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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

The nadir of vital interests: Hannah Arendt and the Franco-German Armistice 1940

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Abstract
Illusions of common interest and joint purpose falter when states choose to break up, as with the recent changes to the European Union, or according to more dangerous precipitants such as those which shaped the Franco-German Armistice 1940, 80 years ago as a detail of war. The latter bares the sudden end of the Franco-British alliance and holds an invitation from history to re-examine the troubling political, social and legal layers of the concept of the *vital interests* of states. That category opened to radically different interpretations for political and legal thinkers who witnessed the fall of France yet did not respond directly or immediately. Hannah Arendt's theory of politics, conceived in the aftermath of war as a corrective to the internal fragmentation of the European nation-state, elucidates the instability of the concept of *vital interests* which underpinned international legal and political thought in the 1930s and 1940s and frustrates the co-operative relations between states. The problem pairs back, she says, to whether interests signify an associative technique or sword. Her invitation for legal thought is to challenge the expectation of rupture implicit in the juridical category by outlining an alternative that recovers the pacifistic function of law and implicates the international lawyer.

Keywords: friend-enemy; Hannah Arendt; international legal profession; the Franco-German Armistice 1940; vital interests

1. The problem of vital interests in 1940

In the summer of 1940, international lawyers on both sides of the Atlantic reacted to the Franco-German Armistice 1940 and the Franco-Italian Armistice 1940 (the Armistice agreements) with silence. Germany had invaded France. France acceded to its invader's demands.[1] The fantastic turning ruptured the Franco-British alliance and left much of metropolitan France and the French navy under the enemy's command. For internationalists opposed to Axis advance, what to do next meant reserving the vital interests of their state and, as the juridical doctrine of the same name suggests, putting the life, security, and independence of the political unit first. The concept

[1]English translations of the agreements circulated by the Associated Press in Berlin appeared in the *New York Times* and *Washington Star* on 26 June 1940 in the form subsequently issued by the American Society of International Law: '"Armistice Between France and Germany" signed in the Forest of Compiègne, 22 June 1940 6.50 p.m., German summer time', (1940) 34 *AJIL Sup.* 173; '"Armistice Between France and Italy" signed at the Villa Incisa, near Rome 24 June 1940 7.15 p.m. Rome time', (1940) 34 *AJIL Sup.* 178. The terms also appeared, in late June 1940, in England: 'The Franco-German Armistice Terms', (29 June 1940) 17(13) *Bulletin of International News* 779; 'The Franco-Italian Armistice', (13 July 1940) 17(14) *Bulletin of International News* 852; summaries immediately appeared in 'Report of the Executive Committee for 1940', (1940) 26 *Transactions of the Grotius Society xl*, at *xli*.

of vital interests opened to different orientations for political thinkers who also witnessed the fall of France yet did not respond directly or immediately. Hannah Arendt, the German-Jewish political theorist who fled her interwar refuge in Paris in the days after Armistice, reframes the legal category as an indicator of political exchange and co-operation that law stabilizes and not, as the lawyer presumes, as an idiom of war. The suggestiveness of her concept for the international lawyer is twofold: to notice the unexpected significations of the idea of vital interests; and to challenge the expectation of rupture which underpins the legal category and silences the international lawyer. Armistice registered the nadir of the legal category of vital interests worth investigating for its exaggerated reminders that peace and war are always strategic projects which progress by law and the choices of the international lawyer.

Lawyers guard the contingent character of legal meaning in ordering and comprehending international affairs by analysis, debate, and interpretation. This means lawyers enter the field of international relations by attention to the legal record, including the doctrine of vital interests and the various agreements which annotate the crises of states. Critical examination of those agreements ensures the idea of vital interests remains a legally, as well as a politically, relevant category for co-ordinating international relations. The Armistice agreements were part of this expanding index of the legal concept of vital interests which threatens, then fatally, the prospects of peace through friendly relations and alliance. Forced peace signalled the reign of the legal idea of vital interests by the most dangerous kind of extra-juridical solution for interstate disputes: invasion, surrender, and agreement to lay down arms according to the enemy's terms. It also ended the most significant strategic alliance against Germany in Europe. That English-speaking lawyers did not discuss the terms of the two agreements, which immediately appeared in translation in major newspapers worldwide, confirms the belligerent logic of the legal category of vital interests. The idea threatened the rule of law as a normative exception to the interwar prohibition on violence contained in the Kellogg-Briand Pact of 1928 and disturbed the pacifistic projects of law by obscuring the legal and political consequences of surrender even for the international lawyer.

The legal notion of vital interests projected a negative pattern of silence, belligerency, and tactical politics in 1940 that merits re-examination for its juridical signature of a striking conceptual, political, and historical intersection. Studying these intersecting themes elucidates the limits and alternatives of the legal concept of vital interests registered by the Armistice agreements. Arendt contributes to such a study by highlighting alternatives to the stalemate and disappointments predicted by the legal category, elucidating the concept's layered nuances and outlining how to realign the idea with peace. Her thought provides cues for progressing that re-examination as a legal project: first, by situating the juridical category within a broader, conceptual conversation about the meaning of political interests (Section 2); second, by encouraging a re-examination of the legal consequences of vital interests identifiable with the terms and circumstances of the Armistice agreements (Section 3); third, by reframing the concept of interests as a dynamic, progressive and iterative relationship between political subjects or states that stabilizes by law (Sections 4 and 5); and finally, by reflecting on the impasse of vital interests and the international lawyer (Section 6).

2. A conceptual intersection in legal and political thought

Interests mean different things depending on the subject's experience of crisis and his or her understanding of the function of law and the character of political alliance. When France fell, two versions dominated legal and political thought though neither received attention. Each received affirmation by the alarming details of German invasion and French surrender and the new uncertainty about the likely dangers of the advancing enemy in the months ahead. A further version, the one framed by Arendt in the immediate aftermath of war, questions the

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belligerent logic underpinning the standard viewpoints by its alternative suggestion. Arendt's reframing of vital interests re-signifies its familiar emphasis on the autonomy of distinctive political units or subjects to manage the risks of competition which, in the international case, preserves the likelihood of war. She sees interests differently, as an affirmative technique of political cohesion that partners politics with law to constitute a more peaceful world. The result of noticing these juxtapositions exposes the idea of vital interests as a conceptual intersection with unexpected historical, political, professional, and legal layers and possibilities.

Prominent entries in the juridical conversation about vital interests straddle the fall of France and include Hersch Lauterpacht's monograph *The Function of Law* (1933) and several essays by James Brierly published in 1944.[2] These studies clarify the wartime status of the phrase which regularly appeared in bilateral agreements in the first decades of the twentieth century. Vital interests clauses became a common drafting technique to preserve the option of states to refuse mandatory juridical settlement for disputes arising from the circumstances of the relevant agreement that were most likely to lead to rupture. The legacy of such clauses traces further to the seventeenth century views of Emer de Vattel and were cemented in nineteenth century legal thought as the conviction that obligatory arbitration must depend on the political gravity of the particular controversy and the risks it poses for the safety or existence of the state.[3] A vital interests clause reserves, as is the intention, an uninhibited margin for state parties to determine how to respond to questions implicating the notoriously indeterminate categories of national independence, identity or honour. The effect of honour clauses distinguishes legal and political disputes, the latter being immune to involuntary control, and eliminates possible legal or procedural restriction on the right of states to go to war.

When the phrase 'vital interests' entered the legal vernacular via optional arbitral clauses, there was no permanent juridical mechanism to encourage peaceful resolution of international disputes and war was still a lawful alternative according to customary international law. The situation by the early 1930s when Lauterpacht's monograph appeared was radically different. The Permanent Court of International Justice (1922–1946) and the Kellogg-Briand Pact of 1928 introduced the presumption of non-violent resolution of all disputes. By then, the phrase 'vital interests' assumed a more general function. It appears both as a specific reservation against compulsory arbitration and as a conceptual category for explaining the rising tendency of certain states to disobey the pacifist inclinations of interwar international law according to political whim or ambition. In either case, the term 'vital interests' expresses the political logic of belligerency. The Armistice agreements were a striking juridical citation of the politics underpinning the technical and general sense of vital interests as it figures as a conceptual category in interwar legal thought. Whatever definition focused the lawyer's commentary, the meaning of vital interests was continuous with the belligerent tendency of states, the breakdown of co-operative international relations and the failure of law to regulate political life.

Lauterpacht and Brierly analyse the concept of vital interests to criticize the tendency of states to pursue national purposes extra-legally and sometimes illegally, though they disagree about the capacity of law to stabilize international relations in situations likely to escalate. Their professional stature, both held chairs of international law at Cambridge or Oxford universities during the 1930s and 1940s and advised the British Foreign Office about the legality of state strategy, affirms the significance of their reflections for legal thought in 1940, especially in the absence of a comparable detractor.[4] The technical concept identifiable with arbitration agreements transforms through

[2]H. Lauterpacht, *The Function of Law in the International Community* (2011); J. Brierly, *The Outlook for International Law* (1944); J. L. Brierly, 'Vital Interests and the Law', (1944) 22 BYIL 51 which extended earlier commentary by Brierly about the relation between law and politics: J. Brierly, 'The Relation of International Law to International Peace', (1927–1928) 13 *Cornell Law Quarterly* 385, at 396–7.

[3]See Lauterpacht, *Function of Law*, ibid., at 147–52.

