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From Just War to False Peace
Robert J. Delahunty* and John Yoo†

Abstract

This Article addresses the reliance of both policymakers and scholars on just war theory as a guide to twenty-first century war. More especially, it evaluates the assumption that the UN Charter system is a modernized form of historical just war theory. The Article traces the genesis of various just war theories from ancient Greece and Rome through medieval Christianity, arguing that these theories were based on moral and religious obligation. In the early modern era, as papal supremacy weakened, just war theorizing tended to wane. In its place, four different approaches to limiting war began to emerge: public international law, jus in bello, reason of state, and balance of power. Although there are indications of a revival of just war thinking in the twentieth century, the Article argues that it is a fundamental mistake to understand and treat the UN Charter as an adaptation of traditional just war principles. Instead, the UN Charter expresses an overriding commitment, not to the aim of ensuring that war is waged if and only if it is just, but rather to preserving the existing international order, regardless of that order's justice or injustice. The UN Charter forbids both preventive war and humanitarian intervention unless authorized by the Security Council. International justice and the promotion of peace would be far better served, however, by a more flexible approach than is afforded either by historical just war theory or by the Charter system.

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I. INTRODUCTION

Those who seek to outlaw war sometimes claim an ancient lineage, like English aristocrats tracing their origins to a warrior who crossed the channel with William the Conqueror. Political philosophers today explicitly describe their work to be in the field of just war theory, invoking the examples of Cicero working out the grounds for attacking barbarians or medieval jurists struggling with the grounds for the Crusades. Contemporary regimes to prohibit armed conflict, first introduced by the League of Nations and reinvigorated by the UN Charter, have called upon this history to claim that international law bans war as an unjustified interruption of peace. In this narrative, the great powers’ unrestrained pursuit of raison d’état from the seventeenth to nineteenth centuries presents the sharp break from the history of international law. As Stephen Neff writes, the League of Nations and the period after 1919 “sought to reinstate the fundamental principle that underpins just-war strategies,” that is, “the notion that the normal state of international relations is one of peace, with war permitted only as an exceptional act requiring affirmative justification.”

As utopian visions often are, this account is attractive and oft-repeated. It may even describe what the drafters of the League of Nations or the UN Charter believed they were doing. But it is mistaken. The twentieth century’s leagues and charters—and not the era of great power politics—attempted a radical change in the course of history. From ancient times on, international rules on jus ad bellum—the law governing the start of war, in contrast to jus in bello, rules on the conduct of war—remained fundamentally separate from political philosophy or religion. Ancient thinkers and medieval scholastics may have argued over just war, but their claims remained rooted in the abstract world

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1 See, for example, Michael Walzer, Arguing About War 3–4 (Yale 2004).
of philosophy and morality, not the real world of diplomacy and conflict. One, of course, might influence the other, but a war that might violate Christian morals did not automatically run counter to international law, and vice versa.

By confusing concepts of justice with the longstanding rules of international politics, modern day political philosophers and legal scholars are not just getting their history wrong. The error has also led to the dysfunctional UN Charter system that formally governs war today. It prohibits military conflict when everyone—the great powers, the states where civil war is occurring, and innocent bystanders—would benefit. At the same time, it creates the illusion that the current rules themselves promote justice, when instead they protect a status quo that can do little to restrain the actions of the great powers while discouraging interventions that would improve global welfare. Once we understand that the current system marks a sharp departure from the traditional rules of international politics, we can begin to rebuild a system that better reflects the world as it is and gives nations the proper incentives to heal its worst problems.

II. FROM ANCIENT TO EARLY MODERN TIMES

A. Customary Limitations on War in Ancient Greece

War, of course, did not emerge in the world along with the nation-state and modern militaries. Armed conflict has beset humanity throughout its history, and even before its history. From those earliest times, humanity has sought to reach agreement on its limits. A number of examples can be seen in Ancient Greek city-states that followed certain rules restraining the worst excesses of war. Sophocles's *Antigone* centers on the general Greek practice of allowing opponents time after a battle to bury the dead. In the play, Thebes has enacted an exception to this rule for traitors, and Antigone is sentenced to death for burying the body of her brother, Polynices. Similarly, in his *Peloponnesian War*, Thucydides describes a number of customs that had prevailed among the city-states, such as giving immunity to emissaries, sparing women and children, and protecting religious places. As we will see, the laws of war bear these same characteristics from the days of the city-states in Greece to the city-states of Italy almost two millennia later. Nations do not express the rules of war in written agreements; they arise instead from custom and tradition.

Nations generally do not restrict *jus ad bellum* by law; they instead regulate *jus in bello*. To the extent that nations limit the start of war, religious or moral considerations, rather than notions of international law, drive the rules.

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4 See, for example, id at 471–72.
Thucydides’s account of the Peloponnesian War provides perhaps the most famous example of these principles. The war pitted the two great superpowers of the Greek world, Athens and Sparta, against each other in a contest for supremacy. Athens remained dependent on control of the seas and trade, while Sparta fielded the dominant land forces of the time. Both cities sought to build alliances with dozens of other city-states to support a struggle that spanned decades. The many interactions, whether peaceful or hostile, between these states provide a great deal of information about the practices of the ancient Greeks in what might be thought of as international affairs. And because Thucydides is often considered the first modern historian and first “realist” scholar—he discounts religious or supernatural explanations for events and instead focuses on the intentions and incentives of different states, and sees their struggle as one for power—his account is more reliable than other Greek sources of the time.5

In the Melian dialogue, as recounted by Thucydides, the Athenians present the inhabitants of the island of Melos with the choice of either joining their Delian League or being destroyed. The Athenians say that they will put aside “specious pretense,” such as claims that the Melians harmed them first or that their leadership of Greece in the Persian Wars justifies their empire. The Athenian envoys plainly declare: “[Y]ou know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”6 The Melians complain that the Athenians only speak of “interest” and not of “right,” and that this destroys “our common protection, namely, the privilege of being allowed in danger to invoke what is fair and right.”7 Pleading to remain neutral in Athens’ struggle with Sparta, the Melians appeal to “justice,” while they accuse the Athenians of speaking only of “expediency.” The Athenians are unimpressed by appeals to the gods: “Of the gods we believe, and of men we know, that by a necessary law of their nature they rule wherever they can.”8 When the Melians remain unconvinced to join the empire, the Athenians lay siege to the city and eventually conquer it. They put to death all the men of military age and send the women and children into slavery.

In Thucydides’s retelling, we see the main elements of the international rules on war. Melos does not rely on any written treaty to claim that Athens should refrain from an attack. Instead, its people appeal to a shared

6 Landmark Thucydides at 5.89 (cited in note 5).
7 Id at 5.90.
8 Id at 5.105.
understanding of justice among the Greeks. The Melians’ claim takes the form of an appeal to the gods, rather than any notion of “law.” To them, it is religion, rather than the idea of positive law, that limits the freedom of states to go to war. In the end, invocation of religious ideals fails Melos and the contest is resolved in favor of “interest,” as Thucydides puts it. The Athenians presented the right of the strong to rule the weak as a principle of natural law, but not as a standard of international law. Some scholars, such as Coleman Phillipson, have asserted that the Greeks would always find some legal justification for armed conflict, but the Peloponnesian War shows this to be untrue at least with regard to any concept of secular law. The Athenians, and the Spartans in turn, might cite self-interest, religion, or undefined notions of justice as reasons for going to war, but not international law as such. When the term “just war” appears in the Greek sources, it is used first by Aristotle to describe wars by Greeks against barbarians, where only moral principles and not law prevailed.

Religion’s importance becomes more prominent with regards to the rules for the conduct of war once begun. Much of the Greek restraint in war—for example, permitting religious ceremonies to continue—promoted respect for sacred objects and places. Greeks generally gave religious sites and personnel, such as temples and priests, immunity in combat. During the Peloponnesian War, for example, Athens committed the rare act of fortifying a religious site during the fighting in Boeotia. Athens did not argue that it had violated custom, but instead claimed that military necessity had forced its troops to retreat to the redoubt. Contending nations also paused the fighting to allow religious ceremonies: the Olympic Games continued during the Peloponnesian War and states would refrain from attacking on holy days. Even the principle of respecting the dead stemmed from religion. Warring Greeks returned dead bodies to the enemy and provided a time for their burial. This was not done for humanitarian reasons, but to respect religious funeral rites. In Antigone, the tragic heroine does not invoke international law to support her violation of her city’s decree. Instead, she appeals to religion to justify her effort to bury the dead body of her brother.

We can see the religious point in clearer relief against the contrast of the conduct of war itself. Ancient Greeks did not understand humanitarian considerations to limit the methods of warfare. No external norm restrained the

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11 See Lanni, 26 L & Hist Rev at 476–82 (cited in note 3).

12 Landmark Thucydides at 4.98 (cited in note 5); Lanni, 26 L & Hist Rev at 477 (cited in note 3).

13 Lanni, 26 L & Hist Rev at 478–79 (cited in note 3).
Greeks in their choice of weapons or tactics. No international law of war prohibited, for example, killing prisoners in battle. Greek historians—including Herodotus, Thucydides, Xenophon, Polybius, and Diodorus—tell of numerous examples where Greek forces massacred enemy fighters or enslaved survivors, even those who had surrendered. As in the Melian dialogue, the lack of legal rules applied even to civilians captured during a siege. After one siege, Thucydides reports, the Athenians debated at length whether to massacre the male population of Mytilene, but only on the grounds of policy. The debate did not include a discussion of whether custom or law barred the choice. Earlier in the war, Sparta decided to put the entire garrison at Plataea, an ally of Athens, to death after it had surrendered. Religious observance did not protect noncombatants from death in war.

Ancient Greek states also seemed to settle on a related point. War between Greeks differed from war with foreigners. Conflict within a city-state was stasis, while war between Greeks and foreigners was known as polemos. Although city-states divided the Greek world, they remained united in language, culture, and heritage—even conflict between the Greeks became more a form of civil strife than war. Greeks remained fiercely loyal to their city, but they also shared a common ethnic and cultural identity that shaped their view of war. At the same time, the city-states carefully guarded their sovereignty and independence, which meant that conflict would often break out among them. Greek competitiveness meant that they were in conflict all the time; as one of Plato’s speakers observes in The Laws, “in reality every city is in a natural state of war with every other, not indeed proclaimed by heralds, but everlasting.” In the Greek universe, there was no permanent state of peace from which war erupted unnaturally.

We should not obscure the debate among classicists over whether any legal rules restrained war among the Greeks. Military historian Victor Davis Hanson argues that some rules did exist among the ancient Greeks, such as those restricting hoplite warfare to certain seasons and limiting the pursuit and killing of civilians and the defeated. Hanson argues that these standards gave way

15 See Landmark Thucydides at 3.36–49 (cited in note 5).
16 See id at 3.52–68.
17 Victor Davis Hanson, A War Like No Other: How the Athenians and Spartans Fought the Peloponnesian War 10 (Random House 2005).
20 Plato, 4 Dialogues of Plato 156 (Houghton 1897) (Benjamin Jowett, trans).
21 See Hanson, A War Like No Other at 299 (cited in note 17); Victor Davis Hanson, The Western Way of War: Infantry Battle in Classical Greece 14–18 (Knopf 1989).
before the higher stakes of the Persian and Peloponnesian Wars in the fifth century BC. Others, such as Adriaan Lanni, argue that the earliest signs of restraint grew out of the limits of hoplite warfare, which depended on slow, heavily armed farmers, rather than out of any norms—once the technology of Greek warfare changed, war could and did become more destructive.22

Regardless of the outcome of this debate, it should remain clear that the Greeks did not believe that any limits applied to the choice of when to go to war, only how to wage it. Self-restraint may have arisen from religious obligation, self-interest, or concern over reciprocal treatment, but the Greeks did not understand any legal rules to bind their decisions on whether to go to war.

