
Aggression before Versailles

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Abstract

The roots of aggression as a concept of international law are rarely traced back beyond the end of World War I. The Versailles Peace Treaty of 28 June 1919 and the Covenant of the League of Nations, which constituted its first 26 articles, are often quoted as the first seminal steps towards its emergence as a key concept of the modern jus contra bellum. In this article, this assumption is tested and read against the backdrop of 18th- and 19th-century use of force law. The paper makes three claims. First, although international use of force law underwent important change during the 19th century, it remained deeply rooted in the jus ad bellum of the early modern age, which in turn had its roots in late-medieval scholarship. Therefore, 19th-century doctrine and state practice cannot be fully appreciated without an awareness of the historical tradition they built on. Second, although it cannot be denied that 19th-century international law conceded to states the right to resort to force and war, this right was conditional and restricted. Third, both early modern as well as 19th-century international lawyers referred to a concept of aggravated violation of jus ad bellum which – at least in theory – triggered reaction and even sanction by the international society of states against the perpetrator. This was, from the 18th century onwards, loosely and inconsequentially, but with increasing frequency, referred to as ‘aggression’ or ‘aggressive war’, both in diplomatic practice as well as in legal scholarship. Although the Versailles Peace Treaty broke with existing peace-making practice and returned to a discriminatory conception of war by blaming the war on Germany and its allies and by sanctioning them, it drew on a pre-existing conception of aggression as a violation of use of force law.

1 Introduction

The roots of aggression as a concept of international law are rarely traced back beyond the end of World War I. The Versailles Peace Treaty of 28 June 1919, and the Covenant of the League of Nations that formed its first 26 articles, are often quoted as

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the first seminal steps towards its emergence as a key concept of the modern *jus contra bellum*.¹ Article 10 of the Covenant named ‘external aggression’ the concern of all members of the League of Nations and made it a central plank of its system of collective security.² Aggression figured prominently in the actual peace settlement between the Allied and Associated Powers and Germany. Article 231 stipulated the liability of Germany for all of the loss and damages of the Allied powers and their nationals ‘as a consequence of the war imposed upon them by the aggression of Germany and her allies’.³ Article 227 provided for the prosecution of the former German Emperor Wilhelm II (1859–1941) for ‘a supreme offence against international morality and the sanctity of treaties’. The article did not expressly mention aggression, but the history of its origins makes clear that the former emperor was to be arraigned for, among others, the premeditation and execution of a war of aggression. This article is generally considered the historic precursor for the prosecution of crimes against peace after World War II.

Careful students of the concept’s history have quoted the condemnation of the French Emperor Napoleon I (1769–1821) by the Congress of Vienna after his final defeat and his subsequent imprisonment as a precedent for Emperor Wilhelm II’s arraignment or have pointed to the use of the term aggression in 19th-century alliance treaties and justifications for war. But none have given this more than a cursory mention. These references to aggression in the practice of the 19th century have been generally dismissed as part of a political or moral discourse that fall outside the ambit of international law.⁴ They stand at odds with the prevalent view that the 19th-century *jus ad bellum* was almost literally just that – the mere recognition that sovereign states had a right to resort to force and war, leaving no room for aggression as a violation of it.

¹ Versailles Peace Treaty 1919, 225 Parry 188. Brownlie, ‘The Use of Force in Self-Defence’, 37 *British Yearbook of International Law (BYIL)* (1961) 183, at 222; A. Cassese, *International Criminal Law* (2003), at 111; Griffiths, ‘International Law, the Crime of Aggression and the *Ius ad Bellum*’, 2 *International Criminal Law Review* (2002) 301, at 303–304; Eagleton, ‘The Attempt to Define Aggression’, 264 *International Conciliation* (1930) 581, at 586–588; Murphy, ‘The Crime of Aggression at the International Criminal Court’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 533, at 534–535; O’Connell and Niyazmatov, ‘What Is Aggression? Comparing the *Jus ad Bellum* and the ICC Statute’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 189, at 189–190; Sellars, ‘Delegitimizing Aggression: First Steps and False Starts after the First World War’, 10 *JICJ* (2012) 7, at 7–18; J. Stone, *Aggression and World Order: A Critique of the United Nations Theories of Aggression* (1958), at 10.

² Covenant of the League of Nations 1919, 13 *AJIL Supp.* 128 (1919).

³ The other peace treaties that were concluded at the peace conference of Paris with Germany’s former allies included similar clauses. Treaty of Saint-Germain-en-Laye with Austria 1919, 226 CTS 8, Art. 177; Treaty of Neuilly-sur-Seine with Bulgaria 1919, 226 CTS 332, Art. 121; Treaty of Trianon with Hungary 1920, Art. 161, reprinted in K. Strupp (ed.), *Documents pour servir à l’histoire du droit des gens* (2nd edn, 1923), vol. 5, at 44; Treaty of Sèvres with Turkey 1920, Art. 231, reprinted in *ibid.*, vol. 5, at 62.

⁴ Baldwin, ‘The Proposed Trial of the Former Emperor’, 29 *Yale Law Journal* (1919–1920) 75, at 79; I. Brownlie, *International Law and the Use of Force by States* (1963), at 351–352; C.A. Pompe, *Aggressive War: An International Crime* (1953), at 47–53.

The reading of the Versailles Peace Treaty as the first step in the criminalization of aggression falls squarely in line with the dominant historical narrative of international use of force law. This contrasts the gradual, but steady, emergence of the *jus contra bellum* between 1919 and 1945 with the almost complete absence of any legal restrictions on the resort to force and war at the turn of the 20th century. Under this view, the decades straddling the year 1900 saw the final demise of the just war doctrine, the decline of which had started with the rise of the sovereign state in the early modern age (circa 1500 to circa 1800). They marked the nadir of the role of international law in constraining war. Versailles and the League of Nations made an end to this lawlessness by introducing a new regime of use of force under international law.⁵ Some authors have labelled this a return to the just war doctrine.⁶

In the past, a few international lawyers have reached the uneasy conclusion that 19th-century doctrine and practice of use of force were altogether more complicated and sophisticated than they were generally credited for.⁷ But only in recent years did scholars challenge the prevalent narrative head on. Over the past decade, historians have indicated that the just war doctrine has proven far more resilient in the legal writings and state practice of the early modern age than was traditionally acknowledged.⁸ In his seminal historical study of war as a legal concept, Stephen Neff argues that, while the just war lost its relevance for the legitimization and restriction of actual war during the 19th century, it formed the intellectual foundation under different categories of measures short of war, such as self-defence, actions of necessity and, above all, reprisal.⁹ Agatha Verdebout estimates that the view that international law was indifferent to the legality of force and war was, contrary to what most post-World War I international lawyers assumed, not representative of 19th-century doctrine or practice. She lists only four 'radical positivists' from the late 19th or early 20th centuries who defended the indifference thesis: John Westlake (1828–1913), Thomas J. Lawrence (1849–1920), Lassa Oppenheim (1858–1919) and Dionisio Anzilotti (1869–1950). In her opinion, it fitted the political agenda of the League of Nations

⁵ Brownlie, *supra* note 4, at 19–65; Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, 2012), at 75–79; T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 9–10; Nussbaum, 'Just War – a Legal Concept', 42 *Michigan Law Review* (1943–1944) 453; O'Connell, 'Peace and War', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 272; T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 53–54; M.N. Shaw, *International Law* (7th edn, 2014), at 811–814; Von Elbe, 'The Evolution of the Just War Doctrine in International Law', 33 *American Journal of International Law (AJIL)* (1939) 665.

⁶ S.C. Neff, *War and the Law of Nations: A General History* (2005), at 279–90; Von Elbe, *supra* note 5, at 687–8.

⁷ Brownlie, *supra* note 4, at 46–50; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 39–40.

⁸ B. Klesmann, *Bellum Solemne: Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (2007); Lesaffer, 'Defensive Warfare, Prevention and Hegemony: The Justifications for the Franco-Spanish War of 1635', 8 *Journal of the History of International Law (JHIL)* (2006) 91 and 141; A. Tischer, *Offizielle Kriegsbegründungen in der Frühen Neuzeit: Herrscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständnis* (2012).

⁹ Neff, *supra* note 6, at 215–249.

period, which rendered a central place to international law in securing peace, to dismiss the role of international law in the pre-war period because it had failed.¹⁰ In her study of the role of international law during World War I, Isabel Hull contends that, in spite of the dominant view, international law did play a significant role in decision-making, diplomacy and propaganda at the commencement of the war. She points a finger at the concerted action of the German Foreign Ministry, German diplomats and German academicians during and after the Parisian Peace Conference to discredit the Versailles Peace Treaty and its war guilt clause.¹¹ The success of these actions, which were also evident within international academia, goes indeed some way towards explaining why post-World War I international lawyers chose to believe that international law did not restrict the right of states to resort to force or war in the years before 1914.¹²

This article subscribes to this recent turn in the historic narrative of international use of force law. It makes three claims. First, although international use of force law underwent important change during the 19th century, it remained deeply rooted in the *jus ad bellum* of the early modern age, which in turn had its roots in late medieval scholarship. Therefore, 19th-century doctrine and state practice cannot be fully appreciated without an awareness of the historical tradition on which they are built. Second, although it cannot be denied that 19th-century international law conceded to states the right to resort to force and war, this right was conditional and restricted. Third, both early modern as well as 19th-century international lawyers referred to a concept of aggravated violation of *jus ad bellum*, which – at least in theory – triggered reaction and even sanction by the international society of states against the perpetrator. From the 18th century onwards, this was loosely and inconsequentially, but with increasing frequency, referred to as ‘aggression’ or ‘aggressive war’ both in diplomatic practice as well as in legal scholarship. Although the Peace of Versailles broke with existing peace-making practice and returned to a discriminatory conception of war by blaming the war on Germany and its allies and by sanctioning them, it drew on a pre-existing conception of aggression as a violation of use of force law.

The article falls into four substantial sections. Section 2 explores the place of aggression in the *jus ad bellum* of the 17th and 18th centuries. The focus is on the work of Emer de Vattel (1714–1767), who was the most influential of the early modern

¹⁰ Verdebut, ‘The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis’, 1 *Journal of the Use of Force and International Law (JUFIL)* (2014) 223, with the thoughtful reflection by Ruys, ‘Editorial Comment: From *Passé Simple* to *Futur Imparfait*? A Response to Verdebut’, 2 *JUFIL* (2015) 3.

¹¹ I.V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 1–15.

¹² Dickmann, ‘Die Kriegsschuldfrage auf der Friedenskonferenz von Paris 1919’, 197 *Historische Zeitschrift* (1963) 1, at 59–94; Evans and Baylen, ‘History as Propaganda: The German Foreign Ministry and the Enlightenment of American Historians on the War-Guilt Question, 1930–1933’, in K. Wilson (ed.), *Forging Collective Memory: Government and International Law through Two World Wars* (1996) 151; Herwig, ‘Clio Deceived: Patriotic Self-Censorship in Germany after the Great War’, in Wilson, *ibid.*, 87; P. Krüger, *Deutschland und die Reparationen 1918/1919: Die Genesis der Reparationsprobleme in Deutschland zwischen Waffenstillstand und Versailler Friedensschluss* (1973), at 82–92; see also *Official German Documents Relating to the World War*, 2 vols (1923).

writers of the law of nature and of nations during the 19th century and who was most elaborate on the subject. Section 3 illustrates the place of aggression in the early modern *jus ad bellum* with an example from 18th-century state practice – namely, the case of the attack on Saxony and the Habsburg monarchy by King Frederick II of Prussia (1712–1786) in the summer of 1756. Section 4 briefly explains the major evolutions of the *jus ad bellum* in the century before 1914, arguing for the resilience of much of early modern tradition. Finally, section 5 turns to the Peace Conference of Paris in 1919.

2 Just and Legal War in Early Modern Europe

The *jus ad bellum* of the 17th and 18th centuries operated two different, but interconnected, conceptions of war: just war and legal war. The doctrine of just war had reached its classical articulation in the writings of canonists and theologians from the 12th and 13th centuries. The concept of legal war was a product of the civilian jurisprudence of the 12th–15th centuries. In his *De Jure Belli ac Pacis*, Hugo Grotius (1583–1645) recycled both concepts and gave them a place within his dualist systematization of the law of nations.¹³ Whereas just war pertained to the natural law of nations, which applied in conscience (*in foro interno*), legal war, or *bellum solemne* as he labelled it, pertained to the positive law of nations, which applied to the external relations between states (*in foro externo*).¹⁴ After Grotius, this dualism of operating two different sets of norms with relation to war – one at the level of natural justice and one at the level of its effect under the positive law of nations – became mainstream and remained so until the 19th century.¹⁵

A just war is an action of forcible self-help in order to seek redress for the violation of a right. In his classical rendering, the theologian Saint Thomas Aquinas (circa 1225–1274) listed three conditions for a war to be just: authority, just cause and righteous intention.¹⁶ Authority signifies the absence of a higher authority. Later authors would sometimes list different just causes. Grotius distinguished between self-defence, redress and punishment. But, in each case, the underlying cause was an injury committed by the enemy, including an unjustified armed attack.¹⁷ Righteous intention referred to the mental disposition with which a belligerent entered and fought a war. In practical terms, it referred to the war's purpose, which should be the attainment

¹³ H. Grotius, *De Jure Belli ac Pacis Libri Tres* (1925 [1625]).

¹⁴ *Ibid.*, at 1.3.4.1, 3.3.4–5, 3.3.12–13.

¹⁵ S.C. Neff, *Justice among Nations: A History of International Law* (2014), at 143–213. For examples of this dualism, see C. van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (1930 [1737]), at 1.1–2; G.F. von Martens, *Précis du droit des gens de l'Europe* (2nd edn, 1804), at 8.2.265–267; S. Rachel, *De Jure Naturae et Gentium Dissertationes* (1916 [1676]), at 2.39–46; J.W. Textor, *Synopsis Juris Gentium* (1916 [1680]), at 16.8–12, 17, 18.1–4; R. Zouche, *Juris et Iudicii Feccialis, sive, Juris Inter Gentes* (1911 [1650]), at 1.6, 2.6.1–2. The distinction between just and formal war is also debated by the radical naturalist Samuel Pufendorf (1632–1694), *De Jure Naturae et Gentium Libri Octo* (1934 [1688]), at 8.6.1–5, 9.

