Revival of the Just War Doctrine?

by

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I. Introduction

The reality of war as a constant element in human affairs involves great suffering, death and destruction, and often the catastrophic ravaging of entire societies. In such circumstances one can readily understand the desire for a moral inquiry into this phenomenon, involving an examination of war from the standpoint of justice. But how has the concept of "just war" become the subject of legal attention?

It is to be observed that an elemental concern of the law of war is with the distinction between lawful and unlawful use of force. Upon analysis, it will be found that the doctrine of *bellum justum*, as classically expressed, was invoked in this regard, as a legal doctrine, at once to regulate a sovereign's legal right to resort to war and to prescribe rules, if only minimal, for the conduct and regulation of hostilities. At its zenith, the legal doctrine of *bellum justum* had a vitality independent of any moral inquiry into the intrinsic justice of a war, although the influence of the moral debate as a philosophical underpin to the doctrine can be discerned. Yet, with the decline of Christendom and the emergence of the nation state, the practical significance of the doctrine began by the seventeenth century to gradually decline. In addition, the eclipse of *bellum justum* was influenced by the maturation of theories of positivism—replacing traditional theories of natural law—according to which resort to war by the State, for whatever reason, was always found to be lawful.

This century, however, significant changes can be perceived once more in the conceptions both of lawyers and States. The old "just war"

doctrine is again being discussed by legal commentators and increasingly invoked in the practice of States. Among leading writers on international law, Bourquin[1] and Oppenheim[2] maintain that the traditional doctrine is revived in certain international treaties. Other writers such as Kelsen[3] and McDougal and Feliciano[4] utilise the doctrine in their respective theoretical expositions of the international legal system. At the recent Diplomatic Conference on the Law of War,[5] the "just war" doctrine was widely discussed and particularly espoused by the Third World States with respect to wars of national liberation and self-determination. Various resolutions of the General Assembly of the United Nations too, possibly reflect a revival of the doctrine, as does the Soviet justification of its invasion of Czechoslovakia in 1968 and former President Nixon's doctrine of "just war" in Vietnam.

The present paper will initially examine the development and substance of the traditional *bellum justum* doctrine, noting its emergence, modification and eclipse. Against that background the assertions of modern commentators and the instances of state practice will be canvassed to determine the extent to which there has been a revival of the old "just war" doctrine. While it will be found that recent theory bears some resemblance to the traditional concept, it will be submitted that the contemporary doctrine is principally motivated by state ideology, and in the result, provides little legal basis for distinguishing between lawful and unlawful warfare.

II. The Traditional Doctrine of *Bellum Justum*

The legal right to resort to war in Antiquity was reasonably circumscribed. In the states of Ancient Greece it was the practice always to assign a cause for starting a war. "[N]o war was undertaken without the belligerents alleging a definite cause considered by them as a valid and sufficient justification therefor, and without their previously demanding reparation for injuries done or claims unsatisfied."[6] Where the cause was sufficient and the wrongdoer had refused to atone, warfare was considered just. The Roman approach was

[1] *Grotius est-il le père du droit des gens?* (1948).
[2] *International Law* (7th ed.), v. 2.
[3] *Law and Peace in International Relations* (1942); *General Theory of Law and State* (1945).
[4] "Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective" (1959) 68 Yale L.J. 1057.
[5] The first "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" was held at Geneva in February and March 1974.
[6] Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911), v. 2, 179.

similar but more formal in nature; in particular it entailed the observance of specific legal rules and procedures before a war might validly be commenced. These rules were laid down and administered by a college of priests called *fetiales.*[7] "[T]he *fetiales* were not concerned with the intrinsic justice of the war but only with correct observance of formalities."[8] In this way, a war commenced in accordance with the *jus fetiales* was *justum,* which meant legally correct.[9] Although the leading Roman historians, including Cicero,[10] frequently expounded upon the motives for particular wars, such moral inquiries did not impinge upon the formal requirements of the *jus fetiales.*

Later, moral content was introduced into this hitherto formal concept of just war as the Christian concept of just war developed by St. Augustine (A.D. 354-430) and Isidore (c. A.D. 570-636) furnished its own rules for utilising the doctrine in accordance with the precepts of the new religion.[11] Given the widespread pacificism which characterised the Christian church at the time of St. Augustine, a theological dilemma of major importance developed as Christendom faced the imminent threat of invasion by Germanic tribes. As Christians would obviously have to resort to war, the theological difficulty was to explain how a Christian could participate in a war, even in self-defence, without committing a sin against the religion's pacifist precepts. St. Augustine propounded that a Christian could participate in warfare provided that the war was just. This Christian concept of *justum* emphasised the moral rather than the legal aspects of the doctrine. Although it was still central to the Augustinian concept of *bellum justum* that an initial injury must have been perpetrated,[12] war was seen as part of the general struggle against evil, and it was thought that what ultimately justified war was not the manner in which it was conducted but rather its end. The object of war according to these theorists was not to chastise sin but rather to restore harmony between men by the redress of wrong.

By the thirteenth century the doctrine had been considerably amplified, and there existed a mature theory of just war. The distinction between a just war and an unjust war had come to be recognised as essential to any discussion of warfare as "only a just

[7] Cf. Kotzsch, *The Concept of War in Contemporary History and International Law* (1956), 29.

[8] Brownlie, *International Law and the Use of Force by States* (1963), 4.

[9] von Elbe, "The Evolution of the Concept of the Just War in International Law" (1939) 33 A.J.I.L. 665, 666.

[10] E.g. *De Officiis* I, xi, 34-36; *De Republica,* III, xxxiii. Cf. von Elbe, *loc. cit.,* 667, note 15.

[11] See Jessup and Deak, *Neutrality: Its History, Economics and Law* (1935), v. 1, 8 et seq.

