Too much history.

From war as sanction to the sanctioning of war.

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1. INTRODUCTION

The enshrinement of the prohibition for States to use force in Article 2(4) of the Charter of the United Nations of 26 June 1945 is mankind’s most ambitious attempt, to date, to ban war. The UN Charter stands at the end of an evolution by which the right of States to use force was progressively limited. This evolution started at the turn of the 20th century with the two Hague Peace Conferences (1899/1907). Historians of international law and international lawyers alike have written about the rise of the *jus contra bellum* as one of the key changes that revolutionised international law and divided the ‘classical international law’ of the 19th century from the ‘modern international law’ of the 20th century.2 They have caught this revolution in terms of a stark contradiction between the licence of the 19th century for States to resort to force and the almost complete, albeit far from effective, prohibition of force in the Charter era. Under this historical narrative, the *jus ad bellum* – the laws about the conditions under which war is legal

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of the 19th century was reduced to the mere acceptance that the decision to resort to war fell within the preserve of State sovereignty and was a matter of policy rather than law. The *jus ad bellum* shrunk from a ‘law to war’ into a ‘right to war.’ Some scholars have added that the revolution of use of force law after World War I reached back beyond the 19th century towards the tradition of the just war of the late Middle Ages.3

This narrative has historical merit. It is sustained by the writings of 19th and early 20th century international lawyers.4 But, we should be careful not to turn a blind eye to the elements of continuity in the history of use of force law. Two important nuances need to be made. First, although ultimately the sovereign States of the 19th century had a right to resort to force, the *jus ad bellum* had not been emptied of all meaning. The State practice of the 19th century showed that States still justified or condemned forcible actions under a widely accepted, albeit evolving, framework of reference that partook in the tradition of just war. Doctrinal writers may indeed have relayed these justifications to the domain of morals and politics, but facts show that a customary use of force law that had not shed the influences of the just war doctrine persisted. This sheds new light on the so-called return of the just war of the 20th century. Second, the gradual rise of the *jus contra bellum* did not occur in a context where there was hardly any material use of force law. This rise occurred in constant dialogue with the existing customary use of force law. In that sense, the *jus contra bellum* of the Charter did not mark a clear and utter break with the old *jus ad bellum*.


Throughout the narrative of the intellectual history of war in the West runs the scarlet thread of the just war tradition. Throughout the ages, ideas about the justification of war have been changed, twisted and turned around a stable nucleus of ideas. The central core of that tradition is that war is a reaction to an injustice committed by the enemy. The just war tradition roots back to the Roman *jus fetiale*, the stoic concept of natural law as evidenced in the work of the Roman orator Marcus Tullius Cicero (106-43 BC)\(^5\) and early Christian theology, in particular the writings of Saint Augustine (354-430).\(^6\) Augustine’s thought found its way into the *Decretum Gratiani* (c. 1140), the basic authoritative text of late-medieval canon law. The just war doctrine came to its full articulation in the writings of the theologians and canon lawyers of the 12\(^{th}\) to 14\(^{th}\) centuries. The Dominican theologian Saint Thomas Aquinas (1225-1274) moulded it into its classical form.

Aquinas distinguished three conditions for a war to be just: *auctoritas, causa justa* and *recta intentio*. *Auctoritas* meant that a war could only be waged by or under the authority of a sovereign. Most late-medieval writers did not list possible just causes, but confined themselves to a broad definition. In general, it boiled down to the view that a just war was a reaction against

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\(^5\) Cicero, *De officiis* 1.11.33-1.13.41; idem, *De re publica* 3.33.

a prior or threatening injury by the enemy – ‘ulcisci iniuriam’ in the words of Augustine. It was a form of law enforcement (executio juris), of forcible self-help in the absence of a superior authority to turn to.

In his *De jure belli ac pacis* (1625), the Dutch humanist Hugo Grotius (1583-1645) discerned three just causes: defence, the re-vindication of property or rights and the inflicting of punishment. The final condition, recta intentio, implied that the war needed to be waged with the intention to do justice, and ultimately, to attain a just peace.

In relation to the classical just war doctrine, three important remarks must be made. First, war was discriminatory. Except for the rare case when both sides had to be considered unjust, a just war was a war between a just and an unjust side. In a consequential application of the doctrine, the jus ad bellum spilled into both the jus in bello – the laws of war properly speaking, i.e. the laws regulating warfare itself – as well as the jus post bellum – the laws about the ending of war. Only one side had a right to be in the war and could thus benefit from the so-called jura belli, the rights of war such as the right to use violence, to take loot, to hold enemy persons to ransom or make conquests. The soldiers on the unjust side only retained their natural right of self-defence in case of personal attack. A just peace stood at the end of a just war. This implied that the claim over which the war had been fought had to be attributed to the just belligerent and that he would receive compensation for all the damages suffered because of the war. The just side had a right to punish the enemy as a means to guarantee against new wrongs. In the words of the neo-scholastic theologian Francisco de Vitoria (c. 1480-1546), the victor of a war had to ‘think of himself as a judge, sitting in judgment between two

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8 Hugo Grotius, *De jure belli ac pacis libri tres* (1625) in JB Scott (ed) *Classics of International Law* (Clarendon Oxford 1925) 2.1.2.

9 Thomas Aquinas, *Summa Theologiae* IIaIIae 40.1.
commonwealths, one the injured party and the other the offender.'

This, however, did not mean that the writers of the just war doctrine equated victory to justice. Just war was not an ordeal; nothing guaranteed the victory of the just side. It could only be deplored that its defeat would lead to injustice.