[4]For general biographical and bibliographical details see, e.g., 'Sir Hersch Lauterpacht (1897–1960)', *Oxford Dictionary of National Biography* (2019); C. W. Jenks, 'Hersch Lauterpacht: the scholar as prophet', (1960) 36 *British Year Book of International Law* 1; E. Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (2010); 'James Leslie Brierly', *Oxford Dictionary of National Biography* (2019).

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their attention into a persuasive diagnostic tool for understanding why international law fails to prevent war. They agreed that vital interests meant sovereign needs according to subjective valuation of states and utilized the phrase 'vital interests' as a legal and political term of art relevant to optional clauses contained in international agreements obligating pacifist resolution of disputes. They also arrived at the same conclusion. Each identify vital interests as the most pressing dilemma for collective security in the era of the League of Nations and for future order. Future peace hinged, in 1933 for Lauterpacht or 1944 for Brierly, on the preparedness of states to submit the most menacing disputes, those most likely to elude diplomatic compromise, to international juridical solution.

Well known for their theoretical differences, Lauterpacht and Brierly disagree about what law can reasonably do, either through judicial processes or by outlawing war, to prevent ruptures and resolve international disputes where states are unwilling to compromise. Lauterpacht's rejection of orthodox positivism, especially the authority it assumes for states in the conduct of international affairs, shaped his conviction that '[p]eace is pre-eminently a legal postulate' and that the reign of law was 'in itself a powerful constituent element of peace'.[5] He thought agreements to exempt certain disputes from international jurisdiction missed the 'true legal position' about the capacity of law to stabilize international affairs by satisfying the reasonable expectations of states. The 'true' position was that no state enjoyed the 'metaphysical' privilege of making its consent the sole criteria for legality beyond the rights, powers and duties conceived by international law and reflected by state practice. Lauterpacht believed all interests, even those fundamental concerns of territorial integrity, immigration or treatment of aliens are 'safe under international judicial settlement, because nothing—except force—can alienate them'.[6] Lauterpacht's idealism about the function of law downplays the contextual factors which influence the political decisions characteristic of the swift-paced chronologies of rupture. He understood that law was not a panacea and could never match the effectiveness of war. Nevertheless, the rule of law was an indispensable element of peace that lawyers must defend by paying critical attention to the untenable distinctions between political and properly legal interests.[7]

Brierly adds sobering reminders about the difference between the pathology of law (i.e., procedures for settling disputes) and the healthy operation of a legal system (i.e., the effectiveness of those procedures).[8] His position is mindful of the reality of control exercised by states rather than law over international order. That reality means the rule of law always depends on the confidence of states that the rule of law, including the outcome of compulsory juridical settlement, will deliver justice and protect what states legitimately claim to be vital interests for the life, governance, and security of the nation. The absence of such confidence led to war (and the breakdown of the rule of law) and reflected the failure of the legal system to provide a sure means to distinguish reasonable and unreasonable interests and satisfy the vital interests of states insofar as those were reasonable.[9] Vital interests presented a juridical *and* sociological dilemma that inhibited the pacifistic function of law for which neither the particularities of Brierly's realism nor Lauterpacht's anti-positivist critique of states and state sovereignty articulated satisfactory answers.

Another conversation about the political and legal effects of state interests on international relations dominated continental intellectual thought in parallel to the interwar analyses of jurists

[5]See Lauterpacht, *Function of Law*, *supra* note 2, at 445–6. For detailed analysis of Lauterpacht's critique of positivism, states, and state sovereignty in the context of his theory of international law including his specific idealism and naturalism see, e.g., M. Koskenniemi, 'Hersch Lauterpacht (1897–1960)', in J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (2004), 601, at 619–22, 644, 657–8, 661.

[6]Lauterpacht, *Function of Law*, *supra* note 2, at 181, 181–5.

[7]Ibid., at 444–5.

[8]Ibid., at 183, restating views expressed in Brierly, 'International Peace', *supra* note 2, at 396–7. Also see H. Lauterpacht, 'Brierly's Contribution to International Law', (1956) 32 *British Year Book of International Law* 1, at 1–6, 8–9.

[9]Brierly, *Outlook for International Law*, *supra* note 2, at 38.

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in England. Carl Schmitt, the German jurist and political theorist still marked by his allegiance to Nazism, famously disputed the pacifist potential of twentieth-century international law. He thought the failure of law to prevent war was a symptom of the hypocrisy of the late-modern liberal nation-state and its imperial appetite for economic, political, and cultural dominance. Those interests signified the life, honour, and independence of the state and co-ordinated the techniques of sovereignty, including law or friendly alliance such as between France and Britain before invasion, but more pertinently and forcefully, violence. Schmitt understood every friendly interaction or alliance between states as a concession directed to satisfy sovereign interests or to postpone violent confrontation. His thesis agrees with Lauterpacht and Brierly insofar as it elucidates the logic of belligerency which also underpins their idea of vital interests but extends it by suggesting violence is also the logic underpinning the genesis and development of public international law. Schmitt's analysis of the new *nomos* he identifies with the late modern world credits sovereign interests as the moderator of world order. The result provocatively refocuses the debate about vital interests beyond conjecture about the pacifistic character of law or the need for a more effective system of law to the political catalysts which shape international law and international relations in the service of peace or war. For Schmitt, the idea of vital interests or rather, sovereign interest, elucidates the logic of international relations and international law. That is, vital interests are a conceptual axis for comprehending the reality and techniques of international affairs based on risk.

In 1932, the year preceding Lauterpacht's monograph, Schmitt identified all political relations as friend-enemy relations in *The Concept of the Political*.[10] He explained the 'phenomenon of the political' – which in its international iteration comprises the interactions among states – only arises in the 'possibility' of enmity and further, that war signifies the 'high points of politics' by revealing the enemy 'in concrete clarity ... as the enemy'.[11] Schmitt's critique of liberalism contradicts the conviction shared by jurists such as Lauterpacht or Brierly that law premised on democratic or universalist principles can preserve international order. For that reason, his insights remain a relevant influence for later critical scholarship addressing the historical patterns and bias underpinning liberal international law. The friend-enemy grouping also rearticulates the dilemma of vital interests for influential international lawyers including German émigré jurists such as Hans Kelsen, Leo Strauss or Josef Kunz in America who acknowledged the repute and intelligence of Schmitt's oeuvre even when they disagreed with his ideology.[12] The enemy-friend grouping captivated the liberal political imaginary in 1940 even without Schmitt's name, which by then was synonymous with the Nazi regime. The imperatives of survival and enmity confirmed the prescience of Schmitt's earlier analysis and unsettled the logic of the scientific analysis preferred by other German-speaking jurists, including Lauterpacht and Kelsen, as the key to a more peaceful world. In the midst of crisis, sovereign interests modelled on the logic of the life, security, and independence of the nation-state transfigured the excuse of unruly or belligerent states into an imperative of all states and all witnesses, including the international lawyers who announced vital interests to be the great contradictor of their hopes for order.

During the war, detailed academic discussion about vital interests temporarily paused. English-speaking jurists concentrated on questions concerning the continuity of international law despite

[10]Schmitt, *The Concept of the Political* (1996).

[11]Ibid., at 35, 67.

[12]German-speaking émigré scholars in America and Great Britain ensured the repute of Schmitt's oeuvre for anglophone scholars during the 1930s alongside disagreement with his celebration of the authoritarian state and its predisposition to war, e.g., J. Kunz, '*Völkerrechtliche Grossraumordnung*', (1940) AJIL 173, at 176; Lauterpacht, *Function of Law*, *supra* note 2, at 69. For general discussion of intellectual debates between Schmitt and contemporary juridical thinkers during the 1930s including Hans Kelsen and Leo Strauss see, e.g., D. Dyzenhaus, 'Friend and Enemy: Schmitt and the Politics of Law', in D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (1999), at 38–101.

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the prevalence of invasive force *and* the legality of strategic responses.[13] That is, attention shifted to the meaningful existence of law during war, by references to its structure and general principles, and engaged with specific questions that were contingent in the sense of being relevant to the uncertain events or choices which lay ahead. The reissue of textbooks by Brierly and Lauterpacht in the early 1940s reassured international lawyers, for example, that law survived. More specifically, the continuous, detailed debate among English and American international lawyers about the proper scope of existing rules addressing neutrality or the conduct of war reassured governments that international law allowed manoeuvres against Axis powers.[14] The reform agenda of international law was also active but contingent on the interests and decisions of those states which might succeed in winning the war.[15] When the exercise of vital interests in tactical manoeuvres produced intractable political facts, such as the resignation of France to its invader, lawyers were silent. Vital interests organized the present and it seemed, the future of international law.

The Armistice agreements registered the truth of the conceptual paradigm which adjusts law to strategy and, despite academic complaint when imminent dangers affecting the life or honour of the state is less acute, obscures the criteria that might theoretically and practically generate a political and legal alternative. What was unsaid was that vital interests co-ordinated political and juridical responses during war despite the earlier resistance to non-pacifistic solution and need for the diligent, critical attention to projects of peace by the international lawyer. Vital interests determined the content and tactical advantages of juridical conversation and equally, where it was more useful to remain silent or where words could not confer a tactical advantage. Understood as part of this pattern, the surrender of France and its confirmation in the Armistice agreements took shape as a political rather than a legally relevant fact and endures as such by the absence of juridical comment. That silence represents the intractability of vital interests in juridical thought in the early 1940s.

