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PLAYING THE GAME OF INTERNATIONAL LAW

Uri Weiss & Joseph Agassi***

ABSTRACT

In the realist game of international negotiations, each state attempts to promote their interest regardless of international law. Thus, it is negotiations in the shadow of the sword, i.e., a negotiation in which each side knows that if the parties will not achieve an agreement, the alternative may be a war, and thus the bargaining position of each party is a function of their capacities in a case of war. Negotiation in the shadow of international law is an alternative to it: in this alternative the parties negotiate according to their international legal rights. It reduces injustice and incentive to armament and to terror. It thus promotes peace. A state can choose unilaterally to play the game of negotiations in accord with international law by merely respecting the rights of one's neighbours regardless to their waving swords, and by this have much more peace and generate incentives against terror and armament. This efficiently brings much more security and peace. A policy of respecting international law, combined with conditional generosity, is more efficient. The wish for peace should make a country encourage its neighbours to avoid armament. The best way to do so is to adopt a policy of unilateral respect for international law and conditional generosity towards one's neighbours. The international community should enforce, or at least encourage, negotiations in accord with international law.

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PREFACE

What game of international dispute-resolution should be chosen by the planners and by the players of international relations? What should be the place of international courts in conflict resolutions? What is the best response to negotiation failure?

Peace negotiation is clearly better than war. Even a negotiation between robbers and their victims are notoriously better than murder. Of course, every submission to a robber encourages robberies; one of the advantages of international law is that it encourages replacing terror with compromise. In the language of the social contract theory: when a state plays as if it is a Hobbesian “natural state,” namely, a game without any valid law in which “[h]omo homini lupus” (“a man is a wolf to another man”),¹ they will be robbed much more if they play as if it is a “political state.”² This is so, since from the point of view of the state that believes that international relations represent a Hobbesian “natural state,”³ every demand by the other side is a robbery, and there is no distinction between legitimate demands and illegitimate demands. We argue that while a state recognizes international law, the state plays a game of political state and thus is robbed much less. Thus, when a state recognizes international law, they declare their right not to be robbed.⁴ By this, they play a less

¹ See FRANS DE WAAL, PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED 3 (2016) (De Waal claimed: “Homo homini lupus—“man is wolf to man”—is an ancient Roman proverb popularized by Thomas Hobbes.”).

² See THOMAS HOBBS, LEVIATHAN ch. 17 (1651), available at <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm>. Hobbes claimed, “[a]nd in all places, where men have lived by small Families, to robbe and spoyle one another, has been a Trade, and so farre from being reputed against the Law of Nature, that the greater spoyles they gained, the greater was their honour; and men observed no other Lawes therein, but the Lawes of Honour; that is, to abstain from cruelty, leaving to men their lives, and instruments of husbandry.” *Id.*

³ MICHAEL JOSEPH SMITH, REALIST THROUGH FROM WEBER TO KISSINGER 13 (1986) (claims Hobbes's “analysis of the state of nature remains the defining feature of realist thought. His notion of the international state of nature as a state of war is shared by virtually everyone calling himself a realist.”).

⁴ Thomas Hobbes claimed that “before constitution of Sovereign Power (as hath already been shewn) all men had right to all things; which necessarily causeth Warre.” Thomas Hobbes, *The Project Gutenberg eBook of Leviathan*, GUTENBERG.ORG, <https://gutenberg.org/files/3207/3207-h/3207-h.htm> (last visited Aug. 10, 2022).

dangerous game, a game that protects their citizens from terrorism. We will explain this argument in this paper.

There are many different potential games of international negotiation: one extreme game is that if negotiation fails, one country has the power to force the other to settle the court with a universal jurisdiction and a capacity to enforce their decision. When the states play the negotiation game, they play the game of negotiation in the shadow of the law. Another possible negotiation game is one in which each country attempts to maximize their benefits regardless of the law, and if negotiation fails, they will settle their conflict by war. When they negotiate, they play the game of negotiation in the shadow of the war.

The first game will be played in a world with a court with universal jurisdiction and an effective mechanism to enforce their decisions. A game of negotiation in the shadow of the law will also be played in a non-utopian world. It will be the case, if the two states respect international law enough. The two states may choose to litigate if they fail to reach agreement. When this is the case, we will see many fewer territorial disputes, and thus the solution of conflict by this mechanism is much less visible, namely, the illusion is that this mechanism is neglected.⁵

Moreover, a state may choose to respect international law regardless of the choice of the other state, and by this choose the game. Despite the unilateral acceptance of international law, international law may influence the two parties' negotiation. This will be the case particularly, when a side that may achieve more territory by sword than it is entitled by international law, will subject itself to international law. Thus, it is much more important that the strong side will accept international law, since the strong side is the one that can take more territory than it is entitled by international law.

Games of international negotiation in the shadow of international law reduces injustice in international relations, and reduces terrorism, arming and wars. We recommend to any state that faces conflict to invite the other side publicly: let's negotiate, and if the negotiation fails, let's go to the international court of justice. The choice of a state not to rob even when it can rob without paying,

⁵ This is similar to the friendship paradox: since people with more friends are more visible, people tend to think that others have more friends than they have. See Scott L. Feld, *Why Your Friends Have More Friends Than You Do*, 96 AM. J. SOCIO. 1464, 1464-77 (1991).

incentivizes the other side not to arm. It is also more important that the strong side, the side that may achieve by sword more than it is entitled by law, will be subject to international law. Yet even the weak side can invite the strong side publicly for an international adjudication. For It, it is (almost) a no-lose strategy: it will gain if the strong side accepts its proposal, and it will gain even if the strong side does not accept its public proposal since by this the strong side will lose legitimacy to attack and to justify it by raising a self-defense claim. When a weak side relinquishes transparency, it pays an enormous price (that usually it cannot see because of the lack of transparency).

In an ideal world, the international community will force the game of negotiation under the shadow of international law. However, it does not mean that partial universal jurisdiction is always better than jurisdiction that is based on the mutual consent of the states.⁶ The realists claim that we do not live in an ideal world, and hence international law does not matter.⁷ As such, there is no such thing as international law.⁸ We argue that, by a unilateral acceptance of international law, a state defends itself, that international law is a *sine qua non* that states will not rob and will not be robbed.

I. INTRODUCTION

Let us now discuss in the common language of international relations: what states should do if negotiation fails? There are states that, in this case, will go to war, and there are states that in this case will go to international adjudication.

How should international conflict be solved? What should a country that faces a conflict do? According to the traditional approach, the conflict should be solved at the negotiation table.⁹ This solution is

⁶ See Uri Weiss, *The ICC Should Not Encourage Occupation*, 37 TOURO L. REV. 797, 797 (2021).

⁷ See Gregory Shaffer, *Legal Realism and International Law* (U.C. Irvine School of Law, Research Paper No. 2018-55, 2021). They claimed that “[l]egal realism is not IR realism and should not be confused with it. IR realism views international law as epiphenomenal because state power, and not law, determines international relations outcomes.” *Id.*

⁸ See John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 48 (2000).

⁹ Let us see some examples to this approach regarding the contemporary conflicts. Zelensky claimed that the war could only come to a conclusive halt “at the

probably better than war: “in peace sons bury their fathers, but in war fathers bury their sons.”¹⁰ However, what should be the case if negotiation fails? One possibility is that in this case the conflict will be solved through litigation.¹¹ This will turn the negotiation be a negotiation in the shadow of the law. Another possibility is to go to another negotiation if negotiation fails, and this raises the question, what to do if the additional negotiation fails. Infinite negotiation may lead to the freezing of the status quo, even if the status quo is a status quo of war. Another possibility is that the conflict will be settled by sword, if negotiation fails. This is the approach of Carl von

negotiating table.” *Zelensky: Only Diplomacy Can End Ukraine War*, BBC NEWS (May 21, 2022), <https://www.bbc.com/news/world-europe-61535353>. The possibility of going to arbitration has not been mentioned as an option. Regarding the conflict in Yemen, “[w]hat has been most frustrating during my time [...] has been the absence of comprehensive peace talks,” said Martin Griffiths, Special Envoy of the Secretary-General for Yemen, during his briefing to the Security Council, adding that he had emphasized time and again the primacy of a political process to negotiate the core political and security issues needed to end the war. The last time the Government of Yemen and Ansar Allah, or the Houthis, sat down to discuss the sticking issues was in Kuwait in 2016, he said, “[o]nly a negotiated political settlement can truly turn the tide in Yemen,” he said, arguing that a mediator is not responsible for the war nor for the peace, despite the common assumption to the contrary. Rather, the mediator’s privilege is to present to the parties the ways the war can end, he stressed.” *Negotiated Political Settlement Only Way to End War*, UNITED NATIONS (June 15, 2021), <https://press.un.org/en/2021/sc14552.doc.htm>. Furthermore, “[s]ome countries claim, more or less, that the ICC should not have jurisdiction over the West Bank, East Jerusalem and Gaza, since the conflict should be solved via negotiation. *See generally* Situation in Palestine, Case No. ICC-ICC-01/18, Public Document: Submissions Pursuant to Rule 103 (Uri Weiss) (Mar. 16, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01105.PDF. *See also* Raphael Ahren, *Why the Palestinian Case at the Hague Took A Big Hit This Past Week*, THE TIMES OF ISRAEL (Feb. 21, 2020 9:40 AM), <https://www.timesofisrael.com/why-the-palestinian-case-at-the-hague-took-a-big-hit-this-week/>.

¹⁰ HERODOTUS, *THE HISTORIES*, Book I, ch. 87, § 4.

¹¹ *The Palestine Mandate*, YALE L. SCHOOL LILLIAN GOLDMAN L. LIBRARY (2008), https://avalon.law.yale.edu/20th_century/palmanda.asp;

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Id.

Clausewitz, who said that “[w]ar is nothing but a continuation of political intercourse with an admixture of other means.”¹²

It is possible to imagine what to do if negotiation fails: that the strong world powers will force a solution.¹³ An alternative is that the Security Council will force a solution;¹⁴ however, the fact that the five permanent members have a veto power may prevent a resolution.¹⁵

How should the international community organize the world, such that conflict will be solved in a better way? What should be the jurisdictions of international courts? What policy toward international law states should take, even unilaterally?

II. HISTORICAL BACKGROUND

For years, there was no effective legal mechanism for international law enforcement.¹⁶ For the traditional doctrine of international law assigned a court jurisdiction only with the consent of both parties, the complainant state, and the claimant state. Further, one of the strong doctrines of international law was, and largely remains,

¹² See KARL VON CLAUSEWITZ, ON WAR 596 (O.J. Matthijs Jolles trans., 1943).

¹³ A historical example to a forced solution may be that the U.S. forced Japan to adopt their liberal constitution.

¹⁴ We can illustrate this by the Security Council’s Resolution 134, 181, 392, and 418 regarding South Africa. See (S/RES/134), (S/RES/181), (S/RES/392), (S/RES/418). The last one imposed a mandatory arms embargo against South Africa. We can partially illustrate this by the Security Council’s Resolutions 242 and 228 regarding the Israeli-Arab conflict. See (S/RES/242), (S/RES/338).

¹⁵ See U.N. Charter art. 27, ¶¶ 1-3. “Each member of the Security Council shall have one vote.” *Id.* at ¶ 1. “Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.” *Id.* at ¶ 2. “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.” *Id.* at ¶ 3.

¹⁶ See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1832);

[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

Id. See also Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

the primacy of state sovereignty.¹⁷ States are equal and must respect each other's sovereignty. The recognition of immunity of foreign heads of state and its diplomats is recognized as a part of this respect.

