

THE CONTEMPORARY DISCOURSE ON THE USE OF
FORCE IN THE NINETEENTH CENTURY: A DIACHRONIC
AND CRITICAL ANALYSIS

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I. INTRODUCTION

As David Kennedy highlighted almost twenty years ago, when it comes to the history of international law, the nineteenth century has often been neglected and deprecated as ‘a non-legal, even pre-legal background of diplomatic history, context for an emerging legal order.’¹ Despite the fact that, since then, the interest of legal historians for that forgotten century has grown, the negative image that it holds remains, in particular in regard to the use of force. Today the prohibition of the use of force—defined as the principle according to which resort to armed force, of which war is only but a form, is forbidden²—is apprehended by a single legal regime headed by the Charter of the United Nations (UN). In the nineteenth century, however, it was traditionally considered that war and more limited uses of military force depended on two separate legal regimes, respectively the laws relating to the state of war and the laws of peace. Despite the extensive debates that the contemporary prohibition continues to provoke, doctrine usually agrees that the outlawing of the use of force in international relations (war and armed intervention) is a twentieth-century creation. International law textbooks in fact either teach that before the adoption of the League of Nations Covenant in 1919 states could freely resort to arms, and that this was even an ‘ordinary mean of State policy,’³ or that, ‘traditional

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¹ David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ (1996) 65 *Nordic Journal of International Law* 390.

² Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant, 2001) 595. Rules of the *jus in bello*—a branch of international law that is agreed to started developing in the course of the nineteenth century with the work of Henri Dunant, the Geneva Convention of 1864 or the 1868 Declaration of Saint-Petersburg—are thus beyond the scope of this study.

³ Jean Combacau and Serge Sur, *Droit international public* (Montchrestien, 1997) 612. See also James L Brierly, *The Law of Nations—An Introduction to the International Law of Peace* (Clarendon Press, 1949) 284; Charles de Vischer, *Théories et réalités en droit international public*

international law, while leaving untouched the ultimate right to resort to war, achieved some regulation of the use of force short of war.⁴

These are two variations of what scholarship sometimes refers to as the theory of ‘indifference,’⁵ which is so anchored in the collective conscience of international lawyers that some authors have not hesitated to qualify any attempt to discuss it as being ab initio ‘absurd.’⁶ Several elements, however, may challenge this commonly accepted account of the history of international law. First, the analysis of pre-First World War literature does not seem to support the theory of indifference. Most of the international lawyers of the time in fact affirmed that the law of nations did impose restrictions on the use of force, war and intervention alike.⁷ Secondly, it appears that even in the nineteenth century, states usually felt the urge to justify their actions when they resorted to military measures. The famous *Caroline* incident, in which the United Kingdom argued that the destruction of the US steamboat was legal as matter of self-defence, comes to mind.⁸ In an attempt to reconcile these conflicting elements,

(Pedone, 1955) 360; Georg Schwarzenberger, *A Manual of International Law* (Stevens & Sons, 1967) 182; Krzysztof Skubiszewski, ‘Use of Force by States. Collective Security. Law of War and Neutrality’ in Max Sørensen (ed), *Manual of Public International Law* (Macmillan, 1968) 742; Jan H Verzijl, *International Law in Historical Perspective* (AW Stijhoff, 1968) vol I, 215; Joe Verhoeven, *Droit international public* (Larcier, 2000) 670; Antonio Cassese, *International Law* (Oxford University Press, 2001) 27; Nico Shrijver, ‘Article 2, Paragraphe 4’ in Jean-Pierre Cot and Alain Pellet, *La Charte des Nations Unies—Commentaire article par article* (Economica, 2005) vol I, 440; Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge University Press, 5th edn 2011) 69; Oliver Dörr and Albrecht Randelzhofer, ‘Article 2 (4)’ in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations. A Commentary* (Oxford University Press, 2012) 204; Mary Ellen O’Connell, ‘Peace and War’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook on the History of International Law* (Oxford University Press, 2012) 277.

⁴ Philip C Jessup, *A Modern Law of Nations. An Introduction* (Macmillan, 1950) 157. See also Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1968) 19, 45; Anthony Clark Arend and Robert J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, 1993) 17; Stephen C Neff, *War and the Law of Nations—A General History* (Cambridge University Press, 2005) 161, 177, 215; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (LGDJ, 2009) 1032; Malcolm Shaw, *International Law* (Cambridge University Press, 2008) 1121; Robert Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix* (Bruylant Helbing Liechtenhahn, 2009) 28.

⁵ Some may prefer terms such as ‘tolerance’ or ‘acceptance’, which hold a less pejorative connotation, to qualify the attitude of international law to the use of force in the nineteenth century. The argument generally developed by contemporary doctrine is, however, that classical international law did not prohibit resort to armed force but did not authorise it either; it was ‘indifferent’ to it in the sense that it left it untouched. Albeit that this meant that the use of force was de facto ‘tolerated’ or ‘accepted’, it is something else to say that it was de jure. In any event, since ‘indifference’ is the name doctrine gives its own account, the use of this expression seems to be justified. See Paul Guggenheim, *Traité de droit international public* (Tome II Librairie de l’Université de Genève, 1954) 94; Kolb (n 4) 28.

⁶ Albane Geslin, ‘Du justum bellum au jus ad bellum: glissements conceptuels ou simples variations sémantiques?’ (2009) 64 *Revue de métaphysique et de morale* 463.

⁷ See discussion below.

⁸ In a letter dating from 6 February 1838, the Governor of the Province of Upper Canada, Sir Francis Head, explained to the US Secretary of State John Forsyth that: ‘[T]he Piratical char-

contemporary doctrine generally argues that nineteenth-century authors were more concerned with the law as it ought to have been rather than with the law as it truly was, and that states' justifications were the mere reflection of political and moral considerations.⁹

Some authors have nonetheless recently started to question this interpretation, claiming that it seemed 'too prompt to disqualify classical international', and that

in an over-hasty amalgam, commentators inferred that States legally had the right to trigger any war at any time. Nothing could have been more mistaken. In classical international law—as in the modern law of nations—the right to resort to war was no more the right to do anything than sovereignty was itself absolute.¹⁰

Nonetheless, despite the doubts that have slowly been expressed over the theory of 'indifference', the discrepancy between the modern discourse on the history of the use of force and the 'reality' as it stems from the sources of the time has not yet been subject to extensive analysis. This article aims to set out the basis to fill this lacuna by investigating this discrepancy further and to launch some initial explanatory tracks as to its 'sociological roots'. How can this dissonance between the modern and the past discourse be explained? Why did the twentieth-century authors suddenly place themselves against the tide of their nineteenth-century predecessors? Is the narrative of 'indifference' the result of the abandonment of the naturalistic paradigm in favour of positivism? Or do other factors, exogenous to the strictly legal sphere, also hold some explanatory power?

In order to answer these questions, this article will be divided into three sections. The first section will start by surveying how the question of the prohibition of the use of force was tackled in the nineteenth century. Mainly focusing on scholarly writings, albeit occasionally referring to state practice, this brief outline will show that most of the authors of the time considered the prohibition of the use of force in general (war and intervention) to be a logical consequence of the principle of the equal sovereignty of states. It should be emphasised that the aim here is not to determine thoroughly and authoritatively

acter of the Steamboat "Caroline" and the necessity of self-defence and self-preservation under which her Majesty's subjects acted in destroying that vessel, would seem to be sufficiently established' in Upper Canada, *Journal of the House Assembly*, 3rd session (1837–38), 13th Parliament, 3 March 1838 (Jos H Lawrence Printer, 1838) 424.

⁹ See Hans Wehberg, 'L'interdiction du recours à la force. Le principe et les problèmes qui se posent' (1951) 78 *The Hague Academy Collected Courses* 21; de Visscher (n 3) 359; Brownlie (n 4) 41; Daillier, Forteau and Pellet (n 4) 1032; Dinstein (n 3) 69; Kolb (n 4) 32.

¹⁰ Emmanuelle Jouannet, *The Liberal Welfarist Law of Nations—A History of International Law* (Cambridge University Press, 2012) 130. See also Randall Lesaffer, 'Too Much History: From War as a Sanction to the Sanctioning of War' in Marc Weller and Alexia Solomou (eds), *The Oxford Handbook on the Use of Force* (Oxford University Press, forthcoming); Olivier Corten, 'Droit, force et légitimité dans une société internationale en mutation' in *Le discours du droit international—Pour une positivisme critique* (Pedone, 2009) 72.

the existence of a customary rule prohibiting resort to armed force before the Great War, but simply to show that classical international law seems to be more complex than is generally assumed. More importantly, this analysis will permit us to rule out the hypothesis according to which the change of doctrinal discourse in the interwar years, and the rise of the ‘indifference’-narrative, is merely the result of a ‘positivistic turn.’ In fact, nineteenth-century authors were largely positivists themselves.