Arendt's political theory offers a conceptual substitution for the paradigm which dominated legal and political thought among her contemporaries. She intervenes in their conversation by her suggestive reorientation of the standard meaning of vital interests in interwar legal and political thought. In her estimation, vital interests confirms a radically different concept of sovereignty which does not expect war or social fracture but rather explains how the political field is constituted and evolves by the continuing encounter between distinctive agents and, importantly, is stabilized by their legal accords.[16] She borrows from the word's literal signification (*inter*+*est*) to re-signify the category as a constitutive technique (*est*) of political subjectivity and political community that arises by meeting one's opponent in iterative exchange (*inter*). Arendt's thesis avoids the expectation of risk that accompanies the more familiar legal and political category because she envisages interests as a means of connecting or relating to one's opponent rather than as a divisive technique which depends on segregation, preservation or hegemonic advantage. Her provocation to international legal thought is the methodological reminder that the imaginative fluency which is sometimes missing from the stubborn normative categories of law releases by

[13]E.g., Q. Wright, *A Study of War* (1942); H. Kelsen, *Peace Through Law* (1944); H. Kelsen, *Law and Peace in International Relations* (1943); G. Schwarzenberger, *Power Politics: A Study of International Society* (1941); G. Schwarzenberger and G. Keeton, *Making International Law Work* (1939); G. Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943). Numerous wartime textbooks of international law alluded to the problem of vital interests (sometimes by name) in the context of explication of basic principles relevant to organizational oversight of international security by the League of Nations: e.g., L. Oppenheim (Lauterpacht 6th edn.), *International Law. A Treatise Vol II., Disputes War and Neutrality* (1940), at 30–3; J. Brierly, *The Law of Nations* (1942), at 211–12; G. Scelle, *Manuel Élémentaire de droit international public (avec les Textes essentiels)* (1943), at 536, 553.

[14]See Lauterpacht, *International Law* (1940), *supra* note 13; Brierly, ibid.

[15]See, e.g., Schwarzenberger (1941), *supra* note 13.

[16]H. Arendt, 'Chapter V: Action', in *The Human Condition* (1958); H. Arendt, *On Revolution* (1963), at 142–3.

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interdisciplinary translation. How Arendt encounters interests turns the lawyer's returning dilemma into an opportunity to reimagine political and legal association.

Even though Arendt does not address the prevailing interwar paradigm of vital interests directly, she wrote against its historical and theoretical backdrop, witnessed the fall of France, and shared the same complaint that the prevailing rules of social and legal organization frequently frustrate the universal desire for cohesion, peaceful relations or justice. For a German Jew in interwar or wartime Paris, the personal challenge of vital interests arose from her exclusion from any political community as a stateless non-person. Statelessness became, for her, the exemplar of the internal crisis of the interwar nation-state which predicated national interest on political and legal exclusion. Arendt responds to the dilemma of vital interests as it presents in international crisis by addressing the same themes which preoccupied international lawyers and political thinkers such as Schmitt in the context of the internal organization of states. A state is the comprehensive field of inquiry for the study of vital interests and the key co-ordinate of the international political realm which raises similar, though differently situated, questions. Arendt also discovers important indicators for her idea in Roman law and the patterns by which the imperial state progressed its international ambitions. Her concerns about political relations within the nation-state are, self-consciously, a differently situated version of the same paradigms which determine international relations and explain war. Arendt's insights reveal vital interests to be a conceptual axis with multiple, intersecting themes and options.

3. The legal record of vital interests in 1940

The juridical understanding of vital interests co-ordinated international relations and international law in 1940 even if international legal scholarship neglected the idea's analytic nuances. How the category of vital interests figured in international legal thought during war shifted, however, in parallel to the relevant political contingency. Armistice signifies the juridical citation of the idea when the contingent prospects of France against Germany disappeared, obviating the relevance of legal conjecture about those facts or for alternatives to war. When, however, political interests were live, vital interests presented multiple opportunities for the lawyer to engage with the affairs of states by articulating interpretative insights, confirming the continuity of basic principles or speculating about the future. Those themes figured the international lawyer as a significant interlocutor of states or commentator on international affairs. In both cases, irrespective of contingency, the conceptual category of vital interests persisted less as a vocabulary for criticizing the hesitancy of states for peaceful resolution of disputes but as a lingering set of themes or co-ordinates for understanding the war-response of lawyers to political events and the wartime preoccupations of international law.

3.1 Armistice and non-contingent interests

The Franco-German Armistice (22 June 1940) and the Franco-Italian Armistice (24 June 1940) comprise the legal record of the fall of France and are a wartime citation in the expanding legal register detailing the disruptive impact of vital interests on international affairs.[17] The agreements translate the political effects of invasion into law by terms which record the new reality of immediate ceasefire between France and the enemy, French disarmament, German occupation of the northern and eastern regions of France, reallocation of French resources, and the dramatic reshuffling of wartime alliances. The strategic consequences for France's former ally included the reminder in Article III of the Franco-German Armistice (and, Article VI Franco-Italian Armistice) of Germany's ambition to continue its military advance and defeat Britain. That clause contemplated the reduction of German control in Western France 'after ending hostilities with

[17]See notes and citations at note 1, *supra*.

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England' which was more likely after June 1940 given the prohibitions in Article X on the French government or any citizen aiding states or interests opposed to Germany by redeploying military resources or other allegiance abroad. Complementary terms reappeared in extended form in Articles II-XXI of the Franco-Italian Armistice. English language newspapers immediately published the Armistice agreements in translation and reiterated Winston Churchill's public announcement on 23 June 1940 which set the tone for civic, diplomatic and juridical opinion.[18] The Prime Minister famously expressed his 'grief and amazement' in response to the agreements which compromised the 'freedom, independence and constitutional authority' of France and exposed its former allies.[19] No international lawyer analysed the juridical consequences.

International lawyers spent the early 1940s imagining the future of international law, reassuring each other that international law had practical utility despite its flagrant contravention, and reflecting on the legality of questions which were contingent and could influence the conduct of war.[20] That lawyers did not remark on the status of the Armistice agreements as legal regimes between belligerents or on the legality or scope of individual terms confirms the singular stature of the agreements for France's former allies as the token of the immediate political danger. Those legal questions remained, theoretically live, yet did not concern politically contingent issues and could not, in any case, affect the political reality for allied states of the loss of the French navy, the end of joint diplomatic purposes with France nor the new risks of the missing geographical buffer against Germany. Neither was the theory of vital interests open to theoretical conjecture in circumstances where the danger of rupture was no longer moot and susceptible to theoretical appeals for states to pursue a pacifistic solution. The Armistice agreements clarified why the life, independence, and honour of all states in Europe opposed to Germany depended on the immediate success of non-pacifistic tactics and plans for legal reform belonged to the future rather than reinterpretation of the recent past of international law. The present belonged to political leaders.

In that further detail, the Armistice agreements confirmed Schmitt's account of the war-bias underpinning modern international relations based on liberal international law. Churchill's grief and amazement on reading the terms of Armistice, for example, was unequivocally for the new danger of a far stronger and more proximate enemy rather than for the predicament facing France. The effect of French defeat on British war strategy was the vital detail registered by the Armistice agreements. It confirmed the Franco-British alliance was always a political arrangement with a life-span entirely contingent, consistent with Schmitt's analysis of international relations, on the vital interests of each state. States relate politically, as Schmitt notes, on the presumption

[18]On 24 June 1940, for example, *The Daily Mirror* carried the headline, 'Hitler's Terms: Navy and Half of France', and a summary of the terms, highlighting clause 8 which related the resignation of the French fleet. See also, 'Mr Churchill on the Terms: "Grief and Amazement"—Call to Frenchmen—"Aid Britain to Defeat Enemy"', *Sydney Morning Herald*, 24 June 1940, at 9.

[19]For a 'running account' of the French collapse and the main political events in France and other countries between May and June 1940 see, e.g., H. F. Armstrong, 'The Downfall of France', (1940) 19(1) *Foreign Affairs* 55, esp. at 134.

[20]Multiple observers expressed dismay about the destruction of the laws of warfare and neutrality by German ambivalence to codes governing belligerency, e.g., W. Friedmann, 'International Law and the Present War', (Lecture to Grotius Society, 21 November 1940) (1940) 26 *Transactions of the Grotius Society* 211, at 211, 216–27; C. Warren, 'Lawless Maritime Warfare', (1940) 18 *Foreign Affairs* 424. Textbooks confirmed the continuity of international law despite the lawless interventions of belligerent states: Lauterpacht, *Disputes* (1940), *supra* note 13; Brierly, *Law of Nations*, *supra* note 13; G. Scelle, *supra* note 13. For reviews see responses by, e.g., W. Friedmann, 'Textbook Myth on International Law', (1941) 3(4) *Modern Law Review* 299; F. Deák, 'International Law. By L. Oppenheim. Vol. II. Disputes, War and Neutrality. 6th ed. Edited by H. Lauterpacht. New York, London and Toronto: Longmans, Green & Co., 1940. Pp. xliv, 766. Index $17.50', (1941) 35(2) AJIL 403, at 403–4; P. H. W., 'The Law of Nations. By J.L. Brierly. Third edition. Oxford University Press 1942. Viii+272pp. (5s.)', (1944) 26(3) BYIL 235; F. M. G., 'The Law of Nations by J.L. Brierly', (1944) 26(3/4) *Journal of Comparative Legislation and International Law* 86. Other prominent international lawyers in America and England also responded to the general perception of lawlessness and the end of international law among international lawyers: e.g., P. C. Jessup, 'In Support of International Law', (1940) 34 AJIL 505, at 505; F. N. Keen, et al., 'The Future of International Law: Final Report by the Committee Appointed to Consider the Sources of International Law', (1941) 27 *Transactions of the Grotius Society* 289, at 291, 302; P. Marshall Brown, 'Changing Concepts of International Law', (1940) 34 AJIL 503, at 504–5.

of the friend-enemy grouping which 'in no way implies that one particular nation must forever be the friend or enemy of another specific nation' or that enmity is desirable or moral.[21] What matters is the actual possibility of real war. In 1940, France's altered stature vis-à-vis Britain made friendship between the former allies politically, meaning strategically, impossible. The silence of international lawyers acceded the legal facts accompanying military defeat to the political facts and the shifts in British strategy which followed from the Armistice agreements. Their silence affirmed the pattern implicit in the idea of vital interests which co-ordinates political and juridical phenomena around risk and, despite their wish to remain in the disinterested, objective margin of theory, implicates the international lawyer in international politics.