¹⁶ T. Aquinas, *Summa Theologiae* IIaIIae 40.1.

¹⁷ Grotius, *supra* note 13, at 2.1.2.

of a just peace. To these three conditions, one can add two more that were inherent in the logic of late medieval just war doctrine: necessity and proportionality. In early modern doctrine, the former was increasingly translated into an obligation to exhaust all peaceful means to obtain redress before resorting to war.

In principle, a just war opposes a just to an unjust belligerent. It discriminates between the belligerent sides, both during war and at the time of peace making. A consequential application of the just war doctrine denies the benefits of the laws of war, such as the right to conquer, take booty or exact ransom to the unjust belligerent, as he holds no right to wage war in the first place. At the end of a just war comes a just peace, whereby the just belligerent receives recognition of the contested right and is granted reparation for all of the damages and costs pursuant to the injury and the war.¹⁸

A legal war is a form of dispute settlement. For a war to be legal, it suffices that it is waged between sovereigns and, according to most early modern writers, is formally declared.¹⁹ The state of war triggers the equal application of the laws of war to all belligerents. The outcome of the war, or of the ensuing peace negotiations, determines the attribution of the right under dispute and creates title to it. Alberico Gentili (1552–1608) famously likened a legal war to a civil trial.²⁰ Similar to a civil trial, both sides have the right to defend their claims. Whereas in a civil trial the judge is supposed to render justice, force decides the outcome in war.²¹

Modern scholars have readily dismissed the resilience of just war in the early modern literature of the law of nature and of nations as empty lip service to an old, venerated tradition. Taking a cue from John Austin (1790–1859), they generally disparage just war as a moral, rather than a legal, category.²² But this constitutes a far too bleak view, which vastly underestimates the normative force of natural law in general and the just war doctrine in particular. This modern view is inspired by a too secular, anachronistic reading of early modern natural law.²³ Under the pens of mainstream writers of the law of nature and of nations of the early modern age, natural law was only secularized in the most limited of manners. Most writers, such as Grotius, did not take the untying of natural law from Christian religion any further than the acknowledgement that people could understand natural law regardless of their faith.²⁴ This concession served to bridge the gap between Christians of different denominations in Europe after the Reformation and to indicate a common basis for legal relations with

¹⁸ P. Haggemacher, *Grotius et la doctrine de la guerre juste* (1983), at 51–444; Neff, *supra* note 6, at 45–82; F.H. Russell, *The Just War in the Middle Ages* (1975).

¹⁹ B. de Ayala, *De Jure et Officiis Bellicis et Disciplina Militaris* (1944 [1584]), at 1.2.34; A. Gentili, *De Jure Belli Libri Tres* (1598, edn 1612, Classics of International Law, 1933), at 1.2. 1.6; Grotius, *supra* note 13, at 1.3.4.1.

²⁰ Gentili, *supra* note 19, at 1.2.18, 1.6.47–52.

²¹ J.Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (2012), at 25–132.

²² J. Austin, *The Province of Jurisprudence Determined*, edited by W.E. Rumble (1995 [1832]), at 19–21.

²³ Silverstrini, 'Justice, War and Inequality: The Unjust Aggressor and the Enemy of the Human Race in Vattel's Theory of the Law of Nations', 31 *Grotiana* N.S. (2010) 44, at 47–58.

²⁴ Grotius, *supra* note 13, *Prolegomena* 11.

peoples outside Christian Europe, such as the American Indians. But, to most classical writers of the law of nature and of nations, the ultimate foundation of natural law lay with God. More importantly, the application of natural law in conscience tied it back to religion and moral theology. For most of these writers, whatever their appurtenance in terms of Christian denomination, a violation of natural law equalled sin and could lead to the condemnation of the soul at the end of times. Whereas to the modern lawyer, a natural obligation is an unenforceable obligation, in the minds of most scholars, statesmen and diplomats of early modern Europe, precepts of natural law were enforceable. They would be enforced by the most supreme judge of all.²⁵ It was no coincidence that Grotius, his contemporaries and his followers recycled several doctrines from late medieval canon law and theology, such as just war, into natural law.²⁶

Just and legal war shared an important similarity to the extent that both turned on a conflict about rights. But, whereas just war was founded on the assumption that only one side was in the right, legal war lifted this assumption. Just war was an instrument for the enforcement of a pre-existing right, while legal war was an instrument to settle a disputed right. To build on the metaphor of Gentili, if legal war could be likened to a civil trial, just war was tantamount to the bailiff knocking on the door to enforce a prior verdict. The problem with just war was that, among sovereigns, it was generally impossible, with God being silent and without a common, human authority to judge, to establish this verdict with certainty. Herein lay the ontological connection between just and legal war, a connection that is generally disregarded by modern legal scholarship because of its association to the theological foundations of just war.

The late medieval canonists and theologians who first gave the just war doctrine its classical form were primarily concerned with the question of the impact of war on an individual's soul and afterlife. To them, the justice of war was indeed a matter of conscience.²⁷ In this respect, they had few qualms about the unpractical consequences of discriminating between just and unjust belligerents for the application of the rights of war or about the lack of realism in the proposition that belligerents should render justice after war, regardless of its outcome. The impracticality of these consequences, chiefly among them the lifting of the reciprocity in the application of the laws and customs of war, however, greatly troubled the civilian jurists of the late middle ages and the Renaissance who adopted the just war doctrine. They were primarily concerned with the effects of the law in the relations between princes and states in the here and now. It was for this reason that they devised the concept of legal war.²⁸

²⁵ *Ibid.*, *Prolegomena* 12, 20; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1916 [1758]), at 3.8.137; J. Gordley, *The Jurists: A Critical History* (2016), at 66–81.

²⁶ Lesaffer, 'Roman Law and the Intellectual History of International Law', in A. Orford and F. Hoffmann, *The Oxford Handbook of the Theory of International Law* (2016) 38, at 51–57; Silvestrini, *supra* note 23, at 56–58.

²⁷ See the title of the section in Aquinas, which listed the three conditions for just war: 'Whether it is always a sin to wage war.' Aquinas, *supra* note 16, *IIaIIae* 40.1; translation in R.W. Dyson (ed.), *Aquinas: Political Writings* (2002), at 240.

²⁸ Greenwood, 'War and Sovereignty in Medieval Roman Law', 32 *Law and History Review* (2014) 31.

The standard reasoning that connected legal war to just war held that in the light of the impossibility to establish among sovereigns who had right on his side, both sides as well as third parties in the external forum had to act as if both sides had just cause. By consequence, all belligerents were supposed to have a right to wage war. Under the conception of legal war, the discrimination between the just and the unjust belligerent was lifted since the judgment of the underlying claims was suspended until the final judgment. This explanation for legal war as a default solution to the riddle of justice in war was repeated by numerous writers from the 15th to the early 20th centuries. Its oldest explicit articulation known comes from Raphael Fulgosius (1367–1427).²⁹ Vattel's clear restatement of it was crucial for its survival in 19th-century literature.³⁰

There were actually three, rather than two, conditions for a war to be legal. Each belligerent needed to forward a plausible just cause. In case a belligerent did not make such a claim, or in case the claim was manifestly unjust, the uncertainty about the justice of each side's cause was lifted, and the suspension of judgment became unnecessary. By consequence, the just war re-entered the world of men in full force and caused legal effects in the secular world. Here, a space opened to conceive of a violation of the *jus ad bellum*, which led to a duty to compensate all of the costs and damages of the war to the just belligerent. It was in this space that the concept of aggression emerged.

None of the classical jurists of the law of nature and of nations of the *ancien régime* explored this space more elaborately than Vattel. The Swiss diplomat reiterated the dual system of just and legal war (*la guerre en forme*).³¹ He insisted that a war could only be considered legal inasmuch as the justice of the different belligerents' claims remained uncertain. Thereto, all belligerents needed to forward a just cause, even if this was mere pretext. Vattel acknowledged that princes and rulers were often far from sincere in the justifications for war they proffered, but as long as they indicated a just cause, it was impossible to judge. Failure to forward a just cause, however, lifted the protection of legality from a belligerent and threw him back into the realm of just war.³² A war that was manifestly unjust was also illegal. This implied that the unjust side would not benefit from the laws of war and that, at the end of the war, the unjust belligerent would be held accountable for all of the costs and damages of the just belligerent pursuant to the war.³³

Although Vattel was particularly elaborate, thus far he did nothing but expound the logic of the dual system of just and legal war. However, Vattel took the theory some steps further by adding a moral dimension and attaching severe consequences to the concept of a manifestly unjust war. Failure to forward a just cause did not only lay the perpetrator bare to the full consequences of fighting an unjust war, but it also made the war a concern of the international society of states as a whole. It made the unjust belligerent into an enemy of mankind.³⁴ According to Vattel, neglecting

²⁹ R. Fulgosius, *In Pandectas* (1534), ad D.1.1.5.

³⁰ Vattel, *supra* note 25, at 3.3.40, 3.12.188; see also C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1934 [1749]), at 7.889.

³¹ Vattel, *supra* note 25, at 3.3.24–28, 40.

³² *Ibid.*, at 2.18.335, 3.3.30–33, 3.4.67–68.

³³ *Ibid.*, at 3.4.68, 4.2.18; Silvestrini, *supra* note 23, at 61–63.

³⁴ Vattel, *supra* note 25, at 3.3.34.

to justify war signified contempt for justice and was tantamount to declaring 'open war upon all what [was] sacred in human society'. At least, a sovereign who offered a pretext 'tacitly [confessed] that flagrant injustice merits the indignation of all men'.³⁵ Such behaviour warranted two reactions by the society of states. First, all other states obtained the right to join forces against the enemy of mankind and subdue him. This also included the right to take measures to guarantee against new transgressions and safeguard peace and security for the future.³⁶ Second, Vattel even suggested that the sovereign prince of the involved state could be personally punished. However, he did not insist on this point.³⁷ As Walter Rech indicates, Vattel's concept of common sanction was not driven by moral indignation and a desire to punish but, rather, by a concern for collective security.³⁸ Although Vattel reiterated the core elements of the classical just war doctrine, he reframed it by insisting on the fundamental right of self-preservation as its ultimate basis. Thereby, he placed state security at the heart of his *jus ad bellum*. This widened the scope of the concept of just cause to include threats to a state's security, thus allowing actions to prevent injury or an anticipated attack. Vattel thus extended self-defence to anticipatory self-defence.³⁹

The category of enemy of mankind was not limited to those failing to offer a just cause for war. It contained all those whose actions made their use of force manifestly unjust. Vattel did not list them in any systematic way, but from various remarks, one can infer three more categories. First, there were the notorious warmongers. Those were rulers and peoples whose propensity to commit injustice and resort to violence was so notorious that any justifications for war they might proffer were discredited.⁴⁰ Second, there were those rulers who desired to dominate Europe and thereby threatened to overthrow the balance of power and the security of all states.⁴¹ Third, the contempt of a ruler for the sanctity of treaties could stain him as an enemy of mankind.⁴² Apart from these categories stood 'barbarian nations' who fought wars in uncivilized ways, without regard for the laws and customs of war. This group was different as it concerned peoples outside Europe, whereas the former categories all referred to European rulers and peoples. While Vattel was mild with regard to the punishment for warmongers, disturbers of the balance of power and violators of treaties, he insisted that these barbarians merited harsh, effective and collective punishment.⁴³

Of all the great writers of the law of nature and of nations of the 17th and 18th centuries, Vattel was the most explicit and elaborate on the consequences of waging

³⁵ *Ibid.*, at 3.3.32.

³⁶ *Ibid.*, at 2.5.70.

³⁷ *Ibid.*, at 3.4.68, 3.11.184, 4.2.6.

³⁸ W. Rech, *Enemies of Mankind: Vattel's Theory of Collective Security* (2013), at 125–127, 149–157.

³⁹ Vattel, *supra* note 25, at 2.4.49, 3.4.42–44.

⁴⁰ *Ibid.*, at 2.5.70, 3.3.33–34.

⁴¹ *Ibid.*, at 3.3.45–49.

⁴² *Ibid.*, at 2.15.222; see Rech, *supra* note 38, at 182–192.

⁴³ Rech *supra* note 38, at 112–127.

a manifestly unjust war.⁴⁴ But he was only partially original. He mainly exploited the traditional logic of dualism and the interconnection between just and legal war. To this, he added a concern for collective security, which came from founding the whole *jus ad bellum* on the right of self-preservation. This latter move made a lasting imprint on mainstream doctrine.

The resilience of just war in early modern legal scholarship reflected its relevance for state practice at the time. All through the early modern age, the princes and governments of Europe took great trouble in justifying war. For this purpose, they generally used the discourse of just war. Justifications for war were commonly to be found in formal declarations of war and official manifestos, which were given a wide distribution within and without the country. These justifications served four purposes and were targeted at four audiences. First, they were meant to assuage the conscience of the rulers themselves. Second, they were a means of propaganda to shore up the morale of a belligerent's own soldiers and populations and, third, to undercut the confidence of the enemy. Here, the religious dimension of just war played a prominent role. Many thought that God might not only rule on the justice of war at the end of times but also might already indicate his favour in war. While this was a widely spread popular belief, it was also shared by some theologians and legal scholars.⁴⁵ Fourth, the justifications were addressed to the governments of allies and neutral states. The former target audience was of particular importance as most alliance treaties were defensive and only triggered the *casus foederis* in case of an unprovoked attack by the enemy – in other words, when the ally could indicate to be the just belligerent.

