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## Wither Away State Right to Wage War Unilaterally

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## Wither Away State Right to Wage War Unilaterally

### Cover Page Footnote

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## Wither Away State Right to Wage War Unilaterally

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### Abstract

One only has to look into the history of international relations to realize that the use of force has been intrinsically related to the *ius gentium*. For example, it is quite revealing that international law, as a scientific discipline, emerged from this relation. There are also many publications from the founding fathers that are related to this branch of law and which titles specifically mentioned the law in war. To this end, one can relate to the works of De Vitoria, Suarez, Molina, Grotius, etc. Thus, it would not be too bold to claim that the modern international order was born from the regulation of the use of force and so, since the Renaissance.

The banishment of the use of force in international relations surely is the cornerstone of the UNC, this new social contract that would now exist between the nations that had defeated the Nazi-fascist barbarism and the Japanese imperialism. Yet, this rule, true and veritable idea that it was, did not emerge overnight but was the fruit of a long and laborious process from different stages of which will be presented in the following pages. It is fair to wonder how did we get to the current framework of the use of force and more specifically how States, those who are the very legislators of international law, have supplanted the law regulating the use of force; *ius ad bellum*, by the law on the prevention of war; *ius contra bellum*. Was it not Clausewitz who once claimed that war was nothing else but the extension of politics by other means, therefore being considered like any other (lawful) means and moreover, a sovereign right of States?

UNC Article 2 (4)<sup>(2)</sup> enshrines this epochal revolution, yet this was the end point of a lengthy if not laborious historical and legal process. It is then of paramount relevancy to pinpoint the various steps of its development.

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(2) United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS, article 2§4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

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“No ! Giusta causa non è Iddio / La terra spargere di sangue umano [...] Queste del cielo non fûr parole ... no, Dio nol vuole [comparatively to the battle cry of the Catholics during the St. Bartholomew's Day massacre: “God wills it”]. No, Dio non vuole. Ei sol di pace scese a parlar”.<sup>(3)</sup>

Five centuries separate the following two images<sup>(4)</sup>. They are also the pictographic representation of the legal and historical tale that will be unfolded in this article.



One only has to look into the history of international relations to realize that the use of force has been intrinsically related to the *ius gentium*. For example, it is quite revealing that international law, as a scientific discipline, emerged from this relation. There are also many publications from the founding fathers that are related to this branch of law and which titles specifically mentioned the law in war. To this end, one can relate to the works of De Vitoria, Suarez, Molina, Grotius, etc. Thus, it would not be too bold to claim that the modern international order was born from the regulation of the use of force and so, since the Renaissance.

The banishment of the use of force in international relations surely is the cornerstone of the United Nations Charter (hereinafter: UNC), this new social contract that would now exist between the nations that had defeated the Nazi-fascist barbarism and the Japanese imperialism. Yet, this rule, true and veritable idea that it was, did not emerge overnight but

- (3) Giuseppe Verdi, “I Lombardi alla prima crociata”, Act 2, scene VIII (“No, it is not in the just cause of God! / The earth is moistened with human blood [...] It was not the word of heaven ... No! God wills it not! – No! God wills it not! He only speaks of peace”).
- (4) The first image (left) is a fresco from the Fifteenth century that is now exposed in the Palazzo Abatellis at the “Galleria Regionale della Sicilia”, in Palermo. The fresco (dated around 1446) is entitled “Triumph of Death” (“Il trionfo della morte”) which presumably occurred after a war. The second fresco (right) is found at the “Grace Cathedral” in San Francisco, the city where the Charter of the United Nations was negotiated and signed. The fresco represents to the right, the Winged Victory of Samothrace and to the left, a woman holding a dove and a branch of olive tree, representing peace.

was the fruit of a long and laborious process from different stages of which will be presented in the following pages. It is fair to wonder how did we get to the current framework of the use of force and more specifically how States, those who are the very legislators of international law, have supplanted the law regulating the use of force; *ius ad bellum*, by the law on the prevention of war; *ius contra bellum*. Was it not Clausewitz who once claimed that war was nothing else but the extension of politics by other means, therefore being considered like any other (lawful) means and moreover, a sovereign right of States?

