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## The Westphalian Peace Tradition in International Law

*From Jus ad Bellum to Jus contra Bellum*

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**D**URING THE COURSE OF 1998, the 350th Anniversary of the Peace of Westphalia was celebrated in different European countries, and throughout 1999 the Centennial of the First Hague Peace Conference repeatedly received solemn attention.<sup>1</sup> This article, written in honour of Professor Leslie C. Green, will use the years of 1648 and 1899 as assessment points in relation to developments in international law regarding the use of force by States. As concerns the emerging law of collective security, the account will probe somewhat beyond the year of 1899, but not beyond the establishment of the League of Nations in 1920. The chosen topic is thus one of legal history, which is not inappropriate when one takes into account the achievements of Leslie Green; he himself became part of legal history through participation in war treason trials in India after World War II, and he has written on international humanitarian law and the UN Charter law on the use of force from both a historical and contemporary perspective. The historical approach of this contribution may be timely—at a juncture in international relations when the world community is at a crossroads (as before in history) between multilateralism and unilateralism, between global and regional decision making, and between the

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

idealism of ambitious blueprints for the future<sup>2</sup> and laissez-faire oriented realism.

### The Peace of Westphalia and the Grotian Legacy

In October 1648, after 30 years of war and almost four years of negotiations, two peace treaties were signed in the Westphalian cities of Osnabrück and Münster. Most of the international actors of 17<sup>th</sup>-century Europe were represented at the peace congress: the Holy Roman Empire; nation-States like France, Sweden, Spain, and Portugal; an emerging State, the Netherlands (then called the United Provinces); the Holy See; i.e., the Swiss Confederation; Italian units such as Venice, Tuscany, and Savoy; and various German principalities and bishoprics, etc.<sup>3</sup> It was the first general peace congress in the history of Europe. Among its immediate results were the introduction of a principle of religious tolerance, the breakdown of medieval imperial and clerical universalism, and the downgrading of the papacy to the status of a second-class international actor. Moreover, in a longer term perspective, the peace contributed to the emergence of the modern international system of territorial and sovereign States, a system where actors were (and are) maximizing their own State interests, while at the same time striving for a balance of power.

From a legal point of view, the principle of national sovereignty was now in the foreground, while at the same time restrictions in sovereign rights were recognized as a consequence of, *inter alia*, the Westphalian Peace Treaties. Against a backdrop of natural law perceptions, nation-States, city-States, and principalities alike perceived themselves as being part of a European collective bound together by an emerging law of nations (*jus inter gentes*). The traditional Roman concept of *jus gentium* survived, but took on a more State-oriented meaning. International law, as we know it today, started to develop through new (more efficient) forms of diplomacy, relying to a greater extent on permanent missions and an increased registration of State practice.

Hugo Grotius died in 1645, but left behind<sup>4</sup> a conception of an *international society* which, at least in part, seemed to materialize after the Peace of Westphalia. To some extent, this conception was realist in the sense that he was aware of the importance of sovereignty, stressing that a sovereign State is a power "whose actions are not subject to the legal control of another."<sup>5</sup> Moreover, Grotius did not promote a doctrine of equality of States but rather recognized power differences and legal relationships based on non-equality.<sup>6</sup> Yet the conception was idealistic in the sense that, consistent with stoic doctrine, a society of mankind, not one of States alone, was envisaged.<sup>7</sup> In this society, the

individual possessed fundamental rights and freedoms and was not merely an object.<sup>8</sup> It is possible to deduce from his thinking, as Hedley Bull has done, the interpretation that Grotius was alluding to an international society of a more advanced nature—an international community—which implied a vision of “solidarism” and consensus in international relations.<sup>9</sup>

As Bull himself and others have pointed out, Grotius said little or nothing about crisis management, balance of power, great power responsibilities, international institutions, multilateral conferences, or collective suppression of aggression<sup>10</sup>—in other words, nothing about collective security. Benedict Kingsbury and Adam Roberts have noted that certain “solidarist” principles are nevertheless discernible in his writings. They are, however, difficult to concretize, a point made by Kingsbury.

Grotius’ positions on such solidarist themes as the consequences of the justice or injustice of a war . . . and the enforcement of law by third parties generally, are all complex and often difficult to reduce to rules of decision.<sup>11</sup>

In these areas, the treaties of Osnabrück and Münster did, as we shall see, carry things somewhat further and with greater clarity than the doctrines of Grotius. His view of the law was “registrative” and backward-looking. He wanted to remind his contemporaries of the nature of the existing legal system, that it was almost as old as humanity itself and was “supposed to be as valid in his time as it had been in Roman times.”<sup>12</sup> As a consequence, Grotius’ thinking was not in full harmony with the Westphalian Peace regime, which was future-oriented and designed to expound a new legal order relating to the use of force in Europe.

In *De Jure Belli ac Pacis*, Grotius picked up the medieval and theological Just War Doctrine and elaborated his own version of it. Although he circumscribed the right to wage war to a number of instances in order to curb wars of conquest, his immediate legacy tended to be counterproductive to that purpose. His basic *bellum justum* principle is reasonably clear: “war ought not to be undertaken except for the enforcement of rights.”<sup>13</sup> Since Grotius wrote this at a time when acts of violence for the enforcement of rights occurred between actors other than States, such as families, cities, and corporations, and since he was not ready to exclude such *bellum privatum* from the legal sphere, but rather draw analogies from it with regard to inter-State relations, his position could be described as admmissive vis-à-vis the use of force generally. However, at the same time he tried to introduce, *de lege ferenda*, a State monopoly on the use of force, for he perceived it to be conducive to law and order.

When Grotius listed the legitimate reasons for resorting to use of force, he deduced them from a citizen's reasons for commencing a law suit.<sup>14</sup> Any denial of existing rights would justify a victimized State's reaction with military force. For example, force could be used for the recovery of lost property or the repair of economic damage. This position meant that Grotius' *jus ad bellum* doctrine (like other *jus ad bellum* doctrines) included first use of force as a natural element. It also included second use reactions to other States' use of force. Grotius' view on self-defence in fact foreshadows the *Caroline* case. He only admitted preventive action if it was "necessary" and in response to an immediate threat where one was "certain" about the intentions of the opponent. Arguing somewhat loosely, he asserted that "the degree of certainty required is that which is accepted in morals."<sup>15</sup>

Morality also played a role in Grotius' view on punitive actions. Punishment was a just cause in response to injustice done to oneself or third States. There was a general right of participation in a just war. Moreover, Grotius recognized the justness of a war "against men who act like beasts,"<sup>16</sup> and thus came close to what today is called humanitarian intervention. He based his "just causes" on natural law and the voluntary or positive law of nations (agreements and practice).

