

Symposium Article

War Aims Matter: Keeping *Jus Contra Bellum* Restrictive While Requiring the Articulation of the Goals of the Use of Force

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Abstract

Should planned humanitarian interventions be required to have a well-articulated plan for peace? What has been lost by reducing the principal justification for the use of force to self-defense? This article explains why a full articulation of the goals of the use of force should be required, but why this explanation of desired ends should not entail a loosening of the limited legal justifications for the use of force. Jus post bellum is focused on the successful transition from armed conflict to peace. The success of this effort begins with the formation and declaration of war aims, not with steps taken after cessation of hostilities. A review of recent international armed conflicts in Kuwait, Kosovo, Afghanistan, Iraq, Libya, Ukraine, and elsewhere, underscores the connection between the articulation of war aims and the quality of the resulting peace. The customary law on declarations of war and peacemaking are examined, as well as current law rooted in the United Nations Charter.

The articulation of war aims matters not only for jus post bellum, but for the prevention of war and for jus in bello as well.

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An honest discussion of what is required to create the desired situation post bellum can generate internal and allied pressure to avoid the use of force in the first place. A clear explanation of the aims of the use of force may also improve rules of engagement so that specific targeting decisions and other decisions prioritize the construction of a just and sustainable peace. A more forthright and comprehensive formulation and disclosure of war aims should be demanded from the outset and throughout any ongoing series of decisions to use force.

I. INTRODUCTION

A. THE BRIDGE

Imagine targeting a bridge. Destroying the bridge provides a military advantage, and it can be done in a manner that no one is likely to be hurt or killed, but destroying the bridge may make the just and sustainable ending of the armed conflict more difficult.¹ The bridge literally and historically connects two communities. Its destruction will cause enduring resentment.

How do we make the decision whether to destroy the bridge? The *jus in bello*² proportionality assessment is notoriously difficult to make—how exactly does one compare the apples of military necessity to the oranges of civilian lives and suffering? If destroying a bridge would be part of the first responsive act that would start armed conflict between a state or armed group, how should the *jus ad bellum* proportionality requirement be analyzed? Should the assessment of the value of the bridge be limited to its intrinsic value (e.g., price for replacement, cultural value, suffering caused by its destruction)? Or should there be a particular consideration of its role in maximizing the possibility of a successful transition to a just and sustainable peace?

This article assesses broad themes and is based in part on a grand tradition, the just war tradition, that spans many

1. See e.g., Prosecutor v. Prlić et al., Case no. IT-04-74-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013), <http://www.icty.org/case/prlic/4> (describing Mostar Bridge which arguably fits this model, but not implying any criminal liability attributable to specific instances).

2. During much of the twentieth century, the law applicable to armed conflict was typically divided into two parts, the first governing resort to force (*jus ad bellum*), and the second the conduct within the conflict (*jus in bello*). More recently, *jus post bellum* has often been included to make a tripartite analysis.

centuries and countless wars, but it is useful to begin with this limited hypothetical. There are numbers of specific criteria that can be applied to the firing of a single mortar—whether the order to fire violates international humanitarian law; whether the order to fire violates international criminal law; whether it is an act of aggression; whether such an order is so manifestly illegal it must be disobeyed; whether it follows the domestic law binding on the actors; whether it follows the terms of engagement; whether it is unethical; whether it is good policy; whether there is sufficient warning to civilians; whether it is properly timed; whether the method minimizes civilian harm; whether there are alternatives; whether the subsequent conduct minimizes civilian harm and maximizes war aims. But at the end of any assessment, the bridge will either remain standing or tumble into the gorge. Stacked against the concrete realities of the use of force, discussing the honesty surrounding war aims may seem trivial. But changing how war is discussed before the first mortar is fired may not only prevent the use of armed force sometimes, but also change how armed conflict is fought, and how peace is built.

This work is as much about the public, forthright analysis (or lack thereof) that surrounds such a targeting decision as it is about the direct, classic analysis of the legality of the resulting destruction. Should the entity targeting the bridge be required to declare the rationale justifying the use of force? Most analyses of conduct such as this rightly focus on the conduct itself, not the public proclamations or justifications by those who decide whether and how to use force. *Jus ad bellum* and *jus in bello* analyses are generally objective evaluations of conduct. The existence of an armed conflict typically does not depend on the public statements of states.³ States may not declare war, or may actively deny the existence of an armed conflict, but nonetheless be in an armed conflict based on an objective analysis of relevant

3. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (granting applicability of the Conventions even if a state of war is not recognized by a party to the armed conflict); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

conduct. That said, this work will argue that in order to better restrain the general use of force, to wage armed conflict specifically, and more importantly, to improve any eventual transition from armed conflict to peace, a more forthright and comprehensive formulation and disclosure of war aims should be demanded from the outset and throughout any ongoing series of decisions to use force.

B. INTRODUCING THE CONCEPTS

How would one normally address the legal questions surrounding the potential use of armed force against a bridge as described above? The answer is not with the goals of the use of force, but with the legal justification for the use of force. Regardless of what is declared as the ultimate goal, an international or military lawyer is likely to ask first whether or not destroying the bridge is objectively justified by self-defense. In contemporary law, the legality of the use of armed force often comes down to, in one sense or another, whether it can be justified by self-defense, or in the alternative, whether the United Nations ("U.N.") Security Council can authorize the action.⁴ This is most obvious in the interaction between Articles 2.4 and 51 of the UN Charter⁵ in the case of the use of force by one state in response to an armed attack by another state, but it informs all discussions of the use of force. Perhaps the destruction of the bridge is an instance of collective self-defense, where many states may respond to an armed attack upon one state, but the core requirement of an attack on at least one state still remains. Or perhaps it is a use of force explicitly authorized by the U.N. Security Council—in which case the Council may be acting in essence on behalf of the sovereign state of Kuwait or the people of Libya,⁶ but the rationale is still at some level responsive, rooted in defense against aggression or atrocity. With respect to *jus in bello* assessments, the question of whether destroying a bridge is justified by military necessity is not as directly tied to self-defense as the *jus ad bellum* analysis. That said, the definition of what is included in a legitimate military

4. See U.N. Charter art. 51.

5. See *id.* art. 2, ¶ 4, 51.

6. This is not intended to elide the substantial differences between defense of a sovereign state and an internal population, but here the commonality is emphasized to contrast this example with the previous variety of just causes for war.

aim is not unrelated to the question of *jus ad bellum* proportionality, so the overall question of self-defense may have repercussions with *jus in bello* analysis as well. If self-defense is always the final destination of the legal explanation, one might reasonably say that there is little to discuss beyond the assertion of the armed attack or resolution authorizing the use of force. If the only concern is legal authority and no further normative basis for the use of force or commitment to a successful eventual transition from an armed conflict is necessary, there may be little apparent reason to require any further formulation and disclosure of the goals of the use of force.

This was not always the case. The goals of the use of force and the legal justification for the use of force were once diverse, largely the same, and in any case required articulation. As historians of international law have well understood,⁷ self-defense was only one of many legitimate justifications for resort to the use of force before the revolution in *jus ad bellum* during the first half of the twentieth century (making it largely a body of law *contra bellum*, thus causing many to replace one Latin neoterism (*jus ad bellum*) with another (*jus contra bellum*)). Academia has recently highlighted this revolution, thanks to *The Internationalists*,⁸ and more broadly in a forthcoming work, *War Manifestos*.⁹ *War Manifestos* documents that the declared justifications for war included not only self-defense (still the most common justification), but also violation of treaty obligations, tortious wrongs, violations of the laws of war, protecting the balance of power, religious claims, protection of trade interests, humanitarian protection, protection of diplomatic relations, debt collection, and declarations of independence.¹⁰ Oona A. Hathaway and Scott Shapiro, co-authors in both *War Manifestos* and *The Internationalists*, want to underline the historicity, contingency, and potential reversibility of the accomplishment of restricting the legal use of force to instances of self-defense, U.N. Security Council

7. See, e.g., FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 128 (Cambridge Univ. Press 1975); David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299, 299 (2011).

8. OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

9. See Oona A. Hathaway et al., *War Manifestos*, 85 U. CHI. L. REV. (forthcoming 2018) (showcasing a remarkable effort to document the justification of war through the analysis of hundreds of years' worth of war manifestos), <https://ssrn.com/abstract=3037538>.

10. See *id.*

authorization, or with permission of the territorial state. Their scholarship is a celebration of an underrated accomplishment, but more pointedly a warning against the squandering of the inheritance of a world order founded in large part on the prohibition of acquisition of territory by force and more generally on the restrictions on the use of force.

Other scholars emphasize the same restriction of legitimate grounds for the use of force as a problem rather than an accomplishment. Gabriella Blum in *Prizeless Wars* emphasizes that a number of areas of *jus ad bellum* remain unclear, and places blame for this in part on the restriction on the ability of legal discourse to enunciate reasons for the use of force other than self-defense, without fully defining the scope and meaning of self-defense.¹¹ Other scholars (mostly from the United States and United Kingdom, whose governments are also supportive of a changed interpretation) are also pushing back against *jus contra bellum*, particularly with respect to “humanitarian intervention”¹² or use of force under the “Responsibility to Protect” doctrine.¹³

Can these views be bridged? Can we learn anything about the overall body of law and ethics that apply to matters of war and peace (including *jus post bellum*) from this new interest in stated war aims by Blum¹⁴ and from the remarkable research

11. Gabriella Blum, *Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict*, 49 ARIZ. ST. L.J. 633, 688 (2017).

12. See, e.g., U.K. GOV'T PRIME MINISTER'S OFFICE, CHEMICAL WEAPON USE BY SYRIAN REGIME: UK GOVERNMENT LEGAL POSITION (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version>; Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628 (2003); Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?* 38 GEO. WASH. INT'L L. REV. 561 (2006); Daniel Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sep. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

13. See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 39-45 (2001). See also G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138-39 (Sept.15, 2005); U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 48, U.N. Doc. A/63/677 (Jan. 12, 2009); U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 65-7, U.N. Doc. A/59/565 (Nov. 29, 2004).

