

## REWRITING HISTORIES OF THE USE OF FORCE

It is commonly taught that the prohibition of the use of force is an achievement of the twentieth century and that beforehand States were free to resort to the arms as they pleased. International law, the story goes, was ‘indifferent’ to using force. ‘Reality’ as it stems from historical sources, however, appears much more complex. Using tools of history, sociology, anthropology and social psychology, this monograph offers new insights into the history of the prohibition of the use of force in international law. Conducting in-depth analysis of nineteenth-century doctrine and State practices, it paves the way for an alternative narrative on the prohibition of force and seeks to understand the origins of international law’s traditional account. In so doing, it also provides a more general reflection on how the discipline writes, rewrites and chooses to remember its own history.

AGATHA VERDEBOUT holds a PhD in Public International Law from the Université Libre de Bruxelles (ULB). Her main research interests lie in critical histories of international law and the use of force. She is the recipient of several prizes, awards and research grants, notably the 2017 Henri Rolin Prize.

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REWRITING HISTORIES  
OF THE USE OF FORCE

The Narrative of 'Indifference'

**AGATHA VERDEBOUT**

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## FOREWORD

‘The prohibition of the use of force is a peremptory norm of law that was enshrined in the Charter of the United Nations, after having been incompletely enunciated in the Covenant of the League of Nations and then in the Briand Kellogg Pact’. Declined in various forms, this is the account found in the vast majority of contemporary doctrine. In her book, Agatha Verdebout not only questions the relevance of this narrative of ‘indifference’ (i.e., the use of force would have been neither prohibited nor authorized by international law) but also explains its emergence and success.

The narrative of indifference is essentially based on two arguments: one empirical, and the other more theoretical.

According to the first, throughout the nineteenth and early twentieth centuries, States would have never admitted a legal limitation of their ultimate sovereign prerogative to wage war. *Jus ad bellum* was therefore a matter of fact and of power, but not of law. No text, conventional or otherwise, contained such a limitation, nor could anything of the kind be inferred from custom. Based on an in-depth study of practice, Agatha Verdebout firmly rejects this argument. She shows how intervening powers did put justifications based on international law forward; sometimes invoking consideration of collective security resulting from applicable treaties, sometimes more humanitarian considerations but always linked to rules of law. By carefully dissecting archival documents, Agatha Verdebout demonstrates that, alongside politics and morals, law was equally used as a specific resource and register of legitimization. Upon reading these documents, one cannot but realize that this image of a deformalized international law (in the sense that it could not be distinguished from ethics) was created a posteriori and does not correspond to the relevant empirical material at all. In the same spirit, Agatha Verdebout also analyses nineteenth-century doctrine with great finesse. She shows that the prohibition of the use of force was accepted by the

majority of authors, not only among *jusnaturalists* but also, with a few exceptions, within the positivist doctrine. In short, if we confine ourselves to a technical analysis of existing law, we must make a nuanced observation. On the one hand, State practice and doctrine did not conceive of the use of force as an unlimited right; on the other hand, it is true that the latter only set very loose limits, admitting a whole series of justifications for the use of force, which left a wide margin of appreciation to States, especially since the control exercised by international institutions, particularly judicial, was weak, if not nonexistent.

But a second, more theoretical argument, has been put forward to support the historical narrative according to which the prohibition of the use of force was inexistent before the interwar period. In the nineteenth century, it has been argued, there was no international legal order in the proper sense of the term. In the absence of international institutions and even genuine secondary rules governing the creation, interpretation and application of primary rules of conduct, law had barely, if at all, invested the international arena. It is therefore in this context that we should understand the States' justifying discourses when they resorted to force: as discourses, which when they referred to law, truly referred to a form of natural, rather than positive, law. In addition to the fact that it has just been shown that this claim cannot resist an empirical analysis that takes archive documents seriously, it also immediately stands out as tautological: there was no positive international law at the time, so States did not justify the use of force based on positive law; and since States did not justify their behaviour in light of positive law, positive law did not exist at the time. The proponents of this argument are also faced with a problem of coherence. By following it to the end, they would have to conclude that international law itself only came into being after the First, or even the Second, World War. And yet, all the while enshrining the narrative of indifference, historical introductions to most textbooks illustrate that this idea is far from widespread.