Once one knows the end point of this process, the UNC in its article 2§4<sup>(5)</sup>, one can also wonder what were the steps of its development. The various phases that have shaped this process are of course diverse. Hence, according to inevitable and inexcusable historical and legal shortcuts, five general phases will be drawn from the evolution of the law on the prevention of war. Traditionally, the first phase corresponds to the doctrine of the just war.

### 1) *Iustum bellum*:

In ancient Greece, it was already accepted that no war could be started without the prior recognition of the responsibilities and causes of such act. Later, Cicero asserted that a “just” war should be preceded by a declaration of war in proper and due form. This declaration was an activity exerted by a group of magistrates – the Fetiales – through the highly symbolic ritual of the launch of the javelin in enemy territory<sup>(6)</sup>, further to an unsuccessful notice. War was designed as a mean of dispute settlement and framed by a specific procedure. The Fathers of the Church and the Scholastic School hold the merit to have developed the theory of *iustum bellum*: St. Ambrose passing by St. Augustine and Thomas Aquinas to De Vitoria. In order to conduct a just war, the State needed to have a just cause to start the said war: a valid and recognized title (“just” in the sense of in accordance with the law, *iustus*). The title represented the legal basis for the individual right, the *ius ad bellum*. Thus, the only form of war that was lawful was one that was just. St. Augustine, who lived from 354 to 430, considered wars to be just one that would:

“avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it”.<sup>(7)</sup>

This form of justice represents the idea of private justice - the reparation of an injustice

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- (5) United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS, article 2§4: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.
- (6) As a pictorial explanation, the launch of the javelin represented a shift into the law in war. Hence, the situation changed from a state of peace to a state of war.
- (7) St. Augustine, *The City of God*, translated from Latin by Marcus Dods, Hendrickson Publisher, Massachusetts, 2009, vol. 2, chapter XIX.

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by an individual act instead of one agreed and carried out by the community. In his research, Thomas Aquinas identified three cumulative conditions that should be met for a war to be perceived as just: (a) it must be carried out under the authority of a prince, as head of an entity subject to the *ius gentium*; (b) it must have a just cause; (c) the initiator must be animated by good intentions in order to “promote the good and deter the bad”<sup>(8)</sup>. However, rare were those who – in the name of the Gospel of Christ – dared to categorically reject any form of war. Erasmus<sup>(9)</sup> was certainly the most famous of them:

“What would be the just war? Here is the definition! Is just, any war that is decided by a sovereign prince, even if the sovereign prince in question is a child or an idiot (or even both at once). In short, all the doctrine of Christ is now polluted by dialectics, sophistry, mathematic, rhetoric, poetry, philosophy and heathen science of law (*iurisprudencia*)”.<sup>(10)</sup>

Indeed, Erasmus wondered what was the difference between a theft and a murder on one side and a conquest and a massacre on the other.<sup>(11)</sup> The difference lies in the public authority (the sovereign prince), which by his presence allows differentiating between a public war and a private one.<sup>(12)</sup> This is a perfect reflection of Botero’s conception of national interest (“Ragion di Stato”).<sup>(13)</sup> It is nevertheless an isolated voice because a few decades later and as the New World was discovered – another stepping-stone of the science of international law – Francisco de Vitoria, a Spanish jurist and theologian, claimed that defensive wars were obviously legitimate: “force may be repel by force” (*vim vi repellere*), including the “offensive war”, insofar as it is intended to punish injustice from which one was the victim, i.e. “a war where we are not only defending ourselves or seeking to repossess ourselves of property, but also where we are trying to avenge ourselves for some wrong done to us”.<sup>(14)</sup>

Three centuries later, Grotius will authoritatively and conclusively assert that the “justifiable causes generally assigned for war are three, defence, indemnity, and punishment”.<sup>(15)</sup> Accordingly, the grand master of Delft underlined the importance of the rightness of the cause of war, which only may give it its lawfulness. Wars can therefore

(8) *Summa Theologica*, Secunda Secundae, Quaestio 40.

