International law and the use of force : beyond the UN Charter paradigm

Anthony Clark Arend and Robert J. Beck.

International law and the use of force

When the United Nations Charter was adopted in 1945, states established a legal 'paradigm' for regulating the recourse to armed force. In the years since then, however, significant developments have challenged the paradigm's validity, causing a 'paradigmatic shift'. *International Law and the Use of Force* traces this shift and explores its implications for contemporary international law and practice.

'This is an important work. It blends traditional conceptions concerning the use of force under international law with new theoretical insights to suggest a new paradigm on the use of force in contemporary international relations. The text is cogently argued, authoritatively documented, concisely written, yet intellectually balanced and comprehensive in scope.

'The authors strive to put into a rigorous theoretical framework a comprehensible construct of the legal implications of using international force in the modern world. In large measure they have admirably succeeded. As both a text and scholarly monograph, this work will be a very welcome and highly useful addition to the international law literature.'

Professor Christopher C. Joyner,
Political Science Department, George Washington University

International Law and the Use of Force will be of great use to all undergraduate and graduate students of international law, international relations and international organizations.

Anthony Clark Arend is Assistant Professor of Government, Georgetown University. **Robert J. Beck** is Assistant Professor of International Law and Organization in the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia.

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DEDICATION

We would like to dedicate this book to

Dr. William V. O'Brien
Professor of Government
Georgetown University

Our teacher, mentor, and friend

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Acknowledgments

This book reflects the contributions of many. As originally conceived, its authors were to have included William T. Parsons, Esq. and Dr. Alberto R. Coll. Governmental commitments, however, prevented our colleagues from participating in the writing. Nevertheless, they provided valuable insights during the conceptualization process. Indeed, the idea of a new work on international law and the use of force originated with Bill.

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us a concern for the ethical and legal dimensions of armed conflict, the focus of his life's writings. We hope our work will further scholarship in this area and live up to Bill's example.

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Part I

Introduction

Chapter 1

International law and the use of force

On August 2, 1990, in one of the most provocative moves of the post-Second World War era, Iraqi troops invaded Kuwait. The invasion force proceeded quickly to subdue Kuwaiti troops and to establish control over the beleaguered state. In a broadcast statement, Baghdad Radio warned other states not to aid Kuwait, claiming that Iraq would 'make Iraq and Kuwait a graveyard for those who launch any aggression.'[1]

The condemnation of Iraq by the world community was instant. US President George Bush referred to the Iraqi invasion as 'naked aggression that violates the United Nations charter.'[2] He specifically criticized Iraqi leader Saddam Hussein, terming 'his behavior intolerable.'[3] The Soviet government called for the restoration of the 'sovereignty, national independence and territorial integrity of the State of Kuwait.'[4]

In the early morning hours after the invasion, the United Nations Security Council convened. This was the body of the world organization charged with the maintenance of international peace and security. While the Iraqi Ambassador attempted to justify the actions of his state, delegate after delegate called Iraq's action a violation of Article 2, paragraph 4 of the United Nations Charter. This provision prohibits 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.'[5] By the end of the meeting, the Council had adopted Resolution 660, which condemned the invasion and called upon Iraq to 'withdraw immediately and unconditionally'[6] from Kuwait. Four days later, on August 6, the Council adopted Resolution 661, imposing sweeping diplomatic and economic sanctions on Iraq.[7] This was the first time in its forty-five year history that the Council had ordered collective sanctions in response to a use of force.[8]

While diplomatic efforts were being made to reach a peaceful settlement to the conflict, the Security Council continued to take action. It adopted further resolutions condemning Iraq's purported annexation of Kuwait (662), demanding the release of non-nationals held in Iraq (664), authorizing the use of force by states to maintain a naval blockade (665), allowing for

UN supervision of food shipments to Iraq (666), and condemning Iraqi incursions into several diplomatic installations (667). Finally, the Security Council adopted Resolution 678, which authorized states to 'use all necessary means to uphold the Security Council Resolution 660 and all subsequent resolutions and to restore international peace and security in the area'[9] if Iraq had not withdrawn from Kuwait by January 15, 1991. On January 16, 1991, when an allied assault was launched, the forcible action was pursuant to Resolution 678.

During the course of the Persian Gulf conflict, world leaders and diplomats constantly referred to norms of international law. In particular, they cited the rules of international law relating to the recourse to force, the so-called *jus ad bellum*. These are the norms that determine when a state may permissibly resort to force against another state. In the Gulf conflict, decision makers were faced with myriad *jus ad bellum* questions. Was the Iraqi invasion of Kuwait, for example, permissible under international law? Were there any plausible legal justifications for the action? If indeed the invasion was illegal, how could the international community lawfully respond to the action? Could other states unilaterally use force to respond to the Iraqi attack? Or was United Nations authorization required before force could be used against Iraq? What was the relationship between the right of self-defense and the authority of the United Nations Security Council?