The second section will examine the emergence of the theory of ‘indifference’ in the 1920s and 1930s as the dominant discourse of international legal doctrine. Using a framework of analysis inspired by Claude Lévi-Strauss’s work on myths, it argues that ‘indifference’ as a scholarly narrative is intrinsically linked to the events of the First World War and the shock it created in both the erudite and popular spheres of society. In *Structural Anthropology* Lévi-Strauss contends that the (hi)stories that a group elaborates have an immediate social role: they aim at making sense of human experience, to resolve a contradiction.¹¹ The contradiction here seems to be that of how the First World War could happen if the law of nations already restricted the right of states to make use of armed force. The instinctive answer was that it probably did not, or at least not in an effective manner. We will see that, despite the fact that interwar authors did not necessarily share the exact same views, their discourses shared the same underlying rhetoric. Resting on the opposition of an anarchical nineteenth century and of an orderly twentieth century, this rhetoric seems to have been part of a larger societal enterprise of legitimising the League of Nations’ new collective security system and build trust in international law’s capacity to prevent any future major conflict.

If the ‘indifference’-narrative is so much a product of the interwar years, one may then wonder why it has endured through to today and even asserted itself as the commonly accepted version of the history of international law. The third and final section of this article investigates this last question. We will see that beyond the narrative of ‘indifference’ it is actually the entirety of the interwar rhetoric that can still be observed in contemporary literature. As Lévi-Strauss emphasised, although the content of a story per se might evolve, its underlying structure remains—it durably shapes the understanding a society has of its surroundings and of its history.¹² This structure, however, does not maintain itself alone and the role of both legal and general education will be emphasised. We will argue that the rhetoric that accompanies the narrative of ‘indifference’—which, as mentioned, fundamentally rests on the idea that law brings order—not only forms part of the identity, the culture and of how international lawyers envision themselves as professional group, but also corroborates the general vision Western society has of European history.

¹¹ Claude Lévi-Strauss, *Anthropologie structurale* (Librairie Plon, 1958) 254.

¹² *Ibid.*, 231.

II. THE USE OF FORCE ACCORDING TO NINETEENTH-CENTURY SOURCES: THE PROHIBITION OF THE USE OF FORCE AS A CONSEQUENCE OF THE PRINCIPLE OF EQUAL SOVEREIGNTY

As noted above, it is traditionally considered that, in the nineteenth century, war and more limited uses of armed force relied upon distinct legal regimes: war depended on the laws of war; and armed intervention, or ‘measures short of war’, depended on the laws regarding the state of peace.¹³ That being said, when looking at the sources of the time, it appears that the prohibition of both war and intervention was deemed a consequence of the same principle: the equal sovereignty of states.

Let us first turn our attention to armed intervention and other measures short of war. Classical international law authors clearly asserted the use of such measures to be unlawful as a result of the principle of the equal sovereignty of states, a cornerstone principle of the law of nations. Since the idea was expressed by Johan-Ludwig Klüber in 1819¹⁴ (in probably its most distinct form), most scholars have shared the view that states enjoy three ‘primitive’ rights: the right of independence, the right of equality and the right of self-preservation.¹⁵ From these three ‘primary colours’ a palate of other rights could be deduced. In particular, since ‘independence’ was defined as the fact of not being submitted to any foreign influence and the existence of every state had to be respected as a consequence of ‘equality’, as expressed by US scholar and diplomat Henry Wheaton, it followed that:

Every state, as a distinct moral being independent of every other, may freely exercise all its sovereign rights in a manner not inconsistent with the equal rights of the other states. ... *No foreign state can lawfully interfere with the exercise of this right* [the right of independence], unless such interference is authorized by some special compact, or by such a clear case of necessity as it immediately affects its own independence, freedom, and security.¹⁶

Similar positions can be found in the work of many nineteenth-century international lawyers.¹⁷ For example, Paul Pradier-Fodéré expresses the idea in an extremely clear fashion. In 1883 he wrote that:

¹³ Arend and Beck (n 4) 17; Brownlie (n 4) 26; Kolb (n 4) 32.

¹⁴ Johan-Ludwig Klüber, *Droit des gens moderne de l'Europe* (Librairie JG Cotta, 1819) 69.

¹⁵ Henry Wheaton, *Elements of International Law* (B Fellowes, 1836) vol I, 107, 131 and 193; Théodore Ortolan, *Règles de droit international et de diplomatie de la mer* (J Dumaine, Cosse et L Delamotte, 1845) 46; August-Wilhelm Heffter, *Le droit international de l'Europe* (Cotillon et fils, 1873) 56; Paul Pradier-Fodéré, *Traité de droit international européen et américain* (Pedone-Lauriel, 1908) vol I, 306; Ernest Nys, *Le droit international—Les principes, les théories, les faits* (Alfred Castaigne, Albert Fontemoing, 1905) 206.

¹⁶ Wheaton (n 15) 131, emphasis added.

¹⁷ Georg Friedrich Von Martens, *Précis de droit des gens moderne de l'Europe* (Librairie Dietrich, 1821) 215; Robert Philimore, *Commentaries upon International Law* (T and JW Johnson, 1845) vol I, 150; William E Hall, *Treatise on International Law* (Clarendon Press, 1890) 56; Heffter

Il n'y a pas de droit d'intervention parce qu'il n'y a pas de droit contre le droit. *Le droit, c'est l'indépendance: l'intervention c'est la violation de l'indépendance.* Il ne peut y avoir de droit à violer un droit absolu.¹⁸

To further illustrate this point, one might also quote one of the most notorious internationalists of his time, Johan-Caspar Bluntschli, who, in 1870, asserted that:

Aucun état n'est tenu de tolérer sur son territoire qu'une autre puissance y fasse aucun acte politique quelconque (acte de police, d'administration judiciaire ou militaire, prélèvement d'impôts). *Chaque état est tenu de s'abstenir de tout actes semblables sur territoire étranger.*¹⁹

As contemporary doctrine often does, one might be tempted to argue that nineteenth-century scholars were still very much influenced by the natural law tradition and that their writings do not reflect the law as it truly applied.²⁰ It is true, as Emmanuelle Tourme-Jouannet has underlined, that most of the classical international law authors fell within what she calls a 'vatellian dualism', that is to say a conception of international law that oscillates between naturalism and positivism.²¹ Internationalists indeed felt that reason could usefully supplement, but not replace, formal sources.²² As has repeatedly been established, the nineteenth century went hand in hand with the rise of positivism as the new dominant paradigm of legal thought.²³ Although natural law was left with

(n 15) 94; Johan-Caspar Bluntschli, *Le droit international codifié* (Librairie Guillaume & cie, 1870) 83; Henry Halleck, *Elements of International Law and the Laws of War* (JB Lippincott & Co, 1866) 52; Pasquale Fiore, *Il diritto internazionale codificato e la sua sanzione giuridica* (Union Tipografico-Editrice, 1900) 97; Giuseppe Carnazza-Amari, *Trattato sul diritto internazionale pubblico di pace* (V Maisner a compagnia, 1875) 361; Carlos Calvo, *Manuel de droit international public et privé* (Arthur Rousseau, 1892) vol I, 115; Henri Bonfils and Paul Fauchille, *Manuel de droit international public* (Arthur Rousseau, 1908) vol I, 164; Alphonse Rivier, *Principes du droit des gens* (Arthur Rousseau, 1896) 390; David Dudley Field, *Projet d'un code de droit international proposé aux diplomates, aux hommes d'Etat, et aux jurisconsultes* (Pedone-Lauriel, 1881) 8; Lassa Oppenheim, *International Law—A Treatise* (Longman Greens, 1905) vol I, 182; John Westlake, *International Law* (Cambridge University Press, 1910) vol I, 318; Thomas Lawrence, *The Principles of International Law* (DC Heath & Co., 1900) 115; Pradier-Fodéré (n 15) vol I, 547.

¹⁸ Pradier-Fodéré (n 15) 547 ('There is no right of intervention because there is no right against the law. *The law is independence: intervention is a violation of independence.* There can be no right to violate an absolute right', emphasis added).

¹⁹ Bluntschli (n 17) 83 ('No state has to tolerate that another power do any political act (act of police, judicial or military administration, collection of taxes) on its territory. *Each state is required to abstain from all such acts on foreign territory*', emphasis added).

²⁰ See (n 9).

²¹ Emmanuelle Tourme-Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Pedone, 1998) 114. See also Alexander Orakhelashvili, 'The Origins of Consensual Positivism—Pufendorf, Wolff and Vattel' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 93.

²² See survey by Calvo (n 17) 82.

