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DO WE NEED THE LEGAL CONCEPT OF JUST WAR?

I. Introduction

The concept of a just war (*bellum justum*), taken seriously as a legal concept, was part of the theory of the law of nations (*ius gentium*) in modern times. Later it was replaced by the concept of legal war (*bellum legale*). The seventeenth-century famous French writer, François duc de La Rochefoucauld (1613–1680), famously said that: "*Hypocrisie* is a Sort of Homage which *Vice* pays to *Vertue.*"[1] Was the concept of a just war such a hypocritical concept that obscured the real intentions and politics of territorial expansion? Legal arguments justifying, for example, the territorial claims of Louis XIV can be considered as justification for aggression. But did the concept of a just war, even if abused, add any value to the law of nations? Do the legal concepts we use shape in some way our attitude to reality? In the article I will discuss the possible advantages of "just war" as a legal concept. The article is divided into five parts. In the first part, I will present comments on the relationship between legal concepts and the attitudes of legal actors. In the second part, I will show the origins of the concept of just war, and in the next part the mature cob, as it was understood at its height in the 17th and 18th centuries, will be elucidated. The twilight of the concept is analyzed in the fifth part. The last part is devoted to the possible contemporary application of the concept of just war.

II. Language of Law and the Reality

Law is a phenomenon inextricably linked to language, although in my opinion it cannot be reduced solely to language. The importance of language is not limited only to the role of performative utterances, which were characterized by John L. Austin in his speech act theory. Austin rightly pointed out that changes are made in the external world, especially changes in legal relations, by means of or using the utterance of certain formulas. Performative utterances are part of illocutionary acts. The vows spoken during the marriage ceremony

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[1] François de La Rochefoucauld, *The Moral Maxims and Reflections of the Duke de La Rochefoucauld with an Introduction and Notes by George H. Powell* (London: Metheun & Co. Ltd., 1912), 73.

can serve as an obvious example.[2] Ancient laws, especially Roman law, had many situations in which certain actions were legally binding after completing certain rituals, including the uttering of formulas.

Law is related to language in an even deeper sense. As the eminent comparative law specialist, Bernhard Grossfeld, observed, "man recognizes the world around him through the medium of language, and language enables him to grasp and to define reality. Through language he attains power."[3] By giving names, also in the sphere of law, man gains a sense of control over the reality around him. The scholar pointed out further: "Language is not only a means to comprehend the world: it is even a means to recognize it. It is a mental device to enable the mind to comprehend what it sees."[4] Therefore, names also determine the way in which this reality is comprehended. The names we use influence how we think about the phenomena we label with these names. Thus, the way we describe a given legal phenomenon using certain language influences how it will be perceived. For instance, if we describe a specific claim in the language of subjective rights, and even more so when language of fundamental rights is chosen, we will attach a different importance and meaning to this claim than if we use merely the category of legally protected interest.[5] The legal terms used to describe a specific phenomenon undoubtedly influence attitudes towards this phenomenon.

At the end of the 1960s and in the 1970s, thanks to the so-called the Cambridge School made a breakthrough in research on the history of ideas. Scholars such as Quentin Skinner, John G. A. Pocock and John Dunn expressed the view that this history should be understood as the history of discourses and languages in which specific ideas appeared. The methodology developed by the Cambridge School can be successfully applied to the study of the history of law. Gunnar Volke Schuppert proposed just such a perspective in his book on the history of languages of law. In this book, Schuppert pointed out that in the Western history of last four centuries "almost all legal acts marking revolutions and upheavals are formulated

[2] John L. Austin, *How To Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1975), 4–11, 109ff.

[3] Bernhard Grossfeld, "Language and the Law," *Journal of Air Law and Commerce* 50, no. 4 (1985): 795. The author refers to Ernst Cassirer's work *Sprache und Mythos: Ein Beitrag zum Problem der Götternamen* (Leipzig: B. G. Teubner, 1925). In this not very long essay Cassirer wanted to confirm the thesis that the essence of the ancient gods corresponded to their names. These names, however, were created in the process of long development. Moving to the field of law, it can be said that the very terms chosen to describe a legal concept influence the content that this concept will later be filled with during the process of applying the law. To put it simply, the label influences what the labeled thing will later become.