Although the Gulf War was clearly one of the most dramatic uses of force since 1945, the legal questions it raised are by no means novel. Throughout the period of the modern state system, diplomats and scholars have constantly struggled to understand the legal norms relating to the recourse to force. This book seeks to explore the contemporary *jus ad bellum*: What is it? Where did it come from? And where is it going?

Before we address these essential questions of international law, it is necessary first to set the stage for our inquiry. Accordingly, this chapter will be divided into three sections. In the first, we will characterize the nature of the contemporary international system. International law cannot be understood without an appreciation of the international context within which it operates. In the second section, we will discuss in greater depth the purposes of our book. Here, we will introduce our fundamental argument that the *jus ad bellum* has undergone a 'paradigmatic shift.' In the final section, we will describe our book's methodological approach, setting out our test for the existence of a rule of law.

THE CONTEMPORARY INTERNATIONAL SYSTEM

Force has been a consistent feature of the global system since the beginning of time. Early human beings often resorted to violent means to persuade their fellows to take a certain course of action or in order to obtain something another possessed. As the world began to be organized into political

communities, force became a frequent means of interaction among these communities. With the emergence of the modern state system in the seventeenth century,[10] armed conflict of all varieties proliferated. And as technology rapidly advanced, the destructive potential of warfare increased exponentially over the centuries. The machine gun, the airplane, the submarine, and ultimately, the nuclear bomb raised the horrors of war to apocalyptic proportions. In this century alone, there have been two devastating world wars that have resulted in the deaths of over sixty million people[11] and have broken the spirits of entire cultures.

Although the world has been thus far able to avoid another global war, the use of force has not been abandoned. Since the Second World War, there have been myriad uses of force. Professor K. J. Holsti catalogues fifty-eight wars or major armed interventions that have taken place since 1945.[12] And his list excludes both the 1989 US invasion of Panama and the 1991 Gulf War. While some of these conflicts lasted only a few weeks, others were protracted wars, such as the Vietnam War, the Soviet-Afghan War, and the Iran-Iraq War. Taken together, these sixty post-Second World War battles and other 'minor' conflicts that Professor Holsti did not list, have brought death and social upheaval to much of the world. In the relatively brief Gulf War alone, as many as 200,000 persons may have lost their lives.[13] Clearly, the last half of the twentieth century has been no less violent than the first.

The nature of contemporary international relations

The reasons why force has been a perennial factor in international life are many. Indeed, scholars from a variety of disciplines have often undertaken to explore the causes of 'war' and other uses of force.[14] Some of the factors cited by these experts as ultimate causes of international conflict include the inherent aggressiveness of human beings or the sinful nature of humans. But these factors also exist within domestic systems, and yet, generally, domestic authorities have been able to regulate and greatly to limit violence within those systems. Why then does the international system seem to be inherently more violent? The relatively greater incidence of force in the international arena seems to have been due, at least in part, to the very nature of the international system itself.

Unlike a domestic system, where there is a centralized authority with a monopoly of force to deter and punish wrongdoers, the international community is characterized by extreme decentralization.[15] At present, there are over one hundred and eighty states in the world but no international authority with an *effective* monopoly of force to prevent and, if necessary, to punish law breakers. As Professor Robert J. Lieber has explained, there is 'no common power,' 'no overall arbiter or institution to which [states] can turn for settlement of dispute, for enforcement of their rights, or even for effective protection of their basic security and survival.'[16]

There is, of course, the United Nations. But, as will be seen in subsequent chapters, this organization was not actually vested with a monopoly of force at the outset.[17] Moreover, for most of its existence, the UN has been largely unable to use effectively what theoretical power it does possess.

Reinforcing this factual decentralization is the concept of 'sovereignty.'[18] When the state system was emerging in the 1600s, thinkers began developing a theory to justify the de facto arrangement of power. This theory contended that states were to be regarded as juridically equal. No one state was to enjoy greater legal privileges than any other state. Owing to this juridical equality, no state could be subject to the control of another state or of any other temporal authority without that state's consent. States were thus said to be *sovereign*, to have absolute control over activities within their territories. While there may have been certain acknowledged *moral* norms, there were no pre-ordained *legal* norms.[19] Any law that was to be binding on states came not from divine or natural sources,[20] but solely from the states themselves. International law, therefore, if it were to exist, would have to be created by the consent of states.