Second, the scope of the just war doctrine was theological because it was chiefly the product of theologians and canon lawyers. The just war doctrine was the answer to the question of what partaking in war did to one’s eternal soul. Nevertheless, the just war doctrine was also picked up by late-medieval Roman lawyers and those writers who discussed the actual practices of war under the code of chivalry. To these authors, the matter at hand was the actual effects of the justice of war in the here and now. At this level, some of the main civilians struggled with the discriminatory application of the jura belli, which was not sustainable in practice. In this context, they made reference to the concept of postliminium from classical Roman law. According to the Digest, postliminium – the right of a prisoner of war to be restored to all his prior rights and property after his liberation – applied between hostes – enemies in a properly authorised war between independent peoples. On this basis, Bartolus of Sassoferrato (1314-1357) acknowledged the indiscriminate application of the jura belli to both sides in a war between sovereigns. The later commentator Raphael Fulgosius (1367-1427) and the humanist jurist Andrea Alciato (1492-1550) would take this a step further by accepting that a war could be just on both sides, so that all belligerents enjoyed equal rights during the war. This

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11 E.g. Honoré de Bonet, L’arbre des batailles (c. 1386), GW Coopland (transl) The Tree of Battles of Honoré de Bonet (Liverpool UP Liverpool 1949), whose work was largely based on that of the commentator Johannes da Legnano (died 1383), De bello, de represaliis et de duello in JB Scott (ed) Classics of International Law (Carnegie Oxford 1917). See MH Keen, The Laws of War in the Middle Ages (Routledge/Kegan Paul London 1965).

12 D. 49.15.5.1, in combination with D. 49.15.24.
concession, however, only pertained to its effects on earth; it left the effects of the justice of war at the Last Judgment untouched.\textsuperscript{13}

Third, the religious scope of the theory, combined with its law enforcement character, accounted for the fact that war was conceived of as a limited forcible action between a lessor and a lessee and their respective adherents to enforce a claim, rather than an all-out war. War was not thought of as a state of war in which all normal, peaceful relations between the belligerents and their people were broken, but as a set of concrete hostile actions.\textsuperscript{14}

3. JUST AND LEGAL WAR IN THE EARLY MODERN AGE (16\textsuperscript{TH}-18\textsuperscript{TH} CENTURIES)

Although the just war doctrine could not mould the practices of war and peace making to its farthest consequences, it did have a real impact in late-medieval Europe. Wars were often justified in terms which were derived from the just war doctrine. The ‘universal’ authority of canon law and ecclesiastical courts, and in particular the papal court, provided a mechanism for discriminating between just and unjust belligerents and sanctioning the latter.

During the first half of the 16\textsuperscript{th} century, the context in which the old \textit{jus ad bellum} operated radically changed. The Reformation caused the collapse of the religious unity of the Latin West and struck a mortal blow at the main pillars of authority – canon law and

\textsuperscript{13} Bartolus, \textit{Digestum novum in tertium tomun Pandectarum commentaria Secunda super Digesto novo} (Basel 1592) ad. D. 49.15.24; R Fulgosius, \textit{In Pandectas} (Lyon 1554) ad. D. 1.1.5; A Alciato, \textit{Commentarii in Pandectas} (Lyon 1550) ad D. 1.1.5 and idem, \textit{Paradoxorum juris civilis} 2.21, in \textit{Opera Omnia} (4 vols., Basel 1549) vol. 3.

ecclesiastical jurisdiction – upon which the bridge between the doctrine and reality of just war rested. The discoveries and conquests in the New World necessitated a frame of reference for the laws of war other than those of Christian theology, canon and Roman law. The rise of great dynastic power complexes such as Habsburg Spain, Valois France and Tudor England, out of which the modern sovereign States grew as well as the Military Revolution and the massification of armies, navies and warfare it brought, denied the notion of war as a limited law enforcement action. All this wrought important changes to the *jus ad bellum*, without however signalling the utter demise of the just war doctrine.

The vast majority of the jurists and theologians of the 16th to 18th centuries who plied themselves to the laws of war and peace sustained the general outline of the just war doctrine, time and again repeating the three conditions of Aquinas in one form or another. But building on the work of their medieval predecessors, they made some all-important amendments that changed the *jus ad bellum* in its core.

First, early-modern writers away with the discriminatory character of war in relation to actual warfare (*jus in bello*) and peace making (*just post bellum*). Vitoria, while sustaining the objective impossibility of a war to be just on both sides, acknowledged that each side could be excused, on the basis of an invincible error, from believing in good faith that he was waging a just war. Thus, he introduced the concept of *bellum justum ex utraque parte* (war just on both sides) at the subjective level. For Vitoria, the implication of this was that the unjust party would not condemn his eternal soul. But through this, he also opened the door to a non-discriminatory conception of war in which both sides had the right to wage war and enjoy the benefits of the laws of war in the here and now.\(^15\)

The civil lawyers Baltasar de Ayala (1548-1584) and Alberico Gentili (1552-1608) took a more radical step. Building on the tradition of Roman law, they focused on the effects of war

\(^{15}\) Vitoria, *De jure belli* 2.4-5.
in earthly life rather than those in eternal life. They articulated the concept of legal war, or war in due form as it was later known.\textsuperscript{16} So long as war was waged by a sovereign and was formally declared, it was legal. This did not signify a rejection of the just war doctrine, but neutralised its effect on the \textit{jus in bello} and the \textit{just post bellum}. Gentili held that because human fallibility made it impossible in most cases to establish who was in the right, it had to be accepted that both sides had a right to wage war. As such, the laws of war were to be applied indiscriminately to both sides. Gentili brought this new conception of war to its full complement in his \textit{just post bellum}. Since one could not be certain about the justice of war and since victory did not indicate justice, the outcome of war itself – or in the absence of clear victory, of the peace negotiations – determined the attribution of the claims over which the war was waged. This radically changed the conception of war from a law enforcement action (\textit{executio juris}) into a substitute for a legal trial: a form of dispute settlement.\textsuperscript{17} Whereas under the just war doctrine, the attribution of property and all kinds of claim had to be vested in the justice of a cause preceding the war, under the doctrine of legal war it was vested in the outcome of war itself. The \textit{jus post bellum} became a \textit{jus victoriae}.\textsuperscript{18}