[12] *De Civitate Dei,* Book 19, ch. 7. Isidore's remarks were to the same effect though his authorities were Roman rather than Greek: *Etymologiae,* XVIII, i. Cf. Keen, infra, note 13.

war could have legal consequences."[13] A war which was unjust had no standing in law and neither did the participants on the unjust side. As Nicholas put it, "knights who take part in a war without just cause should rather be called robbers than knights."[14] It followed that those opposing an unjust war could commit acts, such as "spoilation" of a man's goods, which would otherwise be regarded as criminal. Always the vital legal question here was not whether the act in question had actually been done in time of war but whether the war in question was a just one.

Certain conditions rendered the recourse to arms *justum*, and Aquinas' formulation may be taken as expressive of the medieval viewpoint.[15] To be just, a war had to be: (i) waged on valid authority (*auctoritas principis*);[16] (ii) just with regard to its cause (*justa causa*); and (iii) animated by the right intention (*recta intentio*). Whilst these requirements were the foundation of the classic *bellum justum* doctrine, greatest emphasis was almost always placed on *justa causa* wherein particular reference to the injury said to have been suffered was made. The requirement that a just war be waged on valid authority (i.e. on the authority of the Roman Church or of a sovereign prince) grew steadily less important as the hold of the Church weakened on individual rulers, and indeed became a mere formality long before the eclipse of the *bellum justum* doctrine itself, while *recta intentio* was more important from a moral point of view: a person levying a just war had to be moved by a genuine desire for justice and not by hate or cupidity.[17]

The original significance of *auctoritas principis* was closely connected with the legal distinction that was made between *bellum publicum*. Private wars and feuds, everyday problems of medieval society, were not regarded as "wars" in the same sense as wars of a sovereign prince, and the *bellum justum* doctrine simply did not apply to this form of warfare. As McDougal and Feliciano state, "[t]he requirement of *auctoritas principis* was designed to exclude private violence."[18] A public war, however, was regarded as being subject to the *bellum justum* doctrine. A war was public if fought for the public weal, but as had long been recognised, only the Pope and sovereign

[13] Keen, *The Law of War in the Late Middle Ages* (1965), 64.
[14] *Lectura Super V Libros Decretalium*, 2 Decretal., Lib. II, Tit. 24, ch. 29. Cf. Keen, *op. cit.*, 65.
[15] *Summa theologica. Secundan Secundae, Quaestio XL.* Cf. von Elbe, *loc. cit.*, 669; McDougal and Feliciano, *loc. cit.*, 1065.
[16] Under Roman law the fetials were accorded *auctoritas principis* as it was their task to formally decide upon the *justum*, i.e. the legal correctness of a war, and it was upon their valid authority that the legality of a war rested.
[17] See also the views of Raymond of Pennaforte, *Summa de Poenitentia, Lib. II*, cap. 5, 17, as explained in Keen, *op. cit.*, 66-67.
[18] *Loc. cit.*, 1065, note 28; also see Keen, *op. cit.*, 70, 80.

princes had the legal authority (*justitia potestatis*) to validly levy a *bellum publicum.* Accordingly, if a prince did not lawfully have the right to levy a public war, he could have no right to levy a just war: "only he who has no superior can declare a just war."[19] If, however, the prince was a sovereign authority, then it was necessary to further consider the requirements of *justa causa* and *recta intentio* to determine whether a war was just.

Even the prince who had a just cause could make unjust war if he acted for wrong motives such as territorial aggrandizement or by imposing an *injusta pax* on the vanquished. His intention had to be to do good and avoid evil (*intentio bellantium recta*) by "punishing evildoers," "uplifting the good," and "securing a just peace." Calderinus stated that even when war was declared on just grounds, if it is waged ruthlessly with a view to vengeance, it thereby became unlawful so that things captured could not rightly be retained.[20] In similar vein, Belli wrote that "in war there was no other objective than peace and there is no peace apart from justice."[21]

The writers when talking of the *justa pax* were, of course, envisaging the situation after hostilities had ended. Thus, it was Vittoria's view that the victor in a just war could impose upon the vanquished only conditions proportionate to the wrong committed, must always act with moderation and Christian modesty and never had the right to ruin the vanquished enemy as a nation.[22] Belli, commenting on the duties of rulers in this respect, said: "Furthermore, being Christian rulers, they should understand that, even when they have undertaken war for just cause, as soon as they have realised enough from the war fully to indemnify themselves for the occasion that gave rise to hostilities, they should terminate the war. . . ."[23] But some writers began to adapt the principle to that part of the law of war known as *jus in bello.* Suárez, for instance, made a modification of the Thomist doctrine in his theory by substituting *debitus modus* (a proper *mode* of conducting war) for *recta intentio*;[24] and his contemporary Grotius, whose main work was in the field of *jus in bello,* undertook to further refine these classic just war postulates.

In the Thomist concept of *justa causa,* a different approach was taken to the injury suffered by the sovereign than that adopted in early Christian doctrine. To Augustine, the injury itself provided the just cause for war. Aquinas, however, put the matter on more of a

[19] Bartolus, *Tractatus de Reprisaliis,* III, 2. Cf. Keen, *op. cit.,* 68.
[20] Cited by Belli in *De re militari et bello tractatus,* Part ii, ch. i, 5. Cf. Brownlie, *op. cit.,* 8.
[21] *Ibid.,* 3. Cf. von Elbe, *loc. cit.,* 673.
[22] Kunz, "Bellum Justum and Bellum Legale" (1951) 45 A.J.I.L. 528, 530.
[23] *Op. cit.,* Part ii, ch. i, 5.
[24] *De Triplici Virtute Theologica* (1621), as cited in *The Classics of International Law, Selections From Three Works* (1944), v. 2, 805, 836-854.

moral plane by demanding some fault or guilt on the part of the wrongdoer for it was his view that the just war was not waged to punish the injury as such, but to punish the culpability of the wrongdoer.[25] Later writers were only more or less committed to this mutation, although it was still fundamental that an injury sufficient to justify resort to war should have occurred.[26] The point was stressed by all writers that the injury needed to be sufficiently serious to provide the requisite *justa causa*.[27]