In terms of traditional international law, internal sovereignty is not limited.¹⁸ This becomes absurd; when dictators (say Assad) massacre their people, it is an internal matter, but when their forces injure members of other nationalities (say Turkish soldiers), it becomes an international issue.¹⁹ Such situations have made Justice Antônio Augusto Cançado Trindade criticize the established state of affairs as a distortion of the original intent of the founders of international law.²⁰

¹⁷ Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BRIT. Y.B. INT'L L. 65, 65 (1999).

¹⁸ Jens Bartelson, *The Concept of Sovereignty Revisited*, 17 EUR. J. INT'L L. 463 (2006);

All the contributors to this volume seem more or less painfully aware of the tension that exists between the traditional view of sovereignty as an indivisible and discrete condition of possible statehood, and the actual dispersion of political power and legal authority to the sub- and supranational levels. They are also very aware of the fact that whenever the concept of sovereignty is simply redefined in order to be better attuned to this dispersion of authority, a series of paradoxes arise that must be resolved if those new constellations of power and authority are to be perceived as legitimate.

Id. at 467.

¹⁹ Jost Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567, 567 (1981) ("An impressive body of international conventions providing for the protection of human rights in almost all spheres of social and political life has been built up during the past fifty years,' but their enforcement is sadly lagging. Sovereignty of states-understood as their supreme authority and independence-is being identified as the major factor responsible for such a lamentable state of affairs with regard to the internationally controlled implementation of human rights.").

²⁰ See ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND* 10 (3d ed. 2010);

The universal *jus gentium* of Vitoria, remindful of the importance of human solidarity, regulated, on the basis of principles of natural law and right reason (*recta ratio*), the relations between all peoples, respectful of their rights, the territories wherein they lived, and their contacts and freedom of movement (*jus communicationis*). Deriving its strength from principles of universal value, the *jus gentium* in the conception of Vitoria applied equally to all, the governed and the governors. On the basis of such conception the emerging international legal order purported to ensure the primacy of law over force, as reflected in Vitoria's famous warning "Imperator non est dominus totus orbis. On his turn, Francisco Suárez, warning that no State sufficed to itself, started likewise from the fundamental unity of humankind (forming a *societas ac communicatio*), and began to move towards the autonomy of the law of nations; such

Over the years, attempts to change the traditional approach in international law took place, including attempts to empower the international court with universal jurisdiction. The attempts were to introduce an international order that rests on principles of law, rather than on a precarious balance of power, such as the equilibrium that the Vienna Congress created.²¹ Henry Kissinger²² presents Woodrow Wilson as the American president who has foreshadowed this approach. In the Treaty of Versailles (1919),²³ compensation was set based on guilt, unlike the previous world order, in which the winners simply forced the losers to pay compensation.²⁴

The attempt to secure “collective security” through international institutions failed between the two world wars.²⁵ The American president during the First World War, Woodrow Wilson,

autonomy was acknowledged by Hugo Grotius, who also admitted the unity of the humankind and emphasized above all the role of reason. In the work of A. Gentili, *jus gentium* was already regarded as the “common law of humankind.” Much later on, with the contribution of the works of Hugo Grotius and Christian Wolff, International Law was gradually to achieve its autonomy vis-à-vis the national legal orders.

Id.

²¹ See Henry A. Kissinger, *The Congress of Vienna: A Reappraisal*, 8 *WORLD POL.* 264, 264 (1956).

²² HENRY KISSINGER, *DIPLOMACY* 218 (1994).

²³ *Treaty of Versailles*, 2 *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949*, at 43 (Charles I. Bevans ed., 1972), available at <https://tile.loc.gov/storage-services/service/l1/ltreaties/ltreaties-ustbv002/ltreaties-ustbv002.pdf>.

²⁴ *Id.*

²⁵ See Joseph C. Ebegbulem, *The Failure of Collective Security in the Post World Wars I and II International System*, 14 *KHAZAR J. HUMANS. & SOC. SCIS.* 29, 32 (2012) (“Another example of the failure of the League of Nations’ collective security is the Manchurian crisis when Japan occupied part of China. After the invasion, members of the League passed a resolution calling for Japan to withdraw or face severe penalties. Given that every nation on the League of Nations Council had veto power, Japan promptly vetoed the resolution, severely limiting the League of Nations’ ability to respond. After two years of deliberation, the League passed a resolution condemning the invasion without committing the League’s members to any action against it. The Japanese replied by quitting the League of Nations. A similar process occurred in 1935, when Italy invaded Ethiopia. Sanctions were passed, but Italy would have vetoed any stronger resolution. Additionally, Britain and France sought to court Italy’s government as a potential deterrent to Hitler, given that Mussolini was not in what would become the Axis Alliance of World War II. Thus, neither enforced any serious sanctions against the Italian government.”).

failed to lead his own country to become a member of the League of Nations.²⁶

The Treaty of Versailles failed to propose a plan that might be stable.²⁷ John Maynard Keynes proposed a much better plan; he wrote in his overlooked book, *The Economic Consequences of the Peace*:

If the General Election of December, 1918, had been fought on lines of prudent generosity instead of imbecile greed, how much better the financial prospect of Europe might now be . . . I believe this to be an act of generosity for which Europe can fairly ask, provided Europe is making an honorable attempt in other directions, not to continue war, economic or otherwise, but to achieve the economic reconstitution of the whole Continent.²⁸

Later on, Keynes wrote:

Great Britain lives by commerce, and most Englishmen now need but little persuading that she will gain more in honor, prestige, and wealth by employing a prudent generosity to preserve the equilibrium of commerce and the well-being of Europe, than by attempting to exact a hateful and crushing tribute, whether from her victorious Allies or her defeated enemy.²⁹

As a replacement for effective enforcement measures (particularly since U.S. Congress resisted the proposal that the U.S. will become a

²⁶ Leroy G. Dorsey, *Woodrow Wilson's Fight for the League of Nations: A Reexamination*, 2 RHETORIC & PUB. AFFS. 107, 107 (1999) ("In July 1919, Wilson pledged to establish an organization of free nations working in concert to "maintain the peaceful understandings of the world" through diplomacy and democracy, and not necessarily through military might. When Congress balked at American participation in the peace organization, one of the first of the modern rhetorical presidents embarked on his famous 'whistle-stop' tour, stumping across the middle and western United States to preach directly to the public about the issue. Wilson's tour, however, played out as a Greek tragedy. His sermons about America's moral responsibility failed to generate the much-anticipated support in any substantive way. Wilson collapsed from exhaustion before he had finished his speaking tour, suffered a stroke days later, and was rendered incapacitated for several months.").

²⁷ See Kissinger, *supra* note 22, at 218.

²⁸ JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 147, 272-73 (1920).

²⁹ JOHN MAYNARD KEYNES, *A REVISION OF THE TREATY: BEING A SEQUEL TO THE ECONOMIC CONSEQUENCES OF THE PEACE* 77 (1922).

member in the League of Nations), the new post-World War I world order was to be secured primarily through public opinion.³⁰ But public opinion had failed to reach a new, stable world order. Only after World War II, did a significant change in international law appear.³¹ Crimes that were once deemed an internal affair are now considered a legal matter for the whole international community to engage in.³²

Half a century before World War II, Theodor Herzl argued that anti-Semitism is not only the Jews' problem, but also the problem of the countries in which it occurs.³³ Later, Martin Luther King adopted this idea.³⁴ In the words of the International Criminal Court's (hereinafter "ICC") President:

³⁰ Woodrow Wilson, President of the U.S., Address at the Third Plenary Session of the Peace Conference in Paris, France (Feb. 14, 1919), *available at* <https://www.presidency.ucsb.edu/documents/address-the-third-plenary-session-the-peace-conference-paris-france>:

You will notice, that when a subject is submitted, not to arbitration, but to discussion by the executive council, it can upon the initiative of either one of the parties to the dispute be drawn out of the executive council onto the larger forum of the general body of delegates, because throughout this instrument we are depending primarily and chiefly upon one great force, and that is the moral force of the public opinion of the world—the cleansing and clarifying and compelling influences of publicity—so that intrigues can no longer have their coverts, so that designs that are sinister can at any time be drawn into the open, so that those things that are destroyed by the light may be properly destroyed by the overwhelming light of the universal expression of the condemnation of the world.

Id.

³¹ See Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331(2009); "The emergence of international criminal law is very special in post-World War II international law." *Id.* at 332.

³² Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST (Sept. 18, 1999), *available at* <http://www.kentlaw.edu/faculty/bbrown/classes/HumanrsemFall2008/CourseDocs/12Twoconceptsofsovereignty-Kofi%20Annan.pdf> ("State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.").

³³ JOSEPH AGASSI, LIBERAL NATIONALISM FOR ISRAEL: TOWARDS AN ISRAELI NATIONAL IDENTITY 89-90 (1999).

³⁴ *Id.*

The vow requires the world to stand hard and resolute against the danger of anti-Semitism and all other kinds of racism and religious bigotry—which always carry in their logic the associated risk of atrocity crimes motivated by them. The ICC is a newfound global instrument through which the world can take that stand.³⁵

From the perspective of the ICC the vow of ‘never again’ is a shared responsibility regarding which the ICC stands ready to play its part. That part requires the ICC to put itself between the victims and the atrocities that the world had in mind when creating the ICC—even if this means brooking political attacks against the Court itself.³⁶

³⁵ *Reflections of the President of the ICC, Judge Chile Eboe-Osuji, on the 75th Anniversary of Auschwitz Liberation: ‘Never Again’ Must Not Be a Meaningless Mantra*, INT’L CRIM. CT. (Jan. 27, 2020), <https://www.icc-cpi.int/news/reflections-president-icc-judge-chile-eboe-osuji-75th-anniversary-auschwitz-liberation-never>.

³⁶ *Id.*

In both the Nuremberg and the Tokyo trials, special international tribunals judged German and Japanese suspects of war crimes.³⁷ This was criticized as “the justice of the victors,”³⁸ yet it prevailed.

Other changes also took place unplanned and with no debate in any international forum. Israel set a precedent for universal jurisdiction in its trial of Adolf Eichmann:³⁹ a state’s authority to judge horrific crimes, even if not committed in its land, and not even against its citizens.⁴⁰ Another change was the trial of retired Chilean dictator

³⁷ Robert B. Walkinshaw, *The Nuremberg and Tokyo Trials: Another Step Toward International Justice*, 35 AM. BAR ASS’N J. 299, 299-302 (1949):

[T]he charter of the Tokyo tribunal. As early as 1944, there was set up at Chungking the Far Eastern and Pacific Sub-Commission for War Crimes; and the arrest of war criminals began as soon as the first American ships came into Tokyo Bay. Some four months later, on January 19, 1946, General MacArthur issued an order establishing the International Military Tribunal for the Far East, and published there with its charter which conformed in essentials to the charter which has been attached to the London Agreement. The legal basis, however, of the one tribunal was different from that of the other. The tribunal of Nuremberg rested upon an international agreement, but one to which Germany never became a party. Its only signatories were Great Britain, the Soviet Union, France and the United States . . . The tribunal for the Far East, on the other hand, rested upon agreement with Japan. Paragraph 10 of the Potsdam Declaration stated: We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The reply thereto of August 10, 1945, stated: The Japanese Government are ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26, 1945 . . . Out of such authority, General MacArthur, acting not as an American officer but as Supreme Commander of the Allied Powers, set up the Military Tribunal at Tokyo. As found by the United States Supreme Court, it too was a purely international tribunal; it was no more a tribunal of the United States than that of Nuremberg.