By the second half of the 17th century, a standard line of justification had developed in declarations and manifestos of war. Usually, belligerents forwarded four arguments for their decision to resort to war. First, they opposed the desire of the enemy to do harm to their own desire for peace. Second, this was proven by citing a preferably extensive list of transgressions of one's rights over a long period of time. This constituted just cause but, third, also showed that one had done everything to avoid war and that it was the enemy's behaviour that made the war an appropriate, proportional and necessary reaction. Lastly, there was a clear preference to argue defensive war, in the sense that the enemy used force first, regardless of how small this force might be. In the rare case that the last claim was not made, governments were at least implicitly conceding they were starting an offensive war.⁴⁶ In these cases, the insistence that the war was just and that the belligerent could not be considered guilty of an unjustified attack was only greater. As princes knew, being labelled an aggressor could carry its

⁴⁴ Wolff, *supra* note 30, at 6.626–636, 652, 965–969; Rech, *supra* note 38, at 155–157. Gentili expressly denied that a manifestly unjust war lifted the protection of its legality from the unjust side, as, so he claimed, 'laws are not based upon rare instances and adapted to them'. Gentili, *supra* note 19, 1.6.51–52.

⁴⁵ Grotius, *supra* note 13, *Prolegomena* 20; J. Cornette, *Le roi de guerre: Essai sur le souveraineté dans la France du Grand Siècle* (1993), at 155–165.

⁴⁶ In classical doctrine, whether a war is defensive or offensive depends on who uses force first. Both types of war can be just or unjust. A defensive war is only just if it counters an unjust attack; an offensive war is just when it is waged to redress injury. Wolff, *supra* note 30, at 6.615; Vattel, *supra* note 25, at 3.3.28.

consequences. Few had as much reason to fear this as King Frederick II of Prussia when he launched the Third Silesian War.⁴⁷

3 A Case of Aggression: The Third Silesian War

On 29 August 1756, the Prussian army invaded Saxony. After having secured the electorate, the invading army launched its attack on Bohemia, which formed part of the Austrian-Habsburg conglomerate. The same day, 13 September, King Frederick II formally declared war on the Empress Maria Theresa (1717–1780), ruler of the Austrian monarchy.⁴⁸ At the time of his attack, Frederick II already held a reputation as a recidivist transgressor of the law of nations. The late summer invasion of that year was not the first offensive war he had started. It was the third, after his invasion of Silesia in 1740, which was then a possession of the Habsburg dynasty, and his attack on Saxony and Bohemia in 1744. To this, his detractors could add the series of violations of treaty obligations he had committed – in particular, his triple betrayal of his French ally during the war of the Austrian succession (1740–1748). Frederick's bad reputation as an opportune expansionist would make a lasting imprint on history. In the 20th century, it further suffered from his close association with Prussian militarism, which was indicated by Germany's enemies and many historians as one of the major causes for the conflagrations of 1914 and 1939.⁴⁹

Most of all, it was King Frederick II's opportunist conquest of Silesia in 1740, shortly after the death of Emperor Charles VI (1685–1740) and at the time of the strenuous succession by his daughter Maria Theresa, which vested Frederick II's black

⁴⁷ For numerous examples of early modern declarations and manifestos of war that used this standardized just war discourse, see Klesmann, *supra* note 8; Tischer, *supra* note 8. Furthermore E.J. Baumgartner, *Declaring War in Early Modern Europe* (2011); Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', in Weller, *supra* note 1, 35, at 42–45. For detailed analyses of some particular wars, see Lesaffer, *supra* note 8; Lesaffer, 'Between Faith and Empire: The Justification of the Spanish Intervention in the French Wars of Religion in the 1590s', in M. Koskenniemi, W. Rech and M. Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (2017) 101; Piirimäe, 'Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War', 45 *The Historical Journal* (HJ) (2002) 499. Representative examples from after 1648, from S. 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 (1710–1732), include the Dutch manifesto against Britain, 2 August 1652 (vol. 3, at 45), the British declaration of war against the Dutch Republic, March 1672 (vol. 4, at 254), the Dutch declaration of war against France, 9 March 1689 (vol. 1, at 256), the British declaration of war against France, 4 May 1702 (vol. 1, at 421) and the French declaration of war against Spain, 1719 (vol. 4, at 382). State practice also reflected dualism to the extent that states, in the application of the laws of war or when making peace, did not rehearse the language of just war and acted as if all belligerents had an equal right to wage war, thus factually operating under the logic of legal war. The conspicuous absence of any attribution of guilt and the general appearance of amnesty clauses in early modern peace treaties illustrate this well. See note 77 below.

⁴⁸ E.A.J. Szabo, *The Seven Years War in Europe 1756–1763* (2008), at 36–40.

⁴⁹ P. Paret, *Frederick the Great: A Historical Profile* (1970), at 105–106. For a brief discussion of historiography, see T. Blanning, *Frederick the Great: King of Prussia* (2015), at 597–601.

reputation, both among his enemies and later historians.⁵⁰ Recently, James Whitman has argued that, although the justification Frederick II offered for his seizure of Silesia seems far-fetched to most modern observers, he remained within the safe confines of legal war through the single act of offering it. However insincere his revival of old dynastic rights to parts of the Duchy of Silesia may appear, it did suffice to offer a platform to his supporters and allies to claim the justice of his cause.⁵¹ In truth, Frederick II just about toed the line of legality with his invasion of 1740. It was only after his armies had entered Silesia that he took the need to publish a plausible justification seriously. Before, the king had proven quite derisive of the attempts of his ministers to draft a justification and convince him of the significance thereof.⁵² The exploitation of this neglect by the Viennese government alerted him to the danger.⁵³ On 31 December 1740, the Prussian government issued a manifesto laying claim to part of the Duchy of Silesia, which it reasoned the Austrians unjustly occupied. This gave Frederick II just cause and a right to secure his inheritance. The manifesto insisted, as Frederick had done before in his communication with the court at Vienna, that he had no aggressive or expansionist intentions against the Austrian Habsburgs.⁵⁴

Writing in 1757 at a time when he had given up all prospect of a career in the service of his suzerain, King Frederick II, and was working for the elector of Saxony and king of Poland, August III the Strong (1696–1763),⁵⁵ even Vattel conceded that Frederick had acted within the confines of the law of nations back in 1740.⁵⁶ This was, however, not the case for his invasion of Saxony in 1756. In a letter to the government of Bern, to which he was accredited as a diplomat, Vattel virulently protested Frederick's attack on his master's lands. In his letter, Vattel argued that there were only two just causes for war: redress for injury after an appeal to the enemy to render satisfaction had failed or the need to defend one's security. As no complaint for injury had been lodged against the elector of Saxony and Saxony had made no threatening preparations, the Prussian king lacked any credible pretext for war. Moreover, Frederick II had protested his friendship for Saxony and, one day before his invasion, had requested passage for his troops. Vattel concluded that the Prussian king's real

⁵⁰ G. Ritter, *Frederick the Great: A Historical Profile* (1968), at 80–81; T. Schieder, *Frederick the Great* (2000), at 80–99; D. Showalter, *The Wars of Frederick the Great* (1996), at 39.

⁵¹ Whitman, *supra* note 21, at 54–55, 67–76, 119–132.

⁵² The much-quoted quip about an earlier memoir as 'the work of a good charlatan' ('*bravo, c'est l'ouvrage d'un bon charlatan*') was not widely known among Frederick's contemporaries. It was written on a draft of 28 November 1740. A. Berney, *Friedrich der Grosse: Entwicklungsgeschichte eines Staatsmannes* (1934), at 123; also W.F. Reddaway, *Frederick the Great and the Rise of Prussia* (1904), at 89–92; Schieder, *supra* note 50, at 84.

⁵³ Schieder, *supra* note 50, at 99.

⁵⁴ *Mémoire sur les raisons qui ont déterminé le Roi à faire entrer ses troupes en Silésie*, reprinted in R. Koser (ed.), *Preussische Staatsschriften aus der Regierungszeit König Friedrichs II (1740–1745)* (1877) 74; D. Fraser, *Frederick the Great: King of Prussia* (2000), at 78.

⁵⁵ Emer de Vattel to Jean Henri Samuel Formey, 17 February 1757, reprinted in A. Bandelier (ed.), *Emer de Vattel à Jean Henri Samuel Formey: Correspondances autour du Droit des Gens* (2012), at 179–180.

⁵⁶ Vattel, *supra* note 25, at 2.18.335.

motive was his desire to acquire a rich country and rob it of its resources and manpower. Such behaviour jeopardized the surety of all and made peace impossible.⁵⁷

This time, King Frederick II was aware of the precariousness of his legal position and the urgent need to offer a credible defence of his action. In truth, although Frederick II was the first to resort to force in 1756, this was not a war of his choice. During the summer of 1756, Frederick II had become – not without cause – convinced that his main enemies, Austria and Russia, were preparing an offensive against him. Ever since the Peace of Aachen, which put an end to the war of Austrian succession and secured Frederick's possession of Silesia,⁵⁸ Vienna had been plotting its reconquest. To this purpose, it could count on the active cooperation of Saint Petersburg and the enmity of Saxony for Prussia. But Vienna also needed to secure the alliance, or at least the neutrality, of Prussia's traditional ally, France.⁵⁹ After years of failure, Maria Theresa and her chancellor, Count Wenzel Anton von Kaunitz (1711–1794), finally achieved their goal in the spring of 1756. Already in the summer of 1755, the likelihood of a colonial war against Britain over North America had convinced France of the necessity to obtain Austria's neutrality so that France could avoid becoming embroiled in a European war.

However, all through the autumn of 1755, the French King Louis XV (1710–1774) had proved reluctant to blow up his alliance with Prussia and betray King Frederick II, as much as he might dislike him and reproach him for his repetitive perfidy. The news of the Convention of Westminster of 16 January 1756, whereby Britain and Prussia agreed to neutralize Germany from the war between Britain and France, caused Louis XV to change tack.⁶⁰ In February 1756, the decision was taken at Versailles not to prolong the alliance with Prussia after its expiration in June 1756, although the French king still refused to listen to any proposals that were directed against Prussia.⁶¹ Nevertheless, with the First Alliance of Versailles, signed on 1 May 1756, he effectively abandoned his ally to the designs of Vienna and Saint Petersburg. The Versailles agreement included a treaty of defensive alliance, which obliged France and Austria to aid one another with a corps of 24,000 men in case of attack.⁶²

⁵⁷ Letter of 28 February 1757, reprinted in Bandelier, *supra* note 55, at 181–184.

⁵⁸ Treaty of Peace of Aachen 1748, 38 CTS 297.

⁵⁹ McGill, 'The Roots of Policy: Kaunitz in Italy and the Netherlands, 1742–1746', 1 *Central European History* (1968) 131; L. Schilling, *Kaunitz und das Renversement des alliances: Studien zur ausserpolitischen Konzeption Wenzel Antons von Kaunitz* (1994); Pommerin and Schilling (eds), 'Denkschrift des Grafen Kaunitz zur Mächtepolitischen Konstellation nach dem Aachener Frieden von 1748', in J. Kunisch et al. (eds), *Expansion und Gleichgewicht: Studien zur europäischen Mächtepolitik des ancien regime* (1986) 165.

⁶⁰ 40 CTS 291.

⁶¹ Treaty of Alliance of Breslau 1741, 36 CTS 217.

⁶² 40 CTS 335, Art. 7; Blanning, *supra* note 49, at 193–202; Bély, 'La politique extérieure de la France au milieu du XVIIIe siècle' in S. Externbrink (ed.), *Der Siebenjährige Krieg (1756–1763): Ein europäischer Weltkrieg im Zeitalter der Aufklärung* (2011) 75; S. Externbrink, *Friedrich der Grosse, Maria Theresia und das Alte Reich: Deutschlandbild und Diplomatie Frankreichs in Siebenjährigem Krieg* (2006) 107–10; Fraser, *supra* note 54, at 287–310; E. Masson (ed.), *Mémoires et lettres de François-Joachim de Pierre, Cardinal de Bernis (1715–1758)* (1878), vol. 2, at 222–275; W. Mediger, *Moskaus Weg nach Europa: Die Aufstieg Russlands zum europäischen Machtstaat im Zeitalter Friedrichs der Grossen* (1952), at 453–637; Pommerin,

It took until June 1756 before King Frederick II realized the impact of the Versailles agreement. Even if he did not know the full details of the treaties made between Versailles and Vienna, what he knew, and the reports he received from his spies of the Austro-Russian plans and preparations, convinced him that France had abandoned him to his enemies. Realizing the bleakness of his situation, Frederick decided to gamble on a quick offensive against Austria, hoping to knock it out of the war before Russia could bring its numeric weight into the equation.⁶³ The news that the Austro-Russian attack had been postponed to 1757 only strengthened his resolve. By late July, Frederick had decided to attack in late summer so as to prevent Russian interference in 1756. He also included the invasion of Saxony in his plan. Securing the electorate would strengthen the defences of Brandenburg and enhance his demographic, logistic and tax basis for the duration of the war. From the perspective of justification, the invasion of Saxony was his weak spot. It would lay Frederick II bare to accusations of expansionism. Although the Prussian king was ascertained of the enmity of the Saxon government and suspected its collusion with Vienna and Saint Petersburg in the planned attack, he had no proof of the latter. The search of the electoral archives after the invasion would not deliver a smoking gun either.

If King Frederick II had good reasons to worry about the outfall of his planned attack throughout Europe for his reputation and general standing, there were also two more concrete motivations for the care he took this time in arguing his case to the world. First, Frederick needed to avoid a condemnation of his actions by the Diet of the Holy Roman Empire, which might lead to the declaration of an imperial war against him and even to the pronouncement of an imperial ban, which would mean his deposition in his German lands.⁶⁴ Second, and more importantly, he needed to avoid triggering the defensive alliance between Austria and France. Thereto, he had to leave the court of Versailles enough leeway so that it could claim – if it chose to – that the Prussian attack on Austria did not constitute an act of aggression covered by the alliance.⁶⁵

'Bündnispolitik und Mächtesystem: Österreich und der Aufstieg Russlands im 18. Jahrhundert' in Kunisch *et al.*, *supra* note 59, 113; Reddaway, *supra* note 52, at 189–205; Rödel, 'Eine geheime französische Initiative als Auslöser für das Renversement des Alliances?', in Kunisch *et al.*, *supra* note 59, 97; Schieder, *supra* note 50, at 117–120; A. von Arneth, *Geschichte Maria Theresias* (1870), vol. 4, at 354–494; R. Waddington, *Louis XV et le renversement des alliances: Préliminaires de la Guerre de Sept Ans 1754–1756* (1896), at 287–359.