The just causes of Grotian doctrine can be summarized as follows:

- recovery of what is legally due to an aggrieved State;
- territorial defence against an attack, actual or threatening, but not against a potential threat;
- economic defence to protect one's property; and
- the infliction of punishment upon a wrongdoing State.<sup>17</sup>

Wars waged without any cause were "unjust," a categorization that entailed certain practical consequences. One was to assume relevance for later legal developments, namely Grotius' doctrine on qualified neutrality. Absolute impartiality was impossible in relation to the aggressor and his opponent. In Book III of *De Jure Belli ac Pacis*, Grotius wrote that neutrals should do nothing to support the "wicked case" or hamper "him who wages a just war."<sup>18</sup> There was no suggestion of a duty to assist actively the "just side," but Grotius asserted that the right of passage ought to be granted to the party fighting for a just cause and denied to one motivated by an unjust cause.<sup>19</sup> However, Grotius did not envisage collective action on the part of the international society. His doctrines expressed a "law of coexistence," not a "law of co-operation" (to use Wolfgang Friedmann's terminology).<sup>20</sup> This does not exclude perceptions of "the Grotian image of war as a fight for the common good," as Michael Donelan would argue, or fighting for a just cause "on behalf of the community as a whole," as

Hedley Bull would put it.<sup>21</sup> Nevertheless, this “solidarist” theme is more pronounced in the provisions of the Westphalian Peace regime.

The Treaty of Münster contains three articles of relevance in this context. First, Article I stated:

That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, . . . That this Peace and Amity be observed and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other; etc. . . .<sup>22</sup>

That this general pronouncement on maintenance of peace also amounted to an international obligation to solve existing disputes by peaceful means was made clear by the 123rd Article of the Treaty. Even if violations of the Treaty should occur

. . . The Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.<sup>23</sup>

These provisions were, in a sense, forerunners to Articles 12, 13 and 15 of the Covenant of the League of Nations (on certain procedures for crisis management) and Articles 2(3) and 33 of the UN Charter (on obligatory peaceful settlement of disputes).

In fact, the Peace of Westphalia contained an embryo of what later would be called collective security. The Article quoted above also obliged the parties (individually) “to defend and protect all and every Article of this Peace against any one, without distinction of Religion.” This obligation was supplemented by a rule on collective sanctions in the following (124th) Article:

[I]f for the space of three years the Difference cannot be terminated by any one of those [peaceful] means, all and every one of those concerned in this Transaction shall be obliged to join the injured Party, and assist him with Counsel and Force to repel the Injury . . . and the Contravener shall be regarded as an Infringer of the Peace.<sup>24</sup>

Thus, there was an obligation to identify the aggressor and join forces to repel the aggression. This Westphalian formula on a mutual guarantee of security to be triggered after the failure of peaceful settlement efforts would influence later

State practice and can today be compared with Articles 10 and 16 of the League Covenant and Chapters VI and VII of the UN Charter.

Grotius' *jus ad bellum* doctrine was not reflected in the Peace provisions. The more ambitious approach of *jus contra bellum* was introduced in State (treaty) practice for the first time (although in a loose manner). It would not prevail in actual practice during the following centuries, but after 1648 it was once and for all ideologically implanted in political thinking on law and diplomacy.

It is definitely an overstatement to say, as Hedley Bull has done, that Grotius "may be considered the intellectual father of this first general peace settlement of modern times."<sup>25</sup> Grotius did not recommend a general conference of European powers and did not envisage that a comprehensive peace settlement would have the potential of providing the international society with an institutional foundation. However, Grotius' conception of international society is bound to have influenced the negotiators in Osnabrück and Münster to some extent. Hedley Bull may be correct in his assessment that "in their impact on the course of international history the theory of Grotius and the practice of Westphalia marched together."<sup>26</sup>

### The Westphalian Balance of Power System 1648–1789

In the immediate aftermath of 1648, it seemed that the old international system had been transformed into an international society, if not into an international community guided by common values, common policy prescriptions, and common legal rules of coexistence. Nevertheless, the weakness of the Westphalian peace and security system soon became apparent. In modern parlance, it had no institutional backing and contained no mechanism for implementing crisis management procedures. Moreover, there was more often than not a lack of political will in the ensuing era of absolutism. Non-peaceful settlement of disputes seemed to be the rule. The first trade war between the Netherlands and Britain was fought between 1652–54. During the same decade, Spanish troops recaptured Barcelona from French occupation, Sweden intervened in the Polish-Russian war, Denmark attacked Sweden's territories in northern Germany, Britain and France jointly attacked Spain, etc. However, the area of main concern to the Westphalian Peace negotiators, central Europe, was still peaceful.

Westphalia left a legacy of balance of power diplomacy that in many respects was conducive to peace. Although the treaties of Osnabrück and Münster contained no explicit wording on balance of power, the concept was inherent in the treaties. The rule on collective sanctions implied a potential of deterrence

that could curb aggressive tendencies in balance-threatening situations. Moreover, a form of collective self-defence materialized in 1663 and 1683 when Turkish troops threatened Vienna (and the Habsburg Empire), but were repelled through the collective efforts of countries (France and others) that came to Austria's assistance. The perception of a threat posed by a strong Islamic presence in central Europe was enough to cause various powers to join forces (in all probability, irrespective of the Münster Treaty).

When the European balance of power system was threatened again in 1688, a coalition against the peace-breaker was forged soon enough. This time the expansionist policy of Louis XIV had manifested itself in a French invasion of the Palatinate (Pfalz). In this and similar cases, most States wanted to preserve some basic status quo as a way to prevent other States from gaining a position of dominance. Balance of power diplomacy was thus directed more towards limiting the political/territorial consequences of war than towards abolishing war as such. The (anti-French) coalition war ended with the Peace of Rijswijk in 1697, where Louis XIV had to give up most of the conquered territories and accept arbitration on numerous territorial claims. The *jus contra bellum* element of the Westphalian heritage had been diluted beyond recognition in actual practice, but traces of it remained in peace treaties for years to come.

Louis XIV threatened the balance of power once again in 1700 when he advanced a claim on the Spanish throne on behalf of his grandson. This led to a new anti-French coalition being formed the following year<sup>27</sup> and to the outbreak of the War of the Spanish Succession (1701–1714), which ended in French defeat. The balance of power was upheld through the peace treaties of Utrecht (1713) and Rastatt (1714). The Peace of Utrecht consisted of a number of bilateral agreements which explicitly confirmed what in Westphalia had been a general understanding—that peace had to be built on a just geopolitical equilibrium (*justum potentiae equilibrium*).<sup>28</sup> In this sense the treaties of Utrecht reconfirmed a Westphalian tradition. However, since France was successful in “bilateralizing” the peace conditions in relation to its different adversaries, the Peace of Utrecht did not mark the existence of an international society or community in the same way as the Peace of Westphalia had done. The Westphalian embryo of collective security was not taken up further. Although Europe had raised a coalition of the willing against the peace-breaker, no obligations as to collective action or sanctions were envisaged for the future. Louis XIV had been forced to respect the European balance, but the powers upholding it could neither impose an efficient *status quo* nor secure peaceful change in the relations of States.<sup>29</sup> Utrecht did not reconfirm the Westphalian principle of European public law requiring peaceful settlement of disputes. The

embryonic element of *jus contra bellum* was not revived; the doctrine of *jus ad bellum* prevailed.