Vittoria (1480-1546) for his part undertook a systematic inquiry into whether the war of the Spaniards against the American Indians was just or not. On his analysis of the causes he found it difficult to accept that justness should be found solely with the victorious Spanish soldiers. As it appeared to him, the Indians were waging war in the honest belief that it was just, and he was led to wonder whether a war could be just on both sides. In the result he was inclined to think that there was justness on the side of the Indians, but here a distinction had to be made between objective justness and subjective justness. He conceded that the case in which both parties have an objectively just cause "clearly cannot occur, for if the right and justice of each side be certain, it is unlawful to fight against it, either in offense or defense."[28] Vittoria was joined by Suárez on this point who called "entirely absurd" the assumption that war may be just on both sides "for two rights contrary to each other cannot both be just."[29] But if for one moment one were to look at the issue of justness subjectively, i.e. from the respective points of view of each side, then Vittoria believed it was possible to maintain the view that a war might be just on both sides. In the case of the Indians, they clearly and honestly believed, for valid reasons, that the war they were waging was a just war, and Vittoria thought that their "invincible ignorance" as he called it served to exculpate them. Ayala was another who thought it "possible to defend the opinion . . . that there can be a just war on both sides"[30] in the sense used by Vittoria. This viewpoint was even echoed by Grotius: "Yet it may actually happen that neither of the warring parties does wrong. No one acts unjustly without knowing that he is doing an

[25] von Elbe, *loc. cit.*, 669: "The just war is primarily in the nature of a punitive action against the wrongdoer for his subjective guilt rather than his objectively wrongful act."

[26] E.g. Vittoria cited in von Elbe, *loc. cit.*, 674.

[27] E.g. Belli, *De re militari*, in *The Classics of International Law* (1936), v. 2, 59; Vittoria, *De Indis et de Ivre Belli Relectiones* (1557), in *The Classics of International Law* (1917), v. 2, 173.

[28] *Ibid.*, 177.

[29] See Scott, *The Spanish Origin of International Law, Part I, Francisco de Vitoria and His Law of Nations* (1934), 449.

[30] *De Iure et Officiis Bellicis et Disciplina Militari* Libri III (1582), in *The Classics of International Law* (1912), Book 1, ch. II, 34-35. Cf. Brownlie, *op. cit.*, 10.

unjust thing, but in this respect many are ignorant. Thus either party may justly, that is in good faith, plead his case."[31]

Gentili (1550-1608), however, went much further. He thought it possible to say objectively that both belligerents may have a just cause as it was in "the nature of wars for both sides to maintain that they are supporting a just cause."[32] Undoubtedly, Gentili's view was far removed from the traditional view. While it showed how unwieldy the *bellum justum* doctrine had become, it also was a most accurate reflection of the direction in which international law was developing. It is to be remembered that writers such as Gentili and Grotius had begun the major task of developing rules as to *jus in bello.* In this respect, it was considered of vital importance that such rules should apply to both sides, and it was convenient to invoke Gentili's modification in support of the view that the laws of war apply to both sides. In the realm of state practice, sovereigns were now apt to engage leading writers on international law to advise them on matters of state and, when required, to justify the sovereign's resort to war. With both sides mobilising the support of the scholars in this way, the modification adopted by Grotius reflected what in fact occurred in practice —the assertion of *justa causa* by both sides.

At this time, and under the influence of these developments, the concept of neutrality took shape. The problems of neutrality came to be considered from the point of view of the duties of a neutral towards a nation waging a just war. Grotius, expressing the commonly held view, laid down that those "who are on neither side in war" ought to refrain from lending assistance to the one who supports an unjust cause and from placing obstacles in the way of the side which wages a just war.[33] He wrote: ". . . it is the duty of those who keep out of a war to do nothing whereby he who supports a wicked cause may be rendered more powerful or whereby the movements of him who wages a just war may be hampered. . . ."[34] It followed from Grotius' view that it was still necessary to ascertain which side had the objectively just cause. However, Pufendorf believed that neutrals should deny both belligerents passage through their territory and even oppose it, since any other course of conduct would involve a determination as to the justice of the war.[35] In this approach, one can see the beginnings

[31] *De Iure Belli ac Pacis Libri Tres* (1625), in *The Classics of International Law* (1925), v. 2, 565. Cf. Brownlie, *op. cit.*, 13.
[32] *De Iure Belli Libri Tres* (1612), Book 1, ch. VI, 48, in *The Classics of International Law* (1933), v. 2, 31. Cf. von Elbe, *loc. cit.*, 676-678; Brownlie, *op. cit.*, 11-12.
[33] Cf. von Elbe, *loc. cit.*, 679-680; Wright, "The Outlawry of War and the Law of War" (1953) 47 A.J.I.L. 365, 366.
[34] *Op. cit.*, in *The Classics of International Law* (1925), v. 2, 786.
[35] See von Elbe, *loc. cit.*, 680.

of the view that neutrality is an absolute duty unconnected with the justice of the war, a view which was to be fully embraced by positivist writers such as Bynkershoek, Wolff and Vattel.[36]

The developments which have been adumbrated such as the assertion that a war could be just on both sides and the revolution under international law of a *jus in bello* and of a law of neutrality gave warning that the ecilse of the *bellum justum* doctrine would not be long in coming. But it is as well to remember that at its zenith the doctrine was a wholly satisfactory and efficacious vehicle for the exposition of the right to resort to war and that political and intellectual conditions reinforced the universal acceptability of the doctrine. It was only as the conditions out of which the doctrine of *bellum justum* was born underwent profound change that the doctrine's viability was exposed to attack. Two specific geo-political developments were significant: the decline of theocracy and the emergence of the nation state. With the rise of the patrimonial state and the political eminence and power which thereby accrued to individual sovereigns, the authority of the Papacy became increasingly formal and indeed was repudiated by many temporal rulers. The result was that there was no longer any supranational organ commonly acknowledged as competent to give judgment on the legitimacy of the cause asserted by a sovereign prince contemplating warfare. Consequently, *justa causa*, formerly integral to the concept of justice, was increasingly subordinated to the sole judgment of the individual prince, who in effect was his own and final judge of the justice of the war. In these circumstances, the doctrine of *bellum justum* was clearly open to abuse, and its rejection by legal theorists soon followed.

