INTERNATIONAL LAW AND THE USE OF FORCE

A Documentary and Reference Guide

SHIRLEY V. SCOTT, ANTHONY JOHN BILLINGSLEY, AND CHRISTOPHER MICHAELSON

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PREFACE

The invasion of Iraq by the United States, United Kingdom, and Australia in 2003 prompted an enormous volume of debate around the world as to whether it was the right thing to do and whether or not it was legal in terms of the Charter of the United Nations. Many who had previously had little interest in international law were now able to conduct a discussion as to whether the invasion had or had not been authorized by the United Nations Security Council. Public outcry in the United Kingdom and Australia prompted those governments to make public the legal opinion on which they had based their decision to join in the invasion of Iraq, and groups of international lawyers spoke out to express their opposition to those opinions.

Iraq thereby brought starkly into focus the body of international law that seeks to govern whether and when countries may resort to the use of force. In the contemporary world, this body of law has as its centerpiece the Charter of the United Nations of 1945. In the scheme of world history it is therefore a relatively recent development. The attempt to place strict limits on the occasions when a country can use force was one of the great governance innovations of the twentieth century. Although political philosophers and lawyers had long called for this development, there was no proof that it would work. It was a bold experiment, and one that the world could not afford to see fail.

This book responds to this heightened interest in international law addressing the use of force and traces the story of this great experiment in world politics. International law on the use of force traditionally comprises two components: first, the law on the use of force and prevention of war *(jus ad bellum)*, which seeks to regulate the resort to force by States, and, second, the law of armed conflict *(jus in bello)*, which concerns whether military operations are conducted justly and in accordance with international customs and treaties (regardless of whether the initiation of hostilities had been lawful). This book mainly addresses the first component, *jus ad bellum*.

The focus of the early chapters is on the historical process by which incremental steps were taken to outlaw the use of force in relations among countries. The first

great step was taken in the Covenant of the League of Nations. The Covenant was unable to prevent World War II, but the lessons that governments and international lawyers took from this and other landmark developments, such as the 1928 Kellogg-Briand Pact, were put to good effect in the UN Charter.

Achieving the prohibition on the use of force in the Charter was by no means the end of the path. Just as a constitution is a living document that must keep up with the changing demands of a national political system, so the interpretation of the UN Charter, which can be considered as a constitution of international society, has had to evolve in an international society that is constantly changing. International lawyers have had a vital role to play in helping to refine the framework outlined in the Charter and in applying it to real world situations.

The bulk of this book addresses some of the key issues that have been raised over the decades since 1945. One of the most vital of these is the content and scope of the right of self-defense. If self-defense is the only permissible exception to the prohibition on the use of force, the exact parameters of that right are deserving of close scrutiny and refinement. Moreover, if the UN Security Council is to have a role in maintaining international peace and security to replace the historical right of a country to wage war in pursuit of its perceived national interests, just when and how the Council is to play that role is crucial.

As will be seen, the United States has had a special role in the creation and refinement of the international law on the use of force. The role of President Woodrow Wilson in establishing the League of Nations is well known, but the contribution of the United States peace movement in bringing about the Kellogg-Briand Pact is less well known. Much of the drafting of the UN Charter took place in the U.S. State Department. This intimate relationship between the United States and the evolution of the international law on the use of force means both that the United States tends to regard its interpretation and application of that law somewhat possessively and that the rest of the international community judges the United States particularly harshly when it does not seem to live up to the standards that it played such an important role in establishing.

While the United States played a pivotal role in establishing this body of international law and, indeed, has continued to shape that law through the conduct and justification of its foreign policy, this book is not about the United States per se. It aims to speak to all peoples who seek clarity on the subject. While the United States has been the subject of extensive criticism, this book does not aim to add to the litany of books condemning U.S. foreign policies. Rather, it aims to provide as objective as possible an account of the engagement of the United States—and of other countries—with the international law on the use of force.

This book examines the international law on the use of force through a selection of documents of fundamental importance to this body of law. Each is of significance for one or more of three reasons. Either it sheds light on the political story through which this body of law evolved; or it is a legal document, a "source" of international law; or, third, it helps us to assess the real-world impact of that law. For, not only does this book examine some of the legal nuances of the framework of the UN Charter, but it considers whether this great experiment in world politics has been successful. Has there in fact been a decline in the incidence of wars, and,

if so, is this trend attributable to international law? Special care was taken to select a variety of documents that include extracts of international treaties and UN Security Council and General Assembly resolutions as well as transcripts of important speeches and press conferences.

This book is intended to be user-friendly. Its goal is to explore the international law on the use of force as a political endeavor and to draw some preliminary conclusions regarding the contribution of this evolving body of law to international security. The documents are divided according to their subject matter into ten chapters. Chapters 1 and 2 explain the dream of ending war through an international rule of law and provide historical background to the current legal regime, which outlaws use of force in inter-State relations. Chapter 3 outlines the post–1945 Charter framework regarding the use of force. Chapters 4 through 8 address questions that have arisen or come to the fore during the life of this legal framework, either because something was left unclear in the original plan or because of changing circumstances. Chapter 9 considers the legality of the 2003 invasion of Iraq, and Chapter 10 concludes by seeking to assess whether this great experiment in world history has made the world a more secure place.

Each chapter begins with a very brief introduction to the topic of that chapter and its place within the subject as a whole. This is followed by a selection of documents. Each document is prefaced by a series of bulleted points, which enable the reader to see at a glance (1) the details of the document, (2) the date of the document, (3) where the document was created or the text finalized, and (4) a succinct summary of the significance of the document. Then follows the document itself. Where those documents are long, it was necessary to extract the key section or portions of the document so as not to obscure the key points through unnecessary additional text.

Each document is followed by an analysis that explains in much greater detail its significance and contents. The analysis is accompanied by sidebars containing interesting associated facts or, in some cases, portions of related documents. The reader is invited to explore further any aspects of the topic through following up on the documents and analyses via the further readings listed at the conclusion of each analysis. A much more comprehensive bibliography of additional readings is provided at the end of the volume, listing books and academic journal readings on the subject as well as a range of relevant Web sites.

