CHAPTER 1

TOO MUCH HISTORY: FROM WAR AS SANCTION TO THE SANCTIONING OF WAR

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I. 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 revolutionized international law and divided the 'classical international law' of the 19th century from

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the 'modern international law' of the 20th century.[1] 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—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' to a 'right to war'. Some scholars have added that the revolution of use of force law after the First World War reached back beyond the 19th century towards the tradition of the just war of the late Middle Ages.[2]

This narrative has historical merit. It is sustained by the writings of some late 19th- and early 20th-century international lawyers.[3] 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. 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. Secondly, 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*.

[1] Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 19–111; Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge: Cambridge University Press, 2001), 71–85; Wilhelm Georg Grewe, *The Epochs of International Law* (Berlin/New York: De Gruyter, 2000), 575–8; Malcom Shaw, *International Law* (6th edn, Cambridge: Cambridge University Press, 2008), 1119–22.

[2] eg Cornelius van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (Leiden: Martinus Nijhoff, 1919). The works of James Brown Scott and Arthur Vanderpol were instrumental in reviving the interest of international lawyers in scholastic just war doctrine. Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague: Kluwer, 1998); Arthur Vanderpol, *Le droit de la guerre d'après les théologiens et les canonistes du moyen-âge* (Paris/Brussels: Tralin/Goemaere, 1911).

[3] Amos Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (New York: Macmillan, 1906), 67.

II. The Just War in the Middle Ages (12th–15th Centuries)

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 has its roots back in 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)[4] and early Christian theology, in particular the writings of Saint Augustine (354–430).[5] 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 12th to 14th centuries. The Dominican theologian Saint Thomas Aquinas (1225–74) 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 a prior or threatening injury by the enemy—'ulcisci iniuriam' in the words of Augustine.[6] It was a form of law enforcement (*executio juris*), of forcible self-help in the absence of a superior authority to which to turn.

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 infliction of punishment.[7] The final condition, *recta intentio*, implied that the war needed to be waged with the intention of doing justice, and ultimately, to attain a just peace.[8]

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

[4] Cicero, *De officiis* 1.11.33–1.13.41; idem, *De re publica* 3.33.

[5] Robert A. Markus, 'Saint Augustine's Views of the "Just War"' in W. J. Sheils (ed), *The Church and War* (Oxford: Blackwell, 1983), 1–13; Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge: Cambridge University Press, 2005), 29–38 and 45–7; Alan Watson, *International Law in Archaic Rome. War and Religion* (Baltimore, MD: John Hopkins University Press, 1993).

[6] Augustine, *Quaestionum in Heptateuchum liber sextus (in Iesum Nave)*, X, *PL*, 354, coll 780–1.

[7] Hugo Grotius, *De jure belli ac pacis libri tres* (1625) in James Brown Scott (ed), *Classics of International Law* (Oxford: Clarendon Press, 1925), 2.1.2.

[8] Thomas Aquinas, *Summa Theologiae* IIaIIae 40.1.

a consequential application of the doctrine, the *jus ad bellum* spilled into both the *jus in bello*—the laws of war properly speaking, that is, 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 the 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 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 commonwealths, one the injured party and the other the offender.'[9] 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.

Secondly, 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.[10] 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 foremost 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 authorized war between independent peoples.[11] On this basis, Bartolus of Sassoferrato (1314–57) 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

[9] Francisco de Vitoria, *Relectio de Jure Belli, in fine* in Anthony Pagden (ed), *Francisco de Vitoria, Political Writings* (Cambridge: Cambridge University Press, 1991).

[10] eg Honoré de Bonet, *L'arbre des batailles* (c 1386) in *The Tree of Battles of Honoré de Bonet* (transl G. W. Coopland, Liverpool: Liverpool University Press, 1949), whose work was largely based on that of the commentator Johannes da Legnano (d 1383), *De bello, de represaliis et de duello* in James Brown Scott (ed), *Classics of International Law* (Oxford: Carnegie Institution, 1917). See Maurice Hugh Keen, *The Laws of War in the Middle Ages* (London: Routledge/Kegan Paul, 1965).