In 1699 Denmark, Poland and Russia formed an aggressive alliance against Sweden, their plan being to launch simultaneous attacks the following year. As a consequence, the Great Northern War (1700–1721) was unleashed, during which Charles XII of Sweden rejected several peace offers. During the war, the 1712 edition of Grotius' *De Jure Belli ac Pacis* was translated into Russian, and inspired the Russian diplomat P.P. Shafirov to defend Peter the Great's first-use-of-force against Sweden. In 1717 Shafirov published *A Discourse Concerning the Just Causes of War Between Sweden and Russia* (as it was called in the later English version).<sup>30</sup> Voltaire, who did not believe that Grotius had influenced anything regarding the restraint of war, ironically rejected (in his book on Charles XII) the just causes advanced by Russian diplomacy during the Northern War.<sup>31</sup> Under the Peace of Nystad (1721), Sweden lost her Baltic provinces and Russia emerged as a major coastal State in the region and as a new Great Power. The northern balance had shifted to a new equilibrium.

In the discourse of international lawyers there have been different views on the matter of balance of power as it relates to the law on war and peace. Some have (since the 18<sup>th</sup> century) seen the balancing system as a precondition of international law, others have viewed it as a peace-oriented policy of preserving the *status quo*, a few may have understood its preservation as amounting to a legal obligation on the part of States, and many have considered it a formula giving rise to legal rights of intervention and resort to force.<sup>32</sup> The legal consequences of the 18<sup>th</sup> century political realities amounted *inter alia* to an extensive interpretation of the law of individual and collective self-defence, although Grotius had not included preventive war among his categories of *bellum justum*. Christian Wolff, writing in 1749, thought that the balance of power was "useful to protect the common security." He did not believe that "the preservation of equilibrium" was in itself a just cause of war, but he nevertheless found that nations under threat of subjugation had the right to resort to force.<sup>33</sup>

Wolff's disciple, Emmerich de Vattel, rejected conquest, property claims, and religious differences as just causes of war, but admitted that in order to protect their interests, States had a right to resort to war in response to what they regarded as injuries. As a consequence of this "realist" approach, Vattel's book, *Le Droit des gens* (first edition 1758) became very popular in government chancelleries and diplomatic circles. Vattel did not, however, completely accept the so-called probabilist doctrine (embraced by Wolff and others before him) that war could be just on both sides since "probable reasons" for legality could be offered in the concrete case. Vattel maintained that it was impossible that two



contrary claims were simultaneously true, although both parties to a conflict could act *bona fide* and accusations of unjustness should be avoided in such situations. Nevertheless, he rejected all suggestions that the end justifies the means and that might is right. He recognized the need for collective action against aggressors that upset the balance of power. The common safety of the society of nations would permit joint action to restrain and punish rogue States.<sup>34</sup>

While Wolff and Vattel were busy authoring their volumes on “the law of nations,” the international scene around them was characterized by power politics. In 1740 Frederick the Great of Prussia embarked upon the Austrian War of Succession, from which Prussia emerged in 1748 as a new Great Power. Again the balance of power had shifted. Other wars followed: the Seven Year War (1756–63) and the Bavarian War of Succession (1778–79). Although during this era an unprovoked attack was regarded as immoral behaviour, a war of aggression was not necessarily looked upon as illegal under the public law of Europe or the law of nations. The Articles of the Treaty of Münster, indicating the contrary, had yielded to what Schwarzenberger has called the Grotian “elasticity of just causes of resort to war.”<sup>35</sup> In retrospect it could be argued that Grotius’ *jus ad bellum* doctrine had served to license war rather than to restrict it. One of Grotius’ purposes was to curb wars of conquest. Sharon Korman has made the point in a recent thesis that Prussia’s conquest of Silesia (1740) and the three partitions of Poland (1772, 1793, 1795) were accepted by the European States and thereby confirmed the existence of a right of conquest.<sup>36</sup> At the time, balance of power arguments were used to legitimize both the conquest of Silesia and the enforced partitions of Poland. The Westphalian Peace concept (where the balance of power ideology was linked to the *non-use* of force) had vanished from State practice, but it survived in different variants in political and philosophical literature.

### Elements of *Jus contra Bellum* in Political Philosophy 1713–1806

During the negotiations leading up to the Peace of Utrecht, the French Abbé de Saint-Pierre served as a secretary to the French delegation and, in his spare time, elaborated a peace plan for Europe. It first appeared in 1712 as *Projet de la Paix Universelle*. The following year a more extended version under the less ambitious title *Projet pour rendre la Paix perpétuelle en Europe* was published. Saint-Pierre may have been influenced by the Quaker William Penn’s booklet, *Essays Towards the Present and Future Peace of Europe* (1693), in which Penn put forward the idea of a federation of European States (including Russia

and Turkey) as a peace maintenance mechanism. Saint-Pierre advocated a federation of European/Christian States based on the post-Utrecht *status quo*. He saw the proposed federal structure as a way to prevent international and internal armed conflict. Disputes would be resolved by peaceful means, i.e., by arbitration or judicial process within the framework of a permanent assembly of State representatives. The Assembly (or Senate) would function under the leadership of the existing major powers. These States would possess more votes than others under the decision-making procedure. Common decisions on enforcement measures could be taken to uphold the *status quo* or implement the desired order. War as a means of coercion, on the part of the Federation, was envisaged as the ultimate sanction against recalcitrant States.<sup>37</sup> In this respect, Saint-Pierre's thinking was part of a Westphalian heritage of collective security. His peace project included an important element of *jus contra bellum*, not in the strict and direct UN Charter "Article 2(4) sense," but in the broader and more general perspective that will always be intertwined with any peace plan for common or collective security.

Saint-Pierre's ideas became well known in Europe and they were commented upon by Frederick the Great, Voltaire, Rousseau and others—although often in a sceptical or even ironic fashion. Rousseau abridged and reviewed his project in an essay—*Extrait du projet de paix perpétuelle d. M. l'Abbi de St. Pierre* (1760)—and has, therefore (at times), been perceived as a strong supporter of Saint Pierre and his peace plan. In fact, Rousseau thought it naive, but applauded Saint-Pierre's aspirations.