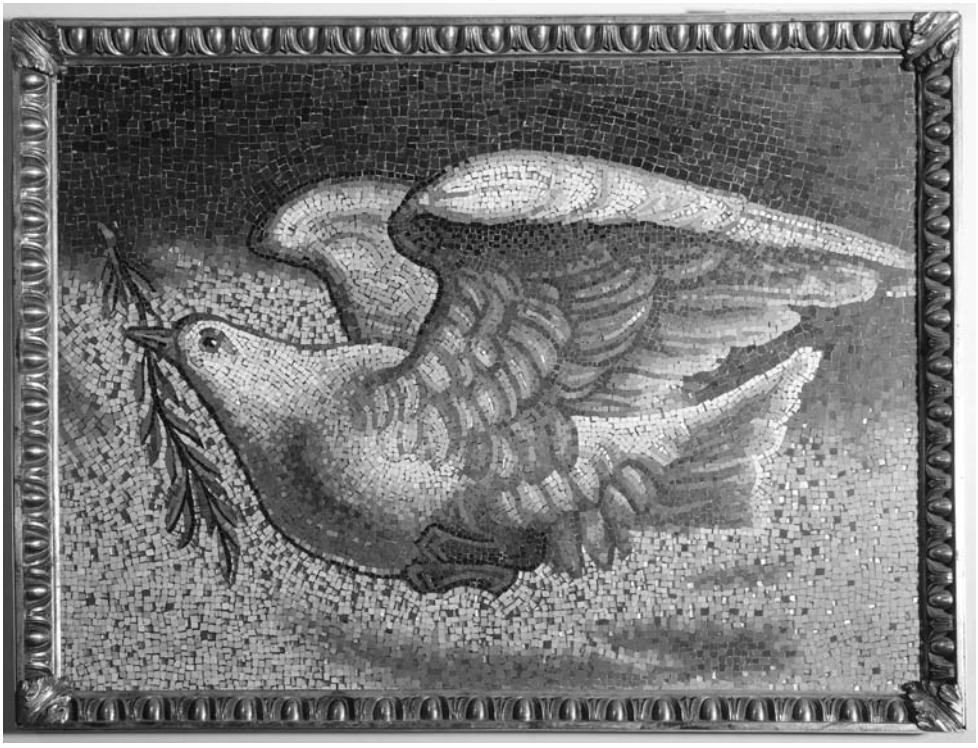
The book thereby aims to cater to interested members of the general public as well as to students requiring an accessible but accurate and nuanced coverage of the content. The authors have also had in mind as a potential audience those who work in related fields or the world of diplomacy who wish to learn more on the subject in a manner more accessible and "less dry" than the standard international law text. We hope that it will inspire readers to learn more about this and other aspects of international law.

As far as the preparation of the book's substantive chapters is concerned, Shirley Scott covered Chapters 1 through 3; Anthony Billingsley concentrated on Chapters 4, 7, and 9; and Christopher Michaelsen focused on Chapters 5, 6, and 8. The book benefited greatly from the most efficient and thorough research assistance of Orli Zahava, to whom we express our sincere gratitude and appreciation. Her strong

organizational skills and dedication to the project have done much to ensure its successful completion. Sascha Knoepfel located graphics and provided technical and research support to the authors during his time as a research practicum student in the School of Social Sciences and International Studies at the University of New South Wales. Needless to say (but we shall say it anyway) we are solely responsible for any errors.

Shirley Scott—Anthony Billingsley—Christopher Michaelsen

INTRODUCTION



The "Dove of Peace." In 1979 Pope John Paul II presented the United Nations with this reproduction of a twelfth-century mosaic. Courtesy of Lois Conner, UN Photo

Warfare and violence have been features of relations between organized communities throughout history. Even before the modern age of weapons of mass destruction, the results of this behavior have often been ruinous. Recognizing the widespread impact of warfare, States have attempted to provide rules or principles to govern armed conflict. Most civilizations have also developed justifications on which to base a decision to go to war. In the West, the most prominent philosophical tradition addressing the initiation and conduct of hostilities has been that of the "just war." This introductory chapter will briefly trace the evolution of just war thinking as an important antecedent of the prohibition on the threat and use of force in the Charter of the United Nations. The Introduction will conclude by outlining the approach this book takes to placing the international law of the use of force in a legal, political, and historical context.

THE ORIGINS OF THE JUST WAR TRADITION

The modern concept of the just war has its origins in a fusion of early Roman and Christian teachings.[1] In the ancient world, the Romans followed the principle that the Republic would initiate hostilities against another State only if there were a just cause.[2] Early Christians did not hold political power and did not attempt to seize it by force; some were pacifists, not accepting war under any circumstances. Once Christianity became the official religion of the Roman Empire, however, the Church had to address the question of the duties of rulers.[3] In his book *De Civitate Dei* (The City of God), St Augustine (A.D. 354–430) set out the view that, although every war was a lamentable phenomenon, the wrong suffered at the hands of the adversary necessitated waging "just wars."[4]

Perhaps the most significant of all philosophers of just war was Thomas Aquinas (1225–1274), who has been described as "the greatest theologian of the medieval, and perhaps of any, era."[5] Aquinas built upon the principles set out by Augustine to develop three criteria of a just war:

1. It must be waged under the authority of a ruler rather than by a private individual.
2. It must have a just cause: "those who are attacked, should be attacked because they deserve it on account of some fault."
3. The belligerents must have a "rightful intention": to advance the good or to avoid evil.[6]

Other writers, such as Francisco de Vitoria (c. 1492–1546), sought to elaborate and refine what constituted a "just cause." Vitoria wrote on the Spanish conquest of Central and South America and concluded that the Spanish invasion *was* justified, on the grounds that, contrary to natural law rules, the Native Americans had unlawfully attempted to exclude Spanish traders from their kingdoms. Vitoria also confessed, however, that his "blood froze in his veins" at the thought of the terrible atrocities committed by the Spanish in the process.[7] His writings on war focused on limiting the horrors of conflict. In principle, he said war could not be justified except as defense against aggression or to right a very great wrong. Moreover, a declaration

of war should be preceded by efforts at conciliation and arbitration. A ruler should consider whether the war might not do more harm than good. Innocent people might be killed only if it were impossible to distinguish them from participants. Finally, Vitoria maintained that if a subject's conscience told him a war was wrong, he must not take part in it.[8] At the end of the sixteenth century, Alberico Gentili, an Italian writer and professor at the University of Oxford, brought classical just war theory to bear on a broad range of concrete questions arising from the actual practice of military hostilities.[9]

