PETER VYŠNÝ
MONIKA MARTIŠKOVÁ
INGRID LANCZOVÁ
MAREK PRUDOVIČ
(editors)

JUST WAR IN THE CONTEXT OF THE SALAMANCA SCHOOL AND OTHER INTELLECTUAL TRADITIONS

CONFERENCE PROCEEDINGS

TRNAVA 2024

TRNAVA UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF HISTORICAL LAW
AND LEGAL METHODOLOGY

The present publication, titled **Just War in the Context of the Salamanca School and Other Intellectual Traditions. Conference Proceedings** is a collection of papers presented at the International Scientific Conference "Just War in the Context of the Salamanca School and Other Intellectual Traditions", which took place on September 27, 2024. The conference was part of the International Scientific Congress "Trnava Days of Law" held on September 26 and 27, 2024 at the Faculty of Law of Trnava University in the city of Trnava, Slovak Republic. The conference was organized within the framework of the VEGA research project no. 1/0202/22 "Just War Theories of the Salamanca School Scholars and Their Legacy in Modern Just War Theories and Modern Law of War" (principal investigator: doc. JUDr. Peter Vyšný, PhD. et Ph.D.).

Authors of papers (in alphabetical order):
Dr. Oscar Cruz Barney; prof. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA;
JUDr. Ingrid Lanczová, PhD.; doc. JUDr. PhDr. Pavel Maršálek, Ph.D.;
JUDr. Monika Martišková, PhD., LLM;
Dr. h. c. prof. JUDr. Peter Mosný, CSc.; JUDr. PhDr. Marek Prudovič;
Dr. Diego Valadés; doc. JUDr. Peter Vyšný, PhD. et Ph.D.

Editors:
doc. JUDr. Peter Vyšný, PhD. et Ph.D.
Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology

JUDr. Monika Martišková, PhD., LLM
Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology

JUDr. Ingrid Lanczová, PhD.
Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology

JUDr. PhDr. Marek Prudovič
Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology

Reviewers:
prof. Markéta Křížová, Ph.D.
Dr. h. c. prof. JUDr. Marek Šmid, PhD.
ThLic. Mgr. Michaela Moravčíková, Th.D.

Peter Vyšný
Monika Martišková
Ingrid Lanczová
Marek Prudovič
(editors)

JUST WAR IN THE CONTEXT OF THE SALAMANCA SCHOOL AND OTHER INTELLECTUAL TRADITIONS

CONFERENCE PROCEEDINGS

TRNAVA 2024

ISBN 978-80-568-0715-6

TABLE OF CONTENTS

FOREWORD 6

VIOLENCE IN THE CHURCH: MARGINAL SCULPTURES AS MEDIEVAL SYMBOLS OF MORALS VIRTUES
(Tomáš Gábriš) 8

LA JUSTICIA DE LA GUERRA VISTA DESDE LAS INDIAS Y FILIPINAS [THE JUSTICE OF WAR AS SEEN FROM THE INDIES AND THE PHILIPPINES]
(Oscar Cruz Barney) 21

THE JUST CAUSE OF WAR FROM THE PERSPECTIVE OF THE SALAMANCA SCHOOL
(Peter Vyšný) 56

LEGAL ASPECTS OF HITLER'S WAR AGAINST CZECHOSLOVAKIA
(Pavel Maršálek) 67

THE CONCEPT OF A JUST WAR IN THE SOCIAL AND LEGAL PHILOSOPHY OF THE FIRST HALF OF THE 20TH CENTURY
(Marek Prudovič) 76

THE EVOLUTION OF THE PRINCIPLE OF (GREEN) PROPORTIONALITY
(Ingrid Lanczová – Monika Martišková) 87

CONSTITUTION AND PEACE
(Diego Valadés) 101

JUST VERSUS UNJUST WAR: SOME REMARKS
(Peter Mosný) 110

FOREWORD

Ludwig Wittgenstein, in his lecture *On Ethics,* states that when ethics attempts to arrive at the knowledge of the absolute good, the absolute values, etc., it cannot be considered a science, but it proves the existence of a certain tendency in human beings that we should respect and not ridicule. We believe that the search for the justice of war manifests such a noble tendency, which makes the purely scientific study of this phenomenon more profound, practical, and morally meaningful, especially in the present sad situation of continuing military conflicts.

To explore and discuss the unfortunately very topical issue of just war we organized the International Scientific Conference "Just War in the Context of the Salamanca School and Other Intellectual Traditions", which took place on September 27, 2024. The conference was a part of the International Scientific Congress "Trnava Days of Law", which took place on September 26 and 27, 2024 at the Faculty of Law of Trnava University in the city of Trnava, Slovak Republic. At the same time, the conference was part of the VEGA research project no. 1/0202/22 "Just War Theories of the Salamanca School Scholars and Their Legacy in Modern Just War Theories and Modern Law of War".

The theme of the above conference was threefold. First, reflections on just war by representatives of the early modern Salamanca School and their influence on the later development of just war theory and the law of war. Second, just war from the perspective of other European and non-European intellectual traditions. Third, the justice (legality, legitimacy) of historical or contemporary military conflicts.

The complexity and multi-dimensionality of the conference theme was reflected in the considerable diversity of the papers presented at the conference. Given this diversity, the most efficient way of organising them in these proceedings was to put them in chronological order.

The present publication thus begin with a medieval study by Tomáš Gábriš (*Violence in the Church: Marginal Sculptures as Medieval Symbols of Moral Virtues*) and continue with two studies from the early modern period. The first is by Oscar Cruz Barney (*La Justicia de la guerra vista desde las Indias y Filipinas [The justice of war as seen from the Indies and the Philippines]*), the second

by Peter Vyšný (*The Just Cause of War from the Perspective of the Salamanca School*). The other conference papers deal with the 20th century and/or the present. The authors are Pavel Maršálek (*Legal aspects of Hitler's war against Czechoslovakia*), Marek Prudovič (*The concept of a just war in social and legal philosophy of the first half of the 20th century*), Monika Martišková and Ingrid Lanczová (*The development of the principle of (green) proportionality*), Diego Valadés (*Constitution and Peace*) and Peter Mosný (*Just versus unjust war: some remarks*).

The editors of this volume would like to thank the authors for their valuable and interesting scholarly contributions, which greatly enriched the abovementioned conference and underlined the fact that (just) war is an important topic for legal studies in general and legal history in particular.

Peter Vyšný, Monika Martišková, Ingrid Lanczová, Marek Prudovič
Editors

VIOLENCE IN THE CHURCH: MARGINAL SCULPTURES AS MEDIEVAL SYMBOLS OF MORALS VIRTUES[1]

Prof. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA

Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology
E-mail: tomas.gabris@truni.sk
ORCID: https://orcid.org/0000-0002-6862-2688

Abstract: *The paper introduces the marginal sculptures in the church of Bíňa in Western Slovakia, depicting a violent scene of hunting. While this type of iconography may seem inappropriate for a church, judging by today´s standards, medieval culture was much more tolerant towards violence in this regard. Albeit, even back in the Middle Ages, military and hunting scenes in churches and monasteries were criticized by some theologians, they were generally accepted and often re-interpreted as symbols of defeating sins and vices and symbols of victory of faith.*
Keywords: *violence, church, Middle Ages, history of art*

Introduction

The paper consists of two major parts. The first one presents the post-modern ideas on persisting relevance of pre-modern ways of thinking. Authors such as Latour, Deleuze, and Guattari, realized that there are constant anthropological features of human beings as an integral part of the nature, which challenges the ideas of separation between culture and nature and of constant progress or linear evolution in the history. We are much closer to the medieval or ancient people and to the nature than we ever expected. As a proof to this idea, in the second part of the paper, we offer a glimpse into the medieval thought with its seeming contradiction between church doctrines on peace and humility on one hand, and the depictions of acts of violence in ecclesiastical art on the other. It is thereby often claimed that the naturalistic secular scenes in church architecture in fact used the nature in their iconography as symbols or allegories of ecclesiastic or spiritual ideals. The medieval church as the organization is thus claimed to have embraced the position of a human embedded in the nature, together with drawing analogies between nature and human cul-

[1] The paper is an outcome of the project APVV-20-0371 *The rise and fall of nobility. Strategies of noble representation in the history of Slovakia*.

ture, including an interaction with the nature or even a fight with the nature. This may have been widely understood by the lay people who could have been accustomed to the use of concrete natural symbols to represent abstract ideas and teachings of the Church. Albeit this may seem to us to be pre-modern, it is in fact just another form of realizing that human being is a part of nature and the nature serves as a reflection and a counterpart of human activities and efforts. This idea is thereby resurfacing even in our times, being present both in today´s environmental approaches to art as well as in general politics taking into account environmental issues.

Post-Modern Thought as a Proof of Relevance of Medieval History?

The recently deceased French thinker Bruno Latour[2] was known for his provocative and engaging works dealing with diverse topics. One of his theses is on the relationship between modernity and postmodernity, specifically claiming that "we have never been modern". This idea was very present and topical also in the specific scholarly discipline of Medieval Studies, which pointed to the fact that medieval man was not that different from today´s human beings, even claiming that Middle Ages are still present in our thought.[3]

Latour thereby perceived his aforementioned idea mostly in the sense that the pursuit of modernity in the enlightened rationalism brought about the idea of isolating nature from society and *vice versa*. However, this was an ideal that Western civilization never succeeded in achieving, Latour claimed. Nevertheless, this idea lives in the consciousness and subconscious thoughts of the majority of the population of Europe and Americas, as an optic, or in Kuhn's words, a paradigm, by which we judge the rest of the world and humanity, as well as our own history. In the 19th and 20th centuries it was namely widely believed that the separation between society and nature is a progressive feature and all other cultures of the world should also be heading towards it.

From the above, it is clear at the first sight that these statements and ideas really have to do with the Eurocentric Enlightenment idea of rationality and progress and with the modern ideas of positivism in science. However, for today's anthropologists (such as Latour), it is obvious that the very essence of

[2] LATOUR, Bruno. *We have never been modern*. Cambridge: Harvard University Press, 1993.

[3] BARTLOVÁ, Milena. *Skutečná přítomnost : Středověký obraz mezi ikonou a virtuální realitou*. Praha: Argo, 2012.

man and humanity, despite the obvious progress in the field of technology and science, does not develop at such a fast pace, and it is questionable whether any progressive element can be identified in this evolution at all.

The fact that we expect something in people and in human thinking to be progressive is perhaps rather the influence of ideas derived from the progress of science and technology, i.e. ideas that if science develops, humans and human society can develop as well. These ideas about the progressive development of human civilization are often materialized, for example, in the form of the idea of abandoning violence in favour of a more gentle "civilization", which can be perceived as abandoning "natural" starting points of civilization, attributed particularly to "primitive" civilizations and cultures.

It is thereby precisely this sign of "modernity", i.e. separation of nature and society, that Latour criticized. He believed that the relationship between natural sciences and social sciences, which we treat today – in the so-called modern era – as separated, was in fact never separated in the past. Latour, citing other authors, demonstrates this on the development and interplay of modern natural and social sciences, demonstrating the inseparability of nature and science on the one hand and society on the other. The argument "we have never been modern" is thus the essence of Latour's thesis about the non-modernity of contemporary peoples and societies. According to him, we still live as beings influenced by nature, although we live in the captivity of an idea of separation between society and nature.

According to Latour, we should finally realize that there is not so much difference between us and "natural" civilizations. Even scientific and technological progress has not changed us in our essence. We only have a kind of technological bias that leads us to a false idea, a false consciousness about ourselves, nature and society. In reality, however, we are not the masters of creation, and we only believe to have the ability to control and change our surroundings, including the nature.

Indeed, as of today, more than a few decades ago, both natural and social sciences begin to realize that civilizations and individual humans are influenced to a large extent by unconscious, natural processes, and even by nature as such. Thus, non-human agents influence us and we interact with them in the same way as natives interacted with their ancestors or with the deities personifying natural forces. We only call these forces and elements differently and do not personify them, which is typical for the idea that only we are the "real persons". But in reality, under the mask and cover of scientific names, such as "natural forces", "genes", or even "memes", the same elements and roots are hiding that were present historically and geographically in all human communities and in

all their generations – only under different names – as nomadically wandering intertwined rhizomes that emerge and reappear again and again.

This brings us to similar ideas and allusions in the work of Deleuze and Guattari, other two postmodern French philosophers. Just like Latour, they questioned the enlightened rationality as the final stage of progress, and believed that in fact throughout history, and even in the distant future, our "platforms", i.e. unique contemporary situations have in fact always been and will always be present as itinerant, nomadic manifestations of the same human and natural essence.[4] Deleuze and Guattari, just like Latour, challenged the current perception of what is "truly and only" rational, in the hopes for development towards the peak of the progress. Instead, they formulated their thoughts under the psychiatric expertise with mentally ill individuals, who themselves are probably closer to nature than to our idea of rationality. Deleuze and Guattari, therefore, instead of psychoanalytical search for reason in human behavior and thinking, deliberately talk about schizoanalysis, that is, the search for precisely those elements that the current rationalist Western civilization considers to be mistaken, faulty, schizoid, but nevertheless, according to Deleuze and Guattari, these elements are really well describing human thinking and the essence of the world – as a world full of dead ends, complexity, and unsystematic problems. According to the two authors, the world is a map in which one can get lost, but at the same time it is connected and overgrown by the same paths, roots, rhizomes, which do not allow us to break free and separate from the place of humans in the nature and in the world.

In order to explain their understanding of the world and the place of humans in it, Deleuze and Guattari, in the above sense, use rather figurative comparisons instead of a fluent text or a story, since just as the world does not have one flowing story, neither can their work describing the world have one. It is about thousands of stories and states, situations, platforms, which are nevertheless close to each other in certain ways, they are connected, but at the same time they represent a labyrinth without a beginning and an end, a map that can be approached from different directions. The very essence of human thought, just like the whole world and the works of Deleuze and Guattari, does not represent a one-way stream of thoughts; it does not represent – again in nature-based figurative words – a tree, but on the contrary it resembles grass, with many shoots parallel to each other, which may be intertwined with roots, but the stems of the grass themselves do not follow each other and each of

[4] DELEUZE, Gilles – GUATTARI, Felix. *A Thousand Plateaus*. London: Bloomsbury Publishing, 2013.

them tells and experiences its own story. To impose one story on every stalk would be a dictatorship. In fact, there is no single story and no single center, no single tree trunk – the world is a-centric, and – here Deleuze and Guattari agree with Latour – it takes the form of a network rather than a single thread running from a beginning to an end.

We cannot therefore draw a division line between nature and man, between society and science, between what is "normal and rational" and what is not. Such dualisms are a false idea – for, in reality, the world is pluralistic. It does not create any regular crystalline structures or predictable shapes like a spider's web, it just has a lot of lines, like rhizomes or blades of grass. Rhizomes, which have no beginning nor end, do not have their own genealogy, and represent in fact a network of repeated interconnections. Therefore, according to Deleuze and Guattari, they precisely describe the actual essence of the world and humans – the rhizome is an anti-genealogy, it does not know hierarchies, and it is without beginning and end – always in the middle – something always precedes it and something follows it, or it starts from something and continues somewhere, and is never isolated in a fixed place and explicable without the context. At the same time, however, the whole network can never be understood – it has as many nooks and crannies as the works of Deleuze and Guattari.

Should we thus summarize this recent post-modern philosophy based on the example of ideas of Latour, Deleuze and Guattari, their works point to the fact that today we live in the captivity of our constructivist ideas, according to which Western civilization represents the peak of civilizational, cultural, scientific and natural development, but this is a false construction. In fact, even nowadays, our thinking and society are still influenced by natural actors which, under the false optics of the Enlightenment ideas of progress, were displaced into the inferior roles of silent and obedient forces. In reality, however, these forces and elements still control us today, we just turned a blind eye to them. The same elements and characteristics that have always appeared in the history of mankind, and which are present even today in all human civilizations, still appear in our thinking, behavior and actions – the anthropological essence of humans namely did not change to the same extent as technological and scientific progress. In fact, we are still a part of nature and represent a part of one system intertwined with the same roots, while the individual elements of this system are connected so many times and by such strong connections that it is impossible to untangle them. Any attempt to do so is bound to fail in the long run, just as our Enlightenment ideas about modernity are failing today. That is why Latour claimed we were never really modern, we just talked

about it. In this sense, it can be held true that post-modernity is pre-modern, and that modernity was a delusion...

In the following text, we will try to prove these constant features of human culture and civilization on the example of naturalistic iconography used in the medieval church of Bíňa in Western Slovakia, which apparently accepted and exploited the idea of a close connection between humans and nature, captured a sort of a battle between nature and humans, and thereby also possibly personified abstract ideas and notions in the form of nature and its creatures – similarly as it is being done today in various environmental and ecological approaches to art.[5]

Symbolic or Actual Naturalism in the Violent Scene from the Church of Bíňa?

The depiction of secular scenes, including violence, in sacred spaces is a dilemma not only for contemporary historians – already medieval theologians also expressed contradictory views on this practice. The well-known quote of Bernard of Clairvaux (from: *Apologia ad Guillelmum abbatem*, XII, 28-29) thus asks: "*What is the point of those unclean apes, fierce lions, monstrous centaurs, half-men, striped tigers, fighting soldiers and hunters blowing their horns?*" Apparently, already back then there was a debate about the appropriate iconography in ecclesiastical art.[6] It was clearly not a generally accepted display practice on the part of the church elites, while either the object of display itself, or the use of such display in spaces reserved to monks, may have seemed inappropriate.

One can thereby identify a similar problem in relation to medieval manuscripts and their illuminations. It is namely often pointed out that in very wild illuminations on the margins of medieval codices, it is difficult to believe in or search for a religious or other deeper meaning – although this is not completely excluded. It is precisely due to the use of these illuminations on margins of codices that even other types of such secular artistic depictions, including secular sculptures in sacred spaces are sometimes called "marginal" (marginal sculptures[7]) – which is supposed to indicate a similar

5 Cf. SONFIST, Alan. *Nature: The End of Art*. Florence: Gli Ori, Thames & Hudson, 2004.

6 Cf. GERÁT, Ivan. *Úvod do vizuálnej kultúry stredoveku*. Trnava: Filozofická fakulta Trnavskej univerzity v Trnave, 2013, p. 35.

7 KENAAN-KEDAR, Nurith. *Marginal Sculpture in the Middle Ages France : Towards the Deciphering of an Enigmatic Pictorial Language*. Brookfield, Vt.: Scholar Press, 1995.

role and function of sculptures and friezes to that played by marginal illuminations in codices.

However, by analogy from the possible roles and significance of marginal depictions it is sometimes pondered upon that even such "non-sacred" depictions cannot be discarded as generally incomprehensible or without special (moral or religious) meaning. Indeed, a kind of transitional category of such depictions is assumed in scholarship, which captures realistic worldly motifs, not directly connected with the Scriptures, but still being allegorically or symbolically connected with religious or moral meaning. We will claim here that a half-column in the church in Bíňa, which dates back to around 1200, and which is the prime object of our research in this paper, can probably be classified as falling into this category.

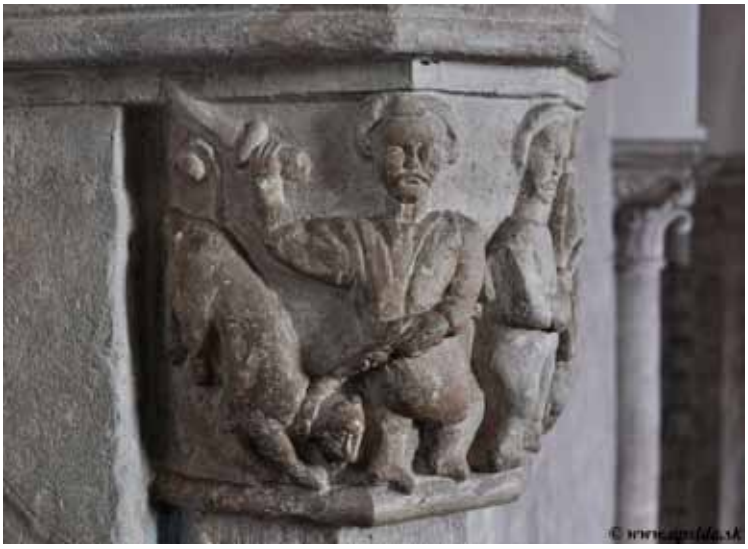

Image No. 1: https://apsida.sk/c/3414/bina

The scene contains two male figures: "*The first of them holds a lioness on a rope in the left hand and a raised dagger in the right hand. The second figure depicts a hunter with a drawn bow aiming at a group of animals consisting of a horse, deer, bear and dog.*"[8] In the current state of knowledge in Slovak art history scholarship, this scene is interpreted in a religious, sacral, or at least

[8] Cited from: https://apsida.sk/c/3414/bina (accessed on 10 October 2024).

moral meaning, which we will try to verify, and possibly even reevaluate. It is namely believed to be a symbol of the victory of good over evil.[9]

However, the mentioned interpretation of secular scenes in a moral or religious spirit may not have really corresponded to the contemporary intention of the creator, nor even to the contemporary perception on the part of the addressee, as may be indicated by the complaints of Bernard of Clairvaux – who either did not perceive any religious or moral motives in such depictions, or he did not consider their way of representation to be suitable and fitting – at least for a church (religious) community. Still, according to E. Mâle and his older writings,[10] these sculptures could in fact have had a locally comprehensible meaning, sometimes even with pagan roots,[11] and therefore they did not have to fulfill only an exclusively decorative function.

On the other hand, besides possible local meanings, assuming the use of the skills of non-local, itinerant artists, and the transfer of patterns from other buildings, sources and countries, marginal sculptures can also be interpreted on the basis of the general (not only local) medieval iconography of the individual captured figures, thus revealing their allegorical meaning. This theory can also be applied and tested against the depiction of the hunting scene on the capital of the half-column in Bíňa, where we can either see the allegorical meaning (in the indicated spirit of the fight between good and evil), or we can try to read the captured scene literally (interpreting figures as signs/symbols). Or, finally, we can proceed by combining a metaphorical interpretation with a literal reading. We will test all these possibilities here.

When examining the figures of this sculpture, it is first of all worth noting that the presence of a lioness is noted in the depicted hunting scene. Leaving aside for the moment whether it really is a lioness, in general it is true that a lion, a lioness, a leopard or a cheetah are undoubtedly the kinds of animals that we would probably not have commonly encountered in Hungary around 1200. It is therefore obvious that the mentioned scene will not describe the Hungarian reality, and therefore it will either be a symbolic (allegorical, metaphorical) sculpture, as an intermediate category between official and marginal sculptures, or, on the contrary, it will be a purely decorative marginal sculp-

[9] KOVAČEVIČOVÁ, Soňa. Vzťahy medzi fantastickými predstavami stvárnenými vo výtvarnom umení a vo folklóre. In: *Slovenský národopis*, 1997, Vol. 45, no. 3, pp. 256–257.

[10] MÂLE, Emile. *The Gothic Image. Religious Art in France of the Thirteenth Century*. Transl. D. Nussey. New York: Harper, 1958, pp. 48–49.

[11] LANGDALE, Allan. Notes on the Marginal Sculpture of the Cathedral of St Nicholas. In: *Medieval and Renaissance Famagusta*. Aldershot: Routledge, 2012, p. 101.

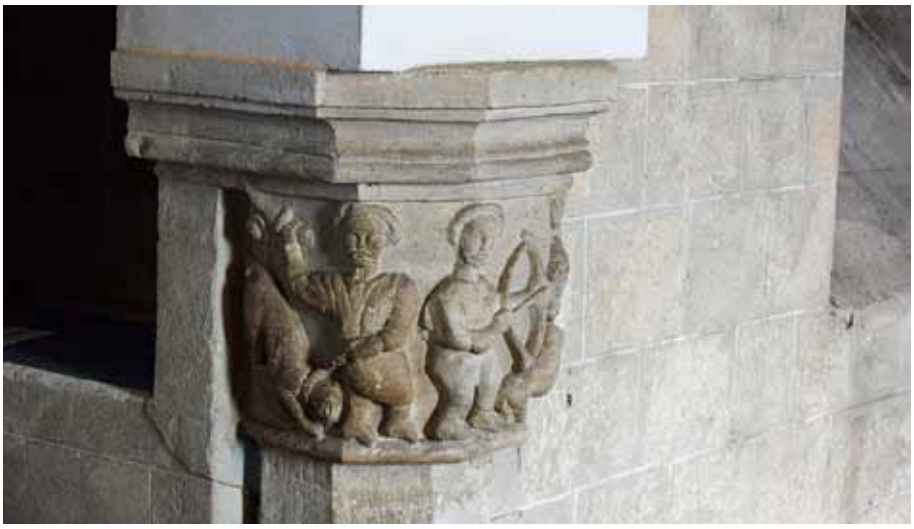

Image No. 2: https://sk.wikipedia.org/wiki/S%C3%BAbor:B%C3%A9ny_vad%C3%A1szjelenetes_oszlopf%C5%91_01.jpg

ture, based on possible patterns from illuminated manuscripts, or from oriental, or Byzantine textiles, which are believed to have served as sources of such scenes in our territories.[12]

In general, the lion is a frequently used element in Romanesque art, as finally demonstrated also by the sculpture of lion found in Bíňa itself, when doing archaeological research in the nearby situated rotunda of the Twelve Apostles.[13] However, the lion is rarely captured in a defeated and chained position, as is the case with our "lion". In medieval iconography, the vanquished lion occurs only in connection with the figure of Hercules, David or Samson, while in sacral conditions it is usually the last two mentioned figures that are being depicted with the lion. On the other hand, in secular scenes, the lion hunt is a depiction mainly associated in the Middle Ages with the majesty of the king or the high aristocracy, to demonstrate their strength and nobility. Finally, the third symbolic meaning of the defeated lion in the medieval depiction practice is the image of the defeated lion as a representation of the triumph of good over evil, or over death – in this

[12] Ibidem, pp. 94–95.

[13] STIGE, Morten. *The lion in Romanesque art, meaning or decoration*? Available online: https://www.academia.edu/29964327/The_lion_in_Romanesque_art_meaning_or_decoration (accessed on 10 October 2024).

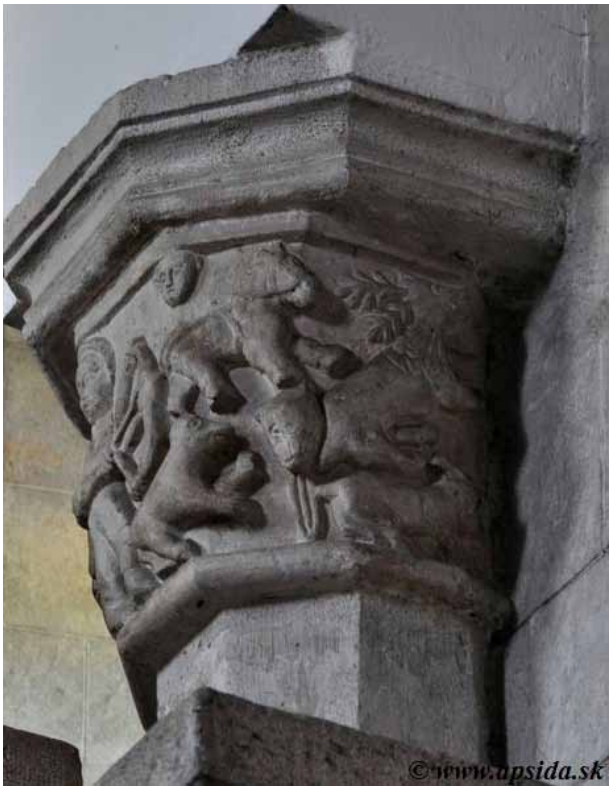

Image No. 3: www.apsida.sk/ c/3414/bina

case, the lion usually lies at the feet of a saint or the Virgin Mary, while the lion symbolizes the devil.[14]

However, in all the mentioned contexts, it is essentially a lion, and not a lioness. This alone can complicate the interpretation of the hunting scene in Bíňa. Even if we take into account the possible flaws in the depiction of exotic animals in the Middle Ages – at that time based mostly on not very accurate bestiaries – the captured figure is undoubtedly closer to a leopard or a cheetah (and to a lesser extent to a lioness) than to a lion. Still, even such an animal was often depicted in Romanesque sculptures, so its presence in Bíňa should not

[14] According to: BOEHM, Barbara Drake – HOLCOMB, Melanie. Animals in Medieval Art. In: *Heilbrunn Timeline of Art History*. New York: The Metropolitan Museum of Art, 2000. Available online: https://www.metmuseum.org/toah/hd/best/hd_best.htm (accessed on 10 October 2024).

be a surprise to us. Indeed, these images were spreading throughout Europe under the influence of exotic designs from Byzantium, or even Persia.[15]

Thereby, leopard also had its own symbolic meaning in the contemporary art. It was considered to be an offspring of the union of a lioness and a pardo, a mythical animal. The leopard often symbolized either a church dignitary, or the illegitimate origin of the symbolized figure (for example, in the case of a heraldic symbol in a coat of arms of illegitimate offsprings).[16] So, should the scene in Bíňa indeed contain a leopard, it would allow for many other interpretations – for example, it could be a hint about the type of "sin" being tamed by the hunter.

In the captured scene, however, we also have a second man, hunter, and other animals – a horse, a dog, a bear and a deer. While the horse and the dog may represent the general hunting animals used by the hunter, the bear and the deer are traditionally hunted animals, even in Hungarian conditions of the period. However, small human head or a mask cannot be left unnoticed in this frieze. These are thereby also commonly present in Romanesque sculptures, and they are supposed to attest precisely the religious or moral meaning of the depiction – for example, if lions surround human heads depicted in this way, it is a symbol of defeating a person by devilish forces.[17] In our case, however, the head appears above the scene of the hunting scene, so it is not in an inferior or defeated position, but on the contrary in a victorious position – which could indicate precisely that the hunt can represent an allegory for the hunt for Christian souls, for the sake of their salvation. A scene with a lioness or a leopard or a cheetah could then, in such a contrast, really mean the defeating of vices and sins.