B. The Roman Understanding of Just War

Roman understandings of war more closely resembled our own. Scholars conventionally point to the writings of Marcus Tullius Cicero as the starting point of a just war tradition that has come down to us through the ages.23 Though Roman practice and thought was changing and diverse over a thousand-year history, Cicero is a central figure. He first introduced the idea that war should advance some good beyond merely a national self-interest in expansion. For Cicero, the natural state of mankind was of peace—war, therefore, was an unnatural interruption that required declaration and justification.24 “Wars, then, are to be waged in order to render it possible to live in peace without denial of rights,” writes Cicero in *De Officiis.*25 A Roman leader should have a just cause, a *iusta causa,* to go to war. “No war can be undertaken by a just and wise state, unless for faith or self-defense,” Cicero wrote.26 If not for self-defense, war should come only in response to an earlier wrong, such as an attack on allies or ambassadors, a breach of treaties, or support for an enemy. Cicero acknowledged that just causes might also include punishment of the enemy, but the unifying idea remained that Roman war occurred in response to an earlier wrong.

Rome observed its just war tradition with religious ceremony. A just war could not begin without the approval of a special college of priests, the *fetiales.* The *fetiales* existed to “take care that the Romans do not enter upon an unjust war against any city in alliance with them,” and to perform the ceremony of

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22 Lanni, 26 L & Hist Rev at 484–85 (cited in note 3).
23 See, for example, Henry Wheaton, *History of the Law of Nations in Europe and America* 21 (Gould, Banks 1845).

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demanding justice of the enemy before hostilities could begin.\(^{27}\) Ceremonies included dispatching a priest to the enemy territory to demand satisfaction (\textit{repetitio rerum}), declaring war if no response was forthcoming after thirty-three days, and throwing a spear into enemy territory to symbolize the beginning of hostilities.\(^ {28}\) While there is some argument over the precise nature and order of the procedure, the central point remains that, in Cicero’s words, “in the public administration, also, the rights of war are to be held sacred.”\(^ {29}\) War was not just a tool of state policy; it was governed by religious principles translated through human interpretation. According to Alan Watson, the Roman gods served as more than mere witnesses to the observance of religious forms. They were the arbiters in contests between peoples, much in the way judges resolved private disputes between individuals.\(^ {30}\)

Cicero, however, discusses just war theory at length without reference to religious sanction. For him, just war was an element of natural law. “In a republic the laws of war are to be maintained to the highest degree. For there are two ways of deciding an issue, one through discussion, the other through force,” Cicero writes in a well-known passage. “The former [is] appropriate for human beings, the latter for beasts.”\(^ {31}\) Peace was the normal state of human relations in nature, and war therefore was an unnatural interruption. It follows for Cicero that Rome must fight a just war honorably and must show mercy to the conquered, though Roman war permitted the seizure of property and the enslavement of the population. For Rome, a war must be \textit{iustum piumque}: just and pious.

In practice, however, just war thinking did not impose any meaningful restrictions on the reasons for war. Instead, Romans seemed to focus more on following the forms of legal observance than the substance of the justification for hostilities. We can see the just war doctrine’s weakness—in contrast to the restraints imposed by religious consequences—on display during the expansion of the Roman Republic. While there are instances where Rome obeyed just war principles, there are many, if not more, examples where Roman leaders manufactured events to satisfy the form and rules of just war. Rome would use hostilities involving an ally as an excuse for war, violations of neutrality, mistreatment of ambassadors, and breaches of treaties. It sometimes made the demands for a peace treaty so onerous that war would inevitably break out. It

\(^{27}\) Alan Watson, \textit{International Law in Archaic Rome} 2–3 (Johns Hopkins 1993) (quoting Dionysus of Halicarnassus).

\(^{28}\) See Phillipson, 2 \textit{The International Law and Custom of Ancient Greece and Rome} at 339 n 4 (cited in note 9).

\(^{29}\) Cicero, \textit{De Officiis} at 11 (cited in note 25).

\(^{30}\) Watson, \textit{International Law in Archaic Rome} at xi–xii (cited in note 27).

\(^{31}\) Cicero, \textit{De Officiis} at 11 (cited in note 25).
would deliberately enter into an alliance with an ally that was threatened or already engaged in hostilities with another city, to produce the grounds for war. While the Senate honored the forms required by legal and religious ceremony, it clearly pursued territorial expansion and plunder rather than self-defense.\(^{32}\) As Polybius observed, Rome always sought a pretext for war so as not to be the public aggressor. But Rome’s steady expansion across Italy and the entire Mediterranean world obviously was not in self-defense.

And then we find situations where no just war restraints seem to be present. The First and Third Punic Wars provide obvious examples. At the time of the First Punic war in 264 BC, Carthage rivaled Rome in the Mediterranean, but she carefully avoided giving any cause for hostilities—it was Roman intervention in a war between Syracuse and Messina in Sicily that sparked conflict.\(^{33}\) While the Second Punic War might have been inevitable, by the time of the Third Punic War Carthage no longer posed a threat to Rome. Yet, Rome destroyed her old enemy anyway.\(^{34}\) Another well-known example, even in ancient times, of Roman war without attention to ideals of justice was Julius Caesar’s conquest of the Gauls. In his \textit{Gallic Wars}, Caesar did not produce an arguable case of harm done to Rome by Gaul—the war was clearly motivated by conquest, a fact that did not go unnoticed among Caesar’s critics. Cicero even claimed that the lack of just \textit{causus belli} in the many conflicts in the first and second centuries BC led to the fall of the Republic. “So long as the sway of the Roman people was maintained by the bestowal of benefits, not by injustice,” Cicero wrote, “our sovereignty might then have been termed the patronage, rather than the government, of the world.”\(^{35}\) But once this policy of just war was “abandoned” in the years after Sulla’s dictatorship, “we are being justly punished” with civil wars and “the republic we have completely lost.”\(^{36}\)

Cicero’s vision of just war was an ideal, one which Rome rarely, if ever, followed in its long conquest of the Mediterranean world. Roman religion was essentially understood from a juristic perspective, as a matter of public law and public order. Other scholars, such as Phillipson and David Bederman, accept Cicero’s view and suggest that the Roman law of war had become secular. “It is hard to discern a legal institution from these aspects of Roman religion and (almost) magical belief,” Bederman writes of the \textit{fetiales} ceremony, “[b]ut there was one.”\(^{37}\) These principles of just war, however, were not part of the \textit{jus gentium}, the law that applied to all people. The Romans, for example, could not

\(^{33}\) See id at 182–90.
\(^{34}\) See id at 234–40.
\(^{35}\) Cicero, \textit{De Officiis}, Book II, ¶ 8 (Little, Brown 1887) (Andrew Peabody, trans).
\(^{36}\) Id.
\(^{37}\) Bederman, \textit{The International Law in Antiquity} at 234 (cited in note 19).
expect a foreign nation to follow the procedures of the *ius fetiale*, though they might wish an enemy to declare war only for certain circumscribed reasons. Rather, as Cicero writes, the *fetiales* were part of the “human laws,” but “under all guarantees of religion.” It was the particular genius of the Romans to transform a religious practice into a legal concept. A just war would have secular reasons, but still needed to meet with the approval of a college of priests. A *bellum justum* must still be a *bellum pium*. But whether the Romans followed the ceremonies or not, they did not allow justice to stand in the way of conquest.

C. Development of Just War Theory in Medieval Christianity

The end of the Republic eliminated any distinction between the concepts of just war and religious oversight. The emperor was both a divine figure and the *princeps*: his decisions on war represented the judgment of the highest religious and civilian authority. Wars that sought to unify the Empire or defend it from external enemies no longer needed any separate justification from a college of *fetiales*. Christianity, however, penetrated the Empire, culminating in Constantine’s conversion and the establishment of Christianity as Rome’s state religion. Christianity’s injunction to “love thy neighbor” created deep tensions with the secular demands to defend the Empire from barbarian invasions. Christian thinkers began their long struggle over the question of whether military service and killing in war were sins. After Constantine’s conversion, theologians such as St. Ambrose began to view the Empire as the protector of Christianity, and military service and war as the necessary shield for civilization and peace. A Christian could fight to keep the barbarians at bay to protect the state and church, but the reasons why remained less than clear.

St. Augustine began the intellectual work of resolving the conflict between Christianity and war by resurrecting just war theory. It is important to understand that the work of the late Roman and early medieval thinkers did not train their sights primarily on state policy and notions of international law. Rather, the question remained whether individuals could serve in the military and kill in combat without violating their Christian ideals—early Christian

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38 On this point, Henry Maine is mistaken in arguing that the *ius gentium* was a subset of the *ius fetiale*. See id at 236.


thought had urged against serving in the imperial armies. As with Roman and Greek understandings, the Christian approach turned on the religious duty owed by the individual, not the secular law that governed between states. In his Contra Faustum, for example, St. Augustine described the dilemma thus: "Is it necessarily sinful for a Christian to wage war?" The Christian theologian answered "no." A Christian could wage war when he did so not out of malice or hatred, but out of love of his enemy. War punished the wrong and prevented them from sinning again, rather than serving any desire for glory or revenge.

St. Augustine’s understanding of individual religious duty led him to a similar view of just war. War served the purpose of recovering lost rights, either those inflicted by another state or by its citizens. In City of God, he compared both capital punishment and war to advance divine instructions as examples of killing that did not violate the Ten Commandments. In its goal, however, St. Augustine’s approach justified a broader scope to war than existed for Cicero. Cicero’s just war was either defensive or sought compensation for a past injury. The Christian just war had a broader, punitive dimension that sought not only to make the state whole, but also to punish the wrongdoer for violating moral principle. Because it is punitive in nature, war relied on more than just a simple plea for compensation, instead demanding reference to a broader set of rules. For St. Augustine, war arose to enforce the ius; not, however, a ius limited to commonly accepted legal rules, but a ius that included righteousness and iustitia—justice. St. Augustine’s innovation linked earlier Roman legal and religious notions of a just war to Christian principles. While he clearly borrowed from Ciceronian concepts, St. Augustine expanded war and infused it with the divine purpose of waging war to advance the will of God and biblical principles.

As Nussbaum observed, Augustine’s rules on just war were “religio-philosophical... In no way did they lay down legal rules.” War was a transgression of the divine order and was more of a sin than a crime.

42 Nussbaum, 42 Mich L Rev at 455 (cited in note 9).
43 As quoted in Draper, 86 Yale L J at 372 (cited in note 40).
45 See, for example, Russell, The Just War in the Middle Ages at 17–18 (cited in note 41); Keen, The Laws of War in the Late Middle Ages at 66 (cited in note 45).
47 Russell, The Just War in the Middle Ages at 22–23 (cited in note 41).
48 Id at 19.
49 See id at 23.
50 Nussbaum, 42 Mich L Rev at 455 (cited in note 9).
In the disorder that followed the collapse of the Empire, early medieval thinking revolved around the use of just war for the pursuit of religious ends. Popes and clerics sought to encourage European kings and nobles to defend Western Christendom from external competitors and violent internal disorder. Popes, for example, approved war to convert barbarians, heretics, and non-believers, and to defend the boundaries of the Holy Roman Empire from Muslim incursions. At the same time, they tried to suppress war for secular purposes among the European nobility. The Crusades became the highest expression of war used for papal purposes—in this case, the liberation of the Holy Land. Just war changed from secular conflicts of compensation or punishment for past wrongs to missions to defend and spread the faith. Sanction for unjust wars came not from the law, but from the religious threat of eternal damnation.

Some Roman lawyers in this period continued the linkage of the individual right to resort to violence with the greater right of a state to go to war. Some commentators on Justinian’s *Corpus Iuris Civilis*, known as the Glossators and post-Glossators, developed their views on just war from the individual’s right of self-defense from attack, though there was disagreement over whether the right of self-defense derived from private law or the *ius gentium*. Private individuals could attack and kill to forestall their own murder or robbery, but not to seek gain or vengeance. Similarly, a public war would become a *bellum licitum*—a “permissible” war—under the *ius gentium* and natural law if it prevented injury to the self or another, in other words if it was in self-defense or preserved the peace. Gratian’s great compilation of canon law in 1140, the *Decretum*, declared a war against heretics to be just because it punished sinners and prevented them from sinning again. Gratian stated that a war was just then if a state seeks compensation for stolen property, responds to an enemy attack, or punishes past injuries. It is important to see the difference between a *bellum licitum* and a *bellum justum*. Descending from the thought of Cicero and St. Augustine, the latter occupied the universe of religion and morality. The former, however, arose from the *ius gentium* and therefore conceptualized the rights of nations in a way similar to the rights of individuals. Law and justice were separate and distinct, with the doctrine of just war acquiring its force from religion and philosophy.