Id.

³⁸ Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 213 (2005) (“For human rights advocates, the notion of ‘victor’s justice’ has become increasingly distasteful in the decades since Nuremberg.”).

³⁹ See G.I.A.D. Draper, *The Eichmann Trial: A Judicial Precedent*, 38 INT’L AFFS. (ROYAL INST. INT’L AFFS. 1944-) 485, 492-93 (1962). See also Itamar Mann, *The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the “Court of Critique”*, 1 TRANSNAT’L LEGAL THEORY 485, 489 (2010) (“The Eichmann trial may have been the first United Nations-era assertion of universal jurisdiction, and perhaps also the boldest one.”).

⁴⁰ Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 746 (2004) (“In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed

Augusto Pinochet: a Spanish judge issued a warrant for his arrest while he was visiting England—for alleged crimes that he had committed in Chile during his reign there.⁴¹ Spain asked England to extradite him.⁴² The precedent set by the House of Lords is that the former head of state should be extradited in such a case, even though he eventually escaped extradition on the excuse of a health condition.⁴³ This was important as it preceded the rejection of the excuse that as a head of state, he had immunity against the extradition.⁴⁴ In the 1990s, the Security Council—the legislative body in international law—established special criminal tribunals for judging war crimes committed on former Yugoslav land (“ICTY”) as well as on Rwandan land (“ICTR”).⁴⁵ The next stage is the ICC.

According to the Rome Statute, the jurisdiction of the ICC depends on the consent of the states.⁴⁶ On one hand, if a state accepts the jurisdiction of the court, the court will have jurisdiction over it. On the other hand, when a state accepts its jurisdiction, then the ICC has jurisdiction to judge even war crimes that have been committed on its territory, even by foreign forces.⁴⁷ This means that if an invaded state

abroad by persons who at the time of commission are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.”).

⁴¹ Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 311 (2000).

⁴² Antoni Pigrau Sole, *The Pinochet Case in Spain*, 6 *ILSA J. INT’L & COMPAR. L.* 653, 653 (1999).

⁴³ See Roht-Arriaza, *supra* note 41, at 312-13.

⁴⁴ *Id.*

⁴⁵ Barbora Hola et al., *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 *J. INT’L CRIM. JUST.* 411, 411 (2011).

⁴⁶ In the case of Aggression, the default is that the consent of the two parties is demanded. Rome Statute of the International Criminal Court [hereinafter Rome Statute], Art. 15(4) (“The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”); Rome Statute, Art. 15(5) (“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”).

⁴⁷ Rome Statute, Art. 12 (2), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>; “In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory

accepts the jurisdiction of the ICC, then the soldiers of the invading state can be investigated and prosecuted although the latter has never accepted the jurisdiction. Furthermore, according to the Rome Statute,⁴⁸ a state can accept the ICC's jurisdiction with respect to crimes that had been committed since the entry into force of the Rome Statute, which was on July 1, 2002.⁴⁹

III. KISSINGER VERSUS KEYNES IN GAME THEORETICAL PERSPECTIVE

President Wilson had a very beautiful vision about international relations, but his program was not founded on institutions and incentives that would lead to its desirable aims. The international order has been founded on moral values which he proposed that were desirable but not stable. Let us define a new equilibrium that may help us to choose games that lead to peace: a game is in peace equilibrium, if and only if every player sees the strategy of respecting the peace as superior to any strategy of going to war or threatening in war if the status quo is not changed in their Favour. The problem with the Treaty of Versailles was that it did not establish a peace equilibrium.⁵⁰

John Maynard Keynes warned in real time from the danger of the Treaty of Versailles.⁵¹ Keynes even explained why people supported the Treaty of Versailles: since people did not say in the external circles what they said in the internal circles. In the game theoretical language, when people say in the inner circles what they do

of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft." *Id.*

⁴⁸ UNITED NATIONS, *Rome Statute of the International Criminal Court*, SOC. JUST. 125-43 (1999).

⁴⁹ Rome Statute, Art. 11, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>; "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." *Id.*

⁵⁰ ERIC HOBBSBAM, *THE AGE OF EXTREMES* 34 (1996) (arguing that "the Versailles settlement could not possibly be the basis of a stable peace. It was doomed from the start, and another war was practically certain.").

⁵¹ JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* XXV (2017).

not say in the external circle, there may be one Nash equilibrium⁵² of supporting one plan in the external circle, while a Nash equilibrium of resisting the plan in the inner circle.⁵³ Actually, the game may be played twice with the same players: one time they declare their opinion publicly, and in the other game they tell their opinions in the inner circles, and we will get two dramatically different equilibria. It is the phenomenon of double talk. Double talk prevents the opportunity to get rid of mistakes: the criticism is said only in the internal circles and saying it in the external circles is considered to be a disloyal step, which incentivizes not to do it. This game may be prevented when enough people have courage to speak openly or when society does not

⁵² See John F. Nash Jr., *Equilibrium Points in N-Person Games*, 36 PROC. NAT'L ACAD. SCI. U.S. 48, 48-49 (1950) (a game is in Nash equilibrium if and only if no player can benefit from unilaterally changing their strategy).

⁵³ JOHN MAYNARD KEYNES, A REVISION OF THE TREATY 4 (2020) (note that this is a reproduction of the original from 1921), available at <https://books.google.co.il/books?id=YRDzDwAAQBAJ&lpg=PA4&ots=INH5bftDRD&dq=For%20there%20are%2C%20in%20the%20present%20times%2C%20two%20opinions%3B%20not%2C%20as%20in%20former%20ages%2C%20the%20true%20and%20the%20false%2C%20but%20the%20outside%20and%20the%20inside%3B%20the%20opinion%20of%20the%20public%20voiced%20by%20the%20politicians%20and%20the%20newspapers%2C%20and%20the%20opinion%20of%20the%20politicians%2C%20the%20journalists%20and%20the%20civil%20servants%2C%20upstairs%20and%20backstairs%20and%20behind%20stairs%2C%20expressed%20in%20limited%20circles&pg=PA3#v=onepage&q&f=false> ;

For there are, in the present times, two opinions; not, as in former ages, the true and the false, but the outside and the inside; the opinion of the public voiced by the politicians and the newspapers, and the opinion of the politicians, the journalists and the civil servants, upstairs and backstairs and behind-stairs, expressed in limited circles. In time of war it became a patriotic duty that the two opinions should be as different as possible; and some seem to think it so still . . . Those who live in the limited circles and share the inside opinion pay both too much and too little attention to the outside opinion; too much, because, ready in words and promises to concede to it everything, they regard open opposition as absurdly futile; too little, because they believe that these words and promises are so certainly destined to change in due season, that it is pedantic, tiresome, and inappropriate to analyze their literal meaning and exact consequences. They know all this nearly as well as the critic, who wastes, in their view, his time and his emotions in exciting himself too much over what, on his own showing, cannot possibly happen. Nevertheless, what is said before the world is, still, of deeper consequence than the subterranean breathings and well-informed whisperings, knowledge of which allows inside opinion to feel superior to outside opinion, even at the moment of bowing to it.

Id.

punish those who speak freely in the external circles. Keynes himself was accused of loving Germans when he proposed the program that could prevent the Second World War.

It should be said that there were attempts to correct the mistakes of the Treaty of Versailles. However, the international community preferred to be tough toward Germany in enforcing the obligations to pay reparation and to cancel their monarchic character, and very flexible regarding Germany's obligation not to strengthen its army and war industry. This prevents a peace equilibrium, since it leads to a combination of hostile feeling, incentives to violate international law, and capacities to fight. Churchill preached the opposite and warned against Great Britain's priorities regarding which German obligation to enforce.⁵⁴ We will discuss later the mechanism established by the Locarno Treaties, which followed the Treaty of Versailles.

Henry Kissinger presented President Theodore Roosevelt as representing the opposite to Wilson.⁵⁵ The alternative approach of

⁵⁴ WINSTON S. CHURCHILL, *THE GATHERING STORM (THE SECOND WORLD WAR)* 10-11 (1948);

The prejudice of the Americans against monarchy, which Mr. Lloyd George made no attempt to counter-act, had made it clear to the beaten Empire that it would have better treatment from the Allies as a republic than as a monarchy. Wise policy would have crowned and fortified the Weimar Republic with a constitutional sovereign in the person of an infant grandson of the Kaiser, under a Council of Regency. Instead, a gaping void was opened in the national life of the German people. All the strong elements, military and feudal, which might have rallied to a constitutional monarchy and for its sake respected and sustained the new democratic and Parliamentary processes were for the time being unhinged. The Weimar Republic, with all its liberal trappings and blessings, was regarded as an imposition of the enemy. It could not hold the loyalties or the imagination of the German people . . . Poincare, the strongest figure who succeeded Clemenceau, attempted to make an independent Rhineland under the patron- age and control of France. This had no chance of success. He did not hesitate to try to enforce reparations on Germany by the invasion of the Ruhr. This certainly imposed compliance with the Treaties on Germany; but it was severely condemned by British and American opinion. As a result of the general financial and political disorganisation of Germany, together with reparation payments during the years 1919 to 1923, the mark rapidly collapsed. The rage aroused in Germany by the French occupation of the Ruhr led to a vast, reckless printing of paper notes with the deliberate object of destroying the whole basis of the currency. In the final stages of the inflation the mark stood at forty-three million millions to the pound sterling. The social and economic consequences of this inflation were deadly and far-reaching.

Id.

⁵⁵ Kissinger, *supra* note 22, at 29.

“balance of powers,”⁵⁶ as advocated by President Theodore Roosevelt, is not just; and it may be destabilized when the balance of power is changed; and it also encourages arms races.⁵⁷ Moreover, if the world order is based on an aristocratic approach such that one state will oblige to help the attacked state, the stability of peace is dependent on the belief of the potential aggressor that the obliging state will fulfil its obligation to protect the attacked state. Even if the obliged state intends to fulfil its obligation, the potential aggressor may misread its intention, and its mistake may lead to war. It should be clarified that there is a big difference between the Realpolitik approach and the aristocratic balance of powers approach, since realpolitik does not take obligation seriously, and thus does not take seriously defined alliances such as NATO. The balance of power approach proposes to stabilize the world by treaties, that make it irrational to go to war. The Realpolitik does not take the treaties seriously, since they claim that treaties cannot lead one country to protect another country.⁵⁸ They argue that one country will protect another country if and only if it is in their best interest regardless of the treaty, so a treaty cannot make any difference.⁵⁹ The aristocrat may see the “honour” as a sufficient mechanism to enforce a treaty. This is why Chamberlain relied on Hitler in the Munich Agreement;⁶⁰ he thought that Hitler was a gentleman who would keep his word.⁶¹ We say: game theory, and particularly the game theoretical distinction of one-time game from repeat game, teaches us that treaties are much more than papers; they

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Uri Weiss & Joseph Agassi, *Game Theory for International Accords*, 16 S.C.J INT'L L. & BUS. 1, 1 (2019).

⁵⁹ See Hobbes, *supra* note 2. The Realpolitik actually followed Hobbes who claimed, “Covenants, without the Sword, are but Words, and of no strength to secure a man at all. Therefore, notwithstanding the Lawes of Nature, (which every one hath then kept, when he has the will to keep them, when he can do it safely,) if there be no Power erected, or not great enough for our security; every man will and may lawfully rely on his own strength and art, for caution against all other men.” *Id.*

⁶⁰ PAUL EKMAN, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE* 15-16 (21st ed. 1985) (“Defending his policies against those who doubt Hitler's word, Chamberlain . . . in a speech to Parliament explains that his personal contact with Hitler allows him to say that Hitler ‘means what he says.’”).