[4] Grossfeld, "Language and the Law," 797. In the further part of his considerations, Grossfeld uses Noam Chomsky's thesis about the existence of a "deep structure of human laguages." He points out that if such a deep structure of language exists, it can be hypothesized that such a deep structure, independent of cultural conditions, must also exist in relation to law, due to the influence that language has on law. At the same time, Grossfeld notes that a law that does not correspond to the linguistic sensitivity of a given society will be more difficult to internalize. Cf. ibid. 802–03.

[5] I am leaving aside the issue of Rudolf von Ihering's theory which bases subjective law on the notion of interest.

as documents of rights."[6] He showed interestingly how the French Revolution and the takeover of power in Germany by the Nazis in 1933 caused a break with the existing language of jurisprudence and meant a "linguistic-conceptual seizure of power," carried out also in the sphere of law.[7] The radical change in the language of law is therefore a symptom of a much broader political and social change, and the study of this language may bring new insights into the change itself. In this article, I will use the approach proposed by the Cambridge school to show, through the analysis of the discussion on just war, the change that took place in the language of the law of nations at the turn of the 18th and 19th centuries.

III. The Origins of the Concept of Just War

The term bellum iustum appeared in Roman thought, but its meaning coincided with what was later referred to as legal war. It was about a war declared in accordance with applicable customs. Cicero devoted some space to reflections on war in *De officiis* ("On Duties," 44 BC), where he stated that sometimes the path to peace leads through war. According to Cicero, war against the side that refused to repair the harm it had caused was justified.[8] In Christian thought, St. Ambrose of Milan (339–397) presented the division of wars into just and unjust. He understood the first category very narrowly as it included only wars in defense of the homeland and wars fought to protect others from unjustified attack.[9] Saint Augustine of Hippo (354–430) was of the opinion that all wars, regardless the causes, produce misery to men. However, there is a category of wars which are justified because they are reaction to the wrongdoing done by one of the parties. These wars can be named just wars and they have the character of punitive wars: "For it is the wrong-doing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be matter of grief to man because it is man's wrong-doing."[10] The wrongdoing that justifies waging war includes unjustified attack, taking of property and causing damage. Augustine demanded that war must be the only possible means of punishing the sinner. Moreover, during hostilities, good faith must be maintained, also in relations with the enemy.[11]

[6] Gunnar Folke Schuppert, *A Global History of Ideas in the Language of Law* (Frankfurt am Main: Max Planck Institute for Legal History and Legal Theory, 2021), 17.
[7] Ibid, 16.
[8] Marcus Tullius Cicero, *De officiis libri tres* (Leipzig: B. G. Teubner, 1915), 11–15; 83–85; Leszek Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny* [The attitude of Christianity of the first centuries towards war] (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1947), 9–10.
[9] Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny*, 56.
[10] Aurelius Augustine, *The City of God*, trans. Marcus Dods (Edinburgh: T. & T. Clark, 1871), Vol. II, 311 (XIX, 7). Augustine emphasized: "For even when we wage a just war, our adversaries must be sinning; and every victory, even though gained by wicked men, is a result of the first judgment of God, who humbles the vanquished either for the sake of removing or of punishing their sins:" ibid, Vol. II, 324 (XIX.15). Cf. John Langan, "The Elements of St. Augustine's Just War Theory," *The Journal of Religious Ethics* 12, no. 1 (1984): 19–38; Andrej Zwitter and Michael Hoelzl, "Augustine on War and Peace," *Peace Review* 26, no. 3 (2014): 317–24.
[11] Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny*, 73–74.