⁶³ Letter of King Frederick II to D.H. von Knyphausen, 8 June 1756, 12 June 1756; to A. Mitchell, 22 June 1756; to D. Knyphausen, 22 June 1756, 26 June 1756, reprinted in J.G. Droysen (ed.), *Politische Korrespondenz Friedrich's des Grossen* (1879–1939), vol. 12, at 394, 400–401, 441–442, 442–443, 465–467; Letter of H.G. von Podewils to A.F. Eichel, 22 July 1756; Letter of King Frederick II to Baron Klinggräffen, 24 July 1756, reprinted in Droysen, *ibid.*, vol. 13, 104–107, 114–115.

⁶⁴ The first would transpire, the second not; Externbrink, *supra* note 62, at 111–130; K.A. von Aretin, *Das Alte Reich 1648–1806* (1997), vol. 3, at 88–100; Wilson, 'Prussia's Relations with the Holy Roman Empire', 51 *HJ* (2008) 337, at 350–352.

⁶⁵ Letter of King Frederick II to D.H. von Knyphausen, 26 July 1756; Letter of Podewils to King Frederick II, 26 July 1756; Letter of Knyphausen to King Frederick II, 10 September 1756, reprinted in Droysen, *supra* note 63, vol. 13, at 128–130, 133, 424.

King Frederick II prepared the ground well for the presentation of his case. During July and August 1756, he had his representative at Vienna ask the empress three times for assurances that she was not preparing an attack on him. The second and third time, he promised that he would not open hostilities if Maria Theresia guaranteed she would not attack in 1756 or 1757. Frederick hoped that her refusal to give this guarantee would deflect the blame.⁶⁶ At the time of the invasion of Bohemia in September, the Prussian government issued a manifesto that was translated in different languages and widely spread. The manifesto, which was from the hand of Frederick II himself, had gone through no less than six revisions since mid-July.⁶⁷

Because the Prussian king could neither invoke serious injury nor unwarranted attack on the Austrian side, he argued preventive self-defence. In the manifesto, he sailed as close to traditional just war discourse as possible. First, the manifest opposed the relentless desire of Austria to harm Prussia with the latter's long suffering thereof. In this context, Frederick accused Austria of having violated a commercial clause from the Peace of Breslau from 28 July 1742.⁶⁸ Although this constituted a 'pretext for legitimate war', it paled in comparison to the many other transgressions of Vienna. Second, the manifesto presented Austria's desire to bring down Prussia as a first step towards the realization of its ambition to dominate Germany, root out the Protestant religion and destroy the liberty of the princes and estates of the empire. Thereby, he invoked the traditional discourse of the Protestant-French alliance that went back to the days of Emperor Charles V (1500–1558). Although he did not mention it in this context, King Frederick II thus hoped to stoke up the concerns that the alliance between the two leading Catholic powers of Europe, France and Austria had caused among Protestants.⁶⁹ Third, the manifesto argued that Austria was planning and preparing an attack on Prussia. It detailed the different steps Austria had taken to build a coalition against Prussia and listed its military preparations. It also rehearsed the fruitless triple attempt by Frederick to avert war by requesting a guarantee that he would not be attacked before the end of the coming year. This and the denial of any preparations against Austria on Prussia's part had to lock the case of preventive self-defence.

The manifesto closed with a remarkable passage, which directly referred to aggression. In it, the Prussian king conceded that he was the one to commence hostilities. However, this did not equal aggression. According to him, aggression only referred

⁶⁶ Letter of Baron Klinggräffen to King Frederick II, 18 July 1756, 27 July 1756, 7 August 1756, 24 August 1756; Minutes of the conversation of King Frederick II with A. Mitchell, 26 August 1756, reprinted in Droysen, *supra* note 63, vol. 13, 90–91, 163, 209, 285–291. Fraser, *supra* note 54, at 310–313; Lüth, 'Frederick the Great and the First World War', in M.H. Danley and P.J. Speelman (eds), *The Seven Years' War: Global Views* (2012) 1, at 1–2; Schieder, *supra* note 50, at 88.

⁶⁷ Exposé des motifs, qui ont obligé Sa Majesté le Roi de Prusse, à prévenir les desseins de la cour de Vienna, in O. Krauske (ed.), *Preussische Staatsschriften aus der Regierungszeit König Friedrichs II (der Beginn des Siebenjährigen Kriegs)* (1892), at 133–183.

⁶⁸ 36 CTS 409, Art. 8.

⁶⁹ Burckhardt, 'Religious War or Imperial War? Views of the Seven Years' War from Germany and Rome', in Danley and Speelman, *supra* note 66, 107.

to ‘every act which is diametrically opposed to a treaty of peace’. The making of an offensive alliance, the exhortation of other states to attack another, designs to invade another state or a sudden attack were examples of aggression, even if only the last one implied resort to force. ‘Whoever prevented such aggressions, could be the one who commenced hostilities, but was not the aggressor’, Frederick concluded.⁷⁰ In sum, the real aggressor was Vienna, which had violated the Peace of Breslau, incited Russia to attack Prussia and prepared for invasion itself.

King Frederick II’s manifesto was cleverly designed to kill two birds with one stone. He presented Austria’s design on Prussia as a first step towards the destruction of liberty and Protestantism in the empire in the hope of deflecting a condemnation by the Diet. In this, time would prove him partially successful. Furthermore, he wanted to counter the accusation that he was guilty of an unwarranted attack, which he labelled aggression, on Austria for this would trigger the Alliance Treaty of Versailles. Frederick’s manifesto, his later writings and his diplomatic offensive failed to attain this latter goal. Already on 26 July 1756, the French ambassador at the Prussian court had warned Frederick II that an attack on Austria would trigger the Alliance of Versailles.⁷¹ Upon Vienna’s invocation of the treaty in the autumn, it decided to send the promised auxiliary corps of 24,000. Worse was to follow. Ever since the closure of the Versailles agreement, Austrian diplomacy had relentlessly pursued its attempts of further committing France to its design against Prussia. However, powerful factions at the French court resisted this either because they held to the ‘old system’ of enmity with Austria and friendship with the German Protestants or because they prioritized the colonial and maritime war against Britain over any embroilment on the continent. The failed assassination attempt against the life of King Louis XV in January 1757 caused a chain of events that led to the fall of some leading opponents of a closer alliance with Vienna. This set the wheels in motion towards France’s full participation in the anti-Prussian alliance.⁷²

The outcome of this was the Second Treaty of Versailles of 1 May 1757. Contrary to its predecessor, this was an offensive alliance. Remarkably, the designs of the allies were justified as a reaction against the ‘unjust aggressor’ King Frederick II of Prussia. Its stipulated goals were to repel the aggressor and to procure satisfaction as well as security for the future for both Austria and Saxony.⁷³ The treaty constituted a bilateral agreement between France and Austria, but the signatories invited Russia, Sweden, Poland-Saxony, Bavaria, the Palatinate, Spain and the Italian Bourbons to join the alliance and reap its benefits. Although negotiations with these powers still had to take place, the treaty stipulated the conditions of their adherence and the benefits they

⁷⁰ ‘Exposé de motifs’, *supra* note 67, 180.

⁷¹ Letter of H.G. von Podewils to King Frederick II, 26 July 1756, reprinted in Droysen, *supra* note 63, vol. 13, at 133.

⁷² Bély, *supra* note 62, at 86–91; Masson, *supra* note 62, vol. 2, at 281–375; M. Hochedlinger, *Austria’s Wars of Emergence 1683–1797* (2003), at 335–337; von Arneth, *supra* note 62, vol. 5, at 57–144.

⁷³ 41 CTS 1, Preamble (Second Treaty of Versailles).

would obtain from it. Versailles and Vienna styled their alliance as an action on behalf of the whole community of European princes.

The treaty, which went partly back to a design of the Saxon government from 1744,⁷⁴ was textbook Vattel. It attached two major consequences to Prussia's condemnation as an unjust aggressor. First, it provided for the compensation of Saxony for the damages it had suffered in consequence of its 'unjust invasion' and 'cruel devastation'.⁷⁵ Second, the treaty partners proposed not only the reconquest of Silesia but also the dismantling of Prussia. King Frederick II would be stripped of almost all of his lands, which were to be distributed among his enemies. Only its historic core, the Electorate of Brandenburg, was to be left. This was justified on the basis of the need to weaken the Prussian king in order to secure the peace and tranquillity of Europe.⁷⁶

The Second Treaty of Versailles was exceptional, not so much in using the discourse of just war but, rather, in envisioning the effective sanctioning of its transgressor. The intentions of the allies contradicted standard practices of peace making. Whereas during the early modern age princes and governments commonly used the language of just war when resorting to war, peace treaties never did.⁷⁷ There is not a single peace treaty among European sovereigns from the 17th or 18th centuries that contains an express, or even implicit, concession by a belligerent that he had waged an unjust war. Moreover, the peace treaties from this period commonly include an amnesty clause, by which the signatories waived all rights to compensation for themselves and their subjects for any damage pursuant to the war, whether legal or illegal, just or unjust. By the mid-18th century, these clauses were considered to be automatically implied.⁷⁸ The Second Treaty of Versailles, for all its bold statements and ambition, would not lead to any different result.⁷⁹ It was never ratified by Austria and was formally lifted, as a result of a change of policy at the French court, by the Third Treaty of Versailles of 30 December 1758.⁸⁰ Nevertheless, it indicated that the discourse of just war, including the concept of aggression as an aggravated, manifest violation of it, was part of the lore and practice of the public law of Europe.

4 International Use of Force Law in the Century before World War I

The perusal of legal scholarship and state practice of the 19th century, when read against the backdrop of the early modern doctrine on which it was built, surely forces

⁷⁴ M.S. Anderson, *The War of the Austrian Succession 1740–1748* (1995), at 135; R. Hanke, *Brühl und das Renversement des alliances: die antipreuussische Aussenpolitik des Dresdener Hofes, 1744–1756* (2006).

⁷⁵ Second Treaty of Versailles, *supra* note 73, Art. 8.

⁷⁶ *Ibid.*, Preamble and Arts 5–6.

⁷⁷ R. Lesaffer, *Europa, een zoektocht naar vrede? (1453–1763/1945–1997)* (1999), at 443–452.

⁷⁸ Fisch, *supra* note 45; *Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (1979), at 92–112; Lesaffer, 'Peace Treaties and the Formation of International Law' in Fassbender and Peters, *supra* note 5, 71, at 87–89.

⁷⁹ Treaty of Peace of Hubertusburg 1763, 42 CTS 361, Art. 1.

⁸⁰ 41 CTS 235; Bély, *supra* note 62, at 91–92.

one to amend the prevalent view that 19th-century international law barely held restrictions on the right to resort to force and war. Although the restrictive normative power of the *jus ad bellum* was diminished and the rules were relaxed during the century stretching from the Congress of Vienna to World War I, the important point is that traditional doctrine survived to a much larger extent than is commonly accepted. This included the concept of aggression as a major violation of the *jus ad bellum*. Even more so, during the 19th century, the concept gained a wider meaning as well as a new prominence.

At first sight, it seems logically inevitable that the ascendancy of positivism and the ejection of natural law from the ambit of international law by the late 19th century caused the demise of just war.⁸¹ This only left the concept of legal war, which, detached from just war, boiled down to a mere acceptance of the right of states to resort to war whenever they saw fit. It left international law with nothing to do but to recognize war as a factual state, of which it could regulate the legal effects but not the legality. However, as Verdebout has argued, only a few scholars from around the turn of the 20th century actually defended this position.⁸² Although there are a few more of these radical positivists than the four Verdebout identifies, their interpretation was not representative of the whole period nor did it sweep the board in the early years of the 20th century.⁸³ It was only after World War I that these authors came to be seen as representative.

Some international lawyers from the first three-quarters of the 19th century continued to adhere to the dualism of natural and positive law and of just and legal war.⁸⁴ But, even after legal positivism took hold and pushed natural law to the margins at the end of the century, only a minority adopted the indifference thesis. The majority, while pushing natural law outside the ambit of law, recycled many of its institutions and doctrines back into positive international law. Their reduction of international law to positive law was largely a theoretical move, which did not necessarily reflect in substance. The redefinition of the right of self-defence of states from a natural to a

⁸¹ In recent years, scholars have debated the impact of positivism of 19th-century international law. The old view that the whole century was an era of positivism needs to be nuanced. The dualism or co-existence of natural and positive law of nations persisted deep into the century. Nevertheless, during the final three decades of the century positivism took hold. Generally, positivists did not reject the existence of natural law, but they denied it any normative value in practice and reduced their understanding of international law to that of positive international law. See M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013), at 30–34; Neff, *supra* note 15, at 241–260; Sylvest, ‘International Law in Nineteenth-Century Britain’, 75 *BYIL* (2004) 9.

⁸² Verdebout, *supra* note 10.

⁸³ A. Hershey, *The Essentials of International Public Law* (2nd edn, 1918), at 349–352; V. Stockton, *Outlines of International Law* (1914), at 294. There are also authors who dismissed restrictions on war out of hand. See, e.g., R. von Mohl, *Staatsrecht*, 2 vols (1860), vol. 1, at 765.

⁸⁴ W.O. Manning, Jr., *Commentaries on the Law of Nations* (1839), at 57–67; R. Phillimore, *Commentaries upon International Law*, 3 vols (1854–1857), vol. 1, 55–85; J. Reddie, *Inquiries in International Law, Public and Private* (2nd edn, 1851), at 111–133; T. Twiss, *The Law of Nations Considered as Independent Communities*, 2 vols (2nd edn, 1884), vol. 1, 145–177; T. Woolsey, *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies* (1860), at 17–21.

customary right offers a good example thereof. Mainstream positivists recycled much of old just war thought back into their newly unified category of international law, collapsing the distinction between just and legal war in the process. The major development of the *jus ad bellum* of the 19th century, in the end, pertained rather to its theoretical framing than to its material content.