It was a basic concern of the new school of writers initiating this theoretical change that a line of demarcation between law and other modes of inquiry such as philosophy or theology be drawn and be rigorously maintained. The philosophical or theological inquiry, it was said, was more concerned with moral than legal matters and was, therefore, more appropriately considered under the rubric of the law of nature—a law which addressed itself to the conscience of sovereigns —than under the law which nations applied in their intercourse with

[36] Bynkershoek, for example, rejected totally the doctrine of *bellum justum* stating: "In my judgment the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice. If I am a neutral I may not lend aid to one to an extent that brings injury to the other." *Quaestionum Juris Publici, Libri Duo*, Book I, ch. 9, in *The Classics of International Law* (1930), v. 2, 61. Cf. McDougal and Feliciano, *Law and Minimum World Public Order* (1961), 408.

each other, designated positive law. The doctrine of *bellum justum*, it was contended, fell clearly into the former category. It sought to make a distinction between wars on the basis of an appeal to the "intrinsic justice" of the respective belligerent's causes. This, however, was a moral matter rather than a legal one, and, accordingly, such considerations as the justice of a war touched only upon the rectitude, but not the legality, of a resort to violence. According to positivist theory, war was conceived as an act entirely within the uncontrolled sovereignty of the individual prince. Since the prince could act as judge of his own cause, there was no reason to suppose that he did not possess an absolute right to wage war which might be exercised at his will.[37]

Although the advent of positivism meant that the legality of a State's action was no longer dependent on the justness of the war, it must be noted that, notwithstanding the eclipse of *bellum justum* in legal theory, States did in fact continue to attempt to justify their wars with reasons of law or equity as if in response to the moral debate on just war which, of course, continued unabated. This ensured that the doctrine of just war was not wholly forgotten, though its legal revival this century must still be regarded as somewhat unanticipated.

III. Contemporary Just War Doctrine

After World War I, it would be fair to say that there was a keen feeling among the Allies that the just cause had prevailed, and the conviction was strong enough to raise at the war's end the "war guilt" of Germany. Under various articles of the Versailles Peace Treaty, notably article 231, Germany was condemned as the "guilty party" and punished for the international delinquencies it had committed. It has been pointed out that such provisions ought to be regarded as *contra legem* and that "international law, as generally accepted in 1914, did not support the idea that a state, by resorting to war, commits an international delinquency,"[38] or that the articles cannot be seen as an application of the doctrine of *bellum justum*, which related only to *jus ad bellum* and not to *jus in bello*.[39] The fact remained, however, that the inclusion of the guilt clauses in the Treaty strongly suggested that a distinction was to be made between a just and an unjust war, and legal writers were prompted to restudy the old *bellum justum* doctrine.[40]

Such studies frequently attempted to vindicate the view that the *bellum justum* doctrine had been wrongly stated by the positivists as

[37] See von Elbe, *loc. cit.*, 684.
[38] *Ibid.*, 687.
[39] Nussbaum, *A Concise History of the Law of Nations* (1947), 253.
[40] Cf. Kunz, *loc. cit.*, 529, note 1.

being solely in the domain of the law of nature by demonstrating that the doctrine had been, and was still, a norm of positive international law. It may be considered no mere coincidence that at this time the theoretical postulates of positivism were, on a much broader front, under attack from natural law writers whose school of thought was beginning to enjoy a revival of influence in legal theory. Article 10 of the League of Nations Covenant was considered by some as affirming the revival of the doctrine. This article contained an undertaking by members of the League to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. Wars were categorised as either legal or illegal according to whether breaches of requirements set down in the Covenant had occurred. The analogy was made between a legal war and a just war and an illegal war and an unjust war. The same analogy is made by Bourquin[41] in his analysis of the provisions of the United Nations Charter as constituting in a sense of revival of the classical doctrine of *bellum justum.*

The General Treaty for the Renunciation of War of 1928 (also known as the Pact of Paris and the Kellog Pact)[42] was another international treaty invoked by *bellum justum* revivalists. The High Contracting Powers to the Treaty, "condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy. . . ." Article 1. While it is generally understood that the Treaty did not constitute a total denial of the right of a party to go to war, the right to wage war in self-defence, for example, was in no way infringed[43] as the learned editor of Oppenheim has commented: "Resort to war ceased to be a discretionary prerogative right of States [which were] signatories of the Pact . . . it became an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris."[44] Thus, it was maintained that the legal regulation of a sovereign's right to resort to violence under positive international law, which the Treaty reintroduced, confirmed the revival of the *bellum justum* doctrine. Kelsen wrote, "[i]t is easy to prove that the theory of *bellum justum* forms the basis of a number of highly important documents in positive international law, namely, the Peace Treaty of Versailles, the Covenant of the League of Nations and the Kellog Pact."[45] Similarly, Oppenheim commented that ". . . it seems

[41] *Grotius est-il le père du droit des gens?* (1948).
[42] *Treaty Series, No. 29* (1929), Cmnd 3410; 94 *League of Nations Treaty Series,* 57.
[43] Oppenheim, *International Law* (7th ed.), v. 2, 182 et seq.
[44] *Ibid.*, 196-197.
[45] Kelsen, *General Theory of Law and State* (1945), 333.

now again possible to distinguish between just and unjust (or lawful and unlawful) wars."[46]