In the High Middle Ages, the concept of holy war appeared. An obvious example of wars that were considered sacred were the Crusades. According to Georges Minois, the concept of a just war was, on the one hand, a continuation and secularized modification of the concept of a holy war, and on the other hand, its development was connected with the consolidation of royal power. The motives of a just war were to be judged as just, but did not have to be of a religious nature.[12] Saint Raymond of Penyafort (1175–1275) and Saint Thomas Acquinas (1225–1274) were the two major exponents of just law doctrine of this time. Raymond formulated five conditions for a just war. The defense of the country or the recovery of property was the only permissible object (*res*) of war. The spirit (*animus*) of war could not include hatred, the desire to gain power or revenge. Clerical persons (*personae*) who were forbidden to fight could not take part in the war. The condition of authorization (*auctoritas*) was that the appropriate superior (sovereign) gave permission to wage a war.[13] In his monumental *Summa theologiae*, St. Thomas presented a just war doctrine with only three conditions. Firstly, such a war was to be declared by the rightful superior authority (*auctoritas principis*), and therefore not by a usurper or a private person. Secondly, the reason for the war was to be just (*justa causa*), i.e. Thomas considered the war of plunder to be a crime, and the goals justifying the war were: protection of the population, fighting against the pagans (although Thomas was against converting them by force) and repairing the harm done to the rightful authority. The final condition was the "righteous intention" of the war (*intentio recta*).[14]

During the conflict between Poland and Lithuania with the Teutonic Order (Order of Brothers of the German House of Saint Mary in Jerusalem), a scholar active in Karków, Paweł Włodkowic (Paulus Vladimiri, between 1370 and 1373–1435/1436) argued that a war started solely for the purpose of converting pagans could not be a just war.[15] A similar view was expressed over a century later by Francisco de Vitoria (ca. 1486–1546), who was a representative of the late scholastic Salamanca School and simultaneously, one of the most important authors writing on the law of war in the 16th century.

IV. The Developed Concept of Just War

The outstanding British historian of ideas, Richard Tuck, distinguished two basic currents in early modern thought on law of nations. The first one is called humanistic and the

[12] Georges Minois, *Kościół i wojna. Od czasów Biblii do ery atomowej* [L>Église et la Guerre. De la Bible à l'ère atomique], trans. Adam Szymanowski (Warszawa: Oficyna Wydawnicza Volumen, 1998), 165–66.
[13] Magdalena M. Baran, *Znaczenie wojny. Pytając po wojnę sprawiedliwą* [The meaning of war. Asking about just war] (Łódź: Fundacja Liberté, 2018), 192–93; Minois, *Kościół i wojna*, 170–71.
[14] Saint Thomas Aquinas, *The Summa Theologica*, Vol. II, trans. Laurence Shapcote (Chicago: Encyclopaedia Britannica, Inc., 1990), 577–81; Saint Thomas Aquinas, *On Law, Morality, and Politics*, ed. William P. Baumgarth and Richard J. Regan (Indianapolis and Cambridge: Hackett Publishing Company, 1988), 220–22.
[15] Ludwik Ehrlich, *Polski wykład prawa wojny XV wieku. Kazanie Stanisława ze Skarbimierza* De bellis iustis [Polish lecture on the law of war of the 15th century. Stanisław of Skarbimierz's sermon *De bellis iustis*] (Warszawa: Wydawnictwo Prawnicze, 1955), 85–86; Ludwik Ehrlich, *Paweł Włodkowic i Stanisław ze Skarbimierza* (Warszawa: Państwowe Wydawnictwo Naukowe, 1954), 169–72.

influence of Italian Renaissance thought on it's concepts is very visible. It puts first the right of the state, understood as a political community, to security. In this respect, it follows the path set by Niccolò Machiavelli who was undoubtedly the most influential Renaissance "philosopher of security" (later, this primacy of security is present, e.g., in the thought of Thomas Hobbes). This current treats war instrumentally and at the same time allows colonization as a method of building the state's power. Moreover, it recognizes that the superior authority is only slightly bound by moral norms. Tuck sees Alberico Gentili (Gentilis; 1552–1608) to be the major representative of humanistic current. The second current, reversely, saw humanity as creating moral community. This current was associated with late scholastic thought and represented by the leading figures of the Salamanca School: Francisco de Vitoria and Luis de Molina (1535–1600).[16]