International lawyers confirmed the political authority of their idea of vital interests by not guarding the integrity of juridical questions through careful analysis of the Armistice agreements. Not commenting conceded interpretative questions about the legal status of the terms, including interpretations which might reinforce or contradict the political decisions of the relevant party or third states, could be useful to similar agreements made at the end of war. Silence also missed the opportunity to affirm the existence and relevance of international law against rising concerns that rampant lawlessness meant international law was a myth.[22] Legal commentary, however, affirms the significance of international law as an indicator or technique of global governance even if the result serves political agendas. Numerous textbooks written by Lauterpacht, Brierly and other scholarly luminaries confirmed that the general principles of international law (including the rules relating to Armistice) survived despite breach or resort to violence.[23] These were self-consciously published against the backdrop of war and in the case of Lauterpacht's text, dedicated to general principles of international disputes, coincided with the Armistice, and gestured to its political, not legal, effects.[24]

Despite the absence of close attention, the Armistice agreements also presented lawyers with pertinent juridical questions about the existing status of Germany and France as belligerents because the relevant legal doctrine relating to the validity and effect of peace treaties was equivocal and in the midst of radical transition.[25] There was uncertainty during the Second World War about the duration and bindingness of the contractual form of armistice agreements. Unlike ordinary or peace-time agreements between sovereign states, the conditions of surrender eliminate the semblance of mutuality between parties. This inequality leads to unequal obligations or rights favouring the stronger belligerent or victor and jeopardizes the authenticity of the vanquished state's consent to disadvantageous terms.[26] Though frequently intended to be final, the unequal character of such arrangements generates doubt about whether particular agreements comprise a temporary or indeterminate 'cessation of hostilities' arising from a stalemate or a true ceasefire between belligerents without terminating war.[27] The 1918 Armistice concluding the First World War with Germany did, in fact, signify the end of war. Its finality unsettled the previous possibility

[21]Schmitt, *Concept of the Political*, *supra* note 10, at 34–5.

[22]Friedmann, *supra* note 20.

[23]See, e.g., Lauterpacht, *Disputes* (1940), *supra* note 13; Brierly, *Law of Nations*, *supra* note 13; Scelle, *supra* note 13.

[24]Both scholars nevertheless situate their wartime textbooks within the historical context of the fall of France: Lauterpacht, *Disputes* (1940), *supra* note 13, at *v-vi*; Brierly, *Law of Nations*, *supra* note 13, at 211–12.

[25]For a general survey of some of the juridical questions surrounding the evolution of armistice in international legal thought see, e.g., Y. Dinstein, 'Armistice', *MPEPIL*, September 2015, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e245 (last accessed 1 July 2020); Y. Dinstein, 'Armistice Agreements', in Y. Dinstein, *War, Aggression and Self-Defence* (2001), 44, at 44–51.

[26]Armistice agreements arise in atypical circumstances of sovereign inequality, being a 'convention entre belligérants', and establish 'unilatérale' regimes or systems better described as 'dispositifs' or situations rather than as genuinely bilateral treaties in the ordinary juridical sense: G. G. Fitzmaurice, 'The Juridical clauses of the Peace Treaties', (1948) 73 RdC 259, at 260; R. Monaco, 'Les conventions entre belligérents', (1949) 75 RdC, 273, at 284–5.

[27]The association of armistice with the 'suspension of hostilities' followed from the pre-1919 understanding confirmed by the language used in Arts. 36–41 of the Hague Regulations Respecting the Laws and Customs of War annexed to the 1899 Convention with Respect to the Laws and Customs of War by Land and to the 1907 Convention concerning the Laws and Customs of War on Land. Today, it is clear that the Hague Regulations apply to situations of ceasefire rather than armistice.

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that parties to armistice agreements remained belligerents until the war between them terminated by formal terms of peace. The status of armistice agreements was not resolved until the second half of the twentieth century when state practice confirmed armistice to be the legal route to permanent peace.[28]

There were also numerous specific questions about the legal validity and meaning of the Armistice agreements in 1940. These issues concerned the viability of consent, the duration of forced peace and the political authority of the relevant signatories.[29] Each agreement had features characteristic of a unilateral *dispositif*, imposing conditions on France, including its immediate cessation of hostilities, disarmament and the territorial and political demarcations of German occupation; each agreement anticipated provisional application until the conclusion of a peace treaty or at German election; and each agreement included signatures of military leaders to finalize armistice as a legal accord.[30] More fundamental, the Armistice agreements named military leaders as the 'fully authorized plenipotentiaries' of the German, Italian, and French regimes.[31] The accuracy of the designation was doubtful. International law did not uniformly recognize the political authority of military personnel negotiating the terms of ceasefire. This uncertainty included circumstances where the constitutional regime is or becomes a military order without democratic support.[32] In the days preceding French surrender, Marshal Pétain acceded to military and political leadership of metropolitan France in substitution of the elected government with popular mandate. A consequential question about the legal status of Pétain's regime, to represent France in international affairs, and the prospects for the implied recognition of the Vichy regime as a new belligerent (or friend) did not prompt lawyers to study the Armistice agreements to better understand the independence of the nominal French government or the consequences of renewing diplomatic relations.[33]

By neglecting these questions, international lawyers missed a chance to draw attention to the juridical limits of lawful association between states, and more broadly, to confirm the relevance of international law in establishing the normative standards for peace. The omission left the political reality of the Armistice undisturbed and ignored, in the view of one post-war commentator on the laws of armistice, the necessity of not forgetting 'the juridical structure of these conventions' which always continues despite the strategic imperatives of war.[34] In his wartime textbook, Lauterpacht refers to the political sensitivity surrounding historical rules of armistice by confirming such agreements are 'always conventions of vital political importance affecting the whole of the war' and are 'as a rule, concluded for a political purpose'.[35] His 1940 text did not examine the transitional state of the laws of armistice which was implicit in the permanency of the 1918 agreement and which did not clearly solve until after the Second World War.[36] The failure to more closely analyse the 1940 agreements contradicts Lauterpacht's interwar appeal for all international

[28]See, e.g., Dinstein (2001), *supra* note 25; Dinstein (2015), *supra* note 25.

[29]Fitzmaurice, *supra* note 26; Monaco, *supra* note 26.

[30]Arts. I and XXIV, Franco-German Armistice 1940, *supra* note 1; Arts. I and XXVI, Franco-Italian Armistice 1940, *supra* note 1. The preamble and final signatures to both agreements identify military commanders, including the 'fully authorized plenipotentiaries of the French government', as the authorized representative of the contracting states.

[31]Ibid.

[32]Eg., Fitzmaurice, *supra* note 26; Monaco, *supra* note 26.

[33]For the renewed juridical interest in questions of state recognition at the end of war see, e.g., H. Lauterpacht, 'Implied Recognition', (1944) 21 BYIL 123.

[34]Monaco, *supra* note 26, at 283–4: '*Bien que les conventions entre belligérants soient stipulées pour realiser des buts politiques, et bien que le côté politique l'emporte souvent en cette matiére sur le côté technique, il ne faut pas oublier qu'ici on doit considerer seulement la structure juridique de ces conventions*' – 'Although the agreements between belligerents are made to achieve political objectives, and although political interests often determine technical details, it must not be forgotten that here we must only consider the legal structure of such conventions' [author's translation].

[35]Lauterpacht, *Disputes* (1940), *supra* note 13, at 435.

[36]He referred, for example, to the ceasefire agreement of 11 November 1918 against Germany and the agreement of 28 January 1871 which ended, in Germany's favour, the Franco-German War. Those agreements represent less controversial

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lawyers to adopt a critical attitude to the study of international law, especially in the context of *v*ital interests. By critique, he meant engaging with legal phenomena and avoiding analyses which give 'passive acquiescence' to government preferences by separating political from justiciable disputes.[37] Silence can also signify passive acquiescence in a range of contexts where political interests become the overriding imperative. With hindsight, the frightening new political reality introduced by the 1940 armistice agreements distinguishes the terms from other contexts or issues which did receive critical attention including the existence and continuation of law and its political application.

3.2 Contingent interests and war

The progress of war remained contingent until allied victory in 1944 settled who would author the new international law and the terms of forced peace. When political questions were open or susceptible to influence or reinforcement, vital interests directed juridical attitudes differently. This classification of juridical attitude included the revival of discussion about the legal meaning of armistice agreements made at the end of war. The lawyer's diligent commitment to scientific rigour or critique also continued in the early 1940s when Lauterpacht, who was Jewish with family still in Poland, gave strategic advice to the British and American governments.[38]

The revised version of Oppenheim's *Disputes* reiterates, for example, legal advice given by Lauterpacht affirming the consistency between rules of neutrality and assistance provided by the American government to British forces before it formally entered the war in December 1941 or more fundamentally, the legality of declarations of war by Britain and France in 1939.[39] Lauterpacht also defends the conservativism of his textbook explanations in the Preface which notes the 'anxious phase' of world politics and outlines his intention to do no more than provide an 'exposition of the existing law' in anticipation of systemic change after war.[40] The existing rules of neutrality or self-defence were, however, sufficiently flexible to permit comments that were sympathetic to the war policies of Britain and America which became a formal belligerent in 1942. When political response was critical to state survival, such as how British war strategy should respond after the loss of French alliance, the relevant legal details did not attract comment but rather affirmed the existing political situation and need for a political solution to protect the independence, life and honour of affected states. Similarly, Lauterpacht's revisions to Oppenheim's *Disputes* or Brierly's discussion of general principles in his wartime edition of *The Law of Nations* explicated established principles of international law in a manner which did not interfere with the political choices necessary to protect vital interests.