(9) Some centuries earlier, Francis of Assisi had not only repudiated war amongst Christians but also denied the lawfulness of the religious war against the Saracen. He instead encouraged the dialogue with them and even went to Palestine in order to discuss this matter with the “ferocious” Saladin.

(10) Desiderius Erasmus, *Against War*, p. 84 [our translation].

(11) *Ibid.*, p. 88.

(12) *Ibid.*, p. 89. However, there is a passage that could be interpreted *in contrario* as legitimating war against non-Christians.

(13) *Della Ragion di Stato e delle Cose della Grandezza delle Città*, Venice, 1958, vol. 1, p. 1.

(14) Francisco De Vitoria, *On the Law of War*, transl. from Latin by H. F. Wright, First question, N°11-12.

(15) Hugo Grotius, *The Rights of War and Peace* (1625), translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901), vol. II, chapter I.2.2,

only be commenced by the sovereign in the pursuit of one of these three purposes. This idea will later be recognized as the Grotius' paradigm – the necessity to assert a just title of war. In this light, even war coated with moral and religious connotations, had to satisfy material conditions in order to be characterized as lawful.

However, this position also contained flaws. First, in spite of ingenious and subtle attempts to apprehend these just causes, their definition was not sufficiently clear and standardize. Of course war engendered due to self-defence was amongst the just cause of war; but an “offensive war” was also permitted for fair grounds other than territorial conquest. Grotius himself did not fail to raise that:

“It may happen indeed that neither of two belligerent powers may act unjustly. For no one can be charged with acting unjustly unless he knows that he is doing so; but there are many, who are not aware of the nature, extent, and consequences of their measures. Thus in a law-suit, both parties may sincerely believe that they have justice on their side. For many things both in law and fact, which would establish a right, may escape the notice of men”.<sup>(16)</sup>

But already De Vitória - and he seems to have been the first - had advanced the hypothesis of a just war just on both sides. In this regard, he distinguished two possible situations: “(a) Apart from ignorance the case clearly cannot occur, for if the right and justice of each side be certain, it is unlawful to fight against it, either in offense or in defense. (b) Second proposition: Assuming a demonstrable ignorance either of fact or of law, it may be that on the side where true justice is the war is just of itself, while on the other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse”.<sup>(17)</sup>

Secondly, the attempt to limit the use of force by the *iustum bellum* suffered from the outset by a structural weakness of the international legal order, i.e. the deficiency or the absence of a third-party body empowered to ascertain the existence and application of an alleged cause. As each of the belligerents is entitled to judge of this issue, there were naturally two opinions diametrically opposed on this subject.<sup>(18)</sup> Indeed, the collapse of the *Respublica Christiana* caused the disappearance of the diarchy that was composed of the Pope and the Emperor (the “two swords” of Christianity, as Dante would say)<sup>(19)</sup>. Jealous of their sovereignty freshly conquered and well fought for, States were facing this institutional void, perplexed and with envy.

(16) *Ibid.*, vol. II, chapter XXIII.13.2.

(17) Francisco De Vitoria, *supra* note 12, second question, § 33.

(18) Alberico Gentili even once said that it was in the nature of things that the two princes feel that they are provided with a just cause of war. This is also known as the phenomenon of self-interpretations due to the absence of an organ vested with the power of compulsory determination.

(19) See Bruno Arcidiacono, *Cinq types de paix. Une histoire des plans de pacification perpétuelle (XVIIe – XXe siècles)*, Paris-Geneva, 2011.

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Finally, the absence of a widely accepted list of just causes of war as well as the non-existence of monitoring bodies of these causes and their application in each case, got the better of the just war doctrine. Machiavelli, for whom a war is just as long as it is necessary<sup>(20)</sup>, introduced the moral indifference towards war. Later, this perception was to be completed and provided with appropriate legal clothes by Emer de Vattel.