14. See Blum, *supra* note 11, at 688.

project described in *War Manifestos*, or is it best addressed only through *jus contra bellum*?¹⁵ It is worth noting that the uses of force since the end of the Cold War that arguably or clearly violate *jus contra bellum* have not ended in a clear transition to a just and sustainable peace.¹⁶ If they did not begin well, they often did not end well. Whether one focuses on Kosovo, Afghanistan, Iraq, Libya, Ukraine, Syria, or elsewhere, it is often hard to tie a clear expression of war aims to a clear accomplishment of those goals. Not only are the current restrictions on *jus ad bellum* effectively at risk of being disregarded—a view shared by all of the authors cited so far, albeit for different reasons—but in practical terms, there is little evidence that states are improving their ability to use force to accomplish clear and justifiable aims.

By design, questions of *jus ad bellum* and *jus in bello* are separated by a firm wall. The laws of armed conflict (*jus in bello*) may not be violated even if fighting a perfectly legal and justified war of self-defense. Similarly, no amount of respecting the laws of armed conflict will lessen the wrongfulness of a use of armed force in violation of the law articulated in U.N. Charter 2.4 (judged pursuant to *jus ad bellum*).¹⁷ But this way of dividing our thinking of war and peace tends to miss connections that run through different areas of law pertaining to war and peace, what was once discussed as *jure belli ac pacis*.¹⁸ While the views of various authors are very unlikely to be reconciled, perhaps the path to drawing the best lessons from these conflicting views also requires bridging the various areas of just war theory separated during the twentieth century but subject to renewed interest in recent decades with special emphasis in the law of transition between armed conflict and a just and sustainable peace, which some call *jus post bellum*.¹⁹

15. See Hathaway et al., *supra* note 9.

16. See, e.g., Jens Iverson, *Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics*, 7 INT'L J. TRANSITIONAL JUST. 413 (2013).

17. U.N. Charter art. 2, ¶ 4

18. HUGO GROTIUS, LIBRI TRES DE JURE BELLI AC PACIS, IN QUIBUS IUS NATURAE ET GENTIUM, ITEM IURIS PUBLICI PRAECIPUA EXPLICANTUR (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625) (Latin for the Laws of War and Peace).

19. Iverson, *supra* note 16.

C. ARGUMENT AND DEFINITIONS

This work argues that an honest articulation of war aims matters. By “honest,” I mean a reasonable level of forthright and comprehensive public expression by the state considering the use of force. By “war aims,” I mean the actual intentions of those individuals and entities that choose whether or not to use force, regardless of whether that use of force would amount to armed conflict or state of war. By “matters,” I mean that whether or not something has legal, normative, and practical implications.

In particular, this work makes the case that requiring the articulation of the goals of the use of force could aid in the successful transition from armed conflict to a just and sustainable peace when armed conflict does occur. By “improving the discussion,” I mean both the honest, internal debate within open societies where public support is likely to be necessary for the sustained commitment of resources if war aims extend beyond symbolic action and the public, forthright publication of the actual rationale for and goals of the use of force. By “successful transition from armed conflict to a just and sustainable peace,” I mean not merely the full cessation of hostilities, but rather the aim of a just peace unlikely to return to armed conflict over the same dispute, as has been the focus of the just war theory throughout its existence.

As Larry May and Elizabeth Edenberg put it:

It is not merely peace that is at issue, but a just peace, where mutual respect and the rule of law are key considerationsThe *jus post bellum* literature focuses, as one might expect, on the achieving of peaceWhile *jus post bellum* theorists want a just peace, not merely any peaceful settlement of hostilities, they focus on the stopping of hostilities*Jus post bellum* principles all are aimed at securing a just and lasting peace at the end of war or armed conflict. Discussion of these principles has been standard fare in the Just War Tradition for several thousand years, even if *jus post bellum* principles are not usually given the status afforded to *jus ad bellum* and *jus in bello* principles.²⁰

20. Larry May & Elizabeth Edenberg, *Introduction*, in *JUS POST BELLUM*

Recognition that the application of law in this area has, as May and Edenberg state, the *aim* of a just and lasting peace (and is not neutral with the application to these normative goals) is necessary for understanding and development of *jus post bellum*.²¹ Another way to frame the normative emphasis on a “just and sustainable peace” so often referenced in the literature of *jus post bellum* is to tie it to concepts from peace studies such as Johan Galtung’s “positive peace” being differentiated from a mere “negative” peace,²² without a just resolution of the causes of the war and conduct within the war.

This work asserts that an honest discussion of war aims matters not only for *jus post bellum*, but for *jus ad bellum* and *jus in bello* as well. As described in *War Manifestos*,²³ a clear statement of war aims has historically allowed the possibility of avoiding war due to settlement. In contemporary *jus contra bellum*, this should obviously function differently. Rather than threatening aggressive war, an honest discussion of what is required to create the desired end state may help generate internal and allied pressure to avoid the use of force in the first place. A clear explanation of the envisioned overall aims of the use of force may also improve rules of engagement so that specific targeting decisions and other decisions more firmly prioritize the eventual construction of a just and sustainable peace.

D. ROADMAP

This work will proceed as follows. The roots of the law on declarations of war and peacemaking will be examined in Part II, with a particular eye towards customary international law, as it existed before the twentieth century, focusing on the works

AND TRANSITIONAL JUSTICE 1–3 (Larry May & Elizabeth Edenberg eds., Cambridge Univ. Press 2013).

21. This section, as well as certain writing on Vattel and *jus post bellum*, builds in part upon unpublished work of the author.

22. The concepts of “positive” peace were developed by Johan Galtung in his seminal 1964 article: Johan Galtung, *An Editorial*, 1 J. PEACE RES. 1 (1964). For more on Galtung’s work on structural analysis of peace, see also Johan Galtung, *Cultural Violence*, 27 J. PEACE RES. 291 (1990); Johan Galtung, *Social Cosmology and the Concept of Peace*, 18 J. PEACE RES. 183 (1981); Johan Galtung, *Twenty-Five Years of Peace Research: Ten Challenges and Some Responses*, 22 J. PEACE RES. 141 (1985); Johan Galtung, *Violence, Peace and Peace Research*, 6 J. PEACE RES. 167 (1969);

23. Hathaway et al., *supra* note 9.

of Emer de Vattel. Part III will provide further context for the current tripartite structure (*jus ad/contra bellum*, *jus in bello*, and *jus post bellum*) commonly used to evaluate the laws and norms pertaining to the use of force, conduct within armed conflict, and the transition from armed conflict to peace. After this initial grounding in the past and present norms regarding war aims and the transition to peace, the current discussion regarding the restrictive nature of *jus contra bellum* and how that relates to war aims is re-introduced in Part IV. Part V extends this discussion to examine how a public and forthright declaration of the aims of the use of force may be connected to the successful transition to a just and sustainable peace in six recent conflicts, namely Kuwait, Kosovo, Afghanistan, Iraq, Libya, and Ukraine. In the conclusion, a discussion of the uncertain future of the laws of war and peace is provided.

II. DECLARATIONS OF WAR AND PEACEMAKING BEFORE JUS CONTRA BELLUM

The idea that war aims should be stated is ancient.²⁴ The earliest relevant example is the Roman practice limiting warfare of demanding redress formally through a *repetio rerum*.²⁵ This diplomatic document would list the wrongs allegedly done and the conduct needed to satisfy Rome.²⁶ After thirty-three days, if satisfaction had not been obtained, the next step was legal authorization in the name of the Senate and the people of Rome.²⁷ Only then would the fetial priests issue a formal declaration of war, and military measures could commence.²⁸

24. This section builds upon the author's Ph.D. thesis *The Function of Jus Post Bellum in International Law*. This study focuses on legal and normative principles of the transition from armed conflict to peace, often called *jus post bellum*. It does not focus on declarations of war, but does address the deep roots of *jus post bellum*, including Emer de Vattel's writings.

25. JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* 153–54 (Princeton Univ. Press 1981).

26. *Id.* at 154.

27. *Id.*

28. *Id.*

Emer de Vattel's²⁹ *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*³⁰ is a classic of international law. Emmanuelle Jouannet has gone so far as to consider Vattel a principal founder of modern international law.³¹ Randall Lessafer places Vattel (along with his intellectual muse Christian Wolff) as the leading voice on the law of peace treaties in the seventeenth and eighteenth centuries.³² As pointed out in *War Manifestos*, Emer de Vattel noted that war declarations were “the constant practice among the powers of Europe.”³³ He states that:

In order to be justifiable in taking up arms, it is necessary—1. That we have a just cause of complaint. 2. That a reasonable satisfaction have been denied us. 3. The ruler of the nation, as we have observed, ought maturely to consider whether it be for the advantage of the state to prosecute his right by force of arms. But all this is not sufficient. As it is possible that the present fear of our arms may make an impression on the mind of our adversary, and induce him to do us justice, we owe this farther regard to humanity, and especially to the lives and peace of the subjects, to declare to the unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force for the purpose of bringing him to reason. This is called *declaring war*.³⁴

Vattel makes clear that the war aims must be made publicly. Notice to the state against whom the declaration is made is demanded by “natural law” but custom goes further, requiring publication domestically and abroad.