Nevertheless, war orientated the analytical choices of Lauterpacht and other international lawyers and supplied specific examples when the political effects of academic comment were appropriate, reinforcing decisions of state or eliminating contingent meaning that might interfere with political strategy. In explaining the basic principles of neutrality to readers of Oppenheim's *Disputes*, for example, Lauterpacht's revisions included analysis of events earlier in 1940 to defend the legality of the rescue by a British destroyer of English sailors from a German vessel in Norwegian waters.[41] The *Altmark* case illustrated circumstances where intervention by a belligerent against another in neutral territory would not contravene the relevant principles of neutrality: 'This will be so particularly in cases in which the importance of political or strategic interests

illustrations of the existing rules of armistice due to the historical character of the conflicts in question which resulted in armistice agreements which were similarly uncontroversial or reinforced the priorities of the liberal state: ibid., at 433–41.

[37]Lauterpacht, *Function of Law*, *supra* note 2, at 442–4.

[38]Lauterpacht, *Life of Sir Hersch Lauterpacht*, *supra* note 4, at 141–250.

[39]Lauterpacht, *Disputes* (1940), *supra* note 13, at 556 or 566–72; Lauterpacht, *Life of Sir Hersch Lauterpacht*, *supra* note 4, at 135–6.

[40]Lauterpacht, *Disputes* (1940), *supra* note 13, at *v-vi*.

[41]Ibid., at 556.

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involved, as in the case of the *Altmark*, considerations of humanity, render such action imperative.'[42] How Britain related to other states (as ally, friend, belligerent or neutral) depended on criteria recognizable with the idea of vital interests. Lauterpacht included his analysis of the *Altmark* case after receiving approval on the text from the British Foreign Office, consistent with his wartime contribution as a legal advisor to the British and American governments on numerous matters including the legality of the latter's partiality towards Great Britain before it entered the war in 1942.[43] His selective use of legal history in Oppenheim's *Disputes* is consistent with his sympathetic analysis of the war strategy pursued by Great Britain and America after 1939.

Lauterpacht's analytical choices in Oppenheim's *Disputes* (and its timing) elucidate the political orientation of international law for other liberal internationalists in 1940. When the question of France arose for juridical attention, lawyers focused on navigating the legal consequences of armistice rather than analysing the legality of the armistice agreements. They analysed practical questions including the new status of French citizens as 'friendly' or 'enemy' aliens in allied states;[44] the scope and techniques of the German administration of occupied France and French complicity;[45] international recognition of Marshal Pétain's regime and General de Gaulle's rival regime in exile;[46] the effects of war on private property, contracts, and French credits or investments in occupied France or abroad;[47] the legality of international transactions between neutral and belligerent states relevant to the prosecution of war;[48] and the continuing status of the United States as a neutral state under international law.[49] For international lawyers, the politics of war determined the new predicament of France as a political question with legal consequences that followed the new political fact. One explanation for the lack of attention to the legality of the Armistice agreements is the perception by international lawyers that no law could restrict belligerency or remove the willingness of states to enforce a right of reprisal. Technical debates about contractual validity between unequal belligerents could not solve the paradoxical situation where 'each state is permitted to use force towards its own ends, legal or illegal'.[50] In that situation, how to respond to the military misfortune ceased to be a matter of international law, and became a matter of policy and discretion for each regime.[51]

The sense of there being live political contingencies which could benefit from legal analysis directed the few examples where international lawyers commented on the defeat of France. Phillip Jessup included details of political and diplomatic communiqués between America and Germany during the days either side of Armistice in a 1940 article in the *American Journal of International Law*.[52] The clear message from the American government on 19 June 1940 was that

[42]Ibid.

[43]Lauterpacht, *Life of Sir Hersch Lauterpacht*, *supra* note 4, at 103–7 and for details of Lauterpacht's contributions to the 'war-effort', at 100–40.

[44]R. M. W. Kempner, 'The Enemy Alien Problem in the Present War', (1940) 34 AJIL 443; E. Loewenfeld, 'Status of Stateless Persons', (1941) 27 *Transactions of the Grotius Society* 59.

[45]The principal focus of Rafael Lemkin's 1944 study of the Axis Occupation is the local laws within the relevant zones that followed, but remain separate to, the relevant bi-lateral agreements of relevance for international legal analysis: R. Lemkin, 'Chapter XVIII: France', in R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), at 171.

[46]R. Cassin, 'Vichy or Free France?', (1941) 20 *Foreign Affairs* 102; F. E. Oppenheimer, 'Governments and Authorities in Exile', (1942) 36 AJIL 568, at 572–5, 579.

[47]E.g., Trading with the Enemy Act 1939 (UK); French Credits (British Banks), *Hansard*, 6 August 1940; C. Parry, 'The Trading with the Enemy Act and the Definition of an Enemy', (1941) 3(IV) MLR 161. For discussion of the effect of armistice on the property left in occupied France by French and foreign refugees who fled to unoccupied France see, e.g., M. Domke, 'Problems of International Law in French Jurisprudence 1939–1941', (1942) 36 AJIL 24, at 34–6.

[48]E.g., H. W. Briggs, 'Neglected Aspects of the Destroyer Deal', (1940) 34 AJIL 569; P. Jessup, 'The Transfer of Destroyers to Great Britain', (1940) 34 AJIL 680.

[49]Jessup, ibid., at 688; Q. Wright, 'The Present Status of Neutrality', (1940) 34(3) AJIL 391.

[50]C. Eagleton, 'The Needs of International Law', (1940) 34 AJIL 699, at 702.

[51]Ibid.

[52]P. Jessup, 'The Monroe Doctrine in 1940', (1940) 34 AJIL 704, at 708–9.

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invasion of France violated the ethos of non-intervention underpinning the Monroe Doctrine in the Americas and mandated its non-recognition of any transfer of sovereign territory in Western Europe, referring explicitly to the French request for armistice which resolved the practical transfer of northern France.[53] Jessup clarified that the link between the Monroe Doctrine and international law, 'if any', is the basic right of states to self-defence.[54] The legality of extending the Monroe Doctrine beyond America would necessarily depend on whether the United States considered the integrity of the European state to be politically expedient for them and then, acted. Jessup reflects that there might be a legal justification or argument:

> [b]ut the life of the law, we are taught, is not logic but experience. Now or in a few years' time, a logical argument could be built to support a war of self-defence waged by the United States on the Yangtze or the Volga or the Congo. In essence the argument would surely be political not legal.[55]

The prescience of Jessup's speculations for the subsequent wars of self-defence waged by America in the Middle East, Asia, and Europe is a reminder that politics continues to be the switch that turns pacifistic states to violence and motivates lawyers to speak or remain silent. His views also agreed with Brierly's textbook reflection in 1942 about the political character of the Monroe Doctrine which 'the United States claims the sole right to interpret' according to its own interests.[56]

A revival of interest in the rules of armistice after the liberation of France exaggerates the inattention by international lawyers to the legal significance of the 1940 agreements.[57] The content and scope of the peace agreements against Germany and Italy immediately became a subject for juridical analysis as did the settlements ending the First World War.[58] Juridical comment presumed the Axis occupations during war were illegal without analytical elaboration or attention to individual clauses.[59] The presumption of illegality, however, was itself politically expedient because it permitted the continuation of the Franco-British alliance throughout the period of German occupation, at least as a legal technicality, and guaranteed a range of subsidiary entitlements to Britain vis-à-vis private parties as a consequence.[60]

Further, all liberal commentators presumed the unconditional military surrender of Germany on 7 May 1945 and the arrangements which followed for international occupation and reparations

[53]Ibid.

[54]Ibid., at 710.

[55]Ibid., at 711.

[56]Brierly, *Law of Nations*, *supra* note 13, at 252–3.

[57]E.g., F.A. Mann, 'The Present Legal Status of Germany', (1947) 1 ILQ 314; H. Kelsen, 'The Legal Status of Germany', (1945) 39 AJIL 518; H. Kelsen, 'Is a Peace Treaty with Germany Legally Possible and Politically Desirable?', (1947) 41 APSR 1188; Lauterpacht, *Disputes* (1940), *supra* note 13, at 214, 552–5; H. S. Levie, 'The Nature and Scope of the Armistice Agreement', (1956) 50 AJIL 881; L. Preuss, 'International Law in the constitutions of the Länder in the American Zone in Germany', (1947) 44(4) AJIL 888; M. Rheinstein, 'The Legal Status of Occupied Germany', (1948) 3 *Michigan Law Review* 23.

[58]Fitzmaurice, *supra* note 26; Monaco, *supra* note 26.