However, other writers were not so easily convinced, and Kunz, invoking a distinction between *bellum legale* and *bellum justum* maintains that there is no basis for the opinion that the discrimination between wars made by the Covenant, the Charter or the Pact of Paris ought to be viewed as entailing a distinction, in classical terms, between just and unjust wars since "the illegality of resort to war [in these treaties] was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement."[47] Kunz' point is cogent in respect of those treaties mentioned above as well as to the Charter of the International Military Tribunal.[48] The I.M.T. was created by the victors of the Second World War to try the former German officials for "crimes against peace." Tucker has said that it was "taken for granted that a distinction was to be made in international law between the just and the unjust . . . war."[49] Article 6 Paragraph A of the Charter speaks of a "war of aggression *or* a war in violation of international treaties, agreements, or assurances. . . ." (Emphasis supplied.) Tucker does not specifically mention Kunz' distinction between *bellum legale* and *bellum justum* when in the course of his discussion he juxtaposes the "war of aggression" with the "war in violation of international treaties," though it may be considered that the distinction finds graphic illustration in this Treaty. Tucker is concerned to ascertain the basis of the phrase "war of aggression" and he concludes:[50]

> The most reasonable interpretation is that the charge 'war of aggression' is based on the *bellum justum* doctrine, in view of the fact that the wording of Article 6, paragraph A, distinguishes between the act of waging a war of aggression and the act of waging a war in violation of international treaties. Either the phrase 'war of aggression' must be considered as superfluous and even misleading . . . or it must be concluded that a distinction was made between the just and the unjust war.

Even if one accepts the view that the Charter of the I.M.T. makes a distinction between just and unjust wars, the conclusion is reached that some of the major international treaties frequently invoked to establish the revival of *bellum justum*, in fact, do not establish a revival of the doctrine at all. It must be remembered that the Charter of the I.M.T. is but a single instance of the use of *bellum justum* and could not as such support a general statement of law expressing the view that the doctrine had been revived. Moreover, when one recalls

[46] *Op. cit.*, 223.
[47] Kunz, *loc. cit.*, 532; see also 533.
[48] Cmnd 6668 (1945); (1945) 39 A.J.I.L., Supplement, 258.
[49] "The Interpretation of War Under Present International Law" (1951) 4 I.L.Q. 11, 22.
[50] *Loc. cit.*, 23, note 24.

the genuine legal debate surrounding the standing of the Charter of the I.M.T. in international law or the number of parties who were signatories to it, it becomes apparent that the Charter does not significantly advance the claims of *bellum justum* supporters any more than do the other international treaties such as the Treaty of Versailles, the Covenant of the League of Nations, the General Treaty for the Renunciation of War and the U.N. Charter; therefore, evidence of a revival of the doctrine must be sought elsewhere.

Before embarking on a further examination of state practice which may manifest the revival of *bellum justum*, reference should be made to the writings of Kelsen and McDougal (in conjunction with Feliciano), both of whom, by employing the *bellum justum* doctrine in their respective theoretical expositions of the international legal system, have made the *bellum justum* doctrine a much more widely discussed subject in the field of international legal theory.

The increasing influence of natural law this century and its link with attempts to revive *bellum justum* has already been noted. Kelsen's use of the doctrine is atypical in this respect. He was a bitter antagonist of natural law, but he felt compelled nevertheless to defend the *bellum justum* doctrine.[51] His use of the doctrine is only as an instrument to interpret the positive law and arises out of a firm appreciation that international law cannot exist if there is an unlimited right to make war. If such an unlimited right existed, then what, he would ask, is the point of legal rules to regulate such a right? Kelsen, therefore, posits that "according to general international law, war is forbidden in principle,"[52] a view which presupposes the *bellum justum* doctrine. He explains his position as follows:[53]

> If the unlimited interference in the sphere of another's interest called 'war' is not in principle forbidden by general international law, if any state is at liberty to resort to war against any other state, then international law fails to protect the sphere of interests of the states subjected to its order; the states have no protected sphere of interests at all; and the condition of affairs created by so-called international law cannot be a legal state. Whether or not international law can be considered as true law depends on whether it is possible to interpret international law in the sense of a theory of *bellum justum*, whether it is possible to assume that according to general international law, war is in principle forbidden. . . .

The Kelsen doctrine of *bellum justum* resembles the classical doctrine in certain ways. Most striking is the general concern which he exhibits for aspects of the *jus ad bellum*. In particular, his use of the doctrine to prescribe the State's right to resort to war is in the classical tradition. The *justa causa* requirement is also affirmed in a somewhat modified form, namely in Kelsen's use of the "delict" to

[51] Kelsen, *General Theory of Law and State* (1945), 331-338.
[52] *Ibid.*, 331.
[53] Kelsen, *Law and Peace in International Relations* (1942), 52.

characterise an international wrong justifying permissible coercion. Thus, in stating the circumstances in which a war is permitted, he has said that it is "permitted only as a reaction against an illegal act, a delict. . . ."[54] Yet, Kelsen was never altogether happy with what may be described as the practical effects of his adoption of the doctrine.[55] In his later works, he shows himself to be well aware of the objections against the workability of the doctrine. However, so far as his own legal exposition was concerned, the doctrine was vital in establishing his thesis, and that after all was a matter of prime importance.

A much more whole-hearted acceptance of the doctrine is to be found in the writings of McDougal and Feliciano who use it in the classical sense, as a basis to draw the necessary distinction between lawful and unlawful exercise of coercion. Since "some degree of coercion is almost continuously observable in the ordinary processes of state interaction,"[56] the need to subject the processes of coercion and violence to effective control is recognised as a "most fundamental contemporary problem."[57] An analysis of the legal use of coercion is made from the point of view of its relation to perceived social goals worthy of support, and the decision-makers of the State are advised to have regard to these goals when determining the lawfulness or unlawfulness of an exercise of coercion:[58]

> In fulfilling their community responsibility decision-makers commonly find it necessary to appraise particular exercise of coercion in terms of conformity to public-order goals, and when appropriate to characterize such exercises as permissible or impermissible. In the making of such appraisals and characterizations, the decision-makers seek to give effect to certain shared policy objectives.