**2) “War in due form”:**

The second phase is marked by the work of Emer de Vattel. Vattel was in fact a man of transition and according to him: “war is that state, in which we prosecute our right by force.”<sup>(21)</sup> Indeed, despite setting forward a new paradigm, Vattel’s ideas still mirror the thinking of his century on stating that there are just causes of war and on outlining three situations or conditions to which the right to conduct a “just war”. All of the three are subordinate to the “right to security” founded on the right of a Nation to “preserve herself from all injury”.<sup>(22)</sup>

However, and here lies his decisive innovation, as the two deficiencies outlined above (or material and structural orders) and because of the equality of States, Vattel argues that:

“It may however happen that both the contending parties are candid and sincere in their intentions; and, in a doubtful cause, it is still uncertain which side is in the right. Wherefore, since nations are equal and independent (Book II. §36, and Prelim. §§18, 19), and cannot claim a right of judgment over each other, it follows, that, in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and until the decision of the cause”<sup>(23)</sup>

Having regard to “the external effects” (i.e. from the standpoint of positive law), this has two major consequences. Firstly, at the level of the laws of war (which will later be called the “*ius in bello*” and nowadays: international humanitarian law)<sup>(24)</sup>, it has an impact on the

(20) Niccolò Machiavelli, *The Prince*, 1515, chapter XXVI, para. 4.

(21) Emer de Vattel, *Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, 1758, Transl. from original French by Thomas Nugent (Indianapolis, Liberty Fund, 2008), Book III, Chapter I, § 1, at 469, ([http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=2246&chapter=212414&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2246&chapter=212414&layout=html&Itemid=27))

(22) *Id.*, Book II, Chapter IV, § 49, at 288.

(23) *Id.*, Book III, Chapter III, § 40, at 489.

(24) “A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war” - as they were traditionally called - were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This “Hague Law” and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the

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equality of the belligerents, direct reflection of sovereign equality. Secondly, at the level of the law on the use of force (“*ius ad bellum*”), the consequence is reflected in the indifference of the just cause of war. What is particularly interesting here is that Vattel focuses on the procedure to be followed by all sovereigns for the purposes of the exercise of the prerogative right to conduct war. This procedure is focused on the declaration of war and it then became the master-word. A declaration is required:

“as a further effort to terminate the difference without the effusion of blood, by making use of the principle of fear in order to bring the enemy to more equitable sentiments,— it ought, at the same time that it announces our settled resolution of making war, to set forth the reasons which have induced us to take up arms”<sup>(25)</sup>

The declaration of war can either be simple or conditional (assuming the position of a notice). Offensive war, waged for the avenging of an injury (from the Latin, *iniuria*, i.e. unlawful) incredibly resembles the notion of reprisal. Reprisals will then become the main instrument for States. They will use the law to their own benefit (“self-help”) in order to enforce the individual rights they hold.

The declaration of war must fulfil certain formalities regarding its publicity. A war is considered a “war in due form”, or lawful if: (a) it is conducted by a public authority or a sovereign, and (b) “it is accompanied by certain formalities”, namely the notice and the declaration of war.<sup>(26)</sup> Finally, a declaration of war is obviously not needed for defensive war.<sup>(27)</sup>

It is therefore not surprising that the Positivist School of the 18th - 19th centuries has always rejected the problem of the *iusta causa*, to concentrate solely on the requirements of form that a war should satisfy to be regarded as lawful. The third Hague Convention of 1907 eventually codified the requirement of “previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war”.<sup>(28)</sup> The latter would incidentally manifest itself with the First World War in 1914.

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victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law”, Legality of the Threat and Use of Nuclear Weapons, advisory opinion of 8 July 1996: *ICJ Reports 1996*, § 75, at 256.

(25) *Id.*, Chapter IV, § 52, at 501.

(26) *Ibid.*, § 66, at 507.

(27) *Ibid.*, § 57, at 503.

(28) *Convention (III) relative to the Opening of Hostilities*, The Hague, October 18, 1907, article 1: “The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war”.

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The justification of conducting war was no longer related to substantive reasons, i.e. the just causes. On the contrary, public international law focussed increasingly on formal conditions, i.e. the preliminary declaration of war and the legal status of belligerents, that is to say the existence of a public and independent authority (thus outlawing “private war”, waged by individuals or group thereof). In a certain way, war became a trial from which the fortune of war would be the sentence.