²³ See Amnon Lev, 'The Transformation of International Law in the Nineteenth Century' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*

a residual role, the vast majority of legal scholars asserted that international law was founded on the will of states.²⁴ Like August-Wilhelm Heffter, most felt that the law was ‘fondée sur le consentement mutuel soit exprès soit tacite ou présumé du moins d’une certaine association d’Etats’ and that in order to determine the content of the law a state practice approach had to be adopted.²⁵ As can thus be seen, discarding classical doctrine as naturalistic would seem a little too peremptory.

Although the focus of this paper is not state practice and the example of the *Caroline* incident has already been mentioned, it might be useful briefly to provide a few more illustrations of how the prohibition of intervention was considered a logical consequence of the equal sovereignty of states by states themselves. When, after 13 years of Napoleonic wars and 26 years of disorder on the European scale, the great powers set out to remould the basis for their relations at the Châtillon-sur-Seine Congress (1814), they unequivocally declared that: ‘[I] est temps enfin que les princes puissent, sans influence étrangère, veiller au bien être de leur peuple; que les nations respectent leur indépendance réciproque.’²⁶ When France was admitted to join the European Concert during the 1818 Congress of Aix-la-Chapelle this principle was again reaffirmed. The Powers stated that:

[L]es souverains en formant cette union auguste, ont regardé comme la base fondamentale, leur invariable résolution à ne jamais s’écarter, ni entre eux, ni dans leurs relations avec les autres, de l’observation la plus stricte du droit des gens, principes qui dans leur application à un état de paix permanent, peuvent seuls garantir efficacement l’indépendance de chaque gouvernement et la stabilité de l’association générale.²⁷

Aside from these linchpin texts, reference could also be made to the discourse deployed by the European powers to justify their ‘humanitarian’ interventions

(Edward Elgar, 2011) 111; Martti Koskeniemi, ‘Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law’ (2005) 15 *Constellations* 189; Carlo Focarelli, *International Law as a Social Construct* (Oxford University Press, 2012) 103; Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press, 2013) 30.

²⁴ See Pieter H Kooijmans, *The Doctrine of the Legal Equality of States. An Inquiry into the Foundations of International Law* (AW Stijhoff, 1964) 140.

²⁵ Heffter (n 15) 3 (an approach ‘founded on the mutual consent, express, tacit or even presumed of at least a certain association of states’). See also Rivier (n 17) 3.

²⁶ Declaration of the Allied Powers on the rupture of the Châtillon-sur-Seine Congress, 16 March 1814, full text available in Charles de Martens, *Guide diplomatique* (JP Aillaud, 1837) 12 (‘it is time, at last, that princes may, without foreign interference, ensure the well-being of their people; that nations respect their mutual independence’, emphasis added).

²⁷ Declaration by Metternich, Richelieu, Castlereagh, Wellington, Hardenberg, Bernstorff, Nesselrode and Capo D’Istria at Aix-la-Chapelle, 15 November 1818, full text available in *ibid.*, 561 (‘the sovereigns in forming this august union, considered as the fundamental basis, their invariable resolution to never depart, between themselves and in their relations to others, from the strictest observance of international law, principles that in their application to a permanent state of peace, are the only ones that can effectively guaranty the independence of each government and the stability of the general association’, emphasis added).

in the Ottoman Empire throughout the nineteenth century. Invited to join, but opposed to, the armed intervention in Greece in 1827—which the United Kingdom, Russia and France had essentially justified on the basis of the right of self-preservation, since their commerce in the Mediterranean was greatly suffering as a result of the Greek rebellion against the Ottoman rule²⁸—the Austrian Chancellor, Metternich, answered on behalf of the Emperor that: '[I]t is a question neither more nor less of the foundations of the law of Nations recognized up to this hour ... oppressed authority cannot be rescued without a manifest violation of the independence of States.'²⁹ Hence he argued that: '[T]he Emperor, in fact, does not know how he can claim the right to employ such measures, or even to threaten the Porte.'³⁰ The deployment of an armed contingent in Lebanon and Syria in 1860 followed the sultan's invitation, without which European powers claimed that 'no foreign troops could [have] enter[ed] the Sultan's dominions.'³¹ Even the crushing of the popular uprisings in Italy and Spain in 1822 by the conservative Concert Nations, which England vociferously opposed on the ground of the principles of independence and equal sovereignty, did not go unjustified.³²

Hence, it is not surprising that authors such as Lassa Oppenheim, John Westlake, Thomas Lawrence and Dionisio Anzilotti, who have sometimes been labelled as 'radical positivists',³³ also came to the conclusion 'that intervention

²⁸ Simon Chesterman, 'The Just War—The Origins of Humanitarian Intervention' in Simon Chesterman (ed), *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001) 29; Eliana Augusti, 'L'intervento europeo in Oriente nel XIX secolo: storia contesa di un istituto controverso' in Luigi Nuzzo and Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Vittorio Klostermann, 2012) 277.

²⁹ Letter of Richard von Metternich to Apponyi, 17 October 1826 in Harold Temperley, *The Foreign Policy of Canning, 1822–1827: England, the Neo-Holly Alliance and the New World* (G Bell and Sons, 1925) 360.

³⁰ Letter of Metternich to Tatistscheff and Wellesley, Vienna, 22 December 1826, full text available in Richard Metternich-Winneburg (ed), *Memoirs of Prince Metternich* (Richard Bentley and Sons, 1881) vol 4, 340.

³¹ Letter of Earl Cowley, British Ambassador to France, to Lord John Russell, the British Foreign Secretary, 31 July 1860, full text in Thomas Sohn and Louis B Buergethal, *International Protection of Human Rights* (Bobbs-Merill, 1973) 155. See also Istvan Pogány, 'Humanitarian Intervention in International Law: The French Intervention in Syria Re-Examined' (1986) 35 *International and Comparative Law Quarterly* 182; Davide Rodogno, *Against Massacre. Humanitarian Intervention in the Ottoman Empire, 1815–1914* (Princeton University Press, 2012) 105; Davide Rodogno, 'The "Principles of Humanity" and the European Power's Intervention in Lebanon and Syria in 1860–1861' in Brendan Simms and DJB Trim (eds), *Humanitarian Intervention. A History* (Cambridge University Press, 2011) 159.

³² In a memorandum regarding the 1814–1815 peace treaties Lord Castlereagh, the British Foreign Secretary of State, insisted that 'the Allies could only justify an Interference in the affairs of a Foreign State, upon the ground of considering their own safety compromised and that, independently of such Consideration, they could not justly claim any right of interference', full text in Harold Temperley and Lillian Penson, *Foundations of British Foreign Policy from Pitt (1792) to Salisbury (1902)* (Cambridge University Press, 1923) 2. See also RJ Vincent, *Nonintervention and International Order* (Princeton University Press, 1974) 73.

³³ O'Connell (n 3) 283.

is as a rule forbidden by the Law of Nations which protects the International Personality of the State, there is no doubt.³⁴

Interestingly, when it comes to resort to full-blown war, these same authors adopt a much more reserved position. In his 1905 treatise, Oppenheim in fact considered that

all such rules laid down by writers on International Law as recognise 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. ...

A State which makes war against another will never confess that there is no just cause of war, and it will therefore, when it has made up its mind to make war for political reasons, always look out for a so-called just cause. Thus frequently the apparent reason of war is only a pretext behind which real causes are concealed.³⁵

Notwithstanding Oppenheim's view in this regard, it must be emphasised that the undeniable majority of classical international law scholars did not share his position. In fact, to the exception of our four 'radical positivists', most authors at the time considered war to be illegal on the same ground as intervention.³⁶ The German jurist Heffter, for instance, considered as 'oiseuses toute les conversations abstraites sur la légitimité des guerres de religion, de vengeance, d'équilibre politique', as the answer to these questions could be found 'dans les principes internationaux que nous avons retracés dans le livre précédent'³⁷—that is, the book on the laws of peace. It follows that, just as the prohibition of intervention is a consequence of the principle of the equal sovereignty of states, so is the illegality of war. In the same vein, as Paul Pradier-Fodéré had determinedly asserted in relation to intervention, Théodore Funck-Brentano and Albert Sorel affirmed about war in their 1877 *Précis de droit des gens*: '[L]a guerre n'est pas un droit pour les Etats ... dire qu'elle est un droit pour les Etats équivaut à dire qu'il n'y a entre les Etats d'autre droit que la force.'³⁸ In other words, the proposition that states may resort to war unconstrained is incompatible with the idea of international law.

³⁴ Oppenheim (n 17) vol I, 182.

³⁵ *Ibid*, vol II 69 and 71. See also Westlake (n 17) vol II, 6; Lawrence (n 17) 292; and Dionisio Anzilotti, *Corso di diritto internazionale* (Anthenaeum 1915) vol III, 185.