Whereas it is readily acknowledged that the right to resort to war or force was inherent to statehood itself under 19th-century international law, it is often forgotten that the opposite was also true. Force and war were also considered to be, in principle, violations of the inherent rights of states. It was through the category of fundamental or inherent rights of states that the just war tradition was recycled into modern international law. The vast majority of the writers of international law textbooks from the period distinguished between fundamental and conditional rights. Fundamental rights were inherent to statehood itself, while conditional rights arose from the dealings between states. The theory predated the ascendancy of positivism. It had its roots in early modern doctrine and became common over the early 19th century. It was even shared by proponents of the indifference thesis.⁸⁵ Dualists from the early 19th century acknowledged that fundamental rights derived from natural law.⁸⁶ Later, positivist writers would sometimes quip that their predecessors had mistakenly believed so. However, they judged them to be an integral part of their solitary category of – positive – international law.⁸⁷ A variety of fundamental rights was proposed, but most writers would agree – under whatever heading – on the rights to existence, self-preservation, internal sovereignty, external independence, equality and dignity. To these corresponded a concomitant duty of other states to respect the fundamental rights of another state. Logically, the use of force against a state, including war, constituted a violation of one or more of the fundamental rights – generally, that of existence or dignity – of the target state.

Force and war were violations of international law and, in principle, illegal. Such violation could only be legitimized on the basis of the superseding right of self-preservation. With the right to existence came the right for a state to do whatever was necessary to preserve itself, its sovereignty, independence and dignity. This included the protection of its rights, vital interests and honour. In this way, the core principles of the just war doctrine were reconstructed under the heading of the fundamental rights of states. The basic reasoning was that force and war were prohibited, except when

⁸⁵ Hershey, *supra* note 83, at 143–145; T.J. Lawrence, *The Principles of International Law* (1895), at 109–111; Stockton, *supra* note 83, at 62–63; J. Westlake, *International Law* (2nd edn, 1907–1910), vol. 1, at 300–301. Oppenheim rejected the distinction but brought fundamentals rights in through the backdoor as customary rights, L. Oppenheim, *International Law: A Treatise* (2nd edn, 1912), vol. 1, at 165–166.

⁸⁶ H.W. Halleck, *International Law, or Rules Regulating the Intercourse of States in Peace and War* (1861), at 81–82; Twiss, *supra* note 84, at 178; Woolsey, *supra* note 84, at 17–32. Some derived them directly from divine will. D. Gardner, *A Treatise of International Law and a Short Explanation of the Jurisdiction and Duty of the Government and the Republic of the United States* (1844), at 87–89.

⁸⁷ J. de Louter, *Le droit international public positif* (1910 [translated in 1920]), vol. 1, at 233; Hershey, *supra* note 83, at 143; A. Mérignac, *Traité de droit public international* (1905–1912), vol. 1, at 233–235; E. von Ullmann, *Völkerrecht* (2nd edn, 1908), at 141.

necessary for a state to preserve itself. Whereas most writers cast the right to force and war in terms of the supersession of the right to existence of the one state by the right to self-preservation of another, some authors – in particular, German authors – preferred to appeal to extra-legal notions of emergency and necessity, which allowed the side-lining of the rights of other states. Although these authors considered war to be a state of fact rather than of law, the concrete acceptable causes for war that they proposed were not materially different.⁸⁸ To all of this, most writers added that force and war could only be resorted to after ways to settle the dispute peacefully had failed or had been refused.⁸⁹

Some authors did not explicitly state that war and force were violations of law in principle, but the implication was clear from their reasoning about fundamental rights and the role of self-preservation, numerous remarks about which legitimizations of war were acceptable and the whole structure of their work. Commonly, war was discussed as the last of the various means of dispute settlement. In addition to

⁸⁸ A. Anzilotti, *Corso di diritto internazionale* (1912), at 302–303; A. Bello, *Principios de derecho de jentes* (3rd edn, 1873), at 23, 147; J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten: als Rechtsbuch dargestellt* (1868), at 84–91, 287; H. Bonfils and P. Fauchille, *Manuel du droit international public (droit des gens) destiné aux étudiants de droit et aux aspirants aux fonctions diplomatiques et consulaires* (4th edn, 1905), at 123–127, 517, 575; A. von Bulmerincq, *Völkerrecht oder internationale Recht* (1884), at 202–203, 357; P. Fiore, *Il diritto internazionale codificato e la sua sanzione giuridica* (1890), at 103, 300; de Louter, *supra* note 87, vol. 1, at 241–248; T. Funck-Brentano and A. Sorel, *Précis du droit des gens* (2nd edn, 1887), at 32–46, 232–236; Gardner, *supra* note 84, at 87–94, 204–206; C. Gareis, *Institutionen des Völkerrechts* (1888), at 80–82, 192; W.E.R. Hall, *International Law* (1880), at 13–53, 226–227; Halleck, *supra* note 86, at 91–93, 313; A.W. Heffter, *Das europäisches Völkerrecht des Gegenwart* (3rd edn, 1855), at 47–53, 191–192, 199–203; Kent, ‘On the Law of Nations’, in J. Kent, *Commentaries on American Law* (1826), vol. 1, 1, at 21–48, 181; J.-L. Klüber, *Droit des gens moderne de l’Europe avec un supplément contenant un bibliothèque choisie du droit des gens* (1861), at 57–60, 64–56, 116–117, 299–305; Lawrence, *supra* note 85, at 109–120; F. von Liszt, *Das Völkerrecht systematisch dargestellt* (2nd edn, 1902), at 41–55; J. Lorimer, *The Institutes of the Law of Nations: A Treatise of Jural Relations of Separate Political Communities* (1883–1884), vol. 2, at 18–42; H.S. Maine, *International Law: A Series of Lectures Delivered before the University of Cambridge 1887* (1888), at 59–64, 210–211; F.F. Martens, *Traité de droit international* (1883–1887), vol. 1, at 387–391; G.F. von Martens, *Précis du droit des gens moderne de l’Europe fondé sur les traités et les usages: Pour servir d’introduction à un cours politique et diplomatique* (3rd edn, 1821), at 219–221, 449–451; Mégnac, *supra* note 87, vol. 1, at 236–242, vol. 2, at 9–11; H.B. Oppenheim, *System des Völkerrechts* (1845), at 85–86, 152; Oppenheim, *supra* note 85, vol. 1, at 166–188; Phillimore, *supra* note 84, vol. 1, at 149–189, vol. 3, at 99–103; R.M. de Damau de Olivart, *Tratado de derecho internacional public* (1903–1904), vol. 1, at 233–235; P. Pradier-Fodéré, *Traité de droit international public européen et américain suivant les progrès de la science et de la pratique contemporaines* (1885–1906), vol. 1, at 283–284, 307, 358–366, 382–384, 413–414, vol. 6, at 507–508; Reddie, *supra* note 84, at 185–181, 211–215; A. Rivier, *Principes du droit des gens* (1896), vol. 1, at 27–29, 255–275; F. Saalfeld, *Handbuch des positiven Völkerrechts* (1833), at 62–63, 190–192; Twiss, *supra* note 84, vol. 1, at 178–183, vol. 2, at 4–5, 51–54; Ullmann, *supra* note 87, at 146–149; Westlake, *supra* note 85, vol. 1, at 307–315; H. Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (1836), vol. 1, at 75–76, 309–312; G.G. Wilson, *Handbook of International Law* (1910), at 55–56; Woolsey, *supra* note 84, at 32–37.

⁸⁹ Bluntschli, *supra* note 88, at 270; Hall, *supra* note 88, at 51; de Louter, *supra* note 87, vol. 2, at 215; Halleck, *supra* note 86, at 289; Liszt, *supra* note 88, at 289; G.F. Martens, *supra* note 88, at 432; E. Nys, *Le droit international: les principes, les théories, les faits* (1904–1906), vol. 3, at 83; Reddie, *supra* note 84, at 216; T.A.H. Schmalz, *Das europäisches Völker-Recht in acht Büchern* (1817), at 212; Twiss, *supra* note 84, vol. 2, at 54; T.A. Walker, *Manual of Public International Law* (1895), at 23–25; Wilson, *supra* note 88, at 94.

these general expositions on force and war, most authors expressly and elaborately debated the question of the legality of a single category of the use of force: intervention. Although, in 19th-century doctrine and practice, the term was frequently used with little discrimination, in the context of a discussion on fundamental rights in textbooks of international law, it generally signified the use of force for the purpose of coercing a state to change its constitution, policy or concrete behaviour. The vast majority of international lawyers expressly labelled this a violation of the right of independence of states and of the corresponding duty of non-interference. Only in exceptional circumstances could intervention be condoned. Many textbooks featured an elaborate discussion of state practice with regard to intervention, distinguishing legal from illegal forms. The subject generated much attention, certainly when compared to the question of legality of war and other measures of war, because it was contentious. In the end, no complete consent was reached in literature. Whereas most authors could agree on the legality of interventions that were necessary to preserve the existence, independence, rights, vital interest or honour of the intervening state – which, in fact, is a restatement of the key elements of just war – or on the legality of interventions in the case of invitation by the other state, no unanimity was reached on humanitarian or religious intervention, regime change or action to uphold the balance of power against the aggrandizement of a certain power.⁹⁰

In all, international lawyers of the 19th and early 20th centuries sustained the two classical legitimizations for war, self-defence and redress of injury, but, at the same time, made four changes to the material content of traditional *jus ad bellum*. First, in particular, mainstream positivists largely surrendered the distinction between just and legal war – between war as a form of self-help after injury and war as a means of

⁹⁰ A. Amos, *Lectures on International Law: Delivered in the Middle Temple Hall to the Students of the Inns of Court* (1874), at 37–41; M. Bernard, *On the Principle of Non-Intervention: A Lecture Delivered in the Hall of All Souls' College* (1860); F.E. Birkenhead, *International Law* (2nd edn, 1903), at 46–51; Bluntschli, *supra* note 88, at 26–27, 97–98; Bonfils and Fauchille, *supra* note 88, at 140–143; C. Calvo, *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens* (2nd edn, 1870–1871), vol. 1, at 224–238, 308–309; Heffter, *supra* note 88, at 53–56; Klüber, *supra* note 88, at 61–63; de Louter, *supra* note 87, vol. 1, at 250–258; F. Despagnet, *Cours de droit international public* (3rd edn, 1905), at 221–238; Funck-Brentano and Sorel, *supra* note 88, at 212–221; Gareis, *supra* note 88, at 82–84; Halleck, *supra* note 88, at 82–87, 315–317, 334; Hershey, *supra* note 83, at 147–153; Lawrence, *supra* note 85, at 119–120; Liszt, *supra* note 88, at 55–58; F.F. Martens, *supra* note 88, vol. 1, at 393–398; Mérignac, *supra* note 87, vol. 1, at 244–301; Oppenheim, *supra* note 88, at 161, 222–224; Olivart, *supra* note 88, vol. 1, at 239; Phillimore, *supra* note 84, vol. 1, at 314–329; Pradier-Fodéré, *supra* note 88, vol. 1, at 424–434, 474–475; Reddie, *supra* note 84, at 192–198, 390–393; Rivier, *supra* note 88, vol. 1, at 390–403; Saalfeld, *supra* note 88, at 62–63; Ullmann, *supra* note 87, at 454–460; Walker, *supra* note 89, at 23–25; Wheaton, *supra* note 88, at 77–100; Wilson, *supra* note 88, at 57–65; see also S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 35–42; Segesser, 'Humanitarian Intervention and the Issue of State Sovereignty in the Discourse of Legal Experts between the 1830s and the First World War' in F. Klose (ed.), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (2015) 56; Vec, 'Intervention/Nichtintervention: Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert', in U. Lappenküpfer and R. Marcowicz (eds), *Macht und Recht: Völkerrecht in den internationalen Beziehungen* (2010) 135.

dispute settlement. Most authors were aware of the historical pedigree of the distinction, and many reiterated that it was the impossibility to discern among sovereign states which belligerent had right on its side that made it necessary to treat both belligerents equally under the laws of war. But they stopped considering them separate legal categories that applied in different dimensions and generated different legal consequences. To them, the distinction between self-help after injury and dispute settlement was one of perspective. Whereas the belligerents themselves considered the war an action of legal enforcement after injury, it generally appeared to be an instrument of dispute settlement from the perspective of objective international law or neutral observers.

Second, the inclusion of the right of dignity among the fundamental rights of states, either as an autonomous right or as an expression of the right to existence, reflected the century's concern for princely and national honour. It became quite common among 19th-century international lawyers to label the protection or restoration of honour a just cause for war next to the protection or restoration of a right.⁹¹ Third, founding the right to force or war on the fundamental right of self-preservation extended the ambit of self-defence. Here, the imprint of Vattel became clear. It made the protection of a state's security a major, legitimate concern of states. This led to the legitimization of anticipatory self-defence against threats to a state's security. Because war could only be allowed when there was no alternative left, this was generally understood to mean an imminent threat. The correspondence between the British and US foreign secretaries on the *Caroline* incident (1837) became the classical statement of this rule in Anglo-American literature.⁹² Lastly, the prominence of self-preservation led to another extension of the right to resort to war – namely, to wars about the vital interests of states. This debased the legal nature of the whole fabric of *jus ad bellum*. It was, however, a contentious point.⁹³ Nevertheless, this relaxation of classical just war thought surely added to the feeling of crisis that surrounded existing international use of force law by the turn of the 20th century.

These four changes allow for a categorization of wars in terms of their justification, which came to replace the old distinction between just and legal war in the international law of the late 19th and early 20th centuries: wars of self-preservation and dispute settlement wars. The first category contained not only wars to repel an actual

⁹¹ Bonfils and Fauchille, *supra* note 88, at 146–147; Bulmerincq, *supra* note 88, at 205; Gareis, *supra* note 88, at 86; Halleck, *supra* note 88, at 313; Liszt, *supra* note 88, at 59–60; F.F. Martens, *supra* note 88, vol. 1, at 402–404; Rivier, *supra* note 88, vol. 1, at 256; Woolsey, *supra* note 84, at 190.

