*

²⁷³ ANTHONY P. D’COSTA, THE GLOBAL RESTRUCTURING OF THE STEEL INDUSTRY: INNOVATIONS, INSTITUTIONS AND INDUSTRIAL CHANGE 30 (1999).

filed for bankruptcy protection, displacing more than 45,000 steelworkers.²⁷⁴

The threat against the American steel industry was viewed as coming from abroad—and from a combination of issues—rather than from faulty domestic production and management methods.²⁷⁵ A massive overcapacity existed in the world's quantity of steel.²⁷⁶ Developing countries benefited from increasing trade liberalization and less stringent capital transfers.²⁷⁷ Prices of steel imported from Asia dropped heavily after the 1998 financial crisis and global prices have remained low ever since.²⁷⁸ Additionally, the United States accused countries of dumping.²⁷⁹ The American Iron and Steel Institute called the United States “the World's Steel Dumping Ground.”²⁸⁰

President Bush supporters will argue that the steel industry was, in fact, jeopardized and blame could be placed on predatory international economic practices.²⁸¹ By illegally using tariffs to support a key industry, the U.S. stood to lose a great deal relative to other member states. These losses go further than what directly affects citizens and voters—jobs and confidence—and has a far more acute effect on national character—autonomy and prestige. Autonomy is particularly important in a time of war. President George W. Bush saw himself as a “wartime President” who must put national security above all concerns. There is an inherent risk in relying solely on foreign raw material in the production of defense and security weaponry—steel is a vital component in building armaments and military vehicles. Prestige is also a critical element in *realpolitik* thinking—the paradigm that states power is the end game in politics.²⁸² Realists—dating back to Thucydides—view poli-

²⁷⁴ Ho, *supra* note 242, at 830. “Meanwhile, more than 100,000 retired steelworkers lost all medical and life insurance benefits as well.” Ho, *supra* note 242, at 830.

²⁷⁵ *Id.* at 832.

²⁷⁶ *Id.* at 831.

²⁷⁷ *Id.* at 830.

²⁷⁸ *Id.* at 831.

²⁷⁹ *Id.* at 832.

²⁸⁰ *Facts Refute Knollenberg Misinformation on Impact of Steel Tariffs*, AMERICAN IRON AND STEEL INSTITUTE, Jan. 29, 2003, <http://www.steel.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=16013>.

²⁸¹ *Id.*

²⁸² *See, e.g.*, MACHIAVELLI, *supra* note 97. Prestige comes from the ancient Machiavellian prescription for preserving power. He postulated that a prince can stay in power longest by earning a reputation for might. *See* MACHIAVELLI, *supra* note 97, at ch. XVII, 59. By using his standing, the prince can achieve what is necessary

tics as a zero sum game where there are clear winners and losers.²⁸³ To an extent, this administration exhibits such characteristics. This is particularly true in its prioritization of domestic issues and unilateral action over a commitment to institutionalism.

V. CONCLUSION: GROTIUS AND SAFEGUARDING HUMANITY

The contrast between Grotius's view of international law—based on the morality of Augustine and Aquinas—and classical realism is one of idealism versus reality. But how “realistic” is realism? It is true that a state will act in its best interest rather than on ethical principles, but do states act solely on the basis of power? The fact is that in an ever-changing world, the scope of national interest cannot be limited simply to power maximization. Realism does not concern itself with citizens. It is useful, then, to evoke the Kantian notion that a state is a social contract decided on by the people.²⁸⁴ And it all, ultimately, goes back to Grotius: states are interdependent in the international system.²⁸⁵ States elect leaders who serve and are accountable to the public.

Through their narrow statement that power is the end of political gains, realists' definition of national interest is not wholly applicable today—particularly in the current international system in which bipolarity does not exist—the world consists of numerous states whose dealings with one another are often in a multilateral setting. By limiting the scope of state interests, realist theory cannot explain interdependence. It can be beneficial for a state to sacrifice some of its operational, or daily, sovereignty in order to benefit from total sovereignty. For example, if states collectively agree to equally limit the number of tons that they fish, this can prevent a conflict in which certain states aim to dominate the industry. Realists are completely against this idea of interdependence and cooperation—which may limit state sover-

to survive without expending energy—and thereby weakening himself. *See id.* Morgenthau continued with this line of thinking. For this reason he opposed the Vietnam War and would likely have opposed the current War on Iraq. States must be prudent in their actions. Force must only be used in the most dire of circumstances. Preventive wars are not in line with realist thinking. *See* John J. Mearsheimer, *Hans Morgenthau and the Iraq War: Realism versus Neo-Conservatism*, OPENDEMOCRACY.NET, May 19, 2005, http://www.opendemocracy.net/democracy-americanpower/morgenthau_2522.jsp.