From what has been indicated so far, it is clear that the captured secular scene could in fact be understood allegorically, with a deeper moral and religious meaning, and not only decoratively, as it is generally understood in later Gothic buildings with their purely marginal sculptures, where we find the most remarkable creatures (e.g. gargoyles on cathedrals) that can really be thought of as a case of marginal depictions only.[18] Purely marginal sculpture,

---

15 Cf. *Chief Formal Characteristics of Romanesque Sculpture*. Available online: http://www.usask.ca/art/a120/rom_scul.htm (accessed on 10 October 2024).

16 Leopard. In: *The Medieval Bestiary*. Available online: http://bestiary.ca/beasts/beast547.htm (accessed on 10 October 2024).

17 *From Roman to Romanesque : Some possible sources of various elements of Romanesque Iconography*. Available online: https://upload.wikimedia.org/wikipedia/commons/8/8c/From_roman_to_romanesque.pdf (accessed on 10 October 2024).

18 LANGDALE, Allan. Notes on the Marginal Sculpture of the Cathedral of St Nicholas. In: *Medieval and Renaissance Famagusta*. Aldershot: Routledge, 2012.

like marginal illustrations in manuscripts, namely show a significantly more grotesque and extravagant form than the usual hunting scene.

Albeit the aforementioned Bernard of Clairvaux himself also wrote about the scenes of hunters and trumpeters, this could just indicate that these were not (or should not be suitable) bearers of a deeper ecclesiastical or sacral meaning, at least in monasteries, but such a meaning of a hunting sculpture cannot be automatically excluded – especially if it is a hunting scene associated with human heads, which can really represent a person's soul. Therefore, the hunting scene in Bíňa cannot simply be equated with purely marginal sculptures or purely decorative depictions. Our hunting scene carries a completely clear, essentially realistically captured story, which can be interpreted symbolically or allegorically.

Still, in order to take into account the possible counter-arguments, one can also test the conclusion that the depiction of the hunting scene was an exclusively decorative or downright secular element. It is namely not excluded that even such sacred places as churches could have also used secular decorations. The strict division between sacred and secular spaces may namely not have been yet fully accepted in the Middle Ages yet – after all, it is assumed that some secular actions and processes also took place in religious spaces, for example, the court proceedings or public assemblies – especially if, for numerous reasons, it was not possible to organize such a meeting in an open space.[19] Thus, the holistic experience of the life of a medieval person could presuppose a decoration in churches pointing not only to religious symbols, but also to secular depictions of medieval life, for the purpose of a comprehensive capturing of the medieval world. Still, even such depictions, which originally did not have a primarily religious and sacred meaning, but, on the contrary, they could have had an exclusively secular meaning, could have nevertheless acquired an additional religious meaning and reinterpretation in the course of time – just like we are trying to interpret and understand them in this light nowadays. That would mean a combination of both literal and metaphorical reading of the sculptures, depending on the audience and the reader.

Conclusions

Violence was not completely excluded from the medieval Church nor from the contemporary Church doctrines. It was in fact very much present in medi-

[19] This is stated, for example, in the chronicle of Thomas of Split, from the 13th century (*Historia Salonitana*). See *History of the Bishops of Salona and Split*. Budapest: CEU Press, 2006.

eval life and thought, being perceived as a natural part of everyday life. Moreover, abstract notions could have been very well personified by human as well as animal figures or other figures from the nature, including naturalistically depicted violent scenes of hunting. Hunting scenes, close and familiar to the secular believers, especially noble donators of the churches, could have thereby been used and interpreted in an allegorical meaning of violence – violence perceived to symbolize the defeat of vices and sins, violence meaning a fight for the Christianity and for the salvation of souls. In fact, this is not dissimilar to the perception and acceptance of violence in the case of just wars – wars against the sinners and unbelievers, for their conversion and salvation.

LA JUSTICIA DE LA GUERRA VISTA DESDE LAS INDIAS Y FILIPINAS

[THE JUSTICE OF WAR AS SEEN FROM THE INDIES AND THE PHILIPPINES]

Dr. Oscar Cruz Barney

Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México.
Vicepresidente del Instituto Internacional de Historia del Derecho Indiano.
E-mail: ocbarney@unam.mx

I. Introducción

Las controversias sobre la legitimidad de la presencia castellana en Indias dieron lugar a múltiples opiniones y cambios en las leyes de conquista y ocupación. Si bien las polémicas no llegaron a poner en peligro esa presencia en Indias, sí obligaron a replantear múltiples ideas y creencias medievales. Se discutieron temas como el poder temporal del papa, la soberanía de los reyes castellanos en Indias, la condición humana y capacidad de los indios, la guerra justa, el derecho a comunicarse y comerciar con ellos y con todos en general. Es la teología lo que llevará a personajes como Francisco de Vitoria y Domingo de Soto a fundar el Derecho Internacional Público. Se dice que estos individuos fueron grandes juristas por que fueron grandes teólogos.[1] Así, en España, los mencionados Francisco de Vitoria y Domingo de Soto abordaron las polémicas indianas, junto con Luis de Molina, Francisco Suárez, Matías de Paz, Diego de Covarrubias y Leyva, Baltasar de Ayala y otros más como Gregorio López en la glosa a las Siete Partidas.[2] En América y en Filipinas se discutieron estos temas por individuos y grupos, así, en América desde luego está Fray Bartolomé de las Casas, el canonista Pedro Murillo Velarde y Bravo, Fray Alonso de la Veracruz, Juan Francisco de Montemayor y Córdoba de Cuenca y el Tercer Concilio Provincial Mexicano de 1585 entre otros. En las Filipinas destaca sin duda Fray Juan de Paz.[3]

---

1 Véase Carro, Venancio P. *La teología y los teólogos juristas españoles ante la conquista de América*, Madrid, CSIC, Tomo I, 1944, Pág. 12.

2 López, Gregorio, Glosa Magna. *Sobre la doctrina de la guerra justa en el siglo XVI*, Presentación, edición y crítica de Ana Ma. Barrero García, Versión Castellana de Ana Ma. Barrero García y José Ma. Soto Rábanos, México, ELD, 2005.

3 Véase sobre este tema Cruz Barney, Oscar, *Una visión indiana de la justicia de la guerra,* México, Instituto de Investigaciones Jurídicas, UNAM, 2014.

Dentro de las denominadas *polémicas indianas*[4], el tema de la Justicia de la Guerra destaca particularmente. Preocupaba a los juristas y teólogos tanto en la península como en las Indias, determinar si la guerra contra los indígenas era justa, de ahí el desarrollo de diversas teorías al respecto. Para el estudio de las teorías sobre la guerra justa, es necesario recordar la expuesta por Santo Tomás de Aquino, en la que se basaron los teólogos-juristas y los juristas españoles.

Tomás de Aquino[5] sostiene que "*La guerra es justa, siempre que sea declarada por autoridad legítima, con justa causa y recta intención*". De ello se derivan los siguientes tres elementos:

1. Que sea declarada por autoridad legítima. Ésta la tiene el príncipe, y no otra persona privada.
2. Una causa justa. Es decir, que a quienes se les hace la guerra merezcan ésta por alguna culpa.
3. Recta intención. Que se busque promover el bien o evitar el mal. Una guerra declarada por la autoridad legítima y con una causa justa puede convertirse en ilícita si no existe una recta intención.

El planteamiento de la polémica de la Justa Guerra en las Indias tomó rumbos diferentes que en España. Las discusiones tanto en Nueva España y tiempo después en el Perú planteaban más que el tema de la ética de la conquista en torno al justo título, el tema de los métodos de evangelización y los modos de atraer a la Corona de Castilla a las poblaciones del nuevo mundo. "No se trata ya en este lado del Atlántico, de la ética de la conquista en general, sino de la justificación de una segunda conquista por medio de guerra a las naciones de los confines del imperio en América, como las llamadas chichimecas, que en un primer término se mostraron pacíficas ante la presencia española y luego se alzaron en una creciente rebelión ante el dominio europeo."[6]

---

4 Sobre este tema véase Cruz Barney, Oscar, *Historia del Derecho Indiano,* Primera reimpresión, Valencia, Tirant Lo Blanch, 2021, págs. 63-103.

5 Santo Tomás trata de la guerra en las cuestiones XXIX y XL de su *Suma Teológica, IIa IIae.* La cuestión XXIX trata de la paz y la XL de la guerra en particular. *Véase* Aquino, Tomas de, *Suma Teológica*, trad. del latín de Hilario Abad de Aparicio, revisada y anotada por el R. P. Manuel Mendía, Madrid, Moya y Plaza Editores, 1882, t. III. Puede verse también la edición de la Biblioteca de Autores Cristianos, Madrid, 1989-1995.

6 Carrillo Cázares, Alberto, "Tratados novohispanos sobre la Guerra Justa en el siglo XVI", en Bataillon, Gilles, et. al. (Coords.), *Las teorías de la guerra justa en el siglo XVI y sus expresiones contemporáneas*, México, UNAM, CIDE, Facultad de Filosofía y Letras, Centro de Estudios Mexicanos y Centroamericanos, Embajada de Francia en México, 2008, p. 50.

Referente obligado en el tema es Fray Bartolomé de las Casas quien en el tema de la guerra contra los indígenas, sostenía que ésta era injusta y que los daños producidos por ella debían ser cubiertos por España.[7] No obstante, sostuvo siempre la validez de la concesión pontificia de las Indias a los Reyes de Castilla y el derecho del papa a efectuarla.[8]

Para Bartolomé de las Casas la guerra de conquista es injusta "no sólo porque no hacen lo que había ordenado el Papa en 1493, sino también porque hacen exactamente lo contrario de lo que él había mandado."[9] Para las Casas los indios son inocentes y jamás han cometido malas acciones en contra de los cristianos[10] "no cometieron (los indios) contra los cristianos un solo pecado mortal que fuese punible por hombres."[11] Califica a las guerras contra los indios de inicuas e infernales, que terminan por colocar a la población en una servidumbre tiránica, ordinaria y pestilencial.[12]

En el pensamiento de Las Casas, "los indios tuvieron siempre justísima guerra contra los cristianos, y los cristianos una ni ninguna nunca tuvieron justa contra los indios, antes fueron todas diabólicas e injustísimas, y mucho más que de ningún tirano se puede decir del mundo. Y lo mismo afirmo de cuantas han hecho en todas las indias."[13]

Muchos otros autores se manifestaron y estudiaron el tema de la justicia de la guerra. Aspectos prácticos notables sobre el tema se desarrollaron tanto en América como en las Filipinas, así, se aclaraba hacia el siglo XVIII que por el nombre guerra no se debía entender solamente la que se hacía en la hueste sino también la hecha al servicio de la patria o en las guarniciones del reino

---

7 Dougnac Rodríguez, Antonio *Manual de historia del derecho indiano,* México, Instituto de Investigaciones Jurídicas, UNAM, 1994, pág. 40. Casas, Fray Bartolomé de las, *Historia de las Indias...,* lib. III, cap. XIII, pp. 471-475.

8 Sánchez Bella, Ismael, Sánchez Bella, Ismael *et al., Historia del derecho indiano,* Madrid, Mapfre, 1992 (colección "Relaciones entre España y América"), pág. 126.

9 Clément, Jean-Pierre, "De las ofensas contra los indios. La injusticia de la guerra y otras violencias, según el Padre Las Casas", en Bataillon, Gilles, et. al. (Coords.), *Las teorías de la guerra justa en el siglo XVI y sus expresiones contemporáneas*, México, UNAM, CIDE, Facultad de Filosofía y Letras, Centro de Estudios Mexicanos y Centroamericanos, Embajada de Francia en México, 2008, p. 131.

10 *Ibidem,* pág. 130.

11 Véase Las Casas, Bartolomé de, *Brevísima relación de la destrucción de las Indias,* 14ª ed., Madrid, Edición de André Saint-Lu, Ediciones Cátedra, 2005, pág. 87. También en Las Casas, Bartolome de, *Tratados,* Prol. de Lewis Hanke y Manuel Giménez Fernández, transcripción de Juan Pérez de Tudela Bueso y traducciones de Agustín Millares Carló y Rafael Moreno, México, Fondo de Cultura Económica, Tomo I, 1997.

12 *Ibidem*, pág. 124.

13 *Ibidem*, pág. 88.

en tierra, mar, río o rivera. Así, lo ganado en guerra por el marido durante la Carrera de Indias por su trabajo e industria personal no se consideraba parte de los gananciales en el matrimonio, haciéndolo suyo el varón independientemente de la mujer.[14]

II. El Tercer Concilio Provincial Mexicano de 1585

Para la organización de la Iglesia novohispana se llevaron a cabo asambleas que buscaron solucionar los problemas surgidos durante el proceso evangelizador, así como los de coordinación entre las ramas del clero y otros asuntos propios de la organización y actuación eclesiástica.

Bajo el arzobispo Antonio de Montúfar, sucesor de fray Juan de Zumárraga, se iniciaron los *Concilios mexicanos* que fueron tres en el siglo XVI, uno en el XVIII y uno en el XIX. De los tres Concilios celebrados en el siglo XVI únicamente recibieron aprobación real y pontificia el primero y el tercero.

El *Tercer Concilio Mexicano* de 1585. Se realizó siendo arzobispo Pedro Moya de Contreras y "puede considerarse como la cristalización jurídica de la fase primitiva de la Iglesia novohispana".[15] Su tema principal fueron las órdenes religiosas, el clero secular e incluso particulares. Se insiste en la predicación y la enseñanza, la preparación previa de los indígenas a recibir los sacramentos y su administración.

Nos interesa para el tema de la justicia de la guerra el Tercer Concilio Provincial Mexicano. Fue aprobado por el Papa en 1589 y por la Corona en 1621, fecha en que autorizó la impresión de sus constituciones.[16]

---

[14] Elizondo, Francisco Antonio de, *Práctica universal forense de los tribunales superiores e inferiores, de España, y de las Indias*, Tercera Edición, En la Imprenta de Ramón Ruiz, 1796, Tomo III, Fol. 101, Núm. 7.

[15] Margadant, Guillermo Floris, *La Iglesia ante el derecho mexicano. Esbozo histórico-jurídico,* México, Miguel Ángel Porrúa, 1991, pág. 154.

[16] *Concilium Mexicanum Provinciale III. Celebratum Mexici Anno MDLXXXV. Praeside D.D. Petro Moya, et Contreras Archiepiscopo Ejusdem Urbis. Confirmatum Romae Die XXVII Octobris Anno MDLXXXIX*, Mexici, Ex Typoigraphia Bac. Josephi Antonii de Hogal, Anno MDCCXX. Existe una edición bilingüe castellano-latín impresa en México por Mariano Galván Rivera como editor en 1859. *Concilio III Provincial Mexicano, celebrado en México el año de 1585*, México, Mariano Galván Rivera (ed.), 1a. ed. en latín y en castellano, Eugenio Maillefert y Compañía, 1859.

En sesión del 31 de julio de 1585 en vista de la relación sobre la guerra que se estaba haciendo a los chichimecas y vistos los pareceres de las órdenes religiosas y consultores sinodales decretó:[17]

1. Que no se puede hacer la guerra a fuego y a sangre a los chichimecas ni el cautiverio de ella derivado.
2. Que se debe examinar no sólo la causa que los españoles tienen contra los indios, sino también la que los indios tienen contra los españoles.
3. Que antes que por guerra, se debe intentar la pacificación por medio de poblamiento y buenas obras.
4. Que para llevar a cabo este remedio, el rey tiene obligación de gastar toda su real hacienda si es necesario.

Se estableció en el Concilio que los obispos y gobernadores debían tener presente que ningún otro cuidado les está más estrechamente encomendado que el proteger y defender con todo el afecto del alma y paternales entrañas a los indios recién convertidos a la fe, mirando por sus necesidades espirituales y corporales. Porque la natural disposición de los indios debía de mover a cualquiera, obligándolos a defenderles y compadecerse de sus miserias, "antes que causarles las molestias, injurias, violencias y estorsiones con que todos los días en tanto tiempo les están mortificando toda clase de hombres."[18]

Se exhortaba a los gobernadores y justicias a reprimir la insolencia de sus ministros y de todos aquellos de quienes los indios reciben malos tratos y agravios, "haciendo que los tengan y traten como a gente libre, y no como a esclavos…"[19]

III. El canonista Pedro Murillo Velarde y Bravo

Pide destino en Filipinas a donde arriba, partiendo de Acapulco, el 27 de octubre de 1723 en calidad de teólogo. Entre los años de 1737 a 1742 impartirá prima de teología en la Misión de San Miguel en Manila.

---

17 Carrillo Cázares, Alberto, *op. cit.,* pág. 87.

18 *Concilio III Provincial Mexicano, celebrado en México el año de 1585*, México, Mariano Galván Rivera (ed.), 1a. ed. en latín y en castellano, Eugenio Maillefert y Compañía, 1859, Libro V, Tít. VIII, Núms. I y II.

19 Véase también Martínez Ferrer, Luis, (Ed), *Decretos del concilio tercero provincial mexicano (1585), Edición histórico crítica y estudio preliminar por Luis Martínez Ferrer,* México, El Colegio de Michoacán, Universidad Pontificia de Santa Cruz, 2009, tomo II, núms. 545-546.

Regresa a España en 1749 y no logra pese a todos su esfuerzos retornar a Manila pues la muerte le alcanza. Fallece en el Puerto de Santa María el 30 de noviembre de 1753 cuando se disponía a embarcar.[20]

Pedro Murillo Velarde aborda el tema de la justicia de la guerra en su *Cursus Juris Canonici, Hispani, et Indici* publicado por vez primera en Madrid en 1743.[21]

Dedica el TITULO XXXIV del Libro I, denominado *De la Tregua y de la Paz* a tratar el tema de la justicia de la guerra. Considera Murillo que la guerra puede ser *defensiva* u *ofensiva*. La guerra defensiva "es aquella por la que se rechaza la violencia o la injuria hecha o por hacer, pues todos los derechos permiten repeler la fuerza con la fuerza." La guerra ofensiva o agresiva "es aquella por la que también se venga o repara la injuria o el daño hecho."

Para que la guerra sea justa, se requiere, siguiendo a Santo Tomas[22]

1 Autoridad legítima, que reside en el príncipe supremo;
2. Causa justa, que debe constar al que declara la guerra, aunque no conste a los soldados, que deben presuponerla.
3. Recta intención a saber, por la que se intente promover el bien y evitar el mal.

Como testimonio de la buena intención del príncipe y para que proceda con seguridad debe hacer examinar cuidadosamente su derecho y el de la parte contraria por varones doctos y de buena conciencia. Sostiene que "…si la mayor probabilidad está a favor de aquél que no posee la cosa, puede buscarla con la guerra: porque la mayor probabilidad hace exceso de derecho y, como por sentencia de un juez se le adjudicaría la cosa, así también, puede buscarla por la guerra y por las armas."

Si el poseedor es el que tiene el derecho menos probable, también le es lícito hacer la guerra; porque la posesión suple el defecto de derecho y da derecho al que posee a retener justamente. Aquél que tiene el derecho menos probable y además carece de la posesión de la cosa, no puede lícitamente declarar la guerra, ni hacerla. Si alguno hace la guerra injustamente peca gravísimamente y está obligado a resarcir, tanto a los enemigos como a los súbditos, todos los daños de los que fue causa injusta.

---

20 *Ibidem,* p. 76-77.

21 Murillo Velarde, Pedro, *Cursus Juris Canonici, Hispani, et Indici,* Matriti, Ex Typographia Emmanuelis Fernandez, 1743, 2 vols. Véase Palau y Dulcet, Antonio, *Manual del librero hispano-americano,* reimpresión de la primera edición, Julio Ollero Editor, Madrid, 1990, t.V, p. 270. La tercera edición se publica en 1791 y de ella se hace la traducción al castellano a que nos hemos referido líneas arriba.

22 *Idem.*

Para Murillo las causas justas para declarar la guerra son:

1. Para recuperar una provincia o una cosa debida y no dada por otro.
2. Para vengar una grave injuria , u ofensa hecha al príncipe; de aquí que el capitán español, en cuya nave está levantada la bandera real, si aparece otra nave en nuestro mar, aunque sea de un príncipe amigo y aliado, y no manda *arriar bandera*, ni dispara sus cañones, en señal de honor, entonces, nuestro capitán para el honor regio y para vindicar la injuria, puede y debe perseguir hostilmente y atacar la nave, aun de un príncipe amigo y aprehenderla y dividir el botín, conforme a la costumbre.
3. Para tomar venganza del príncipe que auxilia el enemigo, que hace una guerra injusta.
4. Para llevar justo auxilio a los aliados.
5. Para reclamar aquellas cosas que son permitidas por el derecho de gentes, cuando injustamente son negadas. Y si en todos estos casos, después de comenzada ya la guerra se ofrece conveniente satisfacción, debe cesarse en ella.
6. A un príncipe católico le es lícito hacer la guerra para defender la verdadera fe y el evangelio, principalmente si los infieles impiden su promulgación. Justifica la guerra contra los indios al señalar: "De aquí que son lícitas las guerras hechas por españoles contra los indios. Porque nuestro rey, en nombre de la iglesia, protege y promueve la predicación del evangelio., en estas vastas regiones y justamente hace la guerra a los que impiden la promulgación de la fe y la predicación del evangelio". Cita a Gregorio López en *l. 2. V. Acrescentar,* y a Juan de Solórzano y Pereyra *en su Indiarum Iure Tom. 1 Lib. 2. Ex cap. 10*.

Aclara que hacer la guerra, precisamente para gloria, interés y extensión del dominio del que la hace, es tiránico e injusto: por lo mismo. Invoca a Hugo Grocio en su *De Jure Belli ac Pacis, lib. 2 cap. 1. 17* al señalar que tampoco es lícito provocar la guerra por el temor de que crezca demasiado una potencia vecina, pero si por esa causa fuere lícito, por la misma deberá ser prudente.

Considera que a los obispos y a los clérigos si bien les es lícito hallarse en las guerras para exhortar a los soldados a combatir con valor y, principalmente, para asistirlos espiritualmente, no les es lícito combatir por propia mano, y aclara que no porque esto sea pecado, sino porque al hacerlo así, no imitarían perfectamente la mansedumbre de Cristo, que deben representar; y porque tal ejercicio los distraería de la contemplación de las cosas divinas, de la alabanza de Dios y de la oración, si bien en caso de urgente necesidad, pueden por propia mano luchar por su vida, por la iglesia y por la patria.

Sobre lo que es lícito hacer en una guerra justa sostiene que es lícito todo aquello que es medio necesario o conducente para alcanzar el fin, y por lo tanto es lícito matar hombres o capturarlos, devastar los campos, derribar fortalezas, entregar la ciudad al pillaje o a la espada y ocupar las tierras; más aún quemar la iglesia y sus bienes. Y algunas veces, al menos indirectamente, es lícito matar a los inocentes; porque, al sitiar, ataca con derecho las plazas fuertes con máquinas de guerra, aunque prevea que con sus disparos habrá de matar a algunos inocentes, lo que sucede sin intención y, por lo mismo, no se imputa como culpa. Y también es lícito matar a los enemigos capturados en la guerra, si son dignos de muerte, porque conscientemente provocaron una guerra injusta, a no ser que, se hayan rendido bajo la condición aceptada de no darles muerte. Que si todos, o muchos, son culpables, entonces, la caridad cristiana aconseja que los autores de la guerra injusta sean muertos y se mitigue el rigor hacia los demás. Pero si los capturados en la guerra son excusables por la ignorancia o la duda acerca de la justicia de la guerra obtenida la victoria no deben ser ejecutados.

Señala que en el fragor de la guerra, es lícito matar a todos los que combaten en la parte contraria, aunque mueran inocentes, si bien aclara que no puede matarse directamente a los inocentes, y considera tales a los siguientes:

1. Las mujeres
2. Los ancianos
3. Los niños
4. Los religiosos
5. Los clérigos
6. Los mercaderes ambulantes y
7. Los campesinos

Sin embargo pueden ser despojados de los bienes externos, si esto es necesario para terminar la guerra. Y las mujeres y los niños pueden ser tomados como cautivos aunque si son cristianos no deben someterse a servidumbre, mas si son infieles háganse sí.

IV. Fray Alonso de la Veracruz

Alonso Gutiérrez, después Fray Alonso de la Vera Cruz nació en 1507 en Caspueñas, diócesis de Toledo. Estudió latín y retórica en la Universidad de

Alcalá y filosofía y teología en Salamanca, donde fue alumno de Fray Francisco de Vitoria[23], "tanto por el saber como por la conducta."[24]

El 22 de julio de 1536 arribó al puerto de Veracruz y solicitó el hábito agustiniano, tomando el nombre de Alonso de la Vera Cruz[25], "tanto por el lugar de su arribo como, como en atención al fraile que lo convenció de tomar el hábito",[26] profesando en la Orden el 20 de julio de 1537. Fray Alonso fue el primero en la Nueva España en exponer un curso público de filosofía a alumnos no necesariamente destinados al sacerdocio en recinto universitario.[27] Silvio Zavala lo considera el primer maestro de derecho agrario en la Universidad de México.[28]

Trata el tema de la justicia de la guerra en su *Relectio de dominio infidelium et iusto bello*[29], calificado como en texto jurídico más importante dentro de sus

---

[23] En el ajuste de los daños y muertes como no hay precio señalado y fijo, siempre se ha de estar al pacto y concierto que las partes hicieren entre si y han de procurar los de dicho pueblo que se recompensen los hechos por la una parte, con los hechos por la otra.v.dia Correa, Roberto, "Fray Alonso de la Vera Cruz Semblanza Bio Bibliográfica", en Vera Cruz, Fray Alonso de la, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Edición crítica, traducción y notas de Roberto Heredia Correa, México, UNAM, 2007, p. XIII. Sobre la determinación del año de nacimiento de Fray Alonso véase la nota 1 del estudio de Heredia Correa. El que haya sido alumno de Francisco de Vitoria no quiere decir que le haya escuchado sus *Relectiones de Indis et de iure belli*, pese a la importante similitud entre los textos de Vitoria y de Fray Alonso, esto debido a que las *Relectiones* de Vitoria fueron pronunciadas entre 1538 y 1539, años después de la partida a Veracruz de Fray Alonso, además es hasta 1557 que se publican las *Relectiones* de Vitoria. Esto salvo que se demuestre que las *Relectiones* de Vitoria se hayan leído en 1532, como es una posibilidad. Véase Gómez Robledo, Antonio,"El problema de la conquista en Alonso de la Veracruz", en *Historia Mexicana*, Vol. XXIII, enero-mayo, 1974, Núm. 91, pág. 390.

[24] Zavala, Silvio, *Fray Alonso de la Veracruz. Primer maestro de derecho agrario en la incipiente universidad de México 1553-1555,* México, Centro de Estudios de Historia de México CONDUMEX, 1981, pág. 38.

[25] Una biografía de Fray Alonso en Gómez Robledo, Antonio, "Alonso de la Veracruz. Vida y Muerte", en Beuchot, Mauricio et. al., *Homenaje a Fray Alonso de la Veracruz en el cuarto centenario de su muerte (1584-1984),* México, Universidad Nacional Autónoma de México, 1986. Sobre su tarea filosófica resulta útil Beuchot, Mauricio y Bernabé Navarro (Comps.), *Dos homenajes: Alonso de la Veracruz y Francisco Xavier Clavijero*, México, UNAM, Instituto de Investigaciones Filosóficas, 1992.

[26] Heredia Correa, Roberto, *op. cit.,* pág. XIII.

[27] Frost, Elsa Cecilia, "Veracruz, introductor de la filosofía en la Nueva España", en Beuchot, Mauricio et. al., *Homenaje a Fray Alonso de la Veracruz en el cuarto centenario de su muerte (1584-1984),* México, Universidad Nacional Autónoma de México, 1986, pág. 32.

[28] Zavala, Silvio, *op.cit.*, Pág. 38.

[29] Utilizamos la edición hecha por Roberto Heredia Correa ya citada: Vera Cruz, Fray Alonso de la, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Edición crítica, traducción y notas de Roberto Heredia Correa, México, UNAM, 2007. Nos remitimos a la cuestión décima exclusivamente.

obras, compuesta en 1553 y debiendo pronunciarse durante la primavera del ciclo escolar de 1553-1554.[30] Dividido en once cuestiones o dudas, abordaremos dos de ellas: la décima y la décima primera. Téngase presente que las seis primeras cuestiones tratan de la tenencia de la tierra, de los tributos y de la encomienda[31], mientras que las siguientes cinco tratan de la justicia del dominio hispánico en las Indias.

La **Cuestión décima** busca resolver si el emperador o el rey de Castilla pudo declarar guerra justa a los indios. Constituye "…el desarrollo de las causas injustificantes de la Conquista de las Indias de parte de la Corona española.."[32] El tema lo resuelve mediante ocho conclusiones que veremos a continuación.

Conclusión primera:

Sostiene sin embargo que ninguna potestad, ni la espiritual del sumo pontífice ni la temporal del emperador[33], puede justamente mover guerra contra los infieles para quitarles el dominio, por el hecho de que son infieles y su dominio es nulo. Lo anterior debido a que los infieles no están privados de dominio por razón de su infidelidad. En consecuencia, poseen justamente lo que retienen. Ahora bien, quien posee justamente no puede lícitamente ser privado o despojado de su dominio. Se sigue, por tanto, que un infiel, sólo por el hecho de que es infiel, no puede ser despojado de su dominio por medio de la guerra, pues el infiel por su infidelidad no estaría privado de su dominio, por lo demás legítimo.

Conclusión segunda:

Sostiene asimismo que el emperador puede justamente mover guerra a los infieles que de derecho son sus súbditos, para que lo sean también de hecho. Y puede castigar a los rebeldes hasta la privación de sus bienes ya que cualquiera puede ejercer su jurisdicción y potestad en aquellos que le están sujetos.

---

30 Torre Rangel, Jesús Antonio de la, *Alonso de la Veracruz: amparo de los indios. Su teoría y práctica jurídica,* México, Universidad Autónoma de Agiuascalientes, 1998, págs. 167-168.

31 Un análisis de estas primeras seis cuestiones en Torre Rangel, Jesús Antonio de la, *op. cit.,* pág. 170 y sigs.

32 *Ibidem*, pág. 229.