[59]Eg., Fitzmaurice, ibid.; Monaco, ibid.; Levie, *supra* note 57; 'In re Suarez', (1943–1945) *Annual Digest of Public International Law Cases* 412 (see editorial comment by Lauterpacht confirming the temporary dimension of armistice and the concordance with the Court's finding that Germany remained the enemy of France throughout occupation). Subsequent scholarship similarly presumes the illegality of the 1940 arrangements, see, e.g., Y. Arai-Takahashi, *The Law of Occupation* (2009), at 30–7; E. Benvenisti, *The International Law of Occupation* (2012), at 135–7, 140–2.

[60]In one instance, France successfully defended its continuing right to the benefit of an insurance contract for requisition of French cargo by the British navy in August 1940 on the basis that Britain continued to qualify as the legal ally of France, given that the armistice agreement violated the mutual declaration of both states not to seek a separate peace: *Societe Commerciale des Proudits du Petrole et Autres v. French State* (Court of Appeal of Paris, 18 July 1945), 1946 ILR 192.

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pursuant to the Berlin Declaration on 5 June 1945 and the Potsdam Protocol were legal.[61] The obvious difference between the settlements of 1919 and 1945 and the armistice of 1940 was not merely that the first agreements initiated permanent peace beyond immediate disarmament and the extended period of international occupation also resulting from the earlier agreement.[62] The latter agreements confirmed Allied victory and reset the legal trajectory of world governance in line with the worldview of liberal states.[63] The return of juridical interest in ceasefire arrangements in 1945 by the expert legal community revealed the political bias underpinning its ideal of international order and community *and* its influence on professional practice. The enemy's law could not, in 1940 or afterwards, signify 'law' for the purposes of analytical engagement by international lawyers when vital interests determined the limits of their international law and disappointed the strategic goals of their state.[64] Such law, of invasion, surrender and occupation, functioned as the indicator of a new political reality and of the need to navigate it by political means. Armistice was the peak wartime example of the ultimate control of vital interests in the affairs of states and of the dependency of international law on the political reality and the perception that law might further particular options when the political situation was contingent and uncertain.

4. Arendt, international law and vital interests

Arendt's political theory elucidates further complications of the conceptual intersection presented by vital interests. For her, vital interests signify an alternative way of comprehending the interactions relevant to legal and political communities which, despite her focus on the interests of citizens, extends to international relations and international law. The adjustment is self-conscious and follows from her general theory of law and the generality of her political vision evident from its repeated adaptation in her oeuvre to numerous political fields. These include the city-state, the modern nation-state, and the relations between states. Each constitute a public sphere for studying her general theory of politics and law. Each become another context for understanding her sense of vital interests as a constitutive juncture or meeting which is assured by law.

Arendt's reflexive description of law is provocative for reflecting on juridical responses to the Armistice agreements because she characterizes law as a mechanism and as a mirror for political function and similarly casts politics as a relational category.[65] Politics and law exist in a mutual, generative loop. That is, law reproduces and conditions politics, as a realm of democratic exchange, as much as politics precedes and shapes law as a reference for stabilizing the political system for the future. The insight changes the character of political interests. Though politics depends on difference and the exchange of viewpoints, interests describes the visceral space of recognition and relation that exists between (or *inter*) political agents and clarifies not merely their relation but the reality of political agency. The sovereign becomes visible as a sovereign not alone

[61]Act of Military Surrender, (Reims, France, 7 May 1945) between German High Command and Allied Expeditionary Forces and Soviet High Command (witnessed by French military representative) ('1945 Surrender'); Declaration Regarding the Defeat of Germany and Assumption of Supreme Authority by Allied Powers (signed 5 June 1945, supplemented by additional requirements 20 September 1945) 60 Stat 1649 ('1945 Berlin Declaration'); Protocol of the Proceedings of the Berlin (Potsdam) Conference (USSR, US and UK) (signed 1 August 1945) 2 Foreign Relations of the United States 1383 ('Potsdam Protocol').

[62]The Potsdam Protocol, Allied occupation continued until 1955 and the Soviet military remained in East Germany for decades longer: Convention on the Settlement of Matters Arising out of the War and the Occupation between the UK, France, USA and the Federal Republic of Germany (signed 26 May 1952, amended by Schedule IV of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany 23 October 1954, entered into force 5 May 1955) 1656 UNTS 29. For discussion on the legal and political prospects for concluding a final peace with Germany see, e.g., Kelsen, 'Peace Treaty', *supra* note 57, at 1190.

[63]Ibid.

[64]G. W. Keeton et al., 'The influence of international law on international conduct', (1947) 33 *Transactions of the Grotius Society* 3, at 6.

[65]Arendt, *supra* note 16.

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but by how and when and where it encounters its adversary as it would a friend. Interests are vital but never cancel the vitality of another. The friend-enemy grouping is missing from Arendt's account of politics. In its place is a positive and evolving version of politics and political relationship that is contingent on mutual exchange.

Classical thought rather than merely the experience of crisis directs Arendt's reflexive concept of law. She refers, for example, to the legacy of Roman law evident in the modern system of treaties that states create as a consequence of political encounter and which figure legal agreements as 'guideposts of reliability' or 'islands of predictability' but leave intact, in the ideal formulation, the unpredictable and spontaneous potential of democratic change.[66] The cruder analogy supplied by the Greek conception of law, as a boundary for the city-state, identifies rules as a condition for politics rather than as a technique of political expansion.[67] The Romans and Greeks meet by characterizing the conjunction between law and politics as necessary for social organization.

Legal theorists, particularly those interested in what Christian Volk names the 'triad of constitutionalism' comprising 'law, politics and order', also read Arendt's concept of law as extending her political vision.[68] Such studies of the 'internal connection' or 'reflexive structure of legal space' focus on Arendt's descriptions of Greek *nomos* and Roman *lex*, the adjustments noticed in eighteenth century revolutionary constitutions, and her sporadic commentary on late-modern law, including its international orientation. When these theorists encounter international law, they focus on contexts addressed by Arendt and do not interrogate the broader implications of her views. Arendt invites such readings by revisiting her concept of law and politics in numerous historical contexts. Her commentary on the inadequacies of the interwar minorities treaties to protect Europe's stateless peoples, for example, reveals the negative potential of the reflexive character of law evident in the modern nation-state system, its genesis in the aberrations of the classical ideal of politics in the eighteenth century revolutions, and the legal permissions for the political crisis erected by the international community in 1919.[69] She criticizes the tolerance of interwar international law for the egoism of the nation-state which meant 'well-meaning' internationalists never made laws to eliminate statelessness.[70]

The international question of law and politics and its possible extension to other contexts of international concern left under-analysed or un-analysed by Arendt, such as the fall of France, enters her theoretical imaginary via the interwar crises of the nation-state. There, the problem of vital interests or the ego-concerns of the sovereign state reveal missed opportunities for international law to support the different idea of interests identifiable with the classical example. Arendt's theoretical reflections give precision to the seeming simultaneity between the legal and political interests in 1940 when the vital interests of the liberal state co-ordinated political responses to the Armistice and coincided with juridical silence. Understanding the reflexive aspect of the professional pause follows from Arendt's explication of Roman law which foreshadows the expansionist ambition of state interests and the contractual basis of the modern state system. The

[66]Ibid.

[67]Ibid., at 196–8.

[68]C. Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (2015), 5–8; C. Volk, 'From *Nomos* to *Lex*: Hannah Arendt on Law, Politics and Order', (2010) 23 LJIL 759; H. Lindahl, 'Give and Take: Arendt and the *nomos* of political', (2006) 32(7) *Philosophy and Social Criticism* 881.

[69]She famously observes the multiple connections between political disaster and the absence of adequate juridical intervention by states during the interwar period. The failure of the Versailles' peace settlements to protect Europe's minorities from persecution was obvious, for instance, because influential states 'were neither willing nor able to overthrow the laws by which nation-states exist' or redefine the abstract constitutional protections which bent in interwar Europe to the will of the nation, and premises her historical study on totalitarianism for new laws and guarantees for political exclusion: H. Arendt, *The Origins of Totalitarianism* (1950), at *ix*, 272–3. For a further example of the negative potential of her reflexive concept of law, Arendt's famous euphemism, the 'right to have rights', explains the exclusionary logic of the eighteenth-century model of universal entitlement which restricts rights to citizens without further guarantee for inclusion within the political community: *Origins*, ibid., at 294–7, esp. at 295–6.

[70]Ibid., at 279.

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classical model also reveals the process by which the state regenerates and extends its interests by violence and unequal agreements. The example reminds international lawyers about the community of interests shaped by the language and logic of law, including the voices it silences, and the power politics that continued to guide the practice of international law after 1939.

Arendt identifies the Roman *lex* with a specific idea of empire as 'a cooperative community' extended by war, fortified by treaties which in turn, reset 'power politics' for further expansion.[71] From this equation, the Romans initiated the spatial possibility of the Western world as a *world* derived from politicizing the space between peoples through peace accords.[72] Armistice provides a late-modern example of the Roman practice of founding 'a new political arena, secured in a peace treaty according to which yesterday's enemies became tomorrow's allies'.[73] Arendt's observations also suggest a more subtle aspect of the constitutive reflex between law and politics in 1940. She differentiates the modern state system because co-operation in the Roman sense assumed that the 'thing to do was to allow an enemy city to live on as an opponent' in permanent, unequal alliance.[74] The viability of empire depended on the continual revision of the political field which depended on inequality and on the ultimate threat, to recall Schmitt's observation about all political relationships, of meeting one's equal as one's opponent in war.[75] The same dynamic replayed in the 1940 Armistice agreements by crediting struggle and inequality as the productive contingency of the political and its renewal. Law stabilized the arrangement according to the negative limit recognizable with *lex*. Armistice was an unequal arrangement determined entirely by prior violence and the risks of violent return which in the event, precluded democratic encounter between the relevant participants, established a relation conducive to the victor's territorial ambitions, and left the new political realm vulnerable to further revision. Armistice was the legal mirror of the politics of war. Though Arendt distances *lex* from the modern treaty system, traces of *lex* explain the reflex at play in 1940 and her critique of the unequal and destabilizing effects of the peace settlements of 1919.