[11] 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 Judgement untouched.[12]

Thirdly, 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.[13]

III. Just and Legal War in the Early Modern Age (16th–18th 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 16th century, the context in which the old *jus ad bellum* operated radically changed. The Reformation caused the collapse of the religious unity of the Latin West and struck a mortal blow to the main pillars of authority—canon law and 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 brought important changes in the *jus ad bellum*, without however signalling the utter demise of the just war doctrine.

[12] Bartolus, *Digestum novum in tertium tomum Pandectarum commentaria Secunda super Digesto novo* (Basel, 1592), ad D 49.15.24; Raphael Fulgosius, *In Pandectas* (Lyon, 1554), ad D 1.1.5; Andrea Alciato, *Commentarii in Pandectas* (Lyon, 1550), ad D 1.1.5 and idem, *Paradoxorum juris civilis* 2.21, in *Opera Omnia*, 4 vols (Basel, 1549), vol 3.

[13] On the just war in the Middle Ages: Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: PUF, 1983), 51–444; Neff, *War and the Law of Nations*, 45–82; Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975).

The vast majority of jurists and theologians of the 16th to 18th centuries who applied 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* at its core.

First, early-modern writers did 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.[14]

The civil lawyers Baltasar de Ayala (1548–84) and Alberico Gentili (1552–1608) took a more radical step. Building on the tradition of Roman law, they focused on the effects of war in the earthly life rather than those in the eternal life. They articulated the concept of legal war, or war in due form as it was later known.[15] As 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 neutralized its effect on the *jus in bello* and the *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 *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 (*executio juris*) into a substitute for a legal trial: a form of dispute settlement.[16] 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

[14] Vitoria, *De jure belli* 2.4-5.

[15] Hugo Grotius used the term '*bellum solemne*' (formal war) in his *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, *Le Droit des gens, ou Principes de la loi naturelle appliqués à la conduit et aux affaires des Nations et des Souverains* (1758) in James Brown Scott (ed), *Classics of International Law* (Washington DC: Carnegie Institution, 1916), 3.4.66.

[16] Gentili likened a war to a duel as well as to a civil trial. Alberico Gentili, *De jure belli libri tres* (1598) in James Brown Scott (ed), *Classics of International Law* (Oxford: Clarendon Press, 1933), 1.2.18 and 1.6.47–52.

the war, under the doctrine of legal war it was vested in the outcome of war itself. The *jus post bellum* became a *jus victoriae*.[17]

Grotius synthesized 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*).[18] After Grotius, this inherently dualistic scheme became part and parcel of mainstream thought on the laws of war and peace. Emer de Vattel (1714–67) still adhered to it.[19] Modern minds have often described the Grotian move in terms of sidelining 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 into the background—which happened at the earliest from the mid-18th century onwards—that the just war doctrine lost its primary position.

Secondly, 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 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.[20] Whereas Gentili and others had already operated this notion, Grotius was the first expressly to define war as a state of affairs.[21] The concept of 'state of war' had two implications. First, it related to the legal effects of war. The concept served to distinguish two spheres of

[17] Balthasar de Ayala, *De Jure et Officiis Bellicis et Disciplina Militaris* (1584) in James Brown Scott (ed), *Classics of International Law* (Oxford: Clarendon Press, 1944), 1.2.34; Gentili, *De jure belli* 1.2 and 1.6; Randall Lesaffer, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties' in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), 210–40. See on the conception of war as a form of dispute settlement, James Q. Whitman, *The Verdict of Battle. The Law of Victory and the Making of Modern War* (Cambridge, MA: Harvard University Press, 2012).

[18] 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.

[19] Vattel, *Le Droit des gens* 3.3.24–28 and 3.3.40.

[20] Lesaffer, 'Alberico Gentili's *ius post bellum*' in Kingsbury and Straumann, *The Roman Foundations of the Law of Nations*, 210–14.

[21] Grotius, *De jure belli ac pacis* 1.2.1.1.

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.[22] 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 to attack or seizure in the service of victory.[23]

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 recognize 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 centuries among European sovereigns included an attribution of justice or guilt for the war.[24] 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 centuries, almost 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 damage that had been inflicted upon them by the enemy because of the war, thus wiping away all questions of the justice of the war and of the legality of wartime actions. After 1800, these clauses disappeared from most peace treaties, but by then it was generally accepted in the doctrine that they were silently implied.[25]

[22] Stephen C. Neff, *The Rights and Duties of Neutrals. A General History* (Manchester: Manchester University Press, 2000).