³⁶ Georg-Friedrich de Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (Libraire Dietrich, 1821) vol II, 448; Klüber (n 14) 367; Bluntschli (n 17) 273; Wheaton (n 15) vol II, 3; Calvo (n 17) 316; Rivier (n 17) vol II, 201; Fiore (n 17) 458; Hall (n 17) 374; Bonfils and Fauchille (n 17) 718; Pradier-Fodéré (n 15) vol VI, 19; Halleck (n 17) 145; and Heffter (n 15) 218.

³⁷ Heffter (n 15) 219 ('we look upon the abstract discussions on the legitimacy of wars of religion, vengeance and political equilibrium as pointless. These questions draw their element of response ... in the international principles that we have exposed in the previous book').

³⁸ Théodore Funck-Brentano and Albert Sorel, *Précis de droit des gens* (Plon, 1877) 232 ('war is not a right for States. ... Saying that it is a right for States amounts to admitting that there is no other law between States than force').

What might explain this fracture amidst nineteenth-century scholars? As we have seen, it cannot simply be said that Oppenheim, Westlake, Lawrence and Anzilotti were positivists and that the other scholars were not. A helpful distinction here is that drawn up by Pieter Kooijmans, who speaks of ‘realist positivists’ on the one hand, and of ‘voluntaristic positivists’ on the other.³⁹ ‘Realistic positivists’ base their method on the analysis of what actually happens and, as a consequence, consider the fact that in practice states resort to war as a sufficient proof that international law does not forbid that behaviour. This approach is exemplified in the extract of Oppenheim’s *Treatise* cited above. Translating the debate in modern terms, one could say that realists placed the emphasis on practice while ‘voluntaristic positivists’ paid more attention to *opinio juris*. Noting that some authors ‘confondent tellement les règles et les faits, les principes de droit et les usages ou les idées régnautes, qu’il n’est pas toujours aisé de former une opinion correcte sur le caractère véritable des guerres’,⁴⁰ Carlos Calvo, for instance, insisted on the distinction that had to be made between the ‘justifying causes of war’ (which referred to the principles of the law of nations) and the ‘motives’ for war (which referred to the facts).⁴¹ The similarity with the methodological debates that roam current *jus ad bellum* literature is confounding. Just as modern-day internationalists contend, it could be said that ‘voluntaristic positivists’ felt that ‘practice only takes on significance if and to the extent that we can deduce that States are convinced their acts are in accordance with a legal rule.’⁴² In other words, the fact that the deviant tries to rationalise its behaviour and hide its real motives behind legal pretexts amounts to recognising the authority of the rule.⁴³

The question then is: what kind of ‘pretexts’ did states put forward to justify their decisions to go to war? When, after numerous attempts to find a diplomatic settlement to the crisis between Russia and the Ottoman Empire, Great Britain and France entered the Crimean War alongside the Turks in March 1854, they apparently argued it was ‘an operation in support of the public law of Europe.’⁴⁴ The two powers’ involvement in Crimea was indeed aimed at contain-

³⁹ Kooijmans (n 24) 108. See also Stephen C Neff, ‘Jurisprudential Polyphony: The Three Variations on the Positivist Theme in the 19th Century’ in Pierre-Marie Dupuy and Vicent Chetail (eds), *The Roots of International Law - Liber Amicorum Peter Haggemacher* (Martinus Nijhoff Publishers, 2014) 301 (speaking of ‘empirical positivists’ and ‘voluntarist positivists’).

⁴⁰ Calvo (n 17) vol II, 22 (‘some authors confuse the rules, the facts, the principles of law and the usages or the dominant ideas so much, that it is not always easy to form a correct opinion on the true character of wars’).

⁴¹ *Ibid.*

⁴² Olivier Corten, *The Law Against War. The Prohibition of the Use of Force in Contemporary International Law* (Hart Publishing, 2012) 20.

⁴³ Tom J Farer, ‘The Prospect of International Law and Order in the Wake of Iraq’ (2003) 97 *American Journal of International Law* 622; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd edn 2008) 28.

⁴⁴ British and French ultimatum to Russia, 27 February 1854 cited in WF Reddaway, ‘The Crimean War and the French Alliance, 1853-1858’ in AW Ward and GP Gooch (eds), *The Cambridge History of British Foreign Policy* (Cambridge University Press, 1923) 374.

ing Russian expansionism in the east, deemed a threat to the general stability of Europe that the Concert nations had vowed to sustain and protect.⁴⁵ Similarly, when Napoléon III notified Prussia of his declaration of war on the 19 July 1870, the European stability and France's right to self-preservation were put forward.⁴⁶ Finally, when the Austro-Hungarian Empire declared war on Serbia in July 1914, it claimed that Belgrade had shown a 'guilty tolerance'⁴⁷ towards the anti-Austrian activities, which even involved state officials, on its territory. In so doing, the Serbs had failed to comply with their international obligations under the Declaration of 31 March 1909 that followed the Bosnian crisis as a result of its annexation by Austria-Hungary. The ultimatum, and the war that was to follow, was hence justified by the failure of Serbia to comply with its engagements and the 'perpetual threat to the tranquillity of the Monarchy'⁴⁸ that this represented.

Surely as Ian Brownlie pointed out—in that regard following the line of thought of our four 'radical positivists'—these were 'stereotyped pleas' which, in Brownlie's opinion, were based on a right of self-preservation that admitted so many *casus belli* that it was actually devoid of any legal content.⁴⁹ From a voluntarist perspective one could, however, retort that, although these pleas were indeed stereotyped and legal questions were only an element among the 'bulk of political and moral considerations',⁵⁰ they nonetheless showed deference to a principle according to which states could not resort to war as they fully pleased. Looking back, one may further wonder the extent to which nineteenth-century state discursive practices genuinely differ from nowadays. For decades, extensive interpretations of Articles 51 and 42 of the UN Charter have been defended, and the moral register of argumentation has been widely mobilised alongside judicial considerations to justify humanitarian intervention.⁵¹ Yet, to the knowledge of the present author, few international lawyers would conclude that those

⁴⁵ In that respect, historian Matthias Schulze underlined that the European Concert acted somewhat like a nineteenth-century 'Security Council' (Sicherheitsrat): see Matthias Schulze, *Normen und Praxis. Das Europäische Konzert der Großmächte als Sicherheitstrat 1815–1860* (Oldenburg, 2009).

⁴⁶ French War declaration on Prussia, 19 July 1870, Ministère des affaires étrangères (MAE), *Archives diplomatiques 1871–1872* (Librairie diplomatique d'Amyot, 1872) tome I, 189 ('le gouvernement impérial a du voir dans la déclaration du Roi une arrière-pensée menaçante pour la France comme pour l'équilibre des forces en Europe. ... En conséquence, le cabinet de S.M. Impériale a jugé qu'il avait l'obligation de pourvoir immédiatement à la défense de son honneur et de ses intérêts compromis').

⁴⁷ Austrian War declaration to Serbia, 28 July 1914, Ministère des affaires étrangères (MAE), *Documents diplomatiques 1914—La Guerre européenne* (Librairie Hachette, 1914) tome I, 34.

⁴⁸ *Ibid.*

⁴⁹ Brownlie (n 4) 41. See also Kolb (n 4) 33.

⁵⁰ See Joachim von Elbe, 'The Evolution of the Concept of Just War in International Law' (1939) 33 *American Journal of International Law* 686.

⁵¹ For illustrations, see Corten (n 42) chs 3, 6 and 7.

discourses were legally insignificant and, as a consequence, that UN Charter and the entire legal regime regulating the use of force were similarly irrelevant.⁵²

To conclude this first section, it follows from this brief survey of nineteenth-century doctrinal views that the use of force (war and intervention) was generally considered as prohibited as a logical consequence of the principle of the equal sovereignty of states, according to which each had the right to the respect of their mutual independence. As such, one can only be struck when reading in contemporary literature that classical international law 'scholars agreed that every sovereign state could have recourse to war whenever it seemed advisable.'⁵³ When did this reversal in international legal discourse happen and how did the idea that states could then use armed force as they pleased become dominant in the minds of today's internationalists? These are the questions that the two following sections of this paper will attempt to tackle.

