Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 1. (2004) NO. 2. PP. 88-103.

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The Doctrine of Just War and its Applicability in Contemporary International Law

I.

In Antiquity nearly each civilization had developed a more or less definite perception on the prerequisites of war[2], but the roots of a coherent doctrine of *bellum iustum* can be traced back merely to the early days of ancient Rome. Just war was at that time a segment of the so-called *ius fetiale* – a mixed body of rigorous religious and domestic legal rules applied and developed by the *collegium fetiales*. This college composed of twenty priests of outstandingly high respect, and was chiefly responsible for the administration of external affairs of Rome, including the implementation of procedures concerning the commencement of war against another tribe or nation. Rome typically considered the following four circumstances as sufficient and just causes of war: violation of the Roman dominion, violation of ambassadors, violation of treaties, and support provided in war by a previously friendly nation to the enemies of Rome.[3]

The initiation of hostilities was, however, not a mechanical consequence of the existence of these causes, since war could be declared only as a last resort. Therefore, if any of the aforementioned circumstances prevailed, Rome sent a delegation of four *fetiales* led by the *pater patratus populi Romani* to the foreign nation with a view of seeking redress for the injury sustained. Dressed in white wool and wearing a wreath of sacred herbs, the *pater patratus* forwarded the complaints and demands of the Roman people (*clarigatio*) to the leaders of the offending nation. In case a satisfactory reply was not given in thirty or thirty-three days, the delegation returned home and made a report, on the basis of which the senate – and, from the 5th century B.C., the *comitia centuriata* – decided whether Rome should launch the war. If such decision was made, the *pater patratus* once again returned to the border of the offending nation, where – in the presence of three adult men – he threw a spear of iron or of charred wood dipped in blood into the enemy territory signifying the declaration of war.[4] As a result of an

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[2] For a brief review, see, e.g., Hershey, A. S.: The History of International Relations During Antiquity and the Middle Ages. *American Journal of International Law*, Vol. 5. No. 4. (October 1911), pp. 901-917.; Brownlie, I.: International Law and the Use of Force by States. Oxford: Clarendon Press, 1963. pp. 3-4.

[3] See, Oppenheim, L.: International Law: A Treatise. Vol. I. Peace. London – New York – Bombay: Longmans, Green & Co., 1905. p. 51.

[4] It is necessary to note that sources differ as regards the ceremony. For more details, see, Livius, T.: A római nép története a város alapításától. [The History of Rome from Its Foundation] Ford. Kiss Fné. és Muraközy Gy. Budapest: Európa Könyvkiadó, 1982. Vol. I., I. 32. at pp. 56-58.; IV. 30. at pp. 335-337.; Vol. III., XXXVI. 3. at pp. 566-567. See also, Geréb, J.: Fetiales, *in* Pecz, V. (szerk.): Ókori lexikon. [Encyclopedia of Antiquity] Budapest: Franklin-Társulat, 1902. (Reprint, 1985) p. 761.; Nussbaum, A.: A Concise History of the Law of

accurate execution of the procedure, a war was to be considered as being a *bellum iustum et pium*, that is to say, a just – or arguably, lawful – war in conformity with religious prescriptions. Later, as Rome expanded, this proceeding would have been overly troublesome, therefore it was carried out symbolically in the capitol, at the temple of Bellona. During the period of imperial rule, the services of *fetiales* were increasingly set aside, while the declaration of war was usually communicated to the enemy by the competent military commander.[5] Unlike the commencement of war, however, the conduct in war was not governed by such meticulous rules, the outcome of which is superbly illustrated by the Roman proverb "*vae victis*".

Apparently, just war had been a formal concept in ancient Rome, and was endowed with substance only by the first Christian philosophers. The emergence of a substantive concept of *bellum iustum* can be attributed to a theological dilemma, which had not really surfaced prior to the advent of Christianity. The question was raised, whether a Christian could take part in war without committing a deadly sin. Some theoreticians, such as Lactantius, argued that it was under any circumstances unacceptable to kill a human being[6], whereas others, for instance St. Ambrose, Bishop of Milan, shared a contradictory view.[7] Finally, it was St. Augustine, who authentically resolved the dilemma in favour of the permissive opinion. His standpoint became the very fundament of the medieval doctrine of *bellum iustum*, thus numerous authors are convinced that just war is, in fact, a product of the early Middle Ages, and its "father" is the *doctor gratiae* himself. As László Gajzágó stated:

"Christian ethics and war engraved in the fate of man had to come to a compromise with each other. […] As a result of this compromise, a new concept appeared in the history of mankind during the time of Christianity, which had formerly been unknown, or at least, had neither previously, nor subsequently gained such importance: the concept of *bellum iustum*."[8]

Augustine, therefore, permitted Christians the participation in war[9], provided that this war was just. He conceived war as a work of the devil; still he thought that in certain cases it could prove to be necessary, or even useful. If it was not commenced upon a divine command of unquestionable legitimacy (*bellum Deo auctore*, *bellum iustissimum*), war was admissible only, when it was necessary, and it was only necessary, when it was just.[10] Besides, war could be deemed

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Nations. New York: The Macmillan Company, 1950. pp. 16-17.; Ramsay, W.: Fetiales, *in* Smith, W. (ed.): A Dictionary of Greek and Roman Antiquities. London: John Murray, 1875. pp. 530-531. (Accessible online at http://www.ku.edu/history/index/europe/ancient_rome.)

[5] See, Csarada, J.: A nemzetközi jog története a legrégebbi időktől a vesztfáli békéig, tekintettel Magyarország nemzetközi viszonyaira a középkorban. [The History of International Law from the Most Ancient Times to the Peace of Westphalia, with Regard to the International Relations of Hungary in the Middle Ages] Budapest: Eggenberger-féle Könyvkereskedés, 1894. pp. 126-127.

[6] Cf., Lactantius: Divinae Institutiones. [Divine Institutes] VI. 20. (The cited writings of Fathers of the Church – unless otherwise indicated – are accessible online at http://www.newadvent.org/fathers.)

[7] Cf., Ambrose: De officiis ministrorum. [Three Books on the Duties of the Clergy] I. XXVIII. 129, 135.

[8] Gajzágó, L.: A háború és béke joga. [The Law of War and Peace] Második kiadás. Budapest: Stephaneum Nyomda, 1942. p. 31. (Translation mine.)

[9] "Do not think that it is impossible for any one to please God while engaged in active military service." Augustine: Epistula CLXXXIX, ad Bonifatium. [Letter CLXXXIX, to Boniface] 4.