THE PURPOSE OF THIS WORK

Over the past several centuries, states have in fact created legal rules to regulate their conduct in a wide variety of areas: international personality; jurisdiction; acquisition of territory; the seas; airspace; outer space; human rights; environmental concerns; economic transactions; and, of course, the use of force. The law relating to the recourse to force, the *jus ad bellum*, developed rather slowly until the beginning of this century. With the devastation wrought by the First World War, however, states redoubled their efforts to impose legal restrictions on the resort to armed force. To this end, both the League of Nations and its successor, the United Nations, sought to establish comprehensive legal regimes.[21]

The League proved to be a short-lived experiment. The United Nations, by contrast, has functioned for nearly half a century as an important actor in the international system. At the same time, the legal framework for the resort to force established by the United Nations Charter has become the most widely accepted framework for describing contemporary law relating to the recourse to force.[22]

In this book, we maintain that the United Nations Charter framework for the *jus ad bellum* represents a 'legal paradigm'.[23] This conclusion is not likely to be disputed. Other scholars have made similar claims.[24] In the years since the Second World War, however, a number of significant developments have challenged the validity of this UN Charter paradigm. These include: problems of Charter interpretation; the changed nature of international conflict; a perceived illegitimacy of institutions for peaceful change and peaceful settlement of disputes; failure of institutions to enforce the law; and a growing preference by states for 'justice' over 'peace.' Most international legal scholars recognize that these post-war developments represent serious threats to the Charter paradigm. Few, if any, contend that these developments are indicative of a 'paradigmatic shift.'[25]

We believe that such a shift has taken place. In this book, we will argue that since 1945 a new legal paradigm has emerged – the 'post-Charter self-help' paradigm. This paradigm, we submit, reflects contemporary international law relating to the recourse to armed force.

The purpose of our book is to explore this shift in paradigms, and to examine the future of the law relating to the recourse to force. To accomplish this task, our work will examine several areas. First, after a brief historical overview, we will describe the United Nations Charter paradigm for the resort to force. Second, we will explore in detail several significant challenges to the Charter paradigm. Third, we will describe the contours of the 'post-Charter self-help' paradigm and assess its capacity to promote international order. Finally, we will explore the future of the *jus ad bellum* and propose a normative framework that will address the problems that have plagued the UN Charter paradigm.

THE APPROACH OF THIS BOOK

Given the purposes outlined above, it is clear that our project will involve two major tasks. First, we will determine what international legal norms relating to the use of force actually exist. Second, we will indicate how these existing norms are at variance with the United Nations Charter paradigm. To accomplish these two tasks, it will be necessary first to set out our methodological approach.

In the decentralized international system, states create legal norms through their consent. The first critical task for any scholar or practitioner, therefore, is to determine what legal norms have in fact been created by states. This undertaking presupposes a fundamental question: How does one determine if a putative rule is genuine 'law?' Where does one look to find 'law?' What, in other words, are the *sources* of international law?

The traditional sources of international law

Traditionally, international legal scholars and world leaders have accepted Article 38 of the Statute of the International Court of Justice as the authoritative enumeration of the sources of international law.[26] While technically this Article is only a list of sources that the Court is to apply in deciding cases before it, most leaders and scholars would agree that Article 38 merely restates those sources that states have already come to acknowledge as authoritative.[27] Under this provision there are three principal sources of international law: 1) *treaties*, 2) *custom*, and 3) *general principles of law*.

There are also two subsidiary means for determining a rule of law: judicial decisions and scholarly writings.

Treaties

The first source listed in Article 38 is treaties, or, as they are referred to in the Article, 'international conventions.' Treaties or conventions are simply written agreements between two or more states and represent one of the most basic and clear ways in which states create rules to regulate their behavior. In a rough sense, treaties may be thought of as somewhat analogous to contracts under domestic law. Just as a contract between individuals creates law for those individuals, so a treaty between states creates law between them. Treaties may be between two states (bilateral) or among more than two states (multilateral). They may deal with many different issues, such as the United Nations Charter, or they may deal with only one subject, such as the 1988 Intermediate Nuclear Forces Treaty between the United States and the Soviet Union.