The equivalent of the notion of *justa causa* in de Vitoria's concept was *injuria* which included the following justifying reasons of war: defending the public good, returning confiscated property or receiving its monetary equivalent, seizing enemy property to cover the costs of war and destruction caused by the enemy, achieving peace and security, and punishing the guilty. Moreover, de Vitoria allowed for a punitive war, but assumed that the punishment should be proportional to the damage caused to one state by another. Such reasons for waging a war as the desire to expand territory, the barbarity of certain peoples, religious differences or the supreme authority's desire for prestige were described by de Vitoria as dishonest.[17] De Vitoria also paid attention to the manner and consequences of waging war. He argued that the ruler should give up waging a war for which he had a just cause if this war were to cause the death of very many people. De Vitoria wrote shortly after the discovery of America, and the beginnings of colonial expeditions undoubtedly influenced his thought. He believed that not only the conversion of pagans by force, but also the taking of their territory could not be justified from the perspective of the law of war. According to the Spanish philosopher, the conquistadors' war against the "Indians" (Native Americans) could only be a just war if it was waged against a chief who punished his subjects for adopting Christianity.[18] Molina dealt with the issue of just war in his work *De justitia et jure* (1592),

[16] Richard Tuck, *The Rights of War and Peace. Political Thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 16–19.

[17] Francisco de Victoria, *De Indis et de Iure belli Relectiones, Being Parts of Relectiones Theologicae XII*, trans. John Pawley Bate, ed. Ernest Nys (Washington: Carnegie Institution, 1917), 171–73; Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), 170–72; Quilicus Albertini, *L'œuvre de Francisco de Victoria et la doctrine canonique du droit de la guerre* (Paris: A. Chevalier-Marescq & Cie, Éditeurs, 1903), 109–34; Ernest Nys, "Introduction," in Francisco de Victoria, *De Indis et de Iure belli Relectiones, Being Parts of Relectiones Theologicae XII* (Washington: Carnegie Institution, 1917), 93–94.

[18] Nys, "Introduction," 72, 85–87, 89–91; Andrzej Szafulski, *Inspirujący wpływ myśli Francisco de Vitoria na rozwój podstawowych praw człowieka i wspólnoty międzynarodowej* [The inspiring influence of Francisco de Vitoria's thought on the development of basic human rights and the international community] (Wrocław: Papieski Wydział Teologiczny, 2009), 133–46. Albertini, *L'œuvre de Francisco de Victoria et la doctrine canonique du droit de la Guerre*, 166–77, 224–34; Minois, *Kościół i wojna*, 212–16.

where he also added a new element to these considerations, namely the modern concept of the sovereignty of state power or the monarch (the concept which was exemplarily expressed by Jean Bodin). The addition of this element meant that, as scholars dealing with this issue note, the entire concept of Molina became ambiguous. Molina stated that a war resulted from harm caused without fault could be considered a just war. Certainly, this may take place when the harm was real. Molina argued that because monarchs are sovereign, there is no judge who could assess the fault of state authority.[19] This ambiguity of Molina's concept means that, according to some authors, this concept allows many aggressive wars to be considered just.[20] Peter Haggenmacher is of the opinion that Molina and other Catholic thinkers of the period after the Council of Trent fell into contradictions, therefore de Vitoria's doctrine should be considered "the decisive clarification" (*clarification décisive*) of the idea of just war.[21]

The founding father of law of nations, Hugo Grotius (1583–1645) presented the most famous of early modern doctrines of just war. His thought followed in the footsteps of the concepts developed on the one hand by the Salamanca School and by Roman Stoics on the other. The scholar emphasized that the behaviour of states and individuals during both war and peace was subject to the law of nature which showed what actions implemented natural justice, being the "sum" of all virtues. According to him, the reasons substantiated a just war are essentially the same as the reasons for a legal action between natural persons. These reasons can be reduced to three, namely: causing harm, unlawful taking of property and commiting offenses which should be punished.[22] It must be noted that, according to this Dutch lawyer, harm also meant the need to take defensive actions. The fear of attack could also justify pre-emptive actions that could meet the conditions of a just war, but this fear had to be justified by actions taken by the opposing side, such as placing troops at the border[23] (it is worth stating that Grotius still permitted private wars, although Gentilis before him questioned the legality of such wars). Grotius believed that just as individuals should try to reach a settlement before starting a trial, states should use negotiations or proceedings before an independent arbitrator before starting a war. When mediation measures fail to produce results, the use of military force becomes permissible.[24] Grotius assumed that