29. Vattel was christened “Emer.” Some authors have mistakenly given him a German name, “Emerich.” See *Introduction in EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* (Béla Kapossy & Richard Whitmore eds., Indianapolis: Liberty Fund 2008) (1758).

30. *Id.*

31. EMMANUELLE JOUANNET, *EMER DE VATTEL ET L'ÉMERGENCE DOCTRINALE DU DROIT INTERNATIONAL CLASSIQUE* (Paris: A Pedone 1998).

32. *Id.* at 358.

33. See DE VATTEL, *supra* note 29, at 328 (discussing the necessity of making war declarations of war under international law). See also Hathaway et al., *supra* note 9.

34. See DE VATTEL, *supra* note 29, at 328.

It is necessary that the declaration of war be known to the state against whom it is made. This is all which the natural law of nations requires. Nevertheless, if custom has introduced certain formalities in the business, those nations, who, by adopting the custom, have given their tacit consent to such formalities, are under an obligation of observing them, as long as they have not set them aside by a public renunciation (Prelim. §26). Formerly the powers of Europe used to send heralds or ambassadors to declare war; at present they content themselves with publishing the declaration in the capital, in the principal towns, or on the frontiers: manifestoes are issued; and through the easy and expeditious channels of communication which the establishment of posts now affords, the intelligence is soon spread on every side.³⁵

Besides the foregoing reasons, it is necessary for a nation to publish the declaration of war for the instruction and direction of her own subjects, in order to fix the date of the rights which belong to them from the moment of this declaration, and in relation to certain effects which the voluntary law of nations attributes to a war in form. Without such a public declaration of war, it would, in a treaty of peace, be too difficult to determine those acts which are to be considered as the effects of war, and those that each nation may set down as injuries of which she means to demand reparation.³⁶

This requirement of a public declaration is interesting both in its rationale and detail. It was not enough for a sovereign or sovereign government to be internally convinced of the legality and rightness of using force, but rather it must be, to the degree feasible, made known not only to an opposing sovereign but the general public of both nations. This was the customary practice of states at the time.³⁷ But why? At least in part because the state preparing to use force must also be preparing for the treaty of peace that would allow the possibility of a sustainable peace with the causes of the armed conflict justly resolved. It is worth noting that there is an exception to the requirement of such a public declaration: "He who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy's declaration or open hostilities."³⁸ This will be examined further

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

below.

With respect to *jus post bellum*, as in many areas, Vattel took Wolff's work and expanded it into a more comprehensive treatise on the transition to peace, paying particular attention to the law applicable to the formation and results of peace treaties. Vattel was profoundly interested in the connection between war and peace, not simply treating them as unconnected bodies of law.

Out of four books in *Le Droit des Gens*, Vattel devotes an entire volume to largely to the subject of the transition to peace: "Of the Restoration of Peace; and of Embassies." This ultimate book in *Le Droit des Gens* begins with a definition of peace as the natural state of mankind, *contra* Hobbes.³⁹ Sovereigns were not free to take the obligation of cultivating peace lightly, but were bound to it by a "double tie"—as an obligation both to the people and to foreign nations.⁴⁰ This restricts the sovereign not only from "embarking in a war without necessity," but also from "persevering in it after the necessity has ceased to exist."⁴¹

Vattel is applying his law "Of the Restoration of Peace" functionally, before peace starts and during war, not limited by time. Many of the themes sounded by Vattel are, unsurprisingly, along the same lines of Wolff. A sovereign "may carry on the operations of war till he has attained its lawful end, which is, to procure justice and safety"—showing that the object in mind is a peace both just and safe (and thus not unsustainable).⁴² A treaty of peace is inevitably a compromise, in which the rules of strict and rigid justice are not observed; otherwise it would be impossible to ever make peace.⁴³ A peace treaty extinguishes any grievance that gave rise to war, and creates a reciprocal obligation to preserve perpetual peace (at least with regards to that subject).⁴⁴ Amnesty is implied in all peace treaties, as peace should extinguish all subjects of discord.⁴⁵ The focus for Vattel is clearly establishing a just and sustainable peace.

Randall Lesaffer wrote the best scholarship on Vattel with respect to the transition from armed conflict to peace in his contributions to two edited volumes (*Vattel's International Law*

39. *Id.* at 431.

40. *Id.* § 3, at 432.

41. *Id.* § 6, at 433.

42. *Id.*

43. *Id.* § 18, at 438.

44. *Id.* § 19, at 439.

45. *Id.* § 20, at 439.

from a XXIst Century Perspective/*Le Droit International de Vattel vu du XXI e Siècle* and *The Oxford Handbook of the History of International Law*).⁴⁶ I have no wish to be repetitive of Lesaffer's excellent summation, but would like to draw out certain highlights.⁴⁷

In *A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties*,⁴⁸ Lesaffer notes that Wolff and Vattel both emphasized the need for compromise and a less-than-maximalist approach to just claims in order to achieve peace.⁴⁹ Vattel emphasizes from the outset that there is an obligation on all nations to cultivate peace.⁵⁰ Lesaffer notes a peace treaty must resolve the underlying issues that Vattel identifies: disputes that led to war, the termination of the state of war, and the organization of and preservation of the peace.⁵¹

III. A NOTE ON LATIN NEOTERISMS AND THE STRUCTURE OF THE LAW OF WAR AND PEACE

Many lawyers with an introductory familiarity with contemporary discourse on the regulation of the use of armed force and the waging of armed conflict will be familiar with the division between *jus ad bellum* and *jus in bello*, and assume that these terms describe a natural and ancient distinction. This is wrong. Robert Kolb tentatively credited Josef Kunz with coining the terms *jus ad bellum* and *jus in bellum* in their contemporary sense in 1934.⁵² He notes:

46. For more on peace treaties in general, as well as a comprehensive synopsis of the work of Vattel, including Wolff's impact on Vattel with respect to *jus post bellum*, see, e.g. PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE (Randall Lesaffer, ed., 2004); Randall Lesaffer, *The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648*, 18 *Grotiana* 71 (1997).

47. For a more comprehensive synopsis of the work of Vattel, including Wolff's impact on Vattel with respect to *jus post bellum*, see also VATTEL'S INTERNATIONAL LAW IN A XXIst CENTURY PERSPECTIVE (Vincent Chetail & Peter Haggemacher eds., 2011); THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2014).

48. Randall Lesaffer, *A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties*, in VATTEL'S INTERNATIONAL LAW FROM A XXIst CENTURY PERSPECTIVE 353, 359–66 (Vincent Chetail & Peter Haggemacher eds., 2011).

49. *Id.* at 363.

50. *Id.* at 366.

51. *Id.* at 369.

52. Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bellow*,

The august solemnity of Latin confers on the terms *jus ad helium* and *jus in bello* the misleading appearance of being centuries old. In fact, these expressions were only coined at the time of the League of Nations and were rarely used in doctrine or practice until after the Second World War, in the late 1940s to be precise.⁵³

Stahn has identified the emergence of the terms in the 1920s,⁵⁴ with Giuliano Enriques using the term *jus ad bellum* in 1928.⁵⁵ If one were to argue for a venerable root of the distinction, one could look to Christian Wolff, in the 1764 edition of his *Jus Gentium Methodo Scientifica Pertractatum*, which states:

Since hostilities in war are due to the force by which we pursue our right in war, which consists either in collecting a debt or imposing a penalty, and therefore all our right in war is to be determined thereby, the right to destroy the property of an enemy is not to be determined otherwise, unless you should wish to assume a thing which can be assumed only in contravention of the law of nature, that there is absolutely no place left in war for justice, which orders us to give each one his right, and that *right in war* disappears in mere licence, to which none can be entitled.⁵⁶

The italicized text, “right in war” corresponds to the term “*jus in bello*” on page 300 of the original Latin text. On the next page of the original text, Wolff asserts:

The law of nature, which gives us a *right to war*, gives also a right against the property of enemies, as far as that is necessary in waging war; for otherwise the former right would be useless, if it were not allowable to claim

37 INT'L REV. RED CROSS 553, 561 (1997).

53. *Id.* at 553.

54. Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT'L L. REV. 311, 311–12 (2008).

55. See Giuliano Enriques, *Considerazioni sulla teoria della Guerra nel diritto Internazionale* [Considerations on the Theory of War in International Law], 7 RIVISTA DI DIRITTO INTERNAZIONALE [R.D.I.] 172 (1928) (It.).

56. 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, 426 (James Brown Scott ed., Joseph H. Drake & Francis J. Hemelt trans., 1934) (emphasis added).

the latter.⁵⁷

The translated text “right to war” is in the original text: “*jus ad bellum*.”⁵⁸

What does this tell us about the contemporary usage of the term? Reviewing the terms as they were used does not indicate any clear link to the current usage. Nor is there any evidence that these terms, as used by Wolff, were identified by subsequent scholars. It is unsurprising that those particular words should come together in a long book in Latin about international law. Kolb and Stahn are right in essence—the reason these terms are used today is not because Wolff used them in the eighteenth century. They are used, in this author’s view, primarily because of the need to protect *jus in bello* from *jus ad bellum*, to emphasize that the constraints on the waging of war apply equally to all belligerents, regardless of the justice or legality of the overall recourse to the use of force.⁵⁹

Jus post bellum is self-consciously named in relation to its sister terms, *jus ad bellum* and *jus in bello*—terms that have been exhaustively developed and theorized since they were coined in the early-1900s. *Jus post bellum*, in contrast, is comparatively under-developed. For *jus post bellum*, there is no foundational treaty text equivalent to the Hague Regulations of 1899⁶⁰ and 1907⁶¹ or the Geneva Conventions of 1949⁶² for *jus in*

57. *Id.* at 427 (emphasis added).

