CHAPTER TWO
AN OVERVIEW OF THE HISTORICAL EVOLUTION OF THE LEGAL NORMS GOVERNING USE OF FORCE UNDER INTERNATIONAL LAW
2.1. Introduction

For as long as human beings have suffered at the hands of one another, there have been efforts to impose restrictions on the recourse to force. The earliest evidence of such efforts can be found in the writings of ancient religions and can be traced through the scholarly writings, customary international law, and international agreements of the succeeding centuries.¹

The issue of intervention by one state in the affairs of another has always been one that the international community has had to confront. External interference in the relationship between ruler and the ruled has been an enduring and pervasive characteristic of the ‘Westphalian’ system since its inception.² This has always been the case since issues pertaining to the relationship have an international dimension when the manner in which one state treats its subjects within its territory is challenged by other states. Intervention was common in the Greek city-state system, the Roman Empire, and in the religious wars of the 16th and 17th centuries.³

Two main motivations have been responsible for interventions in the relationship between rulers and the ruled. Firstly, states have intervened in the internal affairs of other states due to the fact that, domestic developments elsewhere could undermine their own security, either by increasing the chance of conflict between states, or by undermining the legitimacy of their own regimes. Secondly, interventions have occurred because values related only loosely to material or security interests, or in the interests of humanity, have prompted states to bring pressure to bear on others to alter the way in which they treat their own citizens or subjects.⁴

In reviewing the history of the law relating to the use of force, legal scholars found that, during particular times a certain normative orientation regarding the recourse to force predominated. In consequence, these scholars have divided history

² Richard A. Falk, ‘The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States’, *HLJ* (1959), p.163 at 166. The term “intervention” as applied in the international system eludes any precise definition. It has been generally used to mean almost any act of interference by one state in the affairs of another. In a more specific sense, it denotes dictatorial interference in the domestic or foreign affairs of another state that impairs that state's independence.
³ Hans J. Morgenthau, ‘To Intervene or not to Intervene’, 45 *Foreign Affairs* (1967), p.425. He observes that “from the time of the ancient Greeks to this day, some states have found it advantageous to intervene in the affairs of other states on behalf of their own interests and against the latter’s will”.
into periods based on the predominant normative orientation. While such division of history is clearly only an approximation and should not be interpreted too strictly, it can prove useful in understanding the historical changes that have occurred in the *jus ad bellum*.

### 2.2. The Law of Nature

In the early development of western culture, Greek philosophers began arguing about the existence of a universal law of nature, which everybody was obliged to obey and all positive laws had to conform to. Aristotle (284-322 BC) made some fundamental assumptions about this natural law thus: “One part of what is politically just is natural, and the other part legal. What is natural is what has same validity everywhere alike”.  

However, this theory was not developed further until much later when the Stoics developed a coherent theory about the law of nature. They saw the natural law as something that was part of the structure of the universe, and directed the actions of rational beings. They thus believed that the law of nature was conceivable a priori, universal and applied to all individuals alike.

The law of nature was the philosophical underpinnings of several basic norms, both legal and moral. It is an essential feature of the law of nature that all human beings be treated equally and can therefore be regarded as the foundation of the concept of inherent human rights. This law constituted the rational basis of political society and formed the foundation on which the social contract theory and state sovereignty were based in the early days of civilization.

### 2.3. Just War Theories

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

Those which were not instituted by God were not holy and were therefore, not permissible. From a normative perspective, divine ordination was the sole element

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6 That this law was conceivable by the mere exercise of reason, and everybody had the power of reason because God had endowed every human being with it. Every human being was therefore capable of conceiving the natural law.

7 Aristotle, supra note 8, at 22.
that determined the permissibility of the war. Even wars of conquest were acceptable if they were sanctioned by God.\(^8\)

As time passed, the holy war came to be replaced by the just war doctrine proper.\(^9\) Under this idea, recourse to force was deemed to be permissible when there was a just cause. Divine sanction, while still a plausible just cause, was no longer regarded as the conditio sine qua non for the use of force.

The first major effort to develop a just war doctrine came during the time of the great writers of classical Greece and Rome. One of the first writers to argue that the recourse to force should be circumscribed was Aristotle. In the Politics, he strongly criticized those city-states, like Sparta, whose entire orientation was for the prosecution of war. For Aristotle, war was not to be deemed an end in itself, but only a means to the greater end of establishing the ‘good life’ for the citizens of a political community. He explained that “war must therefore be regarded as only a means to peace”.\(^10\) Based on this general assumption, Aristotle submitted that training in warfare should be directed toward three ends. These ends were thus the three ‘just causes’ for waging war.

The first of these ends was “to prevent men from becoming enslaved”. In contemporary parlance, this would be self-defence. The second reason for preparing individuals for war was “to put men in a position to exercise leadership - but leadership directed to the interests of the led, and not to the establishment of a general system of slavery”.\(^11\) Here what Aristotle seems to have meant was that it would be permissible to use force to establish a political rule over individuals who would benefit from it.\(^12\)

Finally, the third reason that Aristotle gave for preparing for war was “to enable men to make themselves masters of those who naturally deserve to be slaves”.

At first glance, this might seem to contradict his admonition against the establishment of a “general system of slavery”. But a more thorough understanding of Aristotle's conception of human nature reveals that there really was no contradiction.

\(^10\) Aristotle, supra note 10, at 24.
\(^11\) Ibid. at 25.
For Aristotle, some individuals were slaves by nature. These people could only realize their full potential as human beings when they were being subjected to slavery. It would thus be just to use force to establish such a system over these people. Other individuals, however, were not slaves by nature. Hence, it would be unjust for a state to attempt to enslave those individuals.