An important, perhaps overriding, issue for scholars of this time, known as “Decretists,” who commented on Gratian, was the source of authority for

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52 Id at 44–45.
declaring war. They continued to see the notion of just war as more religious than legal, and more an issue of sin than a violation of Roman (in contrast to canon) law. In the disorder after the fall of the Empire, these thinkers prohibited war by private individuals. War had to be declared by some public authority, but with no single Roman emperor, the right devolved to kings and princes. This diverted attention from analysis of the just causes that could support war and instead focused on the political or—in the case of the Crusades—religious authorities who could declare the opening of hostilities. By the end of the twelfth century, in other words, lawyers and philosophers had done little to advance just war theory beyond the frameworks of Cicero and St. Augustine, and instead used law to regulate the process of declaring war. “The just war was the province of princes, popes and prelates,” scholar of medieval history Frederick H. Russell summarizes. “[I]ts use was justified when it was necessary to defend the patria against hostile force and to protect the Church from its many enemies.” Russell mistakenly assumes that just war is a legal as well as religious concept, but he correctly describes the commentators’ struggle over authority as central.

In the following century, canon lawyers known as the “Decretalists” sought to give more precise legal form to these ideas. They developed a number of criteria for a just war: persona, res, causa, animus, and auctoritas. First, war had to be fought by laymen, not members of the priesthood. Second, the war must be to recover stolen property or to defend the country or the Church. Third, a just cause required that war be necessary. Fourth, Christians could not go to war to punish, but to make whole. Fifth, a prince, king, or emperor of proper authority had to declare the war. Rather than focus on the substantive causes for war, just war theology concentrated on jurisdiction—which princes, kings, popes, or emperors could legally start war. A war’s justice became the proper consideration of soldiers and vassals, who could suffer spiritually for following a superior’s orders in an unjust conflict. Due to the personal spiritual responsibility of the individual, war became an aggregation of many conflicts between soldiers as well as states. For them, a legal war narrowed down to an analysis of the legitimate political authority to declare public hostilities, rather than whether the causes of war were just.

But even as these writers narrowed the scope of a legal war, they conceived of self-defense as sharply different. Repelling attack became understood as part of the natural law that did not need to meet any of the five requirements for just war. John of Legnano, a fourteenth-century professor of civil law at the

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55 Russell, *The Just War in the Middle Ages* at 126 (cited in note 41).
56 See id at 131–55.
57 Mayali, *Droit, Raison et Nécessité* at 467 (cited in note 54).
University of Bologna, viewed self-defense as a “particular war” waged by a single individual, as opposed to a “universal war” by a whole community, which derived from the right of anyone to self-preservation. Without self-defense as a possible cause, just war became more akin to dispute resolution or law enforcement. A just cause for war was to seek compensation for a previous harm or to recover lost rights. The Crusades, however, assumed the status of a war to recover lost rights because popes considered the Holy Lands to belong only to Christendom.

It was the task of St. Thomas Aquinas, in his *Summa Theologiae* of the latter half of the thirteenth century, to codify these different strands in Christian approaches to war. As others have observed, Aquinas sought to harmonize canonical teachings with the views of Aristotle and natural law. He accepted St. Augustine’s view that war is not a sin when it is: (a) waged by a public authority; (b) for the purpose of punishing wrongdoers; and (c) with the intent of securing peace and helping the good or avoiding evil. Aquinas referred to the second factor as just cause: “those against whom war is to be waged must deserve to have war waged against them because of some wrongdoing.”

Quoting St. Augustine, he continued: “A just war is customarily defined as one which avenge injuries, as when a nation or state deserves to be punished because it has neglected either to put right the wrongs done by its people or to restore what it has unjustly seized.” Aquinas accepted the punitive character of war, but he also expanded upon the duty of kings and princes to maintain the public good by killing malefactors (just as a doctor could amputate a diseased limb), maintaining order and peace, and preserving the Christian faith.

Others have observed that the Thomistic approach to war only restated the conventional Christian understanding of war. It is also important to understand that Aquinas did not address himself to temporal law, but to religious and moral obligation. Indeed, the issue that drew the most attention from medieval lawyers—the *auctoritas principis* of those who declare war—merited little discussion. Instead, Aquinas remains significant because his work provided a comprehensive moral restatement of the Christian approach to war that provided the jumping off point for later scholars. That thinking culminated in

59 Id at 60-61.
60 See Russell, *The Just War in the Middle Ages* at 195–212 (cited in note 41).
61 See, for example, Pangle and Ahrensford, *Justice Among Nations* at 80–81 (cited in note 40).
63 Id at 240.
64 Id at 240–41.
the work of two Spanish monks, Francisco de Vitoria and Francisco Suarez, as
the West left the medieval world and emerged into the modern world.

Spain’s conquest of the New World moved Vitoria to address just war. In
two works, On the Indians Lately Discovered and On the War Made by the Spaniards on
the Barbarians, Vitoria outlined the ways that the Spanish empire in the Americas
could become just, but had yet to do so. He rejected the claims that the Holy
Roman Emperor or the Pope possessed the whole world and could grant the
Americas to Spain, that a right of discovery applied to lands already peopled by
the Indians, that the Spanish had a right to conquer non-Christians and stop
their violations of natural law, or that the Indians were already Spanish
subjects. Although Vitoria accepted the punitive purposes of just war
developed by Augustine and Aquinas, the Indians had not committed any harm
to Spain. Instead, Vitoria argued, Spain could resort to armed force because the
Indians sought to exclude her citizens from travel, trade, settlement, and
propagation of the faith in the Americas. Vitoria, however, recognized that the
Indians might reasonably use force to defend themselves from the Spanish, who
must have appeared strange and threatening. In a departure from the law
enforcement model of earlier medieval thinkers, Vitoria raised the possibility
that both sides of a conflict might have a just cause.

Suarez notably rejected Vitoria’s notion that a war could be just on both
sides. Writing only a few years before the publication of Grotius’s De Jure Belli ac
Pacis, Suarez pursued the theme that war was the outcome of a judicial process
between contending nations. War amounts to a judgment against a wrongdoing
nation, and therefore a just cause could only benefit the nation that had suffered
harm. Although they disagreed on this point, Vitoria and Suarez still shared an
important overall assumption. For Vitoria, a just war did not seek vindication
through the law of nations. Instead, whether war was just was a matter for the
forum conscientiae, the forum of conscience, and not for jurists. Similarly, for
Suarez, the rules of just war did not rely on a legal system for existence. They
remained the domain of popes and priests, who enforced the rules through

66 Francisco de Vitoria, Vitoria: Political Writings 264–76 (Cambridge 1991) (Anthony Pagden and
Jeremy Lawrance, eds).
67 Pangle and Ahrensford, Justice Among Nations at 98 (cited in note 40).
68 As a matter of principle, Vitoria held that war could not be just on both sides; he used a penal
model of war. See Oliver O’Donovan, The Just War Revisited 22–23 (Cambridge 2003). But he also
taught that ”invincible ignorance” could excuse the party in the wrong, and in that sense believed
that war might be just on both sides. See Vitoria, Vitoria at 312–13 (cited in note 66); Nussbaum,
42 Mich L Rev at 460 (cited in note 9).
70 Francisco de Vitoria, De Indis I, no 3, ¶2 (Mohr 1952).
excommunication, the threat of eternal damnation, or the release of subjects from their duty of loyalty.\textsuperscript{71}

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This Section has traced the development of just war theory from its ancient origins through the medieval period. Its differences from the just war thinking of today are striking. Just war emerged from the obligations of individual morality or religion; it had little purchase as a legal rule that governed relations between states. Indeed, the idea that war must have a just cause demanded little attention in legal and political practice. Greeks held no concept that a legal war must have a just cause, and the Romans seemed to view the idea as a matter for religious ceremony that could be easily manipulated. While medieval thinkers developed a more refined and extensive theory of just war, it still remained primarily a matter for the individual conscience. Thus, the causes for legal war went largely unexplored, in contrast to the great debate over the process or forms of war—whether the proper public authorities had declared the start of hostilities. This suggests that contemporary appeals to just war restraints, as embodied in public international law or the UN Charter, make little sense, because they seek a doctrine ripped out of its intellectual and historical moorings.

III. FROM THE EARLY MODERN PERIOD TO THE TWENTIETH CENTURY

The Protestant Reformation and the related rise of the modern state led to fundamental changes in the ways in which European statesmen and thinkers viewed the relationship between justice and war.\textsuperscript{72} As claims of papal supremacy in theological and political matters weakened their hold, and as control over the instruments of violence were increasingly concentrated in the hands of national sovereigns, the question of the “justice” of initiating war came to have less importance in the conduct of international relations. Indeed, by the end of this development in the early twentieth century, international law had come to teach that the decision of whether to wage war was a prerogative whose exercise lay within the discretion of every sovereign state.\textsuperscript{73} This prerogative was considered

\begin{footnotesize}
\begin{enumerate}
\item Nussbaum, 42 Mich L Rev at 463 (cited in note 9).
\item On the connections between the Protestant Reformation and the nation-state, see Daniel Philpott, Revolutions in Sovereignty: How Ideas Shaped Modern International Relations 75–149 (Princeton 2001). Even before the Reformation, however, European states had vigorously contested the claims of the Papacy, see Eamon Duffy, Saints & Sinners: A History of the Popes 175–76 (Yale 1997). And likewise, even during the Counter-Reformation, the conduct of Catholic powers like Spain, Austria, and Venice “revealed the hollowness of papal claims to universal jurisdiction.” Id at 227.
\item See Antonio Cassese, Realism v. Artificial Theoretical Constructs: Remarks on Angiolin’s Theory of War, 3 Eur J Intl L 149, 149–50 (1992) (“It is well known that before 1919 States were at liberty to resort to war either to enforce a legal right or simply to realize their economic or political interests.”).
\end{enumerate}
\end{footnotesize}
to be an essential element of sovereignty,\(^7\) if not indeed sovereignty’s “ultimate expression and prerogative.”\(^5\) Although statesmen continued to justify their decisions to wage war in moral terms, no “cause” was considered necessary for war to be lawful. Thus, for English publicist John Westlake, attempts “to determine in the name of international law the conditions on which a recourse may be had to arms, as that an offer of arbitration shall have been made,” merely represented “the counsel of morality,” not “rules of law.”\(^6\)

At least four major, interacting trends in thinking about international relations worked to bring about this transformation. First, the rise of modern public international law, especially in the form it took in the work of Hugo Grotius (1583–1645), rejected just war theory. Second, a decided shift in emphasis away from the *jus ad bellum*, which can also be credited largely to Grotius, led to a growing preoccupation with *jus in bello*. Third and fourth, two doctrines of international relations, or two ways of thinking about that subject, emerged: *raison d’État* or reason of state, and balance of power theory. Both of these doctrines served, as just war theory had aimed to do, to limit the occasions of war. We shall briefly examine each of these four developments in turn.

A. Public International Law

Hugo Grotius was, and remains, a vastly influential presence in international law and political theory.\(^7\) Yet he is difficult to interpret. Michael Walzer and others claim that Grotius “incorporated just war theory into

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See also C. A. Pompe, *Aggressive War: An International Crime* 301–02 (Nijhoff 1953) (“War was a fact, an international phenomenon, and classic [nineteenth century] international law was indifferent towards it... A ‘legality’ of war supposed distinction between just and unjust wars, which may have lingered on in public opinion and may have been defended by some authors, but was not, according to the majority of them, part of international positive law.”).

\(^7\) See *Case of the S.S. “Wimbledon” (UK v Ger)*, 1923 PCIJ (ser A) No 1, ¶ 72 (Aug 17, 1923) (Anzilotti and Huber dissenting) (“The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it.”).


international law." That, we think, is a mistake. On what we consider the better reading of Grotius, his doctrine of the law of nations effectively overturned traditional just war theory. But even on a plausible alternative reading, Grotius did not so much codify just war theory as eviscerate it.