Until the creation of the League of Nations (hereinafter: LON), the *ius gentium* allowed war as well as its minor variations to be conducted for other reasons than for a just cause, and therefore it recognized the right of States<sup>(29)</sup> to have recourse to the *ius ad bellum*<sup>(30)</sup>, as an *extrema ratio* in the settlement of their disputes.<sup>(31)</sup>

Even in 1914, the “Great war” began as an “hackneyed” “Cabinet War” or at most, as a war of settlement of dispute: punish Serbia (self-help) and require the Russian Empire to back down from the Balkans (for the Austro-Hungarian empire); break free from the English maritime and sit on its continental supremacy (for the German Reich). In short, recalibrate the balance between the Powers. However, if the “Great war” began as a war located in space and in time as well as according to means and goals, it ended, as a war of annihilation, of destruction of the adversary and resulted in the dissolution of four empires.

**3) The Restrictions of *ius ad bellum*:**

The third phase will presents the attempts of restriction and the restrictions of the *ius ad bellum*. Even if before the First World War the *ius ad bellum* was in principle unlimited, it is important to mention that there were two attempts of conventional nature that were undertaken to regulate its use and even tried to restrict it timidly. In chronological order, these important attempts are as follows:

Firstly, the Drago-Porter Convention, concluded at the second Hague Conference of 1907, affirmed the illegality of coercive recovery of contractual debts. This “odious practice”, often concretise itself in the blockade of the ports, bombing, etc. The Venezuelan crisis of 1902 was still very vivid in peoples’ minds and fostered greater awareness to no longer allow such practice of dispute resolution. This *multilateral* Convention then banish in its article 1, to enforce a coercive default notice toward the debtor State (a form of private

(29) Peter Haggemacher, « Naissance du sujet international », *Droits*, vol. 16/2, p. 15. « C’est donc, selon la tradition, en termes de juridiction et d’absence de recours possible [*Kompetenzkompetenz*] que la compétence de guerre est justifiée.

(30) Alfred Verdross, « Règles générales du droit de la paix », *R.C.A.D.I.*, vol. 30 (1929-V), p. 497. « D’où il résulte que la guerre, pour être légitime en droit international commun, doit toujours se fonder sur un titre juridique ».

(31) Letter from Moltke to Bluntschli, Berlin, December 11th, 1880, published in *Bluntschli’s Gesammelte Kleine Schriften*, vol. II, p. 271: “Perpetual peace is a dream, and not a beautiful one either: war is part of the divine order of the world. During war are developed the noblest virtues that belong to man – courage and self-denial, fidelity to duty and spirit of self-sacrifice: the soldier is called upon to risk his life. Without war the world would sink in materialism”.

justice).<sup>(32)</sup> The only exception that existed was if the debtor State would not submit itself to an arbitration procedure or would not carry out an arbitral award.

Secondly, since the beginning of 1913, a very dense network of bilateral treaties, the so-called Bryan Treaties, was set forward by the United States of America (USA).<sup>(33)</sup> Article 1 of these treaties provided the High Contracting parties with a dual obligation. First, if a dispute was to emerge, the Parties shall refrain from resorting to arms for a period of twelve months - a cooling interval of fighting spirits (“cooling-off period”) and secondly, the Parties must submit their dispute to a commission of inquiry established by the Treaty. Within one year, this joint body will report to the Parties and clarify the material facts that generated the dispute. Therefore, this is how appeared for the first time, the consubstantiality between the two obligations, now common among the fundamental principles of the UNC respectively in articles 2§3 and 2§4. These two obligations were merely an embryo of what may later help resolve such a dispute.

However, the sequence of events and conclusion of the First World War gave a salutary impulse to the awareness regarding the restriction as well as for the centralized and monitored use of the *ius ad bellum*. In other words, a powerful institutional architecture had to succeed – on a universal plane – to the Concert of Europe. The First World War or the “Great War”, which also had been described as the “War to end all wars”<sup>(34)</sup>, also managed to encourage States to outlaw war.