Treaties normally become law in a process involving several steps.[28] First, the parties enter into negotiations to determine what provisions they would like to include in the treaty. After they reach agreement, they sign the treaty. It is then normally submitted to the domestic ratification processes of each of the parties. In the United States, for example, before the President can ratify a treaty, he or she must submit it to the Senate for advice and consent.[29] Once the domestic procedures are complete, the states submit their instruments of ratification as required by the provisions of the treaty. Instruments of ratification are simply documents certifying that the states intend to be bound by the agreement. In the case of bilateral treaties, the agreement normally becomes binding international law once both sides have deposited their instruments of ratification. Most multilateral treaties specify a particular number of ratifications that must be deposited before a treaty actually becomes binding, or, in more technical language, *enters into force.*

Custom

Another principal source of international law is custom. Article 38 refers to it as 'international custom, as evidence of a general practice accepted as law.' Customary international law is thus created not by a written instrument but rather by state behavior. If, over a period of time, states begin to act in a certain way and come to regard that behavior as being required by law, a norm of customary international law has developed. In other words, for a norm of customary international law to exist, there must be two elements. First there must be state practice. States must comply with the putative rule in their actions. For instance, if there were to be a norm that diplomats were not to be arrested by the host country, states would have to demonstrate a practice of not arresting diplomats. Second, the proposed rule must be perceived to be law. Not only must states actually engage in a practice, they must do so because they believe that the practice is required by law. Thus, in the example given above, states must not only refrain from arresting diplomats, they must do so because they believe that it is *unlawful* to do so.

General principles of law

A final major source of international law listed in Article 38 is 'general principles of law recognized by the civilized nations.' This source is more controversial and difficult to grasp than the other two sources. In fact, international legal scholars seem to disagree on the precise nature of general principles[30]. For those who accept general principles as an independent source of international law, there seem to be at least three plausible definitions, which are not necessarily mutually exclusive.

First, general principles may refer to those basic legal principles that are present in most *domestic* legal systems.[31] Under this interpretation, legal concepts such as prescription,[32] estoppel,[33] and *res judicata*,[34] which are accepted in virtually all domestic systems, would also be applicable principles of international law. The logic is that because states have acknowledged these as important principles in their internal legal systems, they would also accept them as principles in the international legal system.

Second, general principles of law may refer to general principles about the nature of international law that states have come to accept.[35] This interpretation contends that there are certain *a priori* principles that underlie customary international law and treaty law. In other words, in order for customary and treaty law to make sense, there are certain first principles, certain assumptions, about the law-making process that states must accept. Two of these principles that immediately come to mind are sovereignty and *pact sunt servanda.* For law created by custom and treaty to be efficacious, states must first accept the notion that states are sovereign, that they can be bound by no law without their consent, and thus, that they *can* be bound by law *with* their consent. Similarly, the principle of *pacta sunt servanda*, the principle that promises should be kept, is an assumed principle of treaty law. Without first accepting this notion, any particular treaty would have no binding force. These underlying assumptions can be considered as a separate source of international law because they are philosophically prior to norms of custom. One cannot, for example, establish through treaty the principle that treaties should be obeyed.

Finally, a third interpretation of the meaning of general principles of law is that they refer to 'principles of higher law,'[36] such as principles of equity[37] or humanity.[38] Here, general principles would be similar to natural law principles that would fill the gaps left by treaty law and customary law.

Text writers and court cases

In addition to the three principle sources of international law, Article 38 also lists two 'subsidiary means for the determination of rules of law': 'judicial decisions and the teachings of the most highly qualified publicists of the various nations.' These two items are not independent sources of international law, but are rather means by which one can determine the existence of a principal source. In other words, to determine the content of a particular rule of custom, general principle, or the existence and meaning of a treaty, recourse can be had to court decisions and the writings of international legal scholars. Courts and scholars do not 'create' the law, but only give testimony to its existence. It is often quite laborious to undertake an independent assessment of state practice to determine the nature of a particular rule, however. Consequently, it is often convenient to cite credible scholars and generally accepted court decisions that have already reaped the fruits of such an assessment.

Other possible sources of international law

While treaties, custom, and general principles remain the accepted sources of international law, in recent years much attention has been given to the role that resolutions of international organizations play in the formulations of international law.[39] Technically, it is indeed possible for states to create an international organization by treaty and endow a body of that organization with law-making authority over the members. Various organs of the European Community, for example, have such law-creating ability.[40] From the standpoint of universal international organization, this type of law-making authority is quite limited. Resolutions of the United Nations Security Council can be binding on all members of the United Nations if the Council so decides.[41] For a resolution to be adopted, however, it must receive nine affirmative votes from among the fifteen members of the Council. In addition, each of the five permanent members of the Council – the United States, Great Britain, France, Russia (formerly the Soviet Union), and the People's Republic of China – must either vote in the affirmative or abstain for a resolution to be adopted. If any of the permanent members votes in the negative, the resolution is vetoed[42].