In his great work *The Rights of War and Peace*, Grotius at first appears to follow the tradition in saying that "[w]ar cannot be just on both sides." That assumption is crucial to any genuine theory of just war, because the very point of the theory is to identify which of two belligerents is acting rightly in deciding to wage war, and which has the obligation to surrender. But for Grotius, the question of which belligerent can properly claim to have justice on its side does not generally admit of an answer. Typically, all belligerents will claim to be in the right, and neutral third parties will be reluctant to decide between those claims. In the absence of any higher sovereign who has the power to evaluate the claims and control the actions of sovereign nation-states, it will be lawful for the latter to do as they please: like kings, they are answerable to no one else. Wars begin

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78 Walzer, *Arguing About War* at 5 (cited in note 1). Julius Stone also seems to have thought, mistakenly, that Grotius held the just war doctrine, but he correctly stated that "[c]ontrary to the beliefs of many, the League [of Nations] Covenant did not embody [i]t: rather was the agitation around the notion of 'aggression' part of an attempt to inject that notion ex post nativitate [after the League's birth]." Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* 27-28 (California 1958).


82 Grotius, 3 *The Rights of War and Peace* at 4.4 (cited in note 80) ("When two States are engaged in War, it would be dangerous for any other to pronounce on the Justice of their Cause, for by that Means that State might quickly be involved in a War with other People."); Grotius, 2 *The Rights of War and Peace* at 23.13.2 (stating, in part, that "it may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of. So People may justly, that is, may honestly and fairly go to War"). The situation is well illustrated by the claims and counter-claims made by pamphleteers for France and Spain seeking to influence European public opinion before those states went to war in 1635. See J.H. Elliott, *Richelieu and Olivares* 128-29 (Cambridge 1984). But see A. Claire Cutler, *The 'Grotian Tradition' in International Relations*, 17 Rev Ind Studies 41, 48 (1991) ("The most profound component of the Grotian world view is the assumption that there is a universal standard of justice and morality against which the actions of states may be judged.").

83 Grotius, 3 *The Rights of War and Peace* at 4.2.2 (cited in note 80). ("[I]t is lawful for Kings to do what they please, because they are exempted from Punishment amongst Men."). See C.G. Roelofsen, *Grotius and the Development of International Relations Theory: 'The Long Seventeenth Century' and the Elaboration of a European States System*, 17 Quinnipiac L Rev 35, 50-51 (1997) (noting Grotius's early teaching that subjects are bound to accept their government's determination that a war is "just" so long as the government has probable cause for war).
"where the Methods of Justice cease." Consequently, just war theory cannot be invoked to decide which belligerent may lawfully wage war and which must concede.

On this interpretation, just war theory is, for Grotius, like pacifism. It is a doctrine that, whatever its attractions might be, is simply impracticable in conducting relations between sovereign states. Furthermore, Grotius maintains that just war theory itself contributes to the likelihood and ferocity of war, since men are more apt to wage war, and to fight with greater violence and tenacity, if they think that their cause is just. The bitter religious and ideological struggles of the Thirty Years War, which Grotius himself witnessed, may have underscored that view.

For Grotius, the "justice" of war reduced in the end to a question of formalities. Although he fully recognized that war could in fact be waged without formalities (just as slaves could cohabit without formalizing a marriage), he believed that certain formalities were required to give war a just or, better, a public character. In particular, the main formal conditions he identified as necessary to accomplish this were that the war be made on both sides by sovereign states and that it be duly declared. The existence of declarations by proper public authorities effectively sufficed, for Grotius, to license warring states in harming each other; no reference to substantive "justice" on either side was needed.

An alternative reading of Grotius also commands some scholarly support. On this approach, "Grotius held that war is justifiable when, and only when, it serves right. Since the conditions for service to right are numerous and nonobvious, he must expend considerable effort identifying and explicating them." Thus, on this alternative interpretation, Grotius's theory of just war is an extremely thin one. This putative form of just war doctrine would forbid a state to defend itself if it were attacked by an aggressor who was "serviceable to many." And contrary to traditional just war doctrine, it would permit (some)

84 Grotius, 2 The Rights of War and Peace at 1.2.1 (cited in note 80).
85 Id at Preliminary Discourse ¶ IV (contrasting Christian pacifism to doctrine that all war is justified, and indicating that both views are mistaken).
86 Id at Preliminary Discourse ¶ XXVIII ("Of how great Force in Wars is the Consciousness of the Justice of the Cause, Historians everywhere shew, who often ascribe the Victory chiefly to this Reason.... [T]he Equity of the Cause has of itself a certain, and that very great Force towards Action."). See also Forde, 92 Am Pol Sci Rev at 645 (cited in note 79).
87 For a recent account, see generally Peter H. Wilson, The Thirty Years War: Europe's Tragedy (Belknap 2009).
88 We have elaborated further on this aspect of Grotius's doctrine in Robert J. Delahunty and John Yoo, Making War, 93 Cornell L Rev 123, 142-43 (2007).
89 Miller, Stanford Encyclopedia of Philosophy (cited in note 79).
90 Grotius, 1 The Rights of War and Peace at 1.9.1 (cited in note 80).
preventive wars. Colonel Draper, one of the scholars who believes that Grotius had a form of just war doctrine, concedes that its impact on state practice was "minimal."

B. Jus in Bello

What now constitutes the corpus of international *jus in bello* began to take shape in early modern Europe between, roughly, 1550 and 1700. A new normative framework for the emerging European states system was necessary, not only to "fill[] the void created by the collapse of the unity and authority provided by the Church of Rome," but also to accommodate the growing centralization of military power and domestic legitimacy in territorially based states. The search for new rules to govern the conduct of hostilities, abundantly evident in Grotius's work, reflects the interests of such states both in limiting the pervasiveness of "private" violence, and in applying standards of instrumental rationality to their violence against each other.

To be sure, the emerging European tradition of *jus in bello* was firmly rooted in the past: the military historian Geoffrey Parker argues that "the laws of war in Europe have rested since the Middle Ages upon the same five foundations," which he identifies as: (1) prescriptive texts, including the Bible, Roman law, canon law, and the writings of figures such as St. Augustine and St. Thomas Aquinas; (2) the teachings promulgated from the eleventh century onwards by the Peace of God and the Truce of God; (3) various military manuals and articles of war that were issued by national armed forces; (4)

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91 Grotius, *The Rights of War and Peace* at 2.2.25 (cited in note 80). One writer cites the latter passage in support of the view that Grotius forbade preventive war, but the text says that a preventive war is permissible if one side concludes that the other has both the power and the intent to attack it. See W.J. Korab-Karpowicz, *In Defense of International Order: Grotius's Critique of Machiavellism*, 60 Rev Metaphysics 55, 63 (2006). See also Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 Am J Ind L 477, 481 (1982).

92 Draper, *Grotius’ Place in the Development of Legal Ideas About War* at 50 (cited in note 77).

93 Cutler, 17 Rev Intl Studies at 44 (cited in note 82).


96 For discussion of the articles of war promulgated by both royalist and parliamentary forces in English Civil War of the seventeenth century, see Barbara Donagan, *Codes and Conduct in the*
customs arising from the practice of war; and (5) combatants’ growing appreciation of the advantages of restraint in warfare, including honoring truces and surrenders, and sparing captives and the wounded. Nonetheless, the period of the Reformation and afterward saw a decided turn away from *jus ad bellum* and towards the development, and eventually the codification, of *jus in bello*.

Several reasons lay behind this turn. First, as we have just seen, there was a growing skepticism about the feasibility or even desirability of trying to frame standards or rules of substantive justice to govern the power-political relations between sovereign states. Second, the very prevalence of *jus ad bellum* theory in Europe before the seventeenth century had inhibited the growth of *jus in bello*. There is indeed a conceptual, not merely a historical, connection between the rise of one and the waning of the other: war is more likely to be regulated when it is not forbidden. Just war theory tends to weaken a belligerent’s inhibitions because it appears to require or permit war, using the most dreadful measures available. On the other hand, if an unjust war is categorically forbidden, there is no possibility of regulating its violence. Finally, instrumental rationality combined with religious and humanitarian feelings in calling for wars to be fought with a minimum of suffering and loss of life. Why go to unnecessary extremes of atrocity and destructiveness when military victory could be obtained without such harm; when a more lenient policy could forestall retaliation if the enemy invaded one’s own territory; when peace would be more durable if the defeated side had fewer memories of the victor’s harshness; and when the evil reputation that a belligerent would earn for exceptional cruelty in warfare could be avoided? Economy in the use of force seemed to dictate essentially the same methods as moral restraint.

This new spirit of moderation in warfare infused even Spain, which by the seventeenth century labored under the odium of being particularly cruel and ferocious in its manner of war. Painfully aware of this reputation, Spanish rulers and generals consciously sought to overcome it. Thus, the historian John Nef pointed to “the presence of a new chivalry—adjusted to novel and horrible

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100 For an account of the origins of Spain’s sinister reputation, see Benjamin Keen, *The Black Legend Revisited: Assumptions and Realities*, 49 Hispanic Am Hist Rev 703 (1969). See also notes 101 and 102 and accompanying text. Interestingly, just as Spain’s humanitarianism in war was dramatized in the Spanish artist Velázquez’s painting, so the “Spanish fury” in war was depicted by the Flemish artist Peter Bruegel. See Stanley Ferber, *Peter Bruegel and the Duke of Alba*, 19 Renaissance News 205 (Autumn 1966).
weapons, hitherto unused," in Diego Velásquez's great painting from (perhaps) 1634–35, The Surrender at Breda (Las Lancas). Las Lancas portrayed the surrender in 1625 of the defeated Dutch forces under Justin of Nassau to the Italian aristocrat and Spanish commander, the Marquis of Spinola. Spinola's siege of Breda had been a spectacular display of engineering and skill that had attracted distinguished visitors from all over Europe, and although the Spaniards prevailed in the end, the siege had been an exhausting one for both sides. Nonetheless, General Spinola's terms for the garrison's surrender were magnanimous—reflecting, perhaps, seventeenth century Spanish ideals for the treatment of defeated enemies. "In spite of the religious wars [of the seventeenth century]," Nef writes, "Europeans had at their disposal remnants of the medieval conception of universal Christian community. They also had remnants of the old chivalry and the pageantry that accompanied it."

Others, while recognizing that a new humanitarian spirit was at work in Europe by the seventeenth century, attributed its origin, not to the persisting effect of Christianity, but to more secular causes. Notable among these was the great nineteenth century Prussian theorist of war, Carl von Clausewitz. Clausewitz recognized that the seventeenth century had seen the beginning of a new rationality and humaneness in warfare. But he ascribed this less to a lingering tradition of Christian chivalry than to what he called "intelligence".

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101 John U. Nef, War and Human Progress: An Essay on the Rise of Industrial Civilization 139 (Harvard 1950). Likewise, Theodore Rabb saw the painting of early seventeenth century Europe—including that of Rubens as well as of Velázquez—as signifying a change in values. Of The Surrender at Breda, Rabb wrote that it refused to proclaim unabashedly the majesty of war, but instead emphasized quite different virtues even as [it] commemorated Habsburg victories. . . . [An] emphasis on compassion . . . animates Velázquez's 'Breda,' and especially its central figure, Spinola, the great general who was known to have urged an end to Spain's debilitating wars. . . . [T]he 'Breda' gives little sign of the exultation of victory. Instead of delight at the successes of Habsburg arms, it shows us figures who are as pensive . . . on the Spanish as on the Dutch side. And the central gesture is an act of comforting magnanimity, not triumph, by Spinola.