CLASSICAL WRITING ON THE "JUST WAR" AND THE BIRTH OF MODERN INTERNATIONAL LAW

Hugo Grotius (1583–1645), a Dutch scholar and jurist often considered the father of modern international law, further refined the concept of just war. Grotius was influenced in his thinking by the horrors of the Eighty Years' War between Spain and the Netherlands and the Thirty Years' War between Catholic and Protestant European nations. His contribution to the development of Western thinking on what constitutes a "just war" was to develop a secular form of theorizing.[10] Grotius transformed aspects of natural law theory into what he termed the "law of nations." The distinctive feature of the "law of nations" lay in the fact that it was seen as a body of law distinct from the law of nature and, as a consequence, not as part of law governing human social affairs in general. Instead, it was a set of rules applying specifically to one particular category of human beings: rulers of States.

In his important work *De Jure Belli ac Pacis (On the Law of War and Peace)* Grotius attempted to provide a general ethical basis on which conflicts might be restrained. According to Grotius:

> Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon the subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.[11]

De Jure Belli ac Pacis contains a set of principles that Grotius believed to be binding on all people and nations regardless of local custom. The book identifies three circumstances in which war can be justifiable (*jus ad bellum,* justice in the resort to war): self-defense, reparation of injury, and punishment. Grotius also took up the issue of the rules that regulate the conduct of war once it has begun (*jus in bello,* justice in the conduct of war). He maintained that all parties to war are bound by such rules, whether or not their cause is just.

The emergent system of international law incorporated elements of natural law thinking, by which the content of the law is said to be set by a divine source or by

Hugo Grotius. Portrait by Jan van Ravesteyn, 1599. Courtesy of Dutch Portraits.

nature and hence to have validity everywhere. Increasingly, however, international law became positivist in orientation, meaning that the content of the law did not derive its validity from divine or moral sources but from criteria internal to the legal system itself. In the late seventeenth and mid-eighteenth century, the German philosophers Samuel Pufendorf (1632–1694) and Christian Wolff (1679–1754) distinguished between natural law, reflecting the influence of God, and voluntary law, resulting from the positive actions of States.[12] Wolff, who had been trained as a mathematician, was criticized for relying too much on a logical structure and failing to take account of the actual behavior of States. Emerich de Vattel (1714–1767) addressed the practical behavior of States in his book *Le Droit des Gens (The Law of Nations)* of 1758. Vattel defined the law of nations as "the science of those rights which exist between nations and States, and of the obligations corresponding to those rights."[13] Vattel argued that each State was sovereign, independent, and equal and that the law of nations could be derived from an examination of writings about State practice, from treaties agreed to by States, and from custom drawn from the implicit acceptance of States. Whereas Wolff had been disdainful of the voluntary law, Vattel fully embraced it.

This had important implications for thinking regarding the legality of war. The natural law theory of just wars allowed a State to resort to force in self-help to vindicate a legal right that had been violated, which meant that in any given conflict, only one side may be fighting justly. The voluntary law, however, was not concerned as to which party to a conflict had a stronger legal claim to use force but treated each side as if it had lawfully resorted to war; it largely contended itself with regulating the conduct of wars.

By the nineteenth century, legal positivism had taken hold. The belief that law is an entirely human institution led eventually to the view that rules agreed upon by States were the *only* true source of international law. As the Permanent Court of Justice would later express it in the *Lotus* case, "the rules of law binding upon States . . . emanate from their own free will."[14] Advocates of legal positivism rejected the distinction between just and unjust wars. From the positivist perspective, a State using armed force was creating a factual situation in which the set of international rules relating to the conduct of hostilities replaced that which applied during peacetime, but international law did not attempt to delve into either the origins or the merit of that act.[15] W. E. Hall asserted that:

> International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relations.[16]

From roughly the eighteenth to the twentieth century States were presumed to have a right to wage war in the pursuit of their national interests.[17]

While the decision to resort to war was seen as a legal right intrinsic in the sovereignty of the nation-State, the positivist era of the nineteenth century was the period in which the international community first began "legislating" by way of multilateral

treaties—agreements legally binding on those States that have given their consent to be so bound. The Western philosophical tradition of just war theorizing can be seen underpinning some of the early examples of multilateral treaties that attempted to regulate the conduct of hostilities *(jus in bello)*. The first major example of this was the 1856 Declaration of Paris, which, *inter alia*, restricted the capture of private property at sea and abolished privateering. The 1868 Declaration of St. Petersburg introduced a ban on exploding bullets and denounced total-war practices by stating that the only permissible objective of war is the defeat of the enemy's armed forces.

THE INTRODUCTION INTO INTERNATIONAL LAW OF A PROHIBITION ON THE THREAT AND USE OF FORCE

This book is not concerned with the body of positivist international law that has developed in an attempt to regulate the conduct of hostilities once they have commenced, so much as with an arguably more radical legal innovation of the twentieth century. This was the introduction into international law of a prohibition on the first use of force and even of the threat to use force. As will be seen in later chapters, the Treaty of Versailles and the 1928 General Treaty for the Renunciation of War constituted preliminary steps that culminated in Article 2(4) of the Charter of the United Nations. Article 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) can be understood as a general prohibition on the use of force in inter-State relations. The Charter intends the United Nations to enjoy a monopoly over the use of force, permitting States to resort to force only in self-defense or if authorized by the United Nations Security Council (UNSC).

International law in the post-1945 world has, as its two principal sources, treaty law and customary international law. Customary international law is defined as "evidence of a general practice accepted as law."[18] Custom is made up of two elements: State practice and *opinio juris*. State practice refers to a pattern of State behavior, and *opinio juris* is "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[19] Both State practice and *opinio juris* must be present in order to find that a rule of customary international law has developed. The International Court of Justice has confirmed that the principles regarding the use of force found in the UN Charter are not only part of treaty law but correspond, in their essentials, to what is found in customary international law.[20] This confirms that the prohibition extends to all States, whether or not they are members of the United Nations. Indeed the prohibition on the first use of force by States in Article 2(4) is widely held to constitute *jus cogens:* a peremptory or absolute rule of international law recognized by the whole community of States, from which no derogation (exemption) may be permitted.