General Assembly resolutions, on the other hand, are for the most part only recommendations.[43] Only resolutions dealing with such issues as financial contributions, budgetary matters,[44] and internal housekeeping are binding on member states. General Assembly resolutions are, however, often cited as evidence of state practice. This is normally done in one of two ways. Some scholars contend that if a General Assembly resolution is adopted unanimously, or nearly unanimously, it indicates a belief on the part of states that the principles enunciated in the resolution are 'regarded as law.'[45] These individuals would, in consequence, be willing to rely on the resolution as the main indicator of state practice. Other scholars and statesmen would disagree with this interpretation.[46] They would argue that states vote for United Nations General Assembly resolutions for a variety of reasons – to appease a domestic audience, to gain international acceptance, to gain specific favors from other states, and so forth. These reasons may have very little to do with the perception that the resolution should be regarded as indicative of state practice. Individuals supporting this interpretation would contend that generally a General Assembly resolution should be regarded as but *one* possible indicator of a customary practice that should be taken into consideration along with the more traditional indicators – daily actions of states, statements of government officials, behavior of commanders in the field and the like. These scholars would contend that it would be possible for a resolution to constitute a codification of existing customary international law. The resolutions could thus be cited as a 'short hand' to denote the custom, much as treaties that codify customary international law are cited. To do this, however, it would be necessary to demonstrate that there was a norm of customary law that existed prior to the adoption of the resolution and that the states adopting the resolution intend to codify this norm.

The test of international law

We believe that two criteria should be used to determine if a putative norm is genuinely 'law': 'authority' and 'control.'[47] First, any rule of international law must be seen as *authoritative*.[48] States must regard the norm as legitimate;[49] they must perceive it to be 'law.' In the traditional language of international law, the norm must have *opinio juris*.[50] Second, the prospective legal norm must be *controlling* of state behavior.[51] Through their practice, states must actually comply with the requirements of the rule. Neither 100 percent compliance nor a 100 percent perception of authority is necessary. There must, however, be a *general* perception of authority and a general, widespread compliance in order for a putative rule to be authentic international law.[52]

It is clear how our two-prong test applies to customary law since authority and control are simply an alternative method of expressing that a rule of custom requires a practice (control) regarded as law (authority). This argument is not particularly controversial. We assert, however, that the 'authority-control' test for 'law' can also be applied to both treaties and general principles.

It seems reasonable to argue, for example, that states have in practice effectively withdrawn their consent from a particular provision of a treaty, and hence, that it is not 'law,' if: 1) the provision is not believed by them to be authoritative, and 2) there is very little compliance with the provision,

even though the treaty may remain technically 'in force.' Similarly, if a putative general principle is not perceived to be authoritative and is not controlling, it would be impossible to declare that it is truly a 'general principle of law recognized by the civilized nations.' In short, whatever the traditional source of a particular rule of law in question may be, the validity of the rule will be determined by reference to its authority and control.

This approach, while diverging somewhat from the traditional conception of the sources of international law, is grounded firmly in the *positivist* understanding of international law. As the late English jurist J. L. Brierly has explained: 'The doctrine of positivism . . . teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented.'[53] State consent, we maintain, exists only if the rule in question is authoritative and controlling. If there is not a high level of authority and if the putative norm is not reflected to a significant degree in state practice, we posit that the suggested rule is not a norm of international law.

In the absence of a norm restricting state behavior, sovereignty allows states to act as they choose. As a consequence, unless a restrictive norm of international law can be established prohibiting a particular use of force, states are permitted to engage in that use of force. In other words, for the use of force to be prohibited there would need to be a *proscription* that was both authoritative and controlling.

Chapter 2

Historical overview: the development of the legal norms relating to the recourse to force

INTRODUCTION

For as long as human beings have suffered at the hands of one another, there have been efforts to impose restrictions on the recourse to force. The earliest evidence of such efforts can be found in the writings of ancient religions and can be traced through the scholarly writings, customary international law, and international agreements of the succeeding centuries. The purpose of this chapter is to explore this evolution of the norms relating to the recourse to force by examining their development through history. This discussion will set the context for an examination of the UN Charter framework.

In reviewing the history of the law relating to the use of force, legal scholars such as Professor John Norton Moore have found that during particular times a certain normative orientation regarding the recourse to force predominated.[1] In consequence, these scholars have divided history into periods based on the predominant normative orientation. While such division of history is clearly only an approximation and should not be interpreted too strictly, it can prove useful in understanding the historical changes that have occurred in the *jus ad bellum*. Drawing on the work of Professor Moore, six rough historical periods can be identified: 1) the just war period, 2) the positivist period, 3) the League of Nations period, 4) the Kellogg-Briand Pact period, 5) the United Nations Charter period, and 6) the post-United Nations Charter period. Each section of this chapter will discuss the normative developments that occurred during the four periods prior to the Charter Period.