III. THE EMERGENCE OF THE 'INDIFFERENCE'-NARRATIVE IN THE INTERWAR PERIOD: LEGITIMISING THE LEAGUE OF NATIONS' COLLECTIVE SECURITY SYSTEM

The adoption of the Covenant of the League of Nations seems to have acted as a break point in the evolution of the discourse on the use of force. The creation of the League undeniably constituted notable progress. The Hague Conventions of 1899 (I) and 1907 (III) had respectively created the Permanent Court of Arbitration (PCA) to which states *could* submit their disputes, and imposed the requirement for a formal war declaration to be issued,⁵⁴ but the novelty of the Covenant was to make arbitration mandatory before any resort to war could be had.⁵⁵

⁵² As Corten has notably pointed out, although numerous authors nourish themselves from IR realist reflections, 'peu de spécialistes de droit international assument une adhésion sans faille à ce schéma théorique': see Olivier Corten, *Méthodologie du droit international* (Editions de l'Université Libre de Bruxelles, 2009) 74. See, however, Michael J Glennon, *Limits of Law, Prerogatives of Power—Interventionism after Kosovo* (Palgrave Macmillan, 2001).

⁵³ Bernhard Roscher, "The 'Renunciation of War as an Instruments of National Policy'" (2002) 4 *Journal of the History of International Law* 294. See also Neff (n 4) 161; Antoine Favre, *Principes du droit des gens* (Editions Universitaire de Fribourg Suisse, 1974) 711.

⁵⁴ Art 20 Hague Convention (I) on the peaceful settlement of international disputes, signed on the 29 July 1899 in The Hague, entry into force: 4 September 1900; Art 1 Hague Convention (III) relative to the opening of hostilities, signed on the 18 October 1907 in The Hague, entry into force: 26 January 1910.

⁵⁵ The League of Nations' collective security system relied on a series of procedural thresholds: mandatory resort to arbitration and a three-month period after the arbitral award. The redactors of the Covenant were convinced that the establishment of these 'cooling-off' periods would suffice to hamper the possibilities states had to wage war. See Titus Komarnicki, *La question de l'intégrité territoriale dans le Pacte de la Société des Nations (l'article X du Pacte)* (Presses Universitaire de France, 1923) 154; FP Walter, *A History of the League of Nations* (Oxford University Press 1952) vol I, 42; Neff (n 4) 293; Kolb (n 4) 37.

From 1919 onwards, the dominant doctrinal view clearly draws from Oppenheim, Westlake, Lawrence and Anzilotti far more than it does from the 'voluntarist positivists'. Like Maurice Bourquin, most interwar authors indeed felt that: '[L]e droit international classique tel qu'il s'est précisé au XIX^{ème} siècle, admettait, en somme, la légitimité de la guerre'.⁵⁶ Efforts, such as the Hague Conventions of 1899 and 1907, had, of course, been made to limit the use of force, but according to 1920–30s scholarship:

Il fallu attendre le cataclysme de 1914 pour donner l'impulsion décisive et faire pénétrer dans la conscience juridique du monde ce principe, désormais bien établi, que le recours aux armes, loin d'être une prérogative intangible, constitue dans certaines conditions tout au moins, un crime contre lequel la communauté internationale doit se dresser.⁵⁷

For all that, the position of interwar authors was not necessarily identical to that of the four 'radical positivists' who, let us recall, considered that war was permitted while *intervention* was strictly regulated by the law of nations. Scholars in the 1920s and 1930s tackled the question of the legality of war much more than they did that of 'measures short of war' so that their opinion in that respect is blurry and less apparent. At first glance it seems that doctrine actually went both ways. In the 1922–23 *British Yearbook of International Law*, for example, PH Winfield meticulously examined the legal framework of intervention, coming to the conclusion that although war was beyond the reach of the law, intervention was justified only under certain conditions.⁵⁸ With few exceptions, the interwar literature barely delved into the history of the use of

⁵⁶ Maurice Bourquin, 'Le problème de la sécurité internationale' (1934) 49 *The Hague Academy Collected Courses* 477 ('classical international law, as it came to be defined in the 19th century, admitted, in sum, the legitimacy of war'). See also Hans Wehberg, 'Le problème de la mise de la guerre hors la loi' (1928) 24 *The Hague Academy Collected Courses* 160; Karl Strupp, *Éléments du droit international public universel, européen et américain* (Les Editions Internationales, 1930) vol II, 506; Otfried Nippold, 'Le développement historique du droit international depuis le Congrès de Vienne' (1924) 2 *The Hague Academy Collected Courses* 79; Louis le Fur, *Précis de droit international public* (Librairie Dalloz, 1939) 302; Georges Scelle, *Manuel élémentaire de droit international public* (Les Editions Domat-Montchrestien 1943) 43; CG Fenwick, 'War as an Instrument of National Policy' (1928) 22 *American Journal of International Law* 826; Quincy Wright, 'The Outlawry of War' (1925) 19 *American Journal of International Law* 89; Arnold D McNair, *Collective Security: An Inaugural Lecture* (Cambridge University Press, 1936) 11; von Elbe (n 52) 684; Olof Hoijer, *Le Pacte de la Société des Nations. Commentaires théorique et pratique* (Editions Spes, 1926) 4; Stephen Pierce Duggan (ed), *The League of Nations: The Principles and the Practice* (The Atlantic Monthly Press, 1919); Frederick Pollock, *The League of Nations* (Stevens and Sons, 1929) 4; Ellery Stowell, *Intervention in International Law* (John Byrne & Co, 1921) 317.

⁵⁷ Maurice Bourquin, 'Règles générales du droit de la paix' (1931) 35 *The Hague Academy Collected Courses* 178 ('it was not until the cataclysm of 1914 that a decisive impulse was given to the movement and that the now well established principle according to which resort to arms, far from being an intangible prerogative, is at least in certain conditions a crime against which the international community must react, entered the legal conscience of the world').

⁵⁸ PH Wingfield, 'The History of Intervention in International Law' (1922–1923) 3 *British Yearbook of International Law* 131.

force below the threshold of war even though the interpretation of the League of Nations Covenant, and later of the Pact of Paris (Briand–Kellogg Pact), generated extensive debate regarding the scope of the prohibition that they enunciated.⁵⁹ Commentators often regretted that a more encompassing prohibition of the use of force had not been integrated in the Covenant or, at least, expressed in clearer fashion.⁶⁰ Attempts to fill this lacuna were undertaken in particular on the regional or bilateral level—for example with the Treaty of Locarno in 1925 and the numerous non-aggression pacts signed by the Soviet Union in the 1930s⁶¹—after a general prohibition of the use of force failed to be included in the 1928 Briand–Kellogg Pact.⁶² As a consequence, many internationalists felt that under the Covenant and the Pact framework states could still have recourse to armed measures that did not amount to war. In turn, this probably meant that they did not believe that a customary rule restraining the right to intervention existed before the Great War, or at least one that had survived the adoption of the League of Nations Covenant. To summarise, although internationalists' views on intervention in the pre-Versailles era were divergent—some following the furrow traced by Oppenheim et al and others taking a more extreme stand—the dominant strand of interwar legal scholars affirmed that classical international law left the right to wage war untouched.

Even though this strand of thought was dominant, it was still just a strand; the 'indifference'-narrative did not impose itself in an uncontested and univocal manner in the post-Versailles era. Some authors continued to uphold the nineteenth-century view on the matter. Normativists above all opposed the majority opinion wildly. Alfred Von Verdoss, who qualified this thesis as 'erroneous', for instance insisted that:

[L]a doctrine combattue renverse le fardeau de la preuve ... elle exige la démonstration de l'existence de règles spéciales limitant la liberté des Etats en cette matière, au

⁵⁹ At the centre of the controversies regarding the scope of the League of Nations Covenant was Art 10, according to which Member States undertook to respect their territorial integrity and independence. As will later be confirmed by practice, some commentators felt that armed intervention was beyond the scope of the Covenant since the preamble only spoke of some 'obligations not to go to war'. Others believed that since this disposition was the only one not to refer to war but to territorial integrity and independence it must have had a wider meaning and included the prohibition of 'measures short of war'. On the interwar debates on the scope of Art 10 of the League of Nations Covenant, see Agatha Verdebout, 'Article 10' in Kolb (ed), *Commentaire du Pacte de la Société des Nations, Du Pacte de la SdN à la Charte des Nations Unies* (Bruylant forthcoming). On the debates regarding the scope of the 1928 Pact of Paris, see Quincy Wright, 'The Meaning of the Pact of Paris' (1933) 27 *American Journal of International Law* 52; Ahmed Rifaat, *International Aggression—A Study of the Legal Concept, Its Development and Definition in International Law* (Almqvist & Wiksell International, 1979) 69.

⁶⁰ Bourquin (n 56) 481; Hans Wehberg, 'Le Protocole de Genève' (1925) 7 *The Hague Academy Collected Courses* 38.

⁶¹ For a list and full texts of the Soviet non-aggression pacts See 'Supplement: Official Documents' (1933) 27 *American Journal of International Law* 167.