[10] See, Van der Molen, G. H. J.: Alberico Gentili and the Development of International Law. His Life Work and Times. Second, revised edition. Leyden: A. W. Sijthoff Publishers, 1968. p. 72. Cf. also, Augustine: De civitate Dei contra paganos. [Concerning the City of God against the Pagans] H. BETTENSON transl. Harmondsworth – Baltimore – Ringwood: Penguin Books, 1972. I. 21. at p. 32.; II. 25. at pp. 81-82.; IV. 15. at p. 154.; XIX. 7. at pp. 861-862.; Augustine: Contra Faustum Manichaeum. [Reply to Faustus the Manichaean] XXII. 71-72, 75.

just only if it was prompted by an injury, by a sin of the adversary, and its objective was to restore peace.[11] More precisely: "A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."[12] In addition, Augustine – noting that acts of clemency in war were to be attributed to the influence of Christianity – significantly contributed to the establishment of *temperamenta belli*: a notion that had been almost entirely ignored by the former Roman theory of *bellum iustum*.[13]

In the following centuries, authors such as Isidore of Seville[14], Gratian[15], and St. Thomas Aquinas developed the concept of just war into a coherent and detailed theoretical construction. For instance, by the time of Gratian, the three typical just causes of war had been firmly established, namely, to repel an attack (*propulsare hostes*), to recover unjustly taken property (*repetere res suas*), and to take vengeance for an unlawfully inflicted injury (*ulcisci iniurias*). It was, furthermore, a prerequisite in each of these cases that the enemy deserved punishment for some reason.[16] Building upon the foundations laid down by Augustine, St. Thomas Aquinas summarized the theory of just war in the famous second section of the second part of *Summa theologica*, also known as the *Secunda secundae*. According to the *doctor angelicus*, "in order for a war to be just, three things are necessary". Firstly, "the authority of the sovereign by whose command the war is to be waged" (*auctoritas principis*). Secondly, it was indispensable to have a just cause (*iusta causa*) rooted in the guilt of the offender: "those who are attacked, should be attacked because they deserve it on account of some fault" (*propter aliquam culpam*). Thirdly, the belligerents had to be motivated by a right intention (*recta intentio*), which was "the advancement of good, or the avoidance of evil".[17]

To put it briefly, the quintessence of just war in medieval Christian philosophy was the remedy or punishment of injustice or transgression. Unlike their subjects, princes had no "earthly judge" bearing authority to resolve their disputes, thus war appeared to be a self-evident – albeit ultimate – means of settlement for them. (That also explains why solely sovereigns were eligible to declare war.) Just war was, therefore, perceived as an ordeal, within the framework of which a dispute between princes was referred to God and decided by a contest of arms. Such hostilities were nothing else, but a mere execution of justice. Nonetheless, the Christian doctrine of *bellum iustum* would have been inapplicable, if it had not been based on "a value system which was recognized universally as objective and which provided the criteria for judging what was to be considered "just", "good" or "bad".[18]

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[11] See, Augustine, De civitate Dei, XIX. 7. at p. 862.; XIX. 12. at p. 866.
[12] Augustine: Quaestiones in Heptateuchum, VI. 10a, *quoted in* AQUINAS, T.: Summa theologica. Secunda secundae, XL. 1. Thus, in ethical terms, a just war was not an action, but a reaction. See, Rendtroff, T.: Christian Ethics and the Doctrine of Just War: A Re-Evaluation in the Nuclear Age. *German Yearbook of International Law*, Vol. 28. (1985), p. 216.
[13] Cf., Augustine: De civitate Dei, I. 7. at pp. 12-13.
[14] In his *Originum sive Etymologiarum libri XX*, Isidore considerably drew on Cicero's *De re publica*. Cf., Cicero, M. T.: Az állam. [On the Republic] Ford. HAMZA G. és HAVAS L. Budapest: Akadémiai Kiadó, 1995. III. 23. 35. at p. 164.
[15] See, Decretum Gratiani, II. XXIII. I-III., *quoted in* EPPSTEIN, J.: The Catholic Tradition of the Law of Nations. London: Burns Oates & Washbourne Ltd., 1935. pp. 81-82.
[16] See, Gajzágó: A háború és béke joga, p. 33.
[17] Aquinas: Secunda secundae, XL. 1.
[18] Delbrück, J. – Dicke, K.: The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law. *German Yearbook of International Law*, Vol. 28. (1985), p. 196.

II.

The value system underpinning the Christian doctrine of just war, however, gradually diminished in the late Middle Ages, *inter alia*, owing to the emergence of independent and sovereign states, the discovery of the New World, and the rise of Reformation. Neither a universal recognition of values, nor objectivity could be seen as given any longer. As a result of theories of *raison d'état*, primarily advanced by Niccolò Machiavelli[19], princes adopted a different attitude towards moral values, and reserved the right to determine the justice of their own *casus belli*, introducing substantial subjectivity to the qualification of originally objective just causes. Unity likewise ceased to exist in spiritual terms, which was clearly reflected by conflicting opinions on the justness of certain religious causes of war both within the sphere of science and in practice.[20] Finally, the great discoveries, the violent colonization of the New World, and the war waged by the Spaniards on Indians raised a series of important legal questions. The doctrine of just war had to be adjusted to these new circumstances in order to secure its applicability in the future. It was the first prominent representatives of the simultaneously materializing science of international law, who made the necessary adjustments. As an outcome of this process, *bellum iustum* became a secular category and its religious roots slowly, but surely sank into oblivion. Understandably, the general framework set up by authors in the early Middle Ages remained unaltered; nevertheless some of the criteria of just war were considerably modified in content. As I have suggested above, the most fundamental changes occurred probably with respect to the just causes of war. A great variety of views came into existence in this regard, accompanied by a thorough deliberation of questions, to which scholars had never had to devote special attention before: Who is competent to determine the justness of the cause? Can a war be just on both sides?[21]

A Dominican, Francisco de Vitoria, *prima professor theologiae* at the University of Salamanca and founder of the Spanish school of international law, was among the first to address these new issues in his lectures. Two *relectiones* bear special importance in this respect, both delivered in 1532 and noted down by his students: *De Indis recenter inventis* and *De Indis sive de iure belli Hispaniorum in barbaros*. Based on the assumption that the sole just cause for a war was a wrong of sufficient gravity inflicted upon someone, he questioned the majority of *causae* articulated by his fellow countrymen to justify the war of conquest against the Indians. Vitoria submitted that Indians were "*privatim et publice*" in peaceful possession of their goods, therefore this status was not be disturbed "unless cause is shown". A refusal of the lordship of the Pope or of Christianity by the inhabitants of the New World, their deadly sins contrary to the law of nature, or a mere diversity of religion, for example, did not authorize sovereigns to wage war.[22]

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[19] In Chapter 26 of his famous *Il principe*, Machiavelli made an interesting remark on the justice of war: just is a war for those, to whom it is inevitable; and sacred is the weapon for those, to whom there is no hope left other than weapons. See, Macchiavelli, N.: A fejedelem. [The Prince] Negyedik kiadás. Ford. Lutter É. Budapest: Kossuth Kiadó, 2001. p. 134.

[20] It is worth noting that Protestants have never developed a separate just war theory. On the other hand, *jihad* in Islam is, in a certain sense, an institution that can at least be compared to *bellum iustum*.