Scholars are divided as to the degree to which the Charter's prohibition on the first use of force is a modern manifestation of the just war tradition. As Lynn Miller

observed, "some writers, concerned with the broad concept of the attempt to limit war, have placed the Covenant and the Charter in the tradition of just war theory, whereas others have argued on a somewhat more specific basis that the content of the peacekeeping provisions of these twentieth-century organizations differs from that of the traditional just war doctrine."[21] There is little doubt that the intellectual heritage from which the Charter derived was predominantly Western and that the just war tradition is central to the philosophical heritage of the West as regards questions of war and peace. Not all scholars accept that there is any closer connection between the just war tradition and the prohibition on the use of force in the UN Charter. According to Yoram Dinstein:

> It is wrong to believe that the UN Charter, in forbidding the use of force in international relations, has followed in the footsteps of the 'just war' doctrine. The proscription of inter-State force amounts to a veritable revolution compared to earlier international law. The UN Charter has wiped out the pre-existing permissive legal norms concerning recourse to inter-State force and has introduced a whole new set of legal norms based on a *jus contra bellum*. It is totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter?[22]

In asserting that it is irrelevant today as to whether a war is just, Dinstein is referring to the content of the contemporary, predominantly positivist, system of international law in which considerations of morality or theology are explicitly excluded from the logic of legal analysis; the content of the law derives its authority from the rules to which States have given their consent. If, however, we recall that the just war tradition began as a Christian practice of theorizing about conditions under which war could be acceptable, we can usefully view the Charter from the perspective of just war:

> Even though just war thinking in the strict sense, in the present world is clearly outdated and it is unequivocally contrary to modern international law, as found in the General Treaty for Renunciation of War in 1928, in Article 2(3) and (4) of the Charter, and Chapter VII of the UN Charter, some provisions of the Charter are similar to jurisprudence upon the *jus ad bellum* and are readily reconcilable with some of the major strands of Christian and secular thinking upon war and armed conflict. . . . The UN Charter's position on the just war question is that it is permissible for States, regardless of their domestic power structures, to go to war, if and only if they are victims of the threat or use of force against their territorial integrity or political independence and only until such time as the UNSC acts to restrain the aggressor.[23]

Neff, in his general history of war and international law, refers to the UN Charter as having reinstated a "full just war system".[24]

In recent conflicts initiated by the West, the public in the United States, in the United Kingdom, and elsewhere have demanded that their leaders explain their rationale for the launch of hostilities. The NATO governments that used force during the Kosovo crisis of 1999 made much of the need to respond to a humanitarian crisis, and the governments involved in the 2003 invasion of Iraq emphasized

breaches of international law on the part of Iraq. Both of these lines of justification have echoes of just war theorizing, and, on occasion, national leaders have explicitly invoked the language of a "just war." Tony Blair, Prime Minister of the United Kingdom at the time of the Kosovo crisis, claimed that NATO's war was a just war because it was based not on any territorial ambitions but on values.[25]

The attacks of September 11, 2001, gave rise to a flurry of writing on just war. Faced with new security challenges, the West has arguably felt the need to review its attitude toward war, drawing on this long tradition of philosophical theorizing as to when resort to war might be morally acceptable. A cynic might say that we have seen this revival of just war thinking because the tradition can offer the State more malleable guidelines for the use of force than can modern positivist international law, and it is for this very reason that many international lawyers are strongly opposed to references to the just war that aim to legitimate breaches of the Charter or to weaken its normative pull. The just war tradition is, on the other hand, welcomed by those—including lawyers—who seek to promote the ethical conduct of international affairs. This is so precisely because the tradition offers a framework within which moral considerations on which the Charter is silent can be taken into account. Exploration of the question of whether wars of national liberation could be waged to end colonialism often took place within a just war framework, arguably because the issue had been left unaddressed by the Charter. The Rwandan genocide in 1994 and ongoing atrocities in Darfur (Sudan) have prompted heated debate on the concepts of humanitarian intervention and the "responsibility to protect," which draw heavily on principles developed by the just war doctrine.[26]

THE RATIONALE FOR THE SELECTION OF DOCUMENTS

In considering how to approach this book, we were aware that the use of force is one of the most hotly debated issues in the study of international relations and international law. Attempts to enclose the resort to force by States within a legal framework have run up against traditional patterns of State behavior and the basic instinct of States that their core interests and national honor can be preserved only by their ability to threaten or to use force against other States. We approached our writing from the perspective that international law plays a vital role in assisting States to pursue their interests through nonviolent and rule-governed means. Indeed, we are of the view that international law has contributed greatly to changes in State policy and practice over the past hundred or so years. We are, however, aware that not everyone shares this view. A tradition of thinking associated with realism in international relations dismisses international law as little better than an ideological disguise for the policies of great powers and considers any attempt to constrain the powerful via international law as doomed to failure. We have chosen for analysis documents that highlight the various perspectives involved.

The documents selected include some of the most famous and important in the corpus of international law. They include other documents that are important and illustrative but have been overlooked or forgotten with the passage of time. In addition to

treaties, UN resolutions, and judgments of international tribunals, we were careful to include a variety of other sources, including public speeches and press conferences. These sources tend to be excluded in more traditional collections and works on international law. What all selected documents have in common is that they illustrate the relevance of international law to national decision making and to relations among States.

CHAPTER 1: INTERNATIONAL LAW AND THE STRUGGLE FOR WORLD PEACE

The development of an international legal regime addressing the use of force and binding on all States was a twentieth-century development. But, as has already been suggested, the twentieth-century developments cannot be fully understood except within a longer historical context. The tradition of writing on just war is one historical trajectory leading to the present. Chapter 1 introduces others, including that of treaties of alliance that may commit States either to use, or to refrain from using, force in particular situations. The Treaty of Kadesh between the Egyptian and Hittite empires, which is generally dated to 1258 B.C., for example, contained provisions on the nonuse of force between the two parties, guarantees of recognized mutual borders, and the return of refugees. In the nineteenth century, European States created a web of alliances that placed obligations on States either to come to the defense of an ally or to stay neutral in the event of war breaking out. The law of neutrality was intended to enable States not parties to a conflict to continue with trade and commerce without becoming entangled in the war.