⁶² Bourquin (n 56) 482; Wehberg (n 9) 49.

lieu de se demander si, et dans quelle mesure, le principe généralement accepté du respect du territoire étranger souffre des exceptions.⁶³

Following a path of reasoning quite similar to that of the pre-war authors, the proponents of the normativist school of thought considered the prohibition of the use of force to be a logical and necessary consequence of the principle of the equal sovereignty of states. Hans Kelsen further added that it was even a *sine qua non* condition for the existence of an international legal order—the basis of the ‘international social contract’.⁶⁴ In effect, in his view, saying that states could freely resort to armed force before 1914 amounted to saying that there was no international law before the First World War.

Alongside the normativists, another small branch of the doctrine, among which voluntarists as well as objectivists can be found,⁶⁵ also continued to defend the idea that, although imperfectly, classical international law regulated both war and intervention.⁶⁶ Nicolas Politis, for example, wrote in 1925 that:

[A]u cours du siècle dernier, le concert des Puissances a dressé son veto contre l'exercice du droit illimité de guerre ... la politique a senti d'instinct que le droit illimité de guerre est inadmissible.

A la fin du siècle dernier, ces idées aboutissaient à une règle normative de caractère encore générale et vague d'après laquelle on n'a pas le droit d'entreprendre une guerre injuste.⁶⁷

Differences of theoretical approaches once again partly explain the multiplicity of views that can be identified in interwar international scholarship. In clear dissonance with the pre-Versailles literature, however, the defendants of the ‘indifference’-narrative formed the evident majority.

⁶³ Alfred Von Verdoss, ‘Règles générales du droit international de la paix’ (1929) 30 *The Hague Academy Collected Courses* 469 (‘the doctrine we fight reverses the burden of proof ... it requires for the demonstration of the existence of special rules limiting the freedom of States in this regard, instead of asking itself if, and to what extent, the generally accepted principle of the respect of foreign territory suffers from exceptions’). See also Leo Strisower, *Krieg und die Völkerrechtsordnung* (Manz, 1919) 20.

⁶⁴ Hans Kelsen, ‘Théorie du droit international public’ (1953) 84 *The Hague Academy Collected Courses* 497. See also Guggenheim (n 5) 94.

⁶⁵ Objectivism can be defined as a ‘legal doctrine according to which international law is the product of social solidarities and of international communities necessities and its evolution’: Salmon (n 2) 764. It differs from naturalism in that the source of the law is not reason or nature but social needs as they exude from international life and relations.

⁶⁶ Victor H Rutgers, ‘La mise en harmonie du Pacte de la Société des Nations avec le Pacte de Paris’ (1931) 38 *The Hague Academy Collected Courses* 21; Jan de Louter, *Le droit international public positif* (Imprimerie de l’Université d’Oxford, 1920) 251; Nicolas Politis, ‘Les problèmes de la limitations de la souveraineté et la théorie de l’abus de droit dans les rapport internationaux’ (1925) 6 *The Hague Academy Collected Courses* 41; Robert Redslob, *Histoire des grands principes du droit des gens* (Rousseau & Cie, 1923).

⁶⁷ Politis (n 66) 41 (‘in the course of the last century, the concert of Powers vetoed the unlimited exercise of a right to wage war ... instinctively politics felt that the unlimited right to war was inadmissible. By the end of the last century, these ideas resulted in a normative rule, although general and vague, according to which one cannot undertake an unjust war’).

What might explain this sudden shift of discourse? As we have seen, the reversal cannot simply be summed up to epistemological reasons and, in particular, to a 'positivist turn'. Realists, voluntarists, normativists and even objectivists were all positivists—they all ambioned and pretended to describe the law as it was and not as they thought it should be. The present author's argument is that, aside from these theoretical considerations, attention should also be given to the contingent character of the emergence of 'indifference' as dominant. The interwar discourse in fact seems to be intrinsically linked with the trauma the First World War left in society as well as the establishment of the first formalised collective security system.

Interestingly, although they did not share the same views, interwar authors (with the exception of normativists) shared the same overall and underlying rhetoric regarding the adoption of the League of Nations Covenant. Realists, voluntarists and objectivists all believed the collective security system of the League, despite some shortcomings, was a great progress and achievement. In historical accounts narratives of progress often go hand in hand with a depreciation of the previous period for the correlative enhancement of the present achievements—such a depiction of the past legitimises the new regime.⁶⁸ Indeed, doctrine was actually self-aware of that phenomenon. Erich Kaufman, for instance, highlighted in 1935 that:

Il parait la conséquence de toute codification qu'au moins pour une certaine période, le travail scientifique a la tendance d'exagérer les nouveaux éléments et le caractère absorbant de la nouvelle réglementation.⁶⁹

In the same manner, without fully spelling it out, Maurice Bourquin equally admitted to the penchant for exaggeration that affected the literature of his time. He wrote:

Certains juristes, par attachement à la tradition, s'efforcent de minimiser la portée de ce mouvement [that of the change of international law], de le présenter comme un simple prolongement du passé, dont les assises resteraient intactes. Assurément, tout s'enchaîne plus ou moins dans le développement des sociétés, et les révolutions elles-mêmes, malgré certaines apparences, se soudent à l'état des choses qu'elles ambitionnent de détruire.⁷⁰

Although self-reflexive and critical, interwar doctrine nonetheless presented the Covenant as the triumph of law over politics; of order over anarchy. The analysis of the lexical field of the literature of the time is particularly compelling. As

⁶⁸ Randall Lesaffer, 'The Grotian Tradition Revisited: Change Continuity in the History of International Law' (2002) 73 *British Yearbook of International Law* 103.

⁶⁹ Erich Kaufmann, 'Règles générales du droit de la paix' (1935) *The Hague Academy Collected Courses* 589 ('It seems that the consequence of any codification is that, at least for a certain period of time, the scholarly literature has a tendency to exaggerate the new elements and the absorptive character of the new regulation').

⁷⁰ Bourquin (n 57) 5.

Martti Koskeniemi has pointed out, there was no theme that 'united international lawyers of the 1920s and 1930s more than their critique of pre-war diplomacy and of the balance of power that were held responsible for the slide into full-scale war in August 1914'.⁷¹ The pre-Versailles era was consequently presented as that of 'European anarchy', of the 'state of nature', of 'chaos', 'brutal force', 'catastrophe' and 'war', while the creation of the League of Nations was greeted by terms such as 'peace', 'protective realm of the law', 'order', 'justice' and even 'Holy Grail'. The new collective security system was assimilated to the rebirth of just war and in quasi-religious conceits introduced as the most remarkable and audacious *oeuvre* of Versailles, one that would revive a transfigured and rejuvenated Holy Roman Empire.⁷² In sum, the nineteenth century was analysed in overly realistic terms and the twentieth century in overly idealistic ones.

We stand at the heart of the structural oppositions and mystical analogies that Claude Lévi-Strauss identifies as the discursive basis of most myths. In studying the ancestral stories of the Puebloan people he noticed that, despite the fact that these stories were not necessarily identical, they all shared the same structure—didactic linguistic constructions rooted in dual imageries (oppositions, symmetries, contraries, analogies, etc).⁷³ Because they are didactic and thus easily comprehensible these structures become permanent; the story might evolve but the underlying rhetoric remains, as we will see in the next section. But what is the purpose of those discursive constructions? Lévi-Strauss is of the opinion that they 'fourni[ssent] un modèle logique pour résoudre une contradiction' and, as such, help make sense out of human experience.⁷⁴

In the present case, the contradiction seems to be the following: how could an abomination such as the First World War not be prevented if international law already regulated the right of states to wage war? As some scholars duly noted, the trust in the moral power of the law had been profoundly altered and demands for more efficient guarantees emerged not only from academic fields but from the whole of society.⁷⁵ How could trust be built in the League of Nations' law if law had not been able to avoid the outbreak of the First World War just a few years before? In other words, how could the credibility of international law, and by the same token international law as a profession, be salvaged?

⁷¹ Martti Koskeniemi, 'History of International Law, World War I to World War II' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol IV, 927.

⁷² See Redslob (n 66) 560, 561. For the same kind of narrative see Hoijer (n 56) 1.

⁷³ Lévi-Strauss (n 11) 241.

⁷⁴ *Ibid.*, 254 ('provide a logical model to resolve a contradiction').

⁷⁵ Hoijer (n 56) 172. See also Carlo Focarelli, 'International Law in the 20th Century' in Alexander Orashkelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 483.