33 Que en el momento de la redacción de su Relectio De dominio infidelium era todavía Carlos I de España y V de Alemania. Para Prometeo Cerezo de Diego "el hecho de que Veracruz dedique dos de las once Dudas o cuestiones de que se compone su tratado… a comentar el problema de la autoridad del emperador sobre el Nuevo Mundo… nos da idea de la importancia que la tesis medieval del señorío universal del emperador poseía en los ambientes oficiales y no oficiales de la sociedad de la Nueva España en la mitad del siglo XVI." Véase Cerezo de Diego, Prometeo, *Alonso de Veracruz y el Derecho de* Gentes, México, Prólogo de César Sepúlveda, Porrúa, 1985, pág. 215.

El emperador puede también compeler a la obediencia a sus súbditos rebeldes y como esto no puede realizarlo sino mediante la guerra, esta puede ser lícita, principio aplicable no solamente al emperador, sino también a propósito de cualquier rey que tuviere dominio legítimo. De lo anterior se sigue, señala Fray Alonso, que el emperador mueve guerra justamente contra los turcos y aquellos sarracenos que habitan en Tierra Santa y en otras provincias que de derecho están sugetas al imperio romano, y que de hecho en otro tiempo lo estuvieron, aunque ahora no lo estén. Asimismo, si los habitantes del Nuevo Mundo hubiesen sido en otro tiempo súbditos del imperio romano, sería justa la guerra que se hiciera contra ellos para someterlos al imperio romano; o si en otro tiempo fueron súbditos de los reyes de Castilla, ahora lícitamente, aun contra su voluntad, vendrían bajo su potestad. Sin embargo, "como de ningún modo consta que ellos alguna vez hayan sido súbditos, y no hay ningún derecho para disponer de tal dominio, se sigue por esto mismo que no fue lícita la guerra que se hizo en contra ellos, y que tampoco es lícito que por esta casa el emperador ejerza su domino en estas partes; y así, tampoco por esta razón el emperador impone tributos justamente y los exige y los recibe; y en consecuencia, está obligado a la restitución de todo"[34] y como el mismo emperador, de manera semejante están obligados todos los demás que tienen y reciben tributos, si no lo hacen en razón de que en otro tiempo estaban bajo el imperio romano o los reyes de Castilla. Tampoco es válido sostener que el emperador es señor del mundo, y que por tanto le pertenecen estas nuevas tierras; porque esta idea ya fue rechazada y reprobada, y comprobada como insostenible.[35]

Conclusión tercera:

Señala sin embargo que como los habitantes del Nuevo Mundo, antes de la llegada de los cristianos, en nada les habían sido hostiles, en nada les habían perjudicado ni a ellos ni a sus bienes, por esta causa no puede justificarse la guerra, cuando en un principio esta nación fue sometida al emperador. "En otra parte, pues debe buscarse una razón justificante."[36]

---

[34] Vera Cruz, Fray Alonso de la, *De dominio…*, Núm. 666.

[35] Francisco de Vitoria rechazaba también este título y señalaba que, de ser cierto, sería sólo dueño con jurisdicción, no con dominio y, por eso, no podría ocupar las provincias de los bárbaros, establecer príncipes nuevos en lugar de los antiguos y cobrar impuestos. Vitoria, Francisco de, *Relectio de Indis,* edición crítica bilingüe de L. Pereña y J. M. Pérez Prendes, Consejo Superior de Investigaciones Científicas, Madrid, 1967, cap. 2, núms. 1-24, pp. 32-74.

[36] Vera Cruz, Fray Alonso de la, *De dominio…*, Núm. 673.

Conclusión cuarta:

Ahora bien, si los infieles de cualquier condición, no quisieran aceptar a los predicadores del Evangelio, sino que más bien los llenan de injurias o los matan, y de ningún modo se les diera completa facultad para predicar, es lícita la guerra contra éstos, sobre todo con la autoridad del sumo pontífice, porque corresponde al papa, por su propio cargo, enviar tales predicadores, para que conduzcan a las ovejas que están fuera del redil al redil de la Iglesia.

Dice Fray Alonso que los infieles, cualesquiera sean, están obligados a oír a los predicadores, así como están obligados a aceptar la fe. Pueden por ello ser compelidos por aquel que tiene tal potestad y ese es el sumo pontífice incluso por medio de la guerra. Y así como por el pontífice pueden ser compelidos a esto con la fuerza de las armas, así también de manera semejante puede realizarse esto por los Reyes Católicos y por el emperador, a partir de una concesión del mismo pontífice. Pues lo mismo es que el propio sumo pontífice ejerza esta potestad, o que otro la ejerza por él.

Señala que si los habitantes del Nuevo Mundo no hubiesen aceptado a los predicadores que les hubiesen sido asignados, sino que los enviasen al destierro, podrían ser compelidos a esto por medio de la guerra, y ésta podría ser llevada hasta que el daño se hubiese resarcido.

Sin embargo, como primeramente no fueron enviados tales predicadores, sino que desde el principio vinieron soldados en armas, que aterrorizaban, despojaban y mataban a los habitantes del Nuevo Mundo, por esta razón no puede justificarse aquella primera guerra que se hizo para someter estas tierras bajo el imperio de emperador. "Y así, ni es justa la posesión por parte del emperador, ni por parte de los mismos españoles a quienes fueron encomendados los pueblos. Y de esta suerte están obligados a la restitución de todo si por otra vía no se encuentra justificación."[37]

"Esto es lo que indagamos y lo que por ahora nos preocupa, puesto que estos naturales no son en modo alguno hostiles ni rechazan a los ministros de Dios; más aún, los han acogido con los brazos abiertos. Así pues, no hay por esta razón justicia en la guerra."[38]

Conclusión quinta:

Si estos infieles admitieran a los predicadores y les permitieran evangelizar libremente, aunque no quisieran creer, por esta causa no pueden ser privados de su dominio por medio de la guerra. Esto porque nadie debe ser obligado

[37] *Ibidem*, Núm. 682.
[38] *Ibidem*, Núm. 683.

a la fe y someter a los infieles y privarlos de su domino, a menos que crean, es obligar a la fe. Por consiguiente, de ningún modo deben ser privados de su dominio.

Conclusión sexta:

El hecho de que los naturales del Nuevo Mundo rindieran cultos a sus ídolos y tuvieran muchos dioses, y hubiese entre ellos adulterios o simples fornicaciones o borrachera, aun cuando estos vicios fuesen muy comunes, no por esa razón fue justa la guerra para someterlos y despojarlos de su legítimo dominio. Lo anterior debido a que por la idolatría no se da una causa justa para quitar los dominios, puesto que la infidelidad, como se ha dicho, no es causa suficiente de una guerra justa. Ahora bien, señala Fray Alonso que la infidelidad de éstos consiste en rendir culto a muchos dioses. En consecuencia, no por esto es justa la guerra, si ésta fuese razón suficiente, podrían ser compelidos y obligados a recibir la fe, de tal manera que los que no la recibieran podrían justamente ser privados de sus bienes. Pero esto no puede hacerse al menos con los que no son súbditos, como era el caso de estos bárbaros. Así pues la idolatría no fue causa suficiente.

En cuanto a los adulterios, si existiesen entre ellos, el emperador o el sumo pontífice no podrían mover guerra justa contra cristianos por esa razón ni privarlos de su dominio, tampoco podrían hacerlo contra infieles. Además, los naturales, "aunque bárbaros, tenían de algún modo sus leyes, y castigaban a su manera los adulterios; y no eran en cuanto a esto se refiere tan disolutos que no hubiese algún freno, tanto según naturaleza como según su sistema de gobierno."[39]

En cuanto a las fornicaciones tampoco hubiese sido justa la causa de guerra, porque menos nociva es la simple fornicación que el adulterio; y si el adulterio no es causa justa, menos lo será la fornicación. Misma razón en el caso de la embriaguez. "Porque ésta, aunque es pecado mortal, sin embargo, a lo más, sólo es perjudicial al ebrio, el cual suele perder temporalmente el juicio de la razón, que es lo más valioso en el hombre."[40] Señala que si la comisión de pecados de esta naturaleza en el pueblo cristiano no es razón suficiente para una guerra justa, mucho menos será suficiente para someter por medio de la guerra a los bárbaros infieles. De modo semejante hay que juzgar acerca del concúbito incestuoso, aun cuando haya sido muy frecuente entre ellos.

[39] *Ibidem*, Núm. 697.
[40] *Ibidem*, Núm. 700.

Concluye que por estos pecados mencionados, aunque se diga que son contra naturaleza, y aun cuando ellos vivieran sólo en la ley natural, no habría razón suficiente para hacerles la guerra.

Conclusión séptima:

El hecho de que estos naturales sean vistos y juzgados como niños y como amentes, débiles de ingenio y prudencia[41], no es causa justa para hacerles la guerra y someterlos. Los niños, antes del uso de razón, aunque no se distinguen de los siervos, pueden tener verdadero dominio, y tienen derecho de propiedad. Esto es manifiesto: porque los bienes de los pupilos no son bienes de los tutores. Así, suponiendo que estos bárbaros fuesen niños en cuanto al uso de razón, por más escaso que haya sido ese uso de razón, eran verdaderos señores. Por tanto, no pudieron ser despojados justamente por medio de la guerra. El niño antes del uso de razón es verdadero señor y es verdadero heredero. Por tanto, también los naturales de este Nuevo Mundo, aun cuando no difieran de un niño.

Destaca que no vale la teoría de la servidumbre natural de Aristóteles, en la que algunos son siervos por naturaleza y otros son libres por naturaleza; y llama siervo por naturaleza a aquellos que son niños o "amentes", que deben ser conducidos y guiados, y no guiar ellos mismos; y los otros, libres por naturaleza, son los que conducen y guían. No vale porque, dado que así fuese, que sean llamados por Aristóteles siervos por naturaleza, sin embargo, no por esto están privados de dominio, sino que tales individuos, débiles de ingenio, son llamados siervos por naturaleza, porque deben ser guiados y gobernados por otros que destacan por su prudencia, y que son inteligentes y, por esto mismo rectores.

Los habitantes del Nuevo Mundo no sólo no son niños ni amentes, sino que a su manera son destacados, "y hay entre ellos a lo menos algunos que a su manera son destacadísimos. Esto es manifiesto: porque, antes de la llegada de los españoles, y ahora lo vemos con nuestros propios ojos, había entre ellos magistraturas y gobiernos y ordenanzas muy pertinentes; y tenían organización política y régimen de gobierno, no sólo monárquico, sino también aristocrático; y tenían leyes, y castigaban a los malhechores, y así también premiaban a los beneméritos de la república. Por tanto, no eran de tal manera niños y amentes, que fuesen incapaces de dominio." [42]

---

[41] Pareciera que se refiere a Juan Ginés de Sepúlveda y su *De iusto bello contra Indos,* tuvimos a la vista la edición en castellano: *Tratado sobre las justas causas de la guerra contra los indios,* estudio de Manuel García Pelayo, 3a. reimpr., Fondo de Cultura Económica, México, 1996.

[42] Vera Cruz, Fray Alonso de la, *De dominio…*, Núm. 716-717.

Además, señala, si ellos fuesen incapaces, como niños y amentes, se sigue que no podrían pecar, y así todos los vicios, lascivia, borrachera, concúbito libre, incesto, sodomía, no se les podrían imputar más que a los brutos animales. Pero se les imputan, y con razón. Tienen, pues, uso de razón suficiente para pecar, y así, en consecuencia, son capaces de dominio; y no hay justicia en la guerra que se les haga por defecto de razón.

Es claro entonces para Fray Alonso que alegan un título injusto aquellos que juzgan a estos naturales indignos de dominio o de reino o de otras cosas en las cuales eran verdaderos señores.

Conclusión octava:

No es justificación para hacerles la guerra la afirmación de que "Dios los entregó a sus sentimientos perversos", y que por sus pecados quería destruirlos y entregarlos a las manos de los españoles, del mismo modo que en otro tiempo Dios entregó los cananeos a los judíos, como algún varón, por lo demás grave y religioso, se atrevió a probar.[43]

Señala que no hay constancia de tal profecía ni debe prestarse fe a cualquier espíritu; sólo aquello que en la Sagrada Escritura nos ha sido anunciado infaliblemente por los santos profetas y hemos aceptado y aceptaremos con los brazos abiertos; pero otros anuncios con la misma razón con que se profieren se desechan.

En la **Cuestión Décima Primera** Fray Alonso trata el punto de si existe alguna causa que justifique la guerra contra los naturales del Nuevo Mundo. Se pregunta primeramente si, dado que las causas que suelen señalarse por algunos como causas de guerra justa no son suficientes, existe alguna causa justa de guerra de parte del emperador que sí lo sea, ya por propia autoridad, ya por autoridad del papa. Procede entonces a analizar las que han sido alegadas como causas justas para la guerra, o justos títulos para justificar la presencia española en América como los expone en su caso Francisco de Vitoria.

V. Juan Francisco de Montemayor y Córdoba de Cuenca

Don Juan Francisco de Montemayor y Cordoba de Cuenca[44] nació en el año

[43] Se considera que se hace referencia a Juan Ginés de Sepúlveda. Francisco de Vitoria señalaba respecto a esta supuesta justificación para hacer la guerra porque con él se anuncia una profecía en contra de la Escritura sin la realización de milagro alguno. Vitoria, Francisco de, *Relectio de Indis* ..., cap. 2, núms. 1-24, pp. 32-74.

[44] Sobre Montemayor véase el estudio de Barrientos Grandón, Javier, *Juan Francisco Montemay-*

de 1620 en La Luenga, provincia de Huesca, y falleció el 25 de agosto de 1685 en Huesca. Su cuerpo fue trasladado a la iglesia de Alfocea, de cuya villa era señor "y alli se conserva su retrato de cuerpo entero, con su elogio y escudo de armas."[45]

En la Universidad de Huesca llevó a cabo los estudios de cánones y leyes, graduándose de licenciado y doctor hacia 1640.[46]

Montemayor sirvió al rey en la defensa de Aragón entre 1640 y 1642 y el 22 de octubre de ese año, y a la edad de veintidos años, fue nombrado juez de Enquestas en el Reino de Aragón.[47] Posteriormente actuó como auditor general en Cataluña,[48] cargo que sirvió en tres distintas ocasiones.[49]

Por real provisión del 30 de marzo de 1649 es nombrado Oidor Supernumerario de la Real Audiencia de Santo Domingo en la Isla Española, de la que

---

or. Un jurista aragonés en las Indias, Zaragoza, Diputación Provincial de Zaragoza, Area de Cultura, 2001, Colección Benjamín Jarnés. También nuestros trabajos Cruz Barney, Oscar, "Estudio Introductorio: Piratas, soldados y batallas ¿para quién es el botín?", en Montemayor y Córdoba de Cuenca, Juan Francisco de, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* Juan Ruiz Impresor, 1658, ed. facsimilar, CONACULTA-INAH, ICAVE, Colección Historias de San Juan de Ulúa en la Historia, vol. IV, Coordinador Pablo Montero, México, 2001 y Cruz Barney, Oscar, "La bibliografía del *Discurso político jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra. Premios y castigos de los soldados* de don Juan Francisco de Montemayor y Córdoba de Cuenca", *Anuario mexicano de historia del Derecho*, Instituto de Investigaciones Jurídicas, núm. XIV, UNAM, México, 2002. Asimismo véase de Rodríguez Sala, M. Luisa y Miguel B. de Erice "Montemayor y Córdoba de Cuenca, Abogado", en *Anuario mexicano de historia del derecho,* México, Instituto de Investigaciones Jurídicas, UNAM, núm. IX, 1997. Para la bibliografía de Montemayor *véase* Toribio Medina, José, *Biblioteca hispanoamericana (1493-1810),* Santiago de Chile, edición facsimilar del Fondo Histórico y Bibliográfico José Toribio Medina, 1961, t. IV (1701-1767) y del mismo autor *La imprenta en México (1539-1821),* edición facsimilar de la UNAM, México, 1989, t. II III; asimismo Palau, t. V y VI; Jiménez Catalán, Manuel, *Ensayo de una tipografía zaragozana del S. XVII,* Zaragoza, Tip. La académica, 1925; Herrera Gómez, Néstor y Silvino M. González, *Apuntes para una bibliografía militar de México, 1536-1936,* México, Secretaría de Guerra y Marina, Comisión de Estudios Militares, Biblioteca del Ejército, Sección de Estudios Militares del Ateneo, 1937.

45 Medina, José Toribio, *La imprenta en México (1539- 1821).* Edición facsimilar por la Universidad Nacional Autonoma de México, México, 1989, tomo II, pág. 401.

46 Véase Rodríguez-Sala, Maria Luisa y B. de Erice, Miguel, "Juan Francisco de Montemayor y Córdoba de Cuenca, abogado, oidor y recopilador del siglo XVII", *Anuario mexicano de historia del derecho,* México, Instituto de Investigaciones Jurídicas, UNAM, IX, 1997, págs. 194-195.

47 Idem.

48 Véase Sánchez Bella, Ismael, "Estudio Introductorio", *Rodrigo de Aguiar y Acuña y Juan Francisco Montemayor y Cordoba de Cuenca, Sumarios de la Recopilación General de Leyes de las Indias Occidentales,* Con Licencia en México, Impreffos por Francifco Rodriguez Lupercio, 1677, México, ed. Facsimilar, Fondo de Cultura Económica, UNAM, pág. XXXV.

49 Medina, José Toribio, *op. cit.,* nota 2, pág. 401.

llegó a ser presidente, iniciando su actuación en 1650 hasta 1654. Es precisamente en ese periodo que se desarrolla una de las actuaciones militares más brillantes de Montemayor en contra de la piratería, al llevar a cabo el desalojo de los filibusteros de la Isla de la Tortuga.

Al fallecer D. Andrés Pérez Franco, Gobernador de la Española, Montemayor fue nombrado gobernador y capitán general interino,[50] y se encargó durante los últimos meses de 1652 de preparar y ejecutar el plan definitivo de expulsión de los filibusteros y rescate de la Tortuga. El 30 de diciembre de ese año partieron de Santo Domingo las tropas españolas embarcadas en cinco naves con rumbo a la población pirata, a la que después de una campaña de diez días y una aplastante victoria, obligaron a embarcarse y a abandonar definitivamente el lugar.

De la acción militar se obtuvo un importante botín de guerra que se trasladó a Santo Domingo y se dejó en la Tortuga una fuerte guarnición para evitar su reocupación. Sin embargo, los ingleses mantuvieron su interés en recuperar la isla y en apropiarse de La Española, cuya fortificación y defensa en 1653-1655 correspondió nuevamente a Montemayor, quien logró nuevamente una victoria sobre los atacantes. Señalan atinadamente Rodríguez-Sala y Erice que "La consecuencia histórica de este triunfo español preservó su dominio sobre Santo Domingo y evitó su posesión por parte de miembros de la cultura anglosajona como fue el caso de Jamaica."[51]

Esta acción le mereció a Montemayor innumerables críticas y fue sometido a la actuación injusta de su juez de residencia y de otros enemigos, sin embargo, sus meritos de guerra le merecieron la promoción a Oidor de la Real Audiencia de México el 22 de septiembre de 1654.[52] Lo anterior como señalamos, en razón a sus méritos y a su "Suficiencia y buenas letras y singularmente al acierto con que dispusisteis se desalojase al enemigo de la Isla de la Tortuga y demás poblaciones que ocupaba a la banda del norte de essa de Santo Domingo."[53]

---

50 Peña Battle, Manuel A., *La Isla de la Tortuga, Plaza de Armas, refugio y seminario de los enemigos de España en Indias*, Santo Domingo, 3a edición, Editora Taller, 1988, pág. 185.

51 Rodríguez-Sala, Maria Luisa y B. de Erice, Miguel, *op. cit.,* nota 3, pág. 199.

52 Schafer, Ernesto, *El Consejo Real y Supremo de las Indias,* Sevilla, Escuela de Estudios Hispanoamericanos, 1947, tomo II, p. 447.

53 Barrientos Grandón, Javier, "La literatura jurídica indiana y el ius commune", en Alvarado Planas, Javier (Coord.), *Historia de la literatura jurídica en la España del antíguo régimen,* Madrid, Marcial Pons, volúmen 1, 2000, págs. 249-250.

En 1658 publica su *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* (México, Juan Ruiz Impresor). Esta obra de Montemayor, a decir de Ismael Sánchez Bella,[54] tuvo como razón inmediata la de responder a la crítica hecha por sus enemigos en Santo Domingo, a la acción militar emprendida en enero de 1654 contra la isla de la Tortuga, cuando desempeñaba el cargo de gobernador, capitán general y presidente de la Real Chancillería de Santo Domingo. El relato de dicha expedición se publicó en ese mismo año, tanto en Madrid como en Sevilla.

El *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados*[55], firmado por el autor el veinte de diciembre de 1655 y dedicado a Francisco Fernández de la Cueva, Duque de Albuquerque y Virrey de la Nueva España (1653-1660), se divide en diez capítulos más un índice alfabético.

Es en su *Discurso...* en donde Montemayor trata del desalojo que llevó a cabo el 19 de enero de 1654 de los invasores franceses que habitaban la isla de la Tortuga y cuya principal ocupación era la piratería en contra de los intereses españoles. La Tortuga se encontraba gobernada por M. Timoleon Othman de Fontenay, al mando de más de quinientos hombres que defendieron el castillo del asalto español.

En aquella acción de guerra se apresaron el castillo, bastimentos para más de un mes, armas, pólvora, balas, cuerda y otros pertrechos, 46 piezas de artillería, once embarcaciones menores y tres bajeles en puerto, de los que se entregaron dos a los franceses rendidos para que se trasladaran a Francia.[56]

La Real Hacienda gastó en esta acción 192U795 reales a los que se restaron 100U876 que había reunido Montemayor, importando un total de 91U919 reales de gasto. De la venta de la presa de guerra se reunieron 245U937, can-

---

54 Sánchez Bella, Ismael, "Estudio Introductorio", *Sumarios de la Recopilación...,* p. XXXVIII.

55 Montemayor y Córdoba de Cuenca, Juan Francisco de, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* Juan Ruiz Impresor, 1658, ed. facsimilar, CONACULTA-INAH, ICAVE, Colección Historias de San Juan de Ulúa en la Historia, vol. IV, Coordinador Pablo Montero, Compilación y estudio introductorio Oscar Cruz Barney, México, 2001

56 Montemayor y Cordoba de Cuenca, Juan Francisco, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* México, Juan Ruiz Impresor, 1658, fol.3.

tidad de la que se extrajeron el quinto real y lo demás que por derecho le correspondía al Rey sumado a los bastimentos de la gente de mar y guerra que se cobró de lo que de la presa tocaba al ejército[57], sumando un total de 143U271 reales que se entregaron al Rey, junto con la isla, castillo, armas, bastimentos y con 56U675 reales de plata de ganancia.[58]

Mediante *real cédula* del 13 de septiembre de 1654, se ordenó por el Rey el despoblamiento de la isla Tortuga y la demolición del castillo.

Montemayor, cuestionado por el premio dado a los soldados que participaron en la acción, hace una defensa y explicación del derecho de repartimiento de presas, afirmando que "tan bien deseada quanto es bien devida la fatisfacion, y agradecimiento de los fervicios y tan natural fu obligacion, que no folo es injufticia el negarla, pero aun es conocido agravio el diferirla."[59]

Montemayor trata el tema de la justicia de la guerra en la Introducción a su tratado denominada *Sobre el despojo que se ganó al enemigo francés en la expugnación de la Isla de la Tortuga; y la presa de uno de los baxeles de su conserva que se le cogió quando volvió contra lo capitulado à invadirla.* Señala que la guerra en la que se hacen presas debe ser justa, porque no siéndolo, no se puede retener los bienes en ella apresados, ni los prisioneros lo son legítimamente y en consecuencia debe todo ser restituido.

Sostiene, siguiendo a Santo Tomás, que para que la guerra sea justa deben concurrir tres cosas:[60]

Primera: Legítima autoridad del Príncipe soberano que la resuelva.

Segunda: Causa justa.

Tercera: Recta intención.

"Con que faltando todas, ò alguna dellas, no será justa, ni por el consiguiente lícita, según resolución del Angelico Doct. Santo Thomas, y del resto de los Doctores y Sumistas"[61] Las autoridades citadas por Montemayor en este

[57] Pues si bien al Rey correspondía ordinariamente cubrir dichos bastimentos, en "esta plaça" señala Montemayor se acostumbra que los soldados paguen sus bastimentos.

[58] Montemayor y Cordoba de Cuenca, Juan Francisco, *op. cit.,* nota 35, fol. 3v.

[59] *Ibidem*, fol 6.

[60] Montemayor y Córdoba de Cuenca, Juan Francisco de, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* Juan Ruiz Impresor, 1658, Núm. 22, fol. 18v.

[61] *Idem.*

punto son Luis de Molina[62], Domingo de Soto[63], Melchior de Valencia[64], Pedro Augusto Morla[65] y Christophorus Besoldus.[66]

Sostiene, con el Cardenal Belarmino[67], que hay alguna diferencia entre los dos primeros requisitos y el tercero, porque el defecto de aquellos siendo contrario a la caridad y a la justicia, además del pecado, obliga a la restitución. Si el que falta es el último, no siendo contrario a la justicia sino a la caridad, acarrea pecado mortal, pero no la obligación de restituir.

Se refiere a la necesidad de la denunciación o declaración de la guerra, señalando que si se omitiese, los que no la declarasen faltarían al derecho de gentes y por ello no habría obligación de guardarles buena correspondencia, pasaje ni cuartel, que por las leyes militares comúnmente suele guardarse a los enemigos vencidos o rendidos, "sino tratarlos como à ladrones, piratas y traidores. Supuesto que quien obra y procede contra leyes, pierde el beneficio dellas; cuyo auxilio injustamente pide quien las desprecia y atropella."[68]

El requisito de la declaración previa de la guerra se denomina clarigación y "es tan preciso como en el fuero contencioso la citación"[69] Sostiene Montemayor que los que se defienden, no tienen necesidad de denunciar la guerra,

---

62 Molina, Luis de, *De Justitia et Jure tomi sex, Hac postrema editione emendati insuper summarijs et indicibus aucti*, Antuerpiae, apud Ioannem Keerbergium, 1615. Tuvimos a la vista la siguiente edición: Molinae, Ludovici, *De Iustitia et Jure Opera Omnia, tractatibus Quinque, tomisque totidem comprehensa. Editio Novissima,* Coloniae Allobrogum, Sumptibus Marci-Michaelis Bousquet, 1733, 5 tomos.

63 Soto, Domingo de, *De Iustitita et Iure libri decem*, Salmanticae, M.A. Terranova, 1556. Hay ediciones en 1558, 1559, 1563, 1566, 1569, 1573, 1580, 1582, 1589, 1596, 1601 y 1619. Tuvimos a la vista la siguiente edición: Soto, Domingo de, *De la justicia y del derecho*, Versión castellana e introducción del Dr. P. Venancio D. Carro, O.P., Madrid, Instituto de Estudios Políticos, Sección de Teólogos Juristas, 1968, 5 tomos.

64 Con alguna de estas dos obras: *Epistolicae iuris exercitationes sive Epistolae ad Antonium Fabrum iuris consultû Sebusianum : cum eiusdem Anton. Fabri responsis,* Salmanticae, excudebat Antonia Ramirez, 1625 (hay una edición de 1615) o su *Illustrium iuris tractatuum, seu Lecturarum Salmanticensium liber secundus ...*, Salmanticae, apud Hyancintum Tabernier, 1630.

65 Morla, Pedro Augusto de, *Emporium utriusque iuris questionum, in usu forensi admodum frequentum in quinque divisum partes.* Valentiae, per Alvarum Franco, & Didacum de la Torre, 1599.

66 Besoldus, Christoforus, *Dissertatio philologica de Arte Jureque Belli*, Impensis Heredum Lazari Zetzneri, Argentorati, 1642.

67 Belarmino, Roberto, *Officio del principe christiano del cardenal Roberto Belarmino y auisos vtiles para el gouierno politico militar y domestico : en tres libros*, traducido de latín en castellano por Miguel de León Soarez, Madrid, por Iuan Gonzales, 1624.

68 Montemayor y Córdoba de Cuenca, Juan Francisco de, *op. cit.,* Núm. 24, Fol. 20 f.

69 *Idem.*

porque están relevados de esta diligencia por el derecho natural de la defensa. Aclara que no la denuncian en dos casos: los que ya son declarados enemigos y cuando se procede contra rebeldes, sediciosos, o piratas: porque con estos, no se guarda el derecho de gentes.

La omisión de la declaración de guerra se considera una suerte de traición calificada, al no dar oportunidad de prevenirse o resguardarse.

Señala que una vez que se hace la debida denunciación o declaración de guerra los denunciados adquieren el carácter de enemigos públicos u *hostes* con quienes recíprocamente corren los derechos de la guerra, de manera que lo apresado entre las partes en estas guerras es conforme a derecho, de quien lo aprehende. Destaca que los cautivos o prisioneros en justa guerra pasan a ser esclavos de quien los captura (esto es un medio que introdujo el derecho de gentes para evitar la muerte a los prisioneros en las guerras justas), habiéndolos puesto en sus presidios o dentro de sus muros y no antes, precisamente por el denominado derecho de postliminio. El *ius postlimini* era el derecho "...en cuya virtud el ciudadano romano que había caído en cautividad del enemigo, al escapar de ésta y volver al suelo romano borra retroactivamente su cautividad, volviendo a la situación jurídica en que se hallaba antes de ser aprehendido por el enemigo".[70] El cautivo de guerra que volvía voluntariamente a Roma recuperaba no sólo su ciudadanía y su posición familiar, sino que también todos sus antiguos derechos. No recuperaba su situación de hecho como era el matrimonio (si es que éste era *sine manu* ya que la *manus* como derecho si se recuperaba) o la posesión.

La adecuada declaración de guerra permite saber quiénes son los verdaderos *hostes* o enemigos y como deben aplicarse las disposiciones jurídicas para distinguirlos de los que no lo son, o de los que son ladrones y piratas.