⁶¹ *Id.* (“After his meeting with Hitler, Chamberlain writes to his sister. . . in spite of the hardness and ruthlessness I thought I saw in his face, I got the impression that here was a man who could be relied upon when he had given his word . . .”).

change the incentives.⁶² However, game theory also teaches us that in order to have a peace, a peace equilibrium treaty may not be sufficient.⁶³

An example of the aristocratic way to organize the world was the Locarno Treaties.⁶⁴ Germany, Great Britain, Belgium, Italy and France obliged not to attack each other, and that if one country invades the other without justification, the rest will protect the other.⁶⁵ It should be noted that the Locarno Treaties did not include a parallel obligation to protect the borders in eastern Europe. In the end, World War II erupted after Germany did not respect the borders regarding Eastern Europe. Germany even blamed France for violating the Locarno Treaties, while entering a defined alliance with the U.S.S.R.⁶⁶

The Locarno Treaties represent an aristocratic ethos that five countries will be honest regarding each other.⁶⁷ However, it is not

⁶² Uri Weiss & Joseph Agassi, *Game Theory for International Accords*, 16 S.C. J. INT'L L. & BUS. 1, 1 (2019).

⁶³ *Id.*

⁶⁴ Treaty of Mutual Guarantee, art. 16, Oct. 16, 1925, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%2054/volume-I-1292-English.pdf> (Treaty of Mutual Guarantee, done at Locarno, Oct. 16, 1925, Final Protocol of the Locarno Conference of the same Date and Collective Note to Germany dated London, Dec. 1, 1925, regarding Article 16 of the Covenant of the League of Nations).

⁶⁵ See Treaty of Mutual Guarantee, *supra* note 64, at art. 4(3);

In case of a flagrant violation of Article 2 of the present Treaty or of a flagrant breach of Articles 42 or 43 of the Treaty of Versailles by one of the High Contracting Parties, each of the other Contracting Parties hereby undertakes immediately to come to the help of the Party against whom such a violation or breach has been directed as soon as the said Power has been able to satisfy itself that this violation constitutes an unprovoked act of aggression and that by reason either of the crossing of the frontier or of the outbreak of hostilities or of the assembly of armed forces in the demilitarised zone immediate action is necessary. Nevertheless, the Council of the League of Nations, which will be seized of the question in accordance with the first paragraph of this Article, will issue its findings, and the High Contracting Parties undertake to act in accordance with the recommendations of the Council, provided that they are concurred in by all the Members other than the representatives of the Parties which have engaged in hostilities.

Id.

⁶⁶ S.A.H., *Note on the Franco-Soviet Pact and the Locarno Treaty*, 12 BULL. INT'L NEWS 8 (1936).

⁶⁷ Julian Lindley-French, *In the Shade of Locarno? Why European Defence is Failing*, 78 INT'L AFFAIRS 789, 789-811 (2002) (“a complex interplay between the traditional balance of power approach to security and the collective security, disarmament and international arbitration enshrined in the Treaty of Versailles

enough that they will be honest regarding each other, but the honesty should be expanded to a general honesty, at least to a minimal general honesty. This example represents the instability of partial honesty (this is a proposal for a democratization of the aristocratic values). This example also illustrates the advantage of Keynes not only on the Treaty of Versailles, but also regarding Locarno Treaties.⁶⁸ Keynes proposed a solution based on generosity.⁶⁹ One of the advantages of generosity over honesty is that partial generosity may be enough where partial honesty is not enough, and every honesty or generosity is always partial. If states intend to be generous toward each other they will be at least honest, while if they intend to be honest, they may fail. In the Jewish law, some rabbis demanded more than they believe the Torah commanded “in order to keep a man far from transgression.”⁷⁰ Let us say: generosity keeps a state far from transgression; it is like taking a security range. Moreover, since there may be sincere disputes about what is fair, it is not enough that countries will decide to adopt a policy of honesty. This is particularly valid when there is no consented court to decide what honesty commands. Thus, contrary to Realpolitik, we propose that the solution to the absence of enforcement mechanisms in international law is the combination of conditional generosity and the choice to be subject to international law and to the international court regardless of the choice of the other side. We argue that it is in the best interest of each country to adopt such a policy since by this they choose

resulted in strategic paralysis. The nadir of this failed strategic concept was the Treaty of Locarno in 1925 that, by endeavouring to keep all states happy at all times, simply prevented the creation of an effective security and defence mechanism.”).

⁶⁸ See Churchill, *supra* note 54, at 28;

The pact of Locarno was concerned only with peace in the West, and it was hoped that what was called an “Eastern Locarno” might be its successor. We should have been very glad if the danger of some future war between Germany and Russia could have been controlled in the same spirit and by similar measures as the possibility of war between Germany and France. Even the Germany of Stresemann was however disinclined to close the door on German claims in the East, or to accept the territorial treaty position about Poland, Danzig, the Corridor, and Upper Silesia. Soviet Russia brooded in her isolation behind the Cordon Sanitaire of anti-Bolshevik States. Although our efforts were continued, no progress was made in the East. I did not at any time close my mind to an attempt to give Germany greater satisfaction on her eastern frontier. But no opportunity arose during these brief years of hope.

Id.

⁶⁹ See JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 102, 164 (1920).

⁷⁰ Mishnah Berakhot 1:1.

better games. It is much cheaper to be conditionally generous than to prepare for war, and commitment to international law incentivizes the other side to prepare much less to a war against you, and that the policy of respecting international law should not be dependent on the choice of the other player. Unilateral acceptance of international law is sufficient to lead to a huge improvement in the security of the state.⁷¹

⁷¹ Aumann should be praised for his proposal to use game theory in order to compare between the Isaiah game and the Roman game, and we praise him despite coming to different conclusions from this comparison. Before his Nobel lecture, Aumann gave a public pilot lecture in the Rationality Center, that sparked an extremely interesting (and critical) discussion. He claimed that his vision teaches that the vision of Isaiah cannot be an equilibrium, since according to this vision people do not prepare for wars. However, in such a case one player changes their strategy to prepare for war in order to occupy. Aumann erred in his pilot lecture since according to this vision, there is an international court. Fortunately, in the prize lecture itself Aumann changed his mind and wrote:

We end with a passage from the prophet Isaiah (2, 2–4): “And it shall come to pass . . . that . . . many people shall go and say, . . . let us go up to the mountain of the Lord, . . . and He will teach us of His ways, and we will walk in His paths. . . . And He shall judge among the nations, and shall rebuke many people; and they shall beat their swords into ploughshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more.” Isaiah is saying that the nations can beat their swords into ploughshares when there is a central government—a Lord, recognized by all. In the absence of that, one can perhaps have peace—no nation lifting up its sword against another. But the swords must continue to be there—they cannot be beaten into ploughshares—and the nations must continue to learn war, in order not to fight!

Robert J. Aumann, *War and Peace*, 103 PROC. NAT’L ACAD. SCI. U.S.A. 17075, 17078 (2006). It is a huge improvement, but Aumann erred in the choice of the game and in missing the option to play unilaterally the game of international law. The example of the EU challenges the thesis of Aumann, since in the EU it seems that there is an equilibrium in which no country will attempt to occupy the other country even if their victory is assured. Aumann ignores cases of countries that prefer not to occupy even when its victory is assured. See Uri Weiss & Joseph Agassi, *The Game Theory of the European Union versus the Pax Romana*, 70 DEPAUL L. REV. 551 (2020). Moreover, a state may adopt unilaterally a policy of respecting international law, and by this reducing dramatically the incentive to be armed against them. Instead of using the vision of Isaiah in order to study how to change the game in order to have more peace and a significant disarming, Aumann used the vision in order to explain why to arm when we do not play the game of Isaiah. The mistake of Aumann is first of all in the choice of the game: Aumann recommended to play the Roman strategy, based on the argument that we do not play the Isaiah game so a country should not play unilaterally the Isaiah game, instead of asking how to play a game that will be closer to the Isaiah game, in which an international law discourages arming. We argue that it may be done by a country’s unilateral choice to respect

Let us now combine the above-mentioned criticism of the policy toward Germany between the two world wars: the alternative of Keynes that presented a solution of conditional generosity. Instead of this, a solution of partial-honesty was chosen, i.e., a solution in which the security of five countries is guaranteed, but not the security of the other countries in Europe. The Treaty of Versailles did not establish equilibrium, since given the lack of enforcement mechanism the Germans did not see it in their best interest to respect the Treaty of Versailles, particularly since the Treaty of Versailles also created hostile feelings.⁷² The policy of what to enforce and what not to enforce strengthened the incentive of Germany to go to war, since it incentivized Germany to develop its military industry. The solution of Locarno was insufficient in order to prevent wars; it represented partial honesty, since the eastern part of Europe was not protected effectively by the treaty, and in the end the war erupted after Germany invaded this part of Europe. The Treaties of Locarno may have misled Germany to believe that the Western European countries will contain their occupations in the Eastern Europe parts.

We propose that the right attitude is to ask how to establish a peace equilibrium that leads to minimal injustice. This attitude

international law. Unilateral acceptance is sufficient in order to lead to a huge improvement in the security of both sides, and when enough countries accept it, we may move from playing the game of old Europe to playing the game of the European Union. We praise Aumann for his comparison between the Jewish game of peace and the Roman game of peace, yet Aumann erred that the Romans are right when we do not have a central government. We do not only have different recommendation from those of Aumann, but also a different methodology: Aumann adopts the tradition of Von Neumann and Morgenstern to take the game as given, while we first of all attempt to prevent the bad games, including by unilateral choice of the game.

⁷² Der Spiegel, *Henry Kissinger Interview with Der Spiegel*, HENRYAKISSINGER.COM (July 6, 2009), <https://www.henryakissinger.com/interviews/henry-kissinger-interview-with-der-spiegel/>.

Any international system must have two key elements for it to work. One, it has to have a certain equilibrium of power that makes overthrowing the system difficult and costly. Secondly, it has to have a sense of legitimacy. That means that the majority of the states must believe that the settlement is essentially just. Versailles failed on both grounds. The Versailles meetings excluded the two largest continental powers: Germany and Russia. If one imagines that an international system had to be preserved against a disaffected defector, the possibility of achieving a balance of power within it was inherently weak. Therefore, it lacked both equilibrium and a sense of legitimacy.

Id.

synthesizes the two alternatives: it tries to achieve the goal of minimizing global injustice but recognizes the need to create powers, namely, institutions, that make this goal possible, namely, that achieve peace equilibrium.

While Realpolitik is blind to justice in the name of stability, we say that there is no zero-sum game between justice and stability. Reducing injustice changes the preferences and even incentives in a way that may strengthen stability. Kissinger is right in his criticism against Treaty of Versailles; however, Kissinger sees the Realpolitik as the right substitute to the Treaty of Versailles, while we see Keynes' plan as the right substitute for the Treaty of Versailles, namely, peace that is based not on a policy of generosity. Thus, we strongly disagree with Kissinger and Aumann (although our project studies a lot from both of them), and adopt Keynes; thus, we reject the models of Vienna Congress and the Pax Romana and support the model of the EU. Keynes proposed an aristocratic solution that is based on generosity, while Kissinger who admires the solution of Vienna's Congress supports conservative Prussic aristocracy.⁷³

Let us mention another better alternative to the the Realpolitik. In his "Sinews of peace" speech Churchill made this point:

If we adhere faithfully to the Charter of the United Nations and walk forward in sedate and sober strength seeking no one's land or treasure, seeking to lay no arbitrary control upon the thoughts of men; if all British moral and material forces and convictions are joined with your own in fraternal association, the high-roads of the future will be clear, not only for us but for all, not only for our time, but for a century to come.⁷⁴

⁷³ Henry A. Kissinger, *The Congress of Vienna: A Reappraisal*, 8 WORLD POL. 264, 264-80 (1956) ("It is only natural that a period anxiously seeking to wrest peace from the threat of nuclear extinction should look nostalgically to the last great successful effort to settle international disputes by means of a diplomatic conference, the Congress of Vienna. Nothing is more tempting than to ascribe its achievements to the very process of negotiation, to diplomatic skill, and to 'willingness to come to an agreement'—and nothing is more dangerous. For the effectiveness of diplomacy depends on elements transcending it; in part on the domestic structure of the states comprising the international order, in part on their power relationship.").