[19] Cf. Luis de Molina, *De Justitia et Jure. Opus in sex tomos divisum* (Moguntia: J. G. Schönwetter, 1659), Vol. I, 409–30.
[20] Cf. Minois, *Kościół i wojna*, 250.
[21] Haggenmacher, *Grotius et la doctrine de la guerre juste*, 172.
[22] Hugo Grorius, *De jure belli ac pacis libri tres, Volume Two: The Translation by F. W. Kelsey* (Oxford: Clarendon Press – London: Humphrey Milford, 1925), 171–85 (book II, I, II–XVIII); cf. W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), 19697; Franciszek Kasparek, *Zasady Hugona Grocyusza o prawie interwencyi ze stanowiska dzisiejszej nauki filozoficznego i pozytywnego prawa narodów* [Hugo Grotius' principles on the right of intervention from the standpoint of today's philosophical teaching and positive law of nations] (Kraków 1872), 34–36, 45; Haggenmacher, *Grotius et la doctrine de la guerre juste*, 549–52.
[23] Grotius, *De jure belli ac pacis libri tres*, 549 (book II, XXII, V); Ibid, 184 (book II, I, XVII).
[24] Ibid, 560–63 (book II, XXIII, VII–VIII).

the state was created as a result of social contract, but this contract did not allow for the right of resistance on the part of the subjects (citizens). Therefore, according to Grotius, the subjects had the only allowable means of defense against tyrannical power at their disposal, i.e. applying for help from a foreign state (sovereign). Thus, the scholar assumed that the defense of foreign subjects against unjust harm was an acceptable premise for a just war.[25] For this reason, some contemporary authors see Grotius as a precursor of the concept of humanitarian intervention.[26] It is worth adding that Gentilis also allowed such an intervention, while another representative of the school from Salamanca, Francisco Suarez (1548–1617), strongly rejected its legality.[27]

Emer de Vattel (1714–1767) was the most famous author writing about the law of nations in the second half of the 18th century. He based the entire concept on the view that states are in a specific state of nature, so there is no superior over them. At the same time, he rejected Hobbes' view that the state of nature must be a state of actual or potential war. According to Vattel, the state of nature is only a state of uncertainty.[28] Relations between states are not based solely on force, but also on the principles of independence, equality and freedom of each state in relations with others.[29] The assumption that states are sovereign means that these principles can be provided to each of them. In this concept, the institution of sovereignty has a guarantee function. Moreover, Vattel maintains that the virtue of justice, prescribed by natural law, also applies in relations between states. However, states are only responsible for unfair actions only in mutual relations, and not in internal relations. Interference with internal affairs of the state in the name of preventing injustice is contrary to the principle of sovereignty. Thus, Vattel rejected Grotius' view on the possibility of intervention in a situation when the state treats its own subjects unfairly.[30] Vattel assumed that citizens had the right to resist, so allowing external interference was not necessary. However, he believed that once a civil war against a tyrant was underway, the warring citizens could ask other states to intervene.[31]

Vattel believed that repelling an attack and acting to redress harm and punish the state causing the harm in order to deprive it of the ability to harm in the future could be reasons for a just war. Doubts about the rights of the parties to a conflict do not automatically make a war unjust, but Vattel emphasized that the parties must act in good faith and with the intention of reaching an agreement. According to Vattel, an attempt to resolve the conflict