[21] Cf., Grewe, W. G.: Epochen der Völkerrechtsgeschichte. Erste Auflage. Baden-Baden: Nomos Verlagsgesellschaft, 1984. p. 241.

[22] See, Vitoria, F., de: De Indis recenter inventis. [On the Indians Lately Discovered] J. P. Bate transl., *in* Scott, J. B.: The Spanish Origin of International Law. Vol. I. Francisco de Vitoria and His Law of Nations. Oxford – London: Clarendon Press – Humphrey Milford, 1934. Appendix A, I. 4. at vi.; II. 7. at xxiii-xxiv.; II. 11, 15. at xxix-xxx.; II. 16. at xxxii. (Note: The title of this lecture is sometimes cited as „*De Indis noviter inventis*".) See also,

On the other hand, Vitoria considered self-defence by the Spaniards, the prevention of missionary work, of free preaching of the Gospel or of conversion to Christianity, the coercion of native converts by their princes to return to idolatry, as well as the protection of an innocent people from tyranny and despotic laws as just causes of war, but only as a last resort. Last, but not least, a war commenced upon a command of God was also seen as *iustum* or, in fact, *iustissimum*.[23] The most astonishing novelty in Vitoria's works was, in any case, a statement according to which "there is no inconsistency, indeed, in holding the war to be just on both sides".[24] This "mutual" justness was, nevertheless, far from being objective, as merely one of the belligerents could have a just cause, whereas the other party was, at best, in a state of "*ignorantia invincibilis*" concerning his rights. Vitoria still imagined just war as an ordeal, a contest of arms decided by God, thus it would have been a serious logical contradiction to believe that it could be objectively just for both parties.[25]

Balthasar Ayala, a secular member of the Spanish school of international law, considered war as justifiable when it was launched "to procure peaceful existence and freedom from outrage, and begun in such a way as that peace may appear to be its sole object".[26] In his opinion, a just war had to be declared under the authority of a sovereign, as private persons did not have power to begin a war. He also held a just and necessary cause, as well as a right intention – that is, "an entire absence of passion to do hurt and of vengeful savagery and of the lust of conquest" – essential requirements for the justness of the use of force.[27] The list of principal just causes, in Ayala's view, consisted of the following elements: self-defence or the defence of our friends or allies, vengeance for an unjustifiably inflicted wrong, directing arms against rebels and subjects, who abjure the sovereignty of a prince, and the recovery of something from the enemy that he forcibly and unjustly detains.[28] The prevention of preaching of the Gospel and an armed struggle against heretics were similarly just causes. He also permitted the killing of a tyrant, who illegally usurps the throne, but deemed such action against a legitimate, but cruel and unjust sovereign a heinous offence.[29]

A third representative of the renowned Spanish school, a Jesuit, Francisco Suárez spelled out the usual conceptual elements of just war, namely that it has to be waged by a legitimate power, the cause and reason must be just, and the method of its conduct needs to be proper, that is, due proportion must be shown at its beginning, during its prosecution and even after victory.[30]

Vitoria, F., de: De Indis sive de iure belli Hispaniorum in barbaros. [On the Indians, or on the Law of War Made by the Spaniards on the Barbarians] J. P. BATE transl., Ibid., Appendix B, 10. at Liii-Liv.

23 See, Vitoria, De Indis, III. 8. at xL-xLi.; III. 12. at xLiii.; III. 13. at xLiii.; III. 15. at xLiv.; Vitoria: De iure belli, 13. at Liv.

24 Vitoria, De Indis, III. 6. at xL.

25 Cf., Gajzágó, L.: A nemzetközi jog eredete, annak római és keresztény összefüggései, különösebben a spanyol nemzetközi jogi iskola. [The Origin of International Law, Its Roman and Christian Contexts, More Particularly the Spanish School of International Law] Budapest: Stephaneum Nyomda, 1942. p. 229.

26 Ayala, B.: De iure et officiis bellicis et disciplina military libri III. [On the Law of War and on the Duties Connected with War and on Military Discipline] Vol. II. J. P. BATE transl. Washington: Carnagie Institution of Washington, 1912. I. II. 3-4. at p. 8.

27 See, Ibid., I. II. 7. at p. 9.; I. II. 10. at p. 10.

28 See, Ibid., I. II. 11-13. at pp. 10-11.

29 See, Ibid., I. II. 23-26. at pp. 17-18.

30 See, Suárez, F.: De triplici virtute theologica, fide, spe et charitate. [A Work on the Three Theological Virtues: Faith, Hope and Charity], *in* Williams, G. L. – Brown, A. – Waldron, J. (prep.) – Davis, H. (rev.): Selections from Three Works of Francisco Suárez. Vol. II. An English Version of the Texts. Oxford – London: Clarendon Press – Humphrey Milford, 1944. XIII. I. 7. at p. 805.

Among the just causes he mentioned, one may come across the regaining of unjustly detained property, the defiance of the law of nations for no sensible reason, a serious offence against the reputation and honour of a prince or his subjects, as well as the protection of foreign subjects, friends or allies, provided that they themselves would be justified to wage a war, and, either expressly or by implication, consent to our help.[31] Suárez sanctioned a revolt against an "aggressor" prince because of the manner he asserted power, but he thought that mere cruel acts of government did not give a right to subjects to wage war against a legitimate sovereign, save in a case of self-defence. A state in its entirety could, nevertheless, dispose of such brutal prince, for "the state, as a whole, is superior to the king". Suárez qualified the rest of the cases in which subjects take arms against their rulers as sedition.[32]

Pierino Belli's *De re militari et bello tractatus* superbly reflects the process of transition that the doctrine of just war came through. The work, which was published in 1563, contains several progressive remarks concerning the just initiation and conduct of war, but still pays considerable attention to questions related to the feudal hierarchy of princes, and its consequences on the right to declare and wage war.[33] In line with his famous predecessor, Baldus, Belli made a distinction between three types of war, that is, an offensive war, a defensive war, and a war for the recovery of things lost. He also emphasized that war was a "court of last resort" for sovereigns, and was "to be undertaken only for reasons that are at once serious and cogent and just".[34] In contrast to Baldus, who enumerated five conditions, namely just person, just matter, just cause, just intent and due authority, Belli condensed the requirements of just war under merely two titles: just person (including just intent and due authority) and just cause (including just matter and just cause). As for just causes, he mentioned the desire to escape injury and the taking of vengeance for such injury, regardless of the fact, whether someone was righting a wrong done to himself or to his ally, friend or associate. He considered a fight in defence of liberty and fatherland as equally just, moreover expressly posited the taking up of arms for the king, emperor or lord as an obligation.[35]