An instinctive solution was to minimise the existence or the efficiency of classical international law as positive law. In fact, if the law of nations did not regulate the opening of hostilities, then the First World War was not a failure of the law but of politics. Politics and diplomacy were the bearers of chaos and anarchy when law would bring order, peace and stability. The authors who continued to claim that the law of nations apprehended and limited the possibilities for states to wage war equally engaged in the legitimisation of the League's new collective security system. Legal historian Robert Redslob, for example, insisted that the cause of the war was not the law but a 'mistake on the law'.⁷⁶ In the conclusion of his *Histoires des grands principes du droit des gens*—which he revealingly entitled 'La catastrophe du droit des gens et la Renaissance de la Justice mondiale'—he explained that in order to justify its policy Germany had distorted all the fundamental principles of the law: equality, sovereignty, nationality and solidarity. In the nineteenth century, then, the problem was not the absence of law or law itself, but its vulnerability to manipulation and politics. The Covenant, he believed, because it bound and consolidated the four above-mentioned principles in a formal text, would not suffer the same pitfall and would be able to fulfil its noble mission of maintaining international peace.⁷⁷

Furthermore, it must be emphasised that had the doctrine adopted a different type of rhetoric it would have actually placed itself in an awkward position. The dual image of the opposition between a barbaric past and a civilized present and future was indeed not the prerogative of academic spheres. It was a 'popular' discourse that glided over all the strands of post-First World War society.⁷⁸ As a matter of illustration, in his address to the Nobel Committee on receiving his Nobel Peace Prize in 1920, Léon Bourgeois, the representative of France to the Versailles Conferences and first President of the League of Nations, declared that:

De l'horreur de quatre années dé guerres avait surgi, comme une suprême protestation, une idée nouvelle qui s'imposait d'elle-même aux consciences: celle de l'association nécessaire des Etats civilisés pour la défense du droit et le maintien de la paix.⁷⁹

⁷⁶ Redslob (n 66) 549. See also Le Fur (n 56) 9.

⁷⁷ Redslob (n 66) 559.

⁷⁸ George W Egerton, 'Collective Security as a Political Myth: Liberal Internationalism and the League of Nations in Politics and History' (1983) 5 *The International History Review* 496; Brian C Schmidt, *The Political Discourse of Anarchy—A Disciplinary History of International Relations* (State University of New York Press, 1998) 100.

⁷⁹ Léon Bourgeois, 'The Reasons for the League of Nations' (1922) Address to the Nobel Prize Committee, www.nobelprize.org/nobel_prizes/peace/laureates/1920/bourgeois-lecture_fr.html ('Out of the horrors of four years of war emerged, like a supreme protest, a new idea that imposed itself in the minds of all people: the necessity for civilized nations to join together for the defence of law and order and the maintenance of peace').

One of the most important French-language encyclopaedias, *Larousse*, in its 1922 edition also spoke of the League as an ‘instrument of progress’ and described its action as ‘beneficent.’⁸⁰ School textbooks—which are often considered as one of the best indicators for the collective representations that prevail in a given society at a given time—followed the same line. The League of Nations, through the Commission on Intellectual Cooperation, aimed at consolidating peace and developing an ‘international spirit’ by way of the revision of history textbooks.⁸¹ Several historians have shown how the idealist discourse was slowly integrated into official history and taught as early as primary school.⁸²

The rhetoric that underlies the doctrinal discourse of ‘indifference’ was in harmony with the rationalisation that the society, in all its components, tried to make out of the events of the Great War. It fitted the popular feeling, demands and (hi)story; it suited the understanding of the moment as it was then built. But why, then, does the ‘indifference’-narrative still dominate today’s international legal scholarship?

IV. THE PERSISTENCE OF THE ‘INDIFFERENCE’- NARRATIVE IN CONTEMPORARY DOCTRINE: IDENTITY, CULTURE AND EDUCATION

If we go back to our Lévi-Straussian analysis framework, we remember that the anthropologist argued that while myths are stories of the past elaborated to respond to present needs, they simultaneously relate to the future.⁸³ The content of the story per se may evolve, but its underlying structure remains and lastingly shapes the understanding a society has of itself and of its universes. And, in fact, when looking at post-First World War literature it can be noted that, besides the persistence of the theory of the ‘indifference’, one can in fact observe the permanence of the entire interwar rhetoric.

The Second World War is traditionally presented as the second major event of twentieth-century international relations history and, as such, as the starting point of a new era of international law. Just as interwar years saw the deprecation of the pre-Versailles period, post-1945 literature emphasised the shortcomings of the League of Nations’ system which, for lack of political will, had, from the

⁸⁰ Claude Augé (ed), *Larousse Universel en deux volumes. Nouveaux dictionnaire encyclopédique* (Editions Larousse, 1922) vol II, 958.

⁸¹ See Maria-Christina Guintella, ‘Enseignement de l’histoire et révision des manuels scolaires de l’entre-deux-guerres’ in Marie-Christine Basquès, Annie Bruter and Nicole Tutiaux-Guillon (eds), *Pistes didactiques et chemins d’historiens. Textes offerts à Henri Moniot* (L’Harmattan, 2003) 161.

⁸² See Christophe Bechet, ‘La révision pacifiste des manuels scolaires. Les enjeux de la mémoire de la guerre 14–18 dans l’enseignement belge de l’entre-deux-guerres’ (2008) 20 *Cahiers d’histoire du temps présent* 49.

⁸³ Lévi-Strauss (n 11) 231.

very start, been too weak really to canalise interstate relations. This ‘periodisation’ that characterises most historical introductions to international law often goes hand in hand with ‘whiggish’ analysis—such an approach leans on the idea that history follows a linear path of progression towards greater good and greater humanity.⁸⁴ The past is then often analysed from the present standpoint and the evolution of international law is depicted as if obeying some kind of ‘trial and error’ trajectory. Each era, inaugurated by a traumatic event (the First and Second World Wars, the end of the Cold War, 9/11, etc), is then understood as an improvement in comparison to the previous period; the UN Charter is certainly better than the League of Nations’ system, but the League of Nations’ system was already better than whatever prevailed before the First World War.⁸⁵

Contemporary legal scholarship has thus kept the 1920s and 1930s account and even somewhat ordained it. As we have in fact seen, with a few exceptions, the position of interwar scholars on the legality of armed intervention in the nineteenth century was not always crystal clear. Today’s literature, for its part, takes a much clearer stand and can distinctly be divided between the advocates of ‘total indifference’ and those of ‘partial indifference.’ The first group, which seems to form the majority view, believes that ‘limitations to the use of force by States in their international relations are clearly an achievement of the 20th century’⁸⁶ and that ‘prior [to] World War I, virtually no prohibition to resort to force or war against another State existed on the international plain.’⁸⁷ The second group, on the other hand, contends that although the nineteenth century’s law of nations was characterised ‘by an unrestricted right of war,’⁸⁸ strict conditions had to be met in order to resort lawfully to measures short of war.⁸⁹

Once again, and as mentioned, be it in the writings of the advocates of total or partial ‘indifference,’ it is the same underlying rhetoric that structures their presentations. This is of course linked with the tendency to periodise the history of law and the ‘whig’ interpretations that often ensue from this method. The founding opposition and analogies given in evidence in the previous section distinctively appear. The historical introductions in general international law manuals to the principle of the prohibition of the use of force are, in fact, usually organised thus: the era of *bellum justum* (just war theory), the era of *jus*

⁸⁴ On the periodisation of the history of international law, see William E Butler, ‘Periodization and International Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 379; Oliver Diggelmann, ‘The Periodization of the History of International Law’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook on the History of International Law* (Oxford University Press, 2012) 997.

⁸⁵ Diggelmann (n 84) 1008.

⁸⁶ Oliver Dörr, ‘Use of Force, Prohibition of’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol X, 608. For a list of authors that take up the same view, see n 3 *supra*.

⁸⁷ *Ibid.*

⁸⁸ Brownlie (n 4) 19. For a list of authors that take up the same view, see n 4 *supra*.

⁸⁹ See n 4 *supra*.

ad bellum (the right to war) and the era of *jus contra bellum* (the law against war). While the first era is characterised as that of the more philosophical than strictly legal theories of just war, the second is described as that of the ‘collision of naked interests,’⁹⁰ of ‘war as state policy,’⁹¹ of a positivism that was tantamount to the deference of the law to the will of states,⁹² of ‘generalised warfare,’⁹³ of ‘international anarchy’⁹⁴ and of the ‘cult of brutal force.’⁹⁵ The third era is simply presented as ‘just war reborn.’⁹⁶

Methodologically, the periodisation and ‘whig’ approaches to history seem to explain the persistence of the theory of ‘indifference’ and of the rhetoric that accompanies it. But why, then, does this particular conception and presentation of history prevail? The roots of ‘indifference’ actually appear to be deeper and, in opinion of this writer, linked to the very identity of international law as a discipline and as a profession. It was argued above that the emergence of this account as the prevailing version of history in the interwar years was the result of the preoccupation with safeguarding the law and the profession associated with it. As several authors have emphasised, international law is, among other things, an idealistic project; civilizing for Martti Koskenniemi, ‘liberal-welfarist’ for Emmanuelle Tourme-Jouannet.⁹⁷ Law, in general, is envisioned as a means to ordain and regulate life in society—in the dictionary ‘disorganisation’ is presented as its antonym. If we go back to classics such as Thomas Hobbes, John Locke, etc, the rule of law is opposed to the state of nature. This is to say that, almost by definition, law is considered to be an element of social progress. The ‘whig’ vision is not limited to the history of international law, but actually applies to law itself—where there is more law there is more ‘humanity’. The opposition of politics as anarchy and law as order is hence at the very core of the discipline’s identity, and therefore of the profession’s identity as well. Despite the fact that critical legal studies enjoy increasing momentum, it remains that, even if in a more diffuse manner, this vision still forms part of the group’s ‘social psyche’ and ‘of *a priori* representations of self and of society, that is, in terms of cultural capital that are already there and are transmitted from generation to generation.’⁹⁸ The First World War contradiction, as a consequence, still touches the core of how international law and international lawyers perceive themselves—as a barrier against disorder, anarchy and, thereby, war.