The overriding policy objective postulated by McDougal and Feliciano, according to which a State's decision-maker is to appraise the exercise of his power to resort to coercion, is "a world public order honoring, in deed as in rhetoric, human freedom."[59] This is an all-embracing concept, and it involves a conception of world order incorporating perspectives about law, human nature and society and patterns for the production and sharing of associated values. In the name of an international law of human freedom, the theorists' legal perspective is extended to include a multiplicity of factors, all of which are said to go to the characterisation of an act of coercion as lawful or unlawful. These include:[60]

[54] Supra, note 51, 331.
[55] *Ibid.*, 336-337; also see Kunz, *loc. cit.*, 529.
[56] "Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective" (1959) 68 Yale L.J. 1057.
[57] *Ibid.*, 1058.
[58] *Ibid.*, 1059.
[59] *Ibid.*, 1058.
[60] *Ibid.*, 1087.

> . . . the factor of priority in exercise of substantial coercion; the relative size and strength of the contending parties; the nature of their objectives; the conditions under which coercion is applied; the methods employed; the effects achieved; their relative willingness to accept community intervention; and expectations about the effectiveness and costs of decision.

The legal resort to coercion is seen in terms of the policy objectives of the State whose interests are affected. It accordingly followed that a war was just when it accorded with a State's perceived policy objectives, while the unjust war was one which attacked those objectives.

Having made the State's policy objectives the basis of the legal operation of the *bellum justum* doctrine, it was an easy next step to use the doctrine to defend every war undertaken by that State as just, and conversely, to maintain that the other side could always be regarded as waging an unjust war. McDougal and Feliciano write:[61]

> In a world marked by deep, continuing conflict among differing conceptions or systems of world public order, it is no longer revolutionary to suggest that the kind of public order demanded by a participant charged with unlawful coercion is a factor relevant to a decision on permissibility. The suggestion amounts to this: that decision-makers rationally should take account of the probable effects of various alternative decisions upon the values of the system of world order to which they are committed. There is growing recognition that conflict between competing conceptions or demanded systems in fact deeply affects both the prescription and application of policy on recourse to coercion, as on other problems.

The use of *bellum justum* in this way is to be regarded as an attempt to cloak ideological and political motives and goals with legal respectability. The *justa causa* requirement of the classical doctrine, which involved the commission of a serious injury, is here replaced by the idea that going to defence of a socially desirable policy is "just cause" to go to war. Essentially political and ideological considerations predominate over the legal concerns when the decision-maker is asked to reach a decision as to whether to resort to coercion. He is bound to take account of his State's own subjective interpretation of its social and foreign policy objectives; but while this may do as a prescription for the politician, such an approach must be concluded as being altogether too subjective an approach on which to base a legal claim.

The tenets offered by McDougal and Feliciano are regarded by some writers as an apology for United States' foreign policy objectives and as a legal justification of coercion resorted to by the United States.[62] Whilst this is possibly a harsh view of the obvious academic learning which has gone into the exposition of the theory, the apologetic nature of the thesis does attain plausibility when it is remembered that legal writers in the U.S.S.R. adhere to a *bellum justum* doctrine based on *that* State's policy objectives and goals. The Soviet doctrine

[61] *Ibid.*, 1107.

[62] See Tucker, *The Just War* (1960), where the author argues that the United States does profess and adhere to a doctrine of just war.

of just and unjust war views the Socialist war always as a just war. In the words of Ramundo, "peaceful coexistence . . . means only that nuclear wars and unjust wars, so-called wars of aggression, or wars serving the interests of the forces of Western imperialism are barred . . . just wars are those which are waged in the Soviet interest."[63]

Further aspects of Soviet doctrine lay emphasis on the concept of "wars of liberation." These too are considered just wars:[64]

> Just wars, [are] wars that are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism.

The concept of a "war of liberation" is much referred to in contemporary state practice. It is seen to be based on the general principle of international law of the right to self-determination.[65] In particular, it embraces internal wars fought by liberation movements against colonial régimes (although it is also invoked in mixed civil and international wars, guerilla wars and wars in defence of the "Socialist commonwealth," to support the liberation movement, guerilla group or national army waging such wars). Soviet thinking on colonialism fully explains why a war against a colonial power is a just war. Colonialism is regarded as a purely evil state and one which it is legal and just to fight against until the "yoke of imperialism" has been overthrown and the rights of the oppressed peoples vindicated. In these circumstances any measures of coercion taken by a group or liberation movement against the colonial power are considered to be taken in self-defence. The doctrinal position was well expressed by Mr Kiapi when he stated:[66]

> It is now against international law to own colonial territories. Any Power that insists on ruling or owning colonial territories without the consent of the inhabitants is, as a matter of law, an aggressor. Therefore, if the inhabitants rise against the colonial rulers, they are as a matter of right fighting in self-defense. . . .

No doubt under the influence of the Soviet doctrine of just war, the "war of liberation" has in recent years taken on the character of a

[63] *Peaceful Coexistence: International Law in the Building of Communism* (1967), 138-139.

[64] Commission of the Central Committee of the C.P.S.O., *History of the Communist Party of the Soviet Union* (1939), 167-168. Cf. McDougal and Feliciano, *loc. cit.*, 1108-1109.

[65] *Declaration of the General Assembly of the United Nations on the Granting of Independence to Colonial Countries and Peoples* Res. 1514 (XV) (14 Dec. 1960). By this resolution, the members of the United Nations, with none opposing and nine abstaining, proclaimed their belief that, "[t]he subjection of peoples to alien subjugation and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. All peoples have the right to self-determination."

[66] Proceedings of the American Society of International Law (1967), 20.

cause célèbre in the field of international law and politics, and it is now convenient to make references to instances in the realm of state practice where this facet of *bellum justum* has emerged. At the 1974 Geneva Diplomatic Conference on the Law of War,[67] the doctrine of *bellum justum* figured prominently in discussions related to the application of international law's *jus in bello* to wars of national liberation and self-determination.[68] In a stand strongly supported by the Third World States, it was argued at the Conference that wars of national liberation and of self-determination must be regarded as international wars, and hence subject to the Hague Regulations and the Geneva Convention. These two sets of agreements form the basis of the law of war as it pertains to *jus in bello*. The annex to the Fourth Hague Convention of 1907[69] contains rules which contain the actual conduct of combat, while in the Geneva Convention of 1949[70] are contained humanitarian protections which are to be accorded to combattants and non-combattants both on and off the battlefield.