But, if the thesis of indifference is so difficult to defend, both empirically and theoretically, how can its success be explained? It is at this stage that Agatha Verdebout's contribution is the most original. In the last part of her book, she traces the genealogy of the narrative of indifference, which emerged with the end of the World War I. At that precise moment, the profession of international law was confronted with a kind of cognitive dissonance: on the one hand, the progress of law as a peaceful means of settling disputes had been praised (with the Hague



conferences of 1899 and 1907 in particular); but, on the other hand, it had in no way prevented the outburst and terrible ravages caused by the Great War. One way of overcoming this dissonance was to rewrite history, to construct a narrative according to which the problem lay in the inadequacies of the law of the time – inadequacies that it was therefore sufficient to remedy in order to avoid the outbreak of new wars. It was at this point, therefore, that it began to be asserted that the prohibition of the use of force had previously been nonexistent, and that its formalization into conventional texts should make it possible to guarantee peace through law. It was also at this point that internationalists once again presented themselves as the vanguard of the pacification of international relations. Of course, history has shown all the vanity of this prophecy and corporatist representation. In any case, the episode confirms that this idealistic vision of peace through law is deeply rooted in the ‘subconscious’ of internationalists. Agatha Verdebout explains how this vision has been very precisely applied in the central domain of the framing of force by law. She also warns us about a defect that is too widespread among internationalists. It is not enough to accept, in principle, that this idealistic vision has limits; one must also draw all the consequences when one considers the historical evolution of a particular legal rule, avoiding relaying anachronisms and making the effort to deconstruct them, even if they have been firmly anchored in the doctrine for decades.

It is clear that this is a landmark work, both in the field of the use of force and, more broadly, in that of the history of international law. Particularly appreciated by her thesis jury and already abundantly commented on in the literature through an article outlining its main lines, it has already been awarded the Henri Rolin Prize (2017) and the Alice Seghers Prize (2018). Let us bet that this book will seduce many more readers in the short, medium and long terms. With this book, we are decidedly talking about history.

**Olivier Corten**

## ACKNOWLEDGEMENTS

I observe a lot and hesitate for a long time. Perhaps this is a quality for a researcher, but it is a condition that requires being well guided and surrounded to carry out the intense and grueling project that is a doctoral thesis and its transformation into a monograph. I was lucky, I lacked neither one nor the other.

My gratitude, first of all, goes to Olivier Corten, who supervised the thesis from which this book is issued. I am thankful for his availability and his trust; his confidence and his encouragements made me audacious. Throughout my doctoral research, I was also privileged to benefit from the advice and feedback of an interdisciplinary PhD supervision committee. I am especially in debt to Anne Lagerwall for her continuous investment and her (always well-informed) advice; to Pieter Lagrou for his instructive and wise remarks, which helped me get a better grasp of the methods of history; and to Emmanuelle Tourme-Jouannet for those two weekends at Gometz-le-Châtel, which had a decisive impact on the theoretical turn the research eventually took. My thanks also go to Randall Lesaffer and Martti Koskenniemi for accepting to be part of the PhD examination committee and for their support in the publication of this monograph. Jean Salmon has also been a guiding force throughout this research; I feel extremely privileged for his support and guidance.

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## ABBREVIATIONS

AFSdN	Association française pour la Société des Nations
APD	Association pour la paix et le droit
ASIL	American Society for International Law
BFSP	British and Foreign State Papers
FO	Foreign Office
GUSdN	Groupe universitaire pour la Société des Nations
ICJ	International Court of Justice
IDI	Institut de droit international
IIFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
ILC	International Law Commission
IPB	International Peace Bureau
IULNA	International Union of League of Nations Associations
LEP	League to enforce peace
LN	League of Nations
LNU	League of Nations Union
MAE	Ministère des affaires étrangères (France)
PCIJ	Permanent Court of International Justice
UN	United Nations
USSD	United States State Department
WWI	World War I
WWII	World War II