103 Nef, War and Human Progress at 139 (cited in note 101).

104 Carl von Clausewitz, On War 15 (Oxford 1976) (Michael Howard and Peter Paret, trans) ("If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than te [sic] crude expression of instinct.").
It had ceased to be in harmony with the spirit of the times to plunder and lay waste the enemy’s land, which had played such an important role in antiquity, in Tartar days and indeed in medieval times. It was rightly held to be unnecessarily barbarous, an invitation to reprisals, and a practice that hurt the enemy’s subjects rather than their government—one therefore that was ineffective and only served permanently to impede the advance of general civilization. Not only in its means, therefore, but also in its aims, war increasingly became limited to the fighting force itself. Armies, with their fortresses and prepared positions, came to form a state within a state, in which violence gradually faded away.\footnote{Id at 236. Clausewitz is of course referring here only to wars within Europe, not to wars by Europeans against non-European states and peoples, or against the natives of remote parts of Europe such as the highland Scots and the Irish. On the former, see Jeremy Black, *Culloden and the '45* 187–88 (St. Martin’s 1990); on the latter, see Donagan, 118 Past & Present Socy at 70–71, 93–95 (cited in note 96); Donagan, 99 Am Hist Rev at 1148 (cited in note 96). Wars waged by “Western” European powers such as Sweden against “Eastern” European powers such as Russia also displayed a savagery not found elsewhere, which included the use of bayonets, a weapon not often employed elsewhere. Such practices have been explained in part by “the traditional European’s view of the Slav as less entitled than his own people to civilized treatment.” Nef, *War and Human Progress* at 253 (cited in note 101).}

To be sure, Clausewitz was very well aware that, even if eighteenth century intra-European war was “limited” in the ways he described,\footnote{For criticism of Clausewitz on this point, see Gunther Rothenberg, *The Age of Napoleon*, in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds, *The Laws of War* 86, 86–87 (cited in note 95).} the advent of the wars of the French Revolution and of Napoléon had changed all that: for the first time in centuries (or perhaps ever), European war had become “total,” in that one state pitted the entirety of its people and its resources against another.\footnote{See David A. Bell, *The First Total War: Napoleon’s Europe and the Birth of Warfare As We Know It* 8 (Houghton Mifflin 2007); J.F.C. Fuller, *The Conduct of War* 1789–1961 26–58 (Eyre & Spottiswoode 1961); Gunther E. Rothenberg, *The Origins, Causes, and Extension of the Wars of the French Revolution and Napoleon*, 18 J Interdiscipl Hist 771, 773–76 (1988).} Indeed, the very scale and intensity with which the French nation and people fought those wars may be due, in part, to their perception that they were engaging in a new species of “just war.”\footnote{Historians disagree over the nature and causes of the French Revolutionary Wars. Some see them as primarily ideological wars; others contend that they were merely a continuation of the power-political wars of the eighteenth century; and still others consider them to have stemmed from the vicissitudes of domestic politics. What can safely be said is that the wars presented a direct challenge to the bases on which the international society of states then rested, in particular to the dynastic principle of legitimacy. The French revolutionaries argued that it was essential to draw a distinction between a people or nation and its state or rulers, and that legitimacy fundamentally depended on the popular will. This new principle was invoked to justify French foreign policy of the period, including its refusal to recognize established international boundaries. See David Armstrong, *Revolution and World Order: The Revolutionary State in International Society* 84–91, 204–19 (Oxford 1993).} Yet even the Revolutionary and Napoleonic wars did not permanently arrest the trend towards a more developed
humanitarian legal regime for war. Gradually but insistently, throughout the latter half of the nineteenth century military manuals and, thereafter, multilateral treaties began to codify *jus in bello*. Thus appeared such landmark instruments as the 1863 Lieber Code—used by the Union Army in the American Civil War, which is regarded as the origin of “Hague Law”; the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, from which later “Geneva Law” derives; and the 1868 Declaration of St. Petersburg, which introduced restrictions on the use of certain types of weaponry in war. The Hague Conferences of 1899 and 1907 issued important conventions that regulate the conduct of warfare and the use of weaponry, including the 1907 Convention (IV) with Respect to the Laws and Customs of War on Land. The codification of the *jus in bello* thus attained new heights even as the doctrine of just war theory approached its nadir.

C. Reason of State

Reason of state can be described as the doctrine of the primacy of the state over all competing interests or considerations—the teaching that “no value, whether moral or secular, should stand above the security of the state” and that “the moral rules applicable to the individual were not transferable to the state in its behavior towards citizens or towards other states.” Or, in Kenneth Waltz’s

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109 Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds, *The Laws of War* 116, 119 (cited in note 95) (“Up to the mid-nineteenth century the laws of war did exist, but in a form very different from today: in custom, in broad principles, in national laws and military manuals, and in religious teaching. The second half of the nineteenth century was ... an era of belief in control of war. Indeed, that characteristic modern encapsulation of the laws of war—the multilateral treaty setting out principles in this field for states to follow—was only invented in the second half of the nineteenth century.”).


111 The Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field (1864) 22 Stat 940 (1865). This convention marks the point at which the rules of *jus in bello* began to become multilateral.

112 See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (1868), 138 Consol TS 297 (1868).

113 Convention (IV) Respecting the Laws and Customs of War on Land and in Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907), 36 Stat 2277 (1907).

formulation, “the conditions of international politics [do not] permit statesmen to think and act in terms of the moral and legal principles that may be both serviceable and acceptable in domestic politics.” Like medieval just war theory, the doctrine was addressed to rulers and those charged with advising or assisting them in administering a state’s affairs. The doctrine instructed them to pursue the interests of the state above the interests of other claimants to their support and loyalty, such as the Papacy, as well as over purely dynastic or personal interests. Moreover, it dictated a policy driven by rationality, rather than by passion or whim. Although sometimes understood as a description of how states do or even must behave, it is better seen, and in its origins it was seen, as normative guidance for how states should behave. One normative justification offered for the reason of state doctrine was, therefore, that the rational pursuit of a state’s goals in international relations tends towards the limitation of war and the mitigation of its horrors. Another justification was that the doctrine admonished statesmen “to carry out a foreign policy in the interest of the whole nation and not just in the selfish interests of the ruling elite.”

In order to understand the doctrine properly, it is essential to bear in mind that it originated in the post-Reformation period, as the modern European state was still being formed. Other powerful (and, as we would say today, transnational) actors in European affairs, including the Papacy and the Holy Roman Empire, were pressing competing claims to universal loyalty and obedience over the heads of local rulers, including kings. Likewise, political actors at the sub-state level, such as local lords and magnates, sought to command the population’s allegiance and to extract its resources. The reason of state doctrine served to legitimize the priority of the king’s claims over the competing claims of the Church, the Empire and the aristocracy. A king’s

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115 Kenneth N. Waltz, Man, the State and War: A Theoretical Analysis 38 (Columbia 1954).
116 Thus, under the leadership of the seventeenth century figure Cardinal Richelieu, a high-ranking Catholic prelate and the chief minister of a Catholic state, France intervened decisively against the Imperial-Catholic Habsburg powers in their contest with the Protestant forces. Richelieu, an adept practitioner of “reason of state,” sought to maintain Europe’s balance of power and thus prevent the Habsburgs from achieving universal dominion. For studies of Richelieu’s reason of state policy, see William F. Church, Richelieu and Reason of State (Princeton 1973); R. Harrison Wagner, War and the State: The Theory of International Politics 73–76 (Michigan 2007); Donald M. Mackinnon, Power Politics and Religious Faith: The Fifth Martin Wight Memorial Lecture, 6 Brit J Intl Studies 1 (1980).
117 This point is rightly emphasized in Wagner, War and the State at 63–65 (cited in note 116).
118 See Reinhart Kosellek, Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society 46–48 (MIT 1988) (“[I]t was the very primacy of politics that offered an opportunity to meet moral demands as well—by a detour, so to speak, by way of rationalising both war and the State.”).
demand for the subject's undivided loyalty was based on the promise that he and his forces would provide the population in return with security within the borders of his realm. The doctrine and practice of reason of state enabled the ruler to make good on that promise.

It is also important to see that the doctrine, like just war theory, "represented an attempt to order policy to cope with a universal predisposition to conflict." Conflict was understood to arise from "passion," which could most effectively be checked by the sober, far-sighted and "interest"-based calculations of "reason." For example, reason of state counseled kings to observe the treaties that they had made: the long-term reputational advantages that a policy of treaty-compliance brought were seen generally to outweigh the benefits of breaking a treaty in order to exploit another state's momentary weakness, despite the opportunity for making conquests that such vulnerability might seem to afford.

Finally, reason of state represented an attempt to solve, or at least to mitigate, a problem inherent in the theory and practice of an emerging royal absolutism. If the Church, feudal custom, and the law could no longer check the power of the monarch (as in the premodern period), how could monarchy be

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120 Haslam, No Virtue Like Necessity at 17 (cited in note 114).
122 Again, we may cite the example of Cardinal Richelieu. Richelieu's conception of statecraft laid considerable emphasis both on what he called "continuous negotiations" and on the sanctity of treaties. See Sir Herbert Butterfield, Diplomacy, in Ragnhild Hatton and M.S. Anderson, eds, Studies in Diplomatic History: Essays in Memory of David Bayne Horn 357, 365 (Longman 1970); Butterfield, Raison D'État at 16 (cited in note 114) (stating that "one of the most valuable parts" of Richelieu's writing is the emphasis on continuous negotiations). Richelieu's emphasis on continuous negotiations stemmed from:

his profound belief in the general power of reason and language. 'Authority Constrains Obedience,' he writes in [his] Testament Politique, 'but reason captivates it. It is much more expedient to lead men by means which imperceptibly win their wills than, as is more the practice, by those which coerce them.'

G.R. Berridge, Richelieu, in G.R. Berridge, Maurice Keens-Soper, and T. G. Otte, Diplomatic Theory from Machiavelli to Kissinger 71, 75 (Palgrave 2001). Richelieu also thought that an enlightened self-interest in maintaining "reputation"—which he saw as a key ingredient of a monarch's power—counseled the strict observance of treaties.

'Kings,' he writes, 'should be very careful with regard to the treaties they conclude, but having concluded them they should observe them religiously. . . . A great prince should sooner put in jeopardy both his own interests and even those of the state than break his word, which he can never violate without losing his reputation and by consequence the greatest instrument of sovereigns.'

Id at 78.
distinguished from tyranny?\textsuperscript{123} Reason of state doctrine, which purported to identify an objective and rational standard that the monarch could grasp and follow, was one of three overlapping solutions: the other two were “princely virtue,” which attempted to instill the habits of self-restraint in the monarch, and “enlightened despotism,” which sought to direct absolute power to the pursuit of the common good.\textsuperscript{124}

Although reason of state doctrine has long been condemned as immoral,\textsuperscript{125} its most thoughtful defenders have seen it as a necessary, indeed virtuous, response to a tragic situation. Discussing Machiavelli, Kenneth Waltz posed the question:

[W]hy should the success of the prince in establishing internal order and contriving a defense against external enemies be taken as the criterion by which any act [of statecraft] can be justified? Why define success in terms of princely or state interest instead of, say, in terms of living a moral life?\textsuperscript{126}

Machiavelli’s answer, said Waltz, appealed to the desperate straits to which Italy had been reduced by her rulers’ inability to defend her against foreign invaders. Italy was, according to Machiavelli, “a country without dykes or banks of any kind” to be used against foreign foes; had she been “protected by proper measures, like Germany, Spain, and France, this inundation . . . would not have happened at all.”\textsuperscript{127} In conditions in which a state is unable to defend itself and its people from devastating and repeated foreign invasion, there is no possibility for those within that state of living lives with a measure of independence, decency, and virtue. To secure the state against ruthless foreign enemies of the kind that had made Italy wretched, Machiavelli argued, its rulers must prove to be no less unscrupulous than their opponents. As Waltz put it, “[i]f by cruelty the dykes and banks are built and kept in good repair, then cruelty is the greatest mercy. If by practicing virtue they are torn down again, then virtue is the greatest vice.”\textsuperscript{128}


\textsuperscript{125} Alternatively, reason of state doctrine is criticized for giving no, or only a weak, defense of the values of the societies that it is invoked to defend. See Jack Donnelly, \textit{The Ethics of Realism}, in Christian Reus-Smit and Duncan Snidal, eds, \textit{The Oxford Handbook of International Relations} 150, 154–55 (Oxford 2008).

\textsuperscript{126} Waltz, \textit{Man, the State and War} at 215 (cited in note 115).

\textsuperscript{127} Id at 215–16.