⁹² Bello, *supra* note 88, at 147; Gardner, *supra* note 88, at 204–205; Halleck, *supra* note 88, at 314–315; Kent, *supra* note 88, at 47; Lawrence, *supra* note 85, at 118; F.F. Martens, *supra* note 88, vol. 1, at 388; Phillimore, *supra* note 84, vol. 1, at 187; Twiss, *supra* note 84, vol. 1, at 181–182, vol. 2, at 3; Westlake, *supra* note 85, vol. 1, at 312.

⁹³ Anzilotti, *supra* note 88, at 303; Anzilotti, 'Il concetto moderno dello stato ed il diritto internazionale', in *Scritti di diritto internazionale pubblico* (1914–1915) 619, at 621; Funck-Brentano and Sorel, *supra* note 88, at 231, 238; Liszt, *supra* note 88, at 276; Martens, *supra* note 88, vol. 1, at 391; Reddie, *supra* note 84, at 212–213; Rivier, *supra* note 88, vol. 2, at 149; Ullmann, *supra* note 87, at 431. Some spoke out against it, Bluntschli, *supra* note 88, at 291; Nys, *supra* note 89, vol. 3, at 107.

or imminent armed attack but also wars in reaction to a violation of the rights, interests or honour of states. The category encompassed the whole area of what used to be just war, plus its expansion towards the protection or restoration of vital interests and honour. Whereas only wars to repel an actual or imminent attack fell within the confines of the traditional understanding of the right of self-defence as it originated from natural law, the terms self-preservation and self-defence were increasingly confounded, particularly in state practice. The second category contained wars to settle a dispute over rights, interests or honour. These categories were not two separate legal regimes but, rather, were a reflection of the argumentations in doctrine and practice. The categorization was more a matter of perspective, except in clear cases of self-defence against a prior armed attack. Whereas belligerents would often claim to fight to enforce a violated right or interest under the invocation of self-preservation, the war appeared to be a dispute settlement war to third parties.

By 1900, international use of force law was in disarray. Yet, contrary to what modern historians have generally alleged, the basic tenets of the old just war doctrine largely survived in legal scholarship. The changes and challenges came less from the substantial moves that had been made than from the radical alternation of the intellectual context and theoretical framing of international law. This did not only stem from the rise of legal positivism but also from the secularization of international relations and law. Although many statesmen, diplomats and lawyers still identified European civilization with Christianity, the separation of religion and state after the American and French Revolution forced international lawyers to cut their law loose from its traditional, religious moorings.⁹⁴ Both positivism and secularization made natural law and obligation in conscience appear as empty categories, which pertained to the world of morality or political intentions but not to law. The new – positive – international law that emerged was a much-reduced category compared to the old dualist system of the law of nature and of nations.

By the end of the 19th century, international lawyers had become more critical and sceptical of existing *jus ad bellum*. However, few international lawyers took the ultimate consequence of ostracizing the just war tradition together with natural law from the sphere of their international law.⁹⁵ But even those scarce radical positivists who did so, such as Thomas Lawrence or Lassa Oppenheim, retained a far more sophisticated doctrine of use of force than the thesis of indifference suggests. First, they agreed with dualists and mainstream positivists that war and force were a violation of the fundamental rights of states that were only exceptionally permissible. Second, they retained the separation of just and legal war in two different spheres. In this, they were straying closer to the dualist tradition than mainstream positivists were. In short,

⁹⁴ Steiger, 'From the International Law of Christianity to the International Law of the World Citizen: Reflections on the Formation of the Epochs of the History of International Law', 3 *JHIL* (2001) 180, at 184–190.

⁹⁵ Apart from the demise of natural law, social Darwinism has also been indicated as a cause for the indifference thesis; Diggelmann, 'Beyond the Myth of a Non-Relationship: International Law and World War I', 19 *JHIL* (2017) 93, at 98–102.

the radical positivists by and large rehearsed traditional doctrine, only to dismiss just war as part of a moral or political discourse. The indifference thesis came from their radical redefinition of international law rather than from a substantial rewriting of traditional doctrinal. It was their reduction of international law to positive, enforceable rules that made them expel just war from the confines of the law. But, even if they just mentioned it in order to state that it found itself outside the confines of the law, they still aided in preventing it from falling into oblivion.

Mainstream positivists reacted to the challenge of natural law's demise by transferring the just war doctrine back into their newly defined – positive – international law and merging the justice and legality of war into one single category. However, this reduced the normative strength of restrictions on war. Under early modern doctrine, a prince who waged an unjust, but legal, war might escape sanction in the here and the now, but he knew that he would be threatened by divine sanction at the end of times. Under the newly unified category of positive international law, the distinction between justice and legality collapsed. A war was either legal or illegal. In both cases, there was generally no possibility to sanction an illegal belligerent as there was no one to render an objective judgment. Mainstream positivists just as much as radical positivists felt unease over this situation, and many of them looked for alternative methods to restrict war, such as the introduction of a binding obligation to resort to pacific means of dispute settlement – primarily arbitration – in positive international law.⁹⁶ But, in the meantime, mainstream positivists preserved much of the old doctrine for the discipline of international law. In the end, the most fundamental difference between radical and mainstream positivists concerned the question what part of the old *jus ad bellum* they considered to be part of international law. The radical positivists drew the line at enforceable rights and obligations; mainstream positivists also kept unenforceable rights and obligations corralled in.

The fusion of just and legal war expanded the scope of and for aggression. Whereas under the dualist doctrine, an aggressive war was a war that was both unjust and illegal and was an exceptional and aggravated violation of the law, aggression now referred to any illegal war. This was a vague, indeterminate, but altogether wider notion, and one to which international scholars increasingly referred when indicating a transgression of international use of force law. By this was meant any war that was not fought in self-preservation or as an ultimate resort of dispute settlement, such as wars for conquest or greed. The problem with it was that in most cases aggression could not be sanctioned as there was no objective platform from which to judge.⁹⁷ Nevertheless, a few authors did discuss the option of sanctions in case the illegality of a war was manifest. Much in line with early modern doctrine, the suggestion was

⁹⁶ Lynch, 'Peace Movements, Civil Society, and the Development of International Law', in Fassbender and Peters, *supra* note 5, 198.

⁹⁷ Bonfils and Fauchille, *supra* note 88, at 577; Bulmerincq, *supra* note 88, at 357; Gardner, *supra* note 88, at 204–207; L. Levi, *International Law, with Materials for a Code of International Law* (1887), at 278; Manning, *supra* note 84, at 96–97; G.F. Martens, *supra* note 88, at 452; Nys, *supra* note 89, vol. 3, at 106; Ullmann, *supra* note 85, at 466; Woolsey, *supra* note 84, at 214.

made that in this case the suppression of the perpetrator became the concern of the whole international community. Two sanctions were proposed: liability for the costs and damages of the war and collective action to stop the offence and enforce guarantees for future security.⁹⁸

If legal scholarship retained much of the old doctrine, nineteenth-century practice adhered even closer to tradition. Although the practice of formally declaring war fell into disuse over the 19th century, the justification of force and war remained as crucial to states as before. If anything, the growing impact of public opinion on foreign and national policy enhanced the need for governments to explain their actions within and without the country. Since defensive alliance treaties were still an essential tool of security policy, and the right and duties of neutrals had expanded, foreign governments continued to be a primary target audience. Whereas the forms of these public communications grew ever more varied, the discourse used and its normative context did not evolve all that much. Manifestos and other public utterances that served to legitimize war were couched in the language of just war all through the period under scrutiny. Their primary purpose was to deflect the danger of being labelled an aggressor.⁹⁹

By and large, justifications were construed on the same basic line of argument as before. They offered a list of offences that the enemy state had committed over a long period of time and opposed its desire to harm one's own desire for peace. The purpose of this argumentative line was to indicate just cause and to persuade that one had done everything possible to avoid war but that this now had become inevitable. A survey of 19th-century practice shows three further trends. First, states referred to offences against their honour and vital interests as a cause for war but preferably combined this with violations of rights. Second, the relative weakening of the persuasive value that came from the invocation of interest, including military necessity, was compensated by a greater insistence that the enemy had been the first to resort to violence. Third, if one could neither invoke the violation of right or honour nor a prior armed action by the enemy, the main road left was that of preventive self-defence. Justifications of the latter kind, like the one of King Frederick II in 1756, generally bespoke of an awareness of the urgency not to be stained with the stigma of aggression.¹⁰⁰

⁹⁸ Bello, *supra* note 88, at 151–152; Halleck, *supra* note 88, at 313–314; Kent, *supra* note 88, at 49; Saalfeld, *supra* note 88, at 199; Woolsey, *supra* note 84, at 187–190.

⁹⁹ Birkenhead, *supra* note 88, at 92; Bluntschli, *supra* note 88, at 293–294; Bonfils and Fauchille, *supra* note 88, at 586–589; P. Bordwell, *The Laws of War between Belligerents: A History and Commentary* (1908), at 156–200; Funck-Brentano, *supra* note 88, at 241–245; Hall, *supra* note 88, at 315–322; Halleck, *supra* note 88, at 351–356; Heffter, *supra* note 88, at 211; Hershey, *supra* note 83, at 356–359; Kent, *supra* note 88, at 52–55; Lawrence, *supra* note 85, at 299–302; Levi, *supra* note 97, at 281; Manning, *supra* note 84, at 118–120; G.F. Martens, *supra* note 88, at 453–454; J.F. Maurice, *Hostilities without Declaration of War from 1700 to 1870* (1883); Oppenheim, *supra* note 88, at 226; Phillimore, *supra* note 84, vol. 3, at 116–121; Rivier, *supra* note 88, vol. 2, at 221–222; Schmalz, *supra* note 89, at 221–222; Twiss, *supra* note 84, vol. 2, at 56–80; T.A. Walker, *The Science of International Law* (1893), at 240–242; Wheaton, *supra* note 88, at 313–315; Wilson, *supra* note 88, at 244–248; Woolsey, *supra* note 84, at 197–199.

¹⁰⁰ Declaration of War by Russia against the Ottoman Empire, 26 April 1828, reprinted in *British and Foreign State Papers (BFSP)* (1815–1977), vol. 15, at 656; Declaration of War by Uruguay against Argentina, 24

5 Aggression at Versailles

Aggression featured in the negotiations that led to the Versailles Peace Treaty in two different contexts: the prosecution of the former German Emperor Wilhelm II and reparations. The proposition to prosecute German leaders, including the emperor, for having started a war of aggression and for transgressions against the laws and customs of war had been entertained on and off by British and French officials during the war. It was part of the Allies' wider plan to destroy Prussian autocracy and militarism and construct a new world order on the basis of respect for international law.¹⁰¹ In 1918, London and Paris made the prosecution of German war leaders into one of their war goals. In the run up to the general elections of December 1918, the British Prime Minister David Lloyd George (1863–1945) promoted the criminal prosecution of the former emperor, now living in exile in the Netherlands, as a prominent item of his campaign platform.¹⁰² Notwithstanding strong hesitations about the wisdom, feasibility and legality of such a move within his Cabinet, Lloyd George persisted.¹⁰³ In a meeting in London on 2 December 1918, the three major European Allied leaders, Lloyd George and his French and Italian counterparts Georges Clemenceau (1841–1929) and Vittorio Orlando (1860–1952), agreed to pursue the idea at the peace conference.¹⁰⁴

After its opening in Paris on 18 January 1919, the Inter-Allied Conference referred the matter to the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties (CRW). The commission, which counted several international lawyers among its members – the American James Brown Scott (1866–1943), the Frenchman Ferdinand Larnaude (1853–1945), the Belgian Edouard Rolin-Jacquemyns (1863–1936) and the Greek Nikolaos Politis (1872–1942) – was chaired by the US Secretary of State Robert Lansing (1864–1928), himself a fierce opponent

February 1839, reprinted in 27 *BFSP* 1214; Declaration of War by the Ottoman Empire against Russia, 4 October 1853, reprinted in 42 *BFSP* 1321; Message of Queen Victoria to Both Houses on the Outbreak of War with Russia, 27 March 1853, reprinted in 44 *BFSP* 110; Manifesto of War of Austria against Sardinia, 28 April 1859, reprinted in 57 *BFSP* 228; Memorandum of Sardinia for the Invasion of the Papal State, 12 September 1860, reprinted in 50 *BFSP* 358; Manifesto of War of Austria against Prussia, 17 June 1866, 63 *BFSP* 580; Manifesto of War of Prussia against Austria, 18 June 1866, reprinted in 63 *BFSP* 854; Declaration of War by France against Prussia, 19 July 1870, reprinted in *Correspondence Respecting the Negotiations Preliminary to the War between France and Prussia, 1870* (1870), at 9–10; see also *Recueil des documents relatifs aux origines de la guerre de 1870* (1910–1932), vol. 29; Decree of China, Declaring War against Japan, 1 August 1894, reprinted in 86 *BFSP* 301; Proclamation of Japan, Declaring War against China, 1 August 1894, reprinted in 86 *BFSP* 86.

¹⁰¹ Boemeke, 'Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles', in M.F. Boemeke, G.D. Feldman and E. Glaser (eds), *The Treaty of Versailles. A Reassessment after 75 Years* (1998) 603; W. Mulligan, *The Great War of Peace* (2014); H.W.V. Temperley (ed.), *A History of the Peace Conference of Paris*, 56 vols (1920), vol. 1, at 166.

¹⁰² J.E. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982), at 3–64.

¹⁰³ Imperial War Cabinet 37, Minutes, London, file CAB/23/43, National Archives (NA). During this discussion, numerous references were made to the fate of Napoleon after Waterloo.