[23] Neff, *War and the Law of Nations*, 100–2.

[24] The Preamble to the Peace Treaty of Madrid of 14 Jan 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. Periode de la preponderencia española* (Madrid: Consejo Superior de Investigaciones Cientificas, 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=site%2Ehtm&nav=209iteid=312>.

[25] Randall Lesaffer, 'Peace Treaties and the Formation of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford

On the other hand, the just war doctrine was still very much alive with regard to the practice of the justification of war (*jus ad bellum*). In most cases, the princes and republics of Early Modern Europe went to 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 utilized.[26]

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 widespread practice for princes to consult a council of specialists, on which theologians regularly took a seat, before the decision to go to war was taken. It was only late into the 18th century that the religious dimension began to recede and the justifications for war became commonly criticized for being mere propaganda or pretext. A now secularized 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.[27]

Two important remarks must be added with regard to 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 19th century, the category of 'measures short of war' emerged. The justifications for imperfect war drew heavily

University Press, 2012), 71–94. For a good example of an amnesty clause: Peace of Utrecht of 13 July 1713 between France and Great Britain, Art 3 in Clive Parry (ed), *The Consolidated Treaty Series* (Dobbs Ferry, NY: Oceana, 1969), vol 27, 475–501.

[26] eg justification by Gustav Adolph of Sweden (1611–32) for his invasion of the Holy Roman Empire in 1630; the justifications put forward in the French declaration and manifesto of war of 1635 and the Spanish counter-declarations, see Randall Lesaffer, 'Defensive Warfare, Prevention and Hegemony. The Justifications for the Franco-Spanish War of 1635' (2006) 8 *Journal of the History of International Law* 91–123 and 141–79; Partel Piirimäe, 'Just War in Theory and Practice. The Legitimation of Swedish Intervention in the Thirty Years War' (2002) 45 *Historical Journal* 499–523. See for more examples from the 17th and 18th centuries, Bernd Klesmann, *Bellum solemne. Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (Mainz: Zabern, 2007); Stephen Whatley (ed), *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time*, 4 vols (London: Knapton, 1710–32).

[27] Vattel, *Le Droit des gens*, 3.3.32; Whitman, *Verdict of Battle*, ch 3.

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 was rooted in old late-medieval institution whereby a sovereign authorized a subject forcefully to seize property from the subjects of another prince in compensation for an injury committed by a subject of that 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 authorization 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.[28]

Secondly, 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 an instrument to correct the unjust and to restore justice for all. As such, it was an altruistic action.[29] 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, for example 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. First, self-defence was more limited in terms of duration, both with regard to its beginning and its end. Whereas self-defence was only justified in the case of actual or imminent attack, defensive war was also put forward in the 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 in the war, necessary to secure victory.

[28] Neff, *War and the Law of Nations*, 121–6.

[29] Augustine, *Letter* 238, see Henry Paolucci (ed), *Augustine of Hippo, The Political Writings of St Augustine* (Cambridge: Cambridge University Press, 1962).

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 the 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 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 standardized line of argument for the justification of war, which was 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 to 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.[30]

IV. Just War in the Shadows (19th Century)

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

[30] Klesmann, *Bellum solemne*; Randall Lesaffer, 'Paix et guerre dans les grands traités du XVIIIe siècle' (2005) 7 *Journal of the History of International Law* 25–41; idem, 'Defensive Warfare'; Neff, *War and the Law of Nations*, 126–30.

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 centuries, 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.[31] 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)[32]—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 were justified for being defensive.[33] By the late 19th and the early 20th centuries, this focus on defensive war found 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*.[34]

Secondly, 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

[31] 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 therein.

[32] Carl von Clausewitz, *Vom Kriege* (1832) in Michael Howard (ed), *On War* (Princeton, NJ: Princeton University Press, 1976), 69.