\textsuperscript{128} Id at 216.
Paradoxically, then, the "immoral" reason of state doctrine offered a plausible and attractive alternative to just war theory in guiding the practice of statecraft. Its exponents could argue that it was at least as well suited as the more traditional doctrine to limit war and preserve peace. By forcing rulers to meet the exacting standards of rationality, it discouraged dynastic wars and forced them to consider the best interests of their peoples. Its regular practice instilled virtues that tended to promote peaceable habits, including fidelity to treaties and a willingness to negotiate. It served to protect the state and its people from foreign aggression. And it enabled kings engaging in state-formation to justify their claims to rule as against the competing claims of the Pope, the Emperor, or the aristocracy.

D. Balance of Power

Like the reason of state doctrine to which it was both historically and conceptually linked, balance of power theory emphasized the security of individual states against the encroachments of other states or empires seeking to aggrandize themselves. And like reason of state doctrine, it counseled rationality and long-term calculation in the pursuit of self-interest: the survival of an individual state was seen to be contingent on maintaining the existence of the system in its entirety against the domination of any single member. Although balance of power thinking accepted the inevitability and, in some circumstances, the desirability of war (including preventive war), it was thought to help maintain peace, in that it offered a permanent check on individual states' drive to self-aggrandizement.

Balance of power doctrine has been in the making for centuries: Waltz finds the doctrine expounded on by Thucydides in the fifth century BC and by Polybius in the second century BC. European statesmen and diplomats began as early as the fifteenth century to think of international relations in terms of a "balance of power" by means of which peace was to be maintained and one

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129 See Friedrich von Gentz, *Fragments on the Balance of Power in Europe* 64 (M. Pelier 1806); Sir Francis Bacon, *Of a War with Spain*, in *2 Works of Francis Bacon, Lord Chancellor of England* 204 (Carey 1841) (Basil Montagu, ed).

130 Thus, in the 1833 account by the eminent nineteenth-century German historian Leopold von Ranke, the ascendancy of seventeenth-century France under King Louis XIV had imperiled the independent development of other European states and cultures. "This arrogated supremacy, which was constantly disturbing the peace, threatened to destroy the foundations of European order and development." Leopold von Ranke, *The Great Powers*, in Georg G. Iggers and Konrad von Moltke, eds, *The Theory and Practice of History: Leopold von Ranke* 65, 71 (Bobbs-Merrill 1973) (Wilma A. Iggers and Konrad von Moltke, trans). The solution was found in the balance of power: "The concept of the European balance of power was developed in order that the union of many other states might resist the pretensions of the 'exorbitant' court, as it was called." Id at 73.

state was to be prevented from dominating others. In 1612, the renowned international lawyer Alberto Gentili, an Italian Protestant, argued in his *De Jure Belli Libri Tres* that the European states were justified in resisting the claims to universal domination by Spain on one side and the Ottoman Empire on the other. Reflection on and theorization of the balance of power were brought to new heights in the eighteenth century, and the policy of maintaining the balance “appeared to many observers as something with moral justification of its own, almost independent of any practical value it might have.”

In other eighteenth century formulations, however, the balance of power was taken to be more mechanical than moral and voluntary; it was compared to gravitational forces in the planetary system or to the “invisible hand” that guided the selfish market choices of individuals into socially beneficent outcomes. As Jean-Jacques Rousseau put it, “[t]he balance existing between the power of these diverse members of the European society is more the work of nature than of art. It maintains itself without effort, in such a manner that if it sinks on one side, it reestablishes itself very soon on the other.”

In such formulations, the doctrine posited a natural or mechanical process of alliance diplomacy that would ensure that no single power was able to remain unchecked if it sought to take excessive advantage of its superior position and capabilities.

Even in its eighteenth century heyday, however, the balance of power had severe critics. The philosopher Immanuel Kant rejected the idea that “a so-called European balance of power” could bring permanent, universal peace. That notion, he said, was “a pure illusion.”

Kant himself was appalled by the several partitions of Poland by its great power neighbors (Prussia, Russia, and

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133 See id at 165–68.


135 An alternative, and sounder, understanding of the doctrine would recognize that the efforts to achieve and maintain a balance of power generally encounter considerable friction. The American political theorist Nicolas John Spykman affirmed this when he wrote:

> Political equilibrium is neither a gift of the gods nor an inherently stable condition. It results from the active intervention of man, from the operation of political forces. States cannot afford to wait passively for the happy time when a miraculously achieved balance of power will bring peace and security.

*America’s Strategy in World Politics: The United States and the Balance of Power* 25 (Harcourt, Brace 1942).


Austria), which led to the utter annihilation of Poland as a state—the very sort of outcome that the balance of power was supposed to prevent. Some studies also suggest that the balance of power system that prevailed in Europe for most of the eighteenth century was in fact far more violent and war-prone than the "Concert of Europe" system that superseded it after the defeat of Napoleon and the great peace settlement at the Congress of Vienna in 1815. As one scholar of the eighteenth century has written, "[b]alance-of-power politics—the politics of confrontation—generated intolerable international tensions, produced increasingly serious armed conflicts, and inspired progressively extravagant plans of aggression. It neither maintained peace nor preserved the independence of sovereign states; by the time of the French Revolution, the international system had broken down altogether."

Scholars disagree over whether, how, and why the nineteenth century Concert of Europe system differed from the eighteenth century balance of power. One possible understanding is that the Congress of Vienna consciously sought to create a rough equality of power among the leading states, thus institutionalizing a mechanism that made it easier for blocking coalitions to be formed. This view runs up against the problem, however, that the settlement

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142 See Edward D. Mansfield, *Concentration, Polarity, and the Distribution of Power*, 37 Int Studies Q 105, 116–17 (1993). See also R. Harrison Wagner, *Peace, War, and the Balance of Power*, 88 Am Pol Sci Rev 593, 600–01 (1994) (reasoning that in a tripolar world of equal power distribution among states, if no state wished to diminish the power available to oppose another state's expansion, then, even if every state would prefer to have more resources, no state would want to assist another in expanding, and any state that sought to expand on its own would be opposed by the
at Vienna left two of the great powers—Britain and Russia—stronger than any of the others.\textsuperscript{143} In any event, whether conceived of as a balance of power system or as a distinctive kind of international order, the Concert system brought Europe a “long peace”—almost a century (1815–1914) without a major war involving all the great European powers.

Like just war theory, balance of power doctrine offered a compelling normative goal: the maintenance of European-wide peace, together with the preservation of the liberty and independence of European states great and small. Yet it could well seem more practicable than just war theory, because it prescribed state conduct, not on the basis of disputable moral judgments, but by reference to the measurable phenomena of relative state power. Finally, although balance of power doctrine, unlike traditional just war theory, permitted preventive wars to maintain or restore balance, it also operated to limit such wars because they ought to stop when the balance was reestablished, rather than putting the enemy state’s existence at risk. Together, Grotian international law, the rise of \textit{jus in bello}, the doctrine of reason of state, and balance of power thinking overshadowed traditional just war doctrine from the early modern period onwards.

In the period from the Protestant Reformation to the early twentieth century, like the period from antiquity to the late Middle Ages, the moral and religious doctrine of just war had little discernible influence on the actual conduct of states. Indeed, if anything, the rise of the modern state and the declining importance of the Catholic Church as an arbiter of international affairs meant that just war doctrine had even less practical import than before. European states went to war against each other regularly from the sixteenth century to the twentieth with little to no heed to the requirements of just war teaching. Eighteenth century wars in Europe, like those of Louis XIV of France, were fought for the purposes of dynastic glory, the acquisition of territory and populations, or the maintenance or restoration of the balance of power. Nineteenth century wars in Europe, like the Napoleonic wars, were fought to prevent one power from achieving unquestioned mastery over the continent or, like the mid-century wars in Germany and Italy, to forge modern nation-states out of still semi-feudal remnants of the dynastic era. Preventive wars that would surely have been condemned by classical just war theorists were, not merely common, but an accepted and legitimate method of statecraft: when asked for his views on Polish nationalism, the German Chancellor Otto von Bismarck replied that while he had no particular hostility towards it, if the state of Poland

\textsuperscript{143} See Dominic Lieven, \textit{Russia Against Napoleon: The Battle for Europe, 1807 to 1814} 477, 524 (Penguin 2009).
were reconstituted, he would strangle it in its cradle. Furthermore, European states in this period waged almost incessant wars of conquest and annexation outside Europe (or on its fringes) with little to no consideration to the demands of elementary humanity. They or the post-colonial states that succeeded them overran the Americas, conquered the Indian subcontinent, partitioned Africa, and divided much of China and the Ottoman Empire into “spheres of influence.” Although, as we have argued, the doctrines of *jus in bello*, reason of state, and balance of power probably exerted some restraining effects on these actions (particularly within Europe itself), the impact of just war doctrine on them seems to have been negligible.

Change began with the First World War. The final collapse of the Concert system in that war discredited the idea of maintaining peace through a balance of power. Certainly the US President, Woodrow Wilson, took the view that the war was largely due to the inherent instabilities of an international order based on shifting alliances and efforts to balance power. Nor was Wilson alone in

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145 In his celebrated “Peace Without Victory” speech of January 22, 1917, Woodrow Wilson had said:

>The question upon which the whole future peace and policy of the world depends is this: Is the present war a struggle for a just and secure peace, or only for a new balance of power? If it be only a struggle for a new balance of power, who will guarantee, who can guarantee the stable equilibrium of the new arrangement? Only a tranquil Europe can be a stable Europe. There must be, not a balance of power but a community power; not organized rivalries, but an organized, common peace.

Address by the President of the United States, 54 Cong Rec S 1741, 1742 (Jan 22, 1917). Likewise, in his speech presenting the Versailles Treaty to the Senate on July 10, 1919, Wilson identified the balance of power as the cause of the War:

>[The sacrifices of the War] had been exacted because one nation desired dominion and other nations had known no means of defence except armaments and alliances. War had lain at the heart of every arrangement of Europe,—of every arrangement of the world,—that preceded the war. Restive peoples had been told that fleets and armies, which they had toiled to sustain, meant peace; and they now knew that they had been lied to: that fleets and armies had been maintained to promote national ambitions and meant war. They knew that no old policy meant anything else but force, force,—always force. . . . A war in which they had been bled white to beat the terror that lay concealed in every Balance of Power must not end in mere victory of arms and a new Balance.

reaching that conclusion. And there are indeed reasons to think that a multipolar balance of power, such as existed before the First World War, is likely to be less stable than a bipolar one, like that of the Cold War.

But Wilson’s objections to the pre-war international system ran even deeper. His conception of the post-war settlement called, not merely for an end to balance of power politics, “cabinet” diplomacy, and the pursuit of national interest, but for at least a partial revival of just war theory. In the manner reminiscent of traditional just war theorists, Wilson viewed aggressive war as a criminal activity, and a counter-war against aggression as akin to the prosecution and punishment of that crime. Thus, he stated at the end of the peace conference that the terms of the Versailles Treaty were:

very hard, it is true, but at the same time every one must realize that the Germans themselves had brought on this horrible war, and that they had violated all ethics of international law and international procedure, and had created a series of crimes that had amazed and shocked beyond belief all the people of the world.

Wilsonianism inspired later twentieth century attempts to create new forms of international security and to frame new doctrines of international law,

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146 The war was widely perceived as “a conclusive demonstration that the balance of power system could not provide security for either the powerful or the small nations of the world.” Alfred Vagts and Detlev F. Vagts, The Balance of Power in International Law: A History of an Idea, 73 Am J Int'l L 555, 576 (1979). Many jurists—Americans prominently among them—condemned the balance of power in favor of what they saw as a more moral system. Id at 576–77. See also Christian Lange, Histoire de la Doctrine Pacifique, 3 Recueil des Cours 175, 222 (Librairie Hachette 1927) (“Le cataclysme mondial de 1914 ne fut au fond que le résultat logique de la politique d'équilibre.”) As translated by Authors to: “The global cataclysm of 1914 was fundamentally nothing other than the logical outcome of the policy of balancing.”).