\textsuperscript{16} Hugo Grotius used the term ‘bellum solenne’ (formal war) in his \textit{De jure belli ac pacis libri tres} 1.3.3.4-5. Emer de Vattel preferred the terms ‘guerre légitime’ (legitimate war) and ‘guerre dans les formes’ (war in due form); Emer de Vattel, \textit{Le Droit des gens, ou Principes de la loi naturelle appliqués à la conduit et aux affaires des Nations et des Souverains} (1758) in JB Scott (ed) \textit{Classics of International Law} (Carnegie Washington 1916) 3.4.66.

\textsuperscript{17} Gentili likened a war to a duel as well as a civil trial. Alberico Gentili, \textit{De jure belli libri tres} (1598) in JB Scott (ed) \textit{Classics of International Law} (Clarendon Oxford 1933) 1.2.18 and 1.6.47-52.

Grotius synthesised the theological-canonist tradition of just war with the civilian tradition of legal war. In *De jure belli ac pacis*, Grotius sustained both conceptions of war, just war and legal war (*bellum solemne*). He relayed the question of the justice of war to the domain of natural law, which applied in conscience (*in foro interno*), while the question of the legality of war fell within the domain of the positive, human law of nations, which was externally enforceable (*in foro externo*). After Grotius, this inherently dualistic scheme became part and parcel of mainstream thought on the laws of war and peace. Emer de Vattel (1714-1767) still adhered to it. Modern minds have often described the Grotian move in terms of side-lining the just war doctrine. This was not the case for the deeply religious men and women of the Early Modern Age. In fact, the Grotian move hardly changed anything in the material terms of the law. It only put the long existing difference between theologians and canon lawyers on one side and civilians on the other side into a single system of thought. The question of justice of war remained as ever a matter of eternal salvation or damnation. Natural law may not have been enforceable in the courts of man, but it was enforceable in the court of God. It was only when religion started to recede to the background – which happened at the earliest from the mid-18th century onwards – that the just war doctrine lost its primary position in the minds.

Second, the concept of war as a state, rather than a string of separate belligerent actions, was introduced. Whereas under the medieval just war doctrine, war had been conceived of as a limited law enforcement action by a prince and his adherents against the perpetrator of the injury which had caused the war, in Early Modern Europe, war became clashes between

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19 Grotius, *De jure belli ac pacis* 1.3.4.1, 3.3.4-5 and 3.3.12-13; Haggenmacher, *Grotius et la doctrine de la guerre juste*, 457-62.

20 Vattel, *Le Droit des gens* 3.3.24-28 ad 3.3.40.
sovereign States in their entirety. By the late 16th century, it had become customary for belligerents, at the inception of war, to take a series of measures in relation to trade, enemy property and personnel, which fundamentally disrupted normal peacetime relations. Thus, war became an encompassing state of affairs, which differed from the state of peace. Whereas Gentili and others had already operated this notion, Grotius was the first to expressly define war as a state of affairs. The concept of ‘state of war’ had two implications. Firstly, it related to the legal effects of war. The concept served to distinguish two spheres of applicable laws. To the state of peace, the normal laws of peace (jus in pace) applied; to the state of war the laws of war (jus in bello) applied for belligerents, while for third parties the laws of neutrality applied. Secondly, the doctrine of state of war allowed taking away all brakes on the expansion of war. Under the just war doctrine, hostile action had to be limited to the perpetrator and those who personally supported his injustices, including his unjustified resistance. Under the new doctrine, war constituted an all-out struggle between two sovereigns and their subjects. Whereas under the old doctrine, violence was only allowed against the guilty and the taking of property was limited to the object of contention and compensation for damages, now all enemy subjects and property became liable for attack or seizure in the service of victory.

More than just a feature of doctrine, the dualism of just and legal war reflected the realities of early-modern State practice. On the one hand, State practice operated the conception of legal war in relation to its effects on the waging of war itself (jus in bello) as well as the making of peace (jus post bellum). The very rare cases in which the indiscriminate application of the laws of war was challenged all related to rebellion, whereby one party refused to

22 Grotius, De jure belli ac pacis 1.2.1.1.
recognise that the other had auctoritas. This was, however, a consequential application of the doctrine of legal war. The concept of legal war also dominated the way wars were ended. In Early Modern Europe, almost all wars were ended by peace treaties. With a single exception, no peace treaty of the 15th to 18th century among European sovereigns included an attribution of justice or guilt for the war. Concessions were not based on the justice of the causes of war, but on its outcome (jus victoriae), or, in the vast majority of cases where there was no clear victor, on the outcome of the peace negotiations. Nothing illustrated the rejection of the just war doctrine in peace treaties better than the so-called amnesty clauses. From the late 15th to late 18th century, close to all peace treaties included such a clause. Under this provision, the former belligerents denounced all rights for themselves and their subjects or adherents to bring forward any kind of claim for the harm or damages that had been inflicted upon them by the enemy because of the war, thus swiping away all questions of justice of the war and of legality of war time actions. After 1800, these clauses disappeared from most peace treaties, but by then it was generally accepted in doctrine that they were silently implied.