58. *Id.* To the author’s knowledge, other scholars have not identified Wolff’s early usage of *jus ad bellum* and *jus in bello*. That said, this usage is still interesting with respect to the question of the normative and historical foundations of *jus ad bellum*, *jus in bello*, and their sister term, *jus post bellum*. In these passages, Wolff seeks to determine the natural law pertaining to the right to destroy enemy property and appears to distinguish between justice during war and the right to go to war. *Id.* at 426-427.

59. Compare Kolb, *supra* note 52 (discussing the misleading implication of *jus ad bellum* and *jus in bello* being centuries old), and Stahn, *supra* note 54, at 426–27 (discussing the emergence of the terms in the twentieth century), with Wolff, *supra* note 56 (utilizing the terms *jus in bello* and *jus ad bellum* in the mid eighteenth century).

60. See Hague Convention IV, Declaration III Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002 (entered into force Sept. 4, 1900).

61. See Hague Convention IV, Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 (entered into force Jan. 26, 1910).

62. See Geneva Convention I, *supra* note 3; Geneva Convention II, *supra* note 3; Geneva Convention III, *supra* note 3; Geneva Convention IV, *supra* note 3.

bello or Articles 2 and 51 of the U.N. Charter⁶³ for *jus ad bellum*. It is a phrase frequently used without definition, or with little understanding that others may use the term to mean something else. It is almost never used with anything approaching a full exposition of the intellectual history upon which it is built. Before the scholarship in recent years, the laws and principles that constitute the *jus post bellum* were rarely expounded. Revisiting these terms and allowing for their use without necessarily cabining one's analysis to a temporal conception of the terms allows for consideration of whether conduct *ante bellum* can have *post bellum* effects.

IV. CURRENT DISCUSSION: THE RESTRICTIVE *CONTRA BELLUM* THESIS AND RELAXED ANTITHESIS

Why were war manifestos useful? In *War Manifestos*, the authors identify several reasons. First, it was required by law.⁶⁴ Second, it served the practical purpose of providing the possibility of avoiding war by settlement of the stated grievances informally or in fully-formed peace treaties before armed conflict.⁶⁵ Third, a variety of reputational costs are described, from the conscience of the sovereign,⁶⁶ to popular domestic support,⁶⁷ to support from allies.⁶⁸ These are all, in essence, *jus ad bellum* concerns, dealing with whether or not it was legal and practical to resort to the use of force. This makes sense given the current framework by which modern jurists tend to approach questions of law and peace, with *jus ad bellum*, *jus in bello*, and *jus post bellum* largely cabined off from one another.

If that is why war manifestos *were* useful, why is the study of them useful today? Again, the focus in *War Manifestos* is focused on *jus ad bellum*, in addition to domestic law issues. Given the horrors of ongoing armed conflict throughout the period studied, the principal lesson given by the authors of *War*

63. See U.N. Charter art. 2, ¶ 51.

64. Hathaway et al., *supra* note 9, at 35. See also DE VATTEL, *supra* note 29, §55, at 329.

65. See Hathaway et al., *supra* note 9, at 39–43 (giving the examples of the Caroline incident and the Nootka crisis). See also *id.* at 43–45 (giving the example of the Eden Agreement).

66. *Id.* at 45.

67. *Id.* at 48.

68. *Id.* at 50.

Manifestos is that the past is a place that is interesting to study, but one would not want to live there. In a world where the use of force was not restricted to self-defense, U.N. Security Council authorization, or permission of the territorial state, but also included treaty obligations, tortious wrongs, violations of the laws of war, protecting the balance of power, religious claims, protection of trade interests, humanitarian protection, protection of diplomatic relations, debt collection, and declarations of independence,⁶⁹ war is inevitably more frequent. With fewer justifications, there are fewer armed conflicts, according to their formulation.⁷⁰ The authors of *War Manifestos* seem squarely in favor of a restrictive, modern, orthodox *jus contra bellum*.⁷¹

In *Prizeless Wars*, Blum emphasizes the limited allowable *function* and *results* of armed conflict after the U.N. Charter:

The terms of the Charter made it clear that no state could lawfully gain land or hold onto colonized territories through force. Wars could no longer function as means of adjudication or enforcement, be waged for collection of debt or the punishment of transgressors, or prosecuted with the goal of converting the religion or beliefs of other people.⁷²

This is laudable, but Blum continues:

What we have lost is the ability to specify the exact goals of war, to identify a clear moment of victory when the goals of war are satisfied and the war has no further justifiable ground upon which to continue. The broad list of affirmative goals, resting on a broad list of permissible justifications, that warring parties were free to pursue in the pre-Charter era was, to modern eyes, wildly permissive; but in a sense, it was also restrictive. For once set, these asserted goals gave warring parties clear yardsticks for the purpose of the war—for what it could

69. *Id.* at 52 (listing the causes in the manifesto collection offered by sovereigns in order of frequency).

70. *See generally id.* (examining the history and evolution of war manifestos).

71. *See id.* at 4, n.1 (“Regardless of the disagreements around the edges, however, there is a strong consensus that the right to war—the *jus ad bellum*—is tightly constrained.”).

72. Blum, *supra* note 11, at 635.

and should attempt to achieve. And this, in turn, indicated when the war had to end.⁷³

Blum's central thesis is that because the criterion for the use of force is generally restricted to self-defense, the current articulation of *jus ad bellum* falls short.⁷⁴ While contemporary, *jus contra bellum* retains certain requirements of classical just war *jus ad bellum*, including:

[L]ast resort (through necessity), proportionality, and perhaps even legitimate authority (a state government under the right circumstances or the Security Council). Some other elements of [just war theory] were largely foregone. Right intention, for instance, is not an objective requirement of the *jus ad bellum*, and as long as there is a justified self-defensive action, the true intention of the defender is not further investigated, at least as a formal matter. Similarly, the law does not require that a defender faces a reasonable chance of success.⁷⁵

Blum would widen the discussion of the goals of the use of armed force to clarify what is meant by self-defense in practice, stating: "Regime change, democratization, nation-building, gender equality, even the elimination of each and every member of an adversary group have all been cited as defensive goals of recent wars."⁷⁶ Blum's argument seems to press against the orthodox *jus contra bellum*, stating:

Wars can, in the wake of much suffering, be wise or unwise, profitable or wasteful, and bring about good or bad outcomes. But none of this matters under the lens of international law, where self-defense is the only legitimate paradigm through which all use of force must be articulated, evaluated, and justified.⁷⁷

Likely the foremost liberal internationalist advocating for a change (although sometimes phrased as a clarification) of *jus ad bellum* restrictions on use of force is Harold Hongju Koh.⁷⁸ In

73. *Id.* at 636.

74. *Id.* at 637.

75. *Id.* at 658.

76. *Id.* at 641.

77. *Id.* at 639.

78. See e.g., Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUSTON L. REV. 971 (2016).

one of his most recent works on the same theme, *Humanitarian Intervention: Time for Better Law*,⁷⁹ Koh argues for a reevaluation of whether unilateral humanitarian intervention is always per se illegal under international law⁸⁰ based on a limited selection of state practice. He identifies the current period as a lawmaking moment, one in which legitimacy and legality can be reconciled in order to allow a response to threatened or ongoing atrocities without losing the benefits of a restrictive *jus contra bellum*.⁸¹ This is an argument that has again come to the fore after the April 6, 2017, missile strikes by the United States government against the Syrian government, an argument that has replayed almost verbatim from the debate in 2013, when airstrikes against the Syrian government by the United States were threatened but not carried out.⁸² One of the more illuminating examples of the argument occurred in a four-part online debate on the subject between Koh and Carsten Stahn, with Stahn defending the orthodox restrictive *jus contra bellum* interpretation of the law.⁸³

Koh may feel that 2017, like 2013, is a moment of particular lawmaking potential. But the stale nature of the debate on *jus*

79. Harold Hongju Koh, *Humanitarian Intervention: Time for Better Law*, 111 AM. J. OF INT'L. L. UNBOUND, 287–91 (2017).

80. *Id.* Koh also briefly discusses domestic legality of unilateral humanitarian intervention pursuant to United States law. *Id.*

81. *Id.* at 287 (“The time has come for international lawyers to develop a better rule to evaluate the legality of unilateral humanitarian intervention . . .”).

82. See Vito Todeschini & John Louth, *Debate Map: Armed Conflict and Use of Force in Syria*, OXFORD PUB. INT'L L., http://opil.ouplaw.com/page/debate_map_syria/debate-map-use-of-force-against-syria (last visited Oct. 17, 2017) (providing a useful overview of the debate surrounding the attacks in Syria).

83. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/2013/10/02/koh-syria-part2/> (last visited Oct. 17, 2016); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part III – A Reply)*, JUST SECURITY (Oct. 10, 2013, 11:45 AM), <http://justsecurity.org/2013/10/10/syria-law-humanitarian-intervention-part-iii-reply/> (last visited Oct. 17, 2016); Carsten Stahn, *On ‘Humanitarian Intervention’, ‘Lawmaking’ Moments and What the ‘Law Ought to Be’ – Counseling Caution Against a New ‘Affirmative Defense to Art. 2 (4)’ After Syria*, OPINIO JURIS, <http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-de/> (last visited Oct. 17, 2016); Carsten Stahn, *On Intervention, Narratives of Progress, Threats of Force and the Virtue of Case-by-Case Assessment – A Rejoinder to Koh (Part III)*, OPINIO JURIS, <http://opiniojuris.org/2013/10/14/carsten-stahn-guest-post-intervention-narratives-progress-threats-force-virtues-case-case-assessment-rejoinder-koh-part-iii/#more-29757> (last visited Oct. 17, 2016).

ad bellum provides reason to believe that there is no clear road ahead for the legal reforms which Koh advocates. Indeed, questions as to the binding nature of *jus ad bellum* have been in constant and increasing circulation since the North Atlantic Treaty Organization (“NATO”) use of force in Kosovo.⁸⁴ Nor, perhaps, are arguments by Stahn, Hathaway, and Shapiro asserting the importance of celebrating and defending existing *jus contra bellum* likely to convince those who see the duty of international lawyers to create an ethical world public order.⁸⁵

Koh’s emphases—normative values, connecting law and policy, and a lawyer’s duty to play a leading and constructive role in interpreting law—are no accident.⁸⁶ They are a direct outgrowth of his long and fruitful engagement with the New Haven School of International Law. In Koh’s 2007 evaluation of the New Haven School, he identifies a number of commitments the school has made, including normative values and connecting law and policy.⁸⁷ He emphasizes that competing schools of international law such as those espousing a commitment to a “new sovereigntism” hold a depressing vision of international lawyers as yes men or scribes, rather than architects, public servants, or simply “lawyers as leaders.”⁸⁸ In Koh’s 2001 *An Uncommon Lawyer*, he lovingly recalls examples of lawyers as “moral actors” who “guide the evolution of legal process with the application of fundamental values.”⁸⁹ In one of the most cited international law articles of all time, Koh’s 1997 *Why Do Nations Obey International Law*, he notes that the New Haven School “viewed international law as itself a decisionmaking [sic] process dedicated to a set of normative values” in contrast to “a set of rules promulgated by a pluralistic community of states, which creates the context that cabins a political decisionmaking [sic]

84. See, e.g., MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (1st ed. 2001); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539 (2001).

85. See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALIST: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017) (arguing that attempts to outlaw wars of aggression resulted in a sustained effort towards peace that is relevant today).

86. This section builds upon the author’s online writings.

87. Harold Hongju Koh, *Is There a “New” New Haven School of International Law?* 32 YALE L.J. 559 (2007).

88. Ben W. Heineman, Jr., *Lawyers as Leaders*, YALE L.J. POCKET PART 266 (2007), <https://www.yalelawjournal.org/forum/lawyers-as-leaders>.

89. Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT’L L.J. 7, 9 (2001).

process.”⁹⁰ He also, notably, critiques past failures of the New Haven School and notes the critiques of others, demonstrating his own intellectual flexibility. In Koh’s 1995 *A World Transformed*, he recalls the 1974 founding of *Yale Studies in World Public Order* (which later became the *Yale Journal of International Law*) and recalls the demand for an evaluation of an ethical world public order, refreshed through the decades by scholars, including Koh himself.⁹¹

Someone with this perspective will not be satisfied with a response that does not allow for the possibility of lawyers to lead towards a world order that can prevent atrocity crimes—with the U.N. Security Council if possible, nonviolently if possible, but without such authorization and with force if necessary. This is not necessarily calling for radical change, but rather reflects frustration with the likely impossibility of any profound structural change under the current U.N. Charter without reinterpretation, perhaps echoing Edmund Burke’s maxim—“A state without the means of change is without the means of its conservation.”⁹² If international lawyers do not discover a way to change the international system to prevent atrocity crimes, it threatens the conservation of the international system itself and an abdication of duty.⁹³

In contrast, one may turn again to Hathaway and Shapiro in 2013 reminding the reader of the horrors of history⁹⁴ or the simple formulation that regardless of what one wishes the law must be, the first duty of the lawyer is to present the law as it is. There are countless other sources in defense of the orthodox interpretation of U.N. Charter 2.4, but perhaps the most revealing source in favor of the existence of an orthodox, restrictive *jus contra bellum* is Koh himself. After all, if the current law were sufficient, there would be no need for it to be a “time for a better law.”

90. Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *YALE L.J.* 2599, 2623 (1997).

91. Harold Hongju Koh, *A World Transformed*, 20 *YALE J. INT'L L.* ix (1995).

92. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 23 (1790).

93. See also Jens Iverson, *The New Haven School on Syria – Observing Professors Koh and Stahn*, *OPINIO JURIS* (Oct. 16, 2013, 7:38 AM), <http://opiniojuris.org/2013/10/16/jens-iverson-guest-post-new-haven-school-syria-observing-professors-koh-stahn/>.

94. Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn't Optional*, *N.Y. TIMES* (Sept. 3, 2013), http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html?hp&_r=0.

V. MISSING FROM THE DISCUSSION: THE END OF WAR

A. INTRODUCTION

One issue that could be further developed from the arguments expressed in *War Manifestos* and *Prizeless Wars*, as well as the general debate on how restrictive *jus ad bellum*/*just contra bellum* is and how restrictive it should be, is the connection between the expression of war aims and the transition from armed conflict to a just and sustainable peace. The research effort that forms the backbone of *War Manifestos* is impressive, and should produce a good amount of additional valuable scholarship. One avenue, of course, is further pairing the original materials compiled with the publicists of the past, as well as an understanding that those publicists were working in a conceptual world that did not as clearly demarcate *jus ad bellum*, *jus in bello*, and *jus post bellum* in the manner international lawyers do today. To return to Vattel, he declares

Without such a public declaration of war, it would, in a treaty of peace, be too difficult to determine those acts which are to be considered as the effects of war, and those that each nation may set down as injuries of which she means to demand reparation.⁹⁵

Put in modern terms, the state preparing to use force must also be preparing for the treaty of peace that would allow the possibility of a sustainable peace with the causes of the armed conflict justly resolved. In Vattel's time, it was recognized that sovereigns were not free to take the obligation of cultivating peace lightly, but were bound to it by a "double tie"—as an obligation both to the people and to foreign nations.⁹⁶ This restricts the sovereign not only from "embarking in a war without necessity," but also from "persevering in it after the necessity has ceased to exist."⁹⁷ A sovereign "may carry on the operations of war till he has attained its lawful end, which is, to procure justice and safety"⁹⁸—showing that the object in mind is a peace both just and safe and thus sustainable.

95. DE VATTEL, *supra* note 29, at 329.

96. *Id.* at 432.

97. *Id.* at 433.

98. *Id.*

As mentioned before, even in Vattel's time, there was an exception to the requirement of a public formulation and declaration of war: "He who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy's declaration or open hostilities."⁹⁹ One might argue that as the only allowable use of force under current law is defensive (unless authorized by the U.N. Security Council or the territorial state), this limits any requirement to make any public declaration. Of course, there is a new obligation to make a certain sort of public declaration, derived not from customary international law but from the U.N. Charter itself. Article 51 of the Charter says in pertinent part: "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . ."¹⁰⁰ Due to the use of "shall," this is obligatory and indicative of whether the state honestly believes the use of force is in self-defense.¹⁰¹

What would contemporary conflicts look like if these historic customary obligations to disclose war aims were still recognized in a modern form? This necessarily relies on counterfactuals and conjectures, but perhaps a cursory look at what can be reasonably asserted about what happened and where these fell short might be illuminating. In the following sections, a brief *tour d'horizon* will be presented regarding certain uses of force, namely Kuwait, Kosovo, Afghanistan, Iraq, Libya, and the Ukraine. Volumes have been written on each of these, and only a cursory examination will be put forward here. Even this cursory examination, however, supports the basic argument that the lack of full and honest discourse about the aims of the use of force contributed to non-optimal outcomes. In effect, the switch from a discourse centered on *bellum legale* rather than *bellum justum*¹⁰² also limits the discourse and frees the potential user of force from discussing the full implications of the use of force.

99. *Id.* at 329.

100. U.N. Charter art. 51.

101. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 200 (June 27) ("[I]f self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus, for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.").

102. Translated from Latin to "legal war" and "just war," respectively.

As noted by Blum, “Right intention, for instance, is not an objective requirement of the *jus ad bellum*, and as long as there is a justified self-defensive action, the true intention of the defender is not further investigated, at least as a formal matter. Similarly, the law does not require that a defender faces a reasonable chance of success.”¹⁰³ Bringing these historic requirements back to the fore particularly when interpretations of self-defense are strained would be a beneficial development.

The implicit assertion made by Blum is that simply asserting the aim of “self-defense” tells us an insufficient amount about the full scope of the intentions of the entity using force, both because of varied potential interpretations of “self-defense” as well as the varieties of additional aims that may be part of the eventual peace. One may assert that the *legal justification* for the use of force is self-defense and thus the aim is that the defense be successful, but that leaves the question of whether the aims also include, as Blum states: “[r]egime change, democratization, nation-building, gender equality, even the elimination of each and every member of an adversary group”¹⁰⁴ unanswered, even though those goals have also informed recent uses of force. It is entirely possible for self-defense to be the principle legal justification for the use of force but invoking that principle is insufficient to properly explain the aims of the entity using force, thus depriving all involved of the ability to guide and measure resulting conduct and outcomes.