148 At the time of America’s entry into the war, Wilson had held the view that the “military masters” of Germany were responsible for the conflict, but that the German people, as their mere “pawns and tools,” could not be held to blame. As the War progressed, however, he concluded that the German people were behind their rulers’ militarism. See Manfred F. Boemke, Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles, in Manfred F. Boemke, Gerald D. Feldman, and Elisabeth Glaser, eds, The Treaty of Versailles: A Reassessment after 75 Years 603, 610–12 (Cambridge 1998). Consistent with his view of Germany as a criminal nation, Wilson considered himself and his Allied colleagues to be “sitting as judges” at the Versailles Conference. Id at 613. He was therefore immovable “precisely on those questions that the Germans objected to most vigorously—questions that had a punitive character and involved national honor and prestige, such as exclusion from the League of Nations, the trial of the emperor, the delivery of war criminals, and of course the war-guilt clause of Article 231.” Id. Wilson failed to grasp that “one man’s justice might be another man’s abomination,” and that Germany, far from accepting Wilson’s opinion on the matter, might have been left bitter, exasperated, and vengeful by the punishment he meted out. Id.

149 Quoted in Marc Trachtenberg, Versailles Revisited, 9 Sec Studies 191, 199 (2000).
including the Covenant of the League of Nations, the Kellogg-Briand Pact and, eventually, the UN Charter. Although more of a realist about the potential of international organizations than Wilson had been, President Franklin Roosevelt echoed Wilsonian themes when he said that the creation of the UN “spells—and it ought to spell—the end of the system of unilateral action, exclusive alliances, and spheres of influence, and balances of power, and all the other expedients which have been tried for centuries and have always failed.”

From the successes of Wilsonianism, the belief has arisen that the League of Nations, and still more the UN, reflect a return to just war doctrine and represent its (re)incorporation into international law. Certainly there were those who, in the immediate aftermath of the First World War, advocated that just war doctrine should be institutionalized in such forms. And even now there are many who appear to think that the UN Security Council has something of the moral and legal authority with regard to war that were once ascribed to the medieval Papacy and Empire. In a particularly clear statement of this view, the British scholar of Christian ethics and political theology Oliver O'Donovan writes:

Nowadays any power contemplating a resort to war has more than a hypothetical or informal judgment to think about. Just as in the Middle Ages there was a Pope and a Holy Roman Emperor, whose authorisation in these matters counted for something, so today there is the United Nations Organisation and its Security Council. To the judgment of this body there belongs not merely moral but positive authority, grounded originally in treaty. Its Charter claims for it the sole right to authorise or use armed force against states other than that undertaken for self-defence against armed attack. A belligerent power, then, ought to be prepared to defer to it, even if it sometimes rules in a way that a truly impartial and well-informed judge would not have ruled.

As we aim to show below, this understanding of the UN is fundamentally mistaken insofar as it seems to assume that traditional just war doctrine, or something very like it, has been incorporated into the UN Charter. The Security Council possesses nothing like the moral authority or sanction of a Pope, Emperor, or judge; nor does the Council follow the prescriptions of just war teaching in its practices; nor was it intended or is it legally required to do so. The UN Charter expresses an overriding commitment, not to the aim of ensuring that war is waged if and only if it is just, but rather to preserving the existing international order, regardless of that order's justice or injustice. Thus, the UN


152 O'Donovan, The Just War Revisited at 24 (cited in note 68) (citation omitted).
Charter, rather than regulating war so as to ensure that it serves only as an instrument of justice, has in fact become a legal mechanism for protecting state sovereignty as against even the most compelling demands of human rights. Instead of preventing or punishing atrocities, the Great Power politics that dominate Security Council deliberations serve only to conceal and shelter them. And the mistaken beliefs that the Charter is designed to regulate war-making in the name of justice, and that the Council is generally successful in executing that task, serve only to obscure the radical defects of a highly dysfunctional system.

IV. JUST WAR DOCTRINE AND THE UNITED NATIONS

A. The UN Charter in Theory and Practice

In order to understand the UN Charter, it is essential to recall its central purpose. This is stated in Article 1: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” In other words, the central purpose of the Charter is to prevent war, not to promote justice or correct injustice. These two goals—order and justice—are often at odds in the international system. The Charter makes a definite and unambiguous choice between them: order takes priority.

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153 UN Charter, Art 1, ¶ 1.
154 To say this is not to deny that the framers of the UN had other, perhaps unavowed, purposes. Some recent scholarship has argued that the UN owed its origin largely to the thought of British imperial internationalists like Jan Smuts and Alfred Zimmern, who saw it as an organization that would protect the British Empire, cement the Empire’s ties to the US, and create a good working relationship between the Anglo-Americans and the world’s other great power, the Soviet Union. See generally Mark Mazower, No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations chs 1–2 (Princeton 2009).
156 Legal scholars and political theorists have repeatedly called attention to the absolute priority that the Charter gives to war prevention over all other goals. Thus, Anthony Clark Arend and Robert Beck write:

In 1945, the world was just coming out of a devastating war begun by certain states using force to alter violently the existing political and territorial status quo. Based on this experience, the delegates of the San Francisco Conference were convinced that force was simply too destructive to be considered an acceptable means of pursuing changes or advancing other policy. Force was not to be used to gain territory, to change the government of another state — no matter how ‘bad’ that government may have been—or even to right a past ‘wrong.’ Such uses of force were considered ‘aggression’ or, as Professor Myres McDougal terms them, uses of force for ‘value extension,’ and were prohibited. Instead, force was to be used only for ‘value conservation,’ for the preservation of the existing political and territorial status quo, either through the exercise of self-defense or as determined by the Security Council.
That the Charter assigns absolute priority to international peace or order over justice, however, demonstrates how far it is from codifying traditional just war theory. At the core of the just war tradition is the idea that one state may legitimately use force against another state in order to serve the ends of punitive justice. Waging a just war is akin to prosecuting a crime and (if the war is successful) imposing a punishment or sentence on the offender that an impartial judge would find justified and appropriate. Preserving peace and the established order are not overriding priorities; indeed, the established order may embed and perpetuate the very injustice that a just war is intended to remedy. Consequently, an offensive war may be as just as a defensive one.\textsuperscript{157} The UN Charter scheme retains nothing of this conception of war. As David Luban says, “by giving absolute primacy to the world community’s interest in peace, [the Charter] does not really answer the question of when a war is or can be just; rather, it simply refuses to consider it.”\textsuperscript{158}

Far from incorporating the just war theory into international law, the Charter system obviates any need for the very type of moral and political reasoning that is most characteristic of that theory. Jean Bethke Elshtain writes that “the just war thinker insists on the need for moral judgments, for figuring out who in fact in the situation at hand is behaving in a more or less just or unjust manner . . . For the just war thinker, moral appeals are the heart of the matter . . .”\textsuperscript{159} “The practical reasoning involved here must reflect the tension between a normative demand “to limit resort to arms” and a conflicting demand “to respond to the urgent requirements of justice.”\textsuperscript{160} But under the Charter scheme, there is no need for such moral deliberation and no occasion for weighing the harms of violence against the evils of injustice. The fact that a party has initiated a war is of itself sufficient to brand that party as the aggressor.\textsuperscript{161}


\textsuperscript{158} See William V. O’Brien, \textit{The Conduct of Just and Limited War} 22 (Praeger 1981) (“In classical just-war doctrine, offensive wars were permitted to protect vital rights unjustly threatened or injured.”).


\textsuperscript{160} Id at 7.

\textsuperscript{161} The only arguable exception recognized in the Charter is for the case of anticipatory self-defense; and even that exception has been doubted. See, for example, Louis Henkin, \textit{War and Terrorism: Law or Metaphor}, 45 Santa Clara L Rev 817, 825 (2005). For further discussion, see Robert J. Delahunty and John C. Yoo, \textit{Great Power Security}, 10 Chi J Intl L 35, 42–43 & n 23 (2009).
To be sure, one might have hoped that in exercising its powers under Chapter VII of the Charter, the Security Council would in fact have ordered or authorized the use of military force when, and only when, such uses of force would have been required or permitted under some likely application of just war doctrine. But there is not even an approximate correspondence between the Council’s Chapter VII decisions and the traditional tests of *jus ad bellum*. The most conspicuous case in which the Council did not apply just war doctrine is surely that of Rwanda, where it failed to authorize a timely military intervention that could have prevented a mass genocide.\(^{162}\) The Council’s refusal to authorize the NATO-led intervention in Kosovo in 1999 is another obvious case in point: although widely regarded as a legitimate and just use of force, NATO’s action was not authorized by the Council, and hence had to be considered an illegal war of aggression under the Charter scheme.\(^{163}\) Indeed, any outside military intervention into the “domestic” affairs of a state, even if it fully accorded with the tests of *jus ad bellum*, would have to be considered illegal and aggressive war under the Charter unless authorized by the Council, except in cases where such intervention could properly be characterized as defensive, or where the state in question had consented to the intervention by treaty or otherwise.\(^{164}\) As many observers have noted, the Charter’s use of force rules thus erect a formidable legal barrier to the protection of human rights and to the safety of populations at risk throughout the globe.

Although less well remembered than Rwanda or Kosovo, the Security Council’s treatment of Bosnia-Herzegovina during the wars in the former Yugoslavia in the 1990s shows how wide is the gulf between just war doctrine and the Council’s practice. In this case, the Council did not merely fail to take affirmative steps of its own to prevent atrocities (as in Rwanda) or refuse to authorize intervention by others to prevent them (as in Kosovo); it acted affirmatively to deny the victim of a campaign of atrocities the means to defend itself. Under Resolution 713, the Council had imposed an embargo prohibiting Member States from shipping arms to Yugoslavia. Even as Yugoslavia thereafter dissolved and conflicts within its former territory intensified, the Council reaffirmed the embargo, thus indicating that arms shipments to any of the states emerging from that dissolution would remain illegal.

\(^{162}\) See Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* 358–82 (Basic 2002).

\(^{163}\) Under current UN use-of-force rules, NATO’s action could not have been considered lawful collective self-defense under Article 51: at the time, Kosovo was not a separate state, but a part of Serbia. Further, even if NATO’s intervention stemmed from purely humanitarian intentions, that would do nothing to exonerate NATO from the charge of aggression. See Definition of Aggression, General Assembly Res No 3314 (XXIX), UN Doc A/RES/3314, Art 5(1) (1974).

\(^{164}\) See Report of the Secretary-General Implementing the Responsibility to Protect, UN Doc A/63/677 at 6–7, ¶ 8 (Jan 12, 2009) (observing that the Constitutive Act of African Union permits Union intervention in Member States in grave circumstances).
The embargo had a disastrous effect on the new state of Bosnia-Herzegovina, which was the scene of a rebellion by the forces of the Bosnian Serb population against the Bosnian government. The Bosnian Serbs were materially assisted by the Serbian government, which in turn was able to draw on the military assets of the former Yugoslav National Army. Bosnia, by contrast, was essentially unarmed, and by reason of the embargo, was unable to arm itself from abroad. Serb atrocities against the Bosnian Muslim population assumed the character of genocide. Despite knowing of Bosnia’s distress, the Council refused to heed the General Assembly’s call of December 18, 1992 for it to lift the arms embargo as to Bosnia. Further, on June 29, 1993, the Council also rejected the same request by six of its Members, including the US. In those circumstances, the Bosnian government twice sought relief from the International Court of Justice, including the request that it be allowed to secure the means to defend its own people against acts of genocide. In substance, Bosnia was asking the Court to lift the Council’s embargo.

In that case, Judge ad hoc Elihu Lauterpacht reasoned that Resolution 713 had the effect of enabling genocidal acts to take place, in violation of an “undoubted” jus cogens prohibition on genocide. Delicately, Judge Lauterpacht wrote that although “it [was] not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens,” nonetheless the “possibility” that a Council resolution “might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what happened here.” So viewed, he said, Resolution 713 called on Member States, “albeit unknowingly and assuredly unwillingly,” to support “the genocidal activity of the Serbs.” Judge Lauterpacht indicated that a Security Council resolution, valid on its face, could be voided on judicial review if found to transgress jus cogens. We offer no opinion.