#### 4) The Covenant of the LON:

The fourth phase underlines the procedural limitations of the Covenant of the LON to restrict the *ius ad bellum*. The Covenant of the LON, which was annexed to the treaties of peace that ended the “Great War” in 1919, honoured both the paradigm of Vattel and the paradigm of Grotius. Therefore, these paradigms found themselves tightly intertwined. Indeed, on one hand (paradigm of Vattel), the Covenant took – from the “Bryan Treaties” – the idea of a moratorium by providing a jurisdictional and political procedure, which any member State had to follow before resorting to war. This dual obligation requires: (a) the obligation (positive) to peacefully resolve the dispute, and (b) the obligation (negative) to observe a war moratorium during the exhaustion of peaceful means for the resolution of the dispute. Henceforth, no war was eligible without first having recourse to a peaceful

(32) *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract* (Hague, II), October 18, 1907, article 1: “The Contracting Parties agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”.

(33) Those treaties get their name from its instigator, that is to say US Secretary of State. Just before the Second World War, there were more than forty of those bilateral treaties.

(34) See David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East*. 1st Ed. Henry Holt and Co, New York, 1989, 635 p.

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settlement. The LON introduced this mandatory procedure for the exercise of the State's right but it was in fact a procedural limitation to the *ius ad bellum*.

On the other hand, the paradigm of Grotius is also embodied in the Covenant insofar as it qualified certain wars as fundamentally illegal, like wars of aggression<sup>(35)</sup> or those directed against a State which abode by a jurisdictional decision or by a recommendation adopted unanimously by the League Council.<sup>(36)</sup> In this respect, one can conclude that the concept of just war was reintroduced by the Covenant and instead of being supported by moral and religious considerations, this time; it was based on positive law.<sup>(37)</sup> Ultimately, one might wonder what was the general attitude of the Covenant in respect of war. The answer can be inferred from its preamble, where it is mentioned that: "The High Contracting parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war".<sup>(38)</sup> Consequently, the main idea is not to outlaw war, but to fetter in a procedure the right of a State to wage war. However, and at the very least, the Covenant of the LON definitely banished the process of self-help and the "gunboat diplomacy" from the legal framework.

### 5) **The Kellogg-Briand Pact**<sup>(39)</sup>:

The Kellogg-Briand Pact represents the fifth and final phase leading to the prohibition of war. However, before looking into the Pact, one cannot ignore the unsuccessful attempt of the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes. The commitment of the contracting parties was illustrated in its article 2, which mentioned that:

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- (35) League of Nations, *Covenant of the League of Nations*, April 28, 1919, article 10: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled".
- (36) *Ibid.*, article 15§6: "If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report".
- (37) Thomas Frank, "Fairness in the International Legal and Institutional System: General Course on Public International Law", *R.C.A.D.I.*, vol. 240 (1993-III), p. 236. However, comparatively to the old distinction (just and unjust wars), the Covenant introduces a new category of prohibited wars; Alfred Verdross, *supra* note 27, p. 498.
- (38) *Covenant of the League of Nations*, *supra* note 31, preamble: "The High Contracting parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war [...] Agree to this Covenant of the League of Nations". The preamble is part of the context of the Covenant. See *Vienna Convention on the Law of Treaty*, 1155 U.N.T.S. 331, May 23, 1969, article 31 para. 1. This Convention codifies the general rule of interpretation of international treaties. Hence, the preamble is an important element that one should consider to understand the signification of the treaty provisions.
- (39) This treaty is named after its fathers, i.e. Aristide Briand (Prime Minister of France) and Frank B. Kellogg (US Secretary of State.)

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“The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol”.<sup>(40)</sup>

Yet, this Protocol, which was to be ratified by all LON member States in order to amend the Covenant, never came into force. Discussions within the LON however did not stop and States maintained a favourable climate for a prohibition of war. The next steps would although emerge from outside of the LON (if only because the USA, the instigators of this project, were not members of the organization). On August 27, 1928, the Kellogg-Briand Pact was signed in Paris. The Pact, which implemented a “frank renunciation of war”, was born out of a French initiative proposed and accepted by the USA who immediately decided to open the treaty, originally of bilateral nature, to all States. It then became a multilateral treaty. According to Article 1, States deprived themselves of their most powerful foreign policy tool by condemning the resort to war.<sup>(41)</sup> States went thus very far in restricting their own prerogatives, so much so that a contemporary writer once described the Pact as a true “mirage”.<sup>(42)</sup> Nonetheless, this international treaty marks the beginning of the “crisis of one’s protective right to war”.<sup>(43)</sup>