An important complement to the introduction of a legal prohibition on the use of force in inter-State relations has been the evolution of a body of international law that aims to help States to settle disputes through peaceful means. This chapter considers the historical antecedents to the web of international courts and tribunals that exist today, and the political impediments that scuttled the first attempts to develop a world court.

CHAPTER 2: THE TREATY OF VERSAILLES AS A TENTATIVE TRIAL RUN

The horrific loss of life and catastrophic economic consequences of World War I prompted attempts to curtail the still-accepted right of a State to use war to achieve its national objectives. The Covenant of the League of Nations prohibited in general terms the resort to force and developed several mechanisms, such as arbitration, a judicial framework in the Permanent Court of International Justice, and elaborate disarmament processes as confidence-building measures. The focus on disarmament was augmented by an attempt to place "collective security" at the heart of the League's powers. As explained in Chapter 2, the League's practical approach was reinforced by the Kellogg-Briand Pact, which sought to provide a broader philosophical imperative whereby States made the abnegation of war a fundamental policy doctrine.

The Peace Palace in The Hague. This was the home of the Permanent Court of International Justice and now houses the International Court of Justice. Courtesy of the International Court of Justice.

The League's failure to prevent a second world war naturally led to widespread questioning of the wisdom of the idea that war could be avoided through reliance on law and international norms. Some people insisted that this was a dangerous approach given the natural tendency of States to rely on force as the basis of their self-defense. Others argued that the disaster was the result of the League being inadequately equipped and supported. It was this perspective that inspired U.S. President Roosevelt when planning began for the post–World War II international order.

CHAPTER 3: THE UN CHARTER REGIME ON THE USE OF FORCE

The text of the United Nations Charter reflects fundamental continuities from the League of Nations and the Kellogg-Briand Pact. The Charter was also a product of World War II, its drafters having endeavored to learn from the experiences of that conflict. Importantly, the Charter gives the Security Council a virtual monopoly on the use of force. Even cases of self-defense are to be referred to the Council for resolution. The new organization incorporates the dispute resolution measures pioneered by the League of Nations. The International Court of Justice serves as the successor

to the Permanent Court of International Justice and has addressed questions concerning the law of the use of force in several of its judgments.

The League of Nations had been greatly weakened by the absence of the United States. In planning for a replacement organization, it was perceived as crucial that all the major powers of the day be fully committed to its success. Chapter 3 includes an excerpt from the debate in the United States Senate that preceded America's endorsement of the United Nations. U.S. Senators deemed the United Nations equipped to deal with threats to international peace and security and were reassured that the inclusion of the veto of the permanent members in the Security Council meant that the UN Charter could not unduly curtail U.S. policy choices. Within weeks of the signing of the Charter, the United States dropped the first atomic bomb over Hiroshima. That event, and the reaction of the Soviet Union, created a particular challenge for the Charter regime, which had not been designed for the atomic age.

CHAPTER 4: KEY CHALLENGES TO THE GENERAL PROHIBITION ON THE USE OF FORCE

Chapter 4 examines a range of cases in which the scope and significance of Article 2(4) have been subject to challenge. In some instances States have used force in ways that ostensibly do not comply with the prohibition on the use of force found in Article 2(4), and in such instances the States resorting to force have sometimes attempted to bolster their arguments with the introduction of supposedly new principles of international law. Among the most contentious and tenacious are the concept of humanitarian intervention and the related idea of the responsibility to protect. These ideas emerged out of the tension in the Charter between the principle of the sovereign integrity of States and the responsibility of the international community to protect fundamental human rights and to prevent genocide. Chapter 4 discusses some of the key challenges to the prohibition of the use of force and the response of the international community to those challenges.

Peace stamp of the German Democratic Republic (East-Germany), 1950. Courtesy of the Federal Republic of Germany.

CHAPTER 5: THE RIGHT OF SELF-DEFENSE

Chapter 5 examines the scope and content of the concept of self-defense. As an inherent right of States, self-defense has a long history. The concept was given a significant degree of recognition in the context of the 1837 *Caroline* incident. The modern formulation of the right of self-defense is contained in Article 51 of the UN Charter as an exception to the general prohibition on the threat or use of force. Scholars and policymakers nevertheless continue to disagree on the correct interpretation of Article 51. A particular point of contention is whether, and to what extent, Article 51 is compatible with the

concepts of anticipatory and preemptive self-defense. Similarly, there is disagreement on whether the protection or rescue of nationals abroad can be justified by self-defense. The law of self-defense has also been challenged by developments since 1945, including the introduction of nuclear weapons. The international community is split over the legality of these weapons, with supporters highlighting their role in the ultimate security of States and opponents drawing on international humanitarian law to reinforce their case.

CHAPTER 6: THE CRIME OF AGGRESSION?

Chapter 6 considers the crime of aggression in international law. It traces the origin and development of this international crime by looking at the Nuremberg and Tokyo tribunals, which were established in the aftermath of World War II to prosecute Nazi and Japanese war criminals. As with terrorism, the definition of aggression remains controversial. A major step towards a legal definition of aggression came with the adoption by the General Assembly in 1974 of a Declaration on the Definition of Aggression. The Declaration generally reaffirmed the principle that acts of aggression are contrary to the UN Charter and international law. A number of countries were keen to see aggression included in the list of crimes over which the International Criminal Court, established in 1998, could exercise jurisdiction and were successful in achieving its inclusion in the Statute of the Court, but agreement on a definition of aggression was not forthcoming during negotiations. The Court will exercise jurisdiction over the crime of aggression once the definition has been finalized. Recent efforts in this regard appear to have been promising, but agreement remains elusive.

CHAPTER 7: CAN COLLECTIVE SECURITY WORK?