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165 The Situation in Bosnia and Herzegovina, General Assembly Res No 47/121, UN Doc A/RES/47/121 at ¶ 7(b) (1992).
170 Id.
on that question here. More relevant to our purpose, the persistence of the Council in reaffirming Resolution 713, despite knowing that its action left the Bosnian Muslims helpless before the Serbs' onslaught, is a vivid demonstration that the Charter system neither codifies just war theory nor functions as a close substitute for it. The UN Charter system deserves no cachet for being a modernized just war doctrine.

B. False Peace

Attempting to impose just war as a restraint on jus ad bellum not only misconceives the nature of this ancient doctrine, it also has the negative consequence of discouraging wars that advance justice. As interpreted by many academics and commentators, the rules of the UN Charter make the wars of the last two decades illegal. The UN's approach to the problem of violence is much like that of domestic criminal law: the government enjoys a monopoly on the use of force except in cases of individual self-defense. Substitute the UN for the government and the nation-state for the individual, and the two legal regimes parallel each other closely. America's attack on Serbia was neither in self-defense nor approved by the UN; most scholars come to the same conclusion concerning the Iraq war. Therefore, they are illegal, just as a private citizen's attack on someone else would be illegal.

Many leading American scholars of international law share this conclusion. They see in Iraq the rise of preventative war, at odds with international legal doctrines restricting the use of force to self-defense. Some even view the American wars of the last decade as an attack on international law and institutions generally. According to Professor Thomas Franck, for example, the UN Charter system "has died again, and, this time, perhaps for good." Controversy over the Iraq war is not a mere ad hoc disagreement about a single war, but "a much broader plan to disable all supranational institutions and the constraints of international law on national sovereignty." The editors of a special Iraq issue of the American Journal of International Law seem deeply worried. For them, the war in Iraq "is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that evolved during the twentieth century." Antiwar activists have attempted to file criminal charges in foreign courts against President George W. Bush, Vice President Dick


Cheney, Secretary of Defense Donald Rumsfeld, and National Security Advisor Condoleezza Rice, among others, for launching what they claim to be an illegal war.\footnote{174 See, for example, Marlise Simons, \textit{Spanish Court Weighs Inquiry on Torture for 6 Bush-era Officials}, NY Times A6 (Mar 28, 2009); see also International Criminal Court Complaint Filed Against Bush, Cheney, Rumsfeld, Tenet, Rice and Gonzales; International Arrest Warrants Requested (Jan 19, 2010), online at http://www.brussellstribunal.org/BoyleICC.htm (visited Apr 19, 2012).}

This criminal law approach to world politics has no longstanding historical foundations; it leapt into international politics between the First and Second World Wars. Some think of the UN Charter as a progressive evolution toward a world governed by law. A broader perspective reveals the current system to be an anomaly, both historically and intellectually. Today's rules describe not the practice of nations, but their hopes. Nations have rarely, if ever, considered that force can only be used in response to an armed attack. The UN Charter creates enormous strain on the international legal system because it imposes rules that run directly counter to the incentives of states to protect their most vital interests—at least as international rules are currently understood by many officials, practitioners, and scholars.

The formal international rules prohibit all wars, regardless of whether they improve global welfare or not. Wars of aggressive conquest are a class of wars that very likely will always reduce human welfare. Death and destruction just to redraw a border will waste lives and resources without any compensating rise in benefits. But borrowing as it does from the criminal law, the UN Charter treats all conflicts other than those in self-defense as just as wasteful as wars of conquest. This over-inclusive approach mistakenly prohibits wars that improve global welfare. Use of force might prevent a dangerous regime from building up the power to unleash a destructive conflict. It might prevent a human rights catastrophe. Or it might check terrorism or international crime. Domestic criminal law may properly seek to drive the level of violence between citizens to zero. Police and courts exist to stop one person from harming another, not only from overt physical force, but from fraud. The use of national force is inevitable if greater harms are ever to be stopped, for no supranational government exists capable of maintaining international peace and security.

The international system should adopt a regulatory approach rather than analogize to domestic criminal law. Rules should encourage the use of proportional force where the benefits outweigh the costs. From a consequentialist or utilitarian perspective, the current law enforcement approach to world conflict is dysfunctional—producing the exact opposite effect from the one the world needs. Peace and security are what are known as public goods. A public good is one from which others cannot be excluded and is not depleted by their use. In economic terms, public goods are non-rivalrous and non-
exclusive. At the domestic level, law and order, and national security, are classic public goods. Security allows citizens to conduct business and their private affairs without the threat of external or internal harm. An individual's increased security does not consume security that is then not available to others in the country.

Public goods also exist at the international level. And as with national defense domestically, peace and security is the classic example of a global public good. If the world is at peace, people everywhere can better raise their families, create businesses, and produce and consume goods and services with less fear of violence. Nations can devote resources to raising the living standards and improving the welfare of their citizens, rather than on soldiers and arms. Consumption of peace by one nation does not deplete its benefits for other nations. Another example might be free navigation of the world's oceans. Because of the seas' vast size, ships can generally make passage without interfering with those of other nations (aside from some heavily-used points of congestion). All nations benefit from the ability to move people and goods on the seas freely, a point recognized as early as Grotius's 1609 work, *Mare Liberum* (The Free Sea).

Standard economic theory predicts that no one will produce enough of a public good. Since the provider cannot exclude anyone from enjoying public goods, it cannot charge enough to recover the costs. There will be free-riders: those who benefit from the good but do not pay for it. If all citizens benefit from national defense, no matter how much is provided, there will be some who will choose not to pay for it unless compelled to do so. The provision of public goods will be suboptimal unless a government can tax everyone who receives the benefits. Hence, in the US, the federal government must secure the national defense because it is the only entity that can tax all American citizens.

At the global level, the provision of public goods is even more unlikely because there is no truly effective supranational government that can tax all nations to share the burdens. No individual nation will provide the optimal amount of international peace and security, because it cannot compel contributions from every nation that benefits. Even in the case of the 1991 Persian Gulf War, the UN did not levy a tax on all nations to pay for the removal of Iraqi forces from Kuwait. Instead, the US and its allies took up the


UN Security Council's request to come to Kuwait's aid, and then sought voluntary contributions from wealthy nations—such as Japan—that benefited.

Seeing the use of force from this angle helps resolve some difficult questions about war, but also poses its own challenges. If the international system allows war when the global benefits outweigh the costs, then conflict becomes a spectrum rather than a black or white, either-or proposition between legitimate and illegitimate wars. The circumstances, rather than increasingly tenuous claims of justified self-defense, will determine questions of war. Viewing conflict as a continuum allows us to transcend the simple distinctions between wars of preemption and prevention, a freedom agenda and stark realism, and humanitarian intervention and stability. These differences, drawn by thinkers over the years, are really arguments over questions of timing, expectations of benefits and costs, and the perils of uncertainty.

Wars of self-defense, preemption, and prevention are all different versions of the same balancing of costs and benefits and are inherently uncertain. The probability of an attack in a case of self-defense is 100 percent—there is no doubt about whether the enemy will attack as it is already underway. When current international rules permit a preemptive attack, they demand that the level of certainty approaches a similar level. In the famous nineteenth century Caroline case, the US protested when Great Britain sent troops across its northern border to pursue Canadian rebels hiding on US territory. Secretary of State Daniel Webster argued that British intervention was justified only if the necessity of force was "instant, overwhelming, leaving no choice of means, and no moment for deliberation." The Caroline case made an appearance in the Nuremberg trials as an important definition of aggression, and has been widely hailed by scholars in the decades since. But the Caroline rule simply elevates certainty over other important values, such as limiting net violence, advancing democracy, or preventing the harm and destruction of greater warfare and human rights abuses.

A more realistic, nuanced view would tie the probability and magnitude of harm by an enemy to the amount of force and its timing. Preemption requires anticipation of attack, as an enemy mobilizes its forces or moves them into offensive positions. Prevention applies pressure even earlier, when a shift in the relative balance of power makes an enemy more dangerous in the future. When the expected harm of an attack is low because its probability is low, we are speaking of prevention. As its likelihood increases, we begin to think of preemption. As the possible harms of war increase, the amount of force that a nation may use should increase at a similar rate.

Understanding that prevention and preemption are really just facets of the same problem sheds light on the controversy over the “Bush doctrine.” Under the Bush doctrine, the US declared that it would use force to stop terrorist attacks before they occurred, and suggested it might even intervene to prevent rogue nations from obtaining weapons of mass destruction (WMDs). In 2002, the Bush National Security Strategy declared: “The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.” Because WMDs threaten massive civilian casualties, nations can use force earlier to forestall the threat. Acting earlier in anticipation of events that haven’t occurred, however, makes it incumbent on nations to act with narrower, more surgical, uses of force.

Re-orienting international rules to allow more wars that improve global human welfare raises challenging questions of institutional design. Part of last century’s failure stems from dysfunctional international organizations. The UN Charter created an overly strict rule (no wars other than self-defense), and married it to a potentially broad exception (for wars to maintain international peace and security). But the designers of the UN system placed the exception in the hands of the Security Council, the only body that could authorize the use of force by member nations for purposes other than self-defense. The Security Council, however, suffers from a crippling, perhaps fatal, defect. It allows any of its permanent members to veto any action, which means that these countries with competing, often conflicting, interests must agree before the use of force is authorized. This unanimity requirement has paralyzed the international political and legal systems. During the Cold War, for example, the Security Council only authorized the use of force twice: once for the Korean War at the dawn of the postwar world when the Soviet Union happened to be boycotting UN meetings; second for the Persian Gulf War at the end of the Cold War, when the decline of superpower competition jumbled the usual alignments.

Changing the rules to expand the set of cases of justifiable war requires a corresponding change in institutions. On one level, expanding the exception to self-defense, but leaving the determination of these cases to the Security Council, will change nothing. Permanent members of the Council will still use their veto power whenever their interests are at stake, continuing the paralysis of the Cold War period. Recent efforts to expand the legitimate use of force to include humanitarian intervention by recognizing a “responsibility to protect,” will continue to be doomed to failure by veto. Other ideas to expand the Security Council’s permanent members to include Germany, Japan, India, or Brazil may bring the structure of the UN into closer alignment with the changing balance of power in the world, but would only make the deadlock worse, since

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the more members, the likelier that one will veto (and the higher the transactional costs of deliberation) making any decision harder to reach. A unanimity requirement only compounds the difficulties.

At another level, changing the rules on force would require an international institution with real authority. UN paralysis has not ended armed conflict. Rather, it has produced an environment in which nations go to war, ignoring the international rules. When it comes to war, states have gotten a divorce from their international institutions. Some believe looser rules will only provide more excuses for concealing wars of aggression. A new type of international institution should exist to police the use of force by states so that new rules do not return the world to the centuries of unlimited war. We believe it should be less, not more, formal. What matters is what international force, from diplomatic pressure on up, can and should be used against dangerous aggression. A looser coalition may be more successful at coordinating welfare-enhancing interventions than a highly formalized body like the UN with its cumbersome bureaucracy and high costs of maintaining a permanent body. The world would be better off with something less like the European Union and something more like the Concert of Europe.

V. CONCLUSION

Neither the UN Charter system nor the classic just war theory provides an adequate *jus ad bellum* for the twenty first century. The UN Charter system has been remarkably ineffective in promoting international justice: it forbids humanitarian military intervention except in the unusual cases where the interests and views of the Permanent Members of the Security Council coincide. Moreover, it is wholly unrealistic to hope that the Charter system can furnish the basis for a durable peace: the “Long Peace” in Europe after the Second World War was maintained by the condominium between the US and the USSR, not by the UN; and if the peace in Asia is to be kept in the twenty-first century, that will be due to an understanding between the US, China and the other Pacific and South Asian powers, not to the UN. The classic just war doctrine is also unsuited to our present needs. While it permits humanitarian interventions, it forbids preventive war: war is only “just” when, like the criminal law, it serves punitive justice. The injuries that war can properly redress, on the classic just war theory, are past ones; the threat of future injury, no matter how grave, cannot justify war except when the injury is actually impending. In an age when rogue states can credibly threaten millions of innocent civilians with instantaneous destruction, that consequence is simply not acceptable. Both international justice and the promotion of peace would be far better served by a more flexible

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approach that created the conditions that would be most likely to produce these public international goods—in other words, an approach in the nature of the balance of power or European “Congress” systems.