Alberico Gentili, who arrived to England as a protestant immigrant, but soon earned to be a respectable lecturer at Oxford, undeniably belonged to the most innovative authors of his time. He defined "war" as "a just and public contest of arms", adding that the adjective "just" referred not only to the lawfulness, but also to the perfection of a just war in all its parts.[36] In line with the dominant position, he claimed that sovereigns had no earthly judge – otherwise one could not call them "sovereign" – and, therefore, it was inevitable that their disputes had to be decided by a force of arms.[37] One of the most important features of his theory was, however, the conviction that war could be just on both sides not only subjectively, as asserted by Vitoria, but also objectively. Moreover, he held it imaginable that a war could be more just on one side, than on the other. He submitted an interesting reasoning: "The virtues admit of

[31] See, Ibid., XIII. IV. 3. at p. 817.
[32] See, Ibid., XIII. VIII. 2-3. at pp. 854-855.
[33] See, Belli, P.: De re militari et bello tractatus. [A Treatise on Military Matters and Warfare in Eleven Parts] Vol. II. H. C. Nutting transl. Oxford – London: Clarendon Press – Humphrey Milford, 1936. I. V. 5-7. at pp. 7-8.
[34] See, Ibid., I. IV. 1. at p. 5.; I. V. 13. at p. 11.; II. I. 1. at p. 59.
[35] See, Ibid., II. I. 2. at p. 59.; II. I. 9. at p. 61.; II. I. 13-14. at p. 62.
[36] See, Gentili, A.: De iure belli libri tres. [Three Books on the Law of War] Vol. II. J. C. ROLFE transl. Oxford – London: Clarendon Press – Humphrey Milford, 1933. I. II. 18. at p. 12.; I. II. 20. at p. 13.
[37] See, Ibid., I. III. 23. at p. 15.

greater or less degrees, and the middle ground of a virtue has length and breadth and is not limited to a point."[38]

Gentili made a distinction between material, formal, and final causes of war. These expressions respectively meant the just causes of war, the right intention, and the conclusion of war, namely the rights of the victor and of the vanquished. As a somewhat unique method, he classified the potential just causes into three groups: divine causes, natural causes, and human causes.[39] Presumably owing to the effects of the persecution of Protestants, he analyzed divine or religious causes in an exhaustive manner. Even though he stated that a war commenced upon a command of God was always justified, he unconditionally denied the justness of a war waged because of a different religion, and admitted the use of force to maintain a religion in only a handful of particular cases – for instance, when a state would suffer harm due to religious diversity. Neither did he accept a civil war for religious purposes. These strict rules, nevertheless, did not apply to those living "like beasts", without religious belief, for the law of nature did not afford them any protection.[40] In the context of natural reasons of defensive wars, one may find the following causes: necessary defence, defence on grounds of expediency, defence for the sake of honour in the interest of others, including the defence of foreign subjects against their own sovereign. Gentili claimed that offensive wars could be launched for the very same general considerations, that is, on grounds of necessity, expediency, or honour – for instance, after the denial of a privilege granted by nature to mankind.[41] Finally, he discussed wars undertaken in the wake of "the violation of some man-made law" under the heading of human causes. He seemingly considered these conflicts a revenge, a punishment of the wrongdoer, be it a sovereign, a nation, or an individual, and a measure for the maintenance of one's rights. Gentili also described an "honourable cause for waging war", by which he meant a war "undertaken for no private reason of our own, but for the common interest and behalf of others", in case "men clearly sin against the law of nature and mankind".[42]

The honourable "father of international law", Hugo Grotius first and foremost strove to distinguish just and unjust wars in his influential work of 1625, entitled *De iure belli ac pacis libri tres*. By drawing a line between *causa iustifica* and *causa suasoria*, he explicated that the causes invoked for the justification of war were not always equivalent to the causes that actually prompted the initiation of war. If none of these causes existed, a war qualified as a bestial act, a sin beyond every human degree, but if merely a just cause was missing, a war was to be seen as a marauding expedition.[43] Concerning the justice of war, he adopted the major rule developed by previous authors, that is, a just reason for a declaration of war can be nothing else, but a wrong received. Grotius did not alter the list of typical just causes either, within the framework of which he mentioned defence, recovery of property, and punishment.[44] Nevertheless, he

[38] Ibid., I. VI. 51. at p. 33.
[39] See, Ibid., I. VII. 56. at p. 35.
[40] Cf., Ibid. I. VIII. 57. at p. 36.; I. IX. 60-61. at pp. 38-39.; I. IX. 65. at p. 41.; I. X. 71. at p. 44.; I. XI. 79. at p. 49.
[41] Gentili maintained that no *stricto sensu* natural causes of war existed, yet there were „reasons because of which we undertake wars under Nature's guidance". For this opinion and the just causes mentioned above, see, Ibid., I. XIII. 93. at p. 58.; I. XIV. 107. at p. 66.; I. XV. 108. at p. 67.; I. XVI. 120. at p. 75.; I. XVII. 128. at p. 79.
[42] See, Ibid., I. XX. 150. at p. 93.; I. XXV. 198. at p. 122.
[43] Grotius, H.: A háború és a béke joga. [On the Law of War and Peace] Vol. II. Ford. Haraszti Gy., Brósz R. et al. Budapest: Pallas Stúdió – Attraktor Kft., 1999. II. XXII. I. 1. at p. 113.; II. XXII. II. at p. 114.; II. XXII. III. at pp. 114-116.
[44] See, Ibid., Vol. I., II. I. I. 4. at p. 161.; II. I. II. 2. at p. 162.

introduced numerous significant changes with respect to the exact content of these comprehensive categories. His inventions are chiefly exposed by the causes that he did *not* recognize as just. Concisely, a war was *unjust* if it was commenced for the following reasons: fear of the power of the neighbouring nation, plain expediency, defence against a righteous attack, rejection of Christianity, heresy, refusal of marriage, desire for a richer land, pretext of discovery, desire for freedom on the side of a people in political subjugation, a wish to rule others against their will claiming that it is for their good, establishment of a universal empire either temporal or religious, fulfillment of a divine prophesy, or the recovery of some debt not of legal nature.[45] On the contrary, the punishment of those, who sin against the law of nature or the law of nations, commit sins against God, engage in religious persecution against Christians, or do not respect their gods, was deemed just.[46] According to Grotius, it was equally justified to wage war in the interest of others, such as subjects, allies, friends, or anyone else. The protection of foreign subjects was also legal, even if they did not have a right to take arms against their own oppressive sovereign.[47] Furthermore, he believed that in case a cause of war was uncertain, one should rather refrain from the initiation of hostilities.[48]

Naturally, Grotius elaborated on the problem of *bellum iustum ex utraque parte*, as well. He expressed a somewhat interesting opinion, according to which a war – similarly to a lawsuit – cannot be just on both sides with regard to its cause, though it is possible that neither of the belligerents act unjustly, that is, in knowledge of his injustice. On the other hand, if the concept of "justice" is examined in the context of legal effects, it may occur that a war proves to be just on both sides.[49] Finally, Grotius held that only a sovereign, a possessor of supreme power could lawfully declare war; in addition, he extensively dealt with the issue of just conduct in war in the third book of his work.[50]

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[45] See, Ibid., Vol. I., II. I. XVII. at p. 174.; II. I. XVIII. at p. 175.; Vol. II., II. XX. XLVIII. at pp. 75-76.; II. XX. L. at pp. 77-79.; II. XXII. V-XVI. at pp. 116-123.