The corollary of the prohibition of war is found in article 2 of the Kellogg-Briand Pact.<sup>(44)</sup> In other words, this article contains the obligation to settle disputes by peaceful means (the other side of the same coin). Sixty-three States were parties to the Pact just before World War II, namely almost all the States that composed the international community at the time. This universality allowed the International Military Tribunal at Nuremberg to declare loud and clear in his judgment against the “Great War Criminals” that:

“In the opinion of the Tribunal, the solemn renunciation of war as an instrument of

national policy nece

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- (40) League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924, article 2.
  - (41) *Kellog-Briand Pact*, August 27, 1928, article 1: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another”.
  - (42) Marcel Sibert, *Traité de droit international public*, vol. II, Paris, 1951, p. 554.
  - (43) Karl Strupp, « Règles générales du droit de la guerre », *RCADI*, vol. 47 (1934-I), p. 571 (“droit prophylactique de la guerre”).
  - (44) *Kellog-Briand Pact*, *supra* note 37, article 2: “The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means”.
  - (45) International Military Tribunal of Nuremberg, *Trials against the major war criminals*, vol. 1, Nuremberg, 1947, p. 232.

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Represented in such a negative way by the Tribunal, the war of aggression became the “supreme international crime” amongst all crimes.<sup>(46)</sup> This primacy can be also inferred by the rank it occupied in the listing of crimes over which the IMT entertained its jurisdiction (Article 6 (a)). Moreover, as to stress the paramountcy of this crime, all the other crimes (of war *and* against humanity) had to be committed in relation with a war of aggression for the IMT to have jurisdiction over them (the so-called nexus requirement).<sup>(47)</sup>

In conclusion, the prohibition of use of force marks the culmination of a process of systemic change that peaked some centuries earlier, by the Peace of Westphalia in 1648, insofar as it represents the necessary corollary of legal equality of States (article 2§1), itself the outcome of a long historical evolution.<sup>(48)</sup> In this perspective, article 2§4 UNC is the overarching element of today’s international legal order for it completes the whole historical process which lead to its current structure.

Regulation of the use of force has oscillated during five centuries between the two poles that can be respectively tagged the “paradigm of Grotius” and the “paradigm of Vattel”. The meaning of the first paradigm revolves on a system of use of force centred on its material legitimation; the “just cause” to have recourse to the use of force. On the contrary, the second paradigm ignored these causes to focus on the formal conditions subordinate to the exercise of this right, starting from the assumption that all States shall enjoy equally, by virtue of their sovereignty, this individual right. By prohibiting any form of unilateral military violence in international relations, the UNC definitively buried the paradigm of Vattel to embody, at least on paper, the paradigm of Grotius. The paradigm of Grotius presupposes a community of values (moral, religious or legal) and advocated for legal monism, while the paradigm of Vattel sets those values aside and based its ideals on legal pluralism. This vague prerogative of the State to conduct war slowly faded and almost nothing of this right remains today but the “natural law” of individual or collective self-defence, under article 51 of the CNU.<sup>(49)</sup> An exception that its founding fathers in San Francisco wished to design strictly but that States have strive to expand since.

(46) *Ibid.*, p. 186.

(47) It’s noteworthy to underline that International Criminal Court Statute, adopted at Rome in 1998, has radically inverted the “hierarchy” among the four (core) international crimes since Genocide (Article 6) ranks first, followed by Crimes against humanity (Article 7), War Crimes (Article 8) and finally Crime of aggression (Article 8 bis), inserted by resolution RC/Res.6 of 11 June 2010.

(48) *International Court of Justice, Case concerning the military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), June 27, 1986, §212: “The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention”.

(49) *Charter of the United Nations*, *supra* note 4, article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at

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[Wither Away State Right to Wage War Unilaterally]

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The reason for this paradigm shift must be sought, in the emergence of an organized international community, including a collective security system and organs empowered to make legal determinations. States no longer are the upholders of their own rights, but they are bound by the obligation to settle their disputes peacefully (article 2§3 UNC) and to refrain from having recourse to the use of force (article 2§4 UNC). States now find themselves forced to negotiate, or, as Machiavelli would say, to pretend to take part in a discussion.