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

Another classical thinker to adopt the just war approach was the Roman statesman and philosopher Cicero. For Cicero, as for Aristotle, the ultimate aim of war was to establish peace. In De Res Publica, he argued that there were two just causes for engaging in war: “redressing an injury” and “driving out an invader”.

He also contends that, “no war is held to be lawful unless it is officially announced, unless it is declared, and unless a formal claim for satisfaction has been made”. Thus, Cicero, unlike Aristotle, advanced a legal argument, contending that war could be lawful if there were a just cause and if the necessary procedural conditions were met.

2.3.1. The Christian Phase

Although the just war doctrine had been advocated by several leading figures in classical thought, it was not immediately embraced by the early Christians. During the first years of the Church, most Christians were pacifists, especially noted thinkers such as Tertullian (160-240) and Origen (185-254). They believed that the return of Christ was imminent and that believers should not preoccupy themselves with the power struggles of this world. As time passed, however, much of this Christian pacifism began to wane. The philosophical shift seems to be attributable to two main factors. The first was the growing realization that the second coming would not be soon. Since Christ's return would take a longer time, Christians would have to deal with concrete problems of the here and now.

13 Aristotle, supra note 14, at 28.
16 Ibid. at 37.
In consequence, they would have, to address the problem of obtaining some form of justice, through human efforts, sometimes perhaps through force. The second factor that seems to have moved many Christians away from pacifism was the growing influence of Christianity in the Roman Empire. Increasing numbers of Christians began to hold positions of temporal power. With Constantine, the emperor himself was a Christian. In consequence, many began asking how this “Christian Empire” could exist without the right to use force.\footnote{Russell, supra note 5, at 17.}

St. Augustine (354-430) was the first major theologian who postulated a theory of just war. Basically, he sought to reconcile the political reality of war with the Christian model of pacifism. He laid down a criterion that if met, would justify the waging of war. He relied on two key concepts, namely, a just cause and a right intention. Incidentally, these concepts formed the very basis of Christian moral theory existing at the time.

It was imperative to ascertain the justness of an action by evaluating the intention behind the particular act. St. Augustine, writing on the legality of war, said:

“Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God himself ordains”.\footnote{Peter Malanczuk, Akehurst’s Modern Introduction to International Law, (Routledge, 2002), p.827.}

Over time, Christian concepts became increasingly influential in the sphere of political theory. This led to the establishment and acceptance of the theory of bellum justum that became an essential foundation of the rules of war.

St. Thomas Aquinas (1225-74) sought to propound his own theory about just wars, but this was largely based on the model developed by St. Augustine. He laid less emphasis on pacifist commands from the bible that prohibited all wars whatsoever. He concluded that there is no general prohibition on war and that when certain requirements are met; a war could be waged justly.\footnote{St. Thomas Aquinas, The Summa Theologica, (Benziger Bros edition, 1947), p.188.}

First, it had to be waged by a competent authority, which authority he referred to as “the authority of Princes or of the Church”. Second, there must be a just cause for the war, meaning, “that those who are attacked merit the attack because of some
fault”.\textsuperscript{20} He gave examples of just wars as wars fought in self-defence; restoration of peace; assistance of neighbors against armed attack and most importantly, “defence of the poor and oppressed”. Finally, a just war had to be waged with a right intention.\textsuperscript{21}

These three conditions for a just war came to be widely accepted by Christian thinkers in the medieval period. As time passed, the late scholastics, such as Francisco Vitoria (1480-1546) and Francisco Suarez (1548-1617), continued to develop the just war doctrine. One clarification that Suarez and Vitoria made to the requirement of a just cause was the addition of the idea of proportionality.

Suarez explained that “it is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion”.\textsuperscript{22} In other words, the injury suffered by the state must be roughly equivalent to the injuries to be suffered in war in order for it to justify recourse to war. This concept of proportionality was to continue to play an important role in the development of the \textit{jus ad bellum}.

In examining the Christian phase of the just war doctrine, it would appear that the scholars were more concerned with the morality of war rather than with its legality. But for the Christian thinkers of the time, if recourse to war were “unjust”, it would also be illegal. This was because the medieval Christian writers generally accepted a natural law approach. Natural law, according to Aquinas, was “the rational creature's participation of the eternal law”.\textsuperscript{23} In other words, natural law was what a human being through reason could understand of God's eternal law. Human law, which today might be called positive law, was only really ‘law’ if it conformed to the natural law. In consequence, if a war did not meet the requirements of the \textit{jus ad bellum}, it was not simply immoral, but also legally impermissible. The requirements for just recourse to war can thus be regarded as legal requirements.

\subsection*{2.3.2. The Secular Phase}

As the medieval period was coming to an end, the Christian content of the just war doctrine came to receive less emphasis. For the medieval thinkers, war could be just because it conformed to certain theological precepts. Increasingly, however, 16\textsuperscript{th} and 17\textsuperscript{th} centuries writers began to develop the \textit{jus ad bellum} apart from supernatural

\begin{footnotesize}
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\item \textsuperscript{20} Ibid. at 188.
\item \textsuperscript{21} Ibid. at 188.
\item \textsuperscript{23} Aquinas, supra note 12, at 218.
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concerns. Perhaps the most celebrated writer of this period was Hugo Grotius (1583-1645).

Hugo Grotius, the man widely regarded as the father of international law was the first western philosopher who sought to separate the law of nature from the law of God.\(^\text{24}\) Perhaps Grotius singular most important contribution to legal theory is his application of the concept of natural law to international law. He built his “Law of Nations” on his view of the law of nature.\(^\text{25}\) He argued that the individual possessed some inherent rights, emphasizing that nation-states came into existence because individuals wanted to improve their security and as a result ceded part of their inherent rights to the state. The sovereign powers of the state were therefore limited to the extent of the rights ceded by individuals.