[46] See, Ibid., Vol. II., II. XX. XL. at pp. 63-65.; II. XX. XLIV. at pp. 67-69.; II. XX. XLIX. at pp. 76-77.; II. XX. LI. at p. 80.

[47] See, Ibid., Vol. II., II. XXV. I, IV-VI, VIII. at pp. 151, 154-155, 157-159. For the sake of comparison, Samuel Pufendorf mentioned the following just causes: to preserve and protect ourselves and our possessions, to assert our claim if performance is refused to us, and to obtain reparation for losses resulting from an injury. On the other hand, he explicitly disagreed with Grotius on the issue of defence of foreign subjects, as he believed that such assistance was acceptable only upon request and for a reason these subjects could themselves rightfully advance. Cf., Pufendorf, S.: De iure naturae et gentium libri octo. [The Law of Nature and Nations Eight Books] Vol. II. C. H. and W. A. Oldfather transl. Oxford – London: Clarendon Press – Humphrey Milford, 1934. VIII. IV. 3. at p. 1294.; VIII. VI. 14. at p. 1307.

[48] See, Grotius, Op. cit., Vol. II., II. XXIII. VI. at p. 129.

[49] See, Ibid., Vol. II., II. XXIII. XIII. at pp. 134-136. For a similar approach, see, Zouche, R.: Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de eodem explicatio. [An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the Same] Vol. II. J. L. BRIERLY transl. Washington: Carnagie Institution of Washington, 1911. II. IV. 2. at p. 112. Johann Wolfgang Textor, a less known contemporary scholar, also thought that "a war materially just on both sides is impossible, but different considerations apply to formal justice". Textor, J. W.: Synopsis iuris gentium. [Synopsis of the Law of Nations] Vol. II. J. P. Bate transl. Washington: Carnagie Institution of Washington, 1916. XVII. 23. at p. 174.

[50] Cornelius van Bynkershoek, however, devoted fairly little attention to the delicate details of just war in his *Quaestionum iuris publici libri duo*. He considered war "a contest of independent persons carried on by force or fraud for the sake of asserting their rights", and mentioned merely two just causes: defence, and the recovery of one's own property. (By "independent persons" he meant "nations".) Apparently, Bynkershoek did not attribute much significance to the issue of proportionality, since he expressly stated: "every force is lawful in war" and "everything is lawful against an enemy". See, Bynkershoek, C., van: Quaestionum iuris publici libri duo.

The next truly momentous event in the history of the doctrine of just war happened more than a hundred years later, when a brilliant systematizing mind, Christian von Wolff, realized by drawing a clear line of demarcation between natural or necessary law and the voluntary law of nations that "the question of the justice of wars falls outside the pale of positive law".[51] So far as the law of nature is concerned, he recognized three possible aims of war: firstly "to attain that which is our own or which is due to us", secondly "to provide for security for the future by punishing the wrongdoer", and thirdly "to prevent wrong to ourselves by defending ourselves through resistance to illegal force".[52] The first and second aims rendered a war offensive, whereas the existence of the third goal constituted a war of defence. In the second case, a war was not only offensive, but also punitive, which was "not legal except for one who has received irreparable injury, and when he cannot obtain satisfaction for it in any other way". Wickedness of a nation, dreadful violations of the law of nature, offences against God, atheism, deism, or idolatry were, consequently, excluded from just grounds of punitive wars.[53] Wolff also submitted that a defensive war was legal exclusively against an unjust attack, so he deemed it unjust when the offensive war was just on the side of the enemy. It can readily be derived from this statement that he ruled out the possibility of a war being objectively just on both sides, at least in the context of natural law.[54]

The question of justice of war looked, however, completely different under the voluntary law of nations, in which war – regarding results – had to be considered just on either side, as, owing to the liberty of nations, none of them could assume the functions of a judge and pronounce upon the justness of the cause.[55] By virtue of the fact that justice was not a determining factor, Wolff believed that a further principle of natural law – "he who wages an unjust war has no right in war"[56] – did not prevail under positive law either. As both parties were presumed to act in a just manner, whatever was rightly allowable for one was also allowed for the other, although it did not mean that the voluntary law of nations legalized warlike actions, which were unlawful under the law of nature. Positive law permitted parties only what was otherwise tolerated by natural law to a just belligerent. Hence, the voluntary law of nations did not grant the unjust party "a true right to warlike acts, but merely immunity from punishment for the action", thus – as Wolff asserted – positive law was from *his* standpoint wrongly called law.[57]

This remarkable shift in legal thinking was brought to a climax by the well-known forerunner of positivism, Emerich de Vattel. He also treated just war as an institution of the necessary law of nature, rather than that of the voluntary law of nations, and reiterated the usual conceptual elements of *bellum iustum*. It was, for him, a last resort that was given to

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[Questions of Public Law Two Books] Vol. II. T. Frank transl. Oxford – London: Clarendon Press – Humphrey Milford, 1930. I. I. 2-3. at pp. 15-16.; I. III. 22. at p. 29.

51 Elbe, J., von: The Evolution of the Concept of the Just War in International Law. *American Journal of International Law*, Vol. 33. No. 4. (October 1939), p. 682.

52 Wolff, C., von: Ius gentium methodo scientifica pertractatum. [The Law of Nations Treated according to a Scientific Method] Vol. II. J. H. DRAKE transl. Oxford – London: Clarendon Press – Humphrey Milford, 1934. § 619. at pp. 315-316.

53 See, Ibid., §§ 636-638. at pp. 325-327.

54 See, Ibid., § 629. at p. 320.; §§ 633-634. at pp. 324-325.

55 See, Ibid., § 888. at p. 454.

56 Ibid., § 777. at p. 402.

57 See., Ibid., §§ 889-891. at pp. 455-456.

sovereigns by nature only for their defence or for the maintenance of their rights, with the specific purpose of avenging or preventing an injury. The threefold object of lawful war was "to obtain what belongs to us, or what is due to us", "to provide for our future security by punishing the aggressor or the offender", or "to defend ourselves, or to protect ourselves from injury, by repelling unjust attacks".[58] The existence of either of these "justifying grounds" guaranteed the lawfulness of war, but was insufficient for a prudent undertaking of war without the support of "proper and commendable motives" that showed whether it was really advisable for a sovereign to declare war.[59] Grounds and motives were so important for Vattel that he considered nations waging war without a reason, a motive, or a pretext as being savage inclinations, enemies of the human race, unworthy of the name of men, and – as a somewhat rarely appearing extremity – he even permitted their extermination.[60] Similarly to his immediate predecessors, he rejected that a war could be just on both sides, but contended that "in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided". The injustice of a war could not be imputed to a nation if it was a result of invincible ignorance or error.[61]

However, under the voluntary law of nations a war "as regards its effects, must be accounted just on both sides" for there was no common judge recognized by equal and independent nations, and none of them could set itself as a judge over another.[62] This principle was supplemented by two further rules, both indicating the influence of Wolff. On the one hand, since belligerents had an equally just cause, whatever was permitted to one in a state of war, was permitted to the other, as well. On the other hand, the voluntary law of nations did not confer upon the unjust party any true rights capable of justifying his conduct, but only made his behaviour legal "in the right of men", and exempted him from punishment.[63] Findings such as these immensely contributed to the fading of the doctrine of just war, and – at the same time – elevated Vattel to a celebrated precursor of the science of positive international law.