Montesquieu, in *De l'Esprit des lois* (1748), came close to embracing the stricter *jus contra bellum* approach when he rejected the right of conquest (except as a matter of self-defence) and advocated the principles that "nations, without prejudicing their true interests, in time of peace ought to do one another all good they can, and in time of war, as little injury as possible."<sup>38</sup> The former proposition would today include the peaceful settlement obligation of Articles 2(3) and 33 of the UN Charter, while the latter would refer to the principles underlying the international humanitarian law of armed conflict. Montesquieu's views on natural law in this respect supplements this proposition. In arguing against Thomas Hobbes' thesis of men by nature being in a state of war, he claimed that "peace would be the first law of nature."<sup>39</sup>

In the 1780's, Jeremy Bentham crafted a peace project—"Plan for a Universal and Perpetual Peace"—but it was not published until after his death in the volume *Principles of International Law* (1843) and thus could not exert any influence during the period under consideration. In it, Bentham criticized Vattel and other naturalists. He aimed at a codification of international law that

would rule out war and colonization and rely on public opinion as a sanction for peace.

The French Revolution conveyed an ideology which had important implications for the development of certain international legal concepts. Internal freedom (civil and political rights) was seen as a condition for peace and the competence to wage war ought to, in accord with this perception, be placed under the authority of the representatives of the people. The idea was advanced that "all unjust aggression" was contrary to natural law. War should only be used to repress a grave injustice and conquest should be forbidden. A constitutional proposal by Mirabeau provided that if the legislative assembly found a minister or other executive agent guilty of international aggression, he would be punished for criminal acts against the State.<sup>40</sup> The ensuing Decree of the National Assembly of May 22, 1790, was not that far-reaching, but did contain a rejection of wars of conquest, and its text was later incorporated in the Revolutionary Constitution. The 1791 Constitution included the following formula:

The French Nation renounces the undertaking of any war with a view to making conquests and will never use its forces against the liberty of any people.<sup>41</sup>

A follow-up Decree of April 13, 1793, pronounced the principle of non-intervention in the affairs of other States. These revolutionary conceptions also found expression in the *Déclaration du droit des gens*, which in 1795 was submitted to the French Convention by one of its members, Abbé Grégoire. It was intended as a corollary to the *Déclaration des droits de l'homme* of 1789, a parallelism inspired by 18<sup>th</sup> century natural law thinking. The new (draft) declaration contained a number of lofty principles, including the proposition that an armed attack by one nation upon the liberty of another would be an offense against all nations, and the principle that the interests of individual nations should be subordinated to the "general interests of the human race."<sup>42</sup> The Declaration was not adopted.

Edmund Burke's well-known condemnation of the French Revolution was linked to his concern about the future of the balance of power in Europe. With the outbreak of the Revolution, Westphalia had become "an antiquated fable," he wrote in 1791.<sup>43</sup> Any attempt to upset the European balance of power system was for Burke a just cause of war. There was a duty to intervene in the internal affairs of France in order to protect "the public laws of Europe."

When Thomas Paine published Part II of his *Rights of Man, Being an Answer to Mr Burke's Attack on the French Revolution* in 1792, he also opposed Burke's

view on war. Instead of finding a “public law of Europe,” Paine noted the “uncivilized state of European governments” and the fact that those governments were “almost continually at war.”<sup>44</sup> He denounced war as such as harmful to the “principles of commerce and its universal operation” and made the point that commercial development is dependant on the maintenance of peace. Thus, it was in everyone’s interest to avoid war.<sup>45</sup> Paine was here to some extent foreshadowing the plans of Robert Schumann and Jean Monnet for a European Community. He did not, however, draw any legal conclusions from this reasoning, other than that he implicitly denied a *jus ad bellum* based on an alleged public law of Europe.

When Immanuel Kant published his famous essay *Zum ewigen Frieden* in 1795, he argued, like Paine, that “the *spirit of trade* cannot coexist with war, and sooner or later this spirit dominates every people. For among all those powers (or means) that belong to a nation, financial power may be the most reliable in forcing nations to pursue the noble cause of peace.”<sup>46</sup>

Kant was critical of Grotius, Vattel, and other naturalists and their pretension of stating a valid legal prohibition against certain uses of force. Thus, he denied any *lex lata* on the subject (although he did not put it in these terms). He noted, however, a “dormant moral aptitude to master the evil principle in himself” and claimed that “from the throne of its moral legislative power, *reason* [emphasis added] absolutely condemns war as a means of determining the right and makes seeking the state of peace a matter of unmitigated duty.”<sup>47</sup> He thereafter embarked upon an idealistic reasoning *de lege ferenda*:

But without a contract among nations peace can be neither inaugurated nor guaranteed. A league of a special sort must therefore be established, one that we can call a *league of peace* (*foedus pacificum*), which will be distinguished from a *treaty of peace* (*pactum pacis*) because the latter seeks merely to stop one war, while the former seeks to end all wars forever. This league does not seek any power of the sort possessed by nations, but only the maintenance and security of each nation’s freedom, as well as that of the other nations leagued with it, . . .<sup>48</sup>

Although accepting the decentralized Westphalian State system of equal nations, Kant wanted to improve upon it through agreement. His proposal amounted to a loose federation of free nations, without any supranational mechanisms for collective sanctions (not to erode national sovereignty), but kept together by the moral force of leading States. He was not aiming for a universal world State but a universal moral order. This could be achieved by one or two States inspiring others to join in a federation:

It can be shown that this *idea of federalism* should eventually include all nations and thus lead to perpetual peace. For if good fortune should so dispose matters that a powerful and enlightened people should form a republic (which by its nature must be inclined to seek perpetual peace), it will provide a focal point for a federal association among other nations that will join in order to guarantee a state of peace . . . , and through several associations of this sort such a federation can extend further and further.<sup>49</sup>

As indicated above, Kant did not (in *Zum ewigen Frieden*) support a collective security system based on enforcement or sanctions. In an essay published two years earlier, he had written:

But it will be said that nations will never subject themselves to such coercive laws; and the proposal for a universal cosmopolitan nation, to whose power all individual nations should voluntarily submit, and whose laws they should obey, may sound ever so nice in the theory of the Abbé St. Pierre or of a Rousseau, yet it is of no practical use. For this proposal has always been ridiculed by great statesmen, and even more by leaders of nations, as a pedantically childish academic idea.<sup>50</sup>

A modern reading of Kant would confirm key-words/concepts like national sovereignty, international agreement, constitutional basis, peaceful settlement of disputes, non-use of force, non-intervention, the right to self-defence, and national self-determination (Kant opposed colonization).<sup>51</sup> All in all, his *jus contra bellum* approach was reasonably modern.