The idea of collective security is central to the United Nations structure for the maintenance of international peace and security but has been difficult to put into practice. After the failure of the League's model of collective security, the drafters of the United Nations Charter sought to base a new approach on more realistic foundations. Chapter 7 demonstrates that the record of success has been mixed. There have been only two occasions on which the United Nations has formally invoked collective security action. Chapter 7 considers these two instances of collective security as well as situations in which an apparent violation of the Charter has not been met by a collective response.

CHAPTER 8: TERRORISM, INTERNATIONAL LAW, AND THE USE OF FORCE

This chapter looks at how the threat of terrorism is addressed by States within the framework of international law. The world has witnessed a range of spectacular acts of terrorism since the early 1960s. The international response has been complicated

by an inability to agree on a definition of the term "terrorism" in international law. Despite such problems, the international community has pressed ahead with measures designed to address specific aspects of terrorism. Both the UN General Assembly and the Security Council have confirmed that terrorism qualifies as a threat to international peace and security. The international community has also adopted several multilateral conventions and protocols that address specific criminal acts considered terrorist in nature. The chapter draws attention to the legal basis for military action against Al-Qai'da and the Taliban in Afghanistan and the Bush administration's highly controversial practice of detaining alleged illegal enemy combatants in Guantanamo Bay and elsewhere.

CHAPTER 9: WAS THE U.S. INVASION OF IRAQ LEGAL?

During the 1990s the Security Council devoted much time to the problem of how to deal with Iraq after its expulsion from Kuwait in 1991. Toward the end of the decade, the possibility of military action against Iraq was discussed on several occasions, and Council members made clear their view that any action must first be specifically approved by the Security Council. The 2003 invasion of Iraq by the United States and a small coalition took place without such approval and provoked concern among States and widespread popular opposition. In the public debate in the months immediately before the invasion most States took the view that the invasion represented defiance of the United Nations Security Council and threatened to undermine the rule of law. The United States Administration devoted considerable effort to providing justifications for the invasion under international law. Chapter 9 examines the legal justifications provided by the main protagonists in the context of the crisis and its origins.

CHAPTER 10: CONCLUSIONS: HAS THE INTERNATIONAL LAW RELATING TO THE USE OF FORCE CREATED A MORE PEACEFUL WORLD?

Early attempts by the international community to limit the resort to force by States and to outlaw war failed to prevent the outbreak of World War II. The ideas contained in the Covenant of the League of Nations and in the Kellogg-Briand Pact nevertheless survived and were embodied in the Charter of the United Nations with its broad prohibition of the threat and first use of force. The UN Charter is often likened to an international constitution, and its prohibition on the use of force is widely agreed to represent not only customary international law, but *jus cogens*.

We argue that the establishment in international law of a prohibition on the threat and use of force in interstate relations has had a significant influence on State behavior. This can be seen in the expectation that a breach of the norm will trigger an international response. Given the tumultuous nature of the post–World War II

years, including the Cold War and decolonization, it is reasonable to believe that, without Article 2(4), the incidence of international violence would have been much greater than it has been.

While there are always those who doubt that international law can have any independent impact on powerful States, the leaders of even the most powerful States usually perceive a need to offer a legal justification when they do decide to use force in the international arena. International law provides not only an expected standard of behavior but a common means of legitimating—and de-legitimating—the actions of States. It serves to render more predictable the behavior of States and to offer alternatives to settling disputes through armed conflict.

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INTERNATIONAL LAW AND THE STRUGGLE FOR WORLD PEACE

Peace Palace Competition. Winning design by J. F. L. Frowein, March 23, 1907. Courtesy of Delft University of Technology Library, The Netherlands.

OVERVIEW

The international legal regime addressing the use of force by States was a twentieth-century development. The ideal of a world governed by law rather than by military might is, however, far older. And, even before there was an attempt to establish a legal prohibition against war, there were treaties of alliance that placed obligations on States, for example, either to come to the defense of an ally or to stay neutral in the event of war breaking out. This chapter looks at what existed before the momentous legal developments of the twentieth century as regards obligations in international law either to use or not use force and to settle disputes by peaceful means. It provides useful historical background for the chapters to follow.

The Peace Movement in the Nineteenth Century

- ***Document:*** Extract from William Ladd, *An Essay on a Congress of Nations for the Adjustment of International Disputes Without Resort to Arms*
- ***Date:*** Originally published by Harvard University, 1840
- ***Where:*** Maine, United States
- ***Significance:*** This is an outline of a very influential nineteenth-century scheme for how to achieve world peace through international law.

DOCUMENT

The chief end and purpose of government is, to prevent one person from injuring another; so that every one may sit under his own vine and fig-tree, with none to molest or make him afraid. This is the object of all our laws, and all the expensive machinery of government, which has taken care that no individual should molest his neighbor; and when disputes arise, so far from leaving each individual to take his cause into his own hands, governments have provided courts of law to decide the controversy. In many governments, the legislative has been entirely separated from the judicial power, and the executive from both. In all of them, the impartiality of the judicial power has been in a ratio equal to the knowledge and virtue of the people. In some of these governments, laws have been made, not only for securing the rights of private individuals, but also of bodies corporate, and even of component parts of the empire which are for many purposes independent. No such thing has yet been done with respect to nations, though courts have been instituted, to decide controversies which have arisen between two or more members of the same confederacy of nations. Our object is to go one step further, and appoint a court, by which contests between

nations shall be settled, without resort to arms, when any such controversy shall be brought, by mutual consent, before it.

By consent of all writers on international law, nations are considered as individual, moral persons, perfectly equal and independent of one another. Therefore, the same moral laws which ought to govern individuals, ought to govern nations. What is wrong for an individual, is wrong for a nation. In the intercourse of these moral persons, disputes will arise, injuries will be done, retaliation and revenge will follow, and, unless some means of terminating their disputes by amicable and rational methods are devised, war will be the consequence. There are three ways already in use, whereby war may be avoided. The first is, by cultivating a spirit of peace, which is the spirit of the gospel, and is as much the duty of nations as it is of individuals; by this means, injuries, especially if not very grievous, will be overlooked, or be passed by with a bare remonstrance, and an appeal to the moral sense of the nation that has inflicted the injury. The second is, by negotiation, where the subject in dispute is formally discussed and settled by reparation or compromise. If this cannot be done, the next step is mediation of a friendly power, accompanied with arbitration and the acceptance of the award. The last resort is war, which commonly increases, instead of remedying the evil. We propose a plan more likely to procure justice than either of these.