[33] eg the Russian declaration of war against the Ottoman Empire of 26 Apr 1828, in *British Foreign and State Papers* (London: HMSO, 1842), vol 15, 656–62; the declaration of the British Queen Victoria announcing the war against Russia on 27 Mar 1854, 44 *British Foreign and State Papers* 110; and the diplomatic discussions just before the outbreak of war in 1914 as well as the declarations of war themselves, *Collected Diplomatic Documents Relating to the Outbreak of the European War* (London: Foreign Office, 1915).

[34] Brownlie, *Use of Force*, 19–50; Neff, *War and the Law of Nations*, 161–214.

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 of the *Caroline Incident* (1837).[35] Reprisal had evolved from its traditional meaning of the authorization for private individuals to use force into the modern meaning of an armed action by a state against another state in retribution for 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 regard to its cause and 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.[36]

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 organized 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 to a more pragmatic attitude that found its expression in the just war doctrine. Pacifism remained in the margins until it gained a constituency in some protestant denominations from the 17th century onwards, particularly in Britain and its North American colonies. Anglo-American Protestants would play an important role in the 19th-century peace movement.[37] Secondly, from the

[35] '. . . a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation', letter from Daniel Webster of 24 Apr 1841, 29 *British Foreign and State Papers* 1137–8.

[36] Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer, 1996), 11–27; Neff, *War and the Law of Nations*, 215–49; Brendan Simms and D. J. B. Trim (eds), *Humanitarian Intervention. A History* (Cambridge: Cambridge University Press, 2011); Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), 227–53; Ellery Cory Stowell, *Intervention in International Law* (Washington DC: Byrne, 1921).

[37] Roland Bainton, *Christian Attitudes towards War and Peace: A Historical Survey and Critical Re-examination* (New York: Abingdon Press, 1960).

Late Middle Ages, a tradition of peace plans in European literature emerged. Writers from Jean Dubois (c 1305) to 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) and through to Immanuel Kant (1724–1804) and Jeremy Bentham (1748–1832) laid out schemes to stabilize peace and ban war.[38] 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 which did not respect the outcome of such a settlement or unjustly attacked a third power.[39]

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 wreaked by the Crimean War (1853–6) and the American Civil War (1861–5), the moderate peace movement gained traction and influence. It gained strength through its alliance with international lawyers, who from around 1870 started to organize their field into an autonomous, international academic discipline and pressure group.[40] 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, furthering the peaceful settlement of disputes through arbitration, codification of the laws of war, and collective security.[41]

[38] Pierre Dubois, *De recuperatione Terrae Sanctae* (1306) in *The Recovery of the Holy Land* (transl Walther Brandt, New York: Columbia University Press, 1956); Maximilien de Béthune de Sully, *Oecomomies royales* (1640) in David Buisseret and Bernard Barbiche (eds), *Les oeconomies royales de Sully* (Paris: Klincksieck, 1970–88); Emeric de Crucé, *Le nouveau Cynée ou Discours d'Etat représentant les occasions et moyens d'établir une paix générale et liberté de commerce par tout le monde* (1626) (ed Alain Fénet and Astrid Guillaume, Rennes: Presses Universitaires de Rennes, 2004); Gottfried Wilhelm Leibniz, *Codex juris gentium diplomaticus* (Hannover, S. Ammonus, 1693); idem (anon), *Caesarini Fuerstenerii, Tractatus de Jure suprematus ac Legationis principum Germaniae* (sl 1678); William Penn, *An Essay towards the Present and Future Peace of Europe by the Establishment of an European Dyet, Parliament or Estates* (London, 1693–4; repr Olms Hildesheim, 1983); Charles-Irénée Castel de Saint-Pierre, *Mémoires pour rendre la Paix perpétuelle en Europe* (Cologne, 1712; 2nd edn, Utrecht, 1713–17; repr Paris: Fayard, 1986) in Hugh Hale Bellot (transl), *Selections from the second edition of the Abrégé du Project de Paix Perpétuelle by C. I. Castel de Saint-Pierre* (London: Sweet & Maxwell, 1927); Imanuel Kant, *Zum Ewigen Frieden. Ein philosophischen Entwurf* (Konigsberg: Friedrich Nicolovius, 1795) in Mary Campbell Smith (transl), *Perpetual Peace. A Philosophical Essay* (London: Allen & Unwin, 1917); Jeremy Bentham, *Plan for a Universal and Perpetual Peace* (1786–9) (ed C. John Colombos, London: Sweet & Maxwell, 1927).