The Westphalian tradition would include concepts like peaceful coexistence, equality of sovereign States, peaceful settlement of disputes, non-use of force, balance of power, mutual security guarantees, and collective sanctions. One or more of these concepts have on and off appeared in the State practice or doctrine touched upon so far.

When, during the Napoleonic Wars, the Austrian statesman Friedrich von Gentz published *Fragmente aus den neuesten Geschichte des Politischen Gleichgewichts in Europa* (1806), he singled out some of these Westphalian concepts: balance of power, equality of States, peaceful coexistence, and joint action against peace breakers. He was, of course, heavily influenced by Napoleon's upheaval of the traditional European balance and wanted to see the feature of national self-determination reestablished on the European continent. As a consequence, von Gentz supported normative development towards a prohibition of first use of force in the relations between States, but, in light of his later association with Metternich and the post-1815 doctrine of armed

intervention against revolutionary movements in other States, his commitment to a genuine *jus contra bellum* approach can be doubted.

### The Concert of Europe and European Peace Diplomacy 1815–1897

Revolutionary France, in spite of its “peace-loving” constitution, hurled itself into an armed conflict with the rest of continental Europe in 1792. Following Napoleon’s ascendancy to power a few years later, the European balance was threatened anew. In 1804, Alexander I of Russia presented a peace plan for a European order after the expected fall of Napoleon. As with the Peace of Westphalia, the new peace was to be guaranteed by articulation of rules for the behaviour of and relations between States laid down in treaty form. Every State would pledge not to start a war without first having exhausted all available means for a peaceful solution of the dispute. Acceptance of mediation would be the rule. A State that violated these norms risked facing the joint armed forces of the European powers. This initiative from St. Petersburg was, however, not politically credible and was soon eroded by the capriciousness of the Czar.

A more promising initiative of a less ambitious nature was taken by the British foreign minister, Lord Castlereagh, at the Congress of Vienna in 1815, when he proposed a Final Declaration of the Congress in which States would oblige themselves to strengthen and maintain the dearly-bought peace. The result was a Proclamation, adopted on March 13, 1815, consisting of a pledge by the eight peace-concluding parties to protect the peace, in particular against revolutionary upheavals. It seemed that political *status quo* was more important than protection of the peace as such.

The decade following the Congress of Vienna was characterized by Great Power initiatives for management of international affairs. First, Czar Alexander initiated the Holy Alliance with its religious overtones, and thereafter Fürst Metternich started to orchestrate a European military preparedness to preserve the “legitimate” position of existing governments. The Concert of Europe brought with it a form of political cooperation that was unprecedented in the history of the continent. The emphasis was on common security, rather than on non-use of force. Lord Castlereagh had said in Parliament in May 1815, apropos of the need for reassurances against a revitalized France, that

... in order to render this security as complete as possible, it seems necessary, at the point of a general Pacification, to form a Treaty to which all the principal Powers of Europe should be Parties, fixed and recognized, and they should all bind themselves mutually to protect and support each other, against any attempt to infringe them.<sup>52</sup>

On making the statement, Lord Castlereagh noted that he desired a treaty which would “reestablish a general and comprehensive system of Public Law in Europe.” It was *jus contra bellum*, but primarily in the collective security sense. First use of force mandated by the Powers was not excluded.

The balance of power was monitored through consultations at international conferences: Vienna 1815; Aix-la-Chapelle (Aachen) 1818; Troppau (Opava) 1820; Laibach (Ljubljana) 1821; and Verona 1822. The conference majority in Troppau agreed upon a legitimization of intervention in the affairs of other States (where the current political order was threatened), although British diplomacy had resisted and done its best to prevent this development. When Austria under Metternich intervened against the revolutionaries in Naples in 1820, Britain objected. Three years later, when France intervened against the liberal insurgents in Spain, Britain objected again.

Conference diplomacy took a more constructive turn in 1830 when the risk that France and Prussia would intervene on either side of the Belgian uprising against the Dutch supremacy surfaced. In order to maintain European peace and security, a diplomatic conference was convened in London. Under the leadership of Lord Palmerston, a process of crisis management was initiated, one which yielded concrete results; Belgian independence was recognized in 1830 and Belgian neutrality in 1831. When the Netherlands attempted to undo the results of the conference through armed force, Britain and France intervened militarily and secured the conference solution.

It is often said that the Congress system and the European Concert broke down after a relatively short time, but in the mind of many political participants during the latter part of the century (e.g., William Gladstone) the European Concert retained its relevance as an ideological project. The important thing, from a historical point of view, is the observation that conference diplomacy as a phenomenon was there to stay. The fact that this diplomacy, if not preventive, at least was crisis management oriented, is of relevance for the history of the law of collective security. However, it is of limited importance for our theme of *jus contra bellum* developments.

The Ministerial Congresses and the Diplomatic Conferences of the time were reactive, not proactive, as regards interstate use of force. With the exception of treaties on neutralization of small areas, international negotiations were not concerned with normative blueprints in order to forestall aggression and other uses of force; rather, they were concerned with crisis management after the outbreak of war. This is true for the 1841 Turkish Straits Agreement (concluded between the five Great Powers and Turkey), the 1850 London Peace Agreement after the first Schleswig-Holstein War (between Prussia and

Denmark), the 1856 Peace Conference of Paris after the Crimean War, the 1878 Congress of Berlin after the Russian-Turkish War, and the 1897 Great Power mediation after the Greek-Turkish War.

It should be noted, however, that the 1856 peace settlement of Paris included one element of *jus contra bellum*. The specially adopted Declaration of Maritime Law prohibited States from licensing piracy through the following text: "Privateering is, and remains, abolished." The prohibition was applicable in armed conflict, and—one would presume—in peacetime as well.

One of the frequent London Conferences was not a reaction to an outbreak of war, but an attempt to avert such an outbreak. During the crisis of 1867 over Luxemburg (which Bismarck was not prepared to let Napoleon III purchase from the Netherlands), British diplomacy engineered the solution of an independent and neutralized principality of Luxemburg. A war between Prussia and France may have been prevented in the process.

Still, a number of wars of aggression occurred during this period, indicating the prevalence of Clausewitz's thinking that war is an extension of national policy. The concept of *jus ad bellum* did not seem to imply any restrictions on the sovereign decision-making power of nations. Troops of the German Confederation invaded parts of Denmark in 1848, Prussian-Austrian troops repeated this in 1864 (and conquered Schleswig-Holstein), and Prussia embarked upon a war with its former ally Austria in 1866.