⁹⁰ Neff (n 4) 167.

⁹¹ *Ibid.*, 159.

⁹² Arend and Beck (n 4) 15; O’Connell (n 3) 277; Geslin (n 6) 463.

⁹³ Kolb (n 4) 28.

⁹⁴ Charles Rousseau, *Droit international public* (Sirey, 1980) vol IV, 22.

⁹⁵ Albert Sirey, *Traité de droit international public* (Libraire Dalloz, 1951) vol II, 628.

⁹⁶ Neff (n 4) 277; O’Connell (n 3) 289.

⁹⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations—The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) 12; Jouannet (n 10).

⁹⁸ Mario Prost, *The Concept of Unity in International Law* (Hart Publishing, 2012) 144.

The role of education as a major medium of the transmission of this cultural capital and identity must be highlighted. As Emile Durkheim has underlined, education indeed seeks to make us a full member of the society that inculcates it; to make us share its beliefs, its practices and its collective opinions of all sorts.⁹⁹ The theory of ‘indifference’ is the account of history that has been taught to generations of international lawyers since the 1920s and 1930s; indeed, even earlier if we think of Oppenheim et al’s students. Interestingly, when they contend that no prohibition of the use of force existed before the creation of the League of Nations, contemporary scholars barely feel the need to reference their affirmation, showing that they consider it to be common knowledge. The authors who do reference their affirmation generally make no reference to nineteenth-century state practice or doctrine (other than our ‘four radicals’). Jessup cites Oppenheim, Dinstein uses Lawrence and Brierly, Arend and Beck rely on Brownlie and Brierly, etc. Ian Brownlie is a notable exception since he does undertake to examine state practice, although it could be argued somewhat selectively and in a biased manner. For the rest, as legal historians have often pointed out, literature ‘leans too much on the writings or elaborations of sources by others and too seldom shows signs of an independent and systematic research in the available immediate sources.’¹⁰⁰ Moreover, legal historians wholeheartedly admit to the tediousness of proper historical research,¹⁰¹ which is evidently an important factor in the general lack of thorough historical investigations in textbooks. Understandably, history is rarely the focus of international law courses and is often just rapidly sketched in the introduction. The didactically simplified (or ‘mythologised’) account of history thus naturally finds its place.¹⁰² Scholars whose main interest is not the history of international law will scarcely have the will and the time to take a leap into proper historical research, even where some contradictions may be apparent.

Other than university curricula, fundamental (primary and secondary) education also plays a role. It has already been noted that, following the establishment of the League of Nations, modifications to school textbooks were undertaken in order to integrate the overall pacifist narrative. The structural opposition between an anarchic nineteenth century and the beginning of a new world order in 1919 thus became part of official history. Just as the theory of ‘indifference’ was consistent with the popular interwar discourse, legal education maintains, in that regard, continuity with basic education. The ‘reality’

⁹⁹ Emile Durkheim, *Education et sociologie* (Presses Universitaire de France, 2013) 51.

¹⁰⁰ *Verzijl* (n 3) vol. I, 407.

¹⁰¹ *Ibid*; Randall Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’ in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2007) 36.

¹⁰² See Thomas Skouteris, ‘Engaging History in International Law’ in José Maria Beneyto and David Kennedy (eds), *New Approaches to International Law—The European and the American Experiences* (TMC Asser Press, 2012) 105.

as it emanates from nineteenth-century sources contradicts not only what we have been taught as jurists but also the more deeply anchored representation of European history that we have been taught in school. A short anecdote might better illustrate this point. When at a family dinner a guest asked this author what her thesis was about, the answer was given that the project concerned the use of force in the nineteenth century; the immediate response was: 'But how could there have been a rule when there wasn't any international organisation to enforce it?' This reaction essentially reproduced the classic realist argument, according to which there can be no limitations to the liberty of states to resort to arms in the absence of an 'international government'.¹⁰³

In sum, the cognitive dissonance between what we know and what can be seen in nineteenth-century sources is doubly puzzling; it contradicts what we have been taught and what we know as both lawyers and members of a Western-centred society. This seems to be why, as was noted in this paper's introduction, some reject any attempt to question the traditional theory of 'indifference' as being irrational.¹⁰⁴ In fact, as highlighted by legal historian Randall Lesaffer, with this scheme in mind

everything that corroborates the 'Hobbesian' or 'Westphalian' interpretation of the law of nations since 1648 is placed in the spotlight and called fundamental to the system; everything that detracts from it is pushed into the shadows and rejected as exceptional. The 'revolution of international law' in the 20th century and the gradual decline of the sovereign state's dominance have done nothing to correct that view of the modern law of nations in the period between Westphalia and Versailles (1648–1919).¹⁰⁵

V. CONCLUSION

Drawing from the observation that the current discourse on the history of the use of force appeared to be in contradiction with what came through the sources of the time, this article aimed at tracing the itinerary of the 'indifference' narrative in international legal scholarship. It has been argued that, although before 1914 very few authors defended the idea that war was a legal means of state policy, this position became widely dominant after the establishment of the League of Nations and its new collective security system. The First World War was obviously hugely traumatic in so many respects, and was therefore a 'pivotal point in the history of international law of security'.¹⁰⁶ Despite the shortcomings of the League's legal framework, trust had to be built into

¹⁰³ See Kenneth Waltz, *Man, State and War* (Columbia University Press, 1959) 188, 228.

¹⁰⁴ See n 6 *supra*.

¹⁰⁵ Lesaffer (n 101) 36.

¹⁰⁶ Jouannet (n 10) 131.

its capacity to avoid any major future conflict. One way of doing that was to emphasise the revolutionary character of this framework by, correlatively, deprecating classical international law; if the First World War happened it was not because law was unable to prevent it, but because there was no law or, at least, not enough law. It was further argued that if the theory of ‘indifference’ and its underlying rhetorical structure managed to durably shape international lawyers’ understanding of the history of their discipline, it is because this fits the image law has of itself as an element of human progress—the idea that the evolution of international law goes hand in hand with greater humanity.

This ‘whig’ interpretation actually goes beyond historical accounts. The present discourse on the abandonment of a state-centred system of international law towards a more global and people-oriented approach equally follows this narrative track. In that context, what does the revival of historical investigations, with strong inclinations towards critical histories, tell us about international law? It may be that the growing inquiries into the ‘foundational myths’ of the discipline are symptomatic of undergoing self-reflectiveness and paradigm shifts. The end of the Cold War is often identified as the triggering event of the current ‘historical turn’ and some legal historians further argue that such movements can actually be observed after every major international crisis.¹⁰⁷ Even the interwar years experienced such a phenomenon, albeit perhaps merely to serve immediate means rather than to satisfy a strictly intellectual curiosity. History, then, acts as some kind of refuge in times of uncertainty; and uncertainties are numerous when it comes to today’s rule on the prohibition of the use of force—should unilateral humanitarian intervention be admitted? Should preventive legitimate defence or legitimate defence against non-state actors be accepted? Is the UN, and the Security Council in particular, still a relevant arena? Although it could be contended that historical research helps put these current debates into perspective, notably by showing that they are not new, it brings no answer to these questions nor does it have ambitions to. In fact, instead of bringing certainty, contemporary historiographies of international law often tend to shatter deeply secured collective assumptions. In other words, the current revival of history is of a different nature, and it may be that it is indicative of a discipline that has become sufficiently assured of its foundations to question its past without risking delegitimising its existence.

¹⁰⁷ Martti Koskenniemi, ‘Why History of International Law Today?’ (2004) 4 *Rechtsgeschichte* 63; Lesaffer (n 101) 29; Emmanuelle Tourme Jouannet and Anne Peters, ‘The *Journal of the History of International Law*: A Forum for New Research’ (2014) 16 *Journal of the History of International Law* 2.