⁷⁴ Winston Churchill, *The Sinews of Peace (Iron Curtain Speech)*, AMERICA'S NATIONAL CHURCHILL MUSEUM, [history.html#:~:text=On%20March%205%2C%201946%2C%20the,%22The%20Sinews%20of%20Peace.%22](https://www.nationalchurchillmuseum.org/history/html#:~:text=On%20March%205%2C%201946%2C%20the,%22The%20Sinews%20of%20Peace.%22) (last visited Aug. 12, 2022).

By this he proposed to accept unliterally international law. The strategy of Churchill to “adhere faithfully to the Charter of the United Nations”⁷⁵ is his advantage on the strategy of the Pax Romana: “[i]f you want peace, prepare for war,” and on strategies that attempt to follow the Pax Romana, such as the strategy of Aumann.⁷⁶ This is how Thomas Willing Balch characterized the relationship of the Romans regarding international law, “[t]he Greeks made some attempts at arbitration among themselves, notably in an agreement between the Lacedaemonians and the Argives. But with the ‘barbarians’ who formed the rest of the world, the Greeks, apparently, would not arbitrate. For a long time the Romans as the masters of the world maintained peace by force of arms but not by arbitration.”⁷⁷ Contrary to the vision of the Pax Romana, that is glorified by Aumann,⁷⁸

⁷⁵ *Id.*

⁷⁶ See Yisrael Aumann, *Israel70: Yisrael Aumann on gaming Israel's Future*, FATHOM (Mar. 2018), <https://fathomjournal.org/israel70-yisrael-aumann-on-gaming-israels-future/>

Why do the Swiss need fighter planes if they've been at peace for so long?' I responded that that's exactly why! They have peace because they are strong. The runners-up to the Swiss are the Romans, who had a Pax Romana which lasted for about 230 years and who had a maxim: 'If you want peace, prepare for war.' Yet while Israel does prepare for war, it's not getting peace. That's because while we may be preparing for war in *hardware*—investing in the tools of war such as tanks, missiles, ground forces and drones, we are failing to prepare for war in *software*—deep down in our hearts. To fully follow the Roman axiom, a country has to feel deep down that it is ready to fight. But our heart isn't fully in it.

Id.

⁷⁷ Thomas Willing Balch, *The Proposed International Tribunal of Arbitration of 1623*, 46 PROCS. AM. PHIL. SOC'Y 302, 302-11 (1907).

⁷⁸ Steve Lind, *Nobel Advice: Israeli Strength and Peace, According to Prof. Yisrael Aumann*, JERUSALEM POST (July 28, 2018 13:35), <https://www.jpost.com/jerusalem-report/nobel-advice-israel-strength-and-peace-according-to-prof-aumann-563395>; Aumann explained his view in an interview:

There was the Pax Romana, which lasted well over 200 years. It kept the whole Western world at peace. How did they do it? Now, I don't like the Romans, OK? They destroyed the Temple and they were cruel people, but they kept the peace, and if you want peace, you have to look at what they did. The motto on my blackboard, “Si vis pacem, para bellum” means “If you want peace, prepare for war.” That's a Roman proverb, OK, and people don't understand that. You know, I was at a conference of sorts of a medical unit of the IDF, and someone said, “We never come up with this. We don't have to deal with this because it never happens.” But I say (he raises his voice), “You have to deal with it in order to keep it from happening!

Id.

Churchill recommends being prepared for war, but also respecting unilaterally international law.⁷⁹

Let us now compare what lesson Aumann and Churchill studied to form the absence of mechanism to enforce international law. Aumann claimed, in his Nobel lecture,

Isaiah is saying that the nations can beat their swords into ploughshares when there is a central government—a Lord, recognized by all. In the absence of that, one can perhaps have peace—no nation lifting up its sword against another. But the swords must continue to be there—they cannot be beaten into ploughshares—and the nations must continue to learn war, in order not to fight!⁸⁰

Contrary to him, Churchill claimed:

I have, however, a definite and practical proposal to make for action. Courts and magistrates may be set up but they cannot function without sheriffs and constables. The United Nations Organisation must immediately begin to be equipped with an international armed force. In such a matter we can only go step by step, but we must begin now. I propose that each of the Powers and States should be invited to delegate a certain number of air squadrons to the service of the world organization . . . I wished to see this done after the First World War, and I devoutly trust it may be done forthwith.⁸¹

Let us comment on the difference: Aumann takes the international game as given and recommends what strategy to take in this game, while Churchill recommends changing the game to be more peaceful one.

⁷⁹ *See id.* He claimed: “From what I have seen of our Russian friends and Allies during the war, I am convinced that there is nothing they admire so much as strength, and there is nothing for which they have less respect than for weakness, especially military weakness.” *Id.*

⁸⁰ Aumann, *supra* note 71, at 17078.

⁸¹ Winston Churchill, *The Sinews of Peace (Iron Curtain Speech)*, AMERICA’S NATIONAL CHURCHILL MUSEUM, [history.html#:~:text=On%20March%205%2C%201946%2C%20the,%22The%20S inews%20of%20Peace.%22](https://digitalcommons.tourolaw.edu/lawreview/vol38/iss3/7) (last visited Aug. 12, 2022).

Let us note also some other international relations' policies that should be rejected: the solution of George W. Bush (before September 11, 2001), to the fiasco of Israel and Palestine to achieve peace agreement, was "let them bleed."⁸² In other words, Bush proposed the parties to fight and then to discover the balance of powers between them. This solution illustrates the disadvantages of Realpolitik: sometimes the balance of powers is unclear, and this may lead negotiations to fail without having an option of solution by adjudication. Meanwhile the parties may develop a more hostile feeling that makes the solution much more difficult; even if they corrected their mistakes regarding their balance of power before the last fight between them, it does not mean that they know what their current balance of powers is. The country that wins the former war may be over optimistic regarding the result of the next war, which makes it more difficult to prevent the next war. Bush changed his policy after September 11, 2001; however, his wars in the name of justice, democracy and human rights did not lead to democracy but to the raising of ISIS.⁸³ Bush was right that democratization may lead to much more security; however, he was wrong in believing that the right way to spark democracy is by wars. It was much cheaper for the U.S. to promote democracy in the Middle East by Keynes' style solution: to invest in education, development and subsidizing peace agreements. The tragedy of rejecting the proposal of Keynes has repeated again and again, and we try to develop his theory and propose a combination of respecting international law and generosity.

IV. FROM NEGOTIATION TO LITIGATION IN PEACE PROCESSES

We argue, here, that a shift from a game of international negotiation in the shadow of the war (a realist negotiation) to a game of international negotiation in the shadow of the law will have three main effects: a distributive effect, an effect of reducing the incentive to arm and terrorize, and increasing the likelihood of peace.

⁸² See Lev Grinberg, *The Busharon Global War*, FPIF.ORG (July 8, 2002), https://fpif.org/the_busharon_global_war/. See also Aluf Benn, *Bush's Middle East Band-Aid*, SALON.COM (Mar. 22, 2002 8:23 PM EST), https://www.salon.com/2002/03/22/peace_8/.

⁸³ Hassan Hassan, *The True Origins of ISIS*, THE ATLANTIC (Nov. 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/isis-origins-anbari-zarqawi/577030/> ("Most historians of the Islamic State agree that the group emerged out of al-Qaeda in Iraq as a response to the U.S. invasion in 2003.").

First, this shift has a distributive effect. While in the negotiation mechanism, the settlement will be a function of Force, in the litigation mechanism, it will be a function of Law. Second, the shift from negotiation to litigation influences the incentives, particularly this shift reduces the incentive to pursue terrorism. Third, the shift from negotiation in the shadow of the war to a negotiation in the shadow of international law increases our likelihood to reach agreement. In the negotiation mechanism there are possible obstacles ("market failures")⁸⁴ in our way to achieve a settlement.

The shift from a negotiation in the shadow of the war to a negotiation in the shadow of international law may happen in two main ways: the first way is by establishing an international court with universal jurisdiction and an enforcement mechanism. According to the vision of the U.N. Charter:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.⁸⁵

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.⁸⁶

The vision of the UN charter is legally strengthened by the Rome Statute, in which it is sufficient that either the invading country or the invaded country will be a member in order that the court will have jurisdiction regarding war crimes, crimes against humanity and the

⁸⁴ See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); See also Branislav L. Slantchev & Ahmer Tarar, *Mutual Optimism as a Rationalist Explanation of War*, 55 AM. J. POL. SCI. 135 (2011).

⁸⁵ U.N. Charter art. 33.

⁸⁶ U.N. Charter art. 36(3).

crime of genocide, but regarding aggression usually the consent of both sides is needed (the crime of Aggression limits the right of a country to go to war, to impose a blockade or an occupation regime, or to annex a territory).⁸⁷ The Rome Statute establishes an international criminal court that may impose an individual responsibility and may also oblige to pay reparations.⁸⁸

The second way to shift from a negotiation in the shadow of the war to a negotiation in the shadow of international law is by a state's choice to subject itself *unilaterally* to international law.⁸⁹ Many countries prefer to accept the jurisdiction of the International Court of Justice and the International Criminal Court; this helps those countries to enjoy peace. The statute of the international court of justice determines:

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation;

⁸⁷ See Rome Statute, art. 51, available at [https://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](https://legal.un.org/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute]:

Crimes within the jurisdiction of the Court The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

Id.

⁸⁸ See Rome Statute, *supra* note 87, at art. 258 (“[1] The Court shall have jurisdiction over natural persons pursuant to this Statute. [2] A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”).

⁸⁹ It is interesting that the international law enables unilateral declarations and obligation: “Any State possesses capacity to undertake legal obligations through unilateral declarations.” Int’l Law Comm’n, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_9_2006.pdf; See also Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT’L L. 1, 1-30 (1977).

the nature or extent of the reparation to be made for the breach of an international obligation.⁹⁰

Seventy-three states chose to accept the compulsory jurisdiction of the Court.⁹¹

Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other States, which have accepted the same obligation, before the Court, by filing an application instituting proceeding with the Court. Conversely, it undertakes to appear before the Court should proceedings be instituted against it by one or more other such States.⁹²

Realpolitik ignores that there are states which choose voluntarily to be subject to international law.⁹³ Realpolitik sees the obligation to international law as no more than beautiful empty words, since the court has no mechanism to enforce its decisions.⁹⁴ Realpolitik's supporters ignore that even when the courts have no mechanism to

⁹⁰ Statute of the International Court of Justice, INTERNATIONAL COURT OF JUSTICE, (2017), <https://www.icj-cij.org/en/basis-of-jurisdiction>.