THE JUST WAR PERIOD (c330 BC–AD 1650)

The earliest efforts to provide some form of normative framework for the recourse to force can be seen in the sacred writings of ancient religions. Frequently, these reflected a 'holy war' approach. According to this approach, recourse to force was to be deemed morally permissible when it was divinely ordained. Under the Hebrew conception, a holy war was one

that was actually fought by God Himself. In Deuteronomy 20, the Israelites were told not to be fearful in battle because 'the LORD your God is he that goeth with you, to fight for you against your enemies, to save you.' Not all biblical wars, however, were holy wars. Those which were not instituted by God were not holy and were therefore not permissible. From a normative perspective, divine ordination was the sole element that determined the permissibility of the war. Even wars of conquest were acceptable if they were sanctioned by God.[2]

As time passed, the holy war came to be replaced by the just war doctrine proper.[3] Under this idea, recourse to force was deemed to be permissible when there was a just cause. Divine sanction, while still a plausible just cause, was no longer regarded as the *conditio sine qua non* for the use of force.

In reviewing the development of this just war approach, three phases can be identified: the classical phase, the Christian phase, and the secular phase. During each of these phases, different approaches to defining just recourse to war were formulated.

The classical phase (c330 BC–AD 300)

The first major effort to develop a just war doctrine came during the time of the great writers of classical Greece and Rome. One of the first writers to argue that the recourse to force should be circumscribed was Aristotle. In the *Politics*, he strongly criticized those city-states, like Sparta, whose entire orientation was for the prosecution of war. For Aristotle, war was not to be deemed an end in itself, but only a means to the greater end of establishing the 'good life' for the citizens of a political community. He explained that '[w]ar must therefore be regarded as only a means to peace.'[4] Based on this general assumption, Aristotle submitted that training in warfare should be directed toward three ends. These ends were thus the three 'just causes' for waging war.

The first of these ends was 'to prevent men from becoming enslaved.'[5] In contemporary parlance, this would be self-defense. The second reason for preparing individuals for war was 'to put men in a position to exercise leadership – but leadership directed to the interests of the led, and not to the establishment of a general system of slavery.'[6] Here what Aristotle seems to have meant was that it would be permissible to use force to establish a political rule over individuals who would benefit from it.[7] Finally, the third reason that Aristotle gave for preparing for war was 'to enable men to make themselves masters of those who naturally deserve to be slaves.'[8] At first glance, this might seem to contradict his admonition against the establishment of a 'general system of slavery.' But a more thorough understanding of Aristotle's conception of human nature reveals that there really was no contradiction. For Aristotle, some individuals were slaves by nature.[9] These people could only realize their full potential as human beings when they

were being subjected to slavery. It would thus be just to use force to establish such a system over these people. Other individuals, however, were not slaves by nature. Hence, it would be unjust for a state to attempt to enslave those individuals.

In the contemporary world, the second and third justifications for using force seem to condone what might be termed imperialism. Nevertheless, in the context of the third century before Christ, Aristotle's effort to limit the recourse to force at all represented a major advance in the thinking about war.[10] But, as Frederick Russell notes, 'Aristotle's theory was not juridical but moral in application.'[11] He was not seeking to define a *lawful* war but rather a *morally* just war.

Another classical thinker to adopt the just war approach was the Roman statesman and philosopher Cicero. For Cicero, as for Aristotle, the ultimate aim of war was to establish peace.[12] In *De Res Publica*, he argued that there were two just causes for engaging in war: 'redressing an injury' and 'driving out an invader.'[13] He also contends that '[n]o war is held to be lawful unless it is officially announced, unless it is declared, and unless a formal claim for satisfaction has been made.'[14] Thus, Cicero, unlike Aristotle, advanced a *legal* argument, contending that war could be lawful if there were a just cause and if the necessary procedural conditions were met.

The Christian phase (cAD 300–AD 1550)

Although the just war doctrine had been advocated by several leading figures in classical thought, it was not immediately embraced by the early Christians. During the first years of the Church, most Christians were pacifists, especially noted thinkers such as Tertullian (160–240) and Origen (185–254). They believed that the return of Christ was imminent and that believers should not preoccupy themselves with the power struggles of this world. As time passed, however, much of this Christian pacifism began to wane. The philosophical shift seems to be attributable to two main factors. The first was the growing realization that the Second Coming would not be soon. Since Christ's return would take a longer time, Christians would have to deal with concrete problems of the here and now. In consequence, they would have to address the problem of obtaining some form of justice through human efforts, sometimes perhaps through force. The second factor that seems to have moved many Christians away from pacifism was the growing influence of Christianity in the Roman Empire. Increasing numbers of Christians began to hold positions of temporal power. With Constantine, the emperor himself was a Christian. In consequence, many began asking how this 'Christian Empire' could exist without the right to use force.[15]