²⁸³ *See, e.g.*, THUCYDIDES, *supra* note 89.

²⁸⁴ *See supra* nn. 59-72 and accompanying text.

²⁸⁵ *See id.*

eignty.²⁸⁶ Allying with other countries requires sharing of their issues and could translate into the inheritance of their conflicts. Furthermore, other countries many not believe in the idea of mutual gains.²⁸⁷ A state constraining itself in the name of interdependence may result in the relative gains of another state. Realists believe that the prospects for international integration—an actuality in the present system—are “limited by diverging state interests in an anarchic self-help system.”²⁸⁸

Although not always applicable, realism is the basis of most international relations theories. Norms may be what well-intentioned individuals and states may strive for, but decisions are ultimately made in light of immediate circumstances. Thus, the realists are correct in saying that international laws will be bypassed when obeying them comes at the cost of state sovereignty. But the realist paradigm has its shortcomings. The world does not exist entirely as a zero-sum game. Mutual benefits *do* exist and trusting other states *can* be in the best national interest. Thus, rationality may induce a state to reduce a measure of its autonomy for some future benefit.

An effective approach to studying inter-state relations must acknowledge that constant change within the international arena causes states to modify their actions accordingly. While there is truth to the universality of human nature, this moral behavior does not apply to states. What may be unjust for one man to do may serve in the best interest of a state. Furthermore, circumstances may incite behavior that would otherwise be considered immoral. Context is critical in understanding both the motivations and conduct of states. In such scenarios, state behavior may not fall in line with moral guidelines. However, international laws are necessary for establishing order. The creation of rules deters states from taking actions that are harmful to other states and allows for a basic international understanding of “right” and “wrong.” When one state is clearly acting outside the boundaries of what is determined “right,” other states in the international arena can act against that state on the basis of its violations.

The actual conception of the laws themselves, however, is not based on a universal moral order, whether it be religious (Augustine)

²⁸⁶ See, e.g., MORGENTHAU, *supra* note 19, at 307-25 (discussing sovereignty: what it is, how it is lost, and how it is indivisible).

²⁸⁷ See Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *Int'l Org.* 485, 485 (1988) (discussing realism's pessimistic view regarding inter-state cooperation).

²⁸⁸ DOUGHERTY & PFALTZGRAFF, *supra* note 130, at 435.

or secular (Aquinas). All states do not have an equal voice in the creation of these laws. It is the strongest states that have the most at stake, the most motivation, as well as the heaviest influence on the creation of international institutions and the laws that they formulate. The balance of power analysis was a useful explanation for nuclear deterrence during the Cold War, but power alone does not explain all actions, nor does it account for the motivation for mutual dependence caused by overlapping state interests. Social, economic, and technological factors have an influence on the decisions that states make. No rigid realist approach to looking at national interest and state behavior can accurately explain international relations. Grotius's conception of an international legal order must live on.

APPENDIX

A. PRINCIPLES OF FREE TRADE

*I. THE THEORY OF COMPARATIVE ADVANTAGE ILLUSTRATED:*²⁸⁹

Prior to Trade-

<u>COUNTRY A</u>	- 10 Motorcycles - 20 Cars
<u>COUNTRY B</u>	- 200 Motorcycles - 25 Cars

After the Decision to Trade-

<u>COUNTRY A PRODUCES:</u>	- 0 Motorcycles - <u>40 Cars</u>
<u>COUNTRY B PRODUCES:</u>	- <u>240 Motorcycles</u> - 20 Cars

What They Trade-

<u>COUNTRY A:</u>	- Gets 30 Motorcycles - Trades 10 Cars
<u>COUNTRY B:</u>	- Gets 10 Cars - Trades 30 Motorcycles

Net Outcome: By the smaller A specializing in Cars and the larger B specializing in Motorcycles, BOTH countries are ultimately better off!

<u>COUNTRY A:</u>	- 30 Motorcycles - 30 Cars
<u>COUNTRY B:</u>	- 210 Motorcycles - 30 Cars

II. THE THEORY OF ECONOMIES OF SCALE:

A situation where the cost of producing one unit of a good or service decreases as the volume of production increases.²⁹⁰ According to Mankiw, economies of scale may be caused by higher levels of pro-

²⁸⁹ See N. GREGORY MANKIW, *ESSENTIALS OF ECONOMICS* 51 (4th ed. 2007).