⁹¹ International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ-CIJ.ORG, <https://www.icj-cij.org/en/declarations> (last visited Aug. 12, 2022).

⁹² International Court of Justice, *supra* note 91.

⁹³ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 225 (2005) (“International law is a real phenomenon, but international law scholars exaggerate its power and significance. We have argued that the best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest.”).

⁹⁴ Shirley V. Scott, *Is There Room for International Law in Realpolitik?: Accounting for the US ‘Attitude’ Towards International Law*, 30 REV. INT’L STUD. 71, 73 (2004) (“There is as yet no coherent theoretical explanation of the phenomenon that is able to reconcile the apparent discrepancy between the support that the United States showed for the system of international law in the immediate post-World War II years and the recent actions/inactions with which observers take issue. Realism, which has been the dominant paradigm in International Relations in the post-World War II era, has scant regard for international law. And yet this article suggests, somewhat counter-intuitively, that the most fundamental tenets of realism regarding state behaviour can in fact well account for US behaviour in relation to international law; the identified ‘attitude’ of the United States towards international law would appear to have been integral to the hegemonic rise of the United States.”).

enforce their decisions, the decisions and potential decisions matter.⁹⁵ Other realists will say that it is because such countries have peace. They ignore that those countries enjoy peace since they accept international law. They ignore that while a country commits itself to respect the legal rights of the other country/people, they reduce the incentive to arm against them. Moreover, when a criminal state makes a concession, they always fear that it encourages terrorism; they ignore that what encourages terrorism is that they are ready to make a concession if and only if the other party strikes them.

Robert J. Aumann used to give the example of the Israeli withdrawal from Gaza;⁹⁶ he claims that it led to extreme violence, since it was in response to attacks against Israel.⁹⁷ Aumann is right that the Israeli withdrawal from Gaza had an effect of incentivizing terrorism. However, Aumann dismisses that it is because Israel adopted a policy of not respecting international law unless the victim of Israel's international law violation leads Israel to say to themselves that the price for the violation will be high enough, and this is even if the price is illegal violence by the victim. He further dismissed that if

⁹⁵ See Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES IN L. 455, 455-78 (2013). Dothan argues that international courts interact with states under their jurisdiction and with their national courts. *Id.* International courts try to preserve their legitimacy vis-à-vis states; at the same time, they want to signal that states will comply with them even if they issue judgments states disagree with. *Id.* International courts can cooperate with national courts and gain legitimacy from interacting with legitimate national courts. *Id.* The norms that international courts apply constrain their ability to maneuver their judgments in ways that can help their legitimacy, but at the same time help legitimize their judgments. *Id.* International courts use various tactics to shape their reasoning in order to improve their legitimacy. *Id.*

⁹⁶ Amanda Borschel-Dan, *Israeli-Palestinian Peace a Matter of Incentives, says Nobel Laureate Aumann*, THE TIMES OF ISRAEL (Dec. 13, 2018, 4:05 PM) <https://www.timesofisrael.com/mideast-peace-a-matter-of-incentives-says-nobel-laureate-aumann/> (Aumann claimed: Everybody wants peace in the Middle East, said Aumann; however, proclaiming that desire may actually drive the fulfilment of it farther away. This applies, too, to any “concessions,” such as the 2005 Disengagement from Gaza, in which Israel unilaterally pulled its settlers and troops from the region, which quickly became a stronghold for the terrorist organization Hamas. “When you shout, ‘peace, peace, peace,’ then it’s a signal [to the adversary] to up the price,” said Aumann. “The expulsion from Gaza—ancient history—was a very very bad move,” he said, and taught the Palestinians that if they put on enough pressure, Israel will capitulate. “We are giving them incentives to press on.”).

⁹⁷ Lee Smith, *Wrong Move*, TABLET MAG. (Sept. 22, 2010), <https://www.tabletmag.com/sections/israel-middle-east/articles/wrong-move>.

Israel withdrew from occupied territories as a step of regret on the criminal settlements and as a credible choice to respect the rights of the Palestinians, then these incentives would have never existed.

We will illustrate the mistaken approach of Aumann by this example: Aumann should be praised for publicly correcting his mistake and recognizing the Israeli occupation.⁹⁸ However, we wonder why it did not lead him to change his mind regarding the Palestinians' rights, and his support of the settlements in the occupied territories. Thus, adopting the views of Aumann will encourage terrorism, since for Aumann international law is not a sufficient reason for avoiding establishing settlements in occupied territories, although it is clearly forbidden. By his support of the Israeli settlements, Aumann signals to the Palestinians: your international legal rights, or at least your international legal rights in eye of the majority of international lawyers, are not a strong enough reason for me to respect them. Thus, the conclusion is that Aumann unintentionally proposes to create a game in which every concession for peace is an incentive to terrorism. This is so since the other side does not see the concession as a choice to respect its international legal rights or as an expression of generosity or peace-loving, but as a capitulation to violence; and Aumann criticizes every such concession to peace as an incentive to terrorism, and by this combination Aumann unintentionally blocks the game of negotiation without threats to use force.

⁹⁸ *Israeli Nobel Laureate: We Should Annex Now, Not 'Talk It To Death'*, JERUSALEM POST (June 6, 2020 8:33 A.M.), <https://www.jpost.com/israel-news/professor-aumann-we-should-annex-now-not-talk-it-to-death-630494>.

I used to be upset when people would talk about “the occupation.” It’s our country, which we’re willing to share with the Arabs, so why do they call it “occupation?” But a while ago, not too long ago, I changed my mind. It is an occupation. We have a military government in Judea and Samaria.

Id.

There’s been a military government for 51 years now. If you have a military government, then you have an occupation. That’s what an occupation means. I think if we want peace, we have to end the occupation. What do you mean by that? What do I mean by ending the occupation? I mean that we belong there, but there has to be some kind of application of Israeli law in Judea and Samaria. Area C is very large, comparatively. It’s not as big as Siberia, but it’s quite large and there’s lots of empty land and lots of Jewish communities there. I think we should go ahead, take the initiative and annex large tracts of Area C.

Id.

In the game created by Aumann, it is impossible to have peace without giving a signal of capitulating to violence, and since Aumann resists any capitulating to violence, and resists respecting the international legal rights of the other, his strategy is one that makes peace impossible. Thus, Aumann's recommendations create a game similar to zero-sum game, in which agreements are impossible. This usage of game theory dismisses all the achievements of modern economic theory, particularly that trade is for the benefit of the two players and hence we should not interrupt trade.⁹⁹

We criticize Aumann for not resisting the settlements although he recognized the occupation. Aumann misses that this policy incentivized terrorism. We argue that the policy of denying the occupation also incentivized terrorism. The Israeli Prime Minister, Ariel Sharon, resisted saying why he chose to withdraw from Gaza.¹⁰⁰ In an extremely rare moment, he said: “[o]ccupation is bad.”¹⁰¹ Immediately, the Israeli Chief Attorney, Eliakim Rubinstein, said to him, “[d]o not say occupation,”¹⁰² since his use of the word could weaken Israel's position in negotiations.¹⁰³ By this, Rubinstein encouraged terrorism; he wished to block any Israeli acknowledgment of the occupation, since he denied the illegality of the Israeli settlements in the occupied territories. Consequently, the Israeli legal system prevents Israel from making concession based on international law, and by this they encourage terrorism; it sabotages the security of Israel by denying that the Palestinians have rights of occupied people in the occupied territories; the Israeli legal system makes respecting

⁹⁹ ADAM SMITH, *THE WEALTH OF NATIONS* (1st ed., 1776). “[T]rade which, without force or constraint, is naturally and regularly carried on between any two places, is always advantageous, though not always equally.” *Id.* at Book IV, ch. III, § II. When a state is committed to international law it is much easier for the state to play the game of bargaining without force or constraint that Smith recommends. *Id.*

¹⁰⁰ Yael S. Aronoff, *From Warfare to Withdrawal: The Legacy of Ariel Sharon*, 15 *ISRAEL STUD.* 149, 149-72 (2010) (“Sharon explained that he was pursuing his plan because ‘a situation has been created in which it is possible to do the things I want and to get an American commitment.’”).

¹⁰¹ AP Archive, *Israeli PM Says Occupation is Bad for Us and Them*, YOUTUBE, (July 23, 2015), <https://www.youtube.com/watch?v=9fzlkrafxBs>. See also Kelly Wallace, *Sharon: 'Occupation' Terrible for Israel, Palestinians*, CNN (May 27, 2003), <https://edition.cnn.com/2003/WORLD/meast/05/26/mideast/>.

¹⁰² Rebecca Trounsan & Megan K. Stack, *Sharon Says 'Occupation' Not What He Meant*, LA TIMES (May 28, 2003), <https://www.latimes.com/archives/la-xpm-2003-may-28-fg-mideast28-story.html>.

¹⁰³ *Id.*

international law to be a submission to violence, and by this encouraging violence. The Israeli legal system forces Israel to play a game of a choice between encouraging terrorism by not respecting international law, or encouraging terrorism by respecting international law, which is a surrender to terrorism in the eyes of the Israelis who do not recognize the Palestinians' rights. Israel pays an enormous price for its institutional lies regarding the non-existence of the occupation. The choice to lie and deny the Palestinians' rights forces Israel to play a risky game, in which it is impossible to allocate the rights peacefully.

It is the complex of the Macho, that occupying countries may suffer from the Macho's roll when they have the power. They necessarily make mistakes in their calculation, but they cannot correct their mistakes, since it will be a capitulation to terrorism. We say that respecting international law is the right way to discourage terrorism. Honesty is the minimal demand and respecting international law is the minimal demand for a state to be honest. The better strategy recommended by Keynes is the strategy of generosity.¹⁰⁴ We recommend this international relations' strategy: being always honest and being conditionally generous.

V. REALIST NEGOTIATION VERSUS NEGOTIATION IN THE SHADOW OF THE LAW

According to the traditional view, international conflicts should be solved via a mechanism of negotiation.¹⁰⁵ This means that the conflict should be solved via negotiation; it does not state it

¹⁰⁴ See Uri Weiss & Joseph Agassi, *The Game Theory of the European Union Versus the Pax Romana*, 70 DEPAUL L. REV. 551, 556 (2020).

¹⁰⁵ Situation in the State of Palestine, ICC-01/118-103, Observations by the Federal Republic of Germany (Mar. 16, 2020), <https://www.icc-cpi.int/court-record/icc-01/18-103>. In its submission to the International Criminal Court, Germany claimed:

It is Germany's long-standing and consistent position to support a negotiated two state solution and hence the goal of an independent, democratic, sovereign and viable State of Palestine. To this end, Germany aims at preserving the conditions allowing for a two-state solution. Germany is one of the most important donors to the Palestinians, linking development cooperation and stabilization funds to the build-up of state institutions. However, it is Germany's consistent position that a Palestinian State, and the determination of territorial boundaries, can be achieved only through direct negotiations between Israelis and Palestinians. The Court would be ill-suited for determination of these issues.

Id.

explicitly, but the implicit significance is that in a situation of failure to reach an agreement, the state of war will continue. Thus, the two bargaining sides know that if an agreement is not being achieved, the state of war will continue, and this may lead to actual war. Each side's alternative for an agreement is a state of war, namely, the game of a state of war. Thus, the resisting payoff of each side is a function of its payoff from playing the game of war, what may be called his value of playing the war game. The resisting payoff is the payoff of a side in the case of no agreement. The resisting payoff is also called the threat payoff. Thus, the agreement will be a function of power, which encourages us to prepare for war.