VI. Fray Juan de Paz y la justicia de la guerra en Filipinas

Juan de Paz perteneció a la Orden de Predicadores, hijo del Real Convento de San Pablo de Córdoba y posteriormente colegial del Colegio Mayor de

[70] Faustino Gutiérrez Alviz y Armario, en *Diccionario de derecho romano,* Madrid, Reus, 1982, *sub voce* "ius postlimini". Asimismo D'Ors, Alvaro, *Derecho Privado Romano,* 7ª edición, Pamplona, Universidad de Navarra, 1989, §.208. Juan Iglesias dice que si "el cautivo retorna *in confines romanos* -dentro de Roma o de una ciudad aliada de Roma- con la intención de quedar en la patria..., se reintegra en todos sus derechos por virtud del *postliminium*." Véase Iglesias, Juan, *Derecho Romano, instituciones de derecho privado,* Barcelona, Ariel, 1982, pág. 128.

Santo Tomás de la Ciudad de Sevilla y Regente de los estudios del Colegio y Universidad de Santo Tomás de la ciudad de Manila en Filipinas. Fue Prior de Santo Domingo en Filipinas y confesor del Arzobispo D. Miguel de Poblete.[71]

En 1687 publica en Sevilla sus *Consultas y resoluciones varias theológicas, jurídicas, regulares y morales*[72] en donde aborda el tema de la justicia de la guerra y lo resuelve como veremos con múltiples citas a la Biblia, al derecho romano y al derecho canónico.

Divide las consultas en diez clases (si bien anuncia solamente ocho y las dos últimas no las considera como tales). La Cuarta Clase se refiere a la restitución por causa de la injusta acción, o acepción de la cosa, e inicia con el tema de la guerra injusta.

La primera consulta de la Cuarta Clase es la que nos interesa al referirse a la justicia de la guerra. Es la siguiente: *Sobre fi hubo causa baftante para hazer cierta guerra fangrienta a unos infieles, y defpojarles de fus hazciendas: y acerca del modo, y orden de la reftitucion de los defpojos.*

Los hechos sobre los que se le plantea la consulta a Fray Juan de Paz son los siguientes: Los Indios principales[73] del pueblo A (así se le denomina en la respuesta que da Fray Juan de Paz) tenían trato con un indio infiel Principal Ygolote[74] quien no guardaba la palabra a los principales del pueblo A en el rescate del oro, por lo cual iban perdiendo ingresos de su hacienda y estaban indignados contra el Ygolote, hasta que el 22 del mes de enero (no se señala el año), con comisión del Alcalde Mayor, fueron con engaño (como que iban a otra cosa) y dieron sobre el indio principal, le hirieron, mataron a su mujer e hijos, le robaron el oro que pudieron encontrar, mismo que repartieron como

---

71 S. Antonio, Juan Francisco de, *Chronicas de la apostolica provincia de S. Gregorio de Religiosos Descalzos de N.S.P. S. Francisco en las Islas Philipinas, China, Japon, &c. Parte primera en que se Incluye la descripción de estas Islas, Que Consagra a la S.C.R. Magestad de D. Phelipe V. El Animoso, Nuestro Cathólico Rey, y Augusto Emperador de las Españas, y de las Indias, la misma Santa Provincia*, Impresa en la Imprenta del uso de la propia Provincia, sita en el Convento de Ntra. Señora de Loreto del Pueblo de Sampaloc, Extra-muros de la Ciudad de Manila, Por Fr. Juan del Sotillo, Año de 1738, pág. 184.

72 Paz, Juan de, *Consultas y resoluciones varias theológicas, jurídicas, regulares y morales*, Sevilla, Thomas López de Haro, 1687. Esta obra mereció una segunda edición: *Consultas y resoluciones varias, theologicas, juridicas, regulares y morales, resueltas por … Fr. Juan de Paz, de la sagrada religión de Predicadores*, En Amberes, a costa de los hermanos de Tournes, 1745 que también tuvimos a la vista.

73 Juan de Paz define al Principal como "el indio noble o cabeza de barangay" a cuyo cargo está el inmediato gobierno de algún pueblo o vecindad.

74 Los Ygolotes o Igolotes eran una de las poblaciones indígenas de las islas Filipinas. Sobre éstos véase Keesing, Felix Maxwell, *The Ethnohistory of Northern Luzon*, California, Stanford University Press, 1962, p. 65 y sigs.

ellos quisieron. Le entregaron una cantidad al Alcalde mayor y a otros, y para nuestra Señora de dicho pueblo A dieron también una cantidad de oro (cuarenta pesos).

El principal Ygolote escapó con vida, porque estando herido se arrojó en un barranco de donde después le sacaron los suyos y "oy vive con anfias de vengarfe, y efte mes veinte y nueue de Mayo empezó a executar fu furia." A las tres o cuatro de la mañana llegó junto con otros muchos Ygolotes al pueblo A y mataron a dos indios, hirieron a otros, robaron lo que pudieron y se fueron. Amenazan con que han de volver y entrar en el mismo pueblo A para vengarse mejor: de noche, y haciendo todo el daño que pudieren a sangre y fuego, corriendo riesgo la iglesia de que una noche la quemen por lo que se piensa sacar la Santas Imágenes y llevarlas al pueblo de B, para que el daño sea menor. Se añade en la consulta que la paz que se tenía con los Ygolotes y los del pueblo de A, se la tenían prometida y ellos la quebrantaron. A los del pueblo A no les iba mal con los Ygolotes salvo por los Principales en el rescate del oro, y en eso no era mucha la perdida y se podía arreglar por otros medios y no con derramamiento de sangre a traición. El sacerdote del Pueblo A no pudo estorbarles en su decisión porque se la ocultaron totalmente. Al destacarles que el fuero de la conciencia les manda restituir es claro que el modo de hacerlo y de lograr la paz presenta dificultades porque los infieles agraviados no admiten treguas, ni tratos para poderse convenir. Los indios fieles no se atreven a ir a hablar con ellos por el miedo que les tienen. Son cuatro dificultades que el sacerdote del pueblo A pregunta sobre este caso y son:

I. La primera, si fue bastante razón para hacer la guerra sangrienta al Ygolote infiel, el no corresponder conforme le pedían los del pueblo A.
II. La segunda, si los de dicho pueblo A, junto con el Alcalde Mayor, están obligados a restituir los daños, y robos que han cometido.
III. La tercera, si habiendo empezado infieles a hacerse Jueces en su propia causa, persevera todavía la obligación de restituirles.
IV. La cuarta, si acaso hay obligación a restituirle al Ygolote, qué modo se tendrá para hacerse la restitución, porque él no da lugar a entregas, ni trato de composición, o restitucional.

I. Juan de Paz responde a lo primero que en el caso propuesto no hubo razón, ni causa, que justificase la guerra contra el Ygolote, ni se le puede llamar guerra la que hicieron contra él, sino robo con homicidios alevosos, pues no hubo soldados ni enemigos que hiciesen guerra, sino ladrones que con traición robaron y mataron. Sostiene que jurídicamente se diferencia entre guerra y robo, entre enemigos que guerrean y ladrones que roban, con estas palabras:

Hostes sunt, quibus bellum publice populus romanum decrevit, vel ipse populo romano, cateri latrunculi, vel praedones appellantur.[75] Asimismo refiere al significado de *Hostes*: *Hostes ii sunt qui nobis, aut quibus nos publice bellum decrevimus, cateri latrones aut praedones sunt.*[76]

Destaca que las razones por las que dicho asalto y acometimiento no pueden considerarse como una guerra justa, son siete:

1. La primera, porque para cometer robos y causar muertes se valieron de la amistad, que tenían con los Ygolotes, lo cual hace evidente la gravísima deformidad de traición que por ninguna vía se puede honestar , ni ser licita, y por esto se abomina tanto la maldad del traidor de Judas, que con beso de amistad entregó al Señor a sus enemigos, como lo predicara la Iglesia en el Oficio Divino de la Semana Santa: *Per osculum implevit homicidium* y en otro Responso *Iudas armis doctus celeris, qui per pacem didicit facere bellum*. Sostiene Juan de Paz que todo lo que es valerse de la amistad y bajo este título hacer daño, es maldad injustificable. Por ello, señala, dejó el Santo Rey David en su testamento a Salomón, que castigase con pena de muerte a Joab[77] ya que con la capa de paz derramó sangre, como fi fuera en guerra.

Alguna semejanza, señala Fray Juan de Paz, tiene el trato doble, que usaron los indios en el caso de referencia, con el que usaron Simeon y Levi con los de Sichém, como refiere el capítulo 34 del Génesis porque en estos procedió el daño, que hizo el Principe Sichém en el estupro de Dina, y en aquellos la mala correspondencia de el Ygolote en la venta del oro, y en ambas partes hubo asalto y acometimiento con robos y muertes, valiéndose de fingida amistad para hacer el daño; lo cual reprobó, y lloró grandemente el Santo Jacob: y después estando a la muerte volvió a reprehender a los agresores, y a dar por mala, y maldita la acción. Concluye: Siempre es malo, e injusto acometer con titulo de paz aunque anteriormente se haya hecho algún daño a los que así acometen.[78]

2. La segunda razón es que dicho acometimiento fue contra la palabra de paz, que ofrecían los de dicho pueblo de A, prometida al Ygolote, palabra que

---

[75] Juan de Paz cita al *Digesto* Libro XLIX, Título XV, núm. 24. "Son enemigos aquellos a los que el pueblo romano declaró públicamente la guerra, o ellos al pueblo romano; los demás se llaman bandidos o salteadores." Utilizamos *El Digesto de Justiniano*. Trad de Alvaro D'Ors, Aranzadi, Pamplona, 1975, tomo III.

[76] *Digesto* Libro XL, Título XVI, núm. 118. "Son enemigos los que nos han declarado públicamente la guerra, o nosotros a ellos; los otros son bandidos o atracadores."

[77] Véase *Regum* III, Cap. II, Num. 5 "*Essudit snguinem belli in pace*."

[78] Paz, Juan de, *op. cit.,* fol. 317, Parecer CIX, Núm. 2.

debieron guardar, aunque fuera enemigo, aquí cita el canon Noli "*Fides quando promittitur, etiam hofti feruanda eft quanto magis amico.*"[79] Refiere que Santo Thomas[80] explica de qué suerte es lícito engañar al enemigo, hacer estratagemas, y usar de ardides, "que el enemigo no alcance a saber, para vencerlo, pero nunca es licito faltarle a la palabra, y fé prometida."[81] De lo cual consta, sostiene Juan de Paz, que fue contra toda razón, y justicia quebrantar la fe prometida al Ygolote.

3. La tercera razón es que acometer con armas y hacer la guerra contra alguno, es como dar una sentencia de muerte grave: porque en la guerra amenazan muchas muertes, robos de hacienda y otros muchos daños: por lo que así como antes de dar sentencia de muerte contra algunos se les ha de hacer los cargos y oír sus defensas; así por mayor razón antes de hacer la guerra, se le ha de proponer al que agravió el daño que ha hecho, y como lo debe satisfacer. Una vez hecha esta diligencia, si el así advertido ofrece satisfacción, no será justa la guerra, porque cesa el agravio, y se recompensa el daño. Solamente habrá justa razón para hacerle la guerra, "quando conftando del agrauio, o daño hecho, no quiere restituirlo, ni ofrece satisfacion", aquí cita a San Agustín en su *Questionum in Heptateuchum Libri Septem*[82] en el sentido de que para que la guerra sea justa, se ha de hacer por una de dos causas; o porque la República contra quienes se mueve la guerra, no quiere castigar el agravio que los suyos han hecho a otros; o porque no quiere que se restituya lo defraudado. Continúa Juan de Paz: "Y así concuerdan comúnmente los Doctores, que la República agraviada, ante de mover la guerra debe pedir satisfacción, y si la

---

[79] La cita completa del canon contenido en el Decreto de Graciano sería "*Fides enim, quando promittitur, etiam hofti fervanda eft, contra quem bellum geritur: quanto magis amico, pro quo pugnatur?.* Véase *Decreti* Secunda Pars, Causa XXIII, Quaest. I, C. III *In bellicus armis viliter Deo placer possunt.* Utilizamos la siguiente edición: *Corpus Juris Canonici Academicum, emendatum et notis P. Lancellotti Illustratum*, Coloniae Munatianae, Impensis Emanuelis Turneysen, 1783, Tomus Primus.

[80] Véase Aquino, Tomas de, *Suma Teológica, op. cit.,* IIa.IIae. Cuest.40 Art. 3, tomo III.

[81] Paz, Juan de, *op. cit.,* fol. 317, Parecer CIX, Núm. 3.

[82] La cita completa sería: *Iusta autem bella ea definiri solent, quae ulciscuntur iniurias, si qua gens vel civitas, quae bello petenda est, vel vindicare neglexerit quod a suis improbe factum est, vel reddere quod per iniurias ablatum est. Sed etiam hoc genus belli sine dubitatione iustum est, quod Deus imperat, apud quem non est iniquitas et novit quid cuique fieri debeat. In quo bello ductor exercitus vel ipse populus, non tam auctor belli, quam minister iudicandus est.* San Agustín, *Questionum in Heptateuchum Libri Septem*, *Liber Sextus, Quaestiones in Iesum Nave*, 10, Utilizamos la versión disponible en línea en: http://www.augustinus.it/latino/questioni_ettateuco/index2.htm

ofrece razonablemente, no le es licito mover guerra". Remite a las obras de Francisco Silvestre de Ferrara[83], Domingo Bañez[84], Manuel Rodríguez[85] y Luis de Molina.[86]

Destaca Juan de Paz que en el caso no se pidió la satisfacción, ni se hizo cargo al Ygolote, ni se le planteó de parte de los principales el daño que recibieran en aquel trato, ni se le pidió que lo enmendase, sino que con todo cuidado se le dejó confiarse para matarle, siendo también en este sentido injusto el daño que se les hizo.

Cabe destacar aquí lo dicho por Luis Ortíz en el sentido de que la idea agustiniana de que el agravio cometido es la base de justificación de la guerra pasará a ser adoptado por la mayor parte de autores posteriores. "El léxico empleado por San Agustín está presente en autores como Santo Tomás, Grocio, o Vattel."[87]

4. La cuarta razón consiste en que por cómo se dieron los hechos, la pérdida que recibieron los principales en el trato con el Ygolote no fue mucha y la pudieron haber remediado por otra parte. Por estas causas fue también injusto el asalto y señala: "que una guerra ó acontecimiento con derramamiento de sangre humana, muertes, y robos, es cosa gravissima, y no fe puede hazer por cosas de poca importancia, fino por causas urgentes, y muy graves, y antes se debian poner otros medios mas suaves, ó menos rigurosos, que llegar a acometer con armas"[88]. Acude aquí a los autores ya citados y nuevamente al canon Noli "*Pacem habere debet voluntas, bellum necefsitas.*" "El cristiano debe procurar mantener la paz, y no recurrir a la guerra sino en caso de extrema necesidad."[89] "La guerra ha de ser a mas no poder, a pura necesidad, quando ya no se halla otro remedio: por lo qual si pudieron por otro modo remediar

---

83 Silvestre de Ferrara, Francisco, *Summa contra gentes*, Parisiis, 1552.

84 Báñez, Domingo, *Scholastica commentaria in Secundam Secundae Angelici Doctores Partem,* Salmanticae, 1586.

85 Posiblemente Rodríguez, Manuel, *Quaestionum regularium et canonicarum tria volumina*, Salmanticae, 1598.

86 Luis de Molina, *De Justitia et Jure tomi sex*, Coloniae Agrippinae, 1613.

87 Véase Ortiz Sánchez, Luis, ¿Legitimidad de la guerra? Una revisión de la Teoría de la guerra justa, Valencia, Universitat de València, Servei de Publicacions, Departament de Filosofia del Dret Moral I Polític, 2011, págs.. 168-169. Disponible en internet: http://www.tdx.cat/bitstream/handle/10803/81306/ortiz.pdf;jsessionid=F3DA49ABE6C325A727644CF9AA1EE8B6.tdx2?sequence=1. Consultado el 29/09/2024.

88 Paz, Juan de, *op. cit.,* fol. 318, Parecer CIX, Núm. 5.

89 Véase Ortega, Juan Fernando, "La paz y la guerra en el pensamiento agustiniano", en *Revista española de derecho canónico,* España, Volumen 20, Núm. 58, 1965, pág. 30.

su pérdida, fue cosa injusta valerse del medio mas aspero." Ejemplifica con lo siguiente: Como haría injustamente un cirujano, que pudiendo curar al enfermo de un brazo llagado, sin pérdida del brazo por abreviar con la cura tomara por el atajo y le cortara el brazo.

5. La quinta razón consiste en que el fin de la guerra para que sea justa, debe ser la paz. Cita a San Agustín: *Non enim pax quaeritur, ut bellum excitetur, fet bellum geritur, ut pax quaritur, vn bellum* La paz no se pretende, para que se pueda adelantar la guerra, sino que la guerra se lleva a cabo para que se logre la paz.[90] Señala que lo que se pretende en la guerra es el bien común, que se conserve el pueblo en paz y quietud, que no sufra daños o agravios y que no se le defraude en lo que le pertenece.

En el caso que se le propone a Juan de Paz, considera que el pueblo de A estaba en paz y quietud y la pasaban bien con el trato de los Ygolotes. El ataque, según Juan de Paz, lo echó todo a perder pues no se buscó la paz por medio de la guerra sino que estando en paz y quietud buscaron la guerra "y para ir en todo contra derecho, no acometieron esta guerra para conseguir la paz, sino que buscaron la paz y se valieron de ella, para hacer guerra y para evitar un pequeño daño, que se seguía a los Principales del trato con los Ygolotes, que se podía remediar de otra manera…".[91] Para Juan de Paz con el ataque se destruyó el bien común que se obtenía para todo el pueblo derivado del trato con los Ygolotes, ocasionándole un daño grave por el sobresalto y temor continuo a los asaltos y la guerra.

6. La sexta razón consiste en que aunque se pudiera hacer justamente a guerra a los Ygolotes, fue una imprudencia y una ilicitud el llevarla a cabo cuando el pueblo no tiene fuerzas suficientes para resistir al enemigo, pese a que pudieron haber pensado que muerto el Ygolote principal no habría nada que temer, ya que debían haber tenido presente que *varius enim eventus est belli; nunc hunc et nuncillum consumit gladium* (los eventos de la guerra son varios…).[92] Aclara Juan de Paz que el matar a un hombre es una acción ardua y los auto-

[90] Mechthild Dreyer considera que este texto sirve "como prueba en favor del planteamiento de la relación medio – fin entre la paz y la guerra en Agustín". Véase Dreyer, Mechthild,"Se llama 'Guerra' – a lo que es apenas un mínimo bien." Hacia una valoración ética de la guerra en Alberto Magno", en *Revista de estudios sociales,* Universidad de Los Andes, Facultad de Ciencias Sociales, Febrero, Núm. 14, 2003, pág. 131. Consultamos la versión en línea http://res.uniandes.edu.co/view.php/298/view.php#23

[91] Paz, Juan de, *op. cit.,* fol. 318, Parecer CIX, Núm. 6.

[92] Cita del *Secundus Liber Regum*, Cap. XI, Núm. 25.

res del asalto debieron preveer el daño y considerar si tenía fuerzas el pueblo A para defenderse a su vez de los ataques del Ygolote si este lograba escapar o bien de sus parientes y amigos si muriese. Concluye que por no haberlo hecho están obligados a restituir los daños que el Ygolote hiciere al pueblo, "porque con dicha guerra, que empezaron, fueron causa de dichos daños."[93]

7. La séptima razón, remitiéndose a Santo Tomás consiste en la falta de autoridad para hacer la guerra, que únicamente la tiene el soberano, que no reconoce superior en la tierra, como es el Rey.

Juan de Paz hace un interesante señalamiento: en las islas Fiipinas la guerra solamente pueden declararla los Gobernadores por autoridad real para todos los casos que la juzgaren conveniente, no así los Alcaldes Mayores quienes carecen de la autoridad para declararla como guerra ofensiva y tienen muy limitada su autoridad incluso para imponer la pena de muerte a los malhechores aunque pertenezcan al distrito de su jurisdicción, debiendo remitir la causa a Manila. Es claro que el Alcalde Mayor de esa jurisdicción no tiene la potestad para hacer guerra ofensiva o invasiva, por ser cosa más grave que una sentencia de muerte a un malhechor; esto es porque el declarar la guerra "es una sentencia de muchas muertes, y se da facultad, y se embian los soldados para que las executen, con peligro de morir ellos tambien en la execucion."[94] Por esta razón, señala Juan de Paz que no tiene por verdadero ni creíble que el Alcalde Mayor de esa Provincia tuviese comisión para hacer esa guerra invasiva, especialmente estando dicha Provincia tan cerca de Manila, a donde cuando se ofreciere la necesidad de hacer la guerra, se pueden proponer las causas y pedir la licencia y comisión necesaria.

Aclara que lo dicho es aplicable a la guerra ofensiva, porque para la guerra defensiva todos tienen potestad por Derecho natural, como lo acreditan el derecho Canónico y el derecho Civil. En derecho canónico Juan de Paz remite a las Decretales de Gregorio IX que establecen *Cum vim vi repellere omnes leges, omniaque iura permittant.*[95]

---

93 Paz, Juan de, *op. cit.,* fol. 318, Parecer CIX, Núm. 6. Aquí remite a Silvestre de Ferrara y a Manuel Rodríguez en las obras citadas.

94 Ibidem, fol. 319, Parecer CIX, Núm. 7.

95 Véase Decretales de Gregorio IX, Lib. V, Tít. XXXIX *De Sententia Excommunicationis*, Cap. III *Si vero.* Tuvimos a la vista la siguiente edición *Decretales Gregorii Papae IX una cum Libro Sexto, Clementinis, et Extravagantibus a Petro et Francisco Pitheo jurisconsultis ad veteres manuscriptos códices restitutae, et notis illustratae*, Augustae Taurinorium, Ex Typographia Regia, 1746, Tomus Secundus.

Concluye que tiene esta invasión por injusta, también por esta causa de falta de autoridad de quien pueda darla para quitar vidas, aun suponiendo, que el Ygolote hubiera cometido contra los Principales de dicho pueblo de A algún delito, que mereciese pena de muerte, y perdimiento de bienes; porque es como si un particular sin jurisdicción alguna, hubiera hecho muertes, y robos. En este sentido, Juan de Paz se acerca a lo que sostiene Baltazar de Ayala en el sentido de que toda guerra debe hacerse con la autoridad del príncipe, pues en él reside el arbitrio de la guerra y de la paz y no le corresponde al particular este derecho, ya que para eso están los tribunales. Sólo con el conocimiento y consulta del príncipe reunirá el particular una fuerza levantada en armas. [96]

II. A lo segundo se responde, según Juan de Paz, que están obligados a restituir todo lo que robaron y a pagar todos los daños, que hicieron. La razón única radica en que fue daño y robo contra justicia y todos los Doctores asientan que todos los daños que se hacen en guerra injusta deben ser satisfechos por los agresores injustos y consta del Derecho que si no restituyen, no se les perdonará el pecado, ni ante Dios. Para la Iglesia se perdona el pecado, hasta que se restituya con efecto lo que se hurtó. Es fingida la penitencia, que se hace, si no restituye lo que se hurtó y no hay arrepentimiento verdadero del pecado, hasta que se paga lo hurtado, si hay posibilidad de ello. Remite al Decreto de Graciano: *Si res aliena, propter quam peccatum est, cum reddi possit, non redditur, non agitur poenitentia, sed singitur. Si autem veraciter agitur, non remittitur peccatum, nisi restituatur ablatum.*[97]

VII. Conclusión

Las controversias sobre la legitimidad de la presencia castellana en Indias dieron lugar a múltiples opiniones y cambios en las leyes de conquista y ocupación. Si bien las polémicas no llegaron a poner en peligro esa presencia en Indias, sí obligaron a replantear múltiples ideas y creencias medievales.

Dentro de las denominadas *polémicas indianas*, el tema de la Justicia de la Guerra destaca particularmente. Preocupaba a los juristas y teólogos tanto en

[96] Véase Peralta, Jaime, *Baltasar de Ayala y el derecho de la guerra,* Instituto Ibero-Americano de Gotemburgo, Insula, Suecia-Madrid, 1964, p. 64.

[97] Véase *Decreti* Secunda Pars, Causa XIX, Quaest. VI, C. I *Poenitentia non agitur, si aliena res non resttuatur.*

la península como en las Indias, determinar si la guerra contra los indígenas era justa, de ahí el desarrollo de diversas teorías al respecto.

Las referencias a Santo Tomás en su *Suma Teológica, IIa IIae* y a San Agustín en sus *Questionum in Heptateuchum Libri Septem*, *Liber Sextus, Quaestiones in Iesum Nave*. Las obras de Domingo Báñez, Roberto Belarmino, Christoforus Besoldus, Juan Buridan, Luis de Molina, Pedro Augusto de Morla, Manuel Rodríguez, Francisco Silvestre de Ferrara, Tomás de Vío y Francisco Vitoria entre otras, se verán citadas constantemente. Asimismo el Decreto de Graciano, las Decretales de Gregorio IX, la Biblia, el Digesto y las Instituciones de Justiniano serán referencia en los textos sobre la justicia de la Guerra.

Aspectos prácticos notables sobre el tema se desarrollaron tanto en América como en las Filipinas que llevan inclusive a épocas tardías como el siglo XVIII, en el que se aclara que por el nombre guerra no se debe entender solamente la que se hacía en la hueste sino también la hecha al servicio de la patria o en las guarniciones del reino en tierra, mar, río o rivera.

El planteamiento de la polémica de la Justa Guerra en las Indias y Filipinas tomó rumbos diferentes que en España. Las discusiones tanto en Nueva España y tiempo después en el Perú planteaban más que el tema de la ética de la conquista en torno al justo título, el tema de los métodos de evangelización y los modos de atraer a la Corona de Castilla a las poblaciones del nuevo mundo. Temas como la obligación de restituir en caso de una guerra injusta habrán de preocupar a teólogos como Fray Juan de Paz en las Filipinas y a Fray Alonso de la Vera Cruz para quien es claro que si los indios fueron reducidos por razón de su infidelidad, el emperador está obligado a la restitución de todas aquellas cosas en que los infieles, quienes vivían pacíficamente, sufrieron pérdida.

Cabe destacar que para Pedro Murillo Velarde las causas justas para declarar la guerra son:

1. Para recuperar una provincia o una cosa debida y no dada por otro.
2. Para vengar una grave injuria, u ofensa hecha al príncipe; *y*
3. Para tomar venganza del príncipe que auxilia el enemigo, que hace una guerra injusta.

Una de las preocupaciones que se plantearán en las Indias será que se debe examinar no sólo la causa justificada que los españoles puedan tener contra los indios, sino también la que los indios tienen contra los españoles. Es claro además que los infieles no están privados de dominio por razón de su infidelidad. En consecuencia, poseen justamente lo que retienen.

Se hace la distinción en el sentido de que si la contienda se hace entre particulares se llama *duelo o riña*; en cambio si sucede entre el príncipe y el pueblo

a él sujeto, se llama *rebelión*; si entre los ciudadanos y la república: *sedición,* si la república está dividida entre los ciudadanos, será *guerra civil*.

Resulta destacable lo señalado por Fray Alonso de la Vera Cruz respecto al argumento consistente en que por la libre voluntad, tanto del rey como de todo el pueblo, se sometieron al emperador y, en su nombre, a sus capitanes, como si eligieran al mismo emperador como su propio rey, esto no es suficiente. En primer lugar, porque queda en duda con qué derecho se hizo la primera entrada de soldados en armas en estas tierras, en segundo lugar, porque, aunque se hubiese dado aquella sumisión, no parece que haya sido libre sino obligada, no nacida del amor sino del temor, conocido el arrojo de los españoles armados y su ferocidad, "y advertida la condición y pusilanimidad de estos naturales."

Autores como Montemayor señalarán que la omisión de la declaración de guerra se considera una suerte de traición calificada, al no dar oportunidad de prevenirse o resguardarse. Una vez que se hace la debida denunciación o declaración de guerra los denunciados adquieren el carácter de enemigos públicos con quienes corren los derechos de la guerra, de manera que lo apresado entre las partes en estas guerras es conforme a derecho, de quien lo aprehende.

Para Fray Juan de Paz, todos los daños que se hacen en guerra injusta deben ser satisfechos por los agresores injustos, si no restituyen, no se les podrá perdonar el pecado correspondiente.

En cuanto a las muertes, Juan de Paz sostiene que la vida del hombre libre no es apreciable por ningún dinero y por ello no hay obligación en el homicida de pagar dinero alguno por razón de la vida que quitó. Se funda en el Digesto y particularmente en la *Lex Rhodia de Iactu.* En el ajuste de los daños y muertes como no hay precio señalado y fijo, siempre se ha de estar al pacto que las partes hicieren entre sí, pudiéndose compensar los daños cometidos por una parte, con los hechos por la otra.

BIBLIOGRAFÍA, HEMEROGRAFÍA Y FUENTES

Aquino, Tomas de, *Suma Teológica*, trad. del latín de Hilario Abad de Aparicio, revisada y anotada por el R. P. Manuel Mendía, Madrid, Moya y Plaza Editores, 1882, t. III.

Barrientos Grandón, Javier, "La literatura jurídica indiana y el ius commune", en Alvarado Planas, Javier (Coord.), *Historia de la literatura jurídica en la España del antíguo régimen,* Madrid, Marcial Pons, volúmen 1, 2000.

Barrientos Grandón, Javier, *Juan Francisco Montemayor. Un jurista aragonés en las Indias*, Zaragoza, Diputación Provincial de Zaragoza, Area de Cultura, 2001, Colección Benjamín Jarnés.

Beuchot, Mauricio y Bernabé Navarro (Comps.), *Dos homenajes: Alonso de la Veracruz y Francisco Xavier Clavijero*, México, UNAM, Instituto de Investigaciones Filosóficas, 1992.

Carrillo Cázares, Alberto, "Tratados novohispanos sobre la Guerra Justa en el siglo XVI", en Bataillon, Gilles, et. al. (Coords.), *Las teorías de la guerra justa en el siglo XVI y sus expresiones contemporáneas*, México, UNAM, CIDE, Facultad de Filosofía y Letras, Centro de Estudios Mexicanos y Centroamericanos, Embajada de Francia en México, 2008.