On the other hand, the just war doctrine was still very much alive with regards the practice of the justification of war (jus ad bellum). In most cases, the princes and republics of

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25 The Preamble to the Peace Treaty of Madrid of 14 January 1526 between the Emperor Charles V and Francis I of France, who was held in captivity by Charles, stated that Francis had been taken captive in a just war. P Mariño (ed) Tratados internationales de España. Període de la preponderencia española (Consejo Superior de Investigaciones Científicas Madrid 1986) vol. 3.3, 128. For a list and the text of early-modern peace treaties, see the ‘Publikationsportal Europäische Friedensverträge’ of the Institut für Europäische Geschichte in Mainz at http://www.ieg-mainz.de/likecms/likecms.php?site%2Ehtm&nav=209&teid=312.

Early Modern Europe went through a lot of trouble to justify their decision to resort to war. Formal declarations of war were often substantial texts in which the reasons for the war were explained in detail; these, as well as the less formal manifestos of war, were widely distributed. In these declarations and manifestos, the discourse of just war was utilised.\(^{27}\)

One could say that when the sovereigns of Early Modern Europe went to war, they went to a just war; but when they waged or ended war, they waged or ended a legal war. To the modern mind, this might all seem to be a grand exercise in propaganda and duplicity, but, at least until deep into the 18th century, there was more to the resilience of the just war doctrine. There was no inherent contradiction between just and legal war. The two concepts played out on a different field. Sovereigns might have been legally safe from sanction for an unjust war by their peers or any human power, but they were not safe from divine sanction. To the vast majority of the princes of Early Modern Europe, this counted for much. It was a widespread practice for princes to consult a council of specialists, on which regularly theologians took a seat, before the decision to go to war was taken. It was only late in the 18th century that the religious dimension began to recede and the justifications for war became commonly criticised for being mere propaganda or pretext. A now secularised natural law lost its teeth and its

commands became truly unenforceable natural obligations, to be re-coined as natural or political morality. But this did not cause princes and other rulers to stop rendering justifications in terms of the demands of natural justice.\(^{28}\)

Two important remarks must be added with regards early-modern State practice. First, the conception of war as a state led to a distinction between full wars and hostile actions not amounting to full war – in the language of early-modern doctrine, perfect and imperfect wars. From this distinction, in the 19\(^{th}\) century, the category of ‘measures short of war’ emerged. The justifications for imperfect war drew heavily on the just war tradition. During the Early Modern Age, the most common instances of ‘imperfect wars’ were actions in reprisal or as an auxiliary. Reprisal rooted back to an old late-medieval institution whereby a sovereign authorised a subject to forcefully seize property from the subjects of another prince to seek compensation for an injury committed by a subject of that same prince. Out of this original form of ‘particular’ reprisal, grew the practice of ‘general’ reprisal, which formed the legal foundation for privateering. Thereby a private person was granted the authorisation to seize all ships belonging to the subjects of a foreign prince. Auxiliaries were non-belligerents who actively supported an ally during a war without declaring war on the enemy. The actions of auxiliaries could stretch to the intervention of their troops or fleet.\(^{29}\)

Second, there is the question of defence. Already in medieval doctrine, a distinction was made between self-defence and defensive war. Self-defence was the natural right of an individual to defend himself or his property against armed attack. Under early-modern doctrine, it was also attributed to States. Self-defence was not a major justification of force in medieval Europe, as it did not sit well with Christian theology. The fundamental justification for the use of force, which Augustine had forwarded to overcome original Christian pacifism, was that of

\(^{28}\) Vattel, *Le Droit des gens* 3.3.32; Whitman, *Verdict of Battle*, chapter 3.

an instrument to correct the unjust and to restore justice for all. As such, it was an altruistic action. Self-defence, in contrast, was an egoistic action. Nevertheless, as theology faded into the background in the discourse of the *jus ad bellum* between the 17th and 19th centuries, self-defence came to be seen in a more positive light. Under the impact of humanism and the writers from the Modern School of Natural Law, self-defence gained traction as the most natural of human instincts and rights. However, in early-modern State practice, self-defence was rarely invoked on behalf of the State. Most often it was used to justify the actions of individual soldiers or units, e.g. a border garrison repelling a raid.

A defensive war was a perfect war for which the just cause was defence against an unjust armed attack by the enemy. There were some major differences between the two categories. Firstly, self-defence was more limited in terms of duration, both with regard to its beginning as its ending. Whereas self-defence was only justified in case of actual or imminent attack, defensive war was also put forward in case of threat of a future attack. A person or state had to desist from hostile action once the attack had stopped. At most, he could continue his action to get back what was taken, but only immediately contingent upon the end of the enemy’s attack. A defensive war could be pursued until total victory. Secondly, self-defence had to be proportional and directed towards the actual attackers, whereas defensive war did not. In a defensive war, the defender could use all violence, including against enemy subjects innocent to the war, necessary to secure victory.