One alternative for the negotiation mechanism that we want to discuss is the Litigotiation mechanism. The word "Litigotiation" consists of negotiation and litigation; it is a negotiation in the shadow of the law.¹⁰⁶ This means that the two bargaining sides know that if the negotiation fails, a specific court will decide on the solution. The two parties may agree about a different tribunal, but there is a default of legal mechanism that they cannot choose. In this case, the two sides know that their alternative for an agreement is the game of litigation. It is important to emphasize that the court is not going to decide in any case. The great majority of cases are not going to arrive at a judicial decision. The two sides are incentivized to come to a settlement in order to save the litigation costs, including the risk, which is involved in litigation.

The current dominant mechanism in international law is negotiation.¹⁰⁷ The International Court of Justice has no universal

¹⁰⁶ Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (defining "litigotiation," as "the strategic pursuit of a settlement through mobilizing the court process"). For Galanter's general approach, see also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 1 (1974).

¹⁰⁷ See Robert P. Barnidge Jr., *The International Law of Negotiation as a Means of Dispute Settlement*, 36 FORDHAM INT'L L.J. 545, 548 (2013) ("Negotiation is undoubtedly the oldest means of dispute settlement. In their dissenting opinions in *Mavrommatis*, Judges Moore and Pessa referred to it as, respectively, the 'legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences' and as 'debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent.'"). See *The Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 11-12 (Aug. 30).

jurisdiction.¹⁰⁸ The proposal that this court will have universal jurisdiction was rejected by the establishing states of the new order after the Second World War.¹⁰⁹ The jurisdiction of this court is dependent on the contest of the two parties (or on the authority given by the Security Council or the General Assembly, which can ask for advisory opinion).¹¹⁰ The new mechanism of the international criminal court may change the picture since it has a partial universal jurisdiction regarding war crimes, crimes against humanity, and genocide.

Let us now compare the game of international negotiation to the game of international Litigotiation, namely, a game in which if negotiation fails the parties will go to court. We will discuss what will be the distributive effect from changing the game of negotiation in the shadow of the war to a negotiation in the shadow of international law, what new incentive this change will create, and how it will influence the likelihood to achieve agreement.

A. The Distributive Effect

The shift from a game of realist negotiation to a game of negotiation in the shadow of the law has a significant distributive effect. While in the realist negotiation game, the settlement is a function of force, in the game of negotiation in the shadow of international law it is a function of Law. If the international court has full compliance, then the settlement will reflect more or less the estimation of the judgment of the court, namely, the international legal rights.

For the goal of illustration, let us take this example, in which we compare two ideal games:

¹⁰⁸ HUGH THIRLWAY, *THE INTERNATIONAL COURT OF JUSTICE* 35 (2016).

¹⁰⁹ Devika Hovell, *The Authority of Universal Jurisdiction*, 29 *EUR. J. INT'L L.* 427, 445 (2018) (“Despite the conscience of humanity having been pricked by the state-deployed barbarism of the Holocaust and World War II, there was still no discernible shift from state to international jurisdiction . . . Although US Chief Prosecutor Robert Jackson opened the trial at Nuremberg observing that ‘the real complaining party at your bar is civilization’, the Nuremberg tribunal based its authority not on universal jurisdiction but on the territorial jurisdiction of the occupying powers.”).

¹¹⁰ *See* U.N. Charter, art. 96 (“[1] The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. [2] Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”).

Two sides have a dispute over a certain territory. The outcome of a war between them regarding the territory will be such that the first side is going to gain 75% of the territory, while the second only 25%.¹¹¹ Each side evaluates its war cost to be equivalent to 15% of the territory. In contrast, if they go to court, the judgment of the tribunal in this particular case will be 50-50. The litigation costs of each side are equivalent to 1% of the territory.

In the game of realist negotiation, i.e., a game in which the parties negotiating without taking into account international law, each party will not agree to any settlement, in which it awards less than its outcome in a war minus its war costs. The first party will not agree to any settlement, in which it awards less than $75-15=60$. This means that its resisting payoff is sixty. The second party will not agree to any settlement, in which it awards less than $25-15=10$. This means that its resisting payoff is ten. The peace settlement creates a surplus of thirty, which is the saving of war costs. If the two sides distribute equally the surplus between them, the settlement will be 75-25.

In the game of negotiation in the shadow of international law the parties are incentivized to come to a settlement in order to reduce the litigation costs (in the ideal game that we discuss there is no legal uncertainty as in real life, and legal uncertainty creates litigation cost).¹¹² This time, each party will not agree to any settlement, in which it gets less than the judgment less the litigation costs. It means, the first party will not agree to any settlement, in which it gets less than $50-1=49$. The second party will also agree only to a settlement, in which it gets at least $50-1=49$. If they are going to equally distribute the surplus between them, then the settlement will be 50-50.

We can see that the move from the negotiation mechanism to the Litigation mechanism in this particular example leads to a shift from a settlement of 75-25 to a settlement of 50-50. It means that this move leads to a transfer of wealth of 25 from the strong party to the weak party. While the first settlement reflects the balance of power in war, the second settlement reflects the balance of rights in court.¹¹³

¹¹¹ It can be so since they are expected to divide the territory (75/25) at the end of the war or because the first side has 75% to win the territory and the second only 25%.

¹¹² Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 149, 149 (2019).

¹¹³ In the General Case, after we have shown the distributive effect in a particular example, let us examine a more general case. The outcome of war is (W_1, W_2) . The war costs are (WC_1, WC_2) . The judgment is (J_1, J_2) . The Litigation costs are (LC_1, LC_2) . Thus, in the Negotiation Mechanism, the threat payoff of the first side is W_1-

One may think that since in the realist negotiation game, the strong benefits more territory than in the game of negotiation in the shadow of the law, it is worthwhile for this state to play the realist negotiation game. It is like saying: if you can rob without being caught by the police, do it. This policy may give the country more territory, but the honest policy will bring them more peace, security, democracy and prosperity. This game shows why fascism is so dangerous: the fetishism of territory without taking international law and justice seriously leads to risky games. History tells us the price of fascism.

Of course, there is uncertainty regarding the result of the war. A country may choose between the game of war that may lead it to loss of life and the game of peace that may lead it to loss of territory they may win in war. When we think about peace and war via this which was proposed by Wald, this refutes the rationality of the nation's choice to go to war.¹¹⁴ The player who takes the decision to go to war is usually the leader that in peace may lose his or her job, while in war others' lives. This is why the international criminal court is so important, and particularly the (too limited) jurisdiction regarding aggression: since the responsibility is individualistic, this may reduce the agency problem in peace or war: the problem that many wars have been caused because of the self-interest of the leaders.

WC_1 . The threat payoff of the second side is $W_2 - WC_2$. So, if they are going to distribute the surplus equally, the settlement will be $[W_1 + (WC_2 - WC_1)/2, W_2 + (WC_1 - WC_2)/2]$. In the Litigation Mechanism, the threat payoff of the first side is $J_1 - LC_1$. The threat payoff of the second side is $J_2 - LC_2$. So, if they are going to distribute the surplus equally, the settlement will be $[J_1 + (LC_2 - LC_1)/2, J_2 + (LC_1 - LC_2)/2]$. We can see that in the move from the Negotiation Mechanism to the Litigation Mechanism there is transfer of $[J_i + (LC_{-i} - LC_i)/2 - W_i - (WC_{-i} - WC_i)/2] = \{J_i - W_i + [(LC_{-i} - LC_i) - (WC_{-i} - WC_i)]/2\}$, which is the gap between its international rights and its force.

¹¹⁴ See Abraham Wald, *Statistical Decision Functions Which Minimize the Maximum Risk*, 46 ANNALS OF MATHEMATICS 265 (1945). See also ABRAHAM WALD, STATISTICAL DECISION FUNCTIONS 25, 52, 59 (1950). Abraham Wald asked a simple question: if you do not know whether it is going to rain, what should you do? He had a simple answer, but one that changes the theory dramatically: you need to choose between two potential mistakes: that you will not take the umbrella and want to use it, and that you will take it and not use it. *Id.* See also Abraham Wald, *On the Principles of Statistical Inference*, 48 BULL. AMER. MATH. SOC'Y 639, 639-40 (1942). Clearly, you can decide what mistake is more expensive.

B. The Morals from the Above Example

In every negotiation each side has a resisting payoff. It is their payoff in the case of no agreement. The resisting payoff of a side is the minimal sum that this side will accept. It is rational for a side to reject lower proposals. In the negotiation mechanism the resisting payoff of each side is their payoff from the playing game of war. However, in the Litigotiation mechanism, the resisting payoff of each side is their payoff from playing the game of an international adjudication. In the negotiation mechanism the bargaining power of each side is its force in war, while in the Litigotiation mechanism is its rights in court.

Martin Luther King, Jr. distinguished Negative Peace from Positive Peace.¹¹⁵ Negative Peace is the absence of tension, while Positive Peace is also the presence of justice.¹¹⁶ We conclude that realist negotiation leads to a negative peace, but not to a positive peace, while playing the game of negotiation in the shadow of international law leads to a positive Peace.

C. The Reduction of Terrorism Effect

The realist negotiation game encourages each side to reduce the payoff of the other side in the case of war, thus this game encourages each side to maximize the war costs of its opponent. In order to maximize their costs, it may take steps of terrorism, occupation, cruel blockade, collective punishment, etc. Keynes said that what gives trade union power in the negotiation is that they convince the employee that they may strike in the future.¹¹⁷ Trade unions strike in order to indicate that they may strike tomorrow, that they adopt a strategy of striking until their demands are accepted.¹¹⁸ Similarly, in a realist negotiation game a side may terrorize in order to indicate that it may terrorize again, if its demands are not met, that it adopts a strategy of fighting until its demands are accepted.

¹¹⁵ Martin Luther King, Jr., *Letter From Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 842 (1992).

¹¹⁶ *Id.*

¹¹⁷ JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, & MONEY* 257 (1936).

¹¹⁸ *Id.* See also Uri Weiss, *About Suffering and Law in the Labour Market*, 46 J. CORP. L. 385 (2020).

Let us illustrate. In the above-mentioned example, the resisting payoff of the strong side was 60, which is payoff from playing the game of war: (75) minus its war costs (10). Let us examine what will happen if the weak side takes a policy of hard terrorism and increases the war costs to 30. Then, the resisting payoff of the first side will be $75-30=45$. If the first party doesn't increase the war costs of the second party, then its resisting payoff will continue to be 25. Hence, the settlement will be (65, 35). It means, that in the realist negotiation game, when one party increases its terrorism, it also decreases the resisting payoff of the other side.

However, if the game is negotiated in the shadow of international law, then no party can benefit from increasing the war costs of the other side (unless the court submits a threat in violence, and this example teaches why courts should not give in to threats to use violence).

We can study from this analysis that it is not true that international law only interrupts state to fight terrorism. Actually, a move from a mechanism of negotiation to an effective mechanism of Litigotiation reduces terrorism dramatically. This move neutralizes the incentive to terrorize and actually creates an incentive to be honest in order to gain the sympathy of the court.

The abovementioned game may be changed even unilaterally. If the strong party is ready to divide the land according to international rights, it will abolish the incentive of the weak party to pursue terrorism. Let us illustrate it: in the above-mentioned example, the division according to international law is 50-50, while the division according to the power is 75-25, when the weak side does not pursue terrorism, and 65-35 while the weak side pursues terrorism. If the strong side is ready to share the law 50-50 as international law commands, it abolished the incentive to manage terrorism and even to arm, but if the strong side refuses to respect international law, it leads to an incentive to pursue terrorism. Our point is that changing the game unilaterally by choosing to be obliged to international law leads to a huge improvement.