Carro, Venancio P. *La teología y los teólogos juristas españoles ante la conquista de América*, Madrid, CSIC, Tomo I, 1944.

Casas, Fray Bartolomé de las, *Casas, Bartolomé de Las, Historia de las Indias,* 2ª ed., Fondo de Cultura Económica, Estudio Introductorio Lewis Hanke, 1965, 3 tomos.

Cerezo de Diego, Prometeo, *Alonso de Veracruz y el Derecho de* Gentes, México, Prólogo de César Sepúlveda, Porrúa, 1985.

Clément, Jean-Pierre, "De las ofensas contra los indios. La injusticia de la guerra y otras violencias, según el Padre Las Casas", en Bataillon, Gilles, et. al. (Coords.), *Las teorías de la guerra justa en el siglo XVI y sus expresiones contemporáneas*, México, UNAM, CIDE, Facultad de Filosofía y Letras, Centro de Estudios Mexicanos y Centroamericanos, Embajada de Francia en México, 2008.

Correa, Roberto, "Fray Alonso de la Vera Cruz Semblanza Bio Bibliográfica", en Vera Cruz, Fray Alonso de la, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Edición crítica, traducción y notas de Roberto Heredia Correa, México, UNAM, 2007.

Correa, Roberto, "Fray Alonso de la Vera Cruz Semblanza Bio Bibliográfica", en Vera Cruz, Fray Alonso de la, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Edición crítica, traducción y notas de Roberto Heredia Correa, México, UNAM, 2007.

Cruz Barney, Oscar, "Estudio Introductorio: Piratas, soldados y batallas ¿para quién es el botín?", en Montemayor y Córdoba de Cuenca, Juan Francisco de, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* Juan Ruiz Impresor, 1658, ed. facsimilar, CONACULTA-INAH, ICAVE, Colección Historias.

Cruz Barney, Oscar, *Historia del Derecho Indiano,* Primera reimpresión, Valencia, Tirant Lo Blanch, 2021.

Cruz Barney, Oscar, *Una visión indiana de la justicia de la guerra,* México, Instituto de Investigaciones Jurídicas, UNAM, 2014.

Dougnac Rodríguez, Antonio *Manual de historia del derecho indiano,* México, Instituto de Investigaciones Jurídicas, UNAM, 1994.

Elizondo, Francisco Antonio de, *Práctica universal forense de los tribunales superiores e inferiores, de España, y de las Indias*, Tercera Edición, En la Imprenta de Ramón Ruiz, 1796, Tomo III.

Faustino Gutiérrez Alviz y Armario, en *Diccionario de derecho romano,* Madrid, Reus, 1982, *sub voce* "ius postlimini". Asimismo D'Ors, Alvaro, *Derecho Privado Romano,* 7ª edición, Pamplona, Universidad de Navarra, 1989

Frost, Elsa Cecilia, "Veracruz, introductor de la filosofía en la Nueva España", en Beuchot, Mauricio et. al., *Homenaje a Fray Alonso de la Veracruz en el cuarto centenario de su muerte (1584-1984),* México, Universidad Nacional Autónoma de México, 1986.

Ginés de Sepúlveda, Juan *Tratado sobre las justas causas de la guerra contra los indios,* estudio de Manuel García Pelayo, 3a. reimpr., Fondo de Cultura Económica, México, 1996.

Gómez Robledo, Antonio, "Alonso de la Veracruz. Vida y Muerte", en Beuchot, Mauricio et. al., *Homenaje a Fray Alonso de la Veracruz en el cuarto centenario de su muerte (1584-1984),* México, Universidad Nacional Autónoma de México, 1986.

Herrera Gómez, Néstor y Silvino M. González, *Apuntes para una bibliografía militar de México, 1536-1936,* México, Secretaría de Guerra y Marina, Comisión de Estudios Militares, Biblioteca del Ejército, Sección de Estudios Militares del Ateneo, 1937.

Iglesias, Juan, *Derecho Romano, instituciones de derecho privado,* Barcelona, Ariel, 1982, pág. 128.

Keesing, Felix Maxwell, *The Ethnohistory of Northern Luzon*, California, Stanford University Press, 1962.

Las Casas, Bartolomé de, *Brevísima relación de la destrucción de las Indias,* 14ª ed., Madrid, Edición de André Saint-Lu, Ediciones Cátedra, 2005.

Las Casas, Bartolome de, *Tratados,* Prol. de Lewis Hanke y Manuel Giménez Fernández, transcripción de Juan Pérez de Tudela Bueso y traducciones de Agustín Millares Carló y Rafael Moreno, México, Fondo de Cultura Económica, Tomo I, 1997.

López, Gregorio, Glosa Magna. *Sobre la doctrina de la guerra justa en el siglo XVI*, Presentación, edición y crítica de Ana Ma. Barrero García, Versión Castellana de Ana Ma. Barrero García y José Ma. Soto Rábanos, México, ELD, 2005.

Margadant, Guillermo Floris, *La Iglesia ante el derecho mexicano. Esbozo histórico-jurídico,* México, Miguel Ángel Porrúa, 1991.

Martínez Ferrer, Luis, (Ed), *Decretos del concilio tercero provincial mexicano (1585), Edición histórico crítica y estudio preliminar por Luis Martínez Ferrer,* México, El Colegio de Michoacán, Universidad Pontificia de Santa Cruz, 2009.

Medina, José Toribio, *La imprenta en México (1539- 1821).* Edición facsimilar por la Universidad Nacional Autonoma de México, México, 1989, tomo II.

Molina, Luis de, *De Justitia et Jure tomi sex*, *Hac postrema editione emendati insuper summarijs et indicibus aucti*, Antuerpiae, apud Ioannem Keerbergium, 1615.

Molinae, Ludovici, *De Iustitia et Jure Opera Omnia, tractatibus Quinque, tomisque totidem comprehensa. Editio Novissima,* Coloniae Allobrogum, Sumptibus Marci-Michaelis Bousquet, 1733, 5 tomos.

Montemayor y Córdoba de Cuenca, Juan Francisco de, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* Juan Ruiz Impresor, 1658, ed. facsimilar, CONACULTA-INAH, ICAVE, Colección Historias de San Juan de Ulúa en la Historia, vol. IV, Coordinador Pablo Montero, Compilación y estudio introductorio Oscar Cruz Barney, México, 2001.

Montemayor y Cordoba de Cuenca, Juan Francisco, *Discurso político, histórico, jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra, premios y castigos de los soldados,* México, Juan Ruiz Impresor, 1658.

Murillo Velarde, Pedro, *Cursus Juris Canonici, Hispani, et Indici,* Matriti, Ex Typographia Emmanuelis Fernandez, 1743, 2 vols.

Ortiz Sánchez, Luis, *¿Legitimidad de la guerra? Una revisión de la Teoría de la guerra justa,* Valencia, Universitat de València, Servei de Publicacions, Departament de Filosofia del Dret Moral I Polític, 2011.

Palau y Dulcet, Antonio, *Manual del librero hispano-americano,* reimpresión de la primera edición, Julio Ollero Editor, Madrid, 1990, t.V.

Paz, Juan de, *Consultas y resoluciones varias theológicas, jurídicas, regulares y morales*, Sevilla, Thomas López de Haro, 1687.

Paz, Juan de, *Consultas y resoluciones varias, theologicas, juridicas, regulares y morales, resueltas por … Fr. Juan de Paz, de la sagrada religión de Predicadores*, En Amberes, a costa de los hermanos de Tournes, 1745.

Peña Battle, Manuel A., *La Isla de la Tortuga, Plaza de Armas, refugio y seminario de los enemigos de España en Indias*, Santo Domingo, 3a edición, Editora Taller, 1988.

Peralta, Jaime, *Baltasar de Ayala y el derecho de la guerra,* Instituto Ibero-Americano de Gotemburgo, Insula, Suecia-Madrid, 1964.

S. Antonio, Juan Francisco de, *Chronicas de la apostolica provincia de S. Gregorio de Religiosos Descalzos de N.S.P. S. Francisco en las Islas Philipinas, China, Japon, &c. Parte primera en que se Incluye la descripción de estas Islas, Que Consagra a la S.C.R. Magestad de D. Phelipe V. El Animoso, Nuestro Cathólico Rey, y Augusto Emperador de las Españas, y de las Indias, la misma Santa Provincia*, Impresa en la Imprenta del uso de la propia Provincia, sita en el Convento de Ntra. Señora de Loreto del Pueblo de Sampaloc, Extra-muros de la Ciudad de Manila, Por Fr. Juan del Sotillo, Año de 1738.

Sánchez Bella, Ismael, "Estudio Introductorio", *Rodrigo de Aguiar y Acuña y Juan Francisco Montemayor y Cordoba de Cuenca, Sumarios de la Recopilación General de Leyes de las Indias Occidentales,* Con Licencia en México, Impreffos por Francifco Rodriguez Lupercio, 1677, México, ed. Facsimilar, Fondo de Cultura Económica, UNAM.

Sánchez Bella, Ismael, Sánchez Bella, Ismael *et al., Historia del derecho indiano,* Madrid, Mapfre, 1992 (colección "Relaciones entre España y América").

Schafer, Ernesto, *El Consejo Real y Supremo de las Indias,* Sevilla, Escuela de Estudios Hispanoamericanos, 1947, tomo II.

Soto, Domingo de, *De Iustitita et Iure libri decem*, Salmanticae, M.A. Terranova, 1556.

Soto, Domingo de, *De la justicia y del derecho*, Versión castellana e introducción del Dr. P. Venancio D. Carro, O.P., Madrid, Instituto de Estudios Políticos, Sección de Teólogos Juristas, 1968, 5 tomos.

Toribio Medina, José, *Biblioteca hispanoamericana (1493-1810),* Santiago de Chile, edición facsimilar del Fondo Histórico y Bibliográfico José Toribio Medina, 1961, t. IV (1701-1767)

Toribio Medina, José, *La imprenta en México (1539-1821),* edición facsimilar de la UNAM, México, 1989, t. II III; asimismo Palau, t. V y VI; Jiménez Catalán, Manuel, *Ensayo de una tipografía zaragozana del S. XVII,* Zaragoza, Tip. La académica, 1925.

Torre Rangel, Jesús Antonio de la, *Alonso de la Veracruz: amparo de los indios. Su teoría y práctica jurídica,* México, Universidad Autónoma de Aguascalientes, 1998.

Vera Cruz, Fray Alonso de la, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Edición crítica, traducción y notas de Roberto Heredia Correa, México, UNAM, 2007.

Vitoria, Francisco de, *Relectio de Indis,* edición crítica bilingüe de L. Pereña y J. M. Pérez Prendes, Consejo Superior de Investigaciones Científicas, Madrid, 1967.

Zavala, Silvio, *Fray Alonso de la Veracruz. Primer maestro de derecho agrario en la incipiente universidad de México 1553-1555,* México, Centro de Estudios de Historia de México CONDUMEX, 1981.

Hemerografía

Cruz Barney, Oscar, "La bibliografía del *Discurso político jurídico del derecho y repartimiento de presas y despojos aprehendidos en justa guerra. Premios y castigos de los soldados* de don Juan Francisco de Montemayor y Córdoba de Cuenca", *Anuario mexicano de historia del Derecho*, Instituto de Investigaciones Jurídicas, núm. XIV, UNAM, México, 2002.

Dreyer, Mechthild, "Hacia una valoración ética de la guerra en Alberto Magno", en *Revista de estudios sociales,* Universidad de Los Andes, Facultad de Ciencias Sociales, Febrero, Núm. 14, 2003.

Gómez Robledo, Antonio,"El problema de la conquista en Alonso de la Veracruz", en *Historia Mexicana*, Vol. XXIII, enero-mayo, 1974.

Ortega, Juan Fernando, "La paz y la guerra en el pensamiento agustiniano", en *Revista española de derecho canónico,* España, Volumen 20, Núm. 58, 1965.

Rodríguez-Sala, Maria Luisa y B. de Erice, Miguel, "Juan Francisco de Montemayor y Córdoba de Cuenca, abogado, oidor y recopilador del siglo XVII", *Anuario mexicano de historia del derecho,* México, Instituto de Investigaciones Jurídicas, UNAM, IX, 1997.

Fuentes

Concilio III Provincial Mexicano, celebrado en México el año de 1585, México, Mariano Galván Rivera (ed.), 1a. ed. en latín y en castellano, Eugenio Maillefert y Compañía, 1859.

Concilium Mexicanum Provinciale III. Celebratum Mexici Anno MDLXXXV. Praeside D.D. Petro Moya, et Contreras Archiepiscopo Ejusdem Urbis. Confirmatum Romae Die XXVII Octobris Anno MDLXXXIX, Mexici, Ex Typoigraphia Bac. Josephi Antonii de Hogal, Anno MDCCXX.

Corpus Juris Canonici Academicum, emendatum et notis P. Lancellotti Illustratum, Coloniae Munatianae, Impensis Emanuelis Turneysen, 1783, Tomus Primus.

de San Juan de Ulúa en la Historia, vol. IV, Coordinador Pablo Montero, México, 2001

Decretales Gregorii Papae IX una cum Libro Sexto, Clementinis, et Extravagantibus a Petro et Francisco Pitheo jurisconsultis ad veteres manuscriptos códices restitutae, et notis illustratae, Augustae Taurinorium, Ex Typographia Regia, 1746, Tomus Secundus.

El Digesto de Justiniano. Trad de Alvaro D'Ors, Aranzadi, Pamplona, 1975, tomo III.

THE JUST CAUSE OF WAR FROM THE PERSPECTIVE OF THE SALAMANCA SCHOOL[1]

doc. JUDr. Peter Vyšný, PhD. et Ph.D.
Trnava University, Faculty of Law,
Department of Historical Law and Legal Methodology
E-mail: petervysny@hotmail.com
ORCID: 0000-0001-5132-1291

Abstract: *Scholars associated with the Salamanca School have formulated a general just cause of war, which was the infliction of grave injury of the just side by the unjust side. In addition, they have rejected the thesis that the cultural and especially religious otherness of a foreign country would be a just cause for waging war against it. However, they did not reject as a just cause for war the harm caused by certain elements of a way of life or certain forms of behavior resulting from cultural/religious otherness. The author of the article attempts to explain this discrepancy using the example of Francisco de Vitoria's complex thinking about just war, Spanish colonization of America and related issues, and the context of the Spanish military conquest of the Americas. Having done so, the author concludes that Vitoria and other scholars only partially departed in opinion from conquistadors, colonists, some royal or ecclesiastical dignitaries, missionaries or intellectuals who justified the Spanish conquest directly by the cultural/religious otherness of the indigenous inhabitants of the Americas – the Indians. Vitoria and other scholars differed in principle only in the fact that they favored the nonviolent establishment of Spanish rule over the Americas and the nonviolent evangelization of the Indians, but like them, they were convinced that both Spanish rule and evangelization would have positive effects for the Indians – "imperfect" Indian societies would become an integral part of the "perfect" European Christian civilization represented by the Spanish monarchy.*
Keywords: *Salamanca School, just war theories, just and unjust causes of war, injury, cultural/religious otherness of the unjust side, Spanish conquest of America, Indians, Francisco de Vitoria*

[1] The article was carried out within the VEGA research project no. 1/0202/22 titled "Theories of just war of the School of Salamanca scholars and their legacy in modern theories of just war and modern law of war" (in the Slovak original: "Teórie spravodlivej vojny učencov Salamanskej školy a ich odkaz v moderných teóriách spravodlivej vojny a modernom vojnovom práve").

Problematics

The Salamanca School is an important part of the history of theological and philosophical thought, as well as political and legal sciences.[2] Scholars belonging directly or indirectly to this School lived in Spain, elsewhere in Western Europe, or in Spain's overseas colonies. The School also had some resonance in Central and Eastern Europe, including, for example, at the historic Trnava University (*Universitas Tyrnaviensis*).[3] The Salamanca School thus had global dimensions. On the other hand, the teachings of this School were heterogeneous – local scholars treated the same themes more or less differently.[4]

The Salamanca School flourished approximately in the first two centuries of the early modern period (from the 16th to the 17th century). In this historical period, wars were common: Europeans fought against the Ottoman Turks, Catholics against Protestants, and European colonizers against the indigenous inhabitants of the non-European world. It is not surpris-

---

[2] The complex theological and philosophical school known as the Spanish, Second or Late Scholasticism is often called the Salamanca School (in Spanish Escuela de Salamanca) after its original centre, the University of Salamanca, Spain. On the Salamanca School, see e.g. ALVES, Andre A. and MOREIRA, José M. *The Salamanca School.* London: Continuum, 2009. BURNS, J. H. (ed.). *The Cambridge History of Political Thought 1450–1700.* Cambridge: Cambridge University Press, 1991. CEREZO DE DIEGO, Prometeo. *La influencia de las ideas de la escuela de Salamanca en América.* Madrid: Real Colegio Universitario "María Cristina", 1985. *Die Schule von Salamanca. Eine digitale Quellensammlung und ein Wörterbuch ihrer juristisch-politischen Sprache* [online]. Available at: <https://www.salamanca.school/de/index.html> [cit. 2024-08-25]. MELQUÍADES, Andrés. *La teología española del siglo XVI.* Madrid: Biblioteca de Autores Cristianos, 1976. PÉREZ LUÑO, Antonio E. *La polémica sobre el Nuevo Mundo. Los clásicos españoles de la Filosofía del Derecho.* Segunda Edición. Madrid: Trotta, 1995. PIEPER, Josef. *Scholastika.* Praha: Vyšehrad, 1993. PONCELA GONZÁLES, Ángel. *La escuela de Salamanca. Filosofía y Humanismo ante el mundo moderno.* Madrid: Verbum, 2015. VACURA, Miroslav et al. *Přehled dějin novověké filosofie.* Praha: Oeconomica, 2013. VELASCO SÁNCHEZ, José-Tomás. *La Escuela de Salamanca. Concepto, miembros, problemas, influencias, pervivencias.* Madrid: Bubok Publishing, 2015.

[3] KRISTÓF, Ildikó Sz. Local Access to Global Knowledge: Historia Naturalis and the Anthropology at the Jesuit University of Nagyszombat (Trnava) as transmitted in its Almanacs (1676–1709). In: ALMÁSI, Gábor (ed.). *A Divided Hungary in Europe: Exchanges, Networks and Representations, 1541-1699, Volume 1 – Study Tours and Intellectual-Religious Relationships.* Newcastle upon Tyne: Cambridge Scholars Publishing, 2014, pp. 201–228.

[4] For more details, see e.g. DUVE, Thomas. Chapter 1. The School of Salamanca. A Case of Global Knowledge Production. In: DUVE, Thomas, EGÍO, José L. and BIRR, Christianne (eds.). *The School of Salamanca: A Case of Global Knowledge Production.* Leiden: Brill, 2021, pp. 1–42.

ing, therefore, that scholars of the Salamanca School explored the justice or, in modern terms, the legality and legitimacy of contemporary military conflicts, primarily the Spanish conquest of the Americas, some of whom also developed comprehensive theories of just war (hereinafter referred to as "theories").

The basic characteristics of the above theories can be briefly summarised as follows:

1. *Relative complexity.* The theories deal, though not all to the same degree, with *ius ad bellum, ius in bello* and *ius post bellum*.[5]
2. *Heterogeneity.* Theories share common elements, but at the same time they differ in various ways.[6]
3. *Continuity with Aquinas' doctrine of just war to some extent.*[7] This continuity is manifested in particular in the definition of the following essential preconditions for a just war: *auctoritas legitima* (declaration of war by the competent public authority – the sovereign ruler); *iusta causa* (just cause of war, which is the injury – *iniuria* caused to the just side); *recta intentio* (the right intention of the waging of war: to achieve an adequate redress of the injury); and the proper *de facto* manner of waging war (use of military force against the unjust side only to the extent strictly necessary and not directly against so-called *innocentes,* i.e. civilians, etc.).
4. *The judicial character of a just war.* The theories view a just war as a *sui generis* judicial process in which the victorious just side judges and punishes the defeated unjust side.[8] Here, however, the victorious just side violated the principle *"nemo iudex in causa sua"* ("no one should be a judge in his own cause") that is a precondition to a fair trial, and therefore, I believe understanding a just war as a judicial process is a problematic aspect of the theories.

---

5 See e.g. CRUZ BARNEY, Oscar. *Historia del derecho en México.* Segunda edición. Mexico City: Oxford University Press, 2006, p. 160ff. GÓMEZ ROBLEDO, Antonio. *Fundadores del derecho internacional. Vitoria, Gentili, Suárez, Grocio.* México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1989. VYŠNÝ, Peter. *Historicko-právne súvislosti dobytia Nového sveta Španielmi.* Trnava: Typi Universitatis Tyrnaviensis, 2015, p. 82ff.

6 Ibidem.

7 BEESTERMÖLLER, Gerhard. *Thomas von Aquin und der gerechte Krieg. Friedensethik im theologischen Kontext der Summa Theologiae.* Köln: J. P. Bachem Verlag Köln, 1990.

8 See e.g. CRUZ BARNEY, Oscar. *Historia del derecho en México,* p. 160ff. VYŠNÝ, Peter. *Historicko-právne súvislosti dobytia Nového sveta Španielmi,* p. 82ff.

5. *Pragmatic purpose.* The theories were not only academic works, but were also meant to help advance certain practical (political, economic or other) interests, e.g. to help justify Spanish colonial expansion.[9] On the other hand, they can be clearly distinguished from the contemporary law of war (*ius belli*), which was at least to some extent applied in military conflicts. This law did not take the form of a coherent system. It mainly regulated practical issues connected with the factual course of a war that had already begun (*ius in bello*), treating the belligerents as equals (by contrast, just war theories accorded the just side a privileged position).[10]

In the works in which the scholars of the Salamanca School dealt with just war, they paid particular attention to the issue of its causes. With a focus on this issue, I have analyzed the works of selected prominent scholars, listed in the table below.

Scholar	Work
Francisco de Vitoria	*Relectiones de Indis* (ca. 1539) (*Relectio prior de Indis recenter inventis; De Indis relectio posterior, sive de iure belli hispanorum in barbaros*)
Domingo de Soto	*De iustitia et iure* (1553–1554)
Luis de Molina	*De iustitia et iure* (1593–1600)
Francisco Suárez	*De Charitate, disputatio XIII De Bello* (1621)
Diego de Covarrubias y Leyva	*Relectio in Regulam Peccatum* (1554)
Baltasar de Ayala	*De iure et officiis bellicis et disciplina militari* (1582)
Juan Ginés de Sepúlveda	*Democrates secundus (alter), sive de iustis belli causis apud Indios* (ca. 1544)
Alonso de Veracruz	*Relectio de Dominio infidelium et iusto bello* (1555–1556)

[9] See e.g. KOSKENNIEMI, Martti. Vitoria and Us. Thoughts on Critical Histories of International Law. *Rechtsgeschichte/Legal History Rg.,* 22, 2014, pp. 119–138. MATSUMORI, Natsuko. *The School of Salamanca in the Affairs of the Indies. Barbarism and Political Order.* New York: Routledge, 2021, ch. 4.

[10] HAGGENMACHER, Peter. Guerra justa y guerra regular en la doctrina española del siglo XVI. *Revista Internacional de la Cruz Roja,* No. 13, 1992, pp. 459–471.

It is not possible in this paper to systematically reproduce my analysis of the above extensive works (primary sources), parts of which I have published elsewhere.[11] I will therefore present below only three general findings to which my analysis has led me.

Finding One. Scholars have rejected the traditional, medieval and even at the beginning of the early modern period more or less accepted causes of a just war. Among the main causes rejected were:

- The desire of a ruler to increase the territory and resources of his own country at the expense of a foreign country, or to gain military glory or increase his own wealth.[12]
- The extension of the emperor's rule as "lord of the whole world" to countries not yet effectively subject to him.[13]
- The alleged right of the Pope as "lord of the whole world" to militarily depose the original rulers of non-Christian countries and install new, Christian rulers.[14]
- The occupation of countries of non-Christians (pagans, infidels, barbarians) under the pretext that they are *res nullius* (*terra nullius*) because of the extreme sinfulness of their inhabitants. The extreme sinfulness of non-Christians was also conceptualized in the period as a lack or absence of rea-

[11] VYŠNÝ, Peter. *Historicko-právne súvislosti dobytia Nového sveta Španielmi,* p. 82ff. VYŠNÝ, Peter. The Valladolid debate (1550-1551): An overview of its historical background and intellectual content. *Forum Iuris Europaeum: recenzovaný časopis pre právnu vedu,* vol. 3, no. 2, 2015, pp. 67–84. VYŠNÝ, Peter. Francisco de Vitoria a španielska conquista Nového sveta. *Právník: teoretický časopis pro otázky státu a práva*, vol. 155, no. 4, 2016, pp. 310–330. VYŠNÝ, Peter. Prvotná okupácia ako spravodlivý titul španielskej conquisty Ameriky. *Právnické listy,* vol. 9, no. 2, 2021, pp. 8–13. VYŠNÝ, Peter. Teória spravodlivej vojny Francisca de Vitoriu. *Právník: teoretický časopis pro otázky státu a práva,* vol. 160, no. 9, 2021, s. 759–778. VYŠNÝ, Peter. Teória spravodlivej vojny Francisca Suáreza. In: GÁBRIŠ, Tomáš, HORÁK, Ondřej and TAUCHEN, Jaromír (eds.). *Školy, osobnosti, polemiky: pocta Ladislavu Vojáčkovi k 65. narozeninám.* Brno: The European Society for History of Law, 2017, pp. 597–608. VYŠNÝ, Peter and PRUDOVIČ, Marek. Koncepcia spravodlivej vojny v stredovekej a rano-novovekej sociálno-právnej filozofii. *Právněhistorické studie*, vol. 53, no. 2, 2023, pp. 61–80.

[12] This just cause of war was based on *Las Siete Partidas,* Partida segunda, título XXIII. *Las Siete Partidas del Rey don Alfonso el Sabio, cotejadas con varios codices antiguos por la Real Academia de la Historia.* Tomo Segundo. Madrid: La Imprenta Real, 1807, p. 226ff.

[13] This just cause of war was related to the fact that King Charles I of Spain was also Emperor Charles V of the Holy Roman Empire of the German Nation, who positioned himself as a ruler superior to all other rulers.

[14] CASTAÑEDA DELGADO, Paulino. *La teocracia pontifical en las controversias sobre el nuevo mundo.* México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1996.

son (rationality) and barbarism (uncivilized way of life). In the view of the medieval theologians Aegidius Romanus, Cardinal Hostiensis, or Alonso de Cartagena, and the canon law principle *"nullus est dominus civilis, quam est in peccato mortali"* ("no one can be *dominus,* i.e. a ruler and owner under civil law while in a state of mortal sin") (a principle abrogated by the Council of Constance), extreme sinfulness deprived non-Christians of the natural right of *dominium,* i.e., the right to their own sovereign rule and ownership of their territory, resources and possessions.[15] Conversely, according to Aquinas, extreme sinfulness does not deprive one of *dominium,* for natural law applies even to extremely sinful non-Christians if they are otherwise sufficiently rational and civilized.[16]

- Punishment of the barbarians for their extremely sinful way of life, manifested itself as: idolatry, promiscuity, polygyny, homosexuality, tyrannical nature of the government, sacrificing people to the gods, ritual cannibalism, etc.[17]
- Holy War, i.e., military expansion of Christianity and fighting hard against those who oppose it.

However, there was also a cause from Greek antiquity that the scholars did not completely reject. This cause was Aristotle's theory of natural slavery, according to which uncivilized and irrational barbarians are naturally destined to be slaves, or some kind of servants with a slightly better status than that of slaves, of "more perfect", civilized and rational people. For barbarians, supposedly, it can be positive if they find themselves under the rule of civilized and rational people – in time they can become at least somewhat civilized and rational themselves, i.e., they can go through a process of some kind of their own "improvement".[18]

Finding Two. Scholars have formulated, following Aquinas, a general just cause of war, which was the infliction of grave injury (*gravis iniuria*) of the just side by the unjust side. This cause was of a natural law and rational nature.

---

[15] For more details, see e.g. GREWE, Wilhelm G. *The epochs of international law.* Berlin: De Gruyter, 2000, p. 53. RUMEU DE ARMAS, Antonio. *El tratado de Tordesillas. Rivalidad hispano-lusa por el dominio de oceános y continentes.* Madrid: MAPFRE, 1992, pp. 41–43.

[16] *Sancti Thomae Aquinatis Summa Theologiae,* II-II q. 10 [online]. Available at: <http://summa.op.cz/sth.php?&Q=10> [cit. 2024-07-25].

[17] For more details, see e.g. TOSI, Giuseppe. Sins against Nature as Reasons for a 'Just War': Sepúlveda, Vitoria and Las Casas. In: HOFMEISTER PICH, Roberto and SANTIAGO CULLETON, Alfredo (eds.). *Right and Nature in the First and Second Scholasticism. Derecho y Naturaleza en la primera y segunda escolástica. Acts of the XVIIth Annual Colloquium of the Société Internationale pour l'Etude de la Philosophie Médiévale,* Porto Alegre, Brazil, 15-18 September 2010. Turnhout: Brepols, 2014, pp. 199–229.

[18] ARISTOTELES. *Politika.* Bratislava: Kalligram, 2009, p. 31ff.

According to scholars, the injury could take many specific forms, e.g. the arbitrary and violent seizure of the territories, settlements, resources, possessions, and inhabitants of a foreign country. Francisco de Vitoria viewed the injury as a violation of the cogent natural right *ius naturalis societatis et communicationis,* which from the *ius gentium* was implied to all the countries of the world, or rather to their inhabitants. This right included: the right to travel to and through the territory of a foreign country, as well as to temporarily reside or permanently settle there; the right to trade in a foreign country; and the right to receive necessary assistance in a foreign country.[19]

Finding Three. Scholars have rejected the notion that the cultural and especially religious otherness of a foreign country would be a just cause for waging war against it. On the other hand, they did not reject as a just cause for war the harm caused by certain elements of a way of life or certain forms of behavior resulting from cultural/religious otherness.