B. KUWAIT

The 1990–91 expulsion of Iraqi occupying forces from Kuwait was, in many ways, an ideal case of collective self-defense. Authorized by the U.N. Security Council¹⁰⁵ and with the cooperation of the government of Kuwait,¹⁰⁶ the goal was plainly stated, that: “Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1

103. Blum, *supra* note 11, at 658.

104. *Id.* at 641.

105. S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 678 (Nov. 29, 1990).

106. *See*, S.C. Res. 678, *supra* note 105 (“*Authorizes* Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area . . .”).

August 1990”¹⁰⁷ That clear and simple goal likely limited the way the armed force was actually used by allied forces acting pursuant to U.N. Security Council authorization. Regime change in Iraq, democratization or gender equality in Kuwait, nation building, elimination of the Iraqi military—none of these goals were part of the legal rationale, nor part of the apparent intent of the states involved. Given the overwhelming military victory, a continued push to change the regime in Iraq might have been tempting, but it was largely resisted. A tragic deviation from this general picture was the encouragement of rebellion within Iraq, resulting in mass atrocities, and paving the way for armed conflict to return.¹⁰⁸ Nonetheless, on the whole, this close match between clear, limited, and stated goals and results supports the thesis that clear war aims are helpful in limiting armed conflict and creating at least the possibility of a just and sustainable peace. For Kuwait and its people, the result was not entry into a new millennium of democracy and human rights, but it was the return of a sustainable peace.¹⁰⁹ Mechanisms for post conflict justice, notably the U.N. Compensation Commission, were largely successful.¹¹⁰ It would take a new government in the United States with new war aims to return Iraq to a state of armed conflict.

C. KOSOVO

The 1999 NATO bombing campaign in Yugoslavia (“Operation Allied Force”) was the first large-scale military action by the organization.¹¹¹ The objective of the intervention was to end Belgrade’s expulsion of ethnic Albanians from Kosovo.¹¹² As put by NATO:

As a result of President Milosevic’s sustained policy of ethnic cleansing, hundreds of thousands of Kosovar people are seeking refuge in neighbouring countries, particularly in Albania and the former Yugoslav Republic of Macedonia. Others

107. S.C. Res. 660, *supra* note 105.

108. See, e.g., HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992).

109. See, e.g., U.N. GAOR, 70th Sess. (Sept. 29, 2015).

110. See e.g., John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT’L L. 144, 144–57 (1993).

111. Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 828–34 (1999).

112. *Id.*

remain in Kosovo, destitute and beyond the reach of international relief. These people in Kosovo are struggling to survive under conditions of exhaustion, hunger and desperation. We will hold President Milosevic and the Belgrade leadership responsible for the well-being of all civilians in Kosovo.¹¹³

NATO made five demands upon the President of Yugoslavia, namely that he:

- ensure a verifiable stop to all military action and the immediate ending of violence and repression;
- ensure the withdrawal from Kosovo of the military, police and paramilitary forces;
- agree to the stationing in Kosovo of an international military presence;
- agree to the unconditional and safe return of all refugees and displaced persons and unhindered access to them by humanitarian aid organisations;
- provide credible assurance of his willingness to work on the basis of the Rambouillet Accords in the establishment of a political framework agreement for Kosovo in conformity with international law and the Charter of the United Nations.¹¹⁴

In some respects, this is admirable both in clarity and in moral intent. At first blush, this successfully creates a connection between the aims of the use of force and the eventual results. As self-servingly put by former NATO Secretary General Javier Solana: “[c]ontrary to widespread criticism, the air campaign achieved every one of its goals. Having seriously underestimated allied resolve, Milošević accepted the alliance’s demands on June 3 A humanitarian disaster had been averted. About one million refugees could now return in safety.

113. Press Release, NATO, The Situation in and Around Kosovo, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels; NATO Press Release M-NAC-1(99)51 (Apr. 12, 1999).

114. *Id.*

Ethnic cleansing had been reversed.”¹¹⁵

That said, the stated goals of NATO were notably silent in some areas. What guarantees would be provided for the ethnically Serb minority in Kosovo? Given the presence of a separatist rebellion in Kosovo, what goals or guarantees would NATO provide with respect to the potential independence of Kosovo or the integrity of the rump Yugoslavia? This failure to tackle the central underlying issues for the participants in the existing armed conflict was not without implications for the post-conflict settlement. Given that even enthusiasts for NATO's mission recognized the extreme uncertainty in its legal basis,¹¹⁶ the failure to provide any clarity as to whether there was any goal with respect to Kosovo's potential status as an independent state not only had implications for positive peace within Kosovo and between Kosovo and Serbia. Additionally, this likely provided a basis for Russia to feel that its allies were under threat from what Russia perceived as NATO's unspoken, hidden intentions—with implications for Russia's use of the veto in the U.N. Security Council as well as other conduct in the future.

D. AFGHANISTAN

The NATO invasion of Afghanistan following the terrorist attacks of September 11, 2001, was justified on the basis of collective self-defense.¹¹⁷ The United States characterized the acts of terrorism as an armed attack and effectively attributed them to Afghanistan.¹¹⁸ NATO likewise regarded the attacks as covered by Article 5 of the Washington Treaty, invoking collective self-defense.¹¹⁹ The U.N. Security Council recognized

115. Javier Solana, *NATO's Success in Kosovo*, 78 FOREIGN AFF. 114, 118 (1999).

116. Wedgwood, *supra* note 111, at 828–34.

117. Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence*, 7 J. CONFLICT & SEC. L. 5, 5–17 (2002).

118. Permanent Rep. of U.S. to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 96(2003).

119. Lord Robertson, Secretary General, NATO, Statement on NATO Response to Al Qaida Terrorist Attacks (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s0111002a.htm> (“On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one

the gravity of the situation, but the goals identified were notably less clear than previously with the Iraqi occupation of Kuwait.¹²⁰ The Security Council called on all states to “bring to justice the perpetrators, organizers and sponsors of these terrorist attacks” and stressed that “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable”¹²¹ The war aims of NATO, the plans for a just and sustainable peace that might be the result of this action entered into with the legal justification of self-defense, were unclear. There was no clear public commitment at the outset to nation building, human rights, gender equity, or any of the numerous justifications for the ongoing armed conflict in Afghanistan that trouble the new regime and its allies to this day. Perhaps if such aims were stated, sufficient resources could have been invested, the armed conflict could have been fought with fewer short-term compromises by compromised domestic actors, and pressure could have been brought to bear on other states such as Pakistan to cease supporting local insurgencies. If the goal was a single-minded effort to “bring to justice the perpetrators, organizers and sponsors of these terrorist attacks” and hold accountable “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors”¹²² of the attacks on September 11, 2001, maybe the initial effort to find high-level Al Qaeda leadership would have been more successful. Perhaps not. The notorious human rights abuses¹²³ were certainly avoidable, and perhaps would have been avoided had the plan for peace resulting from stated goals for the use of force included a robust human rights agenda. But the failure to establish a just and sustainable peace in Afghanistan following the invasion at least on a basic level supports the argument that the lack of clarity as to the honestly declared aims of the United States was not helpful in establishing a just and sustainable peace in Afghanistan.

or more of the Allies in Europe or North America shall be considered an attack against them all.”); see North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

120. S.C. Res. 1368, ¶ 1 (Sept. 12, 2001).

121. *Id.*

122. *Id.*

123. See, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2009).

E. IRAQ

The 2003 United States-led invasion and occupation of Iraq is, in many ways, the mirror image of the multinational effort to expel the Iraqi army from occupied Kuwait. Whereas in Kuwait, the effort could be legally justified as an act of collective self-defense, through U.N. Security Council authorization and for good measure, at least for conduct in Kuwait, authorization of the territorial state, the 2003 Iraq invasion could not be legitimately justified by any of these rationales.¹²⁴ While in Kuwait the public goal was clearly stated and appears to have actually been closely related to the intent of the states using force, the 2003 Iraq invasion shifted from (before the invasion) some combination of alleged violation of U.N. Security Council resolutions, alleged association with terrorist groups, and alleged development of varied unconventional weapons to (after the invasion) democratization, regional stabilization, and human rights.¹²⁵ While in Kuwait, the factual basis for the legal justification was unquestionable (the presence of the Iraqi military in Kuwait), the 2003 invasion turned out to be based out on false assertions.¹²⁶ While the goal of expelling the Iraqi military from Kuwait was accomplished, some of the goals for the invasion in 2003 could not be accomplished because they were not based in reality (ending unconventional weapons programs, ties with terrorists) while others (regional stabilization and human rights) have thus far been abject failures. From a disastrous civil war and resultant ethnic cleansing¹²⁷ to the Abu Ghraib scandal¹²⁸ to the ongoing armed conflict with Daesh,¹²⁹ as well as the potential of armed conflict

124. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 184 (2004) (noting the lack of legitimate basis for the United States' invasion of Iraq through a comparative analysis of the Kuwait conflict).

125. *Id.* at 173–75.

126. *Id.* at 179.

127. Patrick Cockburn, *Syria and Iraq: Ethnic Cleansing by Sunni and Shia Jihadis is Leading to a Partition of the Middle East*, THE INDEPENDENT (Dec. 27, 2015), <http://www.independent.co.uk/news/world/middle-east/syria-and-iraq-ethnic-cleansing-by-sunni-and-shia-jihadis-is-leading-to-a-partition-of-the-middle-a6787731.html>.

128. Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, THE NEW YORKER (May 10, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

129. Saphora Smith, *Fall of ISIS Stronghold Raqqa Will Change War on Extremists, Not End It*, NBC NEWS (Oct. 11, 2017), <https://www.nbcnews.com/>

between the central government and the Kurdish minority,¹³⁰ the invasion did not create a just and sustainable peace compared with the status quo ante.¹³¹

Contrast Vattel's analysis of what the law requires in these two instances. Why did the allied nations decide not to overthrow the Iraqi government in the first instance? The sovereign allies were not free to take the obligation of cultivating peace lightly, but were bound to it by a "double tie"—as an obligation both to the people and to foreign nations.¹³² This restricts the sovereign not only from "embarking in a war without necessity," but also from "persevering in it after the necessity has ceased to exist."¹³³ A sovereign "may carry on the operations of war till he has attained its lawful end, which is, to procure justice and safety"¹³⁴—showing that the object in mind is a peace both just and safe and thus sustainable. In contrast, the 2003 invasion failed to provide any sort of realistic assessment of what the use of force could cost the people of the countries invading, the people of Iraq, and (in time) the people of Syria. Nor was there an honest discussion of what the diversion of resources from Afghanistan would mean for the war aims there. There was insufficient planning and resourcing to actually procure justice and safety. The invasion is often characterized as violating *jus contra bellum*, but the disastrous occupation and post-occupation in fact, also prompted a strong urge to develop what is now called *jus post bellum*. Vattel's approach would not limit the errors of the invasion to discrete violations of lacking a legal basis for the use of force, but place the scope of errors both earlier and later. The problems *post bellum* did not start when major combat operations ended, but rather were rooted in the failure to have an honest discussion of war aims before the invasion began. It also was a devastating

storyline/isis-terror/fall-isis-stronghold-raqqa-will-change-war-extremists-not-end-n808621.

130. Maher Chmaytelli, *More than 180,000 people, mostly Kurds, displaced by Iraqi-Kurdish conflict*, REUTERS (Nov. 2, 2017), <http://www.reuters.com/article/us-mideast-crisis-iraq-kurds-refugees/more-than-180000-people-mostly-kurds-displaced-by-iraqi-kurdish-conflict-idUSKBN1D220A>.

131. JOHN NIXON, *DEBRIEFING THE PRESIDENT: THE INTERROGATION OF SADDAM HUSSEIN* 222–23 (2016).

132. DE VATTEL, *supra* note 29, bk. IV, ch. I, § 3.

133. *Id.* at § 6.

134. *Id.*

blow to the reputation of the United States,¹³⁵ as well as the idea of humanitarian intervention.

F. LIBYA

The 2011 NATO-led bombing campaign in Libya in some ways resembles the NATO bombing campaign in Yugoslavia but with a limited U.N. Security Council mandate. Here, the only legal bases for the use of force are the relevant U.N. Security Council resolutions, particularly resolution 1973. U.N. Security Council Resolution 1973¹³⁶ listed as an aim to “ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel”¹³⁷ and authorized states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory”¹³⁸ This is a more complex goal than expelling the Iraqi military from Kuwait, but still a clearer stated aim than in Kosovo, Afghanistan, or Iraq. It is probably closest to the goal in Kosovo. The difficulty in Libya, in contrast with Kuwait, is that the intent revealed by the conduct of the foreign states using force in Libya is somewhat different than the stated goal of the U.N. Security Council.¹³⁹ Rather, the goal of the foreign states seems to have been regime change pursued by means of providing air support for a rebellious force. No particular plans seem to have been in place or implemented to successfully facilitate a just and sustainable peace post-regime change.

135. See generally Shirley V. Scott & Olivia Ambler, *Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq*, 13 EUR. J. INT'L RELATIONS 67 (explaining that the United States of America's legitimacy suffered substantially following the botched operations in Iraq).

136. S.C. Res. 1973 (Mar. 17, 2011).

137. *Id.*

138. *Id.* ¶ 4.

139. See generally Graham Cronogue, *Responsibility to Protect: Syria the Law, Politics, and Future of Humanitarian Intervention Post-Libya*, 3 J. INT'L HUMAN. LEGAL STUD. 124 (comparing the international response to Libya to that of Syria to show that the same issues of legitimacy will arise with Syria); Gier Ulfstein & Hege Fosund Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT'L & COMP. L.Q. 159, 172 (2013) (arguing that NATO countries were seeking regime change, while the U.N. Security Council merely approved a no-fly zone).

Having failed to honestly describe and publicly prepare for a clear vision of a just and sustainable peace, or to limit the use of force to the stated ends authorized by the relevant authority (in this case the U.N. Security Council), the post-bellum situation in Libya has widely been described as disastrous.¹⁴⁰ It has also reinforced the view in Russia, and elsewhere, that authorization by the U.N. Security Council for limited humanitarian intervention is likely to be abused in a dishonest fashion.¹⁴¹

G. UKRAINE

Since 2014, Russia has seized control of Ukrainian territory (Crimea) and supported separatist armed forces in other areas of Ukraine (Donbass).¹⁴² There was no claim of self-defense or U.N. Security Council authorization for Russian conduct.¹⁴³ Russia's legal justification instead appears to rely on authorization by former government officials, primarily former President Viktor Yanukovich, the instant recognition of a Crimea as an independent state, and then immediate ending of the independence of that state through its purported willing annexation by Russia.¹⁴⁴ This justification lacks merit. Ousted government officials cannot agree to the dismemberment of the states they no longer represent. What is particularly striking for the purposes of this work is not only the flagrancy of the violation of a *jus cogens* norm in the form of the first attempted annexation in Europe since the days of the Molotov–Ribbentrop Pact, but also the open dishonesty surrounding Russia's conduct. While the Russian government at first officially denied seizing Crimean infrastructure after Yanukovich was deposed but before “independence,” the government later bragged that this was done by Russian special forces and created a holiday in their honor.¹⁴⁵ Misinformation appears to be a core part of the

140. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2017 403–11 (2017).

141. Ulfstein & Christiansen, *supra* note 139, at 167.

142. Marissa Mastroianni, *Russia Running Rogue: How the Legal Justifications for Russian Intervention in Georgia and Ukraine Relate the U.N. Legal Order*, 46 SETON HALL L. R. 599, 646–53 (2016).

143. *Id.*

144. *Id.*

145. Michael Birnbaum, *Putin was surprised at how easily Russia took control of Crimea*, THE WASHINGTON POST (Mar. 15, 2015), https://www.washingtonpost.com/world/europe/putin-was-surprised-at-how-easily-russia-took-control-of-crimea/2015/03/15/94b7c82e-c9c1-11e4-bea5-b893e7ac3fb3_story.html?utm_term=.404a54ace215.

intentional strategy of Russia.¹⁴⁶

In some respects, Ukraine falls outside the main focus of this work, or could be argued to be the exception that proves the rule. The argument that “improving the discussion of war aims could aid in the successful transition from armed conflict to a just and sustainable peace when armed conflict does occur” is mainly intended as an analysis for open societies where public support is likely to be necessary for the sustained commitment of resources if war aims extend beyond symbolic action and the public and forthright publication of the actual rationale for and goals of the use of force. Most observers would concur that Russia is not an open society¹⁴⁷ and thus does not necessarily need public support for low-cost commitments, and it is unclear there is any political cost in Russia for conduct violating international law in any case.

While it is too early to assess the sustainability of the peace between Russia, Ukraine, and Russian backed forces, the prospects are not promising. The grievance of an ongoing violation of Ukrainian sovereignty looks long-term and irreconcilable, and the irredentist impulse in the Donbas region has not been resolved. More fundamentally, the open flouting of the core norm of the international system in the form of annexation cannot help but undermine other efforts to restrain the use of force.

H. CONCLUSION: RESTRICTING WAR AND REDUCING RECURRENCE

This work clearly is more focused on the limited set of international armed conflicts, particularly those involving the United States and Russian militaries since the end of the Cold War. The hope in this chapter was to take a reasonable set of prominent and relatively recent examples to test the connection between an articulation of actual war aims and improving the transition from armed conflict to peace. Even given that limited set, it is far from exhaustive. The ongoing interconnected set of armed conflict in the territory of Syria merits further discussion

146. Letter from Def. Research Dev. Can., to Influence Activities Task Forces (Nov. 14, 2014) (on file with Defence Research and Development Canada).

147. For example, Freedom House rates Russia as not free. *See Freedom in the World 2017 Russia Profile*, FREEDOM HOUSE (Oct. 20, 2017), <https://freedomhouse.org/report/freedom-world/2017/russia>.

but is largely set aside in part due to its immense complexity and unfinished nature. Non-international armed conflicts do not formally fit within the domain of *jus ad bellum/jus contra bellum*, but of course clearly and publicly enunciating the goals that would create in the eyes of the armed forces in such conflicts is likely to facilitate the eventual successful resolution of the conflict, and is in essence part of the *lex pacificatoria* identified by Christine Bell.¹⁴⁸

The authors of *War Manifestos* hold up the era of varied justifications for war as a warning. Blum examines this period with more nostalgia, as an era of honestly expressed war aims. As is perhaps evident at this point, I think the authors of *War Manifestos* have a stronger point, but Blum's contribution is also valuable. The authors of *War Manifestos* warn that the legal regime whereby the legal justifications for the use of force are highly restricted is not natural or inherent, but rather a modern creation that was constructed and could be lost.¹⁴⁹ Blum warns that there is a disconnect between the actual aims behind the use of force and the justifications expressed with the limited and somewhat sterile terminology of self-defense.¹⁵⁰ This work has argued largely in favor of keeping rigorous restraints on the use of force and the waging of war, but also argues that the goal of a just and sustainable peace must be firmly fixed when the first evaluations of potential use of force are made.¹⁵¹ Going beyond enunciating a basic legal rationale for the use of force and requiring those who would use force to explain the particular plan of how the armed conflict would produce a specific set of desiderata not only may restrain the use of force from being used at all, but may alter how it is used and what additional policies are employed during and after the use of force.