Lex explains the interactions between law and politics which constitute, stabilize, and extend both fields of experience. According to the imperial model, a treaty follows state expansion to stabilize the new arrangement and provides a springboard for further political extensions by the conquest of new communities, followed by further juridical settlements etc. The Roman example also identifies modern international law as part of the developmental trajectory of international relations based on the inequality between state interests. The pertinent lesson from *lex* for late modern international law is twofold. First, Arendt highlights that law and politics not merely relate as separate fields of experience or expertise but are necessarily constitutive of the other and essential to the other's proper function. The emphasis on the interconnectedness of law and politics revises the assumption implicit in much interwar legal theory, including the perspectives of Brierly and Lauterpacht, which assumes the discontinuity between the two categories. The popular juridical assumption means that the reign of law has pacifistic effects insofar as it works as an external control on political discretion. In the context of discussing vital interests Brierly acknowledged, for example, 'it is inevitable that the interests of defence should be given priority over everything else, including respect of law' and that the future of the rule of law depends on juridical adjustment to political expectations.[76] Lauterpacht's explication of the political character of all international disputes, including legal controversies, highlights the artificiality of protecting some disputes as political and therefore as non-justiciable.[77] This does not lead to simultaneity between political and legal interests but rather confirms the proper function of law as

[71]H. Arendt, 'Introduction into Politics', in H. Arendt, *The Promise of Politics* (2005), 93–200, esp. at 186–7.
[72]Ibid., at 189.
[73]Ibid., at 184.
[74]Ibid. For further consideration of the Roman solution for war see, e.g., Arendt, *Origins*, *supra* note 69, at 202.
[75]Schmitt, *supra* note 10.
[76]Brierly, 'Vital Interests' (1944), *supra* note 2, at 56.
[77]Lauterpacht, *Function of Law*, *supra* note 2, esp. at 149–64.

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an external moderator of the relations between states. Separation means peace is a legal and not merely a political postulate for Lauterpacht because 'juridical logic inevitably leads to the condemnation of, as a matter of law, of anarchy and private force'.[78] A reflexive concept of law integrates political and legal function so that the proper function of either field depends on the function of the other. The further lesson that follows is for the international lawyer who ordinarily stands, as does Brierly or Lauterpacht, on the margin of politics as the expert of a related but different field. When law is a technique for stabilizing political relations, either as a border or as an agreement, the lawyer ceases to be marginal and is suddenly necessary to the existence and progress of political function.

Arendt's reflexive idea of law elucidates why problems of conflicting sovereigns continue with the co-operation of lawyers despite their commitment to the rule of the law. Arendt's description of interconnected projects points to greater responsibility of legal experts but does not, of its own, provide a solution. Noticing the reflex that relates and separates politics and law, animating each as a consequence, refocuses attention on what happens in the space between legal and political practice or other points of encounter between different categories of interest.

5. Arendt and international friendship

Though international lawyers knew that solving the priority states give to vital interests mattered to the outbreak and conduct of war, the progression of international law during war merely affirmed the intractable reality of violence. The simultaneity between law and politics meant political interests were catalysts for crisis and crisis-response that international lawyers could not and did not resist. Arendt addresses the dilemmas presented by the concept of vital interests for international law and international lawyers by reworking the political idiom of interests. In light of her thinking about political relationship, interests cease to signify the criteria which distinguishes one citizen or state from another, as the case might be depending on the relevant political community. Her concept of interests enters the juridical conversation as a proposal for a different technique for stabilizing the interactions and common purpose of members of a political community. Her idea of interests reproduces the reflexive dynamic visible in *lex* for the political field without its imperial associations and extends by analogy to all political fields, according to the general application of her political theory. Her idea offers a corrective to the expectation of risk underpinning the legal idea of vital interests. Arendt envisages how sovereign interests or political interests require states to meet as friends.

Arendt utilizes the term interests or self-interest as a verb. Interests refers to the interaction or generative encounter which connects differently situated political agents and animates all political function (of groups, or agents) rather than selfish purpose. For Arendt, silence is always apolitical or dehumanizing insofar as it denies the potential agent's audibility and therefore, its visibility or existence. The constitutive function of interests applies insofar as political encounter is an indicator of group or individual personality. Arendt explains that the 'vitality' of interests depends on 'persuasion, negotiation, and compromise, which are the processes of law and politics' and produce new forms of democratic cohesion that are mobile, unpredictable and susceptible to change. Her conception of political interest is never divisive.[79] For Arendt, the meaning of interests follows etymological logic. She defines 'worldly interests' as the '*inter-est*, which lies between people and therefore can relate and bind them together' in a 'living web of human relationships'.[80] *Inter-est* is literally the correlation that arises between [*inter*] agents and their unique and combined beingness [*est*] that materializes in response. Arendt's resignification of interests deliberately contradicts the revolutionary category of *fraternity* and anchors her later, incomplete proposals for a

[78]Ibid., at 446.
[79]Arendt, *Origins*, *supra* note 69, at 77.
[80]Arendt, *Human Condition*, *supra* note 16, at 182.

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networked system of international law. Her idea also articulates a counterargument against the presumptions of her generation which reproduce the theoretical opposition friend-enemy as a rule of international order.

Arendt begins her reorientation of interests by examining the interwar and wartime experience of Europe's stateless refugees, literally her Paris of 1940, as evidence of the false promise of *fraternité*. This was the geographical and symbolic site of the breakdown of her ideal of interests and the reflection of that mutation in eighteenth century constitutional law. Paris 1940 figured for disappointed internationalists differently as the symbolic site of their broken interests in strategic alliance with France and their new fears. When internationalists encounter Arendt's analysis of political friendship in the context of the nation-state, they also encounter the fundamental tenets of her theory of all political association. States are not citizens but rather figure as the subjects which meet each other beyond the state by diplomatic exchange and the laws which confirm each as a political actor and potential friend. The logic of her political theory does not change. Rather, Arendt's discussion of *fraternité* offers a context for exploring the potential for reflecting on how a different definition of vital interests might expect friendship, even between states, rather than risk.

Though Arendt seldom uses the language of friendship, her critique of *fraternité* as the companion to the universal rights of *liberté* and *equalité* makes an exception. Her discussion of friendship corrects the mistakes of universal entitlement and corresponds to her notion of interests and by analogy, offers a vocabulary with which to comprehend international political relationship. Arendt criticizes the revolutionary category for confusing brotherhood with friendship because it assumes solidarity depends on the 'human nature common to all men' and the involuntary impulse to 'reach out' to or 'empathize' with the suffering of another.[81] That is, the revolutionary dream of a society of brothers mobilizes through the emotional recognition of one's own capacity for pain, sorrow, desire or happiness, in the experience of another. In the revolutionary tradition, reaching out to or generalizing the suffering of *les malheureux* (in the eighteenth century) or the *les miserables* (in the nineteenth century) did not obviate their subjugation to new regimes.[82] The eighteenth-century rationality of sentimental alliance between brothers disguised the truth that diminishes universal categories in historical context. The liberal vision depersonalizes the human being and forms aggregates of interest which assume that burying the self in the human experience of others could 'establish justice for all'.[83]

The political flaw of *fraternité* (and *liberté* and *equalité)* reproduced as the plight of Europe's stateless who, like Arendt, left fascist persecution for new forms of exclusion in interwar France. Her story of the interwar refugee recounts the 'weird unreality' of those left out of the universal groupings, the 'self-evident' rights which humanize citizens and restrict privilege to the already entitled, and who formed a strange tribe of brothers, 'a fraternity of closely packed human beings' as a consequence of shared exclusion.[84] The brotherhood of *émigrés* developed in the shadow of real equality between French citizens under the conditions of 'absolute worldlessness' where the facts of common humanity was merely the 'warmth' felt between pariahs. This 'fraternity' exposes how the 'humanitarianism of brotherhood scarcely befits those who do not belong among the

[81]H. Arendt, 'On Humanity in Dark Times: Thoughts about Lessing', in H. Arendt, *Men in Dark Times* (1968), 3, at 12.

[82]In her monograph-length critique of revolution, Arendt details her argument against the rhetoric of eighteenth century humanism: *On Revolution*, *supra* note 16, at 76–81. The gestural expressions of *fraternité*, the 'high-flown phrases of the most exquisite pity', flow 'with passionate intensity, towards suffering man himself' without listening to or asking questions of his group, or orchestrating meaningful change but rather, reveal a technique of violence. In the absence of genuine political concern for another, compassion or '[p]ity, taken as the spring of virtue, has proven to possess a greater capacity for cruelty than cruelty itself', and reflects the catch-cry of the brief revolutionary government identified with the Paris Commune in May 1871: '*Par pitié, par amour pour l'humanité, soyez inhumanins!*' [By pity, by love for humanity, be inhumane! (author's translation)].

[83]Arendt, *Lessing*, *supra* note 81, at 14.

[84]Ibid., at 16.

