
The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State

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Abstract

This contribution builds on the assumption that the largely unregulated employment of force practised by Europeans outside of central Europe in the last decades before World War I, between 1914 and 1918, for the first time developed its full destructive potential in a catastrophic war between industrialized Western countries. It focuses on justifications for war and intervention in the three decades before World War I, differentiating between order-related and ontological justifications. Both categories of reasons were used to justify violent measures in the context of Western imperialism and nationalism before the war, leading to an ever more permissive ius ad bellum regime. What was generally being treated as a unified regime of the use of force (ius ad bellum and in bello) was in fact a complex and increasingly unstable Western-dominated discursive practice differentiating between the objects of violence through various argumentative techniques. European and US international lawyers and politicians differentiated between the use of force between, first, the great powers (core); second, between themselves and other sovereign states in their respective strategic and economic zones of influence (semi-periphery) and, third, between violence and war vis-à-vis peoples living on territories that they did not recognize as independent sovereign states (periphery). This differentiation followed the projection of military and economic power in the context of Western imperialism. Only by taking these underlying discursive structures into account, the legal debates around aggression and extreme violence also during World War I and in Versailles can arguably be fully understood. Despite various attempts to ban or institutionalize interstate violence after 1919, both order-related and ontological justifications for the use of force remained an influential discursive structure of 20th century international law.

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Ulrich, the hero of Robert Musil's famous novel *Man without Qualities* (*Der Mann ohne Eigenschaften*) contemplated war, military interventions and other issues of worldwide importance a couple of months before the outbreak of World War I:

Was there a war actually going on in the Balkans or not? Some sort of intervention was undoubtedly going on, but whether it was war was hard to tell. So much was astir in the world. There was another new record for high-altitude flight; something to be proud of. If he was not mistaken, the record now stood at 3,700 meters and the man's name was Jouhoux. A black boxer had beaten the white champion; the new holder of the world title was Johnson. The President of France was going to Russia; there was talk of world peace being at stake. A newly discovered tenor was garnering fees in South America that had never been equalled even in North America. A terrible earthquake had devastated Japan – the poor Japanese. In short, much was happening, there was great excitement everywhere around the turn of 1913–1914.¹

With hindsight, the last three decades before 1914 are often portrayed as being reasonably serene times before the outburst of catastrophic violence on European battlefields. From a Western European perspective, and compared to what happened after 1914, this period appears to be a relatively peaceful one. It is also the era during which international legal pacifism attempted to establish for the first time an effective multilateral legal framework limiting interstate violence, which culminated in the two Hague Conferences of 1899 and 1907. However, as Ulrich remarks laconically from his European perspective, war and intervention frequently took place somewhere else – namely, in the peripheries of the Western powers. In a phase of growing nationalist resistance against Ottoman rule in the Middle East and North Africa, Europe's self-proclaimed great powers,² as well as ultranationalist movements, engaged in bloody conflicts in a quest for territorial enlargement and new strategic zones of influence.³

Besides, for most of the populations in Africa and Asia, the period between 1885 (the Berlin Conference) and 1914 is characterized by the trauma of violent European interventions and colonial war in the rush for colonial empires. In Latin America, this was the height of predominantly US interventionism using military force in order to advance its political and economic interests in the region. Recent historical research from a global history and post-colonial angle has thus reminded us that the period before World War I was less peaceful than it might have appeared from an inner-European post-World War perspective.⁴ Isabel Hull has analysed to what extent extreme forms of violence practised on European battlefields during the war had already been used by Western military powers during earlier interventions in their colonies.⁵ During World War I, however, they were used for the first time in

¹ R. Musil, *The Man without Qualities* (1996), at 390.

² On the hierarchies established by the 19th-century concept of the 'great powers', see G. Simpson, *Great Powers and Outlaw States* (2004); Kingsbury, 'Sovereign Equality', *European Journal of International Law* (EJIL) (2001) 599; reconstructing the links between state hierarchies and intervention from early European modernity until the 19th century, see Keene, 'International Hierarchy and the Origins of the Modern Practice of Intervention', 39 *Review of International Studies* (2013) 1077, at 1077–1090.

³ J. Leonhard, *Die Büchse der Pandora: Geschichte des Ersten Weltkrieges* (2014), ch. 1.

⁴ *Ibid.*

⁵ I.V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (2005).

a large-scale war between what the contemporaries called ‘fully civilized nations’.⁶ And from a post-colonial perspective, Frédéric Mégrét has convincingly traced the systemic exclusion of the so-called ‘non-civilized’ in early 19th-century Western international legal discourse regarding the prohibition of specific weaponry and the principle of distinction between combatants and civilians in international humanitarian law (*ius in bello*).⁷

While building on these insights, the following contribution will focus on the reconstruction of the contemporary Western international legal discourse around *ius ad bellum* before World War I and, thus, on the question of how the move to war and violent intervention was legally justified in the first place. The classic textbook approach to this question is the statement that, before 1914, international law gave every sovereign state a basically unlimited right to wage war or that international law was at least ‘indifferent’ as to this sovereign right. Emmanuel Jouannet has recently challenged this assumption, and Agatha Verdebout has portrayed the ‘indifference theory’ as a retrospective post-World War I construct by international legal scholars.⁸ Verdebout argues that *jus ad bellum* in the 19th century was still doctrinally restricted by the right to a sovereign independent state. Interestingly, the classic specialized literature on *ius ad bellum*, including, in particular, Ian Brownlie’s seminal *The Use of Force in International Law* from 1962, also had taken a differentiated position on the complex discourse concerning *ius ad bellum* in the 19th century and before the war.⁹ Another take on the historical evolution of *ius ad bellum* towards an arguably more permissive regime during this time has been to explain changes in the law by referring to the 19th-century emergence of positivism in international legal discourse as an evermore dominant trend, at least in European scholarship.

As I will argue in this article, neither internal methodological shifts in scholarship, such as the purported periodic revivals of scholastic and neo-scholastic *bellum iustum* theories, nor doctrinal reconstructions alone are sufficient to understand fully the discursive trends in the international legal discourse of this time. Rather than attempting to judge what the law really ‘was’ in the pre-war era,¹⁰ my contribution will shift the

⁶ *Ibid.*

⁷ For *ius in bello* and violence in the colonies that later reappears in the Great War, see Mégrét, ‘From Savages to Unlawful Combatants: A Postcolonial Look at International Law’s “Other”’, in A. Orford (ed.), *International Law and Its Others* (2005) 265, at 265ff.

⁸ E. Jouannet, *The Liberal-Welfarist Law of Nations* (2014), at 130; building on Jouannet’s work, see Verdebout, ‘The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis’, 1 *Journal of the Use of Force and International Law (JUFIL)* (2014) 223, at 223.

⁹ I. Brownlie, *The Use of Force in International Law* (1963), at 43; building on Brownlie’s monograph, see Ruys, ‘From Passé Simple to Futur Imparfait? A Response to Verdebout’, 2 *JUFIL* (2015) 3, at 13.

¹⁰ Von Bernstorff, ‘International Legal History and Its Methodologies: How (Not) to Tell the Story of the Many Lives and Deaths of the *Ius Ad Bellum*’, in A. von Arnould (ed.), *Völkerrechtsgeschichten, Veröffentlichungen des Walter-Schücking-Instituts für Internationales Recht* (2017), vol. 196, 39, at 39–52. On the problem of ‘jurispathic’ reconstruction, see Pahuya and Saunders, ‘Rival Worlds and the Place of the Corporation in International Law’, in J. von Bernstorff and P. Dann (eds), *The Battle for International Law in the Decolonization Era* (forthcoming). On various approaches to global legal history, see T. Duve, ‘Global Legal History – A Methodological Approach’, in *Max Planck Institute for European Legal History, Research Paper Series* No. 2016-04, available at <https://ssrn.com/abstract=2781104>.

focus and concentrate on a reconstruction of justifications advanced by international lawyers for the move towards violence.¹¹ While acknowledging the influence of discursive traditions and changing methodological preferences dating back to Roman law, the late Spanish scholastics and the scholarly traditions between the 16th and 18th century, my central argument is that two categories of justifications for the use of force existed for Western international lawyers. These two categories were decisively shaped by the attitudes and preferences of the foreign policy elites in Western great powers in the context of late 19th-century Western imperialism and European nationalism.¹² Into the first category fall order-related justifications, whereas the second category consists of justifications referring to the ontology of the nation-state (ontological justifications).

Order-related justifications attempted to portray the use of military force as a means to unilaterally or collectively enforce international law. They often served as justifications for violent imperial interventionism in the peripheries of the great powers. Ontological justifications instead referred to the threatened existence of one's own nation-state, which allegedly required the state to take violent measures *vis-à-vis* other entities. A classic late 19th-century argument falling into this category is the 'right to self-preservation'. Both categories of justifications did build on classic legal doctrine, with the order-related approach being more firmly rooted in natural law traditions than the ontological one. And both categories were arguably broadened by contemporary discourse in order to justify wars and interventions in the context of Western imperialism and European nationalism, leading to an ever more permissive *ius ad bellum* regime.¹³

Due to the geopolitical context and strategic interests of foreign policy elites, order-related justifications, including the balance of power, were frequently referred to by British and US international lawyers (diplomats and scholars), whereas ontological justifications had more sway among their continental European counterparts – in particular, in the so-called late nation-states, Germany and Italy. As I will illustrate in this contribution, this insight can help to explain and contextualize

¹¹ Recently, Charlotte Peevers has demonstrated the usefulness of focusing on contested justifications for war in international legal discourse in her insightful book on the Suez War. C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War and International Law* (2013).

¹² For Foucault, the threat and exercise of violence through the diplomatic military 'assemblage' plays a foundational role for competitive European state-based modernity, including European colonialism. See Foucault, 'Security, Territory, Population', in M. Senellart, F. Ewald and A. Fontana (eds), *Lectures at the Collège de France 1977–78* (2009) 285, at 285–310.

¹³ This deformatization of the regime on war and intervention through ontological justifications in the three decades before 1914 was the trend that contemporaries in the interwar period attempted to describe with the notion of the 'indifference theory'. In that sense, A. Verdebout's claim that the 'indifference theory' was somehow invented by interwar scholarship does not seem to be entirely convincing. Verdebout, *supra* note 8, at 223. Order-related justifications were not seen as problematic in contemporary European scholarship before World War I but were increasingly criticized by international lawyers from the semi-periphery. On Drago's battle against interventionism, see A. Becker Lorca, *Mestizo International Law* (2014), at 152–158.

the diverging justifications advanced by Germany and the Allies for starting and entering World War I and the toxic debates over war guilt and reparations in the interwar period. After World War I, ontological justifications – in particular, those justifying aggressive military conquest – fell into disrepute, whereas Western international lawyers generally considered order-related interventions inevitable and necessary. Nonetheless, they were increasingly regarded as requiring a collective or institutional legitimation. With respect to ontological justifications, only the right to self-defence continued to be regarded as a legitimate justification for unilateral state violence after 1945.

My reference to diverging Anglo-American and central European approaches, however, should not be understood as endorsing the overly simplistic contemporary post-World War differentiation between German violent and irrational nationalism and Anglo-American ‘rational’ law-abiding commitment to pacifism and ‘community interests’.¹⁴ Instead, the argument is that both categories of justifications allowed the great powers to justify violence in the context of Western imperialism and nationalism, with, at times, a clear disregard of previously accepted legal limitations on violence. The use of these justifications was as dependent on geopolitical interests of the respective states as it relied on idiosyncratic legal cultures and philosophical traditions for their articulation and promotion. All of the great powers used both order-related and ontological justifications for the use of force, depending on the respective political context. Besides, historical evidence does not allow us to classify order-related measures as less violent or less disruptive for targeted societies than recourse to military force justified for ontological reasons. Towards the end of the 19th century in both categories of justifications, the ever more frequent use of exclusionary social Darwinist and racist tropes can be observed.¹⁵

This leads me to my second basic argument in this contribution. European and US international lawyers and politicians during this time introduced a distinction between various contexts of application of alleged rules on the use of force during the last decades before the outbreak of the war. They differentiated between violence and war, first, between the ‘great powers’ (core); second, between themselves and other sovereign states in their respective strategic and economic zones of influence (semi-periphery) and, third, between violence and war *vis-à-vis* peoples living in territories that they did not recognize as independent sovereign states but, rather, as ‘uncivilized’ nations (periphery). These differentiations followed the projection of military and

¹⁴ On this debate and I.V. Hull’s take on this in her path-breaking monograph, see I.V. Hull, *A Scrap of Paper: Making and Breaking International Law during the Great War* (2014).

¹⁵ Reflecting the rise, demise and resilience of the notion of colonial war, see Giladi, ‘The Phoenix of Colonial War: Race, the Laws of War, and the “Horror on the Rhine”’, 30 *Leiden Journal of International Law (LJIL)* (2017) 847; on racism and the scientific methodology of ‘the men of 1873’, see M. Koskenniemi, *The Gentle Civilizer of Nations* (2004), at 103; with a reflection on the role of social Darwinism in international law before the war, see Diggelmann, ‘Beyond the Myth of a Non-Relationship’, 19 *Journal of the History of International Law* (2017) 93, at 100–102.

economic power in the context of European imperialism.¹⁶ It is well known that the distinction between Western so-called ‘civilized’ states and ‘non-civilized’ peoples was a characteristic, if not constitutive, feature of European international law in the 19th century.¹⁷ International legal discourse worked on the assumption of European sovereign equality but proved flexible enough even to accommodate blatant violations of formal equality in law-making and application by integrating concepts such as unequal treaties, ‘semi-sovereign’ states and colonial subjugation by negating legal personality on the basis of ‘civilizational’ rank in line with the great power’s imperial interests.¹⁸ I will use the core/semi-periphery/periphery terminology as a heuristic device to illustrate that what is often retrospectively being treated as a unified regime of the use of force was in fact a complex and Western-dominated discursive practice differentiating between forms and objects of violence through various argumentative techniques and legal categories.¹⁹

In the remainder of this article, I will first introduce and then trace the use of both order-related and ontological justifications for the use of force by governments and international lawyers from the great powers for the exercise of violence towards other communities. I will start by introducing order-related and ontological justifications concerning war and intervention between the great powers, followed by a description of the justifications for violence used in their peripheries – namely, in the colonies and in the semi-periphery areas. As a third step, I will trace how the two categories of justifications reappear during World War I, followed by concluding remarks on the legacies of these discursive developments.

¹⁶ The core/semi-periphery/periphery terminology originally stems from Immanuel Wallerstein’s world system analysis. Wallerstein’s tripartite distinction between core/semi-periphery and periphery builds on dependence theorists and Karl Polanyi’s economic theory by introducing the tripartite scheme of core, semi-periphery and periphery. States in the core have a dominant position due to their particular economic and military leverage. Economically, the core, using more advanced technological devices, is able to manufacture complex products. Both semi-periphery and periphery communities are being used by the core to provide raw materials and to consume surplus production. Semi-periphery states attempt to join the core and, at the same time, already constitute a core in their relation to the periphery. I. Wallerstein, *World System Analysis: An Introduction* (2004), at 43–59. The history of international lawyers from the ‘semi-periphery’ and their role in the formation of modern international law has recently been explored intriguingly by Becker Lorca, *supra* note 13. Without endorsing Wallerstein’s underlying economic assumptions, Barry Buzan and George Lawson use this core periphery distinction as an ‘analytical’ device to explain the ‘global transformation’ during the 19th century. B. Buzan and G. Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (2015), at 8–10.

¹⁷ G. Gong, *The Standard of Civilization in International Society* (1984); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 56ff; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002), ch. 3; Buzan and Lawson, *supra* note 16, at 175.

¹⁸ On this trajectory, see G. Simpson, *Great Powers and Outlaw States* (2004).

¹⁹ Cf. M. Swatek-Evenstein, *Geschichte der ‘Humanitären Intervention’* (2008), who builds on Anghie’s centre/periphery distinction in his helpful reconstruction of the discourse on humanitarian interventions in the 19th century. My argument, which is inspired by Wallerstein’s core/semi-periphery/periphery heuristic, is that the discourse on ‘humanitarian interventions’ typically belonged to the intervention practice of the great powers in their ‘semi-periphery’. See section 2.A below.

1 The Use of Military Force between the Great Powers

International legal discourse in the period between 1884 and 1914 was in a state of deep-seated transformation. The preceding 50 years had substantially challenged and transformed the basic structures of the old *ius publicum europaeum*. Contemporaries lived in a world that had been revolutionized by 50 years of accelerated Western imperialism and the closely related phenomena of economic globalization and breath-taking scientific and technical revolutions. Moreover, towards the end of the 19th century, enhanced European nationalism was more and more radicalized by racist and Social Darwinist ideologies, particularly, but not only, in the latecomer nations ('*Verspätete Nationen*') of Germany and Italy. This led to an increasingly aggressive rivalry and competition between the great powers of the old concert system. The amalgam of economic imperialism, nationalism, racism, Social Darwinist ideology and technical revolutions in weaponry and transport had developed an unprecedented destructive and violent capacity in the Western powers, which had the potential to be projected on peoples and places in every part of the globe. Even though the so-called concert system had proved to be a rather loose coordinating mechanism among the great powers over the 19th century, European international lawyers still conceived of international law, including its foundational balance-of-power principle, as a functioning 19th-century (post-Napoleonic) inner-European proto-constitution.²⁰

Part of this discursive structure was the first and most restrictive regime on war and intervention, which was the one applied between the European powers or so-called 'fully civilized' nations. According to contemporary scholars, international law required a legitimate ground for waging war, expressed in a formal declaration of war. Without a legitimate reason, waging war violated the 'fundamental right' to independence of the targeted state and, thus, was considered illegitimate, if not illegal.²¹ Moreover, the law of neutrality was understood by scholars to prohibit third party involvement in a war between two sovereign states. Additionally, among the great powers, the basic rules of humanitarian law – most importantly, the distinction between combatants and civilians – were being held to apply. It is remarkable that, despite the bloodshed in the Crimean War from 1853 to 1856 and in various national unification wars, most notably in the Franco-Prussian War of 1871, the 100 years between 1814 and 1914 were a relatively peaceful time for Europe's great powers. Concert diplomacy managed to prevent major wars between the European powers, while they were increasingly engaged in competitive and feverish expansion outside of Europe. The balance-of-power principle in the late 19th century also gradually applied to the colonial empires and, as long as expansion was possible, particularly on the African

²⁰ On this foundational anti-Napoleonic dynamic, see Lev, 'The Transformation of International Law in the 19th Century', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011) 111, at 121–128.

²¹ Jouannet, *supra* note 8, at 130; building on Jouannet's work, see Verdebout, *supra* note 8, at 223; Ruys, *supra* note 9.

continent, European ad hoc crisis diplomacy and imperial expansion prevented further great wars on European soil.²²

With respect to the European understanding of war, Peter Haggemacher has argued convincingly that already throughout the 17th and 18th centuries two concepts of war co-existed in the literature: one concept that was still based on the old *bellum iustum* theories, differentiating between just and unjust parties to a conflict, and a second concept that was a more pragmatic duel-like Roman conception of war as a military conflict between two equals, both acting for their respective strategic interests. Both approaches co-existed in the legal literature – an assumption that relativizes the sequential approach taken by Carl Schmitt, according to which a moralist *bellum iustum* approach was replaced in the 18th century by the pragmatic and duel-like *ius publicum europaeum* concept of war.²³ Until the 1880s at least, elements of both approaches can be detected in international legal discourse even if 19th-century scholars usually do not account for the origins of their particular approach to *ius ad bellum*.

Many textbooks, especially those of an Anglo-American provenance, take a differentiated and rather cautious position on *ius ad bellum*, still influenced by *bellum iustum* arguments.²⁴ While tracing these remnants of older doctrines in the scholarship of the late 19th century is an insightful endeavour, it should not lead to the conclusion that international legal rules had a certain fixed content during this era and that it, as such, regulated state practice. Given that all of these rules were considered to be customary rules, scholars themselves reacted to the practice of the great powers, often in a quest to justify legally what diplomatic and military elites in the great powers had decided to be the right policy *vis-à-vis* foreign entities. Thus, it is not by coincidence that justifications for the use of force advanced by Western scholars and practitioners were often in line with the foreign policy prerogatives of specific great powers. Based on this intuition, the reception and use of legal and methodological doctrines by scholarship often can be explained as an instrumental strategy with the aim to increase the authority of scholarly ‘rationalizations’ of selected great power practices and preferences. Western international legal discourse in this sense routinely ‘rationalized’ violent practices of formal and informal imperial ordering as well as violent practices in the context of the building of nation-states and their persistence through two categories of justifications.

²² The German historian Jürgen Osterhammel sees the relative scarcity of military conflicts within Europe and their limited effects on civilians in Europe through the principle of distinction between civilians and combatants as a respectable European ‘cultural achievement’ (*Kulturleistung*) of the 19th century. J. Osterhammel, *Die Verwandlung der Welt* (2009), at 704; in a similar vein, see Langewiesche, ‘Eskalierte die Kriegsgewalt im Laufe der Geschichte?’, in J. Baberowski (ed.), *Moderne Zeiten? Krieg Revolution und Gewalt im 20. Jahrhundert* (2006) 12, at 27.

²³ Haggemacher, ‘On the Doctrinal Origins of *Ius in Bello*: From Rights of War to the Laws of War’, in T. Marauhn and H. Steiger (eds), *Universality and Continuity in International Law* (2011) 325, at 325ff. With respect to Schmitt’s position, I refer to C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (1938).

²⁴ J. Lorimer, *The Institutes of the Law of Nations* (2nd edn, 1980), vol. 2, at 1820; T. Twiss, *The Law of Nations* (2nd edn, 1884), at 178–185; R. Philimore, *Commentaries upon International Law* (2nd edn, 1873), vol. 3, at 77–78; A. von Bulmerincq, *Das Völkerrecht oder das internationale Recht* (2nd edn, 1889), at 357.

First, there were the ontology-related justifications in which war against independent states is an exceptional, but, in principle, justifiable, measure applied by a state to safeguard its own independent 'existence' by thwarting foreign intervention or by pursuing vital territorial or other interests, such as the protection of the 'honour' of the sovereign state. In this context, notions of 'necessity'²⁵ and 'self-preservation' of the state are often mentioned as a justification for waging war.²⁶ Somewhat paradoxically, the continental European doctrine of fundamental rights of states,²⁷ including the broadly framed right to sovereign 'existence' of the state, required a justification for external aggression into independent statehood while, at the same time, providing itself various justifications for the use of military force for those governments waging war and intervening abroad.²⁸ In its rhetorical turn to positivism, continental European scholars less frequently referred to 'just causes' or 'just intentions' for the war, as did the classic *bellum iustum* theories. Instead, it was held that state practice required a recognized reason for going to war. Doctrine attempted to emancipate itself from explicit references to morality or religion while preserving the concept of legitimate reasons for waging war as accepted by state practice.²⁹

Second, there were the order-related justifications in which war and armed interventions were regarded as *ultima ratio* measures of self-help for sovereign states to vindicate their rights in international law, which, as a primitive law, according to contemporary doctrine, did not possess centralized judicial and executive institutions.³⁰ Another closely linked reason for waging war was to protect or enforce the 'balance of power' between the major European powers. Authors in the context of order-related justifications distinguished the term 'war' from the term of 'armed reprisals' or, as a broader category, so-called 'measures short of war', the latter being enforcement measures outside or below the state of war.³¹ Strategically, by not triggering the state of war, states could thus use military force without acting in the complex regime, including neutrality rules, attached to a war in the legal sense. In addition, cumbersome parliamentary procedures applicable to wars and their authorization could thereby be circumvented.³²

²⁵ On necessity, which in the 19th century was rarely used as a self-standing justification for violence but usually in combination with other reasons such as self-preservation, see F. Paddeu, *Justification and Excuse in International Law* (2018).

²⁶ Brownlie, *supra* note 9, at 43; also building on Brownlie's monograph, see Ruys, *supra* note 9, at 13.

²⁷ For the doctrine of fundamental rights, see the following contemporary authors: H. Bonfils, *Manuel de Droit International Public* (5th edn, 1908), at 131, 134; Twiss, *supra* note 24, at 12; J.L. Klüber, *Europäisches Völkerrecht* (2nd edn, 1851), at 46–101.

²⁸ For the justification for war based on the doctrine of fundamental rights, see Bonfils, *supra* note 27, at 619; Lorimer, *supra* note 24, at 19; von Bulmerincq, *supra* note 24, at 357.

²⁹ Twiss, *supra* note 24, at 181–183; Lorimer, *supra* note 24, at 19; Klüber, *supra* note 27, at 280; A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th edn, 1888), at 244–247.

³⁰ Joseph Weiler speaks of an 'initial stratum of horizontal, dyadic, selfhelp through mechanisms of counter-measures, reprisals and the like'. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547, at 550.

³¹ C. Neff, *War and the Law of Nations* (2005).

³² This is how Georg Jellinek in 1900 explains the 'advantages' of measures short of war for governments. Jellinek, 'China und das Völkerrecht', 19 *Deutsche Juristen-Zeitung* (1900) 401, at 402.

The late 19th- and early 20th-century practice of Western armed interventions for the protection of foreign investment and Western nationals in South America and also East Asia would generally be subsumed under this category of measures short of war. They were the central 19th-century instrument of the Western powers used to enforce economic and political interests in their semi-peripheries, without occupying the respective territories. This form of intervention was often termed by jurists from the core as measures for ‘policing’, ‘restoring order’ and ‘punishing’ alleged prior wrongdoings in these territories. Among the European or Western powers themselves, however, measures short of war were a rare exception, given that such disputes would generally be resolved diplomatically.³³ The German scholar Georg Jellinek in 1900 saw measures short of war as also being ‘political’ measures in nature since they were, in practice, only applied ‘by powerful states vis à vis less powerful ones and by civilized states vis à vis less civilized ones’.³⁴ A third, more specific limitation of *ius ad bellum* in the 19th century was the law of neutrality, which restricted *ius ad bellum vis-à-vis* permanently neutralized states and also demanded restrictions of warfare whenever a state declared itself neutral with regard to an ongoing war between other states.³⁵ Its constraining potential should not be underestimated since neutrality rules, *prima facie*, confined legitimate violence to those states, armies and territories that had initiated or declared war on another state.³⁶

How are these sovereign rights to wage war or armed intervention dealt with in the two Hague Conferences of 1899 and 1907? Pacifist Western attitudes to war and its horrors had made themselves heard more loudly in governmental policymaking circles and placed great hopes on the Hague Conferences. Modern war through mass recruitment and technological revolutions in weaponry and transport – as contemporaries could sense – developed a new potential for destruction. Pacifist movements in the 19th and 20th centuries regarded international law as a potentially powerful tool to promote their political quest to restrict or even outlaw war. Already in the last decades of the century, activists had identified arbitration as an instrument that, in their view, had the potential not only to enforce private property claims against foreign states without military force but, ultimately, also to replace all wars in international relations by rational dispute settlement procedures.³⁷

Inspired by the Anglo-American revival of arbitration practice over the 19th century, the pacifists modelled their procedural approach on taming interstate

³³ For the justification for armed reprisals, see Bonfils, *supra* note 27, at 603–607; Philimore, *supra* note 24, at 18–20; E. von Ullmann, *Völkerrecht* (2nd edn, 1908), at 456–457.

³⁴ Jellinek, *supra* note 32, at 402.

³⁵ On the evolution of neutrality doctrines in maritime law, see S.C. Neff, *The Rights and Duties of Neutrals: A General History* (2000).

³⁶ Neutrality according to Carl Schmitt can only assume this constraining function in a system that is indifferent about the morality and justness of the intervention, Schmitt, *supra* note 23.

³⁷ M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2013), at 85–93.

violence.³⁸ Famous arbitration cases between the United Kingdom (UK) and the USA had served primarily to regulate compensation for private loss of property during the revolutionary wars between the two states on the basis of the Jay Treaty or of the disputes resulting from the UK's involvement in the US civil war, such as the *Alabama* arbitration.³⁹ In 1903, shortly before the second Hague Conference, the British Member of Parliament Sir William Randal Cremer was awarded the Nobel Peace Prize for his tireless promotion of bilateral arbitration treaties and permanent arbitral institutions as a means to prevent and substitute war in international relations. Compulsory dispute settlement by international legal institutions became the ideal of late 19th-century organized international pacifism, championed also by the young American Society for International Law and pre-war US administrations. US President Theodore Roosevelt and his Secretary of State Elihu Root were each awarded the Nobel Peace Prize in 1906 and 1912, respectively, for their efforts to conclude bilateral arbitration agreements with other states.⁴⁰ War was an irrational anomaly that distorted cooperation and free trade and, from the perspective of the liberal peace movement, could be prevented by submitting disputes to independent judicial or quasi-judicial institutions. It operated on the assumption that a rational statesman, after a neutral verdict deciding the dispute and effectively controlled by public opinion, would not decide to wage war in the first place.⁴¹

Very much in the spirit of the procedural approach of the liberal Western pacifist movement, the two Hague Conferences attempted to erect binding legal constraints on a government's decision to use force. Why are these attempts usually considered an ultimately unsuccessful project of reducing violence in pre-World War I international relations? The main reason is that most of the governments of the great powers were not interested in a legal regime effectively restraining interstate violence, let alone their practices of violent interventions in their peripheries. At the same time, all of these governments considered it important to at least rhetorically accommodate the pacifist quest.⁴² All of these new rules adopted in The Hague, including the codification of the *ius in bello* rules, were perceived as not being applicable when it came to violence *vis-à-vis* 'non-civilized' peoples.

Moreover, the applicable rules did not prohibit war, let alone armed intervention. Instead, they took a purely procedural approach by requiring prior mediation and

³⁸ On the move to arbitration and the economic ideology behind the pacifist quest cf. Koskeniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Y. Daudet (ed.), *Topicality of the 1907 Hague Conference, The Second Peace Conference, Hague Academy of International Law Workshop Series 2007* (2008) 127, at 127; Abi-Saab, 'Evolutions dans le règlement pacifique des différends économiques depuis la convention Drago-Porter', in Daudet, *ibid.*, 177, at 177.

³⁹ Treaty of Amity, Commerce, and Navigation (1794); on the *Alabama* arbitration, see J. Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898), at 653ff.

⁴⁰ Mazower, *supra* note 37, at 120–122.

⁴¹ *Ibid.*, at 85–93.

⁴² J. Dülffer, *Regeln gegen den Krieg?: Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik: Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (1981).

arbitration before waging war; they contained no clarification with regard to legitimate or illegitimate reasons for the use of force. Even the existing procedural framework in Article 2 of the first Hague Convention on the Pacific Settlement of International Disputes in 1899, which required states to make use of third party mediation before going to war, was phrased in very weak language by the insertion of the qualifier: ‘as far as circumstances permit’.⁴³ All of these treaties and conventions contained broad standard clauses, according to which disputes affecting the ‘honour’ or ‘vital interests’ of the state (ontological justifications) did not have to be submitted to dispute settlement procedures.⁴⁴ The weak language in Article 38 of the 1907 Hague Convention on the Pacific Settlement of International Disputes demonstrates the meagre result of the Hague negotiations:

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, *it would be desirable* that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, *in so far as circumstances permit*.⁴⁵

In summary, I would agree with Brownlie, who has shown that the meagre results of the Hague Conferences, together with the numerous and broadly conceived contemporary justifications for interstate violence make it difficult to speak of effective legal constraints regarding the *ius ad bellum* in the last decades before World War I.⁴⁶ Even though the step from basically allowing any justification related to important interests of a state to saying that international law grants an unlimited sovereign right to wage war is only a small one, only a minority of pre-war authors have expressly endorsed a negative approach towards the possibility of distinguishing lawful from unlawful reasons for waging war. Interestingly, they are almost exclusively German authors, including Lassa Oppenheim, in his influential textbook.⁴⁷

But why Germany? For a significant part of the intellectual elite and civil servants in Germany, war was closely connected with the recent birth of the nation-state

⁴³ Hague Convention for the Pacific Settlement of International Disputes 1899, 1 *AJIL* (1907) 103.

⁴⁴ Hague Convention for the Pacific Settlement of International Disputes (1907 Hague Convention) 1907, 2 *AJIL Supp.* (1908), Art. 9; cf. Crawford and Schrijver, ‘The Institution of Permanent Adjudicatory Bodies and Recourse to *ad hoc* Tribunals’, in Daudet, *supra* note 38, 153, at 158.

⁴⁵ 1907 Hague Convention, *supra* note 44, Art. 38; cf. Crawford and Schrijver, *supra* note 44, at 158.

⁴⁶ Brownlie, *supra* note 9, at 41; confirming Brownlie are R. Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (2nd edn, 2009), at 33; cf. Verdebout, *supra* note 8, at 233.

⁴⁷ L. Oppenheim, *International Law* (2nd edn, 1912), vol. 2, at 73: ‘[T]hat many writers maintain that there are rules of International Law in existence which determine and define just causes of war. It must, however, be emphasized that this is by no means the case. All such rules laid down by writers on International Law as recognize certain causes as just and others as unjust are rules of writers, but not rules of International Law based on international custom or international treaties.’ On Oppenheim’s German roots and the British textbook tradition. cf. Crawford, ‘Public International Law in Twentieth-century England’, in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (2004) 681; exemplary German quotes on the ‘ideal’ and necessity of war are

through the Franco-Prussian War of 1870–1871. In line with Hegelian philosophy and alleged historical experience, wars related to the ontology of the nation-state were thus a positive – a creative historical force. Yes, war came with sacrifice, but at the same time, it had the proven power to bring about national salvation for those nations who allegedly were more advanced both culturally and technologically than other nations. What can be observed here is the late 18th-century French tradition of revolutionary, idealistic war merging, in the second half of the 19th century, first with nationalist sentiments and then with Social Darwinist intellectual currents nourished by an ontological and quasi-religious concept of the nation-state.⁴⁸ Evolutionist thinking, however, according to which technological advancements in weaponry and transport, military victories, commerce and colonial empires were a sign of the strength of a nation and its ‘natural’ superiority, could be observed in other Western societies too.⁴⁹ But, in Germany, these evolutionist tropes were not predominantly shaped by liberal, capitalist and closely connected pacifist elites but, mainly, by highly influential ultra-nationalist circles.⁵⁰ Besides, the development towards an ever more permissive regime in the pre-war era was furthered by the strategic exploitation of uncertainties and the vagueness of the legal rules accompanying the increasingly violent state practice in the peripheries of the great powers, which consisted of the colonies and the semi-periphery.

2 The Use of Military Force in the Peripheries

On the other side of the spectrum were colonial wars fought by European nations against so called ‘non-civilized’ nations. Here, no legitimate reasons for waging war were required, and principles of humanitarian law were not regarded as applicable;

E. von Holtzendorff, *Handbuch des Völkerrechts* (1889), vol. 4, at 203: ‘In dem Aufhören der Kriege kann in der That nicht das richtige Culturideal erkannt werden. Denn dies kann nicht sein, was der göttlichen Weltordnung widerspricht. Ist der Krieg göttlich, weil ein Weltgesetz, so steht er auch mit dem richtigen Culturideal in Einklang und ist heilsam und gut.’ G. Jellinek, *Die Zukunft des Krieges* (1890), at 539–540: ‘Der Staat, welcher sich bewusst ist, Träger einer neuen großen historischen Idee zu sein, kann nur mit Waffen in der Hand ihr Geltung verschaffen ... denn durch die Verwirklichung neuer geschichtlicher Ideen wird allein der Boden gegeben für das, was man Fortschritt nennt.’ E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911), at 6: ‘Auch nach der hiervertretenen und unten näher zu begründenden Auffassung vom Völkerrecht ist der Krieg eine internationalrechtliche Notwendigkeit, die durch Schiedsgerichte niemals aus der Welt geschafft werden kann oder auch nur sollte.’

⁴⁸ Janssen, ‘Krieg’, in O. Brunner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe* (2004), vol. 3, 567, at 592–612.

⁴⁹ M. Pearton, *The Knowledgeable State: Diplomacy, War and Technology since 1830* (1982), at 97–98.

⁵⁰ The very essence of this late 19th-century assumed ontological relationship between the nation-state and war three decades later (in 1932) was apologetically articulated and reaffirmed by Carl Schmitt in his existentialist theory of the nexus between the state and ‘the political’, which in his view required the readiness to destroy the enemy of a nation. C. Schmitt, *Concept of the Political* (1996). Another cultural difference between German and the United Kingdom (UK) elites certainly was that ontological conceptions of the state resonated much stronger in the German land-oriented political culture than in a sea-oriented one. On these historical German continental sensibilities and neuroses, see Mann, ‘Die Deutschen und das Meer’, in W. Vitzthum (ed.), *Die Plünderung der Meere, Ein gemeinsames Erbe wird zerstückelt* (1981) 35, at 35–48.

acts of violence *vis-à-vis* local populations were generally being treated as ‘small wars’ with the aim of conquering new colonial territory or ‘pacifying’ interventions to establish the white man’s law and order in the colony.⁵¹ It is during the so-called ‘scramble of Africa’ after the Berlin conference in 1884 that colonial territories were conceptualized increasingly as being effectively controlled and integrated into the state territory of the respective European powers. Forced labour and unrestricted violence *vis-à-vis* local populations justified as punishments became a widespread colonial practice, which can be exemplified in Germany’s genocidal reaction to the Herero rebellion in South West Africa (Namibia)⁵² and in King Leopold’s use of terrorizing forced labour schemes in the Congo.⁵³ British and French rule in the colonies also used excessive and often punitive violence in many instances, such as the British troops in the Boer War in 1899.⁵⁴ Generally, the fundamental rule of distinction between civilians and combatants was only held to apply in wars between fully ‘civilized’ nations.⁵⁵

In colonial wars, scholars like Oppenheim in 1905 only saw the need to respect general Christian morals.⁵⁶ The question as to whether or not, and to what extent, humanitarian law rules should apply in colonial warfare was a controversial issue at the two Hague Conferences.⁵⁷ A number of formal and substantive arguments were raised by contemporary jurists from the metropolitan states in order to deny the applicability of *ius in bello* rules in conflicts with ‘savages’, the most important one being reciprocity.⁵⁸ Often, as a justification, authors cynically point to the fact that the indigenous fighters themselves did not adhere to conventional forms of European warfare.⁵⁹ A standard approach to warfare against indigenous populations in practice was the strategy of ‘attrition’, which included the burning of villages, the destruction of crops and the seizure of cattle and foodstuffs. Charles Callwell’s famous and widely read handbook on wars against ‘uncivilized’ peoples from 1906 recommended the following:

But in South Africa in 1851–52, in 1877, and again in 1896, rigorous treatment was meted out to the enemy in crushing out disaffection, and with good results; the Kaffir villages and Matabili kraals were burnt, their crops destroyed, their cattle carried off. The French in Algeria,

⁵¹ The most prominent and widely cited contemporary publication is E.C. Callwell, *Small Wars: Their Principles and Practice* (3rd edn, 1906, reprinted 1996), at 21ff.

⁵² On the German practice, see Hull, *supra* note 5, at 66–90.

⁵³ Osterhammel, *supra* note 22, at 634; on Leopold’s atrocities in the Congo, see A. Hochschild, *King Leopold’s Ghost* (1998).

⁵⁴ Hull, *supra* note 14, at 98–103, 131–143.

⁵⁵ U. Lindner, *Koloniale Begegnungen: Deutschland und Großbritannien als Imperialmächte in Afrika 1880–1914* (2011), at 192–193; Osterhammel counts 40 British ‘colonial’ wars between 1869 and 1902. Osterhammel, *supra* note 22, at 700.

⁵⁶ L. Oppenheim, *International Law: A Treatise*, vol. 1: *Peace* (1905), at 34.

⁵⁷ On these debates, see Mégret, ‘From Savages to Unlawful Combatants: A Postcolonial Look at International Law’s “Other”’, in A. Orford (ed.), *International Law and Its Others* (2005) 265, at 265ff.

⁵⁸ *Ibid.*

⁵⁹ Various reasons for the non-applicability of humanitarian law for colonial wars were given in Callwell, *supra* note 51, at 21ff; also assuming the non-applicability of humanitarian law with reference to British and other military manuals, see Colby, ‘How to Fight Savage Tribes’, 21 *American Journal of International Law (AJIL)* (1927) 279, at 279.

regardless of the maxim, 'Les représailles sont toujours inutiles,' dealt very severely with the smouldering disaffection of the conquered territory for years after Abd el Kader's power was gone, and their procedure succeeded. Uncivilized races attribute leniency to timidity. A system adapted to La Vendée is out of place among fanatics and savages, who must be thoroughly brought to book and cowed or they will rise again.⁶⁰

Excessive violence by regular Western armies *vis-à-vis* civilians occurred often in the form of 'punishment' measures against local insurgents or colonial resistance movements. These colonial war patterns would later reappear in both World Wars and various wars of national liberation, practised, for instance, by the German army during the two World Wars and the French forces in Algeria's war of independence or during the Vietnam War.

However, the peripheries of the Western powers did not only comprise their colonies and other non-state entities but also those communities organized in entities, which were recognized by the centre as 'states' but which did not belong to the inner circle of industrialized Western powers. Unlike the colonies, they were perceived by the centre as having a claim to sovereign equality, but, like the colonies, they had allegedly not yet reached the highest 'civilizational' status. States belonging to this semi-periphery during the second half of the 19th century were, *inter alia*, the Ottoman Empire, formally recognized as a sovereign equal in the 1856 Treaty of Paris, and the Latin American states as well as China and, until 1905, Japan. As it is used here, the 'semi-periphery' is a concept that refers to the relationship between a core state and another formally recognized foreign entity, which, in economic, political and military terms, is regarded by the core state as being a subordinated and usually less 'civilized' entity in its strategic zone of influence. Domination in these core/semi-periphery relations is often exercised through treaty law, such as unequal treaties providing for consular (extraterritorial) jurisdiction or intervention treaties, concessions for resource exploitation or lending agreements and, in the case of assumed non-compliance with the 'standards of civilized nations', military force. Before World War I, the relationship between the Western great powers and China, which was considered by jurists from the core to be a 'half-civilized' state, and between the USA and the fully sovereign Latin American states can serve as examples of semi-peripheral relationships.

What did discursive justifications for violence in the semi-periphery – as developed by international lawyers in the centre – look like? In principle, in order to reduce legal relations with these countries to the specific bilateral treaties that were in force, the intra-regime of the great powers was held to apply in dealings with semi-peripheral states, with the limitation that customary law could only apply to fully recognized states and not *vis-à-vis* to 'half-civilized' states such as China.⁶¹ In practice, however,

⁶⁰ Callwell, *supra* note 51, at 148.

⁶¹ On the status of 'half-civilized' states in contemporary literature, see the most influential pre-World War I German textbook, F. von Liszt, *Das Völkerrecht* (1913), at 3–7. In 1913, for von Liszt, 43 states belonged to the 'state-system' of international law. Apart from the 21 European states (six 'great powers' and 15 'middle and small states', the latter of the two categories comprising Turkey), 21 American states and Japan (China, Persia and Siam being not yet completely included in the 'legal community of nations').

Western states could use bilateral treaties, the conclusion of which had often been forced upon semi-peripheral governments, in order to justify military interventions, or they would simply make more extensive use of the accepted general entitlements to intervene and to use military force. Waging war against sovereign entities in one's semi-periphery also required a proper declaration of war, which expressed a legitimate reason for waging war.

Usually, the European powers would attempt to find – at least retroactively – a common position on such wars and associated territorial modifications in line with the procedures of European concert diplomacy. Moreover, with regard to the semi-periphery, states and scholars often were more lenient when it came to applying the *ius in bello* standards developed for the European powers. *Vis-à-vis* the so-called 'half-civilized' entities, they would simply deny their applicability given that these rules formed part of customary law. In most of the cases where military force was used in the semi-periphery, however, the Western powers would hold that their armed intervention remained under the threshold of "war" and, thus, only constituted an 'armed intervention' or 'measures short of war'.⁶² Let me go through the discursive justifications for interventions and war in the semi-periphery one by one.

A *Measures Short of War in the Semi-Periphery*

Underneath the contemporary threshold of 'war', the international legal discourse – as upheld by the centre – recognized the legality of armed and political interventions in order to enforce economic and other interests in the semi-periphery – the so-called 'measures short of war' usually portrayed as (order-related) decentralized legal sanctions taken in response to a violation of international law. Most notably, the frequent US, UK and French practice to intervene on behalf of private claims of national corporations and banks *vis-à-vis* foreign governments were often based on what was called by Western international lawyers the 'international minimum standard', which constituted the normative basis of the law of aliens. In the last three decades of the 19th century, more than 100 interventions backed by military force by the Western great powers in the semi-periphery, mostly in Latin America and the Ottoman Empire, occurred either unilaterally in the case of the USA or 'in concert' by the European powers.⁶³ A notorious example is the military intervention by the European powers in the Venezuelan debt crisis in 1902–1903. As a reaction to such practices, Latin American states in the early 20th century campaigned for a treaty-based ban on the use of force in the context of the recovery of foreign debts.⁶⁴ One of the results of these

⁶² See section 2.A below.

⁶³ Between 1898 and 1902 alone, US troops had intervened 20 times in Latin America using military force. With further references, see Osterhammel, *supra* note 22, at 687; on interventions on allegedly humanitarian grounds, see also D. Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914* (2011); B. Simms and D.J.B. Trim, *Humanitarian Intervention: A History* (2011).

⁶⁴ On the Chilean proposal to expand the convention to all pecuniary claims, see Trinidad, 'The Presence and Participation of Latin America at the Second Hague Peace Conference of 1907', in Daudet, *supra* note 38, 51, at 57; Neff, *supra* note 31, at 239.

efforts was the 1907 Drago-Porter Convention adopted at the second Hague Peace Conference. Against the initial intention of the famous Argentinian statesman and international lawyer Luís María Drago, however, the convention indirectly confirmed the right to use force in these case constellations by allowing for violent enforcement when arbitration had failed.⁶⁵

Into the camp of measures short of war also fell those great power interventions, which allegedly restored 'order' in the semi-periphery and were justified by the intervening powers on humanitarian grounds or the protection of one's nationals, such as the French intervention in Lebanon in 1860, which was carried out allegedly in order to protect Christian minorities (Maronites) against the massacres committed by fellow Muslim citizens (Druse minorities). Lebanon at the time belonged to the Ottoman Empire and was of utmost strategic interest to France. At the time of the French intervention, the sultan had already stopped the atrocities and had punished the perpetrators.⁶⁶ Like other great power interventions in the semi-periphery, they allegedly brought 'civilization' or 'law' (the sultan had allegedly breached the provisions of the Treaty of Paris) in the form of collective or decentralized enforcement to the semi-periphery. Another example of these 'policing' interventions in the semi-periphery was the coordinated and brutally executed Western military intervention in China in 1900 as a reaction to the so-called Boxer rebellion, during which European diplomats were attacked and killed by a Chinese resistance movement.

All of these interventions are justified as order-related interventions and form part of the policing and enforcement measures in the semi-periphery in the sense that they would only be conducted by the great powers on the territory of other less powerful or less 'civilized' states that were considered to be located in their strategic zones of influence. Their main political aim in most instances was to restore or create an advantageous political and economic status quo by 'punishing' semi-peripheral states for alleged disrespect of international legal rules. According to the intervening powers, it was because these states or communities did not yet fully live up to the standards adhered to in the inner circle that now and then made 'policing' measures necessary. These were thus understood as 'interventions by humanity' (*intervention de l'humanité*), as the French international lawyer Antoine Rougier called them in 1910 rather than 'humanitarian interventions'.⁶⁷ What, in retrospect, has been called an

⁶⁵ Benedek, Drago-Porter Convention (1907) 2007, reprinted in Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, available at <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e733?rskey=RvqdZQ&result=1&prd=EPIL>.

⁶⁶ On this intervention and its reception in the international legal literature, see Swatek-Evenstein, *supra* note 19, at 124–134; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 32–33; referring to it as a humanitarian intervention, see M. Reisman and M.S. McDougal, *Memorandum upon Humanitarian Intervention to Protect the Ibos* (1968), reprinted in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 167, at 180–181; E.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988), at 157.

⁶⁷ Only in retrospect were they often portrayed somewhat artificially as a line of similar cases in which the European powers intervened in order to stop massacres committed by Muslims against religious (Christian) minorities. This is the approach taken, for example, by the influential 1962 monograph by

early practice of ‘humanitarian interventions’ or ‘interventions to protect nationals’ arguably was considered by contemporaries in the late 19th century to be part and parcel of the general policing and punishment practices of the great powers in the semi-periphery. All in all, the permissive structures of the broad category of the ‘measures of war’ in the semi-periphery were seen to justify the more or less unrestrained enforcement of great power interests in these states. In the words of a contemporary observer, Antoine Rougier, commenting in 1910 on the interventions of the great powers:

This is why the doctrine allows a special right to exist for Europe within its relationships with Turkey or China. The capitulations, certain international servitudes, the religious protectorates in the East and Far East, the tutelage of the Sublime Porte, they are all applications of the right to guide and control, exercised by Christians over Muslims and by the white people over the yellow people. The necessary acts of policing will generally be carried out by a community of powers.⁶⁸

The USA had established its own semi-periphery regime for Latin America, including dozens of military interventions justified officially in 1904 by the so-called Roosevelt corollary.⁶⁹ In the Americas, the USA, in line with the Monroe and Roosevelt doctrines, reserved the right to judge on its own whether or not interventions in the region were legitimate or not. Originally, the doctrine, as stated by US President James Monroe (1817–1825), had the primary aim to keep at bay the influence of European powers in the newly independent states of Latin America.⁷⁰ Formulated by an administration of a young nation-state and former British colony during the time of the Holy Alliance, the Monroe doctrine was supposed to keep the European powers out of the American hemisphere. In 1904, after a century of expanding US political and military power and increasing investment-based US control over natural resources and consumer markets in Latin America, Theodore Roosevelt turned the Monroe doctrine into a fully-fledged intervention doctrine:

M. Ganji, *International Protection of Human Rights* (1962), at 22, who sees these interventions as the direct precursors of the minority-protection regime under the League of Nations; on this trajectory in international legal scholarship, see Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 10 *EJIL* (1999) 679, at 679; on such retrospective scholarly distortions and on Rougier’s revealing terminology, see Swatek-Evenstein, *supra* note 19, at 132–134, 138.

⁶⁸ A. Rougier, *La Théorie de L’Intervention D’Humanité* (1910), at 43 (original French text): ‘C’est pourquoi la doctrine admet l’existence d’un droit special dans les rapports de l’Europe avec la Turquie ou avec la Chine. Les capitulations, certaines servitudes internationales, les protectorats religieux en Orient et en Extrême-Orient, la tutelle de la Sublime Porte, sont autant d’application de ce droit de direction et contrôle que s’arrogent les Chrétiens sur les Musulmans et les blancs sur les jaunes. Les actes de police qu’ils nécessitent seront généralement exécutés par une collectivité de puissances.’

⁶⁹ An intriguing and detailed historical account of the US foreign policy establishment in the early 20th century and its embrace of international law for imperialist purposes can now be found in B.J. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (2016), at 144.

⁷⁰ T. Grant, *Doctrines (Monroe, Hallstein, Brezhnev, Stimson)* (2014), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e697?rskey=iL61iR&result=1&prd=EPIL>.

If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. ... We would interfere with them only in the last resort, and then only if it became evident that their inability or unwillingness to do justice at home and abroad had violated the rights of the United States or had invited foreign aggression to the detriment of the entire body of American nations. It is a mere truism to say that every nation, whether in America or anywhere else, which desires to maintain its freedom, its independence, must ultimately realize that the right of such independence can not be separated from the responsibility of making good use of it.⁷¹

With this famous Roosevelt corollary, the USA, while paying lip service to its neighbours' right to independence – granted itself the right to intervene whenever necessary to enforce its own economic or strategic interests in the region. Intervention according to this new doctrine was justified whenever a state was 'unable' or 'unwilling' to live up to the responsibilities 'to do justice at home' in line with the 'primary laws of civilized nations'. Sovereignty came with responsibilities, disregard of which justified unilateral intervention by (US) 'police power'. At the turn of the century, the USA adopted a more and more imperialistic foreign policy in Latin America as reflected in the Roosevelt corollary of 1904.⁷² But how could all of these unilateral foreign policy directives be translated into a recognized right to intervene in a sovereign state? It is the Nobel Peace Prize laureate and former US secretary of state Elihu Root who, in 1914, shortly before the outbreak of World War I, defended the meanwhile harshly criticized Monroe doctrine in the *American Journal of International Law* as being in line with general international law. Interestingly, the champion of the quest for compulsory arbitration and adjudication fully endorsed in this contribution the highly permissive regime for violence and war of the early pre-war 20th century. Root strongly rejected the charge of an ever wider and more interventionist interpretation of the Monroe doctrine: 'They are mistaken. There has been no change.'⁷³ The Monroe doctrine for him was based on both ontological- and order-related justifications for intervention – namely, the right to self-defence and the right to enforce international law in the American states.

With respect to the right to self-protection, Root obviously included the right to extend self-defence beyond the limits of the territorial jurisdiction of the state exercising this right. If interventions abroad that were aimed to safeguard America's 'peace and safety' were necessary, they were also without any doubt lawful.⁷⁴ The second legal

⁷¹ T. Roosevelt, *Annual Message to Congress*, 6 December 1904, available at www.ourdocuments.gov/doc.php?flash=true&doc=56&page=transcript.

⁷² As T.D. Grant holds in his *Max Planck Encyclopaedia of Public International Law* entry on the Monroe doctrine: 'Indeed, at times, the emphasis in American application of the doctrine was on its implied licence to intervene in the affairs of other States in the hemisphere.' Grant, *supra* note 70.

⁷³ Root, 'The Real Monroe Doctrine', 8 *AJIL* (1914) 427, at 433.

⁷⁴ *Ibid.*, at 432.

basis referred to by Root is the decentralized enforcement argument. Even without the Monroe doctrine, the USA would have had ‘the right to insist upon due protection of the lives and property of its citizens within the territory of every other American state, and upon the treatment of its citizens in that territory according to the rules of international law’.⁷⁵ This is why according to Root the USA did not protest in the Venezuelan debt crisis in 1902 against the military intervention of European powers (Germany, UK and Italy), given that these nations had made clear – *vis-à-vis* the USA in an official communication – that they had no intention of permanently occupying Venezuela. All of the elements of a permissive regime for the use of force in the semi-periphery were eloquently justified by Root, including the USA’s right to use force if ‘vital interest’ in the Panama Canal region were affected; on this point, he added insinuatingly: ‘Certainly no nation which has acquiesced in the British occupation of Egypt will dispute this proposition.’⁷⁶ Basically, what Root conveyed with this comparison was that as long as the European powers intervened in their semi-periphery, the USA – when strong economic and military interests were at stake – would also be permitted to do so exclusively in Latin America – economic and military imperialism by mimesis.

B Wars in the Semi-Periphery

Whenever Western interventions in the semi-periphery led to a prolonged occupation or annexation of foreign territory, contemporaries no longer subsumed it under ‘measures short of war’ but, instead, would speak of a ‘war’. When exactly a war could be called ‘war’ in legal terms generally remained extremely disputed until the UN Charter.⁷⁷ Be that as it may, prevalent discursive tropes about waging ‘wars’ in the semi-periphery came with certain peculiarities that deserve closer analysis. The Italian aggression against the Ottoman Empire in Libya in 1911 can serve here as an example. After the French–German dispute over Morocco, Italy was afraid that Germany or France would take over Libya – which, at the time, was a recognized part of the Ottoman Empire – as a further African colony. Italy had economic interests in Libya related to natural resources and a hunger for its own African colony. After a prior ultimatum, which demanded full protection of Italian economic interests by the Turks, Italy declared war on the Ottoman Empire and sent an occupation force to conquer Tripoli. At the end of the war, Italy would have sent more than 100,000 soldiers to Libya. The young General Atatürk of the Ottoman Empire encouraged an Arab rebellion against the Italian forces using guerrilla tactics and no-prisoner policies. Massacres, mutilations and mass executions on both sides abounded. In one incident, the Italians executed 4,000 men and 400 women by firing squad as a reaction to a guerrilla attack by irregular Arab forces.⁷⁸ The Italian army, for the first time in

⁷⁵ *Ibid.*, at 436.

⁷⁶ *Ibid.*, at 440.

⁷⁷ On the various (subjective versus objective) notions of ‘war’, see J.L. Kunz, *Kriegsrecht und Neutralitätsrecht* (1935), at 4–11; Neff, *supra* note 31, at 178–186.

⁷⁸ Wilcox, ‘“The Italian Soldiers” Experience in Libya, 1911–1912’, in D. Geppert, W. Mulligan and A. Rose (eds), *The Wars before the Great War* (2015) 41, at 43.

the history of military conflict, also used aerial bombardments carried out from balloons. It was a distinctive feature of 19th- and 20th-century great power interventions in the periphery and semi-periphery that new weapons were tested and deployed, the legality of which was still disputed by contemporaries. As to the reasons for the war, the Italian government remained vague.

In a formal declaration of war, Italy rejected an extremely forthcoming and conciliatory reply from Istanbul to a prior Italian ultimatum demanding better protection of the interests of Italian nationals in Tripoli. For Italy, the reply from the High Porte was:

evidence of either the ill-will or of the powerlessness of which the Imperial Government and authorities have given so many proofs, particularly with regard to Italian rights and interests in Tripoli and Cyrenaica. The Royal Government is in consequence obliged to safeguard its rights and interests together with its honour and dignity by all means at its disposal. ... Friendly and pacific relations between the two states being thus broken off, Italy henceforth is at war with Turkey.⁷⁹

What were the public reactions to this aggression and the Italian justification by invoking the vague concepts of 'rights, interests, honour and dignity'? The European powers did not condemn the aggression – France, Germany and the UK even turned down the Turkish request to intervene diplomatically in Rome with the aim of stopping the Italian invasion.⁸⁰ The editors of the *American Journal of International Law*, which spearheaded the international legal pacifist quest at the time, commented in three issues on the incident, regretting that Italy had not used peaceful means to settle the dispute before waging war, without, however, explicitly criticizing the invasion as illegal: 'Italy has unfortunately violated the spirit, if not the letter of those sections of the (Hague-) conventions dealing with good offices and arbitration.'⁸¹

For the Italian author Gennaro Tambaro, in his contribution to *Niemeyer's Zeitschrift für Internationales Recht*, international law required a legitimate reason to wage war, such as affected vital interests and the honour of the state. Applying this approach to the Italian–Turkish War, he concluded that the Italian occupation without any doubt was a lawful war because of a whole range of ontological and order-related justifications. First of all, the Ottoman Empire was not a fully 'civilized' nation so other rules applied instead of those applicable between the European powers in the strict sense of the term; in its relationship to the Ottomans, rules applied that were 'more of a colonial than of an international nature'.⁸² This notwithstanding, Italy, for Tambaro, had sufficient legal justification for going to war, such as the way Italian interests and nationals had been treated in Tripoli and Istanbul, which had affected Italy's 'honour' as a nation. Moreover, the developments in northern Africa, particularly, in Morocco,

⁷⁹ Italian Declaration of War, 29 September 1911, as cited in 'Tripoli', Editorial Comment, 6 *AJIL* (1912) 149, at 152.

⁸⁰ 'Chronique des Faits Internationaux', 19 *Revue Générale de Droit International Public (RGDIP)* (1912) 344, at 393.

⁸¹ 'Tripoli', *supra* note 79, at 153–154.

⁸² Tambaro, 'Das Recht, Krieg zu führen', 24 *Niemeyers Zeitschrift für Internationales Recht* (1914) 41, at 70.

Tunisia and Egypt, had threatened the balance of power among the European nations. Italy, therefore, had to restore this balance by occupying Libya. Lastly for Tambaro, Italy had vital economic interests in exploiting natural sulphur resources in Libya, which alone justified armed intervention, not to mention the Italian duty to bring civilization to the barbarians in Libya, a task that, in his view, had been dreadfully neglected by the Ottoman Empire. The interest to live up to this civilizing duty for him had become '*stato di necessita*'.⁸³

In a rather cold-blooded manner, this scholarly contribution in the most prestigious German international law journal of the time used the whole range of ontological and order-related discursive elements of the late 19th- and early 20th-century international legal discourse to justify the aggression. What made this war problematic in the eyes of the other European powers was the fact that it led to an aggrandizement of Italian territory at the expense of the Ottoman Empire without any prior collective approval or mediation by the great European powers. Critical reactions among liberal Western elites and public opinion regarding the Italian aggression also show a tendency for unilateral wars of conquest, at least morally, to become more difficult to justify in the more liberally minded Western public, even if they took place outside the core.⁸⁴ At the same time, this example corroborates the finding that international legal discourse in 1914 provided the aggressor and his jurists with ample choice of available justifications for the move to violence, be they order related or ontological.

3 World War I

In the words of the Allied and Associated powers, World War I, which began on 1 August 1914, was 'the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed'.⁸⁵ The whole Versailles system of exclusive German war guilt, reparations and criminal responsibility of the German emperor as well as of German war criminals was based on this sentiment. What the Allies wanted to convey with this allegation was that the violence unleashed and employed by the German army, who had started and conducted the war by violating Belgian neutrality, including the deliberate attacks on, and maltreatment of, civilians as a means of punishment for non-cooperation, slavery-like forced labour schemes for prisoners of war and civilians, aerial bombardments of densely populated areas outside of the battlefields and the unrestricted use of new weapons

⁸³ *Ibid.*, at 65–68.

⁸⁴ The press in Austria, France, the UK and Germany, however, generally reacted in critical terms to the Italian invasion. The *Daily Graphic* held that '*un tel mépris du droit public restera comme une tache ineffaçable sur l'honneur italien*' (reprinted in 19 *RGDIP* (1912), at 389), and the *Frankfurter Zeitung* spoke of an 'expedition of bandits' (reprinted in *RGDIP* 19 (1912), at 389).

⁸⁵ Letter transmitting the reply of the Allies to the German observations on the draft Treaty of Peace, 16 June 1919, as cited in Finch, 'Editorial Comment: The Peace Negotiations with Germany', 13 *AJIL* (1919) 536, at 545.

technology, such as submarines, were new phenomena in a war between 'civilized' nations. In a downward spiral of the allegedly legally justified reciprocal suspensions of the basic tenets of the 19th-century intra-great power regime, the conflict became what has been called the '*Urkatastrophe*' of the 20th century. It reproduced the late 19th-century belief in economically driven technological progress, the discourse of cultural, religious and scientific superiority of one 'nation' over another as well as the associated vitalist conviction *inter arma enim selent leges* and '*Not kennt kein Gebot*'.⁸⁶ The Pandora's box of unregulated and technologically enhanced violence had been opened before 1914, but in the four years of the war started by Germany, it developed a horrific destructive potential within the very centre from which it had emerged.

Isabel V. Hull has thoroughly reconstructed important legal debates during that time, ranging from the debate over the violation of Belgium neutrality by the German invasion to the long list of violations of *ius in bello* rules during the war. Her overall conclusion is that the ruling military elites in Germany lacked any identification with international law due to a 'realist' understanding of international law 'based on an interpretation of states as bundles of will and power involved in existential struggles to expand or die',⁸⁷ whereas the Allies 'understood themselves as part of a European state community' that was constituted by international law.⁸⁸ At the same time, Hull concedes that the Allies also violated *ius in bello* and neutrality rules; however, they did so in a somewhat more respectful way that, in her view, still attempted to preserve the integrity of the system. While I agree with Hull's overall assessment that a quasi-religious notion of the nation and war was a particularly dominant phenomenon in the conservative ruling military elites in Germany and that this disposition led to an acceptance of disrespect for international legal rules, I propose a complementary perspective on the legal debates during the war using the taxonomy developed in this article.

To start, it should not be forgotten that the role of contemporary international law in World War I was highly ambivalent. While it potentially constrained some violent practices on the battlefields it helped at the same time to legitimize the slaughtering of millions of soldiers as 'lawful' killings. Early 20th-century legal discourse around both *ius ad bellum* and the *ius in bello* provided justifications for massive interstate violence, and even where it attempted to constrain suffering among Europeans, it came with recognized exceptional justifications for violence, such as through the notion of (order-related) reprisals. Apart from the undisputable violation of Belgium's neutrality, the issue of whether or not Germany could legally start a war against France in 1914, for instance, was not clear at all. As Hull diligently argues, the German government used the doctrines of 'self-preservation', '*clausula rebus sic stantibus*' and 'military necessity'

⁸⁶ For a critique of these notions from a contemporary perspective, see L. Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), at 85ff; recently, Isabell Hull has portrayed this legacy as a specific German approach to international law before and during World War I. Hull, *supra* note 14, at 43ff.

⁸⁷ *Ibid.*, at 329.

⁸⁸ *Ibid.*, at 229–330.

excessively in order to justify flagrant violations of both neutrality and *ius in bello* standards during the war. These were ontological justifications advanced in line with the strategic assessments and interests of the German government, which did believe that there either would be a quick and decisive victory in the West or the overall defeat and inevitable demise of the worshipped German Empire. And, equally in line with their perceived geopolitical position, both the UK and the USA justified their entry into the war, including their share of legally disputed measures, such as those linked to the British starvation blockade in the North Sea, as order-related measures.⁸⁹ What both the Allies and Germany had in common in this context was the ultimately destructive use of the notion of reprisals to legally justify *prima facie* violations of recognized rules as measures to enforce rules that had allegedly been violated by the enemy.

Hull is right when she holds that the Allies also fought the war in order to safeguard international law, particularly, if we take into account that for the UK and the USA the vague notion of the balance of power (UK) as well as the more concrete *ius in bello* and neutrality rules (USA) were an integral and strategically vital part of that legal system. In order to make sure that world public opinion knew who was defending European ‘civilization’ and its law and who was acting outside its rules, the Allies did spend an unprecedented amount of money on reports, documentation and media coverage of German wrongdoings. What is somewhat less convincing in Hull’s fascinating account of international law in World War I is her at times too rosy portrayal of the ruling elites in the USA, UK and France as governments guaranteeing and protecting the rights of smaller nations because of their unceasing belief in fairness and equality in international relations.⁹⁰ The three then imperial powers and their governments – at least outside of Europe before 1914 – had neither proven to be particularly consistent defenders of sovereign equality of smaller nations nor of the strict application of humanitarian law in conflicts in their peripheries.

Hull herself reconstructs in great detail that the UK government during the war also took a number of conscious decisions to violate the rights of smaller neutral states in order to make the ‘undeclared’ naval blockade more effective or by using the notion of ‘military necessity’ itself.⁹¹ US legal advisers in a 1915 memorandum on the UK’s naval blockade found it to be ‘a grave violation of neutral rights’.⁹² And both France and the UK eventually engaged in the vicious circle of reciprocal suspension of rules in the form of reprisals, being fully aware that this would massively damage international legal structures as a whole and affect the rights of third parties (neutrals). However, after the brutal excesses of the German army in Belgium, Germany had been identified in Western and US public opinion as the state conducting its military operations in constant violation of international law. From this moment onwards, it was in the direct political and military interest of the UK and France not to lose the advantage

⁸⁹ On the justifications given, cf. Hull, *supra* note 14.

⁹⁰ *Ibid.*, at 329–330.

⁹¹ *Ibid.*, at 185–194, 205.

⁹² Quoted from Benjamin Allen Coates’ reconstruction of international law-related debates within the US administration during World War I. Coates, *supra* note 69, at 144.

of being regarded as generally defending and upholding international law.⁹³ Given that the USA, even before entering the war, had started to support the French and the British war effort through important financial means for this very reason, it was vital not to offend the US government by openly infringing the rights of neutrals and the established rules of international humanitarian law. Abiding by international law after the first massive German violations in 1914 thus directly supported the perceived strategic military interests of the Allies. Disrespect for international law in the eyes of the Allies would have diminished their chances of winning the war with the help of the USA, whereas, for the German military leadership, disrespect for international legal rules constraining warfare rightly or wrongly often appeared to be the only way to win the war. Pointing to such strategic legal asymmetries between the Allies and Germany, however, does not rule out that the UK government, as Hull puts it, acted in many instances out of 'its devotion for law for its own sake'.⁹⁴ After all, the UK had shaped 19th-century international legal structures more than any other European nation and, therefore, also identified itself much more closely with international law than the ruling elites in Germany.

However, was waging war against France in 1914 as such, apart from the clear violation of Belgian neutrality, also a violation of pre-war *ius ad bellum* standards or even a criminal act? It seems that the Allies were aware of the fact that their *ex-post* verdict, which from a moral perspective certainly was in line with public opinion in the Allied and Associated countries in 1918, was not necessarily self-evident from a legal point of view. Germany claimed that it had to start the war for ontological reasons of self-preservation or pre-emptive self-defence.⁹⁵ And, given that most pre-war authors were of the opinion that it was up to the states to decide themselves if a situation of necessity or self-preservation existed, it was difficult to maintain that starting a war as such already constituted a violation of international law. As I have argued above, all of those legal restrictions on the right to wage war in 1914, which may have formed part of international legal discourse up until the mid-19th century, had lost most of their regulating impact through an ever wider range of ontological justifications for waging war recognized by Western governments and Western scholars, including a broad notion of the fundamental right to self-preservation and necessity ('*Notstand*').⁹⁶ The legal debate during the war therefore focused, not by accident, on the violation of Belgian neutrality ('sanctity of treaties') and *ius in bello* violations.

Hence, in Versailles in 1919, it was not the pre-war *ius ad bellum* regime but, rather, the monstrosity of the overall effects of Germany's move to war, the millions of dead

⁹³ Cf. Hull's interpretation of French resistance against the envisaged British blockade policies. *Ibid.*, at 195–196.

⁹⁴ *Ibid.*, at 200.

⁹⁵ The German Chancellor Bethmann Hollweg in 1914 conceded to having violated Belgium's neutrality but saw Germany's move to war as generally justified by the alleged threat to the existence of the Reich: '*Wir sind jetzt in Notwehr und Not kennt kein Gebot!*' Declaration to the Reichstag, 4 August 1914, as cited in H. Fenske (ed.), *Unter Wilhelm II* (1982) 364, at 367.

⁹⁶ Retrospectively criticizing the necessity and self-preservation doctrines as unjustified, see Strisower, *supra* note 86, at 85ff.

soldiers in poison gas-soaked trenches and the German massacres and destruction in civilian areas that, in retrospect, made the war an aggressive, and, thus, also ‘illegal’, war in Western public opinion. Many authors attempted to explain this verdict as a return of the just war doctrine at the end of World War I. I would rather see this as a novel and unique discursive shift, which was an attempt to grapple with the horrific and deeply traumatizing experience with the first fully industrialized major war on the territories of European societies. Western public opinion during the war had created the novel concept of an aggressive war in order to come to grips with the slaughtering on European soils. A more pragmatic motive after the war was that the Allies in any event wanted to make Germany pay for the immense destruction and loss of life suffered.⁹⁷ US President Woodrow Wilson, however, had refused to simply impose on the defeated party a more or less arbitrary fine. This was the traditional 19th-century right of the victor, as practised, for instance, by Germany in 1871 after the Franco-Prussian War. Wilson instead insisted on a rational procedure of fixing compensation sums for concrete German faults and legal wrongdoings. For that very reason, the most destructive wrongdoing – namely, to have started and fought the war against France and its Allies in the first place – needed to be made a legal offence that had to be compensated, even if that meant also rendering the move to war, as such, illegal retroactively.⁹⁸ Invoking the unprecedented ‘crime’ of waging an aggressive world war, however, was not meant to substantively change the existing *ius ad bellum* framework. Interestingly, the League of Nations Covenant, in line with the old pacifist Hague quest for compulsory dispute settlement, continued to take a procedural approach to regulating war. The Covenant stopped short of introducing a comprehensive substantial ban on ‘aggressive wars’ for the future.⁹⁹

Nevertheless, the incrimination of the notion of ‘aggressive war’ and its associated ontological justifications for violence became a central project of international legal activism for the rest of the 20th century. Yet it should be noted in this context that it was not by accident that these notions of ‘aggressive war’ and ‘crimes against humanity’ emerged only after a disastrous war within the core and, thus, not as a reaction to the excessive violence committed by imperial powers in their peripheries before World War I. Organized pacifism in the interwar period intensified its struggle to abolish unilateral wars of conquest between recognized states and culminated in the Franco-American initiative to draft a treaty renouncing wars as a means of national policy, the 1928 Kellogg-Briand Pact. This treaty did not cover measures short of war and did not attempt to outlaw order-related justifications for military interventions. The USA, UK, France and Japan during the negotiations also explicitly declared the

⁹⁷ This is the explanation given by Neff, *supra* note 31, at 287–288.

⁹⁸ *Ibid.*, at 288.

⁹⁹ On the League system, see Lesaffer, ‘Too Much History; From War as Sanction to the Sanctioning of War’, in M. Weller (ed.), *The Use of Force in International Law* (2015) 35, at 49–52; R. Kolb (ed.), *Commentaire sur le pacte de la Société des Nations* (2015), Art. 11; B. Roscher, *Der Briand-Kellogg-Pakt von 1928* (2004), at 36–44; Bothe, ‘Friedenssicherung und Kriegsrecht’, in W. Vitzthum and A. Proelß (eds), *Völkerrecht* (7th edn, 2016) 596, at 597–598. Covenant of the League of Nations 1919, 13 *AJIL Supp.* 128 (1919).

non-applicability of the Pact as to any violent measures taken in their semi-peripheries.¹⁰⁰ The Pact, however, symbolizes the general interwar trend to outlaw military annexations of foreign territory. But, as contemporary scholars already predicted in 1929, a substantive treaty ban on various ontology-related justifications for waging war, without an effective system of collective security, leads to ever more frequent invocations of an expanded notion of self-defence as the last available ontological justification still considered valid.¹⁰¹

Order-related justifications during the interwar period generally were still seen by Western jurists as being necessary, particularly if they were administered collectively through the great power-dominated League Council and later the United Nations Security Council.¹⁰² However, even unilateral interventions in the peripheries of the Western powers remained a frequent practice that was justified as policing and punishment measures. Illustrative examples are violent military measures by great powers in the Middle East, such as the French bombing of Damascus and the UK air raids in Iraq in the interwar period, which had been framed as policing measures.¹⁰³ Nonetheless, international lawyers from the semi-periphery – in particular, from Latin America during the interwar period – successfully delegitimized the notion of the violent decentralized enforcement of the alleged rules of international law by the great powers.¹⁰⁴ And after the insertion of a broad prohibition of the use of force into the UN Charter in 1945 and the International Court of Justice's *Corfu Channel* case in 1948, these unilateral order-related justifications eventually came to be seen as illegitimate reasons for violence also by most jurists from the core.¹⁰⁵ Through decolonization, most of the colonized peoples in the 1950s, 1960s and 1970s acquired formally independent statehood and the status of sovereign equals; but still most of the new governments continued to find themselves in semi-periphery relationships with a state from the core, which often was the former metropole or one of the two Cold War superpowers. With the demise of European formal empires, the second half of the 20th century was marked by the attempt of the two superpowers to justify both unilateral forcible measures of hegemonic and ideologically motivated ordering (communist or capitalist) under an ever-expanding notion of collective self-defence or as 'humanitarian interventions' in their now globally conceived semi-peripheries. The most recent attempt to broaden the notion of self-defence, which is increasingly held

¹⁰⁰ Kellogg-Briand Pact 1928, 94 LNTS 57; on the negotiations and the various national positions regarding the Pact, see Roscher, *supra* note 99; for a concise analysis, see Lesaffer, 'Kellogg-Briand Pact 1928', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010).

¹⁰¹ J.L. Kunz, *Der Kellogg Pakt: Mitteilungen der Deutschen Gesellschaft für Völkerrecht* (1929), 75 at 91–93.

¹⁰² Analysing violent great power interventions in the British and French mandate territories under the League mandate system and the ambivalent role of the League's Permanent Mandates Commission, see S. Pedersen, *The Guardians* (2014).

¹⁰³ *Ibid.*

¹⁰⁴ Becker Lorca, *supra* note 13.

¹⁰⁵ So called 'measures short of war' only to be abolished explicitly by the international judiciary in the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4, at 35.

to cover not only ontological but also order-related justifications for violence, is the revamped ‘unable-and-unwilling’ doctrine of the USA.¹⁰⁶ It allegedly justifies measures of hegemonic ordering and punishment as ‘self-defence’ in the form of unilateral drone strikes against terror suspects in the peripheries of Western states.

4 Conclusion

The use of military force and international law in their historical manifestations builds a complex relationship. While current textbooks often focus on the relentless fight of pacifist international lawyers and enlightened governments to gradually restrain war through more legal rules, we tend to overlook to what extent international law has at the same time normalized the use of force in certain historical periods.¹⁰⁷ Contemporary international legal scholarship had an instrumental role in developing and cementing new justifications for the use of force as well as in adapting justifications to the changing preferences of strong political and economic actors. Methodological trends within the discipline, such as the observed oscillations between natural law traditions and positivism in the 19th and 20th centuries, usually are not at the origin of doctrinal changes but, rather, should be seen as scholarly strategies to enhance or challenge the authority of justifications for the use of force in a particular historical context. In this context, protagonists of pacifist legal projects aspired to create a world without war, but in their concrete and imperfect realization, these projects often ended up serving to buttress or conceal inequality and other forms of hegemonic interventionism.

My main argument with regard to the regime of the use of force during the three decades before World War I was that they spawned two broader patterns of recognized legal justifications for the use of force – namely, order-related and ontological justifications, which decisively shaped 19th- and 20th-century international law. These patterns did emerge in the context of the high water mark of both European nationalism and imperialism. Military force was at the heart of imperialist domination and the related economic exploitation of communities in fully or partially recognized smaller states (semi-periphery) and in the outer peripheries of Western empires as well as essential to the nation-building project. Both order-related and ontological justifications for the use of force helped to legitimize the violence inscribed in those central and interrelated emanations of European modernity. They are here to stay.

¹⁰⁶ See above on the origins of this doctrine and the Roosevelt corollary under section 2.A; out of the vast body of recent literature on the current US justifications only, see Gray, ‘Targeted Killings: Recent US Attempts to Create a Legal Framework’, 66 *Current Legal Problems* (2013) 75; Corten, ‘The “Unwilling or Unable” Test: Has it Been, and Could It Be, Accepted?’, 29(3) *LJIL* (2016) 777; von Bernstorff, ‘Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions’, 5 *ESIL Reflections* (2016) 1, at 1–6.

¹⁰⁷ On this ambivalence of legal humanitarianism, see D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005).