[25] Ibid, 583–84 (book II, XXV, VIII).
[26] Jerzy Zajadło, *Studia Grotiana* (Gdańsk: Wydawnictwo Arche, 2004), 191.
[27] Theodor Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez," *American Journal of International Law* 85, no. 1 (1991): 114; Minois, *Kościół i wojna*, 251.
[28] Cf. Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns. Volume Three: Translation of the Edition of 1758 by C. G. Fenwick* (Washington: Carnegie Institution of Washington, 1916), 7a.
[29] Ibid, 9a, 10a, 6–7.
[30] Ibid, 12a – 13a, 6, 7–8; cf. *ibid.*, 135, 222.
[31] Ibid, 131–32: cf. Zajadło, *Studia Grotiana*, 196–97.

peacefully did not condition the admissibility of war. Moreover, when the reason for the conflict was minor, but the other side refused to resolve it peacefully, war was permissible.[32] The scholar distinguished "essential rights," i.e. those that were key to sovereignty. In his opinion, in the case of their violation, a peaceful way to resolve the dispute was completely out of the question. Like Thomas Aquinas, Vattel also emphasized the condition of righteous motives in war. As he emphasized, such motives certainly did not include the pursuit of wealth, the desire to conquer new territory, passions, hatred of a specific nation, the desire for revenge or the manifestation of power.[33] Vattel expressed the view that pre-emptive military action, if based on a real threat and not on unverified suspicions, could be justified.[34] Similarly, he justified punitive wars. Therefore, the category of lawlessness justifying war has been extended to cover threats that are, in a sense, potential. It should be emphasized that Vattel's ideas were a kind of swan song for the concept of just war in the law of nations.

V. The Twilight of the Just War Concept

The first factor that cast doubt on the concept of a just war was the spread of a radical version of the doctrine of state sovereignty. At the end of the 17th century, Samuel Pufendorf (1632–1694) was the most respected author on the law of nations. He combined the focus on state security, borrowed from the thought of Thomas Hobbes, with the idea of humanity as a moral community, which had previously been proclaimed by Grotius. As Richard Tuck points out, Pufendorf's position was a point of reference for German scholars of the time. Christian Wolff (1679–1754) was one of Pufendorf's most important successors. Wolff developed the idea of a world moral community and claimed that states, as a result of mutual agreements, created such a community, namely: *civitas maxima*. Simultaneously, he accepted the view of Hobbes who emphasized that the sovereignty of states excludes the existence of any authority resolving disputes between them. The consequence of this view was the statement that even if one of the belligerent states had a just reason to start a war, a just reason to start a war, other states cannot judge how just this view actually was because they cannot act as judges. Therefore, Wolff believed that states must be free to decide whether the conditions justifying war were met.[35] Molina's considerations, mentioned earlier in this article, showed that the adoption of the modern doctrine of sovereignty led to ambiguity

[32] Vattel, *The Law of Nations*, 223–28.

[33] Cf. Ibid, 243–47, 254.

[34] Cf. Ibid, 304. It is worth adding that the Scottish thinker Adama Ferguson (1723–1816), recognized by Ludwik Gumplowicz as the founder of the sociology of war, allowed not only a pre-emptive attack, but also a war initiated to stop the development of the power of another state. Ferguson expanded and at the same time "diluted" the concept of just war even more than Vattel: Adam Ferguson, *Principles of Moral and Political Science. Being Chiefly a Retrospect of Lectures Delivered in the College of Edinburgh* (London: A. Strahan and T. Cadell – Edinburgh: W. Creech, 1792), Vol. II, 300–02. Cf. Ludwik Gumplowicz, *Die soziologische Staatsidee* (Graz: Leuschner & Lubensky, 1892), 67–70.

[35] Christian Wolff, *Jus gentium methodo scientifica pertractatum. Voliume 2, trans. J. H. Drake* (Oxford: The Clarendon Press – London: H. Milford: 1934), 324–25; cf. Ludwik Ehrlich, "The Development of International Law as a Science," *Hague Recueil* I (1962): 232–35.

in considerations about a just war. Deriving extreme consequences from this doctrine makes concept of a just war impossible.