The previous position under international law of those who were fighting for a colonial power or so-called racist power was that the rules of *jus in bello* did not extend to such combattants. Their status was that of a criminal who might, for example, be captured, tried and punished for such crimes as were provided under municipal law. The argument that these wars could no longer be viewed as an internal matter was based on the conviction that wars of national liberation and self-determination are good and just wars and ought to be governed by as much as the law of war as possible. It was asserted that as the "freedom fighter" was fighting for an obviously just cause, to make him subject to the municipal law of the colonial or racist régime against whom he was waging this just war, was a legal fetter which could no longer be justified.[71] At the Conference, Committee I was assigned to deal with these proposals with respect to wars of liberation and self-determination. An article which would have had the effect of extending *jus in bello* to these new types of just war was approved by

[67] Supra, note 5.

[68] See Graham, "The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the 'Just War' Concept of the Eleventh Century" (1975) 32 Washington and Lee L.R. 25; Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law" (1975) 16 Harvard Journal of International Law 1; Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations" (1975) 69 A.J.I.L. 77.

[69] 36 Stat. 2277, *Treaty Series* No. 539; II Malloy, *Treaties* 2269.

[70] 75 *United Nations Treaty Series* 31; 85; 135; 287.

[71] Cf. the American view on this point that the activities of a State during certain instances of armed violence which may occur totally within its own boundaries, amounted to an unprecedented infringement upon state sovereignty.

the Committee,[72] although it must be emphasised that the Conference did not formally adopt the Article. It read as follows:

> 1. The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situations referred to in article 2 common to these Conventions.
> 2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[73]
> 3. The High Contracting Parties undertake to respect and ensure respect for the present Protocol in all circumstances.
> 4. In cases not included in the present Protocol or in other instruments of treaty law, civilians and combattants remain under the protection and authority of the principles of international law, derived from established custom, from the principle of humanity and from the dictates of public conscience.

As appears from the view expressed at the Conference by States who supported the Article, the extension of *jus in bello* to these wars has yet further consequences. At present, largely influenced by the teachings of Grotius and Gentili the rights and protections accorded under the Conventions apply equally to all combattants. However, insofar as the position of those States who supported the Article is founded in *bellum justum* doctrine, the principle of "equal application" does not have their outright support. It will be remembered that under the old *bellum justum* doctrine the unjust side was accredited with no legal rights. As has been noted, a war which was unjust had no standing in law, and those on the unjust side who took part in it had none either. The position now adopted by these States is somewhat reminiscent of this old idea. Thus, it has been maintained that the "freedom fighter" cannot and must not be held to the same standards of international conduct expected of States and their uniformed combattants. This view is reflected in the preamble of G.A. Res. 3103[74] which reaffirms the proposition that colonialism is a crime which all colonial people have a right to oppose by any means at their disposal. Looking at the matter from the point of view of the "colonial aggressor," where that State has resorted to armed force in order to

[72] Document CDDH/I/71; approved by a vote of 70 to 21 with 13 abstentions.

[73] Res. 2625 (XXV) annex (24 Oct. 1970). Cf. Res. 3103 (XXVIII) (12 Dec. 1973) *Basic principles of the legal status of combatants struggling against colonial and alien domination and racist régimes*, Article 4: "The combatants struggling against colonial and alien domination and racist régimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949."

[74] *Basic principles of the legal status of combatants struggling against colonial and alien domination and racist régimes* G. A. Res. 3103 (XXVIII) (12 Dec. 1973).

oppose the war of liberation, members of their armed forces are liable to be viewed as participants in a criminal war and therefore as war criminals, rather than as prisoners of war if captured. Article 5 of G.A. Res. 3103 expresses the tenor of this philosophy in stating:

> 5. The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

Commenting on these developments, which also surfaced at the Geneva Conference, Graham states:[75]

> A return to the concept of the 'just war' of self-determination may lead to the treatment of individual combattants fighting on the wrong side in such wars as 'war criminals.' Such a designation could then be utilized as a legal basis upon which to deny these individuals prisoner of war status.

If this fear comes to be realised in practice, then no doubt, in view of the ideological foundation of the approach, it would invite Western reciprocity.

The concept of the war of national liberation which seems to have captured the imagination of the developing black African and Arab States has also had a profound affect on the law of neutrality. In classical times, of course, there were no rules on neutrality and even in the works of Vittoria and Suárez this relatively recent institution of international law finds no mention. The traditional view as developed under the influence of positivism was that, in the absence of treaty obligations, there was a duty of non-interference. However, this view has now been soundly rejected by the Third World States which consider that in a just war the duty of a neutral is to give all possible assistance to the liberation movement or guerilla group. Reference may also be made to the Nixon Doctrine on this point.[76] American policy as officially presented is designed to avoid future "just war" entanglements like that of Vietnam, and envisages the making available of assistance, in the form of military advice or other support, to a State which is fighting for the just cause, albeit on the understanding that the forces of the threatened State will do the actual fighting themselves. The American position may be slightly more restrained than the Third World position, but again there is evidence of support for a new view of neutrality. The rejection of the traditional concept of neutrality certainly seems to indicate the important impact which the contemporary *bellum justum* doctrine is having. Only as recently as September 1976 Tanzania, in a significant move, called on the United States to support black nationalist guerillas fighting wars

[75] *Loc. cit.*, 57.

[76] See Johnson, "Just War, The Nixon Doctrine and the Future Shape of American Military Policy". The Yearbook of World Affairs (1975), 137 et seq.

of liberation against the South African and Rhodesian administrations. In its statement, the Tanzanian government asked why the United States could not say "that if a peaceful transfer of power is impossible because of the intransigence of the racists, then it will be on the side of those who fight for freedom."[77] While the United States declined to give such an assurance, it is noteworthy that the United States' Secretary of State subsequently offered himself as a mediator in the Rhodesian dispute.