Whereas self-defence was only rarely invoked in early-modern State practice, the argument of defence was used with much and increasing frequency to justify ‘perfect’ war. One of the main drives behind the increasing popularity of the notion of defence was the all-important role alliance treaties played as instruments of diplomacy and warfare from the 17th

century onwards. Most of these alliance treaties were defensive, meaning that they were only triggered in case of prior attack by the enemy. For this reason, belligerents went to great lengths to argue that they were fighting a defensive war. The term ‘defensive war’ was thus relaxed and expanded. Under the just war doctrine, all just wars were defensive *sensu lato* to the extent that they constituted a reaction against a prior injury by the enemy – armed or otherwise. But they were only defensive *sensu stricto* if they were fought in reaction to a prior or threatening armed attack by the enemy, however big or small it might have been. Other wars were offensive. In their endeavours to justify wars as defensive, the rulers and diplomats of the 17th and 18th centuries blurred the lines. Declarations and manifestos of war of the 17th and 18th centuries show a standardised line of argument for the justification of war, which meant to trigger the *casus belli* of defensive alliance treaties. In most cases, a belligerent when declaring war argued that the enemy had committed a long and incessant series of wrongs against the legitimate claims of the State. Ideally, but not always, one could point at a few instances of the use of force, such as reprisals or border incidents, or attacking an ally. As all other measures had failed, war was said to be necessary as the last resort to stop this and secure the most fundamental legitimate claims of the State. As the 18th century progressed, the language changed to the extent that the protection of the security and interests of the State came to supplement, and with time, supplant the invocation of rights.  

4. **JUST WAR IN THE SHADOWS (19TH CENTURY)**

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Since the days of Grotius, the law of nations had been thought of as an inherently dualist system existing of two, interconnected bodies of law: natural law and positive law. The legal positivism of the 19th century brought this dualism to an end, as natural law was cast out of the world of law and reduced to a code of morality. Thus, modern international law shrunk to what had been the secondary, voluntary or positive law of nations. The just war doctrine was therefore ousted from the field of international law. Under the pens of some of the leading international lawyers of the late 19th and early 20th century, the *jus ad bellum* withered to the mere recognition that sovereign States had a right to resort to force or war to pursue their claims or protect their security and interests. Some even brought this to its ultimate consequence: the decision to go to war was not a matter of law, but one of expediency.

Mainstream international legal doctrine does not wholly reflect 19th century State practice. The just war tradition proved somewhat more resilient. First, over the course of the 19th century, states continued to offer express justifications to their subjects and allies when they resorted to war or force. Certainly, States more often than before neglected to make a formal declaration of war to the enemy, the forms in which justifications were made became more diverse and explanations became less extensive.32 The language shifted further away from war as a means of legal self-help to that of war as a means of self-help altogether – or war as ‘a pursuit of policy by other means’ to use the famous phrase of Carl von Clausewitz (1780-1831)33 – as wars became justified in terms of the safeguarding of security, territorial integrity, ‘vital interests’ or honour of States rather than legitimate rights. But wars were by and large justified as reactions to prior unwarranted action, preferably armed action, by the enemy. They

32 While formal declarations delivered to the enemy were still often used, the preferred form of the 19th century was the ultimatum delivered to the enemy or a general public declaration of war. Neff, *War and the Law of Nations*, 184-5 and examples there.

were justified for being defensive. By the late 19th and the early 20th century, this focus on defensive war founds its correlation in an increasingly general rejection of aggression by the international community. Although doctrine preached the free arbiter of States in relation to war and force, in practice a weak and vague international customary law that condemned aggression and extolled defence unfolded. But States expanded the term ‘defensive’ to its widest possible extent, completely blurring the lines between defence against an armed attack and reaction against a prior injury of rights or interests. One might say that defence became an empty vessel. The important thing, however, is that defence moved to the centre of modern international law’s *jus ad bellum*.35

Second, the 19th century also saw the rise of ‘measures short of war’ in doctrine and practice. The different types of measures short of war were all rooted in the tradition of just war. The major categories were humanitarian and political intervention, self-defence, defence of nationals and reprisal. Humanitarian and political interventions were justified as actions to safeguard or restore other people’s fundamental rights or actions for the sake of international order and stability. Self-defence of a State and defence by a State of its own nationals on foreign territory drew on the doctrine of the natural right of self-defence. The stress was now on the immediate necessity of the action under the imminence of the threat of greater harm in the absence of a non-violent alternative. These were also the elements in the famous definition of self-defence rendered by the US Secretary of State Daniel Webster (1782-1852) on the occasion

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34 E.g. the Russian declaration of war against the Ottoman Empire of 26 April 1828, in *British Foreign and State Papers* (HMSO London 1842) vol. 15, 656-62 (hereinafter BFSP); the declaration of the British Queen Victoria announcing the war against Russia on 27 March 1854, 44 BFSP 110; and the diplomatic discussions just before the outbreak of war in 1914 as well as the declarations of war themselves, *Collected Documents Relating to the Outbreak of European War* (London 1915).

of the *Caroline Incident* (1837). Reprisal had evolved from its traditional meaning of the authorisation for private individuals to use force into the modern meaning of an armed action by a State against another State in retribution of an injury and enforcement of the right that had been injured. This category remained the closest to the original meaning of just war, both with regards its cause as its extension. Through the practice and doctrine of measures short of war, some concepts and rules from the old natural law of nations were transplanted into modern positive international law.

The reasons why Western rulers, in spite of international legal doctrine, continued to offer their justifications of war has partly to be sought in the emerging role of public opinion in the formation of international policy and the rise of a clamour against war amongst the public. In the wake of the Napoleonic War, in different countries of the West, peace associations emerged from civil society. By the midst of the 19th century, international peace conferences were convened by these peace societies. For all of the 19th century, the organised peace movement remained a rather elitist affair. It had, however, some foothold in politics and from time to time attracted attention at the highest level.