In July 1870, Bismarck had managed to provoke France into declaring war on Prussia. "The German nation . . . is the victim of aggression" declared a representative of the German Social Democratic Workers Party.<sup>53</sup> Karl Marx saw the war on the German side as one of self-defence. But in September 1870, the war of territorial self-defence was over and German troops were fighting for territorial expansion in Alsace-Lorraine. Karl Marx, in his *Second Address of the International*, described the war after Sedan "as an act of aggression" against the territorial integrity of France and against the people of Alsace-Lorraine. Marx was hovering between the poles of justifiability (self-defence) and non-justifiability (aggression), between perceived legality and illegality. As Michael Walzer has pointed out, he was "working within the terms set by the theory of aggression."<sup>54</sup>

At about this time, public opinion was in tune with an emerging *opinio juris* (within rather than between States) that aggression was a crime under international law. Public opinion also greeted the news of the *Alabama Claims* arbitration in 1872. A serious dispute between two major powers had been settled through peaceful means, an occurrence which thereby indicated an alternative



to armed conflict. Expectations *de lege ferenda* pointed towards a future legal regime of obligatory settlement procedures, towards a *jus contra bellum*.

This was a time when the peace movement was on the move again, after a period of decline following the nationalistic sentiments of the Crimean War. The outlawing of war had been on the agenda since the first peace conferences were held in New York, London, Paris, and Geneva between 1815–1830. The first international Peace Congress was held in London in 1843, and in 1867 Victor Hugo and Giuseppe Garibaldi founded the first peace-oriented NGO—*Ligue de la Paix et de la Liberté*—in Geneva. In the aftermath of the judicial settlement of the *Alabama Claims*, international lawyers became active and founded two peace-oriented organisations of their own in 1873: first, the Institut de Droit International in Gent; and thereafter the Association for the Reform and Codification of the Law of Nations (later International Law Association) in Brussels.

In 1888, the Interparliamentary Union was founded in order to unite parliamentarians in a struggle against war, and the following year the first World Peace Conference was convened with representatives from different national peace associations. Both events took place in Paris. In 1889 the Austrian baroness Bertha von Suttner published the best-selling novel *Down with Arms* (*Die Waffen nieder*). Her friend, Alfred Nobel, died in 1896 (he had been active in his way for the cause of peace) and left behind a will that, *inter alia*, resulted in the Nobel Peace Prize. All this private activity may have influenced individual statesmen, politicians and diplomats, but it did not result in any normative proposals sponsored by governments. All the same, a political principle of non-aggression had emerged in conformity with the opinion of many actors in national societies.

Emphasis in the international society remained on *ad hoc* crisis-management. In 1897, when Greece wanted to liberate Crete for reasons of nationalistic fulfilment (*enosis*) power rather than international morality, it was warned by the Great Powers not to attack Turkey. Notwithstanding the warnings, Greece sent a fleet to Crete and mounted operations in Thrace. It has been said that the six Great Powers (Britain, France, Germany, Austria, Russia, and Italy) “laid down the rules of the game—for instance, that the aggressor would not be allowed to obtain any advantage from the conflict, whatever the result might be.”<sup>55</sup> One gets an impression of an emerging *opinio juris* corresponding to the principle *ex injuria jus non oritur*. But it is probably too much to say that the international law on the use of force was developed through State practice at this instant. Nevertheless, international law thinking seemed to have played a certain part in the crisis management. Greece started the war, lost it, was saved by

international mediation, and thereafter put under international administrative control not only for reasons of economic necessity but also in order to secure the payment of war compensation to Turkey under the peace agreement. The principles of non-aggression and *pacta sunt servanda* were important for reasons of balance of power.

The turn of the century was close. Although nothing indicated any substantial legal developments in the near future, in fact, the road of diplomacy had been paved for a new turn in the area of international law and organization.

### The Hague Peace Conference of 1899 and Beyond

When the heads of the various diplomatic missions in St. Petersburg attended the weekly reception of the Russian foreign minister, Count Mouravieff, on August 24, 1898, they were in for a surprise. Mouravieff presented a manifesto of the Czar amounting to an invitation to an International Peace Conference to discuss the most effective means of assuring a lasting peace and a reduction of excessive armaments. The diplomats realized that no government could express anything else than sympathy for such a proposal, but they also realized that no major States could be expected to agree on any disarmament proposals, since preservation of freedom of action was considered vital in this context. A circular was sent out to the different capitals and replies were requested. At a later stage, Mouravieff travelled around in Europe and assured chancelleries that the conference should not discuss disarmament proper—that would be utopian—but try to find limits for the arms race (arms control). The reason behind the initiative, many believed, was Russia's financial situation. The finance minister, Count Witte, was said to refuse to assign the funds necessary for the introduction of new weapons (Russia needed to match the rapid-firing field artillery of Germany) and Witte was perceived as the driving force behind the idea of an international agreement on limitation of armaments in order to save costs.

Reactions to the invitation included suggestions on the need for adoption of rules for settlement of international disputes by arbitration. A new circular of January 11, 1899, enumerated eight items which could usefully be discussed at the Conference. In the terminology of today, items 1–4 concerned arms control, items 5–7 international humanitarian law of armed conflict, and item 8 arbitration. Representatives of the peace movement disliked many of the first seven items, since “war should be abolished, not alleviated.” Already at this preparatory stage, there was a shift of emphasis from the issue of modern weapons developments to the Westphalian concepts of peaceful settlement of

disputes and equality of States, concepts which were strongly supported by smaller States and the peace movement. It is unlikely that these attitudes were directly influenced by the European history of political ideas, but they nevertheless belonged to the Westphalian peace tradition.

The new circular of January 1899 also touched upon the venue of the Conference. The Czar was no longer considering St. Petersburg and thought it better to avoid any of the Great Power capitals. In diplomatic circles this was seen as damage limitation, a consequence of the less than encouraging reactions of the major powers. Change of venue would minimize disgrace if the Czar's initiative should fail. Preparations soon focused on a "neutral" capital, with the Hague finally chosen as the site for the Conference.

When the Conference opened on May 18, 1899, representatives of 26 States were present. Europe dominated with 20 delegations, including Turkey. Other participating nations were the United States, China, Japan, Persia, Siam, and Mexico.

Delegations were composed of seasoned diplomats, military and naval men, and "technical experts." The latter group included experts in international law, such as the Russian professor Fjodor de Martens, a proponent of arbitration and humanitarian law of armed conflict and soon to be famous for the "Martens' Clause" (adopted in its first version in 1899). The British delegation included Sir Julian Pauncefote, the Ambassador in Washington who was well known for his work in 1897 on an (abortive) arbitration treaty with the United States. The U.S. delegation included Andrew D. White, Ambassador in Berlin, who, like Martens and Pauncefote, was a firm believer in the peaceful settlement of disputes. However, most of the military and naval delegates from the major powers seemed to be of the opinion that "might is right."