The gradual departure from the idea of law of nature and the adoption of positivism in the theory of the law of nature, which took place in the second half of the 18th century, was another factor influencing the decline of the concept of just war. Johann Jacob Moser (1701–1785), a prominent German lawyer who adopted positivism, proposed focusing on the concept of legal war (*bellum legale*) and examining whether a given cause of war was not excluded between specific parties due to the provisions of the treaty concluded by them.[36] Although the turn of the 18th and 19th centuries in Europe was a period of constant wars, another German professor, Georg Friedrich von Martens (1756–1821), was of the opinion that the norms of natural law had never been realized in positive law to such an extent as in his times. He distinguished fundamental rights in the law of nations *(droits primitifs)* which were protected by both natural law and positive law. These included the right to security and independence, the right to occupy territories not held by other states and to enter into treaty relations with others.[37] The violation of the right to security and independence by another state justified a declaration of war.

VI. Concluding Remarks: The Possibility of Renaissance of the Just War Concept

The category of justice continues to be one of the most widely discussed in the philosophy of law. There are also many opponents of using this category. Leon Petrażycki (1867–1931) was one of the most ardent among them. He argued that all judgments about justice are in fact the judgments of emotions. Judgments about justice are always projections of the intuitive law of persons who use category of justice.[38] In his early work, *Die Lehre vom Einkommen* ("The doctrine of income"), Petrażycki ridiculed all attempts to create a coherent concept of distributive justice. According to him, any attempt to create such a concept is of subjectivist character and each is marked by "crude, unreasonable materialism."[39] However, later attempts to create a theory of distributive justice, to mention only presented by John Rawls and Amartya Sen,[40] prove that it is difficult to eliminate the very category of justice from the philosophy of law. Petrażycki himself proposed replacing the category of justice

[36] Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," *The American Journal of International Law* 33, no. 4 (1939): 683; cf. Robert A. Kann, "The Law of Nations and the Conduct of War in the Early Times of the Standing Army," *The Journal of Politics* 6, no. 1 (1944): 99.
[37] Kann, "The Law of Nations and the Conduct of War in the Early Times of the Standing Army," 99–100, 104.
[38] Leon Petrażycki, *Teoria prawa i państwa w związku z teorią moralności* [The theory of law and the state in connection with the theory of morality], ed. Wiktor Leśniewski (Warszawa: Państwowe Wydawnictwo Naukowe, 1960), Vol. II, 288–95; Leon Petrażycki, *Law and Morality*, trans. Hugh W. Babb (Cambridge, Mass.: Harvard University Press, 1955), 241–44.
[39] Leo von Petrażycki, *Die Lehre vom Einkommen. Vom Standpunkt des gemeinen Civilrechts unter Berücksichtigung des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Recht. II. Band. Einkommensersatz* (Berlin: H. W. Müller, 1895), 475–77, 485–86.
[40] Cf. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2009).

with the ideal of universal love which was by him the rebirth of the law of nature.[41] This ideal is even more ambiguous than the concept of justice, not to mention that it is difficult to imagine its practical implementation. It should also be emphasized that the controversy surrounding distributive justice does not concern to the same extent retributive justice, which, after all, refers to the redress of suffered harm. References to the concept of justice also appear in many legal systems. Therefore, the ambiguity of the concept of justice is not an obstacle to the introduction or use of the concept of just war.

Replacing the concept of war with the concept of armed conflict in international law was associated, first of all, with the desire to eliminate wars as a means of implementing state policy (General Treaty for Renunciation of War as an Instrument of National Policy, known as the Kellogg – Briand Pact of 1928; Article 2 (4) of the United Nations Charter). Secondly, the purpose of this was to extend the protection guarantees for civilians, private property and cultural property, that were established in international humanitarian law in the case of war, to all armed conflicts, regardless of whether the parties were states or any "organized armed groups."[42] Certainly, extending these guarantees is expedient, appropriate and uncontroversial.[43] However, there is a price that must be paid for abandoning the concept of war (and of just war in particular), namely, the concept of armed conflict has a rather vague connotation and is therefore susceptible to being diminished or "diluted." Any armed conflict can be called a "special military operation" (*специальная военная операция*), so the actual nature and meaning of the conflict are no longer clear. However, there is a price that must be paid for abandoning the concept of war, namely, the concept of armed conflict has a rather vague connotation and is therefore susceptible to being diminished or "diluted." Any armed conflict can be called a "special military operation" (*специальная военная операция*), so the actual nature and meaning of this conflict is no longer clear. The category of just war, if understood precisely, provides a clear connotation that is missing in the concept of armed conflict. Undoubtedly, the notion of just war shapes the attitudes towards a phenomenon which is named by it. Simultaneously, the marginalization of the concept of war in international law has caused this concept to be abused in the current political discourse and used for current political purposes. An example would be the phrase "war on terrorism." The term "just war" has also been used to justify, for example, the American military operation in Iraq as an example of so-called preventive use of force.[44]