This last observation leads us to the hypothesis of this paper.

Hypothesis

As we have just seen, the scholars of the Salamanca School rejected cultural/religious otherness as a just cause for war. On the other hand, various particular elements of the way of life and forms of behavior resulting from this otherness regarded as just causes for war. I will attempt to explain this by using the example of Francisco de Vitoria's complex thinking about just war, Spanish colonization of America and related issues, and in the context of the Spanish military conquest of the Americas. In doing so, I will assume that Vitoria and other scholars only partially departed in opinion from conquistadors, colonists, some royal or ecclesiastical dignitaries, missionaries or intellectuals who justified the conquest directly by the cultural/religious otherness of the indigenous inhabitants of the Americas – the Indians. Vitoria and other scholars differed in principle only in the fact that they favored the nonviolent establishment of Spanish rule over the Americas and the nonviolent evangelization of

[19] VITORIA, Francisco de. De los indios recientemente descubiertos. Relección primera. In: VITORIA, Francisco de. *Relecciones del Estado, de los indios y del derecho de la guerra.* Segunda Edición. México: Editorial Porrúa, 1985, p. 60ff. For more details, see THUMFART, Johannes. *Die Begründung der globalpolitischen Philosophie. Francisco de Vitorias Vorlesung über die Entdeckung Amerikas im ideengeschichtlichen Kontext.* Berlin: Kulturverlag Kadmos, 2012.

the Indians, but like them they were convinced that both Spanish rule and evangelization would have positive effects for the Indians – "imperfect" Indian societies would become an integral part of the "perfect" European Christian civilization represented by the Spanish monarchy.

Hypothesis Testing

On the one hand, Vitoria argued that the cultural/religious otherness of Indians (or other "barbarians") as such was not a just cause for the Spanish conquest of the Americas (or any other war). In this context, Vitoria proved that the barbarians/Indians did not lack the right of *dominium,* i.e., that the barbarians/Indians were true (legitimate) and unlimited *domini* of their territories, settlements, resources, and possessions, which the Spaniards thus could not acquire as *res nullius* by primary occupation.

Vitoria proved the above by refuting the claims which, if proved to be valid, could prove that the Indians were not *domini.* Specifically, there were three claims, namely that the barbarians, i.e. Indians, are: big sinners, infidels, and madmen or idiots,[20] i.e. mentally ill or mentally retarded.

Vitoria first proved that persons in a state of sin, including mortal (grave) sin, can be subjects of *dominium,* since biblical tradition and ecclesiastical history know many very sinful, even downright evil and corrupt people, to whom, however, God gave or did not take away royal or other offices, property or authority to validly perform religious ceremonies, and so on.[21]

The thesis that infidelity deprives of dominium was convincingly challenged by Vitoria, e.g. referring to Aquinas' teaching, according to which *dominium* can be an institution of natural law as well as of human positive laws, while infidelity in itself does not derogate either of these types of law – and thus not the right of *dominium* established by them – which is related to the fact that both types of law are applied not only in the Christian environment, but also elsewhere, wherever people live who are able to recognize their content with their reason.[22]

Finally, Vitoria using empirical arguments, i.e. by pointing out the essential elements of Indian societies, e.g. to the existence of permanent settlements including real cities, a developed social, political and economic organization,

[20] VITORIA, Francisco de. De los indios recientemente descubiertos. Relección primera, pp. 30–33.

[21] Ibidem, pp. 28–30.

[22] Ibidem, pp. 30–33.

or a certain law, he categorically rejected that Indians could be considered irrational and uncivilized people or as madmen or idiots. Moreover, Vitoria stated that even if the Indians were madmen or idiots, it would not be possible to completely deprive them of their *dominium* – it would only be permissible to limit their disposal with its object.[23]

Thus, according to Vitoria, the Indians were neither irrational and uncivilized people nor madmen and idiots, and therefore, according to him, they were subjects of *dominium.* On the other hand, Vitoria believed that Indians were less rational and civilized than Europeans/Christians and he considered certain elements of the Indians' way of life and certain forms of their behavior, resulting from their culture and religion, to be just causes of war. Let's take a closer look at these causes.

First, according to Vitoria, it was possible to wage a just war against the Indians, who would have prevented the free preaching of Christianity in their territories too vehemently or violently.[24]

Secondly, if in an Indian country a part of its inhabitants accepted Christianity, but the ruler or elites of this country tried to return them to their original faith by intimidation or violence, according to Vitoria, the Spaniards could subjugate that country by a just war, which would be understood, in this case, as help provided to fellow believers (Christians).[25]

Thirdly, Vitoria says that if a certain larger part of the Indians should accept and properly profess Christianity, the Pope may establish new Christian rulers for them, especially if their original rulers reject Christianity and suppress it among their subjects.[26]

Fourth, if the tyrannical rule of the Indian rulers or the inhumane laws of the Indians would cause death or other suffering to innocent people. Vitoria saw in certain elements of the Indian way of life, especially the offering human sacrifices to the gods and ritual anthropophagy, a tyrannical and inhumane, and thus irrational and uncivilized treatment of innocent people that needed to be punished.[27] Vitoria therefore argued that the Spaniards could ban human

[23] Ibidem, pp. 33–36.

[24] Ibidem, pp. 65–68.

[25] Ibidem, p. 68.

[26] Ibidem, pp. 68–69.

[27] For Vitoria, offering human sacrifices to the gods and ritual anthropophagy were part of the evidence that the Indians were less rational and civilized than the Europeans/Christians. He considered these religious practices of the Indians to be a manifestation of insufficient development of the virtue typical of completely rational and civilized people – temperance, which leads these people, e.g., to avoid consuming human flesh. See PASTOR, Marialba. La

sacrifice without papal approval, as they had the right to protect the innocent from unjust death, as well as other (in their view) bad Indian customs, regardless of whether the Indians wanted/didn't want to obey their tyrannical rulers or were/were not aware of the inhumanity of their laws. In order to eliminate the bad elements of the Indian way of life, or to effectively protect the innocent Indians, the Spaniards could wage a just war against the Indians, depose their rulers, occupy their territories, etc.[28]

Fifth, Vitoria believed that there was a right for civilized people (Spaniards) to colonize territories inhabited by "backward" (insufficiently civilized) societies (Indians) and take care of their members. However, he considered the legitimacy of this right debatable, although he admitted that the intellectual capacity and degree of cultural development of the Indians were lower than those of the Spaniards and that Spanish rule could be beneficial to the Indians. Thus, Spaniards could legitimately subjugate the Indians with the aim of generally improving their lives, bring them to Christianity, and thus to posthumous salvation. In this case, according to Vitoria, the Spanish conquest of America would be an act of merciful love (*caritas*), a useful help to the barbarians, whom Vitoria considered to be in relation of fellowship to Christians.[29]

Conclusion

Vitoria and other scholars of the Salamanca School established as a general just cause of war the serious injury inflicted on a just side by an unjust. Despite the establishment of this rational and natural law cause of war, Vitoria and some other scholars did not completely reject a just war waged because of certain elements of the barbarians/Indians' way of life and certain forms of behavior resulting from their cultural/religious difference. Although they admitted that these elements and forms of behavior did not deprive them of the right of *dominium,* they considered the degree of rationality and civilization of the Indians/barbarians to be lower than that of the Spaniards (Europeans, Christians), and therefore similarly to those who believed that the rationality and level of civilization of the Indians was deficient or even null, they did not reject Spanish rule over the Indians, since they saw it as a means of systemati-

interpretación de los pecados de la carne en la Escuela de Salamanca. *Iberoamericana,* vol. XV, no. 58, 2015, pp. 49–52.

[28] VITORIA, Francisco de. De los indios recientemente descubiertos. Relección primera, p. 69.

[29] Ibidem, p. 70.

cally Christianizing the Indians and integrating them into "perfect" European Christian civilization, which was supposed to assure their posthumous salvation and generally improve their lives.

Nor did the Salamanca scholars and others differ entirely on the methods of establishing this rule. Vitoria rejected the notion that it was permissible to wage war against the Indians simply because of their cultural/religious otherness and especially their extreme sinfulness. At the same time, however, he argued that if the Indians did not respect their certain obligations to the Spaniards or certain rights that the Spaniards had against them, they would not respect the *ius gentium.* Yet this law, like its foundation, the natural law, was common to all rational and civilized humans, and therefore the Indians, as rational and civilized humans, must have recognized its content. If they did not, Vitoria understood this as a manifestation of the cultural/religious otherness of the Indians – as their lack of rationality and civilization. By disregarding the *ius gentium,* according to Vitoria, an imaginary harm would be done to the whole world (*totus orbis*), i.e. the humanity or international community, which could then authorize a particular country (Spain) to make amends by waging a just war against the Indians. Similarly, the whole world could imaginatively authorize Spain to wage a just war against the Indians if the Indians did not remove certain elements of their way of life that they, as perfectly rational and civilized people, should themselves have evaluated as wrong and inconsistent with natural law and *ius gentium*.[30]

[30] For more details, see e.g. WAGNER, Andreas. Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth. *Oxford Journal of Legal Studies,* vol. 31, no. 3, 2011, pp. 565–582. WAGNER, Andreas. Zum Verhältnis von Völkerrecht und Rechtsbegriff bei Francisco de Vitoria. In: BUNGE, Kirstin, SPINDLER, Anselm and WAGNER, Andreas (eds.). *Die Normativität des Rechts bei Francisco de Vitoria.* Stuttgart–Bad Cannstatt: frommann-holzboog, 2011, p. 255ff.

LEGAL ASPECTS OF HITLER'S WAR AGAINST CZECHOSLOVAKIA

Doc. JUDr. PhDr. Pavel Maršálek, Ph.D.

Charles University in Prague, Faculty of Law,
Department of Legal Theory and Legal Doctrines
E-mail: marsalep@prf.cuni.cz

Abstract: *The article deals with the Nazi aggression against Czechoslovakia in 1938-1945 using the theory of war. The author points out many differences of this conflict compared to other wars. Nevertheless, he believes that it was a war in terms of objectives, methods and implementation. It was an ideological, racial and criminal war. The author focuses on the legal aspects of this war.*
Keywords: *Nazi aggression against Czechoslovakia, Nazi occupation of Czech lands, Protectorate of Bohemia and Moravia, Slovak state, Slovak National Uprising*

I.

Traditionally, it is said that all defining is dangerous. This is also true when trying to define war. Philosophers, political scientists and lawyers disagree. Perhaps only that it is an extreme conflict involving brutality and immeasurable damage. However, their views will differ on the various definitional markers.[1]

Nor can defining war as the continuation of politics by other means be the starting point. The question is what those ‚other means' are. If we define them too narrowly (formalistically), many uncontested wars of the past will not appear as war. This also applies to Hitler's aggression against Czechoslovakia in 1938-1945. Just recall:

1. There was no formal declaration of war on the part of Germany against Czechoslovakia, as required by international law at the time.[2]
2. There was no frontal clash between German and Czechoslovakia. The German and German armies had a head-on conflict at the beginning of the

[1] See TRNKA, Tomáš. *Filosofický problém války*. Praha: Jan Laichter, 1917.

[2] For more details see BECKMANN, Rudolf. *Hitlerova válka proti Československu ve světle mezinárodního práva*. Praha: Orbis, 1948, p. 23 ff.

conflict, as is usual in wars (see typically during the First and Second World War).[3]

3. German expansion at the expense of Czechoslovakia took place in peacetime, before 1 September 1939, and was formally covered by the Munich Agreement, Czechoslovakia's forced agreement to it, as well as other forced concessions by Czechoslovak leaders (the declaration of Slovak independence under German pressure, Hácha's surrender in Berlin).[4]
4. Everyday life under German rule in Bohemia and Moravia (and even more so in the independent Slovak state) showed signs of normality at first sight. The repression was much less compared to other occupied territories (especially in the east), with fewer victims.[5]
5. The Czechoslovak resistance abroad encountered problems with recognition by the so-called allies and its position was complicated by the pseudo-legality of the so-called Second Republic, the German trick with the protectorate and the profiling of Slovakia as a satellite of Germany.[6]
6. Domestic resistance against the Germans was mostly unarmed, the exception being towards the end of the war (Slovak National Uprising, Prague Uprising). The resistance consisted mainly of conspiracy and intelligence, and was less intense than elsewhere; a large part of the population also adopted a passive, waiting attitude, some collaborated.[7]

Notwithstanding these arguments, it can be argued that the aggression of Nazi Germany against Czechoslovakia can be described as a war in terms of its aims, methods and implementation. I will try to prove this in my paper. I will be primarily interested in the legal aspects of this conflict.

II.

It is not an easy task to describe the Czechoslovak-German relations in 1938-1945, which culminated in the war crisis, Nazi aggression and the expul-

---

3 More information is provided by MARŠAN, Robert. *Světová válka*. Praha: Fr. Borový, 1924. *Druhá světová válka 1939 – 1945*. Praha: Naše vojsko, 1966.

4 See PASÁK, Tomáš. *Pod ochranou říše*. Praha: Práh, 1998, p. 9 ff.

5 The problem of comparing Nazi occupation regimes is addressed by MAZOWER, Mark. *Hitlerova říše*. Brno: JOTA, 2009.

6 A detailed overview is offered by KUKLÍK, Jan. *Londýnský exil a obnova československého státu 1938 – 1945*. Praha: Karolinum, Praha 1998.

7 See *Český antifašismus a odboj*. Praha: Naše vojsko, 1988. JABLONICKÝ, Jozef. *Glosy o historiografii SNP*. Bratislava: NVK International, 1994.

sion of Germans from Czechoslovakia, because there are a number of cleavages. Opinions are influenced by nationality, political persuasion and the generation of the judge to the extent that it seems as if it is a completely different story each time.

Regarding the first difference of opinion, Czech and German optics are traditionally opposed. For the Czechs, the period under review is a time of Nazi, and hence German, conquest and oppression by a criminal regime that sought to destroy Czech statehood and Germanise the Czech population. The Czechs were concerned with bare national survival. The post-war expulsion is perceived by most as a just punishment for previous injustices.[8] A large number of Slovaks will see it similarly, although the initial experience with the Nazis was not so tragic in the Slovak case because of the existence of their own state.[9] Germans rarely admit the guilt of the whole nation, not just the Nazis, they usually only talk about the expulsion without recalling what it entailed. For a long time they have been reminded of the right of the Sudeten Germans to self-determination, to a homeland and to return. There have also been attempts to downplay the whole occupation.[10] Assessments of the whole period turn out differently when they are made by an American – that is, by someone who is alien to the idea of a homogeneous nation and to the European experience of using national minorities to destroy foreign states. He is likely to write about the tragic clash of two nationalisms in a hopelessly ethnically mixed territory.[11]

Political beliefs distorted the image of the period under study most of all in the communist rendition. It is no exaggeration to speak of the falsification of history or the political manipulation of history. Everything was interpreted schematically and distorted, through the prism of Marx-Leninist ideology. It has already assigned roles to the actors and predetermined the outcome of the historical process. The most reactionary circles of the German big bourgeoisie were responsible for the Nazi aggression in this interpretation. The resistance, the real resistance, was represented by the communist resistance. Collaboration was reserved for the exploiting class. Nazism was to be inevitably defeated

---

8 The most detailed explanations are contained in the books: BRANDES, Detlef. *Germanizovat a vysídlit*. Praha: Prostor, 2015. GEBHART, Jan; KUKLÍK, Jan. *Velké dějiny zemí Koruny české*. Sv. XV a, b. Praha – Litomyšl 2006 – 2007.

9 See HAJKO, Jozef. *Nezrelá republika: Slovensko v rokoch 1939 – 1945*. Bratislava: Slovart, 2009.

10 Changes in the attitudes of Sudeten Germans are mapped in the book HOUŽVIČKA, Václav. *Návraty sudetské otázky*. Praha: Karolinum, 2005.

11 See BRYANT, Chad. *Praha v černém*. Praha: Argo, 2012.

and its defeat was to be followed by the liquidation of capitalism.[12] A more sophisticated conception (e.g. that the methods of occupation included not only terror but also politics, and that collaboration was a superclass phenomenon) was only promoted in times of political detente and de-ideologisation.[13]

Generational experience was also inscribed in research on the years of war and occupation. This was often marked at the outset by first-hand acquaintance with Nazi methods. The conviction that the struggle against Nazism was a struggle between good and evil was therefore strong. Hatred of all things German prevailed. This gradually changed. Under the Communists, it was advocated that the treatment of Germans should depend on their class origin. For those who had not experienced the occupation, the loss of historical memory began to have an effect on the end. This often meant a decline in understanding of the problems of the time or even a downplaying of the reality of the occupation.[14]

III.

In order to overcome the plurality of perspectives on Nazi aggression against Czechoslovakia and its consequences, it will be necessary to focus on it more thoroughly – to clarify what its motives, goals, methods and phases were. The analysis will show that it was a war of a special kind: ideological, racial and criminal.

At the outset, it should be said that Central Europe, and especially the Bohemian-Moravian area, was traditionally regarded by the Germans as their sphere of interest and area of expansion. However, their plans here clashed with the self-determination aspirations of the Slavic peoples and their statehood. German efforts to dominate this area accelerated massively when Adolf Hitler and the Nazis came to power in Germany. This posed a mortal threat to Czechoslovakia. The situation was made worse by the fact that the Nazis had an ally in Czechoslovakia: the Sudeten German minority, which was involved in the dismantling of the Czechoslovak state.[15] The conflict came to

[12] This approach was embodied in the work of Václav Král. See KRÁL, Václav. *Pravda o okupaci*. Praha: Naše vojsko, 1962.

[13] See PASÁK, Tomáš. *Pod ochranou říše*. Praha: Práh, 1998. TESAŘ, Jan. *Mnichovský komplex*. Praha: Prostor 2000.

[14] An example of this approach is the book BERWID-BUQUOY, Jan. *Zpackaný atentát*. Místo vydání neuvedeno: Česká atlantická komise, 2023.

[15] The gradual gradation of German expansion is summarized in the book KURAL, Václav. *Češi, Němci a mnichovská křižovatka*. Praha: Karolinum, 2002.

a head in 1938: while in the spring of that year Czechoslovakia still resisted the announcement of partial mobilisation, in September everything was heading towards a tragic climax. Czechoslovakia faced a Nazi-backed Sudeten German putsch, which was an undeclared war,[16] as well as a sacrifice by the Allies. President Benes and his government preferred to accept the illegal decision of the Great Powers at Munich rather than a lonely and probably soon to be lost war with Germany.[17] However, Hitler was not satisfied with the gain of the Czechoslovak borderlands, and in March 1939 the second phase of aggression came: first Slovakia became independent under German pressure, and then the rest of the Czech lands were occupied by the Wehrmacht and a protectorate was proclaimed there in name only. It was a starting point for annexation. Its proclamation was preceded by the subversion of the rest of Czecho-Slovakia and the forced surrender of Czechoslovak leaders by intimidation during negotiations with the Nazi leaders in Berlin.[18]

The March annexation of the rest of the Czech lands was already an undoubted act of war, even though it was disguised by Hitler as a police action to secure the lives and property of the people indiscriminately in the territory of the collapsing state. Nor why else would a military administration of a conquered territory be declared, which, according to the Nazis, was only to be returned to the Reich where it originally belonged anyway. Nor could this act of war any longer invoke the fictitious legality of the Munich Agreement, which it clearly violated – some say outright destroyed.[19]

From a legal point of view, it was significant that the events of March did not lead to the dissolution of Czechoslovakia, which was important for the nascent Czechoslovak foreign resistance. Three moments were decisive:

1) The forced secession of Slovakia was merely an illegal secession of part of the state territory, which did not lead to the dismemberment of the Czechoslovak state.
2) There was no complete disestablishment of Czechoslovakia, because the Nazis failed to take control of a large part of the Czechoslovak diplomatic offices, which were Czechoslovak territory.

---

16 See PLACHÝ, Jiří. *Nástin personálních ztrát československé armády v době od 21. května 1938 do 31. března 1939*. Praha: Vojenský historický ústav, 2009.

17 The complicated position of Czechoslovakia at this time is described in detail in the book KUKLÍK, Jan; NĚMEČEK, Jan; ŠEBEK, Jaroslav. *Dlouhé stíny Mnichova*. Praha: Auditorium, 2011, p. 26 ff.

18 See MARŠÁLEK, Pavel. *Pod ochranou hákového kříže*. Praha: Auditorium, 2012, Chapter 1.

19 Cf. BECKMANN, Rudolf. *Hitlerova válka proti Československu ve světle mezinárodního práva*. Praha: Orbis, 1948, p. 19 ff.

3) The occupation of the rest of the Czech lands was opposed by the Great Powers, who in the end, after some delaying, recognized the Czechoslovak foreign state establishment in exile as the legal representative of Czechoslovakia and this state as their ally, which fought against Nazi Germany with its military units.[20]

Now let us look at the Nazi war aims on Czechoslovak territory. While in the case of Slovakia Hitler was content with satellite control, he had more far-reaching plans for the Czech lands: he envisaged their incorporation into the Great German Empire, to whose iron core they were to belong. From this point of view, the protectorate with autonomy granted to Bohemia was only a temporary form of control, which was to be thrown away at the appropriate moment. It depended on the speed of the Germanization of the Czech space and people, and also on when Germany would win the world war it had started. In the meantime, the Protectorate was to be economically perfectly exploited. This goal of the occupation policy gradually gained more and more weight as the Nazi armies on the fronts ceased to thrive. Ultimately, under the pressure of circumstances, this orientation of the occupiers then outweighed the Germanization plans.[21]

The methods the Nazis relied on were varied: terror, intimidation, offers of collaboration and social demagoguery, a combination of violent and political approaches. It depended on the period of occupation, who was setting the course, and the strength of the resistance. In any case, it was a system of refined cruelty designed to Germanise the Bohemians, in fact to destroy them as an ethnic unit, and to exterminate the Jews and Roma after robbing them of their property.[22] It is therefore not an exaggeration to say that the Nazis waged an ideological, racial and criminal war against our population during the occupation, which the people legitimately opposed. The Nazis behaved similarly at the end of the war during the occupation of Slovakia, where they came to suppress the Slovak National Uprising. The level of cruelty there was compounded by the civil war that was effectively under way.[23]

Paradoxically, the quantity and intensity of Nazi crimes, especially during the Heydrichiad, helped to promote the claims of the Czechoslovak foreign

---

[20] Similar conclusions are contained in the book KUKLÍK, Jan. *Londýnský exil a obnova československého státu 1938 – 1945*. Praha: Karolinum, Praha 1998. This book is based on Beneš's theory of the legal continuity of Czechoslovakia, which was the official Czechoslovak position and was gradually enforced.

[21] See BRANDES, Detlef. *Češi pod německým protektorátem*. Praha: Prostor, 1999.

[22] For more details UHLÍŘ, Jan Boris. *Protektorát Čechy a Morava v obrazech*. Praha 2008.

[23] See JABLONICKÝ, Jozef. *Povstanie bez legiend*. Bratislava: LITA, 2024.

resistance in the international forum. The second essential argument was the struggle of the Czechoslovak troops on the fronts of the Second World War. It was also thanks to this that Munich was abolished and the Sudeten Germans were expelled from the republic.[24]

As a result of this development, which was made possible by the total defeat of Nazism, the six-year Nazi rule over the Czech lands can be described as a failed annexation because it was temporary and lacked an international legal title. Legally, it was an occupation. But it could not be governed in its entirety by the international regulation of occupation contained in Articles 42-56 of the 1907 Code of Laws and Customs of Land Warfare.[25] According to it, the occupier would be partially pardoned for repressive acts and the resistance would have a problem of legality. All our post-war legal scholarship agreed on this, but offered different justifications:

1) This regulation did not apply to Czechoslovakia because it was not a signatory of the Hague Convention IV.[26]
2) The Nazi action was not an occupation at all, but an unjust annexation.[27]
3) Germany could not acquire the rights of an occupier because of the lawless and criminal war it waged.[28]
4) International regulation of occupations became obsolete because of German practice and prohibition of offensive war, as well as other changes in international law.[29]

Be that as it may, what was important was that the criminal was not in the right and that he was punished deservedly after the war (see the Nuremberg Trials or the work of the Extraordinary People's Courts).[30]

---

[24] KURAL, Václav. *Místo společenství – konflikt!* Praha: Ústav mezinárodních vztahů, 1994, p. 198 ff.

[25] See HOBZA, Antonín. *Přehled mezinárodního práva válečného*. Praha: Všehrd, 1946, p. 73 ff.

[26] VOŠTA, Ladislav. O německé okupaci českých zemí za druhé světové války. *Právník*, 1947, p. 65 ff.

[27] TÁBORSKÝ, Eduard. Okupace Československa a mezinárodní právo. *Dnešek*, 1947, Nr. 5, p. 77.

[28] DRÁBEK, Jaroslav. Okupace Československa a mezinárodní právo. *Dnešek*, 1947, Nr. 4, p. 54 ff.

[29] BECKMANN, Rudolf. *Hitlerova válka proti Československu ve světle mezinárodního práva*. Praha: Orbis, 1948.

[30] See EČER, Bohuslav. *Norimberský soud*. Praha: Orbis, 1946. FROMMER, Benjamin. *Národní očista – retribuce v poválečném Československu.* Praha: Academia, 2010.

Conclusion

The concept of war is vague. This is demonstrated, for example, by Hitler's war against Czechoslovakia. This war was not declared by Germany, it was fought in peacetime, without a frontal battle of armies. The aggression was masked by forced consent and fictitious legality. Yet it was a war in terms of aims, methods and execution. It was an ideological, racial and criminal war. Its assessment is complicated by the plurality of opinion. Czechoslovakia faced Nazi aggression as early as 1938. The undeclared war was a putsch by Sudeten Germans with German support in the borderlands. After the betrayal of the Allies, Czechoslovakia faced a lone war with Nazi Germany. President Benes and his government accepted under duress the illegal decisions of the Great Powers in the Munich Agreement. Nazi aggression continued in March 1939 with the forced separation of Slovakia, the occupation of the rest of the Czech lands and the declaration of a protectorate. But Czechoslovakia did not disappear, nor was it dismembered. In time, it became part of the anti-Hitler coalition. In the occupied territory, the Nazis waged an ideological and racial war against the native population, their regime was colonial. Their attempt to annex the Czech lands was unsuccessful. Legally, it was an occupation. It was impossible to apply the then existing international regulation of occupations to it, lest the occupiers be exculpated and the resistance be punished.

BIBLIOGRAPHY

BECKMANN, Rudolf. *Hitlerova válka proti Československu ve světle mezinárodního práva*. Praha: Orbis, 1948.
BERWID-BUQUOY, Jan. *Zpackaný atentát*. Místo vydání neuvedeno: Česká atlantická komise, 2023.
BRANDES, Detlef. *Češi pod německým protektorátem*. Praha: Prostor, 1999.
BRANDES, Detlef. *Germanizovat a vysídlit*. Praha: Prostor, 2015.
BRYANT, Chad. *Praha v černém*. Praha: Argo, 2012.
Český antifašismus a odboj. Praha: Naše vojsko, 1988.
DRÁBEK, Jaroslav. Okupace Československa a mezinárodní právo. *Dnešek*, 1947, Nr. 4.
EČER, Bohuslav. *Norimberský soud*. Praha: Orbis, 1946.
FROMMER, Benjamin. *Národní očista – retribuce v poválečném Československu.* Praha: Academia, 2010.
GEBHART, Jan; KUKLÍK, Jan. *Velké dějiny zemí Koruny české*. Sv. XV a, b. Praha – Litomyšl 2006 – 2007.
HAJKO, Jozef. *Nezrelá republika: Slovensko v rokoch 1939 – 1945*. Bratislava: Slovart, 2009.
HOBZA, Antonín. *Přehled mezinárodního práva válečného*. Praha: Všehrd, 1946.
HOUŽVIČKA, Václav. *Návraty sudetské otázky*. Praha: Karolinum, 2005.

JABLONICKÝ, Jozef. *Glosy o historiografii SNP*. Bratislava: NVK International, 1994.
JABLONICKÝ, Jozef. *Povstanie bez legiend*. Bratislava: LITA, 2024.
KRÁL, Václav. *Pravda o okupaci*. Praha: Naše vojsko, 1962.
KUKLÍK, Jan. *Londýnský exil a obnova československého státu 1938 – 1945*. Praha: Karolinum, Praha 1998.
KUKLÍK, Jan; NĚMEČEK, Jan; ŠEBEK, Jaroslav. *Dlouhé stíny Mnichova*. Praha: Auditorium, 2011.
KURAL, Václav. *Češi, Němci a mnichovská křižovatka*. Praha: Karolinum, 2002.
KURAL, Václav. *Místo společenství – konflikt!* Praha: Ústav mezinárodních vztahů, 1994.
MARŠÁLEK, Pavel. *Pod ochranou hákového kříže*. Praha: Auditorium, 2012.
MARŠAN, Robert. *Světová válka*. Praha: Fr. Borový, 1924. *Druhá světová válka 1939 – 1945*. Praha: Naše vojsko, 1966.
MAZOWER, Mark. *Hitlerova říše*. Brno: JOTA, 2009.
PASÁK, Tomáš. *Pod ochranou říše*. Praha: Práh, 1998.
PLACHÝ, Jiří. *Nástin personálních ztrát československé armády v době od 21. května 1938 do 31. března 1939*. Praha: Vojenský historický ústav, 2009.
TÁBORSKÝ, Eduard. Okupace Československa a mezinárodní právo. *Dnešek*, 1947, Nr. 5.
TESAŘ, Jan. *Mnichovský komplex*. Praha: Prostor 2000.
TRNKA, Tomáš. *Filosofický problém války*. Praha: Jan Laichter, 1917.
UHLÍŘ, Jan Boris. *Protektorát Čechy a Morava v obrazech*. Praha 2008.
VOŠTA, Ladislav. O německé okupaci českých zemí za druhé světové války. *Právník*, 1947, p. 65 ff.