The Conference was also followed by enthusiastic activists of the peace movement, like the British journalist William T. Stead, the Russian author and industrialist Ivan Bloch, Bertha von Suttner, and others. The popular demand for arbitration had to be taken seriously by politicians. The general atmosphere of Hague 1899, outside the conference rooms in the Royal summer palace, was filled with optimism and expectations. Delegates, for reasons of self-esteem, found themselves slowly trying to respond constructively to these expectations.<sup>56</sup>

The arms control proposals were soon shelved, not to be taken up seriously again, but the second Committee that dealt with the *jus in bello* under Martens' chairmanship achieved some useful results [the Convention with Respect to the Laws and Customs of War on Land, its Annex of Regulations on Land Warfare, the Convention for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva Convention, and the Declarations concerning

Asphyxiating Gases and Expanding (“dum-dum”) Bullets].<sup>57</sup> But ultimately the work of the Conference centred on the third Committee and the proposal for a permanent court of arbitration.

The initial objective was to make arbitration compulsory in disputes of a less important nature, namely those which did not affect “vital national interests.” In the end, after German recalcitrance, the idea of compulsory arbitration was completely abandoned, although a permanent body (the Permanent Court of Arbitration) was established through the agreed-upon Convention for the Pacific Settlement of International Disputes. Article 1 of the Convention, signed on July 29, 1899, stipulates:

With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.<sup>58</sup>

This non-obligatory wording leaves it to the parties of a dispute to find ways and means of solving their differences. There is no binding renunciation of the use of force, merely a declared intention to avoid resorting to force “as far as possible.”

Article 2 deals with good offices and mediation. Here the contracting parties agree, “before [they chose] an appeal to arms,” to have recourse to such procedures, but only “as far as circumstances permit.”

Articles 15–57 lay down the system for international arbitration and Articles 20–29 concern “the Permanent Court” (consisting of an International Bureau, which serves as a record office, and a list of Arbitrators/Members of the Court). Arbitral procedure is set forth in Articles 30–57 and Article 56 makes clear that an award “is only binding on the parties who concluded the [specially regulated] ‘*Compromis*’.” Despite all the deferences to national sovereignty and State consent, the Convention represented considerable progress at its adoption. Since Westphalia, it was the first step taken in international law to place legal restrictions upon the right of States to resort to war as an instrument of national policy. It was a *jus contra bellum* in a limited sense. A permanent institution had been established and the rules of procedure facilitated arbitration considerably, since such rules no longer had to be agreed upon in each case.

It has been said that

The importance of the First Hague Peace Conference lay not so much in *what* it actually accomplished as in the fact that it accomplished *something* and that it set a precedent for future meetings. . . . Earlier opinions of the work done were not very enthusiastic, and it was only later, when the second Conference met in

1907, that the realization gradually spread that in 1899 the first step had been taken in the direction of international organization.<sup>59</sup>

The Second Hague Peace Conference of 1907 reaffirmed the modest step taken to restrict the use of force through the adoption of a new Convention for the Pacific Settlement of Disputes (which refined the earlier convention) and a convention which prohibited the use of force to recover public contract debts unless arbitration had been refused (the so called Porter Convention, named after a U.S. delegate). That these Conventions (Hague I and II) only amounted to an extremely incomplete *jus contra bellum* was made clear through the adoption of Convention III relative to the Opening of Hostilities, which required a declaration of war or ultimatum before hostilities began.

Still, the first link in a chain towards a more complete non-use of force regime was emerging in 1899 and 1907. The Westphalian Peace treaties had linked together the concepts of peaceful settlement of disputes, equality of States, non-use of force, joint action, and collective sanctions (all of which were in some way included in the 1920 Covenant of the League of Nations and are now ingredients in the UN system). The principle of sovereign equality of States was implicit at the Hague Conferences, it became more explicit upon the creation of the League of Nations (*cf* Article 5 of the Covenant) and today it is enshrined in Article 2 of the UN Charter. The League Covenant marked one step in the legal development by combining equality of States with non-use of force. Article 10 of the Covenant contained the following wording:

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 threats or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.<sup>60</sup>

A non-binding arbitration requirement was included in Article 13 of the Covenant. The imperfection of the Covenant system as regards non-use of force and collective sanctions is well known and need not be explored here. The point—at the end of this contribution—is rather, that the development towards the UN system was underway in 1907 and 1920, and that behind this development the Westphalian Peace agreements and the 1899 Hague Conference played their distinctive roles—although not as indispensable points on a continuum, but as expressions of a recurring theme in legal and political history, as manifestations of ideas with normative potential that were bound to have an impact on the development of international law.

Notes

1. E.g., the International Congress (PEACE – Reconstruction of a European Vision) on the Occasion of the Anniversary of the Conclusion of the Peace Treaties of Münster and Osnabrück, held by the University of Osnabrück, October 25–31, 1998, and the Asia-Pacific Regional Conference in Commemoration of the Centenary of the 1899 Hague Peace Conference, held by the University of Melbourne, February 19, 1999. At the 300-year anniversary of the Westphalian peace settlement, Leo Gross wrote a commemorative article in the American Journal of International Law, *The Peace of Westphalia, 1648–1948*, 42 AJIL 1948, pp. 20–41.

2. Cf. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE, UN Doc A/47/277 (1992), and SUPPLEMENT TO AN AGENDA FOR PEACE, UN Doc. A/50/60 (1995); GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990S AND BEYOND (1993); and The Report of the Commission on Global Governance (Co-Chairmen: Ingvar Carlsson and Shridath Ramphal), OUR GLOBAL NEIGHBOURHOOD (1995).

3. England, Russia, Denmark and Turkey were not represented in Osnabrück or Münster.

4. *De Jure Belli ac Pacis* was first published in 1625 and new editions appeared in 1631, 1632, 1642 and 1646.

5. DE JURE BELLI AC PACIS, Book I, Chapter 3, Paragraph 7, English translation by A.C. Campbell, *The Universal Classics* (1901) and in James Brown Scott (Ed.), CLASSICS OF INTERNATIONAL LAW, Vol. 2 (1925).

6. Benedict Kingsbury, *A Grotian Tradition of Theory and Practice? Grotius, Law and Moral Skepticism in the Thought of Hedley Bull*, 17 QLR (Quinnipiac Law Review) 1997, p. 15.

7. See Peter Haggemacher, *Grotius and Gentili: A Reassessment of Thomas Holland's Inaugural Lecture*, in Hedley Bull et al. (Eds.), HUGO GROTIUS AND INTERNATIONAL RELATIONS (1990), p. 172.

8. Hersch Lauterpacht, *The "Grotian Tradition" in International Law*, BYBIL 1946, pp. 43–45.

9. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977), pp. 148–49, 156–58.

10. Benedict Kingsbury, *supra* note 6, pp. 24–25.

11. *Ibid.*, p. 25.