With this change in attitude, the first major Christian figure to take a just war approach was Augustine. While Augustine did not develop a systematic *doctrine* of the just war,[16] he did argue that under certain circumstances

recourse to war could be 'just.' In this context, however, 'justice' was not justice in the ultimate, divine sense, but rather justice in the relative, earthly, sense. True justice was only possible with the full realization of the kingdom of God.[17]

Drawing on the work of Augustine, Thomas Aquinas provided a systematic framework for the Christian just war doctrine. Writing in the *Summa Theologiae*, Aquinas argued that recourse to war was morally permissible if it met three conditions. First, there had to be 'proper authority.' By this Aquinas meant that a war was just only if some duly constituted ruler initiated it. Private individuals could not declare war.[18] Second, for a war to be just there had to be a just cause. Aquinas was, however, somewhat vague about what constituted a just cause.[19] He explained that 'there is required a just cause: that is that those who are attacked for some offence merit such treatment.'[20] He then quoted Augustine, who had contended that '[t]hose wars are generally defined as just which avenge some wrong, when a nation or a state is to be punished for having failed to make amends for the wrong done, or to restore what has been taken unjustly.'[21] For Aquinas, therefore, it was sufficient to define a just cause as something that righted a wrong or recaptured stolen property. Third, for a just war it was necessary for the state waging the war to have 'right intention.'[22] Those fighting a just war must be doing so to achieve 'some good' or avoid 'some evil.' War was not to be fought out of malice, hatred, or revenge.[23]

These three conditions for a just war came to be widely accepted by Christian thinkers in the medieval period. As time passed, the late scholastics, such as Francisco Vitoria (1480–1546) and Francisco Suarez (1548–1617), continued to develop the just war doctrine. One clarification that Suarez and Vitoria made to the requirement of a just cause was the addition of the idea of proportionality. Suarez explained that 'it is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion.'[24] In other words, the injury suffered by the state must be roughly equivalent to the injuries to be suffered in war in order for it to justify recourse to war. As will be seen later, this concept of proportionality was to continue to play an important role in the development of the *jus ad bellum*.

In examining the Christian phase of the just war doctrine, it would appear that the scholars were more concerned with the *morality* of war rather than with its *legality*. But for the Christian thinkers of the time, if recourse to war were 'unjust,' it would also be illegal. This was because the medieval Christian writers generally accepted a natural law approach.[25] Natural law, according to Aquinas, was 'the rational creature's participation of the eternal law.'[26] In other words, natural law was what a human being through reason could understand of God's eternal law. Human law, which today might be called positive law, was only really 'law' if it conformed to the natural law. In consequence, if a war did not meet the requirements of the *jus ad bellum*, it was not simply immoral, but also legally impermissible. The requirements for just recourse to war can thus be regarded as legal requirements.

The secular phase (c1150–1700)

As the medieval period was coming to an end, the Christian content of the just war doctrine came to receive less emphasis. For the medieval thinkers, war could be just because it conformed to certain theological precepts. Increasingly, however, sixteenth- and seventeenth-century writers began to develop the *jus ad bellum* apart from supernatural concerns. Perhaps the most celebrated writer of this period was Hugo Grotius (1583–1645). Grotius, himself a devout Protestant, took a natural law approach to the recourse to war that dissociated itself from the transcendent. Indeed, he argued that such an approach would be valid even if God were not to exist.

In his work *De Jure Belli ac Pacis*, Grotius set forth his requirements for a just war. He first maintained that for a war to be permissible it needed to be undertaken by a lawful authority. He next discussed just causes for such a war. First, he maintained that it was permissible to use force to defend persons and property.[27] Interestingly enough, however, Grotius allowed for anticipatory self-defense. He explained that it was lawful to use force to respond to 'an injury not yet inflicted, which menaces either person or property.'[28] But, he added, the 'danger . . . must be immediate and imminent in point of time.'[29] A second just cause for initiating war was to inflict punishment on a state that had caused an injury. In *De Jure ac Pacis*, Grotius also discussed several 'unjust' causes of war. These included a 'desire for richer land,'[30] 'a desire for freedom among a subject people,'[31] and 'a desire to rule others against their will on the pretext that it is for their good.'[32]

This secularized version of the just war doctrine continued to be developed by other writers. Noted scholars such as John Locke and Emerich de Vattel formulated their just war approaches to the *jus ad bellum*. One significant aspect about these subsequent formulations was that religion played an increasingly smaller role in the basis of the theory.