THE CONCEPT OF A JUST WAR IN THE SOCIAL AND LEGAL PHILOSOPHY OF THE FIRST HALF OF THE 20TH CENTURY[1]

JUDr. PhDr. Marek Prudovič

Trnava University, Faculty of Law,
Department of Historical Law and Legal Methodology
E-mail: marek@prudovic.sk
ORCID: 0000-0003-4661-9186

Abstract: *This paper examines the concept of a just war within the social and legal philosophy of the first half of the 20th century, a period profoundly influenced by the catastrophic impacts of two world wars. It explores how traditional theories of just war were challenged by the unprecedented scale of global conflicts, technological advancements, and the moral dilemmas posed by new forms of warfare. The study analyses the evolution of just war theory in the context of growing criticism of military conflicts and highlights philosophical debates on international law, human rights, and peaceful alternatives. Key themes include the shifting perspectives on ius ad bellum, ius in bello, and ius post bellum in response to the devastation wrought by modern wars and the ethical implications of emerging military strategies. The paper also discusses the contributions of prominent thinkers, contrasting the ideas of political realism, pacifism, and just war tradition, while reflecting on the lasting philosophical and legal implications of war during this transformative era.*
Keywords: *Just war theory. International law. Pacifism. Political realism. 20th-century philosophy.*

Introduction

The issue of the tradition of just war is perceived as a means of addressing a diverse spectrum of problems. From this perspective, this topic appears not only complex but, in our view, also contradictory. This controversy is already evoked by the very designation of this category. War, in general, is seen as the ultimate form of moral evil, and its association with the attribute "just"

[1] The article was carried out within the VEGA research project no. 1/0202/22 titled "Theories of just war of the School of Salamanca scholars and their legacy in modern theories of just war and modern law of war" (in the Slovak original: "Teórie spravodlivej vojny učencov Salamanskej školy a ich odkaz v moderných teóriách spravodlivej vojny a modernom vojnovom práve").

can seem like an oxymoron.[2] This reality is what allows for the possibility of diverse approaches to its definition, which permeates the entire history of societal development. The tradition of just war is a philosophical and legal concept whose foundational premise addresses the conditions that ensure war can be perceived as morally and legally legitimate.

The concept of a just war[3] can already be found among representatives of ancient philosophical doctrines. The fundamental approach to the issue is formulated through an ethical emphasis. Military training is considered an essential means of preserving the sovereignty of the polis. Military operations are therefore perceived as a defensive measure,[4] although historical experience shows that in the ancient period, aggressive wars were also frequently encountered. A similar approach can be found among representatives of Roman philosophical thought.[5] The tradition of just war, as a comprehensive concept, is the work of medieval patristics and scholasticism. Its early form is formulated by St. Augustine, who, in his work *The City of God*,[6] defines war as a necessary evil, with its purpose, course, and outcome determined by divine providence. A comprehensive concept of the tradition of just war was developed by Thomas Aquinas. His approach no longer views waging war as an unavoidable sin. His most significant contribution lies in establishing three conditions[7] under which a war can be deemed just. *Ius ad bellum*[8] determines the just conditions that authorize the declaration of war, while *ius in bello*[9] defines just conduct during the war.[10] Based on the fulfilment of these conditions, Aquinas concludes that war is a just means of stopping injustice. In the early modern period, the ideas of natural law and rights, the legitimacy of rulers, and the conditions for a just war were revived by representatives of the Salamanca School, Francisco de Vitoria and Francisco Suárez. A significant contributor

---

2 Similarly, it is akin to expressions like "dry rain," "cold sun," or "squaring the circle."

3 *Bellum iustum* in Latin

4 ARISTOTELES. *Politika*. Bratislava: Kalligram, 2009, pp. 52-54.

5 The Roman philosopher Cicero perceived war as a legitimate tool for defending the legal order. CICERO, Marcus Tulius. *De re publica; De legibus*. London: Harvard University Press, 1994, pp. 11.

6 Augustine considers every war a sin. Although he acknowledges the existence of what he termed a „just war," such wars are always a consequence of sin. At the same time, he views war as a means of rectifying sin, which serves as the primary basis for its justification. Sv. AUGUSTÍN. *Boží štát.* Trnava: Spolok sv. Vojtecha, 2005, pp. 166-168.

7 These are the right of authority, a just cause, and the right intention.

8 From Latin = the law before war.

9 From Latin = the law in war.

10 AKVINSKÝ, Tomáš. *Teologická suma.* Olomouc: s. n., 1937, pp. 300-301.

to the modern understanding of war was Hugo Grotius, regarded as the father of international law. He expanded on the tradition of just war in his work *De Iure Belli ac Pacis*,[11] defining war as a legitimate means of enforcing rights. He advocated for minimizing bloodshed in wars, aiming to achieve this through the establishment of a general theory of law that would restrict and regulate warfare between independent powers.[12] A significant shift in the examination of the relationship between war and peace occurred in the 19th century. This period was marked by profound sociological and political changes. With the emergence of nation-states and colonial expansion, war became a prominent means of advancing the geopolitical ambitions of the major powers of the time. One of the theorists who addressed the definition of war during this period was Carl von Clausewitz. He perceived war as a means that is a natural continuation of politics, serving to advance personal or state interests. According to him, war is an act of violence aimed at imposing one's will on the enemy.[13]

The issue of the tradition of just war gained increased attention in the 20th century, particularly in its first half. This period marked a profound turning point in the history of human society. The reality of both world wars, along with the use of chemical, biological, and eventually nuclear weapons, fundamentally changed the way war was viewed – philosophically, legally, and especially ethically. It can be stated that these were pressing questions requiring answers, both in terms of international law and the issue of human rights. A significant contribution to the development of the just war tradition was the theoretical elaboration of questions categorized as *ius post bellum*.[14] It establishes the requirements for how the reconstruction of a war-torn country should proceed. Within this framework, attention is focused primarily on the defence of rights,[15] the inadmissibility of unjust gains,[16] and the pursuit of justice.[17]

---

[11] From Latin = On the Law of War and Peace.

[12] KRSKOVÁ, Alexandra. *Dejiny politickej a právnej filozofie.* Trnava: Právnická fakulta Trnavskej univerzity v Trnave, 2011, pp. 292-300.

[13] CLUSEWITZ, Carl. *O válce.* Voznice: Leda, 2020, pp. 39-49.

[14] From Latin = the law after war.

[15] It primarily concerns the restoration of a legal state in the defeated country that guarantees the fundamental rights of citizens and political organizations.

[16] It concerns respecting territorial and property rights based on legitimate ownership, that is, the restoration of the legal, political, and territorial status quo.

[17] It involves punishing the aggressor who violated the rights of the state and should therefore compensate for the damages caused. Furthermore, it entails establishing personal accountability for the individuals responsible for the situation, who should consequently face legal prosecution.

1 Political Realism, the Theory of Just War, and Pacifism

The issue of war is multidimensional, and one possible perspective is to approach it in relation to moral principles. In this context, three fundamental approaches to this issue can be identified: political realism[18] on one side, pacifism on the other, and the tradition of just war situated between them.

Representatives of the concept of political realism view war as a phenomenon that cannot be evaluated from an ethical perspective. They argue that the conduct of states in war and ethics is incompatible, and therefore ethical principles have no place in assessing war. For the 20th century, the stage of neorealism is particularly significant, stemming from the doctrine that states are fundamentally motivated by the pursuit of power, security, and national interests rather than morality or justice. States primarily focus on acquiring power and defending their national interests. According to realists, states exist in a state of international anarchy without an effective international authority, where no hierarchical body can penalize state behaviour. In this doctrine, moral concepts are considered practically inapplicable in the realm of international relations.[19] Realists perceive the actions of a state in the international context as obligatory. The maintenance of their existence is directly proportional to the consolidation of their power and the uncompromising defence of their interests. The fundamental premise, therefore, is that national interests take precedence over principles of morality. However, realists do not deny the existence of moral standards but consider them inapplicable in international relations.[20] War thus becomes an almost inevitable reality of the entire international system. This approach leads to the conclusion that the clash of diverse and often contradictory national interests will inevitably result in war, and every state will do whatever it takes to win.[21]

Representatives of political realism, however, are not detached from reality and are aware of the negative consequences that wars bring. They approach the issue dialectically. On one hand, there is the destruction of material resources and the loss of human lives. On the other hand, they recognize the advantages of war, such as the potential to achieve political or economic power and domi-

[18] Historically, it has several stages of development: pre-realism, classical realism, and neorealism or structural realism.

[19] OREND, Brian. *The Morality of War.* Peterborough: Broadview press, 2005, pp. 230.

[20] LEE, Steven. *Ethics and War*. *An Introduction*. Cambridge: Cambridge University Press, 2012, pp. 16.

[21] OREND, *The Morality of War,* pp. 226.

nance.[22] The conduct of states during war and ethics are, in the case of political realism, not mutually compatible. From their perspective, ethical norms have no place in the issue of war.[23] The rejection of the application of moral principles to war by political realism does not imply, a priori, that political realism itself is immoral. Ethical principles are present in it to a limited extent but must not endanger its own interests.[24]

Pacifism[25] forms the antithesis to political realism, fundamentally rejecting the idea that moral norms cannot be applied to war. It asserts that war, as an act of violence,[26] cannot be morally justified or excused, and therefore it opposes it outright. Representatives of pacifist thought believe that moral norms can be utilized to organize international relations. Pacifists argue that we face a choice: either engage in war, which inevitably brings horrors, or accept an unjust situation and lawlessness. In some cases, they contend, it is better to accept an unjust state than to resort to war.[27] The foundations of pacifism can be found in religion and humanism. The religious dimension of pacifism originates from the teachings of the Old Testament but primarily the New Testament. The Renaissance was a period in which arguments against war and for world peace were formulated. One of the prominent figures opposing the brutality of war was the Dutch philosopher Erasmus of Rotterdam, particularly in his work *The Complaint of Peace*.[28] Another significant source was the work of Thomas Hobbes, whose doctrine of the origin of political society is based on the concept of the state of nature, in which "man is a wolf to man."[29] In the modern era, a foundational work for pacifist theories became Immanuel

[22] As a result, they secure a greater degree of security, access to mineral resources, or increased political influence.

[23] Some realists even view war as something natural, linked to the egoistic aspect of human nature.

[24] When one state assesses another state as equal to itself or, conversely, strives to respect and accept the interests of the other state, it does so only as long as it does not conflict with its own interests. COPPIETERS, Bruno; FOTION, Nick. *Moral Constraints on War: Principles and Cases*. Lanham: Lexington books, 2002, pp. 1-5.

[25] There are various branches of pacifism, such as absolute, contingent, maximal, minimal, universal sceptical, secular, nuclear, consequentialist, deontological, religious pacifism, or just war pacifism.

[26] Pacifism perceives war as a moral evil, resulting in the greatest losses, namely the loss of human lives.

[27] VELEK, Josef. *Kapitoly z teorie spravedlivé války.* Praha: Filosofia, 2014, pp. 59.

[28] The work condemns the horrors of war and calls on people to take actions that will lead to changing the world.

[29] HOBBES, Thomas. *Leviathan*. Bratislava: Kalligram, 2012.

Kant's philosophical treatise *Zum ewigen Frieden*,[30] in which he declares that world peace is not only possible but also morally necessary. According to Kant, war brings the destruction of all that is good, as the collapse of law and norms devastates human nature. He considers war inherently evil because it violates the right to life. Kant argues that the duty not to kill remains valid even in the case of legitimate defence. Furthermore, this approach emphasizes that in war, it is impossible to avoid innocent victims. He asserts that a peaceful state must be established and that all enmity must be relinquished.[31] Kant proposed a model of a union of free republics that would maintain peace among themselves through legal and democratic institutions. His work had a profound influence on later peace movements and international law.[32] In the 19th century, pacifism became intertwined with social democracy and anarchism, reflecting broader efforts to connect the rejection of war with advocacy for social justice and political reform.[33] Pacifism in the 20th century was closely linked to the Protestant and liberal traditions. This connection arose from a greater acceptance of conscientious objections and religious beliefs in opposition to wars.

The concept of just war pacifism was developed by J. Sterba, who sought to create a new approach that regarded war as inherently evil but still allowed for its possibility in certain circumstances. Sterba's just war pacifism critiques the traditional concept of just war. He leaned toward the pacifist view, arguing that modern wars are incompatible with the principles of just war due to the use of technical means that cannot adequately distinguish between soldiers and civilians.[34]

Advocates of the just war tradition argue that war is sometimes morally justified, and, from a theoretical perspective, it is positioned between political realism and pacifism. Proponents of the theory of just war do not claim that wars, in general, are inherently right or moral. They acknowledge that, under certain conditions, a specific war may be considered just. According to the just war tradition, a war can be deemed moral only if it is waged to rectify wrongdoing, punish evil, assist allies, or ensure the survival of the state. However, it is not considered just when the intent is to acquire foreign territories, material or other

---

30 From German = Perpetual Peace.

31 PEŠEKOVÁ, Mária. Falošná etika pacifizmu. In: *Impulz*, 2007, vol. 3, no. 2, pp. 44.

32 KANT, Immanuel. *K večnému mieru.* Bratislava: Archa, 1996, pp. 10-97.

33 Two movements emerged. The first, represented by Trotsky, allowed for the use of violence to promote its ideals, while the second, represented by Tolstoy and Gandhi, completely rejected it. Both Tolstoy and Gandhi advocated nonviolent resistance against authority, and the number of their followers increased significantly after the use of nuclear weapons.

34 OREND, *The Morality of War,* pp. 244.

economic, or political advantages. Justice in war has a collective dimension, as it pertains to political and social leaders who make decisions that can lead to injustice. At the same time, it addresses individuals, as they are the ones who directly wield weapons during war and have the capacity to cause mass violence.[35]

As we have already noted, the socio-philosophical currents of the 20th century oscillate between pacifism and political realism, with the tradition of just war striving to avoid extreme positions. *"The pursuit of a just war is as futile as the quest for the Holy Grail, and this is because it is an almost universal truth that each side in a war perceives itself as being in the right. The only judge capable of determining this is the victory of one side over the other."*[36]

2 The concept of just war in the first half of the 20th century

The first half of the 20th century, marked by two world wars, brought about the need for a deeper reflection on the issue of just war. Philosophers, legal scholars, and political theorists of the time were compelled to grapple with the changing realities in this area. Warfare was no longer of a localized nature but instead caused global destruction of material resources, mass loss of human lives, and the complete disruption of moral and legal norms. This section of our paper briefly analyses how the concept of just war was reflected in the social and legal philosophy of the first half of the 20th century and how it evolved in the context of growing criticism of military conflicts.

The First World War renewed interest in the issue of just war and, given the specific conditions of the time, introduced new questions and challenges into the discussion. This conflict, which for the first time in human history assumed a global dimension, not only brought military confrontation but also tested the international legal and moral order. It revealed the shortcomings of existing norms and concepts of justice. The fundamental issues concerned the legitimacy of inhumane military operations, including the use of chemical weapons, the bombing of civilians, and blockades.

One of the most prominent advocates of the philosophical concept of pacifism in the 20th century was Bertrand Russell.[37] He argued that war is never

[35] COPPIETERS; FOTION, *Moral Constraints on War: Principles and Cases,* pp. 16.

[36] TAYLOR, Alan John Percivale. *The Origins of the Second World War.* New York: Penguin, 1991, pp. 129.

[37] He was one of the most vocal critics of Britain's involvement in the First World War. In 1916, he was dismissed from his professorship at Trinity College, Cambridge, due to his anti-war

morally justifiable because it always results in massive human suffering and destruction. In his works, Russell criticized governments that chose to engage in war. He rejected war as a legitimate political tool for resolving conflicts, asserting that military conflicts always lead to the destruction of moral values and human lives. According to him, the primary cause of war is not economic or political but rather the fact that *"a large part of humanity has an impulse more toward conflict than harmony and can only be compelled to cooperate with others in resisting or attacking a common enemy."*[38] He understood war as a political manipulation and national ambitions. During this period, the concept of political realism also developed, perceiving war as inevitable and even necessary for maintaining state sovereignty. One of its representatives was the German legal theorist, Carl Schmitt. In his work *Politische Theologie*,[39] he argued that the state must be capable of declaring a state of exception, in which the validity of existing legal norms can be suspended if it ensures the state's survival. According to Schmitt, war is a legitimate tool in situations where the state is threatened and must fight for its sovereignty. His ideas were controversial and had a significant impact on political theory, particularly in the context of authoritarian regimes.[40]

We can state that the First World War emphasized the question of whether war can be just in an era when conflicts become global and destroy not only military but also civilian infrastructure. In the period between the two wars, the primary focus shifted to ensuring lasting peace. For this reason, the League of Nations was established in 1920 as the first attempt to create an international organization to ensure collective security and prevent further global conflicts. Legal and philosophical discussions centred on how to prevent a repeat of the devastating First World War.

Hans Kelsen, an Austrian legal theorist, contributed to this discussion through his works on legal positivism. He primarily viewed war as a legal problem. Kelsen was convinced that war could be limited or even eliminated by creating a supranational legal order to regulate the behaviour of states. He called for international law to include mechanisms for sanctioning states that violate peace agreements or conduct war in an unjust manner.[41]

---

activities, and later, in 1918, he was imprisoned for six months for his articles and speeches opposing the war.

38 RUSSELL, Bertrand. *Why Men Fight.* New York: Cosimo, 2004, pp. 114.

39 From German = Political Theology.

40 SCHEUERMAN, William. *The End of Law: Carl Schmitt in the Twenty-First Century.* London: Rowman & Littlefield, 2019.

41 LEBEN, Charles. Hans Kelsen and the Advancement of International Law. In: *European Journal of International Law*, 1998, vol. 9, no. 2, 1998, pp. 287–305.

Despite these initiatives, the interwar period brought new challenges, particularly with the rise of totalitarian regimes such as fascism in Italy and Nazism in Germany. These ideologies shared a range of common features and methods. Their emergence was driven by postwar disarray, a deep economic crisis, and a complicated social situation. Both regimes primarily appealed to demobilized soldiers returning from the front. This was reflected in their exercise of power, which took the form of military-style organization led by a leader and enforced through strict discipline.[42] These regimes rejected international norms and, in the spirit of political realism, regarded war as a legitimate tool for expanding their power and ideology.

The Second World War is assessed in all aspects as the most destructive and brutal war. Not only did it cause enormous loss of human lives, but it also inflicted massive material damage. It radically transformed not only global politics but also philosophical approaches to war. The concept of total war emerged, characterized by its failure to distinguish between civilian populations and military forces. Ultimately, this meant that the traditional distinction between military and civilian targets became increasingly irrelevant. In addition to its social and legal consequences, the Second World War also had profound philosophical implications.[43]

During the years of the Second World War, Bertrand Russell's philosophical concept continued to evolve. Although he initially supported a policy of appeasement toward Nazi Germany, Bertrand Russell accepted the necessity of war against Hitler after the outbreak of the Second World War. He continued to criticize war crimes and advocated for the idea of a world government to prevent future conflicts. The use of nuclear weapons led him to become one of the most prominent figures advocating for their elimination and a total ban on their use.[44] Jean-Paul Sartre perceived war as an inevitable consequence of the conflict between individual human freedoms and societal or political constraints. In his essay *L'Être et le Néant*,[45] he stated that human freedom is inseparably linked to responsibility for one's actions. While war can be seen as an

[42] COLOTKA, Peter; KÁČER, Marek; BERDISOVÁ, Lucia. *Právna filozofia dvadsiateho storočia.* Praha: Leges, 2016, pp. 130-131.

[43] The representatives of this period mostly experienced or fought in both world wars, and the fact that they were unable to prevent the second war was perceived by the majority as a personal failure.

[44] Together with Albert Einstein and other scientists, he issued the Russell-Einstein Manifesto in 1955, warning of the dangers of nuclear war and urging world leaders to seek peaceful solutions to international conflicts.

[45] From French = Being and Nothingness.

unfortunate expression of this freedom, it does not justify violence if it arises from the need to deny the freedom of others.[46] Simone Weil intensely explored the issues of dehumanization and suffering caused by war. Having personally participated in the Spanish Civil War, this experience profoundly influenced her and shaped her critical perspective on violence and military conflicts. In her book *Reflections on the Causes of Liberty and Social Oppression*, she noted that war degrades humans to the level of objects, harming not only the physical but also the spiritual essence of humanity. It strips individuals of their humanity and moral values. She viewed war as a phenomenon incompatible with human dignity and justice. For this reason, she considered war unjustifiable, regardless of its political or military objectives.[47] Virginia Woolf, in her essay *Three Guineas*, examines the relationship between war, society, and culture, particularly education, and uncovers alarming connections between the traditional status of women and fascism. She asserts that war is a consequence of male dominance in politics and society and argues that true gender equality would lead to peace.[48]

Conclusion

The first half of the 20th century, from the perspective of wartime events, was undoubtedly the most turbulent period in human history. Although wars have historically been a constant, almost everyday phenomenon accompanying the social evolution of humanity, they had never reached the scale and characteristics of a world war. It is only natural that this shift brought fundamental changes to the theories of just war. Given the scale of global conflicts, the advancement of technology, and increasing international cooperation, it became evident that the traditional understanding of war as a means of achieving justice needed to be reevaluated. In the past, war was considered an extreme but legitimate tool for protecting legal order and state sovereignty. In modern wars, however, it became an instrument of mass destruction and suffering. Philosophers and legal theorists in the first half of the 20th century were compelled to formulate new approaches to this issue. They emphasized questions of international law, human rights, and, most importantly, the pursuit of peaceful alternatives.

---

46 SARTRE, Jean-Paul. *Bytie a ničota.* Praha: OIKOYMENH, 2018, pp. 41.
47 WEIL, Simone. *Oppression and Liberty.* London: Routledge, 2001.
48 WOOLF, Virginia. *Tri guiney*. Bratislava: Aspekt, 2001.

It is understandable that the connection between justice and war was only rarely acknowledged during this period. In fact, after the First World War, this connection surfaced in only three instances.[49] However, it must be noted that the development of the theory of just war was not realized in any case of legal or political progress following the First World War.[50]

One of the main criticisms was that technological advancements in warfare, particularly the emergence of nuclear weapons, fundamentally changed the nature of military conflicts. Nuclear weapons, as demonstrated at the end of the Second World War, represented a level of destruction that made any notion of a just war difficult to defend.[51] Pacifist movements, as previously mentioned, developed arguments against war as such. In the first half of the 20th century, numerous critiques of the concept of just war itself also emerged.

In this context, the question of just war became even more complex. War crimes such as the holocaust, genocides, and attacks on civilians challenged any possibility that war could be morally or legally justifiable. The international community began to consider how to ensure that such atrocities would never happen again. In general, defensive wars are considered just. The right to defend oneself against an aggressor is internationally recognized, but the methods that can still be deemed acceptable within the basic perception of humanity remain a contentious issue.

[49] The first instance concerned the Treaty of Versailles, which was perceived as unjust due to the allegedly overly harsh penalties imposed on Germany. The second instance involved the postwar formation of the League of Nations, where the rules of *ius ad bellum* marked a shift from unilateralism to multilateralism, emphasizing a collective approach to aggression. The third instance where justice was mentioned was the use of chemical weapons as a means of warfare, which was prohibited by the Geneva Protocol in 1925.

[50] OREND, *The Morality of War,* pp. 21.

[51] The use of atomic bombs on Hiroshima and Nagasaki in August 1945 demonstrated that modern warfare can have utterly devastating consequences for entire civilizations, seriously challenging the moral foundations of military actions.

THE EVOLUTION OF THE PRINCIPLE OF (GREEN) PROPORTIONALITY[1]

JUDr. Ingrid Lanczová, PhD.
ORCID: 0000-0003-2767-3558
Trnava University, Faculty of Law, Institute of Clinical Legal Education
E-mail: ingrid.lanczova@truni.sk

JUDr. Monika Martišková, PhD., LL.M
Trnava University, Faculty of Law, Department of Historical Law and Legal Methodology
E-mail: nika.martiskova@gmail.com

Abstract: *The authors examine the principle of proportionality from the historical perspective. First, they describe a general understanding of the principle. Secondly, they analyze the principle of proportionality as applicable in armed conflicts, which cause immense damage to the environment. Here, in the first place, the authors present the relevant work of Thomas Aquinas. Furthermore, they describe the war in Vietnam because it was the first war in which intentional anti-environmental actions were a leading component of the war strategy. Another milestone described is the Additional Protocol I (1977), which supplements the 1949 Geneva Conventions. Additionally, the authors mention the Gulf War, when clearly disproportionate anti-environmental actions took place. The authors conclude by mentioning the recent advancements manifold since the Russo-Ukrainian war.*
Keywords: *the principle of proportionality, environment, armed conflicts, just war theories*

The principle of proportionality in the just war theory plays a key role in determining the legitimacy and morality of using force in and during conflicts. It establishes that the harm caused by war must not outweigh the benefits gained from it. In essence, it is about balancing the means and ends of warfare to avoid unnecessary or excessive harm.

The principle applies in two contexts. The first one is *Jus ad bellum* (justice of war). This one refers to the justification for engaging in war in the first place. It requires the proportionality of the expected benefits of going to war (such as stopping aggression, protecting human rights, or restoring peace) to the

[1] The paper is an outcome of the VEGA research project no. 1/0202/22 titled "Theories of just war of the School of Salamanca scholars and their legacy in modern theories of just war and modern law of war" (in the Slovak original: "Teórie spravodlivej vojny učencov Salamanskej školy a ich odkaz v moderných teóriách spravodlivej vojny a modernom vojnovom práve").

harm and destruction the war will cause. The second one is *Jus in bello* (justice in war), which concerns conduct during war, requiring the proportional use of force in individual military actions to the legitimate military objectives and minimal harm to civilians and non-combatants.

The principle of proportionality has evolved over time. From the general understanding of the principle in the first part, the authors will move to the goal of this research, describing the so-called green proportionality, i.e., the application of the principle in protecting the environment in armed conflicts for the first time and up until today.

Starting with the Early Christian Thinkers, we can trace the origins of Just War Theory to the Early Christian philosophers like St. Augustine (354-430), who saw war as *a necessary evil*[2] to restore peace[3] and order. Augustine's writing formed the foundation of proportionality by stressing that wars must serve a just cause, and the harm done should be in the service of achieving a greater good (peace). For Augustine, during wars, it was necessary to protect the innocent and ensure the only goal, i.e., peace, with any use of force needing to be proportional.[4]

Medieval Scholastics, the most visibly represented by St. Thomas Aquinas (1225–1274), was built on Augustine's ideas in his seminal work, *Summa Theologica*.[5] He explicitly formulated the Just War Theory, identifying three

---

[2] ELKINS, B.: *Practical Just War: St. Augustine & His Framing of Just War Theory.* Discentes. Penn's Classical Studies Publication, 2024. Available online: https://web.sas.upenn.edu/discentes/2024/10/13/practical-just-war-st-augustine-his-framing-of-just-war-theory/ [cit. 2024-10-14].

[3] „Peace should be the object of your desire; war should be waged only as a necessity, and waged only that God may by it deliver men from the necessity and preserve them in peace. For peace is not sought in order to the kindling of war, but war is waged in order that peace may be obtained. Therefore, even in waging war, cherish the spirit of the peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace." In: ELKINS, B.: *Practical Just War: St. Augustine & His Framing of Just War Theory.* Discentes. Penn's Classical Studies Publication, 2024. Available online: https://web.sas.upenn.edu/discentes/2024/10/13/practical-just-war-st-augustine-his-framing-of-just-war-theory/ [cit. 2024-10-14].

[4] „... holding the right intention in declaring war, having exhausted all other political options before war is declared, and having sufficiently calculated the proportion of the war's potential benefit to destruction – then that nation is deemed just within jus ad bellum. Yet, for a war to be fully just, it must also satisfy jus in bello, the proper conditions in which war is waged." In: ELKINS, B.: *Practical Just War: St. Augustine & His Framing of Just War Theory.* Discentes. Penn's Classical Studies Publication, 2024. Available online: https://web.sas.upenn.edu/discentes/2024/10/13/practical-just-war-st-augustine-his-framing-of-just-war-theory/ [cit. 2024-10-14].

[5] For more information, please see the text of this article.

key conditions for a just war: proper authority, just cause, and right intention. Aquinas further developed the idea of proportionality, emphasizing that war must be a last resort and that the violence used must not exceed what is necessary to achieve the legitimate aim of restoring peace and justice.

Early Modern Thinkers, such as Francisco de Vitoria and Hugo Grotius, during the 16th and 17th centuries, were central to the development of modern just war theory. Vitoria, a Spanish theologian and jurist, applied natural law to war, arguing that war could only be justified to protect rights and maintain order. He understood proportionality as essential to avoid unnecessary harm to civilians and non-combatants.[6] Hugo Grotius, often titled the father of international law, built on this framework and formalized the concept of proportionality within the laws of war. In his *De Jure Belli ac Pacis* (On the Law of War and Peace), Grotius emphasized that even in a just war, violence must be proportional to the injury suffered, and non-combatants should not be targeted.[7] His work laid the foundation for the modern understanding of proportionality in international humanitarian law.

Modern development is marked by the international law and the Geneva Conventions. In the 19th and 20th centuries, the principle of proportionality became enshrined in international law, particularly in the Geneva Conventions and the Hague Conventions, which regulate the conduct of war. These agreements emphasize that the harm caused by military operations must be proportionate to the military advantage gained, reinforcing the principle of protecting civilians and minimizing unnecessary suffering. The principle was further developed through the Additional Protocols to the Geneva Conventions (1977), which specifically require that attacks must be proportionate, ensuring that incidental harm to civilians is not excessive in relation to the anticipated military advantage.

Considering contemporary international law and humanitarian interventions, today, proportionality is a cornerstone of international humanitarian law, and it continues to evolve with changing warfare technologies (like drones and cyberwarfare). In contemporary debates, proportionality plays a key role in assessing the legality and morality of military interventions, especially in cases of humanitarian intervention or the responsibility to protect. The principle also comes under scrutiny in asymmetric warfare,

---

6 AMELL, A.: The Theory of Just War and International Law. *Hispanic Journal*, 2017, Vol. 38, No. 1, pp. 63-76. Available online: https://www.jstor.org/stable/26535329 [cit. 2024-09-02].