¹⁰⁴ Telegram, 2 December 1918, file FO 618/247, at 21, NA.

of the prosecution of the emperor. In its final report, which was presented to the plenary conference on 29 March 1919, the CRW ruled that Germany and its three allies, Austria-Hungary, Turkey and Bulgaria, were responsible for planning and starting the war. They stood morally condemned for it. According to the report, Germany and Austria-Hungary had planned and premeditated the war in pursuance of a policy of aggression. They had used the murder of the Habsburg heir to the throne, Archduke Franz Ferdinand (1863–1914), by a Serbian nationalist in Sarajevo on 28 June 1914, as a trigger and pretext for a war that Berlin had desired for some time. The CRW claimed that the decision to go to war was taken at a conference in Potsdam on 5 July. After that, Germany had done everything it could to incite Vienna to resort to war with Serbia and to derail Allied attempts at mediation, in the full knowledge that an Austrian-Hungarian attack on Serbia might provoke Russia and lead to a Europe-wide conflagration.¹⁰⁵ In addition, Germany and Austria-Hungary were condemned for violating the neutrality of Belgium and Luxemburg, which they had guaranteed by treaty.¹⁰⁶ In its reservation to the report, the USA abetted the thesis of premeditation by introducing a few more incriminating documents.

But if consent could be reached on indicating the Central Powers as aggressors, the same could not be said about the question of criminal prosecution. In the end, the USA as well as Japan rejected the report and made reservations. The American delegates brought two major arguments to bear against the criminal prosecution of the emperor: first, the immunity of a head of state and, second, the lack of a law against aggression at the time of its commission. In its reservation, the USA insisted on the distinction between legal and moral offences.¹⁰⁷ On the latter point, the CRW concurred. The CRW rejected the argumentation of Larnaude and Albert de La Pradelle (1871–1955), an international lawyer who was secretary-general of the CRW, to vest the prosecution on the violation of the just war doctrine.¹⁰⁸ In a remarkable passage, the commission ruled that the ‘premeditation of a war of aggression’ could not be considered ‘an act directly contrary to positive law’. It based this statement on ‘the purely optional character of the institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration)’. Hereby, the CRW referred to the Convention on the Pacific Settlement of International Disputes of 29 July 1899, amended by the convention of 18 October 1899.¹⁰⁹ This convention exhorted but did not oblige states to attempt pacific means of dispute settlement before they resorted to war.¹¹⁰ It only became an obligation which the report recognized as legal through the Covenant of the League of Nations.¹¹¹ With this, the CRW adopted

¹⁰⁵ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission on Enforcement of Penalties), ‘Report’, 14 *AJIL Suppl.* (1920) 95, at 98–107.

¹⁰⁶ Treaty of London 1839, 88 CTS 411, Art. 1; Treaty of London 1867, 135 CTS 1, Art. 2; Commission on Enforcement of Penalties, *supra* note 105, at 107–112.

¹⁰⁷ ‘Memorandum of Reservation Presented by the Representatives of the United States to the Report of the Commission on Responsibilities’, 14 *AJIL Suppl.* (1920) 127, at 128.

¹⁰⁸ F. Larnaude and A. de La Pradelle, *Examen de la responsabilité pénale de l'Empereur Guillaume II* (1918).

¹⁰⁹ Hague Convention for the Pacific Settlement of International Disputes 1899, 1 *AJIL* 103 (1907).

¹¹⁰ *Ibid.*, Art. 1.

¹¹¹ *Ibid.*, Arts 12–15.

the restricted definition of international law as positive, enforceable rules. In order to escape the contentious issue of criminal prosecution while saving the politically all important moral condemnation of Germany as aggressor, it chose to align itself with the previously radical positivist minority and demote early modern and 19th-century legal doctrine to a matter of ‘public conscience’.¹¹²

The assertions that the Central Powers did not violate any existing law through their aggression and that aggression did not constitute an injury were all the more astonishing as they were unnecessary to attain the goal of preventing a criminal prosecution of Emperor Wilhelm II. It would have sufficed to state that aggression was not an individually imputable crime and invoke the principle of non-retroactivity from domestic law by analogy. It went a step further – to sustain the analogy with domestic law – by also denying that it constituted a civil delict at the time. Part of the explanation for this somewhat odd choice came from James Brown Scott’s fierce, but not very sophisticated, opposition against Larnaude’s appeal to the discriminatory logic of just war.¹¹³

This legal strategy becomes even more peculiar if one considers that the CRW positively affirmed that Germany and Austria-Hungary had violated international law with regard to the neutrality of Belgium and Luxemburg. Nevertheless, the commission likewise counselled against the prosecution of the former emperor for this affirmation. It did not offer any reason for this, but from the relevant section in the report, it can be inferred that this advice was based on the principle of the non-retroactivity of criminal offences. The report underscored the point that aggression and the violation of treaties were not individually imputable crimes through its statement that they should be made so in the future.¹¹⁴

The report did not satisfy the British and French political leadership, which continued to insist with the American President Woodrow Wilson (1856–1924) on the prosecution of the former emperor. In early April, Wilson and Lloyd George, who direly needed to deliver on his campaign promise, reached an agreement. Wilson drafted a clause that became almost literally Article 227 of the Versailles Peace Treaty. The idea to prosecute the emperor for a crime was relinquished. Instead, he would be ‘arraigned for a supreme offence against international morality and the sanctity of treaties’. The former emperor would be brought before, and possibly punished by, a tribunal of representatives of the five Allied great powers, which would be ‘guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality’. Whereas the guarantee of the neutrality of Belgium and Luxemburg was caught under the term ‘undertaking’, ‘international morality’ pointed at aggression. The underlying legal

¹¹² Commission on Enforcement of Penalties, *supra* note 105, at 118.

¹¹³ Willis, *supra* note 102, at 72–73; see also Scott, ‘The Trial of the Kaiser’, in E.M. House and C. Seymour (eds), *What Really Happened in Paris: The Story of the Peace Conference, 1918–1919 by the American Delegates* (1921) 231.

¹¹⁴ Commission on Enforcement of Penalties, *supra* note 105, at 119–120.

reasoning of the CRW's report does not seem to have played a role in the principals' wheeling and dealing.¹¹⁵

The agreement was not much of a compromise but, rather, constituted a major concession on the part of Wilson who needed to buy British and French indulgence on some unrelated matters. Whereas Wilson attained his goal that the former emperor would not truly be brought before an international criminal tribunal, Lloyd George and Clemenceau could claim they had managed to have Emperor Wilhelm II brought to justice. Even if, for lawyers, it was far from clear what this really involved, the moral condemnation of Germany's aggression and the idea that the emperor might not escape the consequences of his actions stuck in the public eye.

But, whatever its political significance, it was a legal conundrum. The deal came at the price of extreme legal ambiguity, if not outright inconsistency. By labelling aggression a matter of international morality and not naming it a criminal prosecution, it avoided the pitfall of breaking the general principle of non-retroactivity. But, by calling for a punishment, it revived that danger. Even if one read the article to mean that punishment could only apply for the violation of treaties, which was evidently considered an injury against existing international law at the time of its commission, retroactivity reared its head again. Just like aggression, this had not been an individually imputable criminal offence in 1914.¹¹⁶

Next to the prosecution of enemy leaders, reparation also figured high on the agenda of France and Britain for a just peace settlement. From the moment negotiations with Germany started about an armistice in October 1918, it became a point of tension between the European Allies and the USA. On 6 October 1918, Germany requested an armistice from the Allied and Associated powers in a note delivered through the good offices of the Swiss government to President Wilson. The note proposed that peace negotiations would be started on the basis of the conditions that Wilson had set out in his Fourteen Points speech of 8 January 1918 and in his subsequent speeches.¹¹⁷ The Allied acceptance of the German proposal to take Wilson's expression of Allied war aims as binding preliminaries to a future peace treaty framed the debate on reparations from the start. It meant that indemnities were excluded.

Since the Napoleonic era, many peace treaties had stipulated indemnities. These were lump sum payments imposed upon the loser of a war in compensation for the costs and damages the victor had suffered. These payments were not based on any allegation of wrongdoing but, rather, on the simple fact of defeat. They did not involve an attribution of guilt or violation of the law, neither at the level of *jus ad bellum* nor *jus in bello*. Consequently, they did not detract from the logic of legal war.¹¹⁸ Wilson's

¹¹⁵ L. Smith, *Sovereignty at the Paris Peace Conference of 1919* (2018), at 79–80; Willis, *supra* note 102, at 81.

¹¹⁶ *Ibid.*, at 77–81.

¹¹⁷ Note of Max van Baden to W. Wilson, 6 October 1918, reprinted in *Foreign Relations of the United States (FRUS)*, Supplement no. 1: The World War (1918), at 338.

¹¹⁸ L. Camuzet, *L'indemnité de guerre en droit international* (1928), at 41–79; Tomuschat, 'The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles', in R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War One* (2004) 382.

approach to peace excluded the option of indemnities. This did not put the Allies before insurmountable problems as the European Allies had been couching their financial demands in the language of justice long before the end of the war. They desired compensation for all losses that were caused by the Central Powers' illegal actions. The question remained, however, to what losses this extended in practice? From the start of the pre-armistice negotiations, this question led to fierce altercations between the USA and its main European Allies. The pre-armistice agreement reached among the Allies and with Germany would frame the discussion all through the peace negotiations. The agreement to base the peace settlement on Wilson's speeches and the exchange of notes between the USA, acting on behalf of the Allied and Associated powers, and Germany came to be seen as a *pactum de contrahendo*, as binding peace preliminaries. Henceforth, the inter-Allied, as well as the Allied-German, debate on reparations would be one about the extent of Germany's pre-armistice, contractual obligation to pay compensation.

Of Wilson's Fourteen Points, three related to reparation. Point 7 called for Belgium to be evacuated and 'restored'. Point 8 mentioned that the 'invaded portions' of France had to be 'restored'. Point 11 used the same term for the 'occupied territories' of Romania, Serbia and Montenegro.¹¹⁹ In the opinion of the US legal advisers, this limited reparations to the damage caused by violations of international law in these occupied territories, with the exception of Belgium where it was extended to all costs and damages the country had suffered in consequence of the war. This was based on the assertion that the invasion of Belgium was contrary to international law as it violated Germany's treaty guarantee of Belgian neutrality.¹²⁰ During the pre-armistice negotiations, the USA expanded this to cover all damages pertaining to the northeastern provinces of France, which the German army had reached by cutting through Belgium.¹²¹

From the start of the American–German negotiations, the European Allies were worried that founding the peace settlement on the Fourteen Points would curtail their desire for reparations. A British memorandum of 12 October expressed the fear that the Fourteen Points would be interpreted in such a way as to only cover damage to civilian property and exclude damage to civilian persons. Moreover, it seemed to exclude damage resulting from the illegal actions of the Central Powers on the seas against Allied and neutral shipping.¹²² The altercations between France, Britain and the USA of October and early November 1918 centred on these two points. The end result was a reservation of the Allied governments to the Fourteen Points. In the reservation, they stressed that the Fourteen Points implied that 'compensation [would]

¹¹⁹ Address of W. Wilson to Congress, 8 January 1918, reprinted in *FRUS*, Supplement no. 1: The World War (1918), at 12.

¹²⁰ Miller, 'The American Program and International Law, Extracts', in P.M. Burnett (ed.), *Reparation at the Paris Peace Conference: From the Standpoint of the American Delegation*, 2 vols (1940), vol. 1, at 363.

¹²¹ American Commentary on the Fourteen Points, Extracts, in Burnett, *supra* note 120, vol. 1, at 386; Memorandum of the Advisory Council of the American Mission to the Inter-Allied Council, 12 December 1918, reprinted in *FRUS*, Paris Peace Conference (1919), vol. 2, at 584.

¹²² Burnett, *supra* note 120, at 382.

be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea and from the air'. In his note of 5 November, by which the USA accepted the German proposal for an armistice, Lansing included this reservation and affirmed that it carried the endorsement of Wilson. Thereby, it became part of the *pactum de contrahendo*.¹²³

The reference to aggression had only been slipped into the final version of the reservation. It replaced the phrase 'by the invasion', which in turn had superseded the original 'by the forces'. The change was made in order to include damage following from the maritime war.¹²⁴ It did not imply an open assertion on the parts of the Allies nor an admission on the part of Germany that the war itself was illegal on the German side and that Germany was liable for all war costs and damages. But, nevertheless, its inclusion opened the door to that interpretation.

After the opening of the conference in Paris, a Commission on the Reparation of Damages (CRD) was established. The French Minister of Finance Louis-Lucien Klotz (1868–1930) became its chairman. From the inception of its real activities in February, the CRD became the grounds of a clash between France and Britain, on the one hand, and the USA, on the other hand, over the width and breadth of Germany's obligation to pay reparations. During November and December 1918, politicians, lawyers and opinion makers of different ilk in both European countries had stoked the fire for the demand of 'full reparation'. In practice, this meant the inclusion of military war costs next to personal and property damage. Several legal arguments were forwarded to base this on while remaining within the confines of the pre-armistice agreement. But, under these, lurked the assertion that Germany had acted illegally in starting the war and committing aggression and was henceforth liable for all ensuing costs and damages.¹²⁵

The CRD proved unable to solve the question on its own in a definite way. The discussions went back and forth between the Council of Four, the Council of Ten, the CRD and the delegations' legal experts. The end result were Articles 231 and 232 of the Versailles Peace Treaty, on which the political leadership reached agreement in April. This time, the deal was largely crafted and drafted by both Wilson and Lloyd George. The final text had gone through many revisions. It was remotely based on a draft made by John Foster Dulles (1888–1959), who served on the American delegation as legal counsel.¹²⁶ The crux of the compromise was a dual proposition to assert the liability of Germany for full reparations but to factually limit those and exclude war costs – except those of Belgium.¹²⁷ Articles 231 and 232, which resulted from the discussions among the Allies, were closely connected. Article 231 stated the theoretical responsibility of Germany for 'causing all the loss and damages to which the

¹²³ *FRUS*, Supplement no. 1: The World War (1918), at 468; see also Temperley, *supra* note 101, vol. 1, at 373; Smith, *supra* note 115, at 67–69.

¹²⁴ Telegram from E. House to W. Wilson, 4 November 1918, reprinted in *FRUS*, Supplement no. 1: The World War (1918), at 460; Dickmann, *supra* note 12, at 46.

¹²⁵ Burnett, *supra* note 120, vol. 1, at 9–16.

¹²⁶ First Dulles draft, 21 February 1919, reprinted in Burnett, *supra* note 120, vol. 1, at 600.