THE POSITIVIST PERIOD (c1700–1919)

Even as Grotius and others were writing about the limitations imposed on the recourse to war, the international system was undergoing fundamental changes that were to diminish the acceptance of the just war approach. The most important of these changes were the emergence of the state system and the development of the concept of sovereignty.

Sovereignty and the state system

As the medieval period was coming to an end, the feudal system was being

replaced by a new structure. Increasingly, the territorial state was becoming the predominant political unit in the European world. Unlike the hierarchical system that prevailed during feudalism, the new international system was centered around individual, relatively autonomous states, ruled by different monarchs. Many factors contributed to this development, not the least of which were the rise of international trade and the concomitant rise of the merchant class, and the decline of the role of the Catholic Church and the universalism that it helped instill.

With the emergence of the state system, there also developed a new theoretical doctrine to explain the status of the state – the doctrine of sovereignty.[33] Associated with writers such as Jean Bodin (*c*1529–1596) and Thomas Hobbes (1588–1679), the doctrine came to be regarded as the fundamental ordering principle of the state system. In a nutshell, sovereignty meant three things. First, it meant that the rulers of a particular state – kings, princes, dukes, etc. – had sole authority over their territory. No pope or emperor had temporal control over them. They were 'sovereign' over their state. Second, states were regarded to be juridically equal to one another. As Chief Justice Marshall would later state in the famous *Antelope* case, '[n]o principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva [then an independent state] have equal rights.'[34] Third, and following from these two previous points, sovereignty meant that states were subject to no higher law without their consent. There was no overarching *a priori* law to which states were bound.

In 1648, the doctrine of sovereignty achieved 'codification' with the adoption of the Peace of Westphalia, which brought an end to the devastating Thirty Years War.[35] In the agreements that ended the war, the signatories pledged not to interfere with the determination by local rulers of which religion would prevail in their realm. This was the principle of *cujus regio ejus religio* – he who reigns, chooses the religion. This clearly affirmed the independence of the local ruler; if he could choose the religion of his state – one of the most important issues at the time – he certainly had a significant amount of autonomy.

With the emergence of sovereignty as an ordering principle of the international system, legal scholars formulated the doctrine of positivism.[36] Positivism asserted that since states could be bound by no higher law, the only law that could exist was that which they created by their consent. This they did through treaties, customs, and general principles. With natural law principles increasingly relegated to theological discussion, positivism had a profound influence on the development of norms relating to the use of force.

'War' and the sovereign state system

The major consequence that these developments had for the law relating to the recourse to war was to supplant the just war concept as the predominant

legal approach to the *jus ad bellum*. Now that states were sovereign, they had a 'sovereign' right to go to war. As the British jurist, William Edward Hall explained in 1880, '[i]nternational law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose.[37] In short, even though there might have been certain moral limitations on the recourse to war, legal doctrine came to accept the right of a state to go to war whenever it so desired. States were said to have a *competence de guerre*, a right to war. In the absence of any higher law or authority, there was a legal regime of 'self-help.' States could institute a war at any time to vindicate their rights. The only real qualification of this right to institute war that was accepted by states during this period was the requirement that war be declared.[38] Hence, a state simply declared war, and it was lawful.

Uses of force short of war

Even though recourse to war was essentially unrestricted, a distinction was made between a full-blown war and the use of force 'short of war.' A use of force short of war was a quick action that did not involve major commitment of forces. It took place in the absence of a declaration of war and was thus regulated by the international law of peace. Typical uses of force short of war include reprisals, and self-defense actions.

Reprisals

A reprisal is an action that a state undertakes to redress an injury suffered during time of peace.[39] It is an act that would normally be a violation of international law but is not regarded as such when it is done in response to a prior unlawful act. Reprisals may or may not involve the use of force. For example, if State A violated provisions of an important treaty with State B, State B's termination of another treaty with State A could be regarded as a *non-forcible* reprisal. On the other hand, if State B responded by shelling a naval base owned by State A, such action obviously would be a forcible reprisal.

Over the course of time, customary law came to recognize certain requirements for a lawful reprisal. The classic enumeration of these criteria for a permissible reprisal can be found in the arbitral decision in the *Naulilaa* case. That case dealt with a German reprisal that occurred in 1914 against Portugal, which was not in a state of war with Germany. The Arbitral Tribunal concluded that for a reprisal to be lawful, three conditions needed to be met. First, there had to be 'a previous violation of international law.'[40] A reprisal was only to be undertaken in response to delictual behavior.[41] Second, the reprisal had to be 'preceded by an unsuccessful demand for redress.'[42] In other words, the injured party had an obligation first to seek redress through pacific means before employing forceful measures. Third,