²⁹⁰ *Id.* at 257.

ductivity that permit workers to specialize and become more efficient.²⁹¹

B. THE GATT AND THE WTO

The International Trade Organization (“ITO”) was an agreement reached through compromise between the United States and the United Kingdom.²⁹² According to Gilpin, “the trade system was born into conflict between American and British negotiators at the Bretton Woods Conference (1944).”²⁹³ The Americans’ primary goal was to achieve free trade and open up foreign markets for commerce.²⁹⁴ The British, he claims, were more concerned with their “dollar shortage” and the potential loss of domestic economic autonomy to achieve full employment.²⁹⁵ The ITO left many issues unresolved.²⁹⁶ The GATT, initially set up as an interim measure, became the world’s chief trade organization after the ITO was defeated in the U.S. Senate in 1950.²⁹⁷ Prior to enactment, what came to be known as the GATT was described as “an effort to give an early boost to trade liberalization after the Second World War—and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s.”²⁹⁸ This resulted in 45,000 tariff concessions affecting \$10 billion—approximately one-fifth—of global trade.²⁹⁹ The founders of the GATT aimed for a continuous advancement towards an open world economy ending the possibility for a return to the cyclical retaliation that characterized the decades prior.

The trade rounds of the GATT were the regime’s vehicles for trade development, covering issue by issue negotiations. Iowa State University explains the four highlights of the rounds system:

²⁹¹ *Id.*

²⁹² GLOBAL POLITICAL ECONOMY, *supra* note 188, at 218.

²⁹³ *Id.* at 217.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 218.

²⁹⁷ *Id.*

²⁹⁸ Iowa State University Economics Department, The Roots of the WTO: A Brief History of GATT, <http://www.econ.iastate.edu/classes/econ355/choi/wto/roots.htm> (last visited Nov. 3, 2009). In 1946, tariff negotiations began among the original 23 “contracting parties” of GATT. *Id.*

²⁹⁹ *Id.* Concluding in 1947, the first round of negotiations took place in Geneva. *General Agreement on Tariffs and Trade*, in ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/228333/General-Agreement-on-Tariffs-and-Trade> (last visited Oct. 3, 2009) [hereinafter *General Agreement*].

- “[First] trade round allows participants to seek and secure advantages across a wide range of issues.”³⁰⁰
- “Second, concessions which are necessary but would otherwise be difficult to defend in domestic political terms, can be made more easily in the context of a package which also contains politically and economically attractive benefits.”³⁰¹
- Third, developing countries and other less powerful participants have a greater chance of influencing the multilateral system in the context of a round than if bilateral relationships between major trading nations are allowed to dominate.³⁰²
- “[Fourth] overall reform in politically-sensitive sectors of world trade can be more feasible in the context of a global package.”³⁰³

According to the WTO, trade rounds during the early years of the GATT concentrated on further reducing tariffs.³⁰⁴ In the mid-1960s, the Kennedy Round initiated a GATT Anti-Dumping Agreement and a section on development.³⁰⁵ The Tokyo Round came about during the 1970s and was the first major attempt to confront non-tariff barriers (“NTB”) and to improve the system overall.³⁰⁶ The Uruguay Round of 1986-94, was the last and most extensive of all—the “round to end all rounds” ultimately led to the WTO and a new set of agreements.³⁰⁷ The 2001 Ministerial Conference in Doha was meant to discuss a wide range of issues regarding developing countries.³⁰⁸ A trade chronology has been included below.

³⁰⁰ Iowa State University Economics Department, *The Roots of the WTO: Trade Rounds-The Package Route to Progress*, <http://www.econ.iastate.edu/classes/econ355/choi/wtoroots.htm> (last visited Nov. 3, 2009) [hereinafter *The Roots of the WTO*].

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *See generally General Agreement*, *supra* note 299 (discussing GATT’s fundamental purpose of reducing tariffs in order that every GATT member would open their market to all other member states).

³⁰⁵ *The Roots of the WTO*, *supra* note 300.

³⁰⁶ *See generally General Agreement*, *supra* note 299 (describing the Tokyo Round and its emphasis upon improving conditions so that less developed countries would have a stronger negotiating position while also discussing the progress made regarding nontariff issues).

³⁰⁷ *See id.*

³⁰⁸ *The Fourth WTO Ministerial Conference*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Oct. 3, 2009)..