7 GROTIUS, H.: *On the Law of War and Peace*. Cambridge: Cambridge University Press, 2013. Available online: https://doi.org/10.1017/CBO9781139031233 [cit. 2024-09-02].

where determining proportionality between state and non-state actors presents unique challenges.

The evolution of the principle of proportionality shows a continuous tension between the necessity of war (self-defence) and the moral and legal obligation to limit harm, reflecting the need to balance justice and humanity in the conduct of war.

Moving to the second part of this article, one must say that when scrutinizing the multidimensionality of the principle of proportionality, there is a dimension not so apparent yet crucial. It is the application of the principle of proportionality in protecting the environment during armed conflicts. The impact of armed conflict on the environment was probably among the last ones considered while assessing the losses in the past. However, there has been a shift in this approach in recent decades. In the following lines, we will highlight that the necessity to protect the environment has always had a universal character and describe how the omnipresent principle of proportionality started to apply in protecting the environment in armed conflicts.

As Reichberg and Syse say in their article Protecting the Natural Environment in Wartime: Ethical Considerations from the Just War Tradition, *"the just war tradition – set in its broader intellectual context – can be of service in the case of environmental aspects,"* i.e., it justifies the application of the principle of proportionality on the natural environment and the protection of natural environment in warfare in general. They refer to Thomas Aquinas when claiming that *"the privileged status of humankind within the natural order has an ecological ethic implicitly built into it."* People, *"as stewards of the whole who can rationally use human powers in a good or bad way, have an affinity with nature taken as a whole, it is not a prerogative of any one individual or people; it belongs to the entire human species."* See Aquinas in Summa Theologica: *"All things are common property in a case of extreme necessity. Hence, one who is in such dire straits may take another's goods in order to succor himself, if he can find no one who is willing to give him something."*[8]

Secondly, Reichberg and Syse remind us that *"Aquinas argues that the widest possible variety of species is necessary for the overall perfection of the universe. Therefore, a moral obligation to protect this variety exists whenever we exercise our stewardship over nature."* See Aquinas in Summa Theologica: *"Hence we must say that the distinction and multitude of things come from the intention of the first agent, who is God. For He brought things into being in order that His*

[8] AQUINAS, T.: *Summa Theologica,* p. 3004. Available online: https://www.ccel.org/ccel/a/aquinas/summa/cache/summa.pdf [cit. 2024-08-30].

goodness might be communicated to creatures, and be represented by them; and because His goodness could not be adequately represented by one creature alone, He produced many and diverse creatures, that what was wanting to one in the representation of the divine goodness might be supplied by another. For goodness, which in God is simple and uniform, in creatures is manifold and divided and hence the whole universe together participates the divine goodness more perfectly, and represents it better than any single creature whatever."[9]

And even though Judeo-Christian thinking is often considered anthropocentric[10] (e.g., White, 1967), the excerpts mentioned above or the teaching of St. Francis of Assisi (e.g., *"Praised be You, my Lord, through our Sister Mother Earth, who sustains and governs us, and who produces various fruit with coloured flowers and herbs."*[11]) show a broader context, calling upon the universal character of the ever-present necessity to protect the environment.

In practice, the milestone for such an approach became the development of warfare since the Second World War, hence also the unprecedented destruction of natural energy resources and the natural environment, most notably during the Vietnam War.

The Vietnam War was a war *"in which intentional anti-environmental actions were a major component of the strategy and tactics of one of the adversaries,"*[12] aimed primarily at the mangrove forests. In the Vietnam area, the mangrove forests have provided huge woody and non-woody biomass as

---

[9] AQUINAS, T.: *Summa Theologica,* p. 545. Available online: https://www.ccel.org/ccel/a/aquinas/summa/cache/summa.pdf [cit. 2024-08-30].

[10] This decline from anthropocentrism towards the so-called intrinsic value of the environment is also evident in international humanitarian law. According to the anthropocentric view, *"the natural environment is only protected by IHL if it affects the civilian population"* (e.g., not a bush in the middle of the desert). The intrinsic value approach recognizes *"the intrinsic dependence of all humans on the natural environment, as well as the still relatively limited knowledge of the effects of armed conflict on the environment and the implications of this for civilians. The period after the 1990–1991 Gulf War marked another moment in this general trend towards the protection of the natural environment as such, and since then the intrinsic value approach has continued to gain ground."* INTERNATIONAL COMMITTEE OF THE RED CROSS: *Guidelines on the Protection of the Natural Environment in Armed Conflict*. Geneva: ICRC, 2020, pp. 18-19. Available online: https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf [cit. 2024-08-29].

[11] From the "Letter to the Faithful" of Saint Francis of Assisi. Available online: https://www.vatican.va/spirit/documents/spirit_20020210_lettera-fedeli-3_en.html [cit. 2024-08-30].

[12] REICHBERG, G. – SYSE, H.: Protecting the Natural Environment in Wartime: Ethical Considerations from the Just War Tradition. *Journal of Peace Research*, 2000, Vol. 37, No. 4, Special Issue on Ethics of War and Peace, p. 449.

an energy source[13] and a hiding place for the guerilla fighters. *"Through the two Indochina wars, which together lasted almost 30 years, the quantity, quality and composition of mangroves have changed greatly. In particular, the use of herbicides and napalm during the Vietnam War (1962-1971) resulted in the destruction of nearly 40% of the mangrove forests in southern Vietnam."*[14] Herbicides were *"born in World War II as part of a monumental alliance of science and the defense establishment ("part of the emerging chemical and biological research program conducted by the US Army* which *did spray various insecticides for mosquito control in the Pacific and lice control in the European theater during WW II"[15]),* with the herbicide industry *reaching maturity in the postwar years in the hands of the private sector."[16] "Nearly 20 million gallons of herbicides by many accounts were distributed over 5 million acres of forest and cropland or approximately 12% of the land area of Vietnam."*[17] Chemical agents named Orange and White were mixtures of compounds which interfered with the metabolism of the plants, thereby killing them. Agent Blue prevented plants from retaining any moisture. Besides the loss of forest resources with their flora, fauna and water supplies, they affected human populations (mutagenic effects, obstetrical accidents, birth defects), and caused erosion and soil degradation.[18]

Therefore, in the early 1970s, biology Professor Arthur W. Galston coined the term "ecocide". The 1970s was also the era when environmental ethics emerged as an academic discipline as a response to ongoing protests (e.g., well-known is the photograph that shows a demonstrator offering a flower to a First Army military policeman during a rally to protest the Vietnam War in 1967[19]), sci-

---

[13] *„As a result, 4.5 million m³ of timber and firewood was lost... The government allowed the exploitation of the remaining area for firewood for people in Saigon and Vung Tau."* NGUYEN HONG, P. – THI SAN, H.: *Mangroves of Vietnam.* Gland: International Union for Conservation of Nature, 1993, p. 98, p. 101.

[14] NGUYEN HONG, P. – THI SAN, H.: *Mangroves of Vietnam.* Gland: International Union for Conservation of Nature, 1993, p. 3.

[15] FREY, R. S.: Agent Orange and America at war in Vietnam and Southeast Asia. *Human Ecology Review*, 2013, Vol. 20, No. 1, p. 2.

[16] ZIERLER, D.: *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment.* Athens (Georgia, US): The University of Georgia Press, 2011, p. 47.

[17] FREY, R. S.: Agent Orange and America at war in Vietnam and Southeast Asia. *Human Ecology Review*, 2013, Vol. 20, No. 1, p. 3.

[18] NGUYEN HONG, P. – THI SAN, H.: *Mangroves of Vietnam.* Gland: International Union for Conservation of Nature, 1993, pp. 97-99.

[19] A Demonstrator Offers a Flower to a Military Police Officer. *DocsTeach, National Archives,* 1967. Available online: https://www.docsteach.org/documents/document/demonstrator-offering-flower [cit. 2024-08-25].

entific works (e.g., Silent Spring by American marine biologist Rachel Carson about the environmental harm caused by the indiscriminate use of pesticides by soldiers during World War II[20]), and the rising concern for the environmental issues (e.g., the first Earth Day in April 1970 created by Senator Gaylord Nelson as a way to force environmental issue onto the national agenda, *"because there was no EPA, no Clean Air Act, no Clean Water Act. There were no legal or regulatory mechanisms to protect our environment."*[21]). In 1976, the General Assembly of the United Nations adopted the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD Convention), *"specifically intended to prevent use of the environment as a means of warfare, by prohibiting the deliberate manipulation of natural processes that could produce phenomena such as hurricanes, tidal waves or changes in climate."*[22]

Finally, in 1977, during the era of decolonization, the invention of new mass-destructing weapons and the Cold War, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted a milestone in environmental protection – Additional Protocol I that supplements the 1949 Geneva Conventions and governs international armed conflicts. It introduced, among other things, the protection of the natural environment in an armed conflict. It did so in two ways – firstly, via application of the general principle of proportionality on the natural environment and secondly, directly through the prohibition of widespread, long-term and severe damage to the natural environment (Article 35(3) and Article 55). The Conference also adopted Additional Protocol II governing non-international conflicts (civil wars), but this Protocol did not include similar obligations.[23] One hundred seventy-four States are party to Ad-

---

[20] CARSON, R.: *Silent Spring.* 1962. Available online: https://archive.org/details/fp_Silent_Spring-Rachel_Carson-1962/page/n3/mode/2up [cit. 2024-08-25].

[21] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: *EPA History: Earth Day.* Available online: https://www.epa.gov/history/epa-history-earth-day [cit. 2024-08-25].

[22] INTERNATIONAL COMMITTEE OF THE RED CROSS: *Advisory Service on International Humanitarian Law. 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.* 2003. Available online: https://www.icrc.org/sites/default/files/document/file_list/1976-enmod-icrc-factsheet.pdf [cit. 2024-08-28].

[23] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Vol. II.* Geneva, 1974-1977, 337 pp. Available online: https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-7/RC-records_Vol-7.pdf [cit. 2024-08-29]. However, *"the ICRC made a statement of the applicability of the principle of proportionality in relation to the environment in both international and non-international armed conflicts in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict in 1993. This assertion*

ditional Protocol I and one hundred sixty-eight States are party to Additional Protocol II.[24]

The principle of proportionality expressed in Article 51(5)(b) of the Additional Protocol I[25] considers as indiscriminate *"an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."*

As stated in the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict, *"the application of the general customary principle of proportionality specifically to the natural environment is articulated in Rule 43.C of the ICRC Study on Customary International Humanitarian Law."*[26] Explained in more detail, *"on the basis of its civilian character, any part of the natural environment that is not a military objective must be protected not only against direct attack, but also against "incidental damage", which must not be excessive – alone or in combination with other incidental civilian harm – in relation*

---

was uncontested." INTERNATIONAL COMMITTEE OF THE RED CROSS: *International Humanitarian Law Databases, Rule 43.* Available online: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule43 [cit. 2024-08-31].

[24] MEDECINS SANS FRONTIÈRES: *The Practical Guide to Humanitarian Law: Geneva Conventions of 1949 and Additional Protocols I and II of 1977.* Available online: https://guide-humanitarian-law.org/content/article/3/geneva-conventions-of-1949-and-additional-protocols-i-and-ii-of-1977/ [cit. 2024-08-29]. Modern international humanitarian law now encompasses four conventions and three additional protocols.

[25] Of course, *"proportionality plays a greater role than this, appearing in many other provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols."* MAROONIAN, A.: *Proportionality in International Humanitarian Law: A Principle and a Rule.* 2022. Available online: https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule/ [cit. 2024-08-31].

[26] INTERNATIONAL COMMITTEE OF THE RED CROSS: *Guidelines on the Protection of the Natural Environment in Armed Conflict.* Geneva: ICRC, 2020, p. 53. Available online: https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf [cit. 2024-08-29]. Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

INTERNATIONAL COMMITTEE OF THE RED CROSS: *International Humanitarian Law Databases, Rule 43.* Available online: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule43 [cit. 2024-08-31].

to the concrete and direct military advantage anticipated from an attack against a military objective."[27]

"The applicability of the principle of proportionality to incidental damage to the environment is supported by a number of official statements," including NATO and the International Court of Justice.[28]

Articles in Protocol I that expressly protect the natural environment are Article 35(3) and Article 55.[29] The proportionality principle and the prohibition to damage the natural environment *"operate differently" – "while the latter prohibits only those attacks that are intended or expected to cause widespread, long-term and severe damage to the natural environment, the proportionality rule may render unlawful an attack which would cause damage to the natural environment of lesser gravity or magnitude."*[30]

Clearly disproportional[31] was the environmental damage in the 1990–1991 Gulf War, an international conflict triggered by Iraq´s invasion of Kuwait. The allied coalition made up of 39 countries against Iraqi leader Saddam Hussein eventually made Iraq accept the terms of a ceasefire agreement on April 6,

---

27 Ibid.

28 NATO: "*When making targeting decisions* (in the case of Yugoslavia), *it took into account all possible collateral damage, be it environmental, human or to the civilian infrastructure.*" ICJ: *"States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.*" INTERNATIONAL COMMITTEE OF THE RED CROSS: *International Humanitarian Law Databases, Rule 43.* Available online: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule43 [cit. 2024-08-31].

29 *Article 35 – Basic rules* 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. *Article 55 – Protection of the natural environment* 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited.

30 INTERNATIONAL COMMITTEE OF THE RED CROSS: *Guidelines on the Protection of the Natural Environment in Armed Conflict. Geneva: ICRC*, 2020, p. 53. Available online: https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf [cit. 2024-08-31].

31 The application of the principle of proportionality is confirmed for example here: *"Other general principles (than Articles 35 and 55 of Additional Protocol I of 1977) and detailed provisions of the laws of war, including those of the 1907 Hague Regulations and the 1949 Geneva Conventions, were indisputably in force and clearly covered these acts of wanton destruction.*" ROBERTS, A.: *Environmental Destruction in the 1991 Gulf War*, p. 552. Available online: https://international-review.icrc.org/sites/default/files/S0020860400071151a.pdf [cit. 2024-09-11].

1991. However, this had been preceded by 382 in-theater casualties, about 697 000 US troops deployed to the Persian Gulf region, estimated Iraqi soldier deaths ranging from 1 500 to 100 000, estimated incremental costs of $61 billion,[32] and an immense environmental damage. As Abdullah Toukan stated in 1991: *"The region is plagued by exploding refineries, the emission of thousands of tons of toxic chemicals into the atmosphere, and oil spills devastating the plains and coastal areas of the delicate Gulf ecosystem. The burning of oil wells, refineries, and other petroleum facilities in Kuwait has created an unprecedented atmospheric disaster and bears silent witness to human and ecological frailty. A good part of the exhaustible wealth of the Arab world is going up in flames."*[33] Just to provide an example, Jacqueline Michel stated in 2011 that *"the release of 11 million barrels*[34] *of crude oil into the Arabian Gulf during the 1991 Gulf War resulted in the largest oil spill in history."*[35] According to Tahir Husain, *"more than 800 oil wells detonated with explosives ignited by the Iraqi forces, out of which more than 650 wells burned with flames for several months and the remainder gushed oil forming lakes and pools."*[36]

To illustrate the effect on the wildlife, *"it is likely that far more birds would be killed in the Gulf than in Alaska (where an estimated 90 000-270 000 died) because the spill covers a wider area and the region is a major migratory path."*[37]

The far-reaching effect was evident as *"a shower of black rain began falling more than 1 000 km away on southern Turkey."*

As a result, in 2022, Iraq completed the payment of $52.4 billion to compensate individuals, companies, and governments who proved damages to the U.N. Compensation Commission, set up by the U.N. Security Council.[38]

---

[32] Gulf War Fast Facts. *CNN,* 2024. Available online: https://edition.cnn.com/2013/09/15/middleeast/gulf-war-fast-facts/index.html [cit. 2024-09-11].

[33] TOUKAN, A.: The Gulf War and the Environment: The Need for a Treaty Prohibiting Ecological Destruction as a Weapon of War. *The Fletcher Forum of World Affairs,* 1991, Vol. 15, No. 2, p. 95.

[34] 1 barrel is approximately 159 liters.

[35] MICHEL, J.: Chapter 37 – 1991 Gulf War Oil Spill. In: FINGAS, M.: *Oil Spill Science and Technology*. Houston: Gulf Professional Publishing, 2011, pp. 1127-1132.

[36] HUSAIN, T.: Kuwaiti oil fires — Source estimates and plume characterization. *Atmospheric Environment,* 1994, Vol. 28, Issue 13, pp. 2149-2158.

[37] GLASSMAN, L. – WALSH, J.: War in the Gulf: Post Mortem of an Environmental Tragedy: Oil Spills and Oil Fires. *Earth Island Journal,* 1991, Vol. 6, No. 2, p. 44.

[38] NEBEHAY, S.: Iraq pays last chunk of $52.4 billion Gulf War reparations – UN. *Reuters,* 2022. Available online: https://www.reuters.com/world/middle-east/iraq-pays-last-chunk-524-billion-gulf-war-reparations-un-2022-02-09/ [cit. 2024-09-11].

Besides the principle of proportionality, other general principles of international humanitarian law apply to environmental protection during armed conflicts. *"Often referred to as a source of law on their own,"*[39] these include the principles of distinction, military necessity, and humanity. *"They complement and underpin the various IHL instruments and apply to all countries. Where gaps exist in the international framework governing specific situations (including, for instance, the relationship between armed conflict and the environment), the Martens Clause* (the 1899 general principle) *stipulates that States should respect a minimum standard as established by the standards of humanity and the public conscience."*[40]

Alongside international humanitarian law, also international criminal law, international environmental law, and human rights law contain provisions on the protection of the environment and the use of natural resources during armed conflict. United Nations Environment Programme prepared an inventory and analysis, launched on the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict[41], which includes a *"number of key findings and recommendations, explaining why the environment continues to lack effective protection during armed conflict, and how these challenges can be addressed to ensure that the legal framework is strengthened and better enforced."*[42] Also, while the general principles are *"generally accepted, there is no agreement and little discussion to date about how they apply in concrete cases."*[43]

Thus, amid the sadness of the ongoing armed conflicts, it is uplifting to see the recent advancements[44] which aim to elaborate on existing rules, originat-

---

39 UNEP: *Protecting the environment during armed conflict: an inventory and analysis of international law,* p. 51. Available online: https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international [cit. 2024-09-03].

40 Ibid.

41 Annually observed on 6 November.

42 Ibid.

43 Ibid., pp. 12-13.

44 For example, the UN International Law Commission adopted Principles on Protection of the Environment in Relation to Armed Conflicts (PERAC), passed by a UN General Assembly on 7 December 2022. As Weir said: *"It's a new way of thinking about the whole lifecycle of conflict." "They cover important topics such as the rights of Indigenous peoples, the use of natural resources, corporate conduct in conflict zones and the effects of war on marine areas. The new PERAC principles are not legally binding on states, but it is hoped they will be implemented through national legislation, military training manuals, business guidance, and outreach with non-state armed groups. One key principle calls on states to make businesses, and subsidiaries, operating in and from their country responsible for harm to the environment and human health caused during wartime. Unlike a legally binding international treaty, there*

ing from just war theories, and deeper protect the natural environment, which is *"not a place to visit, it is home."*[45]

is no formal body or process to carry them out and monitor them. But Weir says legal experts, academics and international groups are taking them seriously. "For example, there's quite a lot of interest in the principles around protected areas and how nature reserves could be protected during conflict. There hadn't been any substantive progress on this before [but] we're now seeing a few different organisations and entities, like the International Union for Conservation of Nature, engaging on it."

KAMINSKI, I.: War and the environment: UN adopts new principles. *Dialogue Earth,* 2023. Available online: https://dialogue.earth/en/justice/war-and-the-environment-un-adopts-new-principles/ [cit. 2024-09-12].

The applicability of the principle of proportionality is highlighted in Principle 14.

GENERAL ASSEMBLY – THE UNITED NATIONS: A/RES/77/104. Available online: https://documents.un.org/doc/undoc/gen/n22/741/64/pdf/n2274164.pdf [cit. 2024-09-12].

Another example might be the 2024 statement that The Office of the Prosecutor launched a public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute.

"The Rome Statute of 1998 incorporates some of the prohibitions contained in Additional Protocol I. For instance, the International Criminal Court has jurisdiction in respect of war crimes that consist in "intentionally launching an attack in the knowledge that such attack will cause incidental [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (Article 8, para. 2 [b, iv])."

INTERNATIONAL COMMITTEE OF THE RED CROSS: *Advisory Service on International Humanitarian Law. 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.* 2003. Available online: https://www.icrc.org/sites/default/files/document/file_list/1976-enmod-icrc-factsheet.pdf [cit. 2024-09-13].

ICC: *Statement: 16 February 2024*. Available online: https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0 [cit. 2024-09-13].

It is also necessary to mention the Council of Europe´s Report on the Environmental Impact of Armed Conflicts (2023). It states that armed conflicts affect not only ecosystems but also human health beyond the conflict area long after the conflict is over. According to it, the existing international legal framework provides for limited protection of the environment in times of armed conflict based on international humanitarian law instruments. It advocates for the universal recognition of the crime of ecocide and measures to outlaw the use of prohibited weapons. It also recommends consolidating the legal framework at the international-European-national levels (especially strengthening the responsibility of a state for extraterritorial environmental damage. It also calls for a draft of a new regional legal instrument or treaty under the Council of Europe's auspices to fill the identified gaps in the existing legal regime – damage threshold, enforcement and liability, and the due diligence principle, etc.).

[45] Gary Snyder (1930, San Francisco), a winner of a Pulitzer Prize for Poetry, academician, and environmental activist.

BIBLIOGRAPHY

A Demonstrator Offers a Flower to a Military Police Officer. *DocsTeach, National Archives,* 1967. Available online: https://www.docsteach.org/documents/document/demonstrator-offering-flower [cit. 2024-08-25].

AQUINAS, T.: *Summa Theologica,* 6806 pp. Available online: https://www.ccel.org/ccel/a/aquinas/summa/cache/summa.pdf [cit. 2024-08-30].

AMELL, A.: *The Theory of Just War and International Law*. Indiana University of Pennsylvania, 2017. Hispanic Journal. Vol. 38, No. 1 (Spring 2017), pp. 63-76. Available online: https://www.jstor.org/stable/26535329 [cit. 2024-09-02].

CARSON, R.: *Silent Spring.* 1962. Available online: https://archive.org/details/fp_Silent_Spring-Rachel_Carson-1962/page/n3/mode/2up [cit. 2024-08-25].

ELKINS, B.: *Practical Just War: St. Augustine & His Framing of Just War Theory.* Discentes. Penn's Classical Studies Publication, 2024. Available online: https://web.sas.upenn.edu/discentes/2024/10/13/practical-just-war-st-augustine-his-framing-of-just-war-theory/ [cit. 2024-10-14].

FREY, R. S.: Agent Orange and America at war in Vietnam and Southeast Asia. *Human Ecology Review*, 2013, Vol. 20, No. 1, pp. 1-10. ISSN: 1074-4827.

From the "Letter to the Faithful" of Saint Francis of Assisi. Available online: https://www.vatican.va/spirit/documents/spirit_20020210_lettera-fedeli-3_en.html [cit. 2024-08-30].

GENERAL ASSEMBLY – THE UNITED NATIONS: *A/RES/77/104.* Available online: https://documents.un.org/doc/undoc/gen/n22/741/64/pdf/n2274164.pdf [cit. 2024-09-12].

GLASSMAN, L. – WALSH, J.: War in the Gulf: Post Mortem of an Environmental Tragedy: Oil Spills and Oil Fires. *Earth Island Journal,* 1991, Vol. 6, No. 2, pp. 43-45. ISSN: 1041-0406.

GROTIUS, H.: *On the Law of War and Peace.* Cambridge University Press, 2013. Available online: https://doi.org/10.1017/CBO9781139031233 [cit. 2024-09-02].

Gulf War Fast Facts. *CNN,* 2024. Available online: https://edition.cnn.com/2013/09/15/middle-east/gulf-war-fast-facts/index.html [cit. 2024-09-11].

HUSAIN, T.: Kuwaiti oil fires — Source estimates and plume characterization. *Atmospheric Environment,* 1994, Vol. 28, Issue 13, pp. 2149-2158. ISSN: 1352-2310.

ICC: *Statement: 16 February 2024*. Available online: https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0 [cit. 2024-09-13].

INTERNATIONAL COMMITTEE OF THE RED CROSS: *Advisory Service on International Humanitarian Law. 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.* 2003. Available online: https://www.icrc.org/sites/default/files/document/file_list/1976-enmod-icrc-factsheet.pdf [cit. 2024-08-28].

INTERNATIONAL COMMITTEE OF THE RED CROSS: *Guidelines on the Protection of the Natural Environment in Armed Conflict.* Geneva: ICRC, 2020, 128 pp. Available online: https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf [cit. 2024-08-29].

INTERNATIONAL COMMITTEE OF THE RED CROSS: *International Humanitarian Law Databases. Study on Customary International Humanitarian Law, Rule 43.* Available online: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule43 [cit. 2024-08-31].

KAMINSKI, I.: War and the environment: UN adopts new principles. *Dialogue Earth,* 2023. Available online: https://dialogue.earth/en/justice/war-and-the-environment-un-adopts-new-principles/ [cit. 2024-09-12].

MEDECINS SANS FRONTIÈRES: *The Practical Guide to Humanitarian Law: Geneva Conventions of 1949 and Additional Protocols I and II of 1977.* Available online: https://guide-humanitarian-law.org/content/article/3/geneva-conventions-of-1949-and-additional-protocols--i-and-ii-of-1977/ [cit. 2024-08-29].

MICHEL, J.: Chapter 37 – 1991 Gulf War Oil Spill. In: FINGAS, M.*: Oil Spill Science and Technology.* Houston: Gulf Professional Publishing, 2011, pp. 1127-1132. ISBN: 978-1-85617-943-0.

NEBEHAY, S.: Iraq pays last chunk of $52.4 billion Gulf War reparations – UN. *Reuters,* 2022. Available online: https://www.reuters.com/world/middle-east/iraq-pays-last-chunk--524-billion-gulf-war-reparations-un-2022-02-09/ [cit. 2024-09-11].

NGUYEN HONG, P. – THI SAN, H.: *Mangroves of Vietnam.* Gland: International Union for Conservation of Nature, 1993, 173 pp. ISBN: 9782831701660.

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Vol. II. Geneva, 1974-1977, 337 pp. Available online: https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-7/RC-records_Vol-7.pdf

REICHBERG, G. – SYSE, H.: Protecting the Natural Environment in Wartime: Ethical Considerations from the Just War Tradition. *Journal of Peace Research*, 2000, Vol. 37, No. 4, Special Issue on Ethics of War and Peace, pp. 449-468. ISSN: 0022-3433.

ROBERTS, A.: *Environmental Destruction in the 1991 Gulf War*, pp. 538-553. Available online: https://international-review.icrc.org/sites/default/files/S0020860400071151a.pdf [cit. 2024-09-11].

TOUKAN, A.: The Gulf War and the Environment: The Need for a Treaty Prohibiting Ecological Destruction as a Weapon of War. *The Fletcher Forum of World Affairs,* 1991, Vol. 15, No. 2, pp. 95-100. ISSN: 10461868.

UNEP: *Protecting the environment during armed conflict: an inventory and analysis of international law,* 83 pp. Available online: https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international [cit. 2024-09-03].

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: *EPA History: Earth Day.* Available online: https://www.epa.gov/history/epa-history-earth-day [cit. 2024-08-25].

ZIERLER, D.: *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment.* Athens (Georgia, US): The University of Georgia Press, 2011, 252 pp. ISBN: 9-780-8203-3826-2.

CONSTITUTION AND PEACE

Dr. Diego Valadés

Emeritus Researcher of the Institute of Juridical Research
of the National Autonomous University of Mexico
and of the National System of Researchers of Mexico.
E-mail: diego_valades@yahoo.com

After the Second World War, the Mexican Constitution was amended to include, in the provision referring to education (Article 3), the State's commitment to contribute "to better human coexistence [and to] support the ideals of fraternity and equal rights of all men, avoiding the privileges of races, sects, groups, sexes or individuals."[1]

A new addition, this time referring to the powers of the President of the Republic, established the principles that govern Mexico's relations with the world:

> "[T]he self-determination of peoples; non-intervention; the peaceful solution of controversies; the prohibition of the threat or use of force in international relations; the legal equality of States; international cooperation for development; respect, protection and promotion of human rights and the fight for international peace and security;"[2]

Years later, Senator Rogelio Israel Zamora Guzmán proposed adding the previous section to introduce the principles of fraternity and solidarity, but it did not prosper. Among his considerations, the legislator referred to my participation in the 1988 addition, saying:

> "Diego Valadés, then representative [member of the federal Congress] and director of the Institute of Legislative Studies of the same Chamber [of Deputies], asked another well-known jurist, Ricardo Méndez Silva, to prepare a constitutional reform project precisely to include principles of foreign policy."[3]

---

1 Reform of Article 3 of the Constitution, published on December 30, 1946.

2 Reform to Article 89-X of the Constitution, published on May 11, 1988.

3 Initiative presented on June 22, 2022. The text can be consulted on the following pages: http://sil.gobernacion.gob.mx/Archivos/Documentos/2022/06/asun_4371338_20220622_1657033099.pdf
https://www.senado.gob.mx/65/gaceta_del_senado/documento/126942

Although it was no longer directly related to the issue of peace, but rather to human rights and their guarantees, a third addition is significant, this time concerning the reception of international treaties on human rights.[4]

The references above show the progressive inclusion in the Mexican Constitution of relevant issues for better human coexistence. In the same sense, provisions relating to the environment, to the guarantees applicable during states of exception, to the restrictions imposed on the armed forces in times of internal peace, for example, could be considered. The constitutionalism of our time is concerned with this dimension of social life that involves national communities with the international community.

The above explains why this concern is introduced into contemporary constitutional theory, as underlined by Peter Häberle, The question of peace has been recurrent for centuries, but it is up to the professor of Bayreuth to construct the discourse of peace as an element of contemporary constitutionalism.[5]

Politics was understood as a science of concord since Plato and Aristotle. For them, peace was a central objective of the *polis*, so that balances were fundamental. To a large extent, this is the logic of