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insulted and the injured and can share in it only through their compassion' for another group and can only ever interpret or speculate about the experience of another.[85]

To mistake the intimacy possible among the outcast with the humanizing aspect of political friendship is the late-modern orientation of *fraternity*. The error elucidates the problem at the root of the dilemmas shared by the legal concept of vital interests. Both categories mobilize concern for oneself or for the other by reference to a 'type' of sentiment which depends entirely on the relevant 'interpreter'. Arendt explains the irrationality that co-ordinates the eighteenth-century presumption of rationality:

> In such a state of worldlessness it is easy to conclude that the element common to all men is not the world, but "human nature" of such and such a type. What the type is depends on the interpreter, it scarcely matters ...[86]

The friend-enemy pairing similarly uses arbitrary divisions that depends on the subjective concerns prioritized by a relevant opponent. This was, of course, the British Prime Minister's and international lawyer's response to the fall of France and the returning dilemma of the doctrine of vital interests.

Arendt's response is to erase the sentiment and bias that distorts politics and depletes it of associative and pacifist function. She says the 'classical drama of friendship' assumes 'humaneness should be sober and cool rather than sentimental; that humanity is exemplified not in fraternity but in friendship; that friendship is not intimately personal but makes political demands and preserves reference to the world'.[87] The modern conflation of friendship and fraternity makes 'it hard for us to understand the political relevance of friendship' because it assumes 'friendship' means 'love for another' and among political units, 'no more than the absence of factions and civil war'.[88] A relationship that makes 'political demands' and 'preserves reference to the world' requires, to generalize the characteristics of Arendt's political vision, the process of encountering the other as part of a continuing, fluid, and unpredictable process of political exchange. That encounter is anathema to the patterns of interpreting, sensing or essentializing that mobilize from compassion or fear of another or desire for self-preservation. Rather, politics is 'talkative', where sentiment is 'mute' and produces 'gestures or expressions of countenance' (of which violence is one), and produces and reproduces the public world, literally substantiates the public arena as a political thing, via the exchange. The international lawyer who recommits to friendship but repeatedly struggles with the problem of vital interests can begin to understand, from Arendt, 'the delusion that law creates order', as Brierly thought, when 'it is only order already established that can provide the soil in which law can take root and flourish', and why the existing world order suffers recurring fractures as well as the self-denying character of professional silence.[89]

Though the word 'friendship' or 'friendly relations' is missing from Arendt's study of international law, the concept underpins her reflections on the prospects for a new networked system of states and international law. Toward the end of her life, in the early 1970s, she extended her thesis of politics as a politics of *inter-est*, evident in her earliest writings and in her earliest comments on the deficiencies of international law, to the problems implicit in world order. Then, she explained the limits of international law required revisions to its functional logic so that the 'final resort should not be *super*national' insofar as it reflected the existing inequality of state influence but '*inter*national', meaning referable to an authentic federated structure of government *between*

[85]Ibid.
[86]Ibid.
[87]Ibid., at 25.
[88]Ibid., at 14.
[89]Brierly, *Vital Interests* (1944), *supra* note 2, at 56.

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states.[90] Though the international question never solved for her through human rights or other universal guarantees, her idea of interests progresses the search for new forms of supranational governance.[91] The radical aspect of Arendt's idea of interests is its simplicity which challenges the existing conversation about vital interests by reversing its presumption of separation and indifference to the other's concerns *and* further, by emphasizing the world-building and world-preserving character of speaking to each other. If 'vital interests' do not depend on state preference or the logic of the friend-enemy pairing, then states would not greet each other in anticipation of the likeliness of war and internationalists would not remain silent and sure of the end of law.

6. New thoughts on the impasse of vital interests and the international lawyer

International lawyers conceded the juridical meaning of the Armistice agreements in 1940 to political decision and temporarily neglected debates about the dilemmas of vital interests. The absence of juridical comment deferred responsibility for the future of international society to the military encounters that ensued and ensured the political legitimacy of the legal profession as a 'silent column' which did not interfere with the dynamic progression of vital interests by states.[92] The fall of France poses questions not merely about the scope or limits of vital interests, as a legal doctrine, but about the vitality of legal function in times of crisis if the analytical talents of lawyers spontaneously adjust, despite being alert to the pacifistic function of law, to the vital interests of states during war. Not speaking for or against law in matters concerning the vital interests of states conflated the legal and political facts. As a member of an intellectual community that parallels the society of nations and progresses the rule of law through expert comment or elucidation, the international lawyer's silence is also self-refusing or self-limiting because it dissolves the distinctiveness of their expert margin into the choices of nations. The manoeuvre was anything but benign. The choice of silence politicizes the international lawyer and disguises the concession of his or her hypothetical commitment to peace.

The critical displacement goes further. Professional silence coincided with the highpoint of military violence against the liberal state, confirming Arendt's observation that 'sheer violence is mute', but exceeded the moment of political disappointment and the 'fifth column' scare and made the meaning of the Armistice agreement a permanent, juridical secret.[93] As a peak point in international diplomatic history and in the history of ceasefire, the juridical relevance of the two Armistice agreements for the relations of states figures as an important stage in the narrative of vital interests between states at war. Self-censorship confirmed the gap between friendship, as a political citation that mobilizes and progresses through speaking as Arendt observes, and the preference of states and lawyers for resolving disputes via strategic alliance that organizes according to risk. That gap informed the reflexive habits of international law as a body of rules and as a professional practice by a professional elite dedicated to the interests of international order. The gap between the kinds of friends and interests to which states yield and the kind of interests which stabilize the political field and enable the rule of law widened with the permission of the international legal profession. That was the nadir of vital interests in June 1940 that deepened and leaves a historical scar. The international lawyer is relevant to the progression of the international political situation, just as Lauterpacht's criticism of the passive acquiescence of some legal commentators to

[90]H. Arendt, 'Thoughts on Politics and Revolution: A Commentary', in *Crises of the Republic* (1972), 199, at 230–1.

[91]Brierly, *Vital Interests* (1944), *supra* note 2, at 51.

[92]The 'fifth column' and encouragement by the Ministry of Information for civic retaliation to it by formation of a 'silent column', to ensure the secrecy of all war-sensitive information, referred to the widespread belief that there were enemy agents within the population relaying important information to Germany. The 'fifth column' scare peaked in May–June 1940: see, e.g., J. Fox, 'Careless Talk: Tensions within British Domestic Propaganda during the Second World War', (2012) 51(4) *Journal of British Studies* 936.

[93]Arendt, *Human Condition*, *supra* note 16, at 26.

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non-compulsory arbitration clauses suggests. To be talkative is a characteristic of political behaviour, but 'finding the right words at the right moment ... is action', and in June 1940 and beyond, there seemed to be no juridical motivation among international lawyers to speak, even to each other.[94] Conceding or respecting the priorities of the sovereign state is not necessarily a political gesture and in any event, fails the international lawyer's rhetorical commitments to international solidarity pursuant to the rule of law.

When Arendt defends the pacifistic potential of political action, she reworks the idea of interests to mean the power that finds its proper location between two or more political subjects and which acquires energy through speaking. To notice the talkative character of interests empties political relationships, between citizens or states, of the tendency for belligerent solutions though not by another utopian substitution. The progression possible through talking is the simpler prospect of addressing or clarifying differences by discovering the right words at the right moment before the moment passes. Law maps and retriggers the exchange and its progression. The potential initiative of the international lawyer during political climax or crisis signifies him or her as a figure of political relevance, though not necessarily a Lauterpacht or a Brierly with the same critical ambition, seniority or readership, whether by witnessing, silently, or by reflection on the juridical details. Arendt's counter-suggestion to her generation begins where others, including politicians, diplomats, lawyers, and intellectuals, merely witness history unfold and find disappointment.

Schmitt elaborated how the conceptual impasse of vital interests proceeds by each of us, as potential agents, in several passages about the proximity between the enemy and ourselves. The passages, written shortly after the liberation of France at the end of the Second World War, note that 'the enemy defines us' and the 'enemy is he who defines me' (1947) and reiterate, '[t]ell me who your enemy is, and I will tell you who you are' (1949).[95] The existential location of the enemy within ourselves exaggerates in the context of civil war, where there are multiple antagonists, and presents a metaphor for understanding why the circle of violence ultimately depends on ourselves:

> Is it not a sign of inner conflict to have more than one real enemy? If the enemy defines us, and if our identity is unambiguous, then where does the doubling of the enemy come from? An enemy is on the same level as am I. For this reason, I must fight him to the same extent and within the same bounds as he fights me, in order to be consistent with the definition of the real enemy by which he defines me.[96]

Arendt's concept of interests confirms another version of Schmitt's idea by envisaging each subject as an agent or potential agent of the political scene. Her difference arises from her positive inflection. She turns the cul-de-sac of vital interests that hinges on the risk of war into an opportunity for international friendship. Her idea of interests confirms a different conception of law can facilitate the internationalist's hope for a more co-operative international society. Rules serve order when reconceived as flexible, responsive and stabilizing boundaries for the everyday encounters and disagreements which enliven and affirm political relations.

In the perspective invited by Arendt's reworking of the political and legal category of vital interests, the 'I' who 'defines me' as the enemy also steers political experience as a permanent work in progress. Politics unfolds according to the choices of those who become agents in its processes by speaking to each other. The suggestion recasts the legal record of the fall of France as a political

[94]Ibid., at 85.
[95]Ibid., at 85.
[96]C. Schmitt, *Theory of the Partisan* (1962), 85.

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citation with a hanging question about what part law might play as an instrument of order if the lawyer had spoken. At the very least, analytical discussion among those experts revitalizes the category of vital interests against the certain expectation of violence that accompanies its more familiar legal designation. When the expert speaks, he or she also confirms the continuing integrity of legal phenomena and the interest of international lawyers in the progression of political strategies for peace.

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