- 1947 The first true round of negotiations. Affected close to \$45 billion in trade. Took place in Geneva.
- 1948 A series of tariff concessions and rules came to be known as the General Agreement on Tariffs and Trade and entered into force.
- 1949-1962 Rounds two through five of trade negotiations—reduced tariffs by 73%. Annecy (1949), Torquay (1951), Geneva (1956), and Geneva/“Dillon” (1962).
- 1963-1967 Kennedy Round, the sixth round: “the most ambitious attempt ever taken to lower barriers to world trade.”³⁰⁹ Four main objectives: (a) significant reduction in tariffs, (b) progress in eradication or reduction of NTB, (c) inclusion of—for the first time in GATT—negotiations regarding agricultural issues, and (d) reductions in barriers to exports of less developed countries (“LDC”).
- 1973-1979 Tokyo Round, the seventh round: “a first try at reforming the trading system.”³¹⁰ It resulted in “an average one-third reduction in customs duties in the world’s nine major industrial markets, [which reduced] the average tariff [level] . . . down to 4.7 percent compared with about 40 per cent at the time of GATT’s creation.”³¹¹ Further agreements on NTB came about between members. What made the Tokyo Round “groundbreaking” was that it introduced a series of mechanisms to deal with trade issues. These were labeled “codes” because they were not accepted by the full GATT membership—although they were not multilateral, they set the stage for adoption and acceptance in the future. These codes included measure on subsidies, anti-dumping, licensing, customs valuation, etc.

³⁰⁹ House of Lords, Kennedy Round of Trade Negotiations, 1964-1967, 1967, Cm. 3347, available at <http://www.bopcris.ac.uk/bopcris/digbib/meta?did=c1:14350&sdid=c1:14352>.

³¹⁰ Iowa State University Economics Department, The Roots of the WTO: The Tokyo Round – A First Try at Reforming the Trading System, <http://www.econ.iastate.edu/classes/econ355/choi/wtoroots.htm> (last visited Nov. 37, 2009).

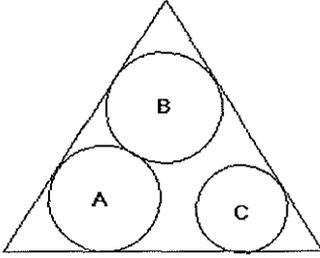
³¹¹ *Id.*

1986-1994 The Uruguay Round, the eighth round. These talks were intended to extend the trading system into new areas: trade in services, intellectual property, and trade reform in the agriculture and textile sectors. All original GATT articles were up for review. "It was the biggest negotiating mandate on trade ever agreed, and the ministers gave themselves four years to complete it."³¹² Two years after commencement, measures were introduced to reform dispute settlement mechanisms and trade policy review mechanisms. These provided "the first comprehensive, systematic and regular reviews of national trade policies and practices of GATT members."³¹³ The Round had, by far, the longest amount of delays. This, however, allowed for some negotiations to progress further than they would have. The ultimate achievement of the GATT was its replacement by the WTO. The General Agreement still exists as the WTO's umbrella treaty for trade in goods.

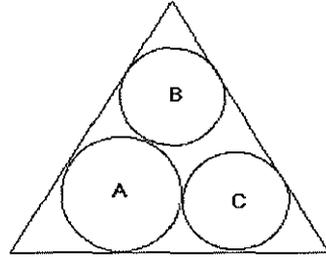
³¹² World Trade Organization, Understanding the WTO: Basics-The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Nov. 7, 2008).

³¹³ *Id.*

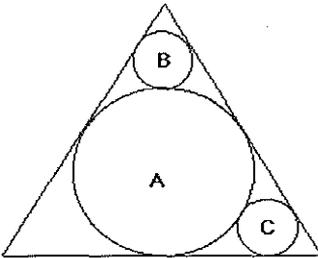
C. Pareto Optimality Illustrated³¹⁴



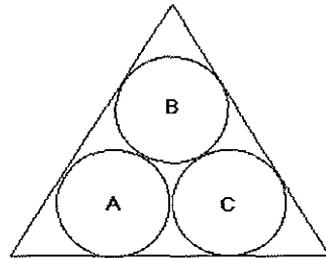
a. Not Pareto optimal – C can increase without reducing A or B.



b. Pareto optimal



c. Pareto optimal – and global optimum if objective function is combined area of $A+B+C$.



d. Pareto optimal

³¹⁴ Charles J. Petrie et al., *Using the Pareto Optimality to Coordinate Distributed Agents*, 9 ARTIFICIAL INTELLIGENCE FOR ENGINEERING DESIGN, ANALYSIS AND MANUFACTURING 269 (1995), available at <http://www-cdr.stanford.edu/NextLink/papers/pareto/pareto.html>.