Further examples of state practice can be cited in which appeals to *bellum justum* have been made. A recent example was the occasion of the Soviet invasion of Czechoslovakia in August 1968. In defending his country's actions before the 23rd Session of the General Assembly, the Soviet Foreign Minister, Mr Gromyko, invoked the concept of a "Socialist commonwealth," which he called "an inseparable entity." "The Socialist states," he said, "cannot and will not allow a situation where the vital interests of socialism are infringed upon and encroachments are made on the inviolability of the boundaries of the Socialist commonwealth."[78] And in the Security Council debate the Soviet representative, Mr Malik, expressed the Soviet position classically when he said, "I am proud of the fact that here in this Council I defend a just cause. . . ."[79] Secretary Brezhnev also commented on the Soviet invasion in a speech delivered to the Fifth Congress of the Polish Communist Party insisting that the Communist countries stood for "strict respect" for sovereignty. He declared:[80]

> But when internal and external forces that are hostile to Socialism try to turn the development of some Socialist country towards the restoration of a capitalist regime, when Socialism in that country and the Socialist community as a whole is threatened, it becomes not only a problem of the people of the country concerned, but a common problem and concern of all Socialist countries. Naturally an action such as military assistance to a fraternal country designed to avert the threat to the social system is an extraordinary step, dictated by necessity.

Such a step, he added, "may be taken only in a case of direct actions of the enemies of Socialism within a country and outside it, actions threatening the common interests of the Socialist camp."[81]

Upon reading these comments one is struck by the similarity of the Brezhnev Doctrine of just war to the view of McDougal and Feliciano discussed above. In his speech Mr Brezhnev clearly identifies the ground for intervention to be the perceived threat to the vital interests of the Soviet community. Apparently then, in Soviet as well as American thought, the war fought in defence of policy goals and

[77] *Auckland Star*, Wednesday 15 September 1976, p. 10.
[78] See (1969) 63 A.J.I.L. 569.
[79] *Keesing's Contemporary Archives* (Oct. 16-Nov. 21, 1968), 22967B.
[80] *Ibid.* (Nov. 16-Nov. 23, 1968), 23027.
[81] *Ibid.*

objectives to which that State is committed is a just and legal war. This view, one may conclude, underscores the ideological nature of the contemporary *bellum justum* doctrine.

IV. Conclusion

Mindful of the offence to the Gods which might otherwise be committed, the rulers of Antiquity were loath indeed to go to war unless a good reason existed for them to do so. To this end, the Romans developed a system of rules by which the right to recourse to arms was held to arise. If the criteria set down in these rules were met, the college of *fetiales* could then declare that the ruler was legally entitled to go to war. Such a war was a *bellum justum*—a war which was legally correct. The primary aim of this legal procedure was the regulation of the right to go to war. In this way, the classical *bellum justum* doctrine is to be regarded as mainly concerned with rules relating to *jus ad bellum.* However, the doctrine certainly did contain some rules which concerned the conduct of the warring parties during the course of hostilities. In the beginning these rules were somewhat vague, but nevertheless, the view that the war must be held to the level of fighting necessary to indemnify the injury which had given rise to the hostilities was frequently expressed.

Later, the doctrine was used by the theologians and canonists to sanction the right of Christians to go to war without thereby committing a sin. Under their influence, much moral and philosophical content was added to the doctrine, and the role of "justice," both in the legal exercise of the right to go to war and in the form of its conclusion (i.e. the *justa pax*) was given considerable emphasis. An indication of the level of moral activity which had now become part of the *bellum justum* doctrine is found in the much-debated idea that a war could be just on both sides. But, of course, such an idea was open to abuse, and in the result the blurring of the objectively just and subjectively just cause only served to deform the *bellum justum* doctrine and seriously affect its workability.

Meanwhile, profound changes were occurring in the structure of international society which would facilitate the eclipse of the doctrine. The decline of theocracy and the emergence of the nation state saw a revolution in ideas and conceptions as well as the practical decline of the Papacy, while the temporal sovereign now laid claim to the right to go to war at his discretion. The impact of these events came to be mirrored in international legal theory; with the hegemony of the temporal rulers firmly established, the need for a legal doctrine of *bellum justum* had been removed, and legal scholars, accepting the doctrine's demise, instead devoted themselves to providing a much

more detailed account of the rules of law which were to apply to the conduct of hostilities both on and off the battlefield.

A doctrine of *bellum justum* has now been revived, purportedly as a doctrine of law. It was first invoked by the Allies at the end of World War I in the Treaty of Versailles as a basis for punishing Germany as the guilty party and unjust aggressor. Subsequent international treaties, in attempting to prescribe a legal régime for regulating the right to use coercion, have alluded to the old doctrine, especially its *jus ad bellum* aspect. Eminent theorists, such as Kelsen and McDougal, have advanced the cause and encouraged the re-acceptance of a *bellum justum* doctrine by incorporating the doctrine in their respective theoretical expositions. Most influential has been the "policy" school with its American and Soviet branches. From this school comes the view that the just war is one fought in support of socio-political ideals and objectives to which the particular State is committed. At the 1974 Diplomatic Conference in Geneva, it was suggested that the concept of *bellum justum* might be used to exclude the application of *jus in bello* to certain of the combattants on the "ideologically opposite" side. The ideological basis with which the contemporary *bellum justum* doctrine has been injected has considerably affected the law of neutrality in that the doctrine has become a green light for state interference and support for the participant considered to be fighting for the ideologically correct objectives.

In the result, what clearly emerges from a study of contemporary theory and practice is that ideological biases evidently form the motive force behind the contemporary doctrine of *bellum justum.* The attempt has been made to equate legality and ideology whereupon the situation has "degenerated into a mere ideology of power politics."[82] Certainly, the *bellum justum* doctrine of today bears some resemblance to the doctrine of ancient times, but unlike its precursor it provides no legal basis to distinguish between lawful and unlawful act of coercion.

[82] Schwarzenberger, "Jus Pacis ac Belli" (1943) 37 A.J.I.L. 460, 465.