If a grave was to be made for the law to wage war (*ius ad bellum*), one could imagine the following epitaph on the tombstone: “the struggle of the law against war appears like the struggle of Sisyphus<sup>(50)</sup>, condemned forever to eternally roll a rock to the top of a mountain”. But then again, the regulation of use of force or the banishment of the use of force has come a long way in only a few centuries! It is therefore difficult not to subscribe to the statement made by US President Eisenhower while the spectrum of the Cold War began to haunt the minds: “With all the defects, with all the failures that we can check up against it, the UN still represents man's best organized hope to substitute the conference table for the battlefield”.<sup>(51)</sup> Hence, it is the duty of future generations to keep alive the flame of that hope.

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any time such action as it deems necessary in order to maintain or restore international peace and security”.

(50) According to Greek mythology, the gods had punished Sisyphus for his arrogance and ordered him to ceaselessly roll a rock to the top of a mountain. Just before he could reach the top, the stone would fall back of its own weight. The gods believed that there was no more horrible punishment than futile and hopeless labour.

(51) Quoted in: TALBOTT, S., *The Great Experiment: the Story of Ancient Empires, Modern States, and the Quest for a Global Nation*, New York, 2008, p. 3.

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تلاشي حق الدولة في شن حرب من طرف واحد

أ.د. جوفيانى ديستيفانو

أستاذ القانون الدولي/جامعة نيوشاتيل

على المرء أن ينظر فحسب إلى تاريخ العلاقات الدولية؛ ليدرك أن استخدام القوة ارتبط في جوهره بالقانون الدولي. على سبيل المثال، فإن تلك النظرة تكشف تماماً أن القانون الدولي، كتخصص علمي، نشأ من تلك العلاقة. هناك أيضاً العديد من المنشورات من الآباء المؤسسين التي ترتبط بهذا الفرع من القانون والتي تناولت عناوينها تحديداً موضوع القانون في الحرب. تحقيقاً لهذه الغاية، يمكن للمرء أن يرجع إلى أعمال "دي فيتوريا"، "سواريز"، "مولينا"، "غروتوس"، الخ. وهكذا، فإنه لن يكون من قبيل الجرأة أن ندعي أن النظام الدولي الحديث وُلد من تنظيم استخدام القوة، و ذلك منذ عصر النهضة .

إن منع استخدام القوة في العلاقات الدولية هو بالتأكيد حجر الزاوية في ميثاق الأمم المتحدة، هذا العقد الاجتماعي الجديد الذي سيكون موجوداً الآن بين الدول هو الذي تغلب على الهمجية الفاشية والنازية والإمبريالية اليابانية. حتى الآن، فإن هذه القاعدة، بالرغم من أنها فكرة صحيحة وحقيقية، لم تظهر بين عشية وضحاها ولكن كانت ثمرة عملية طويلة وشاقة من مراحل مختلفة سنعرضها في الصفحات التالية. فمن الإنصاف أن نتساءل كيف وصلنا إلى الإطار الحالي لاستخدام القوة؟ وبشكل أكثر تحديداً كيف تمكنت الدول، وهم المشرعون الحقيقيون في مجال القانون الدولي، من استبدال قانون تنظيم استخدام القوة، أو قانون الحق في إعلان الحرب، بقانون منع الحرب. ألم يكن "كلوزفيتز" هو الذي زعم ذات مرة أن الحرب لم تكن إلا امتداداً للسياسة بوسائل أخرى، لذا فهي تُعد إحدى الوسائل الشرعية وفوق ذلك فهي حق سيادي للدولة؟ إن المادة ٢ (٤) (٢) من ميثاق الأمم المتحدة تكرر هذه الثورة التاريخية، ولكن كانت هذه نقطة النهاية لمعالجة تاريخية وقانونية طويلة وشاقة. ومن هنا تأتي الأهمية القصوى لإبراز الخطوات المختلفة لتطوير تلك المعالجة.