[39] F. H. Hinsley, *Power and the Pursuit of Peace. Theory and Practice in the Relations between States* (Cambridge: Cambridge University Press, 1963), 13–91; Jacob ter Meulen, *Der Gedanke der internationaler Organisation in seiner Entwicklung*, 2 vols (Leiden: Martinus Nijhoff, 1917–40); Kurt von Raumer, *Ewiger Friede. Friedensrufe und Friedenspläne seit der Renaissance* (Freiburg: Alber, 1953).

[40] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

[41] On the 19th- and early 20th-century peace movement: David Cortright, *Peace. A History of Movements and Ideas* (Cambridge: Cambridge University Press, 2008), 25–62; Cecelia Lynch, 'Peace

V. The Limitation of the Right to War (1899–1945)

The invitation by the Russian Tsar Nicholas II (1894–1917) to an international peace conference in 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.[42] The proposal to introduce obligatory arbitration as a means to settle disputes between states was rejected. The Hague Convention I on the Pacific Settlement of International Disputes (29 July 1899) did not go beyond a promise by the contracting parties 'to use their best efforts to ensure the pacific settlement of international disputes.'[43] The Convention provided for the establishment of a Permanent Court of Arbitration.[44] 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 (Hague Convention III Relative to the Opening of Hostilities, 18 Oct 1907).[45] 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 to be of a legal nature and those that were deemed to be of a political nature, limiting the scope of application of international law to the former.[46] The series of 'Treaties for the Advancement of Peace', also known as the Bryan Treaties (1913–14) after the US 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 12 months.[47]

Movements, Civil Society, and the Development of Law' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 198–221.

[42] Arthur Eyffinger, *The 1899 Hague Peace Conference. 'The Parliament of Man, the Federation of the World'* (The Hague: Kluwer, 1999); idem, *The 1907 Peace Conference. The Conscience of the Civilized World* (Oisterwijk: Wolf Legal Publishers, 2011).

[43] Art 1, 187 *The Consolidated Treaty Series* 410–28. [44] Art 20.

[45] (1908) 2 AJIL Supp 85–90.

[46] eg the Arbitration Treaties between the US and respectively Britain and France of 3 Aug 1911, Art 1 in Ruhl Bartlett (ed), *The Record of American Diplomacy. Documents and readings in the history of American Foreign Relations* (New York: Prager, 1964), 338.

[47] eg Treaty between the United States and Austria–Hungary of 6 May 1914, 220 *The Consolidated Treaty Series* 6–7. On arbitration in the era of the League of Nations, Francis Paul Walters, *A History of the League of Nations* (Toronto: Oxford University Press, 1952), vol 1, 377–87.

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 organized 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 *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 its allies. Germany was designated as the aggressor. In Articles 231 and 232, Germany was held liable for all the loss and damages the Allied and Associated Powers, their governments, and nationals had suffered because of the war—with the exception of most of the costs of warfare itself. The German Emperor Wilhelm II (1888–1918) would be indicted before an international tribunal 'for a supreme offense against international morality and the sanctity of treaties.'[48] Articles 228 and 229 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 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 disregard for treaty obligations, most of all in relation to Belgian neutrality.[49] 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.[50] Articles 10–17 regarded collective security and the *jus ad bellum*. The founders of the League refrained from inscribing a general prohibition of war, but focused on preventing war by imposing upon states the duty first to resort to peaceful ways of dispute settlement.

[48] Art 227 of the Peace Treaty of Versailles, 28 June 1919, *The Treaties of Peace 1919–1923* (New York: Carnegie, 1924), vol 1, 3–264; 225 *The Consolidated Treaty Series: 1648–1918*, 188 (1981).

[49] 'Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties', 29 Mar 1919 (1920) 14 AJIL 95–154.

[50] eg Arts 1–24 of the Versailles Treaty.

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 of three 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 by the report. If no such unanimity was reached, the members had a right to take all actions that 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 blockades.[51] Article 10 was at one time the most encompassing but also the vaguest of the Covenant's *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 for the League's Council. Article 11 provided that any war or threat of war should be referred to the Council.