The peace movement drew on two great European historical traditions. First, there was Christian pacifism. Early Christianity had been radically pacifist but by the 3rd and 4th centuries, when Christian faith won acceptance in the Roman Empire, pacifism had to cede for a more pragmatic attitude that found its expression in the just war doctrine. Pacifism remained in the

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margins until it gained a constituency in some protestant denominations from the 17th century onwards, particularly in Britain and its Northern American colonies. Anglo-American Protestants would play an important role in the 19th century peace movement. 38 Second, from the Late Middle Ages, a tradition of peace plans in European literature emerged. Writers from Jean Dubois (c. 1305) over the Duke of Sully (Maximilien de Béthune, 1559-1641), Emeric de Crucé (c. 1590-1648), Godfried Wilhelm Leibniz (1646-1716), William Penn (1644-1718) and Saint-Pierre (Charles-Irénée Castel, 1658-1743) to Immanuel Kant (1724-1804) and Jeremy Bentham (1748-1832) laid out schemes to stabilise peace and ban war. 39 Many of these plans proposed a combination of the peaceful settlement of disputes through arbitration with a form


of collective security whereby all powers committed themselves to combine against a power who did not respect the outcome of such a settlement or unjustly attacked a third power.40

From early on, a division existed between radical pacifists and moderate reformists. The latter sought gradually to limit the frequency and the devastation of war. After the crisis of the peace movement in the 1850s and 1860s wrought by the Crimean War (1853-1856) and the American Civil War (1861-1865), the moderate peace movement gained traction and influence. It gained strength through its alliance with international lawyers, who from around 1870 started to organise their field into an autonomous, international academic discipline and pressure group.41 A programme to limit warfare through international law was articulated and set on the agenda of international civil society and public diplomacy. This programme rested on four pillars: disarmament through binding international agreements, the furthering of the peaceful settlement of disputes through arbitration, the codification of the laws of war and collective security.42

5. THE LIMITATION OF THE RIGHT TO WAR (1899-1945)


The invitation by the Russian Tsar Nicholas II (1894-1917) to an international peace conference at The Hague in 1899 moved this programme to the centre of international diplomacy. The 1899 and 1907 Conferences, however, achieved little aside from the partial codification of the laws of war.\footnote{A Eyffinger, \textit{The 1899 Hague Peace Conference. 'The Parliament of Man, the Federation of the World'} (Kluwer The Hague/London/Boston 1999); idem, \textit{The 1907 Peace Conference. The Conscience of the Civilized World} (Wolf Legal Publishers Oisterwijk 2011).} The proposal to introduce obligatory arbitration as a means to settle disputes between States was rejected. \textit{The Hague Convention I on the Pacific Settlement of International Disputes} (29 July 1899) did not go beyond a promise of the contracting parties ‘to use their best efforts to ensure the pacific settlement of international disputes.’\footnote{Art. 1, 187 CTS 410-428.} The Convention provided for the establishment of a Permanent Court of Arbitration.\footnote{Art. 20.} The Hague Conferences also codified the age-old obligation of States to formally declare war before starting hostilities, which had somewhat lapsed in practice over the 19th century (\textit{Hague Convention III Relative to the Opening of Hostilities}, 18 October 1907).\footnote{(1908) 2 AJIL Supp 85-90.} The failure of the Peace Conferences did nothing to stop the attempts to promote international arbitration as the ultimate way to prevent war. During the first four decades of the 20th century, an impressive number of bilateral arbitration treaties were signed, if not always ratified. But many of these treaties mitigated the obligation to subject disputes to arbitration or to other forms of peaceful settlement by the exclusion of disputes which touched on the security and vital interests of the State, thus effectively excluding those disputes that most endangered peace. As such, these treaties made a distinction between disputes that were deemed of a legal nature and those that were deemed of a political nature,
limiting the scope of application of international law to the former.\textsuperscript{47} The series of ‘Treaties for the Advancement of Peace’, also known as the Bryan Treaties (1913-1914) after the American Secretary of State William Jennings Bryan (1860-1925), provided for the submission of all disputes, without restriction, to an international commission for investigation. They also stipulated that the parties to the dispute could not resort to war for a period of twelve months.\textsuperscript{48}

The entry of the US under President Woodrow Wilson (1856-1924) in the Great War in 1917 pushed collective security to the centre of the international agenda. Wilson refused to adhere to a traditional strategy for peace and pushed his allies at the Paris Peace Conference (1919-20) towards a new world order. At the heart of this stood collective security, a combination of an obligation to settle disputes peacefully by international law, the limitation of the right to wage war and collective action against aggression by an organised international community, the League of Nations. The Peace Treaty of Versailles of 28 June 1919 between the Allied and Associate Powers and Germany was an amalgam of Wilson’s radical ideas and tradition, but altogether caused a revolution in the \textit{jus ad bellum}.

The Versailles Peace Treaty was the first peace treaty among sovereigns in centuries that broke with the tradition of silence over the justice of war. Article 231 attributed responsibility for the war to Germany and her allies. Germany was designated as the aggressor. In Articles 231 and 232, Germany was made liable for all the loss and damages the Allied and Associated Powers, their governments and nationals had suffered because of the war – with the

\textsuperscript{47} E.g. the Arbitration Treaties between the US and respectively Britain and France of 3 August 1911, Art. 1 in R Bartlett (ed) \textit{The Record of American Diplomacy. Documents and readings in the history of American Foreign Relations} (New York 1964) 338.

exception of most of the costs of warfare itself. The German Emperor Wilhelm II (1888-1918) would be indicated before an international tribunal ‘for a supreme offense against international morality and the sanctity of treaties.’\(^{49}\) Articles 228-9 provided for the prosecution before military tribunals of Germans who had violated the laws and customs of war or committed crimes against the nationals of the Allied and Associate Powers.