148. See, e.g., CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 131–35 (2008); Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006).

149. Compare Hathaway et al., *supra* note 9, with Blum, *supra* note 11 **Error! Bookmark not defined.**

150. *Id.*

151. *Id.*

VI. CONCLUSION: THE UNCERTAIN FUTURE OF
JUS PACIS AC BELLI AND THE RETURN OF
THE *RES*

In 1943, Georg Schwarzenberger's *Jus Pacis Ac Belli* noted that the law regarding law and peace was at that moment changing and uncertain.¹⁵² It was time for better law. War and peace no longer existed as wholly separate legal regimes but could also have ambiguous periods of *status mixtus*¹⁵³ and the fundamental shift from justification from war to preservation of peace (thus reversing Grotius' formulation of *belli ac pacis*¹⁵⁴ to *pacis ac belli*). Koh and others have also suggested that we are in (or should be in) a time of legal change, but in somewhat the reverse direction, with the preservation of peace and the restrictions on the use of force needing an exception in certain humanitarian situations.¹⁵⁵

If Koh is correct, that it is "Time for Better Law," it is

152. See Georg Schwarzenberger, *Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460 (1943).

153. *Id.* at 470.

154. Grotius, *supra* note 18.

155. Koh, *supra* note 78, at 1004; Koh, *supra* note 79, at 287 (suggesting a test comprising: (1) If a humanitarian crisis creates consequences significantly disruptive of the international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security—that would likely soon create an imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under U.N. Charter Article 51); and (2) a Security Council resolution were not available because of a persistent veto; and the group of nations that had persistently sought Security Council action had exhausted all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used (3) limited force for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated. In particular, these nations' claims that their actions were not wrongful would be strengthened if they could demonstrate: (4) that the action was collective, e.g., involving the General Assembly's Uniting for Peace Resolution or regional arrangements under U.N. Charter Chapter VIII; (5) that collective action would prevent the use of a per se illegal means by the territorial state, e.g., deployment of banned chemical weapons; or (6) would help to avoid a per se illegal end, e.g., genocide, war crimes, crimes against humanity, or an avertable humanitarian disaster, such as the widespread slaughter of innocent civilians, for example, another Halabja or Srebrenica; to be credible, the legal analysis of any particular situation would need to substantiate each of these factors with persuasive factual evidence of: (1) Disruptive Consequences likely to lead to Imminent Threat; (2) Exhaustion; (3) Limited, Necessary, Proportionate, and Humanitarian Use of Force; (4) Collective Action; (5) Illegal Means; and (6) Avoidance of Illegal Ends). *Id.*

unclear after review of recent armed conflicts that the moment is right for the law to be developed in the manner he suggests. Trust between major military powers is perhaps lower than at any time since the Cold War. Instead of a wholesale and immediate adoption of a standard that would permit the use of force in the form of humanitarian intervention without the legal justification of U.N. Security Council authorization, self-defense, or permission of the territorial state; perhaps first it is time to revivify obligations with respect to the open and public declaration as to war aims. At a minimum, embracing a discourse ethics¹⁵⁶ that emphasizes honesty in the face of sustained efforts to justify the use of force with misinformation by major military powers seems appropriate.

Even in Vattel's time, genuine cases of purely and unequivocally defensive war did not require any public declaration for response: "He who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy's declaration or open hostilities."¹⁵⁷ He continues, "In modern times, however, the sovereign who is attacked, seldom omits to declare war in his turn, whether from an idea of dignity, or for the direction of his subjects."¹⁵⁸ Under current law, "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . ."¹⁵⁹ This obligation to report to the Security Council, in combination with the customary international law obligation to declare to the "unjust nation" the use of force,¹⁶⁰ should encourage *in particular with respect to questionable or creative legal justifications for the use of force* an obligation for a full and forthright disclosure of the aims of the use of force.

Embracing this obligation would be helpful in a number of respects. It might in some instances avoid the use of force altogether, as described by *War Manifestos*¹⁶¹ through the facilitation of an agreement between states or reconsideration due to public pressure against the state considering use of force. This arguably occurred with respect to threatened use of force

156. See also WILLIAM REHG, *INSIGHT AND SOLIDARITY: THE DISCOURSE ETHICS OF JÜRGEN HABERMAS* (1994).

157. Vattel, *supra* note 29, at 503.

158. *Id.*

159. U.N. Charter art. 51.

160. Vattel, *supra* note 29, at 502-03.

161. Hathaway et al., *supra* note 9.

against Syria during the Obama administration. It may limit the use of force even if the use of force is not avoided. This arguably happened during the expulsion of the Iraqi military from Kuwait. Finally, it may improve the odds of creating a just and sustainable peace in the aftermath of the use of force. This also arguably occurred after the expulsion of the Iraqi military from Kuwait. For the state wishing to justify a colorable but questionable justification of self-defense, declaration to the U.N. Security Council may be helpful or necessary to indicate whether the state honestly believes the use of force is self-defense,¹⁶² and indeed may be helpful legally in terms of any retroactive legal cover the U.N. Security Council may provide.

More fundamentally, a renewed emphasis on an honest formulation and disclosure may help restore the trust needed for any more radical proposal such as Koh's to be consented to by states, particularly Russia and China. It would also help restore the damaged reputation of humanitarian intervention after its misuse as a post-hoc attempted justification for the invasion of Iraq in 2003, its misuse to justify regime change in Libya, and its misuse by Russia in the Ukraine. The honest articulation of the aims of the use of force has legal, normative, and practical implications. Particularly before any questionable use of force occurs, it should be obligatory.

There is a risk of emphasizing the need for an honest discussion of war aims, namely that such discussion is taken as a license rather than an additional restriction. It may be an environment where powerful states and certain jurists are eager to reinterpret a restrictive *jus contra bellum* and demand a rigorous and conservative defense of an orthodox interpretation. But the risk of thinking anew about revivifying old obligations to articulate war aims is a risk worth taking. There is much to gain, as described above. If the current trend of increased mendacity and disregard for the truth continues (exhibited most powerfully in the 2003 invasion of Iraq and the ongoing occupation of Ukraine), the results may be catastrophic.

162. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 ¶ 200 (June 27) (“[I]f self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.”).

At the time of this writing, there is a substantial possibility of an armed conflict between the United States and the Democratic People's Republic of Korea (North Korea), as well as various potential co-belligerents. The United States has declared "if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea."¹⁶³ It is unclear what the United States government means by being "forced to defend." Nor is there a clear, public explanation of how the aim of totally destroying North Korea will lead to a just and sustainable peace. Even more than after the 2003 invasion of Iraq, there is no apparent plan for the hundreds of thousands of casualties such an armed conflict would likely produce. There has perhaps never been such a pressing need for a clear explanation from both sides as to the aims guiding their threatened use of force.

In the Middle Ages, the "*Res*" or "thing" was the territory, property, or other object over which the just war was fought, and was intimately connected to the idea of *causa* or *justa causa* which was the characterization of the *res*; that is, that it was just to pursue the *res* in war, for example, to lawfully recover territory.¹⁶⁴ Under current law governing international armed conflicts, the prohibition of annexation as the *res* or indeed any "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"¹⁶⁵ means that the description of a particular *res* is generally not clearly articulated. The *res* reimagined for current uses of force might not always be a physical thing or territory, but a clear explanation of the outcomes intended by the use of force. The *res* in Kuwait was mainly the territory of Kuwait, the *justa causa* mainly to lawfully recover territory, and to the extent that goal guided the use of force, the use of force was not only legally permissible but served the goal of creating a just and sustainable peace. With Kosovo, the *res* was not a physical thing but the protection of Kosovars—but as with Libya there was no clearly articulated vision of how that could be achieved in the long-term and how that would interact with Yugoslav and Libyan sovereignty.

163. U.N. GAOR, 72d Sess., 3d plen. mtg. at 10, U.N. Doc. A/72/PV.3 (Sept. 19, 2017).

164. The traditional criteria of *persona*, *res*, *causa*, *animus* and *auctoritas* dates from the Apparatus glossarum Laurentii Hispanii in Compilationem tertiam of Laurentius Hispanus (c. 1180-1248). See also Russell, *supra* note 7, at 128.

165. U.N. Charter art. 2, ¶ 4.

While annexation and interference with the territorial integrity and political independence remains prohibited, there is a need for a clear articulation of the *res* in each instance, particularly if states are tempted to stretch a conservative interpretation of self-defense as the legal justification for the use of force.

It is time for a return of the *res*. Before force is used, there should be a full explanation of why it must be used. This goes beyond legal justification to a comprehensive articulation of the goals behind the use of force and a plan to achieve them. Before the mortar is fired, it should be made clear why the bridge must be destroyed, and how it will, one day, be rebuilt.