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.[52]

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

[51] 'League of Nations Assembly Resolution on the Economic Weapon', 4 Oct 1921, LNOJ, Special Supp 6, 24, see also '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.

[52] (1931) 25 AJIL Supp 204–24.

aggression, but it did not exclude war if 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.[53]

In the 1920s, part of the US 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 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.' [54] Article 2 provided for the pursuit of settlement of disputes by pacific means.[55]

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. Secondly, 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 with the US in the case of the German aggression against Western Europe in 1939–40—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 war. Thirdly, 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 US

[53] Brownlie, *Use of Force*, 59–65. [54] Art 1, 94 LNTS 57.

[55] Charles Chatfield, *For Peace and Justice: Pacifism in America, 1914–1941* (Knoxville, TN: University of Tennessee Press, 1981); Cortright, *Peace*, 62–6; Robert H. Ferrell, *Peace in their Time. The Origins of the Kellogg–Briand Pact* (New Haven, CT: Yale University Press, 1952); idem, *Beyond Appeasement: Interpreting Interwar Peace Movements in World Politics* (Ithaca, NY: Cornell University Press, 1999); Bernhard Roscher, *Der Briand-Kellogg-Pakt von 1928. Der 'Verzicht auf den Krieg als Mittel Nationaler Politik' im völkerrechtlichen Denken des Zwischenkriegszeit* (Baden-Baden: Nomos, 2004); Hatsue Shinohara, *US International Lawyers in the Interwar Years. A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012).

Secretary of State Henry Stimson (1867–1950) in 1932.[56] To these three consequences put forward by Neff should be added that resort to war in violation of the Paris Pact was equated to aggression, triggering the obligations of third states under Article 10 of the Covenant.[57]

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.[58] What is certain is that actions in self-defence were excluded from it.[59] Self-defence gained a lot of traction in state practice during the 1920s and it would gain even more 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 *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 *jus ad bellum*. After 1920, states began more than ever before to invoke self-defence. They did so either as a justification for their actions against a so-called aggressor or to trigger collective defence by the international community under Article 10 of the Covenant. In 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. Secondly, 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 US 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 in the interwar period allowed for the claim that by the end of the 1930s an international customary rule against aggression had been formed.[60] This conclusion gives too rosy a picture 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. State practice from the Second World War

[56] Neff, *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 Dec 1933 between most American and European powers, banning wars of aggression, 163 LNTS 393.

[57] 'Draft Treaty on the Rights and Duties of States in Case of Aggression', Introductory Comment (1939) 33 AJIL Supp 819–909, 823.

[58] Brownlie, *Use of Force*, 84–92.

[59] Note by Kellogg to the French ambassador, 1 Mar 1928 in David Hunter Miller, *The Peace Pact of Paris* (London: Putnam, 1928), 43.

[60] Brownlie, *Use of Force*, 105–11.

indicates that states still considered themselves to have a right to resort to war and formally declare war in the case of prior aggression by an enemy. Moreover, the Covenant and the Paris Pact had left the door wide open for 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 all-out reaction. To that end, 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 that 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'. On 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 Pandora's box.[61]

VI. Conclusion

The founders of the UN attempted but failed to close that box. 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.[62] 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 using the word 'inherent' the drafters of the Charter referred to the origins of the right as a natural right,

[61] D. W. Bowett, *Self-Defense in International Law* (New York: Praeger, 1958), 120–31; Neff, *War and the Law of Nations*, 303–13.

[62] Robert Hildebrand, *Dumbarton Oaks. The Origins of the United Nations and the Search for Postwar Security* (Chapel Hill, NC: University of North Carolina Press, 1990). See also the contribution by Nico Schrijver, 'The Ban on the Use of Force in the UN Charter', Chapter 21 in this volume, Section III.

with all its restrictions and limitations. Furthermore, the right was clearly defined in terms 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 of 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.[63]

[63] Thomas M. Franck, *Recourse to Force. State Action Against Threats and Armed Force* (Cambridge: Cambridge University Press, 2002), 45–134; Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford: Oxford University Press, 2008); Neff, *War and the Law of Nations*, 326–34.