¹²⁷ Council of Four, Meeting of 30 March, 5 April, 5 April 1919, reprinted in *FRUS*, Paris Peace Conference (1919), vol. 5, at 15, 21, 31; Council of Ten, Meeting of 1 March 1919, reprinted in *ibid.*, vol. 4, at 173; Burnett, *supra* note 120, vol. 1, at 17–31, 66–70; Lamont, 'Reparations', in House and Seymour, *supra* note 113, 259.

Allied and Associated Governments and their subjects [had] been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies'. Article 232 limited Germany's actual obligation to the compensation of all damage done to civilians and their property and of all Belgian damage and war costs. For the prior point, Article 232 repeated the language of the 5 November reservation by quoting the words 'by such aggression by land, by sea and from the air'. For the latter point, it asserted Germany's prior agreement to give Belgium full compensation.

In later years, an extensive political as well as academic debate would break loose about the question whether Article 231 did imply a moral condemnation of Germany. This referred to the question whether Germany's aggression constituted a moral outrage, which also should be considered a crime even if it was not at the time of its commission. It was a question that not only divided Germany from the Allies but also remained a major point of contention among statesmen, diplomats and academics within the Allied world. In one of the best documented studies from the interwar period, the French historians Marc Bloch (1886–1944) and Pierre Renouvin (1893–1974) argued that Article 231 had not been intended as a war guilt clause but, rather, as an assertion, albeit a merely theoretical one, upon which to base Germany's liability for full reparation. In legal terms, this meant that aggression constituted an injury in analogy to a civil law delict rather than a crime.¹²⁸

These were indeed the terms under which the debate about what Articles 231 and 232 implied was waged. But this left open the question what 'aggression' itself referred to. Did it only refer to some concrete violations of international law, such as the invasion of Belgium and breaches against the laws and customs of war, or did it imply the full illegality of the war on Germany's part? The truth is that the statesmen who drafted these articles did not make any conscious decision on the matter.¹²⁹ But the logic of the case dictates that a statement of Germany's liability for full reparation – 'all the loss and damages', however circumspect – could hardly mean anything but an assertion that Germany had acted illegally by starting the war and invading and that all of its war actions were, by consequence, illegal. This opened an incongruence between the outcome of the debate on the prosecution of the former emperor and that on reparations. Whereas the CRW stated that aggression had not constituted a violation of international law in 1914, Article 231 made the opposite assertion.

But, whatever the conscious intentions, or lack thereof, of the Allies were at the time of the drafting of the Versailles Peace Treaty, it is an irony of history that it was the German reaction to the text of the treaty that settled the debate to Germany's disadvantage. On 7 May 1919, the German delegation was presented with the draft of the Versailles Peace Treaty. The Germans were not given a copy of the CRW report on

¹²⁸ Bloch and Renouvin, 'L'Art. 231 du traité de Versailles: sa genèse et signification', 10 *Revue d'histoire de la guerre mondiale* (1932) 1; see also Binkley and Mahr, 'A New Interpretation of the Responsibility Clause in the Versailles Treaty', 24 *Current History* (1929) 398; Binkley, 'The Guilt Clause in the Versailles Treaty', 30 *Current History* (1929) 294.

¹²⁹ Burnett, *supra* note 120, vol. 1, at 156–157.

war responsibility but knew its content anyway.¹³⁰ Nevertheless, the German delegation responded to the CRW report through a memorandum signed by four prominent academics, among who were Max Weber (1864–1920) and Hans Delbrück (1848–1929), but which was largely prepared by an official of the Foreign Ministry.¹³¹ On 29 May, one day after the submission of that memorandum, by which the German delegation had acted against the orders of the Cabinet in Berlin, the delegation presented its extensive reply to the Versailles Peace Treaty text.¹³² Wrongly assuming that Article 231 was based on the CRW report, it thought that the article included a clear assertion that Germany and its allies were found guilty of aggression and stood condemned for an offence against international morality. Germany's staunch denial and attack on the iniquity of the Allies, which had made this assertion after having rejected Germany's proposal of November 1918 for a commission of inquiry staffed by representatives from neutral countries, elicited a virulent reply by the Allies.¹³³ In their reaction of 16 June, the Allies left no doubt that the peace treaty was meant to condemn Germany for being the aggressor and that this was to be considered a crime. It unequivocally stated that the treaty 'intended to mark a departure for the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war'.¹³⁴ Although these and similar assertions were made with regard to Article 227 rather than Article 231, the whole thrust of both the German defence and the Allies' altercation was to promote the condemnation for aggression as one of the foundational stones under the entire peace settlement.

Germany's defence harked back to the pre-armistice agreement, on the basis of which it tried to minimize its obligation to pay reparations. But the core of its defence against the CRW report, Articles 227 and 231–2 was not so much the assertion that aggression was not a violation of international law nor an individually imputable crime but, rather, that Germany had not committed aggression. Thereby, even if it assumed it was defending itself against the accusation of having committed a moral offence, it still implied that aggression had not been considered acceptable in 1914. But, whatever their position on the scope of international law at the time of the conference was, the very least that can be concluded is that Germany knew what it was accused of under 'aggression' and referred to a tradition that had marked aggression as a violation of the use of force law. This conclusion is corroborated by the fact that

¹³⁰ Reply to the Principal German Representative, 20 May 1919, reprinted in *FRUS*, Paris Peace Conference (1919), vol. 5, at 742.

¹³¹ Bernhard Wilhelm von Bülow (1885–1936). Observations of the German Delegation on the Report of the Commission of the Allied and Associated Governments as to the Responsibility of the Authors of the War, reprinted in *FRUS*, Paris Peace Conference (1919), vol 6, at 781. See Dickmann, *supra* note 12, at 86–89; Herwig, *supra* note 12, at 93–94.

¹³² Observations of the German Delegation on the Condition of Peace, reprinted in *FRUS*, Paris Peace Conference (1919), vol. 6, at 795.

¹³³ Krüger, *supra* note 12, at 44–47.

¹³⁴ Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, 16 June 1919, reprinted in *FRUS*, Paris Peace Conference (1919), vol. 6, at 926, at 961–962.

Germany's defence against the accusation of aggression from 1919 was essentially similar to its justification for war in 1914.

When Germany declared war on Russia and France and invaded Luxemburg and Belgium in August 1914, it did not publish a single, comprehensive text to justify its decisions. But a general line of justification can be inferred from different texts. These include Germany's ultimatum and declaration of war to Russia, its declaration of war to France, its ultimatum to Belgium, the speech of its Chancellor Theobald von Bethmann Hollweg (1856–1921) in the Imperial Diet of 4 August and the German White Book with diplomatic correspondence, which was released shortly after the commencement of the war.¹³⁵ Both in 1914 and 1919, Germany construed the justification of its actions of August 1914 on two separate arguments. Its major concern was to deflect the blame for the Europe-wide escalation of the bilateral conflict between the Habsburg monarchy and Serbia after the assassination of the archduke. First, since Germany neither could nor wanted to deny that it had supported Vienna's desire for retribution and security guarantees from Serbia, even at the cost of war, it consistently argued that Austria-Hungary had a just cause of war and, as its ally, it had a right and interest to support it. The German defence implied that the assassination of the archduke constituted an injury. Moreover, the event was just another proof of Serbia's continuous attempts to harm Austria-Hungary and, in collusion with Russia, to destroy it as a great power. As it was a vital interest for Germany that Austria-Hungary retained its status as a great power and as Germany was treaty-bound to an alliance with Vienna, Germany had no basis to stop Vienna's search for retribution. However, it had counselled moderation.

Second, Germany could not be held responsible for the escalation of the Austrian-Serbian war into a European war. On the contrary, it had done everything to keep it an isolated, bilateral conflict. Whereas Germany stood accused of having pushed Vienna to war in the full knowledge and hope that this could provoke Russia to protect Serbia and trigger the series of alliance treaties bringing at least Russia, Germany and France into the war, it argued that the opposite was true. It threw the accusation back at Russia, which, according to Germany, had been plotting war against Austria-Hungary and the Ottoman Empire for years in the hope of securing access to the Mediterranean. It indicated Russia's decision for full mobilization at the end of July 1914 at a time when Germany was, at the instigation of Britain, trying to mediate between Saint

¹³⁵ Telegram of Bethmann Hollweg to the German Minister in Brussels, 2 August 1914, *The German White Book: The English Translation Issued by the German Government August 1914* (1914), reprinted in J.B. Scott (ed.), *Diplomatic Documents Relating to the Outbreak of the European War* (1916), vol. 2, at 769, 813; German Ultimatum to Belgium, 3 August 1914, reprinted in G.P. Gooch and Harold Temperley (eds), *British Documents on the Origins of War 1898–1914* (1926), vol. 11, at 340; German Declaration of War against France, 3 August 1914, reprinted in K. Kautsky, M. Montgelas and W. Schücking (eds), *Die deutschen Dokumenten zum Kriegausbruch* (1919), vol. 3, at 187; Address of Bethmann Hollweg to Imperial Diet, 4 August 1914, reprinted in *Stenographische Berichte über die Verhandlungen des Reichstags, Dienstag 4 August 1914. Leg XIII.2* (1914), vol. 306, at 5; Telegram of Bethmann Hollweg to German Ambassador at Saint-Petersburg, 31 July 1914 and 1 August 1914, *The German White Book*, reprinted in Scott, *ibid.*, vol. 2, at 46, 47.

Petersburg and Vienna as the true cause for the war. After Russia ignored Germany's ultimatum of 31 July to cease its military preparations, Germany was left with no choice but to declare war on Russia and France and invade Belgium and Luxemburg. This was founded on military necessity and the certainty that France would stand by its ally Russia. Under prevailing German doctrine, Germany could only hope to win a two-front war against Russia, France and possibly Britain if it could take advantage of its capacity to mobilize faster than Russia and take out France before Russia was fully prepared for war. For this, it needed to bypass French defences at the German border by cutting through Luxemburg and Belgium. According to Germany, Russia's decision to mobilize and to continue its preparations in the face of the German ultimatum made it the true aggressor. Germany's justification of 1914 and 1919 showed great similarity to King Frederick II's justification in 1756. In both cases, they pleaded preventive defence on the basis of a combination of certainty that the enemy would attack in the near future and of necessity built on an assessment of the military situation and their own operational doctrine and policies.¹³⁶ The invocation by Germany of its own military doctrine severely weakened the whole argument.¹³⁷

The 1914 justification was beefed up with false accusations of military incursions in Germany and the use of Belgian airspace by the French prior to the German declaration of war. In his speech to the Diet, Bethmann Hollweg conceded explicitly that the invasion of Belgium and Luxemburg constituted violations of German treaty obligations and that Germany was going to compensate for the damages later. It was justified, however, by the necessity to defend the fatherland. Both statements were part of the chancellor's strategy to secure the support of the socialist party, the Sozialdemokratische Partei Deutschlands, in the German parliament, for which only a defensive war was acceptable.¹³⁸ The first statement also served the agenda of trying to trigger the defensive alliance Vienna and Berlin had with Italy.¹³⁹ Both statements were retracted in subsequent months.¹⁴⁰

6 Conclusion

If the parties to the Versailles Peace Treaty could agree on one thing, it was that the treaty radically departed from long-existing practice. The return to a discriminatory conception of war, the attribution of guilt, the enactment of reparations on the basis

¹³⁶ C. Clark, *The Sleepwalkers: How Europe Went to War in 1914* (2013); W. Mulligan, *The Origins of the First World War* (2010), at 93–96; T.G. Otte, *July Crisis: The World's Descent into War, Summer 1914* (2014).

¹³⁷ De Visscher, 'Les lois de la guerre et la théorie de la nécessité', 24 *Revue Générale de Droit International Public* (1917), 94; J.W. Garner, *International Law and the World War* (1920), vol. 2, 186–237.

¹³⁸ Mulligan, *supra* note 101, at 72.

¹³⁹ Treaty of Alliance of Vienna between Austria-Hungary, Germany, and Italy 1912, 217 CTS 311; Foreign Secretary to British Ambassador at Paris, 2 August 1914, *British Blue Book 1*, reprinted in Scott, *supra* note 135, vol. 2, 861, at 1002; *Italian Green Book*, reprinted in Scott, *ibid.*, vol. 2, 1207, especially the Telegram of Foreign Minister to Italian Ambassador in Vienna, 9 December 1914, at 1209.

¹⁴⁰ *German White Book*, reprinted in Scott, *supra* note 135, vol. 1, at 815, 837.

of justice and the prosecution of German war leaders all broke with centuries of peace treaty practice. But the conception of aggression as a violation of the rules that regulated resort to war was not new; it drew on a long-standing tradition that had its roots in the dualist logic of just and legal war from early modern Europe and that had survived within the lore and practice of international law. The originality of Versailles lay in actually rendering a verdict on who the aggressors were and in sanctioning them, not in inventing the concept.

But, if the drafters of the Versailles Peace Treaty made history, they also started to rewrite it. The most elaborate debate on war guilt and aggression during the Inter-Allied Conference of January to May 1919 at Paris took place within the CRW. In its report, the commission condemned Germany for having planned and started a war of aggression, clearly asserting that this had been an offence in 1914 and had been understood to be so. But, in a move that was as astonishing as it was unnecessary, it immediately added that the offence had not been one against international law but, rather, a moral one. In order to do so, it reduced international law to, first, positive law and, second, enforceable rights and obligations, thus assuming the position on use of force law of the small minority of radical positivists such as Westlake and Oppenheim. The position was inconsistent with the conclusion the Allies reached on the reparations debate. Here, the product of their deliberations was an assertion, albeit an unconscious one, that aggression had been a violation of enforceable international law in 1914. But to the statesmen, diplomats and the wider audience in 1919, and in the ensuing fight over the legitimacy of Versailles, this was all juridical hair splitting. Whatever the Allied authors of the Versailles Peace Treaty had meant when they wrote the text, by the time the treaty was signed on 28 June 1919 they had moved to a ringing condemnation of German aggression, a supreme offence against international morality. With this, they, as much as the German detractors of Versailles, did rewrite the history of international law.