These clauses constituted a return to the just war tradition. This revival was only partial and it was not followed up on in general peace treaty practice after 1920. Nevertheless, it was far reaching. The Versailles Peace Treaty restored the discriminatory concept of war from the old just war tradition. Only one side of the belligerents had a right to wage war; the other side had not and was therefore liable for all the costs of damages due to the war. The Treaty went beyond early-modern practices and doctrine, which had restricted the enforceability of just war to the court of God, by providing for criminal prosecution for infringements against both the *jus ad bellum* and the *jus in bello* by the unjust side. The basis for the attribution of responsibility to Germany and its allies were aggression and the disregard for treaty obligations, most of all in relation to Belgian neutrality.\(^{50}\) Some elements of the just war tradition were thus drawn into the sphere of positive international law.

The Paris Peace Conference also agreed upon the Covenant of the League of Nations, which was inscribed in all the peace treaties.\(^{51}\) Articles 10-17 regarded collective security and the *jus ad bellum*. The founders of the League refrained from inscribing a general prohibition


\(^{50}\) *Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties*, 29 March 1919 (1920) 14 AJIL 95-154.

\(^{51}\) E.g. Articles 1-24 of the Versailles Treaty.
of war, but focused on preventing war by imposing upon States the duty first to resort to peaceful ways of dispute settlement. Articles 12, 13 and 15 imposed upon the Members of the League the obligation to refer any dispute that was likely to lead to war either to arbitration or to the Council of the League. Article 12 stipulated a cooling-off period for 3 months after the award of the arbitrators or the report of the Council in which the parties could not resort to war. If the Council voted unanimously on a report regarding the dispute, no State could wage war on a member which abided to the report. If no such unanimity was reached, the Members had a right to take all actions they deemed ‘necessary for the maintenance of right and justice.’ Article 14 provided for the establishment of a Permanent Court of International Justice to rule over disputes between States, but its jurisdiction was not mandatory. Articles 10, 11 and 16 enshrined the compromise the allies had reached on collective security. Article 16 provided for automatic economic sanctions against a Member which resorted to war in contravention of Articles 12, 13 and 15. It stated that in such a case States had to indicate which armed forces they would contribute to protect the Members of the League. In 1921, the League Assembly stipulated that economic sanctions could stretch to naval blockade.\(^52\) Article 10 was at one time the most encompassing but also the vaguest of the Covenant’s \textit{jus ad bellum} clauses. It imposed upon the Members the commitment ‘to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League’ and made any threat or danger of aggression a matter of the League’s Council. Article 11 provided that any war or threat of war should be referred to the Council.

\(^{52}\) \textit{League of Nations Assembly Resolution on the Economic Weapon}, 4 October 1921, LNOJ, Special Supp 6, 24, see also \textit{Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade} 15 June 1927 (1927) 8 LNOJ 834-45.
These clauses from the League’s Covenant did not lay down a new, coherent and all-encompassing *jus ad bellum*. They neither emerged in a juridical vacuum nor did they sweep away existing practices and customary law. During the first decade of the League’s existence several attempts were made to interpret and supplement the Covenant to clarify and fill in the gaps in the system which were perceived to exist. One of these attempts concerned the so-called *General Act of Geneva on the Pacific Settlement of Disputes* of 26 September 1928, which provided that all disputes should ultimately be settled by peaceful means.\(^{53}\)

Apart from the difficulties of interpretation and the unsystematic character of the Covenant Clauses, there were more fundamental reasons to leave the peace movement far from satisfied with the outcome of the Paris Peace Conference. The refusal of the US to join the League and the initial exclusion of communist Russia and the former Central Powers weakened and reduced it to a club of the European victors of the Great War and their allies, minus the main one. The League system neither provided for an effective mechanism of collective security nor for a general prohibition to use force. Its major lacunae in this respect were that it only condemned aggression, but it did not exclude war in case peaceful dispute settlement procedures failed after a period of cooling down had been respected – it even seemed to confirm the right to war in Article 15 – and it did not restrict use of force other than war and aggression.\(^{54}\)

In the 1920s, part of the American peace movement, in concordance with some major political figures, retook the battle and redirected the agenda. As League membership was, after rejection by the US Senate, deemed impossible or even undesirable because of its commitment to the security of other States, the focus was now on the peaceful settlement of disputes – through the accession by the US to the Permanent Court of International Justice – and through what became known as ‘the outlawry of war.’ Aided by the desire of the French to obtain at least

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\(^{53}\) (1931) 25 AJIL Supp 204-24.

some security agreement with the US, in 1928 the peace movement saw a major success through the *General Treaty for the Renunciation of War* of 27 August 1928, better known as the Pact of Paris or the Kellogg Briand Pact. The Pact was initially signed by 15 States, among which were the major powers of the West. Some 48 other states joined later. The Pact condemned ‘recourse to war for the resolution of international controversies’ and renounced it ‘as an instrument of national policy in their relations with one another.’  

Article 2 provided for the pursuing of the settlement of disputes by pacific means.  

The international community of States had thus abolished the concept of legal war. The Kellogg Briand Pact did not provide for any sanctions, but this did not mean that violation remained without legal consequences. Neff indicated the major consequences attached to the resort to war in breach of the Pact of Paris. First, resort to war in contravention of the Pact made the State liable for all the costs and damages ensuing from the war. Second, a violation of the Pact gave all parties to the Pact the right to intervene against the perpetrator. Whereas there was hardly any State practice of armed intervention pursuant to violations of the Pact, during the 1930s a practice of relaxing the duties of neutrality by third parties – as the US in the case of the German aggression against Western Europe in 1939-1940 – arose. Also, the 1930s saw the emergence of a form of non-belligerency, whereby a third power one-sidedly supported one belligerent with supplies, arms, subsidies and the like without resorting to force or declaring

55 Article 1, 94 LNTS 57.  
war. Third, over the 1930s, there arose a rule in State practice that a war in contravention of the Pact could not give rise to any conquest or acquisition of rights of any kind, under the old maxim ‘ex injuria non oritur jus.’ This was enshrined in the so-called Stimson Doctrine, laid out by the American Secretary of State Henry Stimson (1867-1950) in 1932.\(^57\) To these three consequences forwarded by Neff should be added that resort to war in violation of the Paris Pact was equalled to aggression, triggering the obligations of third States under Article 10 of the Covenant.\(^58\)

Similarly to the Covenant, the Paris Pact referred to ‘resort to war’ rather than ‘force.’ Whether ‘war’ in the Pact was used in its technical meaning and all other uses of force were excluded was and remains a matter of contention among international lawyers.\(^59\) What is certain is that actions in self-defence were excluded from it.\(^60\) Self-defence gained a lot of traction in the State practice of the 1920s and it would gain even more so after the Paris Pact. The negotiators at the Paris Peace Conference of 1919-20 put the spotlight on aggression by making it the touchstone of Germany’s responsibility for the war and by making it the concern of all League Members. In putting aggression at the heart of the new \textit{jus contra bellum}, the drafters of the Covenant and the peace treaties inevitably lifted its correlate, self-defence, to the heart of the newly emerging \textit{jus ad bellum}. After 1920, States started more than ever before to invoke self-defence. They did so either as a justification for their actions against a so-called aggressor

\(^57\) Neff, \textit{War and the Law of Nations}, 294-6. The Stimson doctrine in relation to territorial acquisition was also inscribed in the so-called Saavedra-Lamas Treaty of 16 December 1933 between most American and European powers, banning wars of aggression, 163 LNTS 393.

\(^58\) \textit{Draft Treaty on the Rights and Duties of States in Case of Aggression}, Introductory Comment (1939) 33 AJIL Supp 819-909 at 823.

\(^59\) Brownlie, \textit{Use of Force}, 84-92.

\(^60\) Note by Kellogg to the French ambassador, 1 March 1928 in DH Miller, \textit{The Peace Pact of Paris} (Putnam’s Sons New York/London 1928) 43.
or to trigger collective defence by the international community under Article 10 of the
Covenant. Under the State practice of the Interwar Period, these actions were not considered to
amount to full war. Thus, the old natural right of self-defence was given a central place within
positive international law, without however shedding the cloak of necessity that hung together
with its origins. States followed this strategy for two main practical reasons. First, by invoking
self-defence they attempted to avoid the restrictions on war from the Covenant and the Paris
Pact and the consequences of its violations. Second, by not considering a conflict as war third
States could relax the strict duties of neutrality and act with partiality towards the two sides in
the conflict. This would prove a crucial element in the strategy of the American President
Franklin Delano Roosevelt (1882-1945) to overcome the strict laws of ‘New Neutrality’ in the
face of German aggression.

The major treaties and State practice in relation to war and self-defence of the Interwar
Period has allowed for the claim that by the end of the 1930s an international customary rule
against aggression had been formed. This conclusion gives too rosy an idea of how far the
prohibition to use force had progressed before its inscription in the UN Charter. The Covenant
of the League and the Paris Pact ended the legality of war, but only in a discriminatory way.
The State practice from World War II indicates that States still considered themselves to have
a right to resort to a war and formally declare war in case of prior aggression by the enemy.
Moreover, the Covenant and the Paris Pact had left the door wide open to an alternative strategy
to resort to force rather than war, primarily in the guise of self-defence. Whereas States claimed
to operate the limited, by origin natural, right of self-defence in the face of aggression, they did
in fact draw from the rich tradition of defensive war to justify their own actions. State practice
agreed with the notion of defence sensu stricto as a reaction against a prior attack, but States
would use the smallest instance of use of force by the enemy to justify a disproportionate and

61 Brownlie, Use of Force, 105-11.
all-out reaction. Thereto, they beefed up their arguments by referring to injuries against their rights and interests, thus persisting with much of the language of early-modern and 19th-century justifications for war. Also, States pushed their defensive actions beyond the limits of the traditional notion of natural self-defence imposed, so that at times there was little or nothing to distinguish self-defence from full-blown war. In the end, the Covenant and the Paris Pact did very little to stop the tradition of defensive war or restrict the lax interpretation of the term defensive. To the contrary, the transfer of the natural right of self-defence to the domain of positive international law allowed for an even stronger association with the lax justifications of defensive war and opened up the box of Pandora.\(^{62}\)

### 6. Conclusion

This box the founders of the United Nations attempted but failed to close. The drafters of the UN Charter at the conferences of Dumbarton Oaks (1944) and San Francisco (1945) consciously tried to stop some of the gaps the earlier treaties had left. In rephrasing the term ‘resort to war’ to ‘use or threat of force’ they attempted to settle the discussion on the extent of the prohibition of ‘war’ under the Paris Pact.\(^{63}\) The choice to inscribe the right to self-defence in the Charter was not a major step in itself, as the principle had already become well established in positive international law. The merit of the Charter lay in the qualification of the right. By

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using the word ‘inherent’ the drafters of the Charter referred to the origins of the right as a natural right, with all its restrictions and limitations. Furthermore, the right was clearly defined in term of a reaction against an *occurring armed* attack and the duty was imposed upon States to refer to the UN Security Council. Through this, the founders of the UN did everything possible to restrict the sole exception to the prohibition to inter-State use of force, short of banning it. But, as State practice since 1945 proves, in this the UN has met with only very partial success.\(^6^4\)