Therefore, the state exceeded its authority when it denied individuals their basic rights that they had not ceded to the state. It follows that if the sovereign violated the basic rights of the people, he exceeded his jurisdiction and other states had the right to intervene and re-establish the order of the law of nature. He put it this way:

“Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some special rights over his own subjects. But … if a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case. It would not follow that others may not take up arms for them”.\(^\text{26}\)

The statement above and others by Grotius compelled Lauterpacht to state that perhaps Grotius was the first person to authoritatively state the principle of humanitarian intervention. Lauterpacht states: “Grotius made the first authoritative statement of the principle of humanitarian intervention - the principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins”.\(^\text{27}\)

Grotius was of the view that intention was irrelevant for the justice of war but considered in detail the justifiable means of waging war.\(^\text{28}\) He asserted that the issue


\(^{25}\) Ibid. at 101.


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of the justifiable means was contingent on the justifiability of the cause for waging the war. He propounded a theory of proportionality, by holding that any means outside what is necessary for achieving the just cause, would be unjust:\(^{29}\) “The good which our action has in view must be much greater than the evil which is feared, unless, when the good and evil in balance, the hope of the good is much greater than the fear of the evil”.\(^{30}\)

Grotius concluded that certain actions were essentially prohibited no matter what the justification is. This included the killing of civilians that he considered to be the principal crime of war, the raping of women from the enemy side and the forcing of innocent people into slavery.\(^ {31}\) He however, pointed out that sometimes the necessities of war would result in a justifiable violation of the norms that he considered essentially prohibited:

“Many things accompany the right of the agent indirectly and beyond the agent’s intention. … Thus in order to obtain what is ours, if we cannot get that alone, we have the right to take more. Similarly, we may bombard a ship full of pirates or a house full of thieves, even if there are within the same ship or house a few infants, women or other innocent persons”.\(^ {32}\)

### 2.4. Sovereignty and the State System

The views posited by Grotius led to a change in the paradigm of political and legal theory, shifting the emphasis away from the influence of Christian doctrine, resulting in a more realistic view of the theory of sovereignty and the law of war.

As the medieval period was coming to an end, the feudal system was being replaced by a new structure. Increasingly, the territorial state was becoming the predominant political unit in the European world. Unlike the hierarchical system that prevailed during feudalism, the new international system was centered a round individual, relatively autonomous states, ruled by different monarchs. Many factors contributed to this development, not the least of which were the rise of international trade and the concomitant rise of the merchant class, and the decline of the role of the Catholic Church and the universalism that it helped instill.\(^ {33}\)

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\(^{29}\) Ibid. at 367-78.

\(^{30}\) H. Grotius, supra note 66, at 231.

\(^{31}\) Walters, supra note 88, at 404.

\(^{32}\) H. Grotius, supra note, 67, at 232.

\(^{33}\) Arend & J. Beck, supra note 4, at 15.
Machiavelli, a great “political realist”, sought to write about politics as it was at the time and not as it ought to be. He realized that in renaissance Europe, the Princes did whatever suited them and there were no limitations on their power, internally and externally. He concluded that the sovereign did not have a moral superior; the moral good of the society is what the Prince considered it to be. In relation to war, he stated thus:

“When it is a question of the safety of the country no account should be taken of what is just or unjust, merciful or cruel, laudable or shameful, but without regard to anything else, that course is to be unswervingly pursued which will save the life and pursue the liberty of the fatherland”.  

Bodin was one of the first scholars to develop a coherent theory on the principle of sovereignty. He held a view similar to that of Machiavelli. He posited that the sovereign, as supreme legislator, was free from any restraints posed by positive law. The sovereignty of the nation-state was therefore, virtually unlimited.

Hobbes, a predecessor of Bodin, was of the view that people had formed societies to protect them from anarchy. He posited that as long as the government protects the majority of the people, the people had to obey the laws unconditionally.

This absolute sovereignty also applied externally; therefore, no other state had the right to interfere with the sovereign’s treatment of his own people.

John Locke also agreed that the social contract was the foundation of society. Though, he argued from a somewhat weaker position of sovereignty, he nevertheless held that the sovereign held wide discretionary powers both externally and internally.

It is significant to note that these theories of sovereignty were developed in light of the religious wars of the 16th and 17th centuries that had caused constant disorders in Europe. It is therefore, not surprising that the principle of sovereignty got its legal confirmation in the treaty of ‘Westphalia’, which ended the thirty years of war.

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36 Freeman, supra note 43, at 102.
37 Ibid. at 102.
This treaty inaugurated the modern European state system and established the nation-state as the principal actor in international law.\textsuperscript{38} The treaty however, put limited restraints on the sovereign’s power, especially regarding the practice of religion, which was the dominant political issue. The Princes could determine the principal religion within their territory, but minorities had the freedom to practice whichever religion they chose. Thus, even the strict principle of sovereignty of the 17\textsuperscript{th} century had some important limitations.

With the emergence of sovereignty as an ordering principle of the international system, legal scholars formulated the doctrine of positivism. Positivism asserted that since states could be bound by no higher law, the only law that could exist was that which they created by their consent. This they did through treaties, customs, and general principles. With natural law principles increasingly relegated to theological discussion, positivism had a profound influence on the development of norms relating to the use of force.\textsuperscript{39}

It is significant to note that the theory of sovereignty that was developing in the 18\textsuperscript{th} and 19\textsuperscript{th} century differed fundamentally from that postulated in the teachings of Grotius. Notions such as ‘justice’ or ‘humanity’ did not restrict the sovereignty of the nation-state, and therefore, intervention on humanitarian ground could not be regarded as lawful.

According to Brownlie, the concept of just war was relegated “to the realms of morality and propaganda”.\textsuperscript{40} Instead, as Vattel noted, a principle of non-intervention was developed:

“It clearly follows from the liberty an independence of Nations that each has the right to govern itself as it thinks proper. …No foreign State may enquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct, nor force him to make any change in his administration”.\textsuperscript{41}

Vattel, however, later made a modest change to this view when he recognized that under certain circumstances states may intervene in the affairs of each other.\textsuperscript{42}

Other contemporary scholars recognized a limited right of intervention on humanitarian grounds. However, this was not in accordance with the legal and political realities of the time.

\textsuperscript{38} Abiew, supra note 12, at 29.
\textsuperscript{39} Ibid. at 30.
\textsuperscript{41} E. de Vattel, \textit{Droit des Gens}, (1758), (Elibron Classics, Tome II (2005), p.7.
\textsuperscript{42} F. K. Abiew, supra note 18, at 36.
This does not mean war was considered illegal *per se*, but the justification for waging war was no longer found in a concept of justice. The *justa causa* had been replaced by a customary right to go to war in accordance with the virtually unlimited sovereignty enjoyed by states.\(^{43}\)

The major consequence that these developments had for the law relating to the recourse to war was to supplant the just war concept as the predominant legal approach to the *jus ad bellum*. Now that states were sovereign, they had a ‘sovereign’ right to go to war. As the British jurist, William Edward Hall explained in 1880, “international law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose”.\(^{44}\) In short, even though there might have been certain moral limitations on the recourse to war, legal doctrine came to accept the right of a state to go to war whenever it so desired. States were said to have a *competence de guerre*, a right to war. In the absence of any higher law or authority, there was a legal regime of “self-help”. States could institute a war at any time to vindicate their rights. The only real qualification of this right to institute war that was accepted by states during this period was the requirement that war be declared. Hence, a state simply declared war, and it was lawful.\(^{45}\)

Thus, Kunz noted: “The concept of *bellum legale* replaced the concept of *bellum justum*”.\(^{46}\) Therefore, in the 18\(^{th}\) and 19\(^{th}\) centuries, there was nearly a complete abandonment of the distinction between legal and illegal wars and war was generally justified if they were fought for the protection or defence of certain vital interests.\(^{47}\)

### 2.5. Interventions in the 19\(^{th}\) and Early 20\(^{th}\) Centuries

Based on the strict application of the sovereignty of nation-states, the 19\(^{th}\) century was characterized by an unlimited right of war and the recognition of conquests. It was only the emergence of the balance - of - power system in the 19\(^{th}\) century curtailed wars to a very great extent. The expense, destructiveness and long duration of wars, coupled with the risks of defeat, meant that wars were not worth fighting unless the stakes involved were very high.\(^{48}\)

\(^{43}\) Arend & Beck, supra note 5, at 16.
\(^{45}\) Arend & Beck, supra note 7, at 20.
\(^{46}\) J.L. Kunz, ‘Bellum Justum and Bellum Legale’, 45 *Am. J. Int’l L.*, (1951), p.528. That is, justice was no longer an element of the legal right to go to war.
\(^{47}\) Peter Malanczuk, supra note 44, at 228.
\(^{48}\) Ibid. at 229.
In 1860, Philimore wrote that: “War is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights”. 49

However, war was only regarded as a measure of last, and was to be resorted to only when all peaceful means to the resolution of a conflict failed. In 1878, the World Peace Conference in Paris declared by a resolution that: “la guerre offensive est un brigandige”.

State practice, however, did not immediately reflect the changes in the world’s attitude to wars. Instead, what evolved was a doctrine of a right to ‘self-preservation’ of the nation-state, as a Droit absolut des Etats. Out of this doctrine evolved a practice of lesser measures of armed force, which did not amount to ‘war’, such as ‘self-defence’, ‘reprisal’ and ‘pacific blockade’. 50 This practice of lesser measures of force eventually developed to include interventions justified on various grounds.

2.5.1. The Protection of the Lives and Property of Nationals Abroad

Intervention by armed forces to protect nationals was a common occurrence in the period before 1914. Milton Offutt records at least seventy occasions on which American forces were employed in this way between 1813 and 1927. 51 Some of the more important instances may be considered. One of the four grounds offered by President McKinley for the American intervention in Cuba in 1898 was that “we owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection”. 52

The outbreak of the Boxer troubles in China in 1900 led to collective intervention in north China which lasted many months and involved considerable military action and loss of civilian life. Hay, Secretary of State, stated in a telegram to American Ambassadors on 3 July 1900, that his government was prepared to use the necessary force to protect the lives and property of Americans in China. 53

53 Clark, supra note 8 at 14.
The French Minister of Foreign Affairs, Del casse, in a speech in the Chamber of Deputies on the same day referred to the duty of France “of protecting her citizens and of obtaining for her merchants the guarantees obtained by others”. Lord Salisbury concurred in United States (U.S.) policy as set forth in the circular telegram of 3 July. Reasons advanced for American and Japanese intervention in eastern Siberia in December 1917 included the protection of foreigners, war measures against the Germans, and the protection of war material at Vladivostock.

What is characteristic of these and other examples of intervention is that protection of the lives and property of nationals is one of several justifications offered and the justifications are framed so widely that their legal content is obscured by general considerations of national policy. Thus President McKinley in his apology for intervention in Cuba in 1898 refers also to “the cause of humanity” and the need “to put an end to the barbarities …now existing there”, “the very serious injury to commerce, trade, and business of our people”, and the “constant menace to our peace”.

Similarly the telegram of the American Secretary of State on the policy of his government in the matter of the anti-foreign rising in China refers to the guarding and protection of “all legitimate American interests”. The American intervention in and occupation of Haiti in 1915 was an assertion of a protectorate and a severe and prolonged curtailment of sovereignty and it is obvious that the protection of foreign life and property was neither the only nor the principal reason for the occupation. The custom of establishing extensive neutral zones in states torn by internal conflict involved the U.S. in the internal affairs of certain states and amounted to intervention in the internal conflict.

Some interventions had as their purpose not the protection of nationals from immediate danger but the establishment of guarantees of the security of nationals for the future, if necessary by effecting a change of government in the state concerned.

This was the object of the intervention by Great Britain, France, and Spain in Mexico as provided for in a Convention signed in London on 31 October 1861.

54 Ibid. at 15.
55 Ibid. at 16.
58 Ibid. at 164.
60 Ibid. at 468.
Some of the instances of intervention though justified, *inter alia*, in terms of the protection of nationals, had the character of reprisals, as, for example, the bombardment of Greytown by a U.S. war vessel in 1853, and the British occupation of Corinto in Nicaragua in 1895.\(^{62}\)

Moreover, it is particularly significant that one of the leading cases of this form of intervention, as presented by the writers, was very variously characterized by contemporary statesmen and by lawyers, viz. the occupation of Cuba by the U.S. in 1898. The British blockade of Greece in 1850 can hardly be accepted as an instance of protection of nationals. It must be regarded as a reprisal, although it did not satisfy the conditions for resort to reprisal, or as an anomalous and unlawful attempt to coerce the Greek government into acceptance of British demands. It must, however, be admitted that even if the motives are mixed some humanitarian content remains.\(^{63}\)

### 2.5.2. Treaties Conferring a Right to Intervene

In classical international law it was recognized that a right to intervene by force on the territory of another state could properly be conferred by treaty.\(^{64}\)

The treaty might be an instrument to which the object of the intervention was a party or a multilateral agreement to which the object was not a party. Article 3 of the Treaty of 22 May 1903, between Cuba and the U.S.\(^{65}\) provides an example of the former type:

> “The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba”.

The second type consisted principally of treaties which guaranteed a dynasty or form of government of a particular state. Thus in Article 3 of the Treaty of London of 1863 between Great Britain, France, and Russia, it was provided that “Greece, under the sovereignty of Prince William of Denmark and the guarantee of the three courts, forms a monarchical, independent, and constitutional State”. In 1916 and 1917

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\(^{62}\) Natalino Ronzitti, ‘The Expanding Law of Self-Defence’, *JCSL*, (2006), p. 354. To these might be added the intervention, for example, landing of British and French forces in Mexico in 1861.


\(^{65}\) Ibid. at 137. This provision did not appear in the later treaty of 29 May 1934.
the three states intervened in Greece with the purpose of re-establishing constitutional
government in accordance with that provision.\textsuperscript{66}

In many cases the treaties which conferred such rights of intervention were the
product of a relationship in which the interests of one party were subordinated to the
interests of the other. However, the 19\textsuperscript{th} century state practice contains a variety of
pretexts for intervention, and treaty provisions which provided for intervention in
certain circumstances had the virtue of representing some attempt to regulate, and
provide authority for the use of force.

As Aid in the form of armed forces or materials of war, has been furnished to
governments by other states for the purpose of suppressing a rebellion on a
considerable number of occasions. For instances, Great Britain sent troops to Portugal
in 1826 at the request of the Portuguese government to assist in preventing a
successful rebellion by Don Miguel. Russia sent troops into Hungary in 1849 at the
request of Austria to assist in the suppression of a Hungarian revolt.

2.5.3. Humanitarian Ground

State practice regarding interventions on humanitarian grounds date back to
ever earlier times. One of the earliest known instances occurred in 480 B.C. The Prince of
Syracuse, in defeating the Carthaginians, laid down as one of the conditions of peace
that they refrain from the barbarous custom of sacrificing their children to Satum.\textsuperscript{67}

The history of international relations shows many instances of humanitarian
protest and representation by one or more states on behalf of the citizens of other
states.\textsuperscript{68} For the most part, and especially from the latter half of the 17\textsuperscript{th}
century, humanitarian action was undertaken mostly on behalf of persecuted religious
minorities or coreligionists. Intervention was also undertaken on behalf of other
recognizable groups, often constituting minorities.

During the period 1827-1830, France, Britain and Russia intervened in
Greece to protect the Greek right of self-determination and Greek Christians from the
oppressive rule of the Turks following a number of massacres.\textsuperscript{69} This action resulted

\textsuperscript{66} Lord McNair, \textit{The Law of Treaties}, (Oxford University Press, 1961), Chapter XIII, p. 89.
\textsuperscript{67} Louis B. Sohn, Thomas Buergenthal, \textit{International Protection of Human Rights}, (Bobb-Memll Co.,
1973), p.178. It is claimed, however, that a century later the Carthaginians suffered another defeat at
the hands of a Sicilian Prince. This defeat was considered by the Prince a punishment for stopping
human sacrifices, thus restoring it.
\textsuperscript{68} Lord Phillimore, \textit{Commentaries Upon International Law}, Vol.1, 3\textsuperscript{rd} ed, (Butterworth, 1879), p. 3.
\textsuperscript{69} The contention that this intervention was humanitarian in character is borne out by the terms of the
London Treaty of 1827 (for the “Pacification of Greece”) to which Britain, France and Russia were
parties. The preamble to that treaty stated that the contracting powers “…having moreover received
in acceptance by the Porte of the 1827 London Treaty,\textsuperscript{70} and ultimately in the independence of Greece in 1830.

Another important instance of invocation of the doctrine to prevent religious persecution occurred in Syria between 1860 and 1861.\textsuperscript{71} From the 16\textsuperscript{th} century until World War I, geographical Syria, an area encompassing present-day Lebanon, Jordan, Israel, Syria, the West Bank and Gaza, constituted an integral part of the Ottoman Empire. For centuries before the Ottoman conquest of Syria, the mountains of Lebanon offered a refuge for persecuted religious communities, particularly for Maronite Christians immersed in a generally hostile Islamic region. Turkish rule led to the suppression and massacre of thousands of Maronite Christians by the Muslim population. Consequently, France was authorized by Austria, Great Britain, Prussia, Russia and Turkey, meeting at the Conference of Paris of 1860, to intervene in Syria to restore order.

As a result 6,000 French troops were deployed. A Constitution for the Lebanese region was adopted requiring a Christian governor who was responsible to the Porte. The French forces withdrew in 1861 after accomplishing their tasks.

Although the Sultan was a formal party to this intervention as a result of the Protocol of Paris, Turkey assented “only through constraint and desire to avoid worse”.\textsuperscript{72} This constraint was however, deemed lawful by virtue of the humanitarian considerations involved.\textsuperscript{73}

Similarly, Russia intervened in Bosnia, Herzegovina and Bulgaria in 1877, which was also under the rule of the Ottoman Empire. The treatment meted out to Christians in these areas was so cruel that one British investigator described it as “the most heinous crimes that had stained the history of the century”.\textsuperscript{74} The intervention was allegedly carried out on humanitarian grounds.

\textsuperscript{70} The treaty also proposed a limited local autonomy for the region within the Ottoman Empire. The Turkish government rejected this proposal which consequently, resulted in an armed intervention by the Major Powers on 14th September 1829 and acceptance of the treaty.
\textsuperscript{72} Ibid. at 247.
\textsuperscript{74} Abiew, supra note 19 at 37.
Some leading scholars and writers on international law have doubted the ‘genuineness’ of these interventions. These scholars, led by Brownlie, argue that “these interventions were not carried out solely on humanitarian grounds but that power politics between Western and European states also played a role. Subsequently, there has been no clear case of humanitarian intervention”. With regards to the Ottoman Empire, Fenwick states that the “alleged humanitarian motives were… influenced or affected by the political interests of the intervening state”. It is also argued that some of the interventions, like those in Syria and Greece were treaty based and not carried out unilaterally.

Nevertheless, the language used by the intervening states clearly indicates some sort of *opinio juris* regarding the right of humanitarian intervention. Even if other considerations were also involved the states were arguably “attaching primacy to that principle (of humanitarian intervention) over their treaty rights as the justification for intervention”. The states themselves were clear in their conviction that humanitarian intervention was a lawful measure of “lesser armed force” derived from customary international law.

Again, the argument that treaties authorized the interventions does not detract from the fact that the states involved believed that they were entitled by customary law to intervene for humanitarian purposes because these treaties were not universally adopted. They could hardly therefore create a right to unilateral intervention imposable against the target state. In the early 20th century, the desire to intervene for humanitarian purposes subsided and the unilateral use of force was largely considered illegal. In 1904, Borchard, a British legal scholar, noted “where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on the grounds of humanity”. Another early twentieth century scholar declared:

“should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call

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75 Brownlie, supra note 44, at 340.
77 Brownlie, supra note 45, at 341.
upon the powers to exercise intervention for the purpose of compelling such a state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization".  

2.6. The Development between the World Wars

After World War I, nations became horrified about the possibility of another world war, and as nations began to distrust one another, the permissibility of the use of force began to dwindle. From the time period of the First World War to the end of the Second, the policy and core of the language by which the community sought to deprive nations of the unlimited use of self-help were arguably put in place.  

In the Atlantic Charter, both the U.S. and United Kingdom (U.K) declared, “(We) believe that all nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force”.  

The creation of the League of Nations gave institutional guarantees to basic rights and the League was given the power to authorize the collective use of force.

The League of Nation’s Covenant, signed in 1919, sought to restrain countries from going to wars but did not abolish wars altogether.

2.6.1. The League of Nations Period (1919-1928)

In 1914, the liabilities of a system of self-help became obvious when the First World War began. Over the course of its four-year run, the war took a devastating toll. Twice as many people were killed during this relatively brief period than had been killed in all wars combined from 1790-1913. The ‘Great War’ was truly a war unlike any the world had known. Not surprisingly, when the delegates to the Paris Peace Conference assembled in the Palace of Versailles in the spring of 1919, one of their foremost concerns was to ensure that such a war should never again occur.

In the post-mortem following the First World War, the common belief was that the war had resulted from ‘accidental’ causes. Most statesmen felt that the war was not caused by the aggressive intent of any one state, but rather that it resulted from a series of miscalculations and misinterpretations, exacerbated by the lack of procedural limitations on the recourse to war. As a consequence of this belief, the delegates to the Paris Conference sought to establish a new, global international

81 Arend & J.Beck, supra note 46, at 192.
organization that, among other things, would provide the necessary procedural checks to prevent such a war from taking place.\(^8^4\) And thus the League of Nations was established.

### 2.6.1.1 The League System and the Recourse to Force

Under the League of Nations Covenant, an elaborate set of procedures was established to restrict the recourse to force. First, under Article 12 signatories pledged to submit any dispute “likely to lead to a rupture” “to arbitration or judicial settlement or to enquiry by the League Council”.\(^8^5\) A dispute likely to lead to a ‘rupture’ was presumably one that would have disrupted international peace and led to war. Second, Article 15 provided that if such a dispute were submitted to the League Council, and a report were adopted unanimously by the members of the Council that were not parties to the dispute, the disputants were under an obligation “not to go to war with any party, to the dispute which complies with the recommendations of the report”.\(^8^6\)

Article 13 imposed the same obligation in cases in which there was an arbitral or court decision.\(^8^7\) Hence, a state could never undertake a war against another state if the second state were abiding by the decision of the dispute resolution body. Third, Article 12 provided that the parties “agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report of the Council”.\(^8^8\) This meant that even if the one side did not comply with the report of the Council, or the decision of the arbitral tribunal or court, the other side was required to wait at least three months before it could go to war. The Covenant, in other words, imposed a “cooling-off” period.

This procedure, while clearly imposing significant restriction compared to the pre-League regime, nevertheless left open substantial rights to take recourse to force.

First, if there were no decision by the arbitral body, court, or the League Council, there would be no obligation to refrain from the use of force. In fact, Article 15 of the Covenant explicitly recognized this possibility. It provided that:

“if the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the

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85 Covenant of the League of Nations, Article. 12.
86 Ibid. Article. 15.
87 Ibid. Article. 13.
88 Ibid. Article. 12.
dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice”.  

Second, if there were a decision by the Council, states would be obliged to refrain from going to war against a state complying with the decision of the settlement body. If, however, one party were not following the decision, the other party could take recourse to war after waiting three months. For example, if there were a dispute between the U.S. and Canada over fishing rights in the Gulf of Maine that seemed likely to lead to a breach of the peace, both sides would be under an obligation to submit the issue to dispute settlement. Assuming that they submitted the matter to the League Council and the Council handed down a decision, both sides would be under an obligation to carry out the decision. If, however, Canada chose not to follow the decision, after a period of three months, the U.S. could lawfully resort to war against Canada.

These procedural checks were the only definitive restraints on the recourse to war that existed in the League Covenant. Nonetheless, alongside these requirements were provisions of the Covenant that seemed to be more restrictive of the right of states to use force. Article 10 of the Covenant provided that:

“The Members of the League undertake to respect and preserve as against external aggression the territorial, integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled”.  

What this meant was that the League was to protect the territorial integrity and political independence of states from aggression. It seemed, thus, to imply that ‘aggression’ was prohibited. But, as Professor Ian Brownlie points out, (if Article 10 did prohibit aggression, it would seem to contradict the provisions of the Covenant discussed above that allowed for recourse to war under certain circumstances).  

Although the “trauaux preparatories” did not provide a conclusive answer, they “strongly suggested that Article 10 was intended to be subordinate to Article 15, paragraph 7”, the provision that allowed for recourse to war when the Council was

89 Ibid. Article. 15.  
90 Cassese, supra note 33, at 215.  
91 Covenant of the League of Nations, Article. 10.  
92 Brownlie, supra note 19, at 62.
unable to act. Under this interpretation, it would seem that the framers intended that force permitted in accordance with the other provisions of the Covenant (Articles 12 and 15), would not constitute aggression. While subsequent interpretations may have generally affirmed this, the mere presence of Article 10 in the Covenant and the concept of aggression made the League approach to the recourse to war quite confusing.

2.6.1.2. Efforts Under the League of Nations

The League Covenant was far from the last word on the recourse to war during this period. Soon after the organization began meeting, several other attempts were made to clarify and refine the *jus ad bellum*. These included the “1923 Draft Treaty on Mutual Assistance” and the “1924 Protocol for the Pacific Settlement of International Disputes”, the so-called Geneva Protocol. Both of these agreements defined ‘aggression’ as an “international crime”, and although the “Treaty on Mutual Assistance” did not go much beyond the League Covenant in its restrictions on the recourse to force, the Geneva Protocol did. Under Article 2 of the Protocol, the parties pledged not to take recourse to war “except in case of resistance to acts of aggression or when acting in agreement with the Council or Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol”.

In other words, the Protocol sought to limit the circumstances in which there could be a resort to war to two: defence from aggression and when authorized by a competent organ of the League. Unfortunately, even though forty-eight states recommended the ratification of the Protocol in the league Assembly, it failed to receive the number of ratifications necessary to enter into force.

2.6.2 The Kellogg-Briand Pact Period (1928-1939)

2.6.2.1. The Nature of the Kellogg-Briand Pact

Following these abortive attempts to impose additional restrictions on the *jus ad bellum*, yet another effort was made during the interwar period to regulate the right of states to go to war. This was the Treaty providing for on the “Renunciation of War as an Instrument of National Policy”, often referred to as the “Pact of Paris” or the

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93 Ibid. at 63.
94 Ibid. at 69-70.
95 Protocol for the Pacific Settlement of International Disputes, Article 2, cited in ibid. at 69-70.
97 Brownlie, supra note 34, at 71.
The Kellogg-Briand Pact was signed on August 27, 1928 and entered into force on July 24, 1929. Interestingly enough, it is technically still in force, with its parties including the U.S. and the Soviet Union (presumably now Russia).

Under the Kellogg-Briand Pact, the signatories declared “in the names of their respective peoples that they condemn recourse to war for the solution of their international controversies, and renounced it as an instrument of national policy in their relations with one another”. They further agreed “that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by peaceful means”.

Hence, unlike the League Covenant, which permitted the recourse to war in certain circumstances, the Kellogg-Briand Pact outlawed the resort to war entirely. The text of the Pact nowhere provides for any exception to this general proscription.

It was generally recognized by the parties to the Pact, however, that resort to war would be permissible in the case of self-defence. In fact, a number of states, including the U.S., presented diplomatic notes prior to the ratification of the Pact indicating their understanding that, war launched in self-defence would be lawful.

It also seems safe to assume that war would be permissible when it was authorized by the League’s Council in accordance with the provisions of the Covenant. Such force would not constitute the use of war “as an instrument of national policy”. Instead, as Professor Yorum Dinstein points out, it would be the use of war as “an instrument of international policy”.

Even though the Kellogg-Briand Pact has frequently been maligned in the literature of international relations, it was actually quite significant in the development of the law relating to the recourse to force. Like the Geneva Protocol, the Pact drew a legal distinction between aggression on the one hand, and self-defence and force authorized by a universal international organization on the other. But unlike the Geneva Protocol, the Kellogg-Briand Pact entered into force and was widely regarded by states as authoritative.

99 Ibid. Article. 1.  
100 Ibid. Article. 2.  
102 Dinstein, supra note 9, at 81-82.  
103 Ibid. at 82.  
104 Brownlie, supra note 35, at 76.
2.6.2.2 The Problems with the Kellogg-Briand Pact

Despite the advances made through the drafting of the Kellogg-Briand Pact, the treaty still presented several major problems. First, the Pact only explicitly outlawed ‘war’. It did not, therefore, impose any restrictions on the use of force short of war. Once again, the regime that existed in the pre-League period dealing with these uses of force would continue to apply. Second, since the Kellogg-Briand Pact did not define a self-defence exception, the interpretation of permissible self-defence remained unclear.

As noted earlier, many states made explicit statements indicating that they reserved the right to take recourse to war in the exercise of self-defence. But what actions legitimately gave rise to this right? What constituted an offense that would merit the resort to war in self-defence? By not explicitly addressing the issues of self-defence, the Pact left these questions unanswered. Third, as Professor Dinstein observes, the use of the words “national policy” in the prohibition contained in the Pact left open the possibility that other motivations for the recourse to war might be legal. He argues that “the national policy formula gave rise to the interpretation that other wars - in pursuit of religious, ideological and similar (not strictly national) goals -were also permitted”. 105 Conceivably, states could claim that such wars did not contradict the Pact and were thus permissible.

2.6.2.3. The Kellogg-Briand Pact in Practice

That the Kellogg-Briand Pact ultimately did little to restrain the aggressive powers that brought about the Second World War is well understood. Less well understood, however, is the role that the Pact did play in the interwar development of the *jus ad bellum*. There were, in fact, significant consequences of the Pact. First, it led to further efforts to reaffirm and refine the Pact's obligation. 106 During the interwar period, numerous treaties were concluded that reiterated the obligation to refrain from aggressive war. Such agreements included several ‘non-aggression pacts’ and the 1933 Convention on the Definition of Aggression. 107

Second, the Pact does seem to have altered the way statesmen thought about, or at the very least spoke about, the recourse to war. No longer did their rhetoric reflect a belief in an unrestricted competence *de guerre*. Instead, diplomats and

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105 Dinstein, supra note 9 at 82.
106 Brownlie, supra note 35 at 76.
107 Ibid. at 76.
leaders from a variety of states appealed to the Kellogg-Briand Pact as a source of legal obligation.\textsuperscript{108}

Even after the Second World War had begun, Germany, Italy, and Japan were condemned for violations of the Pact. As late as 1941, American Secretary of War Stimson could still speak of the “vital change” that “was made in the system of international law”\textsuperscript{109} by the ratification of the Kellogg-Briand Pact. Indeed, it would seem that despite the failure of the Pact to prevent the war, the idea of prohibiting aggressive war had been indelibly planted in the minds of modern world leaders. As will have been seen, this idea would surface again after the war in the form of Article 2(4) of the Charter of the U.N.

\section*{2.7. Conclusion}

While it is always difficult to attempt to ‘periodize’ history, the development of the \textit{jus ad bellum} can be understood in terms of four rough historical periods: the just war period, the positivist period, the League of Nations period, and the Kellogg-Briand Pact period. During the just war period, there was a sense that recourse to war was permissible if there was a “just cause”. Even though thinkers differed on the particulars of what constituted a “just cause”, there was broad agreement that recourse to force was not absolutely unrestricted.

As the modern state system began to emerge during the positivist period, the just war doctrine began to lose support. With the principle of sovereignty now undergirding the system, states began to articulate a belief that they had a ‘sovereign right’ to go to war.

During this period, customary international law generally recognized that states possessed a \textit{competence de guerre}, even though certain restrictions on the uses of force short of war were acknowledged.\textsuperscript{110}

In the aftermath of the devastating Westphalia wars in Europe, military intervention in intrastate conflicts was seen as violating the fundamental norm of the Westphalia treaty, which state that “war is not waged against a sovereign state which has not itself militarily attacked another sovereign state”.\textsuperscript{111} These interventions were seen as contrary to international rules.

\begin{flushright}
\textsuperscript{108} Ibid. at 74-80.  \\
\textsuperscript{109} Dinstein, supra note 10 at 83.  \\
\textsuperscript{110} Brownlie, supra note 36, at 76.  \\
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Following the First World War, there was a shift away from this approach to the recourse to war. In the League of Nation period, a series of procedural checks were established to restrict the resort to war. Due, however, to significant ‘gaps’ in the League Covenant framework, subsequent efforts were made to fill these gaps. The most important of these efforts was the Kellogg-Briand Pact. During what might be called the Kellogg-Briand Pact period, war as an instrument of national policy was outlawed. The only exceptions to this prohibition that were generally accepted by states were self-defence and wars authorized by the League of Nations.\footnote{Arend & J.Beck, supra note 9, at 23.}

However, military intervention is not a new concept in the military lexicon. Its philosophical roots were pioneered by St Thomas Aquinas and others scholars during the Enlightenment. Those philosophers believed that there must be a justifiable reason for waging war. It was this moral political theory, which anticipated the birth of the U.N. Charter in 1945.