In his Nobel lecture, Aumann claimed that "Isaiah is saying that the nations can beat their swords into ploughshares when there is a central government—a Lord, recognized by all. In the absence of that, one can perhaps have peace—no nation lifting up its sword against

another.”¹¹⁹ Our analysis teaches that even when we do not have a central government to enforce international law, a state may reduce dramatically the incentive to arm against them by being committed to international law, and that the state can do it even unilaterally.

D. The Effect on the Chance to Achieve Peace

According to the theory of Ronald Coase, the parties will maximize their pie, if there is no transaction cost.¹²⁰ Coase did not define what transaction cost is, and the law and economics read him as saying that if there is no failure in the way of rational sides to maximize their common pie they will do it regardless to the initial allocation of the property rights or the legal rules (when they do not limit the freedom of contracts).¹²¹ This seems trivial, but it is also wrong, since it is not true for example when a dollar for the rich is not equivalent to a dollar for the poor.¹²² Despite this, we can study from Coase to ask what failures prevent agreements even when the two sides have an opportunity to achieve mutual gain, and how to prevent those potential failures. We can also study from Coase’s theory that the default is that the sides will not dismiss opportunities to mutual gain, and that in order to understand why and when agreements fail, we can think about failures. There are obstacles that prevent rational players from

¹¹⁹ Robert J. Aumann, *supra* note 71, at 17078.

¹²⁰ RONALD H. COASE, CLASSIC PAPERS IN NATURAL RESOURCE ECONOMICS: *The Problem of Social Cost* 87-137 (1960).

¹²¹ This is how Posner summarized what he called the Coase Theorem: “[i]f transaction costs are zero, the initial assignment of a property right—for example, whether to the polluter or to the victim of pollution—will not affect the efficiency with which resources are allocated.” Richard A. Posner, *Ronald Coase and Methodology*, 7 J. ECON. PERSPECTIVES 195, 195 (1993). This is how Weiss translated the Coase theorem to the language of game theory: “the wrongdoing will be done if and only if the total benefit of the coalition of the manager and the sender from making the wrongdoing is bigger than the total cost of this coalition from committing the wrongdoing, including the transaction cost that is needed in order to create this coalition.” Uri Weiss, *The Talmudic Prisoner’s Dilemma*, 37 TOURO L. REV. 341 (2021).

¹²² See Leonid Hurwicz, *What is the Coase Theorem?*, 7 JAPAN & WORLD ECON. 49, 49-74 (1995) (“The Coase Theorem is interpreted as asserting that the equilibrium level of an externally (e.g., pollution) is independent of institutional factors (in particular, assignment of liability for damage), except in the presence of transaction costs. It is shown here that absence of income effects (due to parallel preferences or quasi-linear utility functions) is not only sufficient (which is well known) but also necessary for this to be true.”).

reaching agreements. In the case of internal legal disputes, the option of litigation prevents the violence. This solution should be applied to international relations too.

Rational players may go to war; we will analyze the potential failures of the parties' way to achieve agreement, and then will attempt to find solutions for them. For example, since one of the major problems in achieving an agreement is a lack of information— asymmetric information¹²³ or excessive optimism—we will propose to establish mechanisms of information flow as a way to improve the chance to achieve peace. Wilson was right when he determined that every treaty between countries should be transparent,¹²⁴ and this principle should be extended to other factors that influence the balance of power. One modest but very important outcome of this recommendation might be to open international negotiations to media coverage.

We can learn from discussion that also perfect rational players may fail to achieve cooperation, even when it is for their mutual advantage. Aumann proposed to learn from this that we should not say: “let’s make love, not war.”¹²⁵ The truth is the opposite: since we cannot rely on mutual rationality to prevent wars, we should discourage hostile feelings, and encourage friendly feelings. Another moral is that since negotiation sometimes fails, we cannot rely on negotiation, but need to have international institutions, such as international courts. We should have institutions that in the case negotiation fails, the adopted alternative will not be war. Litigation, and not war, should be the continuation of politics by other means.

Bertrand Russell famously referred to the Cold War as a game of “chicken” between two teenagers driving toward each other on a collision course.¹²⁶ One of the drivers must swerve, or both may die in the crash, but if one driver swerves and the other doesn’t, the one who swerved will be called a “chicken,” meaning a coward.¹²⁷ Russell used the analogy to support his call for nuclear disarmament—as the

¹²³ Akerlof, *supra* note 84, at 488.

¹²⁴ The Fourteen Points, (President Woodrow Wilson), *available at* <https://www.theworldwar.org/learn/peace/fourteen-points> (last visited Sept. 1, 2022).

¹²⁵ See Robert J. Aumann, *Game Engineering*, Discussion Paper #518, Hebrew Univ. Jerusalem 1, 11 (2009), <https://sites.duke.edu/niou/files/2011/05/Aumann-Game-Engineering.pdf>.

¹²⁶ BERTRAND W. RUSSELL, COMMON SENSE AND NUCLEAR WARFARE 30 (1959).

¹²⁷ *Id.*

possibility of a "crash" exists.¹²⁸ To achieve it, Russell supported the international government.¹²⁹

Moreover, an additional obstacle to agreement may be that a party will not wish to give in to unfair demand; it is recognized in game theory that proposals that seem to be unfair may be rejected even in one-time anonymous situation.¹³⁰ The strategy of not capitulating to unfair demand may be rational, at least when it is a submission to coercion. This is so since a strategy of not giving in to coercion may prevent the coercion and a strategy of giving in to coercion invites the coercion. In international conflict each side tends to think that it is right. This tendency is usually strengthened by the indoctrination of the formal educational system. People who appeal to the national narrative may be denounced as traitors. When the two sides have two contradicted narratives or values, there may be a situation that there is no agreement that will be seen by both sides to be one that is not a submission to coercion. When this is the case, and when each side commits itself sufficiently not to submit to coercion, there will be no agreement. International litigation may play a very important role here: it prevents this game, if respecting the decision of an international court is not to be perceived as a submission to coercion. Moreover, while war incentivizes each side to demonize the other side, litigation incentivizes each side to understand the claims of the other side. International Litigation may prevent the above-mentioned failure in the way to peace agreement. The option of international litigation in case negotiation fails discourages sides from committing to hard lines.

Let us imagine that the Israeli Aumann will negotiate with the Palestinian Aumann; each of them will say that all the holy land is mine. I wish to have peace. However, the right way to make peace is not by concessions. If I give you a part of the holy land, I will incentivize you to command terrorism against me, since it is clear for both of us that I will not make any concession if it was not in my interest, and it is not in my interest to give you anything if you do not have power to oblige me. The inevitable result will be endless war. Respecting international law prevents the game of Aumann versus Aumann, and this is a big advantage of countries who respect

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ An example is the ultimatum game. See Alvin E. Roth et al., *Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study*, 81 AM. ECON. REV. 1068, 1068 (1991).

international law. A peaceful nation will not adopt a strategy that if the two sides take it, it makes peace impossible, and international law should discourage such strategies.

In one of his public lectures, Aumann explained that it is rational to say: that all is mine. It is his lesson from the Mishna:¹³¹

Two holding a garment. One of them says, “I found it,” and the other says, “I found it.” One of them says, “It is all mine,” and the other says, “It is all mine.” Then, one swears that his share in it is not less than half, and the other swears that his share in it is not less than half and it should then be divided between them.¹³²

Aumann explained his support in the New-Right party by saying that they are convinced that the Jewish people have a right on all the holy land.¹³³

Aumann dismisses that if a party says that everything is its own, then either this side closes the door before any compromise or makes any compromise to be a submission to force, what he sees as encouraging terrorism.¹³⁴ Thus, Aumann repeated the mistake of Ze’ev Jabotinsky, who said that he studied a little bit of Talmud but gained his (political) wisdom from the Talmud and said that he concluded from the abovementioned Mishna that we should say that all the holy land is ours.¹³⁵ Similar to Aumann, Jabotinsky saw compromises as encouraging terrorism, and he resisted even to

¹³¹ Of course, it is a misreading of the Talmud. The Talmud assumes that every party speaks sincerely, and the Talmud obliges each side to take an Oath that he has at least half of the Tallit. (We thank Eli Rafal for the last observation regarding the Otha, a private conversation with Uri Weiss.).

¹³² THE MISHNAH: A NEW INTEGRATED TRANSLATION AND COMMENTARY: *Mishnah Bava Metzia* 1:1. (Machon Y. Trust trans., 2012).

¹³³ Naftali Bennett, *Nobel Prize winner Yisrael Aumann announces support for the New Right*, YOUTUBE (Mar. 12, 2019), <https://www.youtube.com/watch?v=9Ki4F4Ff9RY&t=58s>.

¹³⁴ Amanda Borschel-Dan, *Israeli-Palestinian Peace A Matter of Incentives, Says Nobel Laureate Aumann*, TIMES OF ISRAEL (Dec. 13, 2018, 4:05 PM), <https://www.timesofisrael.com/mideast-peace-a-matter-of-incentives-says-nobel-laureate-aumann/> (“The common wisdom—or foolishness—is that making concessions will bring peace. It doesn’t bring about peace, it brings about war—it’s the opposite,” he said. “The expulsion from Gaza has brought all the wars in the Gaza area ever since. We are giving them incentives to keep pressing. We are rewarding their attacks.”).

¹³⁵ Ze’ev Jabotinsky, a Program for temporal government in Israel, Jaffa (1919) (available in Hebrew at <https://benyehuda.org/read/7047>).

negotiation in the argument that it will lead the other side to illusions that will lead to more resistance by it.¹³⁶ The combination of the proposals of Jabotinsky is what makes them so dangerous.

States that instead of claiming strategically: “all is mine,” recognize the international legal rights of the other side, and adopt a strategy of respecting international law and are ready to litigate in the case if dispute, will have much more peace and security.

The game of negotiation is not enough in order to ensure peace. Thus, it is better to choose to play the game of negotiation plus respecting international law. By choosing to respect international law, a nation changes the game they play, having more opportunities to peace, and incentivizes much less terrorism against them.

VI. CONCLUSION

We compared two games of international negotiations. In one game the inability to resolve a conflict by negotiation leads to war. In the other game, this inability leads to some international courts. The first game leads to negotiations under the shadow of war, whereas the second game leads to negotiations under the protection of international law. There are three important differences between these games. The first difference between these games is the distributive effect: in it each player can threaten the other. This renders negotiations a function of military setups. In the second game, the threat is of litigation in the international court. This renders negotiation a function of international law. The second difference between these games is that the first game provides incentives for armament for each party so as to render threats to attack credible. The third difference concerns situations that follow failures of negotiations. Sometimes parties fail to reach agreement even though potential agreements exist that would make all parties better off.

The above comparison between two games of international negotiations leads to two morals. First, the international community should change the game of international relations. The international community should oblige or at least encourage international arbitration. The second, perhaps more important, moral is this. States should unilaterally reduce conflict by preferring the game of

¹³⁶ ZE'EV JABOTINSKY, THE IRON WALL (1925), <http://en.jabotinsky.org/media/9747/the-iron-wall.pdf>.

negotiation under the shadow of international law over any game played under the threat of war. When a state is committed to international law, then they improve their own security. This is so since they thereby declare that they will not attack their neighbours even when easy victory is assured. The commitment to respect international law reduces dramatically the incentive for playing the game of arms race. We thus recommend every country to adopt the policy of honesty, namely, of respecting international law unilaterally, and of conditional generosity. Generosity is the readiness to yield more than the law demands.