12. Peter Haggemacher, *supra* note 7, pp. 173–74.

13. DE JURE BELLI AC PACIS, Prolegomena, Paragraph 25.

14. Bert Röling, *Jus ad bellum and the Grotian Heritage* in T.M.C. Asser Institute (Ed.), INTERNATIONAL LAW AND THE GROTIAN HERITAGE (1985), p. 115.

15. DE JURE BELLI AC PACIS, Book II, Chapter 22, Paragraph 5.1.

16. *Ibid.*, Book II, Chapter 20, Paragraph 40.3.

17. Cf. the listing made by Haggemacher and Draper in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 7, pp. 165 and 195.

18. Book III, Chapter 17, Paragraph 3.1. Cf. Article 2(5) of the UN Charter: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

19. DE JURE BELLI AC PACIS, Book II, Chapter 2, Paragraphs 13.1 and 13.4.

20. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964), pp. 60–63.

21. See Benedict Kingsbury and Adam Roberts, *Introduction: Grotian Thought in International Relations*, in HUGO GROTIUS IN INTERNATIONAL RELATIONS, *supra* note 7, pp. 15–16,

discussing Hedley Bull's *THE ANARCHICAL SOCIETY*, *supra* note 9, and Michael Donelan's article *Grotius and the Image of War*, 12 MILLENNIUM (1983).

22. Treaty of Westphalia, Münster, October 24, 1648, in Fred Israel (Ed.), *MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967*, Vol. I (1967), p. 9.

23. Article CXXIII, *ibid.*, p. 46.

24. Article CXXIV, *ibid.*, p. 47.

25. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 7, p. 75.

26. *Ibid.*, p. 77.

27. The alliance of 1701 included Austria, Netherlands, Great Britain, Prussia, Hannover and some German states. Savoy and Portugal joined the alliance in 1703.

28. See *MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967*, *supra* note 22, Vol. I, pp. 183, 187, 195, 197 and 200.

29. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (1957), p. 23.

30. P.P. SHAFIROV, *A DISCOURSE CONCERNING THE JUST CAUSES OF WAR BETWEEN SWEDEN AND RUSSIA: 1700-1721*, reprinted by Oceana Publications (1973).

31. See the Second Book of FRANCOISE DE VOLTAIRE, *HISTOIRE DE CHARLES XII - ROI DE SUEDE*, first edition in 1731, last edition updated by Voltaire in 1775. A modern version is included in *LES OEUVRES COMPLETES DE VOLTAIRE*, Vol. 4, edition critique par Gunnar von Proschwitz, Oxford 1996.

32. See Alfred Vagts and Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AJIL 1979, pp. 555-57.

33. CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, *The Law of Nations Treated According to a Scientific Method* (1934), translated by J.H. Drake, Carnegie Classics of International Law, pp. 330-35.

34. EMMERICH DE Vattel, *LE DROIT DES GENS; OU PRINCIPES DE LA LOI NATURELLE*, *The Law of Nations or the Principles of Natural Law* (1916), translated by Charles G. Fenwick, Carnegie Classics of International Law, Book III, Chapter 3, paragraphs 34 and 49. Cf. DAVID BOUCHER, *POLITICAL THEORIES OF INTERNATIONAL RELATIONS* (1998), p. 265-67.

35. Georg Schwarzenberger, *The Grotius Factor in International Law and Relations: A Functional Approach*, in HUGO GROTIUS IN INTERNATIONAL RELATIONS, *supra* note 7, p. 307. Cf. the well-known quotation from *De Jure Belli ac Pacis* that a just war implies "the obtaining of that which belongs to us or is our due." Book II, Chapter 1, Paras 1.4 and 2. John Locke used Grotius' just war doctrine as the basis of justifying not only wars between States, but also armed struggle within States against oppression and tyranny. Like Grotius, Locke rejected wars of conquest and admitted wars of punishment against offenders. Unlike Grotius, he may have come close to ideas on collective security. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1690), Chapter XVI, paragraphs 11, 176 and 230, modern version edited by C.B. MacPherson (1980), pp. 11, 91 ff. and 115 ff.

36. SHARON KERMAN, *THE RIGHT OF CONQUEST, THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1996), pp. 67-93.

37. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1958), p. 142; and BOUCHER, *supra* note 34, pp. 300-302.

38. Quoted from MONTESQUIEU, *SELECTED POLITICAL WRITINGS*, edited and translated by Melvin Richter (1990), p. 113.

39. *Ibid.*, p. 112.

40. See C.A. POMPE, *AGGRESSIVE WAR AN INTERNATIONAL CRIME* (1953), pp. 148-49.

41. Titre VI. Quoted by Pompe, *supra*, p. 149.
42. See NUSSBAUM, *supra* note 37, p. 119.
43. Edmund Burke, *Thoughts on French Affairs, Works of Edmund Burke*, Vol. IV, quoted by BOUCHER, *supra* note 34, p. 322.
44. THOMAS PAINE, *RIGHTS OF MAN* (1987 edition), pp. 181 and 179.
45. *Ibid.*, p. 182.
46. IMMANUEL KANT, *PERPETUAL PEACE AND OTHER ESSAYS*, edited and translated by Ted Humphrey 1983, p. 125.
47. *Ibid.*, p. 116.
48. *Ibid.*, pp. 116–17.
49. *Ibid.*, p. 117.
50. Immanuel Kant, *On the Proverb: That may be true in theory, but is of no practical use* (1793), in *PERPETUAL PEACE AND OTHER ESSAYS*, *supra* note 46, p. 89.
51. Kant's Federation of Free States was based on consent and national self-determination. Sovereignty was important. His philosophical concept of "moral self-determination" should not be touched upon here.
52. Quoted by RENÉ ALBRECHT-CARRIE, *BRITAIN AND FRANCE: ADAPTATIONS TO A CHANGING CONTEXT OF POWER* (1970), p. 33.
53. Quoted by MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977), p. 65.
54. *Ibid.*, p. 66.
55. Sir Charles Eliot, quoted by WILLIAM L. LANGER, *THE DIPLOMACY OF IMPERIALISM 1890-1902* (1951), p. 372.
56. See BARBARA W. TUCHMAN, *THE PROUD TOWER, A PORTRAIT OF THE WORLD BEFORE THE WAR: 1890–1914* (1962 and later editions), Chapter 5; and ARTHUR EYFFINGER, *THE 1899 HAGUE PEACE CONFERENCE, 'THE PARLIAMENT OF MAN, THE PREPARATION OF THE WORLD'* (1999), *passim*.
57. See JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907*, Vol. II, *DOCUMENTS* (1909).
58. *Ibid.*, p. 83.
59. WILLIAM L. LANGER, *supra* note 55, p. 591.
60. See Franz Knipping, Hans Von Mangoldt, Volker Rittberger (Eds.), *THE UNITED NATIONS SYSTEM AND ITS PREDECESSORS* (1997), Vol. II, p. 204.