By the 19th century, positivism had defeated natural law thinking, which led to the triumph of the idea that the justice of war was a question outside the realm of international law. Though war remained an ultimate means of settlement of international disputes, its commencement was seen as a "sacred right" of each state regardless of the actual justness of the *casus belli*.[64] It

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[58] Vattel, E., de: Le droit de gens ou principes de la loi naturelle. Appliqués à la conduite et aux affaires des nations et souverains. [Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns] Vol. III. C. G. Fenwick transl. Washington: Carnagie Institution of Washington, 1916. III. III. 25-26. at p. 243.; III. III. 28. at p. 244.

[59] See, Ibid., III. III. 29. at p. 244.

[60] See, Ibid., III. III. 34. at pp. 245-246.

[61] See, Ibid., III. III. 39-40. at p. 247.

[62] Ibid., III. XII. 190. at p. 305. (Italics omitted.)

[63] See, Ibid., III. XII. 191-192. at p. 305.

[64] "The traditional view requires above all the existence of a special cause for a war to be legally permissible; the objective of war has to correspond to this cause in the first place and regardless of the expansion generated by the war itself. The injustice of the other party is in particular seen as such cause, and accordingly, the legally permissible objective consists in the maintenance of international rights. In contrast, nowadays many share a radical, apparently realistic opinion, which frees war from all legal restraint. It is taught that there exists no legal norm, which prohibits war; therefore war can never constitute a wrong in international law." Strisower, L.: Der Krieg und die Völkerrechtsordnung. Wien: Manzsche Verlags- und Universitäts-Buchhandlung, 1919. p. 13. (Translation mine.) For an interesting thought on the justice of war, see also, Woolsey, T. D.: Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies. Boston – Cambridge: James Munroe and Co., 1860. p. 258.

was an era of *liberum ius ad bellum*, in which efforts aimed at the limitation of war were inevitably confined on the development of *ius in bello*. A need for the restriction of the right to wage war arose again only after mankind had witnessed the horrors of World War I, and culminated in the adoption of instruments such as the Covenant of the League of Nations, the Treaty of Locarno, or the Kellogg-Briand Pact.

III.

Irrespective of the fact that it has always been subject to debates whether or not *bellum iustum* has ever formed a part of positive international law[65], invocations of the doctrine have become remarkably frequent at the end of 20th century. It has been often advanced in literature for the justification of the use of force, including unilateral armed actions.[66] But is it adequate to apply the concept of just war as a legal argument in a predominantly positivist environment? In order to be able to address this problem, the previous question has to be rephrased in the following manner: Does *bellum iustum*, in any form, actually prevail in our time as a part of international law? The most expedient method to prove the legal nature of *bellum iustum* is to enumerate its conceptual elements, the list of requirements constituting the notion of just war, and verify that each and every segment corresponds to an existing norm or institution of international law. For the purposes of our analysis, an abstract description of just war needs to be derived from the various theories outlined in the previous chapter. This working definition – in line with the dominant perception – consists of two major components; the first governs the initiation of war (*ius ad bellum*), whereas the other prescribes certain behaviour in war (*ius in bello*). The criteria embraced by *ius ad bellum* are as follows: the war is legitimized by a just cause, it is declared and waged under the authority of a sovereign, this sovereign is animated by a right intention, there is a reasonable chance of success, the resort to armed force is an *ultima ratio*, and war itself is proportional to its desired end. These requirements are accompanied by the conditions of *ius in bello* (that I have chosen to ignore above for lack of scope): innocents and non-combatants must enjoy immunity and protection, intentional and non-intentional results have to be distinguished when protected persons are nevertheless targeted and killed (doctrine of double effect), and any military activity has to be proportional to its objective, which is not to be mistaken for the overall proportionality of war to its goal.[67] It can hardly be left unnoticed that *ius ad bellum* aimed to protect states from war, while *ius in bello* rather strove to ameliorate the situation of individuals in war.

Finally, a conceptual difficulty has to be resolved, as well. The doctrine of just war focuses on the particular institution of *war* – a category that had been clearly differentiated from other

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65 For example, Joachim von Elbe thought that it was a part of positive law, unlike Josef L. Kunz, who doubted it. See, Elbe, Op. cit., p. 670.; Kunz, J. L.: Bellum Iustum and Bellum Legale. *American Journal of International Law*, Vol. 45. No. 3. (July 1951), pp. 529-530.

66 For instance, Yoram Dinstein enumerated – and criticized – three recent manifestations of the concepts of just war: Hans Kelsen's theory on war, wars of national liberation, and humanitarian intervention. See, Dinstein, Y.: War, Aggression and Self-Defence. Third edition. Cambridge: Cambridge University Press, 2001. pp. 63-68.

67 Cf., e.g., Cady, D. L.: Pacifist Perspectives on Humanitarian Intervention, *in* Phillips, R. L. – Cady, D. L.: Humanitarian Intervention: Just War vs. Pacifism. Lanham: Rowman & Littlefield Publishers Inc., 1996. pp. 37-38.; Ramsbotham, O. – Woodhouse, T.: Humanitarian Intervention in Contemporary Conflict: A Reconceptualization. Cambridge: Polity Press, 1996. p. 228.; Walzer, M.: Just and Unjust Wars. A Moral Argument with Historical Illustrations. Second edition. Basic Books, 1992. xvii-xix, p. 21.

hostile measures short of war before and throughout the period of traditional international law. This dichotomy, however, has ceased to exist, and war is now forbidden along with other hostile measures short of war within the framework of the cogent prohibition of the use of force. The development of law has had an interesting side effect: "war" seems to have lost a great deal of significance both in terminology and in practice to the comprehensive and objective categories of "use of force" and "armed conflict".[68] Partly for the sake of simplicity, partly to extend the scope of investigation, I shall apply these modern phrases below, regardless of the fact that a state of war is still distinguished by a number of special features from other manifestations of the use of force.

In case the doctrine of just war is of legal nature, its principal element, *iusta causa*, can adequately be construed as meaning "legal title". Is there a legal title upon which states may resort to the use of force on their own initiative? It is a fact of common knowledge that states – in accordance with Article 51 of the Charter of the United Nations (UN) – can use force, either individually or collectively, in exercise of the inherent right of self-defence "if an armed attack occurs". A classic just cause, *propulsare hostes*, therefore, seemingly prevails even nowadays, although with a substantially modified and restricted content.[69] Notwithstanding, this is the sole instance when states may lawfully employ military force at will, in other words, in an unauthorized manner. The current world order is namely based on a system of collective security in which the offensive use of force is strictly centralized, so it is lawful only if states have been previously and expressly authorized thereto by the Security Council under Chapter VII of the Charter. Unilateral offensive armed actions are prohibited by a peremptory norm of general international law[70]; consequently such measures are to be qualified under any circumstances, and regardless of the justness of their cause, as grave breaches of law. As such, the remaining typical just causes, particularly the ones known as *repetere res suas* and *ulcisci iniurias*, do not render a military action lawful.

Nevertheless, there remains a question, whether an authorization by the Council can be considered a *sui generis* just cause. I assume that the correct answer is inevitably in the negative, although a negligent examination may lead to an opposing conclusion. Several arguments could be raised in support of this statement. The very fundament of any just cause had always been a wrong received either by a sovereign or by his subjects, allies, friends, or basically anyone, whom a prince could also justly protect. I submit that the phrase "wrong" is to be interpreted as a violation of international law for the purposes of our analysis. A glance at the text of Chapter VII of the Charter, as well as on the practice of the Security Council reveals that an injury appropriate in terms of the doctrine of *bellum iustum* does not always exist, when an authorization to use force is adopted. The Council has a nearly absolute power of discretion

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[68] See, Donner, M.: Die Begrenzung bewaffneter Konflikte durch das moderne jus ad bellum. *Archiv des Völkerrechts*, Band 33. Heft 1-2. (Mai 1995), pp. 186-191.; Greenwood, C.: The Concept of War in Modern International Law. *International and Comparative Law Quarterly*, Vol. 36. Pt. 2. (April 1987), pp. 303-306.

[69] See, Article 51 of the UN Charter. For a conflicting view, see, Delbrück – Dicke, Op. cit., p. 206.

[70] See, e.g., Article 2, paragraph 4, of the UN Charter. See also, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. G.A. Res. 2625, 1883rd plen. mtg., 24 October 1970, U.N. Doc. A/RES/2625 (XXV), Annex; Definition of Aggression. G.A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex. The ban under Article 2, paragraph 4, of the Charter exists with similar content in customary law. See, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, para. 188. at p. 99.

regarding the determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression – situations that may result in the taking of enforcement measures, including, when necessary, the use of force.[71] Owing to this exceptionally broad power, the Security Council can qualify not only unlawful, but also lawful conducts as any of the three categories above, and take enforcement measures for the suppression thereof. Let us not forget that the Council is a political organ, not a judicial one, therefore its decisions are rather political than judicial in nature.[72]

In the prevailing system of collective security, therefore, not all wrongs within the scope of the doctrine of just war empower states to use force, moreover, force can be employed even in absence of a wrong received, when the target state does not "deserve punishment", provided that the Security Council authorizes states thereto. Thus, as a general rule, authorizations should not be perceived as just causes. But is it possible that a *specific* authorization based on an injury received by a state, nevertheless, functions as a just cause? I believe that a positive answer would be flawed. The reason is fairly simple and is – as a matter of fact – generally applicable to all authorizations: in contrast to the doctrine of *bellum iustum*, nowadays it is not a just cause, a wrong received, which authorizes states to use force, but a resolution of the Security Council. The just cause is at best the wrong upon which the Council takes action, but not the resulting resolution itself. Under these circumstances it is somewhat futile to examine whether the use of force can be just on both sides. The answer appears to be evident with regard to self-defence. Since the unauthorized offensive use of force is never lawful, and accordingly never just, the exercise of the right of individual or collective self-defence is always justified. On the other hand, there is no self-defence against an authorized use of force; hence an armed conflict cannot be just on both sides, if "just" means "lawful".

The issue of initiation and waging of war is similarly controversial. According to medieval authors, war could be declared and waged exclusively under the authority of a sovereign. Under present international law, a state may resort to force against an armed attack on its own motive; therefore defensive "wars" are truly waged under the authority of a sovereign even in our time. In the rest of the cases, the use of force needs to be authorized by the Security Council. The Council, however, is not eligible to declare and wage war in the traditional technical sense of these phrases as it is obviously not sovereign: it does not possess supreme power, only certain functions and responsibilities conferred upon it by the Charter. Nevertheless, it may instigate the use of force by establishing UN peace-enforcement missions under Chapter VII of the Charter, or authorizing states, as well as other international organizations to employ forceful coercive measures. Authorizations addressed to peace-enforcement missions or international organizations can quite naturally be ignored in this context, as neither of these is sovereign.[73]

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[71] Cf., Article 39 of the UN Charter.

[72] Cf., Kelsen, H.: The Law of the United Nations. A Critical Analysis of Its Fundamental Problems. London: The London Institute of World Affairs, 1950. p. 736.; Higgins, R.: The Development of International Law Through the Political Organs of the United Nations. London – New York – Toronto: Oxford University Press, 1963. p. 174.

[73] Peace-enforcement missions have a mandate to resort to force, and – although being composed of national contingents provided by states – act on behalf of the Organization as a subsidiary organ. "The contributing states thus recognize the exclusive UN control over the members of the force. They accept that the members no longer serve the state, but rather the UN." Bothe, M.: Peace-keeping, *in* Simma, B. (ed.): The Charter of the United

Conversely, it seems reasonable to believe that the use of force on the basis of an authorization is indeed carried out under the authority of a sovereign, provided that the recipients of this authorization are states. Firstly, in the total absence of agreements pursuant to Article 43, it is at their discretion to decide whether or not they undertake the specific task and use "all necessary means" for the purpose determined by the Council. Secondly, when a state opts for the implementation of an authorization, it retains control over its forces[74], whose behaviour will be attributable to it. In other words, a state using force upon an authorization outside the framework of any international organization or peace-enforcement mission is acting in its own name, regardless of the fact that it has been explicitly permitted to do so by the Council. Thus, the resort to force in such a case is launched and waged under the authority of a sovereign state. But does this way of initiating hostilities really correspond to the relevant prerequisite of the doctrine of just war? The requirement of permission from a "higher authority" for the appropriate launch of war has not been entirely unfamiliar to scholars of *bellum iustum*[75], although it was far from being common either. For that reason, one may venture to claim by analogy that currently, when the use of force is strictly centralized, this "higher authority" is the Security Council itself. Yet, this speculative line of reasoning does not alter the previous conclusion, according to which no authorized military action can be perceived as a just war, because an authorization does not amount to a just cause.[76]

So far it seems that the legalistic nature of the doctrine of *bellum iustum* can be verified only in the context of self-defence. As the examination of other cases is to be abandoned, let us see now whether or not the sole probable "candidate", self-defence, meets the requisite of *recta intentio*, as well. From the viewpoint of just war, a right intention meant that the aim of war was peace, and the belligerent – in a case of self-defence, the defending state – was motivated by a desire to advance good and to avoid evil. Despite that the first condition could be identified with the modern technical term "to maintain and restore international peace and security", the natural criteria of advancement of good and avoidance of evil can barely be handled by positive international law. "Good" and "evil" are moral categories, not legal ones; thus self-defence and the advancement of good are not necessarily associated. As far as I am concerned, I can effortlessly imagine a situation of self-defence, in which the victim is morally "evil" and "deserves" an armed attack. Suffice it to recall the armed intervention of the North Atlantic Treaty Organization in the Kosovo crisis in 1999. Then it were the member states of the alliance that promoted "good" by enforcing respect for human rights and humanitarian law, even though their air campaign constituted a grave breach of international law, whereas the defending state was the one, which, in a certain sense, tried to preserve "evil" – the ongoing ethnic cleansing against Kosovo Albanians. As such, the use of force in self-defence cannot be regarded, in general, as being a modern manifestation of just war.

Ironically, none of the remaining conceptual elements would, in itself, rule out the possibility of the legal nature of just war. In spite of the fact that the condition of a reasonable chance of

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Nations: A Commentary. Oxford: Oxford University Press, 1995. p. 596. See also, Tisovszky, J.: Az ENSZ és a békefenntartás. [UN and Peace-keeping] Magyar ENSZ Társaság, 1997. p. 44.

[74] Cf., Frowein, J. A.: Article 42, *in* SIMMA, Op. cit., p. 635.

[75] Cf., e.g., Belli, Op. cit., I. V. 5-7. at pp. 7-8.

[76] Whenever a state employs force in an unauthorized and offensive manner, it certainly occurs under its authority, even though this act is always unlawful. Being that, it cannot be considered a just war under the present hypothesis.

success is of little concern to international law and rather belongs to the domain of policy, it often appears, for instance, in definitions of humanitarian intervention, which is undoubtedly a legal category.[77] In addition, the requirements set by *ius in bello* – the immunity and protection of innocents and non-combatants, the doctrine of double effect, as well as the proportionality of specific armed actions to their objectives – can easily be coupled with existing norms of international law, more precisely, with the provisions of international humanitarian law. Moreover, these criteria had contributed to an enormous extent to the development of humanitarian law, and constitute a *quasi* predecessor thereof. The train of thought above, nevertheless, reveals that at present *bellum iustum* is still not located within positive international law, but is rather embedded in morality.[78]

Conclusions

Bellum iustum is a part of the heritage of ancient Rome, even though it had been at that time a formal concept in a sense that it referred to a strictly regulated procedure, or rather ceremony, which had to be faithfully carried out in order to render a war just and pious. It was transformed into a substantive category only by the Fathers of the Church in the wake of a theological dilemma that had never emerged prior to the spread of Christianity: Is it allowed for a Christian to participate in war? St. Augustine answered the question in the affirmative, thereby laying the fundaments of a Christian doctrine of *bellum iustum* further developed by such outstanding figures as Isidore of Seville, Gratian, and St. Thomas Aquinas.

The emergence of a "modern" state system, the great geographical discoveries, as well as the rise of Reformation, however, had a considerable effect on the doctrine of just war. It became a temporal category and crystallized as a coherent concept composed of two principal segments: *ius ad bellum* and *ius in bello*. The former concerned the just commencement of war by requiring that it had to be legitimized by a just cause, declared and waged under the authority of a sovereign, who was animated by a right intention, furthermore, it had to be a last resort and proportional to its desired end. *Ius in bello*, on the other hand, prescribed that innocents and non-combatants had to be afforded special protection and immunity, intentional and non-intentional outcomes were to be distinguished, and military operations needed to be proportional to their particular goal. This set of criteria was elaborated by the first authorities of international law – for example, Francisco de Vitoria, Balthasar Ayala, Francisco Suárez, Pierino Belli, Alberico Gentili, Hugo Grotius, Christian von Wolff, and Emerich de Vattel – and became a widespread doctrine of natural law. However, it has always been subject to debates, whether *bellum iustum* had ever become a part of the voluntary law of nations, that is to say, positive international law.

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[77] Historically, the immediate antecedent of humanitarian intervention was just war, more precisely, a part thereof. It is fair to assume that at some point, an element of the doctrine, a frequently emerging *iusta causa*, gained recognition by the evolving positive international law, and was put in the context of the prohibition of intervention as one of the so-called rights of intervention. It has to be emphasized though, that in 19th century legal doctrine intervention on grounds of humanity was discussed under the rubric of intervention, and not that of war. Besides, the right of self-defence became an independent legal category presumably as a result of a similar process.

[78] For an opposing view, see, Mushkat, R.: How Useful is the Concept of the Just War in International Law? *Revue de Droit International, de Sciences Diplomatiques et Politiques*, Vol. 66. No. 3. (Juillet-Septembre 1988), p. 169.

These debates notwithstanding, the doctrine has frequently been invoked at the end of the 20th century for the purpose of justifying the use of force. This begs the question: Is just war a legal category today? In case the answer is positive, the conceptual elements constituting the doctrine can be identified as, or coupled with an existing norm or institution of contemporary international law. Although at first sight it may appear that *bellum iustum* forms a part of positive law, a thorough analysis reveals quite the opposite. Due to anomalies connected with certain requirements, particularly *iusta causa*, *auctoritat principis*, and *recta intentio*, just war can and should not be considered a legal institution, and referred to as a justification for the use of force in legal reasoning. This conclusion can be upheld even in view of the fact that some of the criteria of *bellum iustum*, more specifically the ones making up *ius in bello*, have indeed been adopted by positive international law. Even though this ancient doctrine still plays a significant role in international relations, it has to be borne in mind that it is, for the time being, nothing else, but a mere concept of morality.

Gábor Sulyok: La doctrine de la guerre juste et son applicabilité dans le droit international contemporain

L'objectif de cette étude est double: D'un côté elle présente la doctrine ancienne de la guerre juste, de l'autre côté elle examine si on peut la traiter convenablement comme une catégorie du droit positif et existante de nos jours. *Bellum iustum* apparaissait pour la première fois à l'ancienne Rome mais en ce temps-là il était eu un concept formel qui a obtenu sa substance par les pères de l'église chrétienne. Le résultat de leurs travaux était la doctrine chrétienne de la guerre juste qui a perdu graduellement son côté religieux à la fin du Moyen-Âge et – grâce aux représentants de la science du droit international – elle est devenue un principe du droit naturel. Il a été toujours discuté, si *bellum iustum* s'évoluait jamais comme une part du droit international positif qui prenait forme plus tard. La projection de la définition abstraite de cette catégorie sur l'ordre légal contemporain montre qu'on ne peut considérer la guerre juste comme une partie du droit international présent.