In my opinion, Michael Walzer may have been right when he wrote that "a theory of just and unjust uses of force" is needed today.[45] Walzer explained his view as follows: "When

[41] Cf. Petrażycki, *Die Lehre vom Einkommen*, II. Band, 477–78, 486.
[42] The fraze used in the International Criminal Tribunal for the former Yugoslavia's judgement in the case *Prosecutor v. Dusko Tadić*, IT-94–1-AR72, Appeals Chamber, Decision, 2 October 1995, point 70.
[43] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 could serve as the example of sucha n extantion.
[44] Cf. David Mellow, "Iraq: A Morally Justified Resort to War," in *War, Torture & Terrorism*, ed. David Rodin (Oxford: Blackwell Publishing, 2007), 51–70.
[45] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), XV.

we define the criteria by which war and the conduct of war can be judged, we open the way for favorable judgments. Many of these judgments will be ideological, partisan, or hypocritical in character and, therefore, subject to criticism, but some of them, given the theory, will be right < … >"[46] There is no need to comment here on Walzer's own considerations and the doubts they raise. Suffice it to say that the reflections of Francisco de Vitoria that I have mentioned show that the concept of a just war can be used effectively and in a way devoid of hypocrisy. As I have shown, the concept of just war ceased to be used, firstly, due to the hypertrophy of the idea of state sovereignty, and secondly, because legal positivism became the dominant view on the essence of law. It seems that contemporary international law no longer fetishizes sovereignty so much and is no longer based on extreme positivism. Therefore, there may be room for the concept of just war in the contemporary international law if it is understood as an exception to the general principle of refraining from using force and its premises are defined with appropriate precision and very narrowly. The reasons justifying such a war had to include only an open attack or interference with the functioning of state authorities by other states.

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[46] Michael Walzer, *Arguing about War* (Yale: Yale University Press, 2004), X.

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Пьотр Шиманєц. Чи потрібне нам юридичне поняття справедливої війни?

Анотація. У статті представлені витоки та розвиток юридичної концепції справедливої війни від Цицерона до Емера де Ваттеля. Порушується питання про значущість самого цього поняття. Автор показує, що сутінки цього поняття зумовлені, по-перше, гіпертрофією ідеї державного суверенітету, а по-друге, переважанням правового позитивізму. Ба більше, стверджується, що концепція справедливої війни може бути використана ефективно і без лицемірства, як показали ідеї Франциско де Віторія. На думку автора, у сучасному міжнародному праві може бути місце для дуже вузько сформульованого поняття справедливої війни.

Ключові слова: справедлива війна; справедливість; філософія права; міжнародне право; війна.

Piotr Szymaniec. Do We Need the Legal Concept of Just War?

Abstract. The article presents the origins and development of the legal concept of just war from Cicero do Emer de Vattel. The question about the significance of this very concept is raised. The author shows that the twilight of the concept was caused, firstly, by the hypertrophy of the idea of state sovereignty, and secondly, by the predominance of legal positivism. Moreover, it is argued that the concept of a just war can be used effectively and in a way devoid of hypocrisy, as the ideas of Francisco de Vitoria revealed. In the author's view, there may be room for very narrowly coined concept of just war in the contemporary international law.

Keywords: just war; justice; philosophy of law; international law; war.

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