As government is an ordinance of God, necessary for the safety, happiness and improvement of the human race, and as it is absolutely necessary for the peace of society, that when the selfish passions of man come in conflict, the judgment of the case should not be left with the individuals concerned, but with some impartial tribunal; so it is equally necessary, for the peace and happiness of mankind, that when the selfish passions of *nations* come in conflict, the decision of the case should not be left with an individual nation concerned, but should be referred to some great tribunal, that should give a verdict on the affairs of nations, in the same manner that a civil court decides the disputes of individuals. If it was desirable for individuals, bodies politic, and small independent tribes, to unite in some general system of jurisprudence, why is it not equally desirable for large tribes and nations to do the same?

There are two difficulties in the way, which require our attention; but it will be found that they may as easily be removed as were the difficulties attending the commencement and advancement of institutions for the adjudication of difficulties arising between individuals. The first of these is the want of a body of men to enact and promulgate laws for the government of nations; the other is the want of a physical force to carry the decisions of a court of nations into execution.

As to the first difficulty, the formation of what we call a CONGRESS OF NATIONS is no greater than the assembling of any conversation for the enactment of laws, by mutual consent, for the government of the parties represented. It is not expected, that such a combination of powers would be of a very great geographical extent, as it could only embrace the most civilized, enlightened, and Christian nations that could be represented at one great diet, by their ambassadors; and there form a league and covenant, each with every one, and every one with each, that they would, in their future intercourse, be governed by the laws enacted by the diet or congress and ratified by the governments of all the powers so represented. The world has now a kind of code of *voluntary* international law, laid down by eminent civilians, which is, for the most part, respected, but which

is not confirmed, by any compact or agreement, and on which the authors themselves often differ, so that what is now called the law of nations, is but little better than a nose of wax, which may be twisted either way, to suit the purposes of dominant nations.

The magnitude of the second difficulty is apparently greater, but it will be much reduced by reflection. It is true, it would not comport with the peace and happiness of mankind, to invest rulers with the power to compel an acquiescence in the decisions of a COURT OF NATIONS by arms; but if we look into the condition of man in a state of civilization, it will be found, that where one man obeys the laws for fear of the sword of the magistrate, an hundred obey them through fear of public opinion. But I would further observe, 1st, that public opinion has not yet been made to bear on nations, and little or no means have hitherto been used to make it bear on them. The plan we propose is one of the means eminently adapted to make it bear on them, as will be shown in the sequel. 2. We do not know what means the congregated wisdom of Christendom may devise for the enforcement of the decisions of a court of nations, by so regulating the intercourse of nations that a refractory member might be made to feel that its duty is its true interest. 3. As it is not intended that this court of nations shall judge any cases but such as are submitted to it by the mutual consent of both parties concerned, its decisions will have as much to enforce them as the decisions of an individual umpire, which has so often settled disputes between nations. 4. Though at the commencement of this system, its success may not be so great as is desirable, yet, as moral power is every day increasing in a geometrical ratio, it will finally take the place of all wars between civilized and Christian nations, much in the same manner as a civil court has taken the place of the judicial combat.

SOURCE: William Ladd, *An Essay on a Congress of Nations for the Adjustment of International Disputes Without Resort to Arms*. Boston: Whipple and Damrell, 1840.

ANALYSIS

This is an extract from an essay on peace written in 1840. The ideal of peace is probably almost as old as human existence. Ancient philosophers and writers were critical of war, and most religions advocate peace. Political philosophers over the centuries have proposed ways by which peace might become possible. In the early eighteenth century, for example, Charles Irénée Castel, Abbé de Saint-Pierre, drew up a draft treaty, ready for the signature of European Powers, that provided for the creation of a European society. Saint-Pierre had initially decided to devise a plan for a confederation of all kingdoms of the world but had then decided to begin with a scheme to include only Europe so that it would not appear implausible. Saint-Pierre foresaw a general renunciation of war, an obligatory mediation of any dispute, and disarmament such that all States would have the same size armies. His plan even included a prohibition on secret treaties— another twentieth-century legal development; no treaties were to be allowed other than those acceptable to all members of the union.[1] Other thinkers, including Rousseau and Kant, drew inspiration from

St. Pierre's work in developing their own schemes for peace. Rousseau wrote in relation to Saint-Pierre's project:

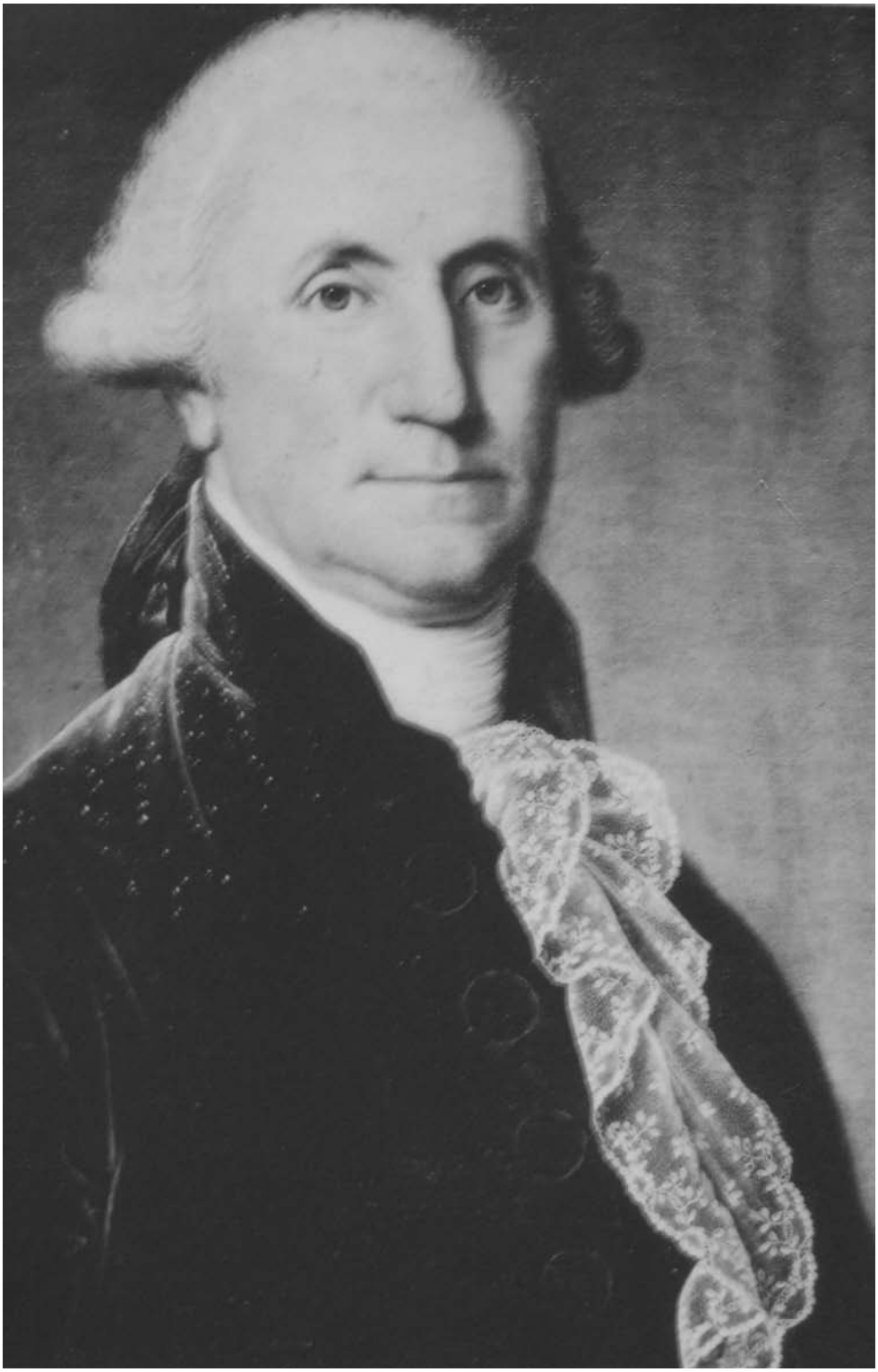
> The advantages which its realization would bring to each prince, to each nation, to the whole of Europe, are immense, manifest, incontestable; and nothing could be more solid or more precise than the arguments which the author employs to prove them. Realize his commonwealth of Europe for a single day, and you may be sure it will last forever; so fully would experience convince men that their own gain is to be found in the good of all. For all that, the very princes who would defend it with all their might, if it once existed, would resist with all their might any proposal for its creation; they will as infallibly throw obstacles in the way of its establishment as they would in the way of its abolition.[2]

In the nineteenth century, a growing number of people came to believe that the progress of civilization might actually lead to a world without war. Peace campaigners sought to turn public opinion against war and to find the best means of preventing war. A number of peace societies were formed in the United States and in England in the years following the end of the Napoleonic Wars in the early nineteenth century, and peace societies were also formed in other countries, including Switzerland and Germany. Members of the peace societies worked for the cause of world peace. Some produced "tracts" to spread information on war and to convince others that war was wrong. Key organizations included the London Peace Society and the American Peace Society, founded in 1828 by William Ladd, the author of this extract.

Ladd's 1840 *Essay on a Congress of Nations*, extracted here, has been referred to as "one of the most celebrated and influential schemes for peace ever propounded."[3] In the plan devised by Ladd, there would be a congress of ambassadors from all Christian and civilized nations, which would agree on the principles of international law for the preservation of peace. In addition to this diplomatic body there would be a court of nations, but it would be merely advisory; it would have no power to enforce its decisions. Cases would be decided according to existing treaties and laws and, where they failed to decide the issue, the case was to be decided according to principles of equity and justice. The scheme devised by Ladd depended heavily on the force of public opinion. Ladd was convinced that the public was coming to want all nations to settle disputes by peaceful means and in the future would not tolerate their leaders taking them to war. He told a meeting of the American Peace Society, that

> a revolution of public opinion has commenced; and revolutions do not go back. The time will come, and that shortly, when nations will settle their disputes by amicable adjustment or arbitration, and will look back on war with as much amazement, as we do on the ordeal by battle and the burning of heretics.[4]

The idea of third-party dispute resolution as a way of avoiding international conflict was not new; the Greeks had sometimes submitted their disputes to arbitration.[5] Hugo Grotius and Jeremy Bentham had both considered arbitration and judicial settlement to be the most effective way of maintaining peace.[6] During the eighteenth



George Washington, 1795. Courtesy of Adolph Ulrike Wertmuller.

century there was considerable use of mediation. States were, however, often reluctant to turn to mediation when issues of national honor were at stake.[7]

The nineteenth century was the era of arbitration. This was considered to be an advance over mediation. A landmark in the development of modern international arbitration was the Jay Treaty of 1794 between the United States and Great Britain. This agreement was initiated by U.S. President George Washington to deal with issues after the American War of Independence. The most famous nineteenth-century arbitration was that between the United States and Great Britain over the *Alabama*, a ship built in Great Britain and used by the Confederacy in the U.S. Civil War. Great Britain had declared its neutrality during the war, and so should not have been assisting either side or allowing its citizens to assist either side. Under British law, however, the building of the *Alabama* had not been illegal, so long as it was not fitted out as a warship or armed in Britain. The *Alabama* had been built in Birkenhead, England, but was fitted out and crewed in the Azores. It sank many Union vessels before itself being sunk by a U.S. warship. In 1872 an arbitral commission in Geneva ordered Great Britain to pay $15,500,000 in gold.

The *Alabama* arbitration was seen as evidence that even as powerful a country as Great Britain was at that time could agree to comply with the decision of third-party arbitration in an issue of national importance. It increased hopes that arbitration might become the standard way by which international disputes were to be settled.

CSS *Alabama* by J. W. Schmidt, 1961. Courtesy of Naval Historical Foundation.

The United States President during the arbitration, General Ulysses S. Grant, predicted "an epoch when a court recognized by all nations will settle international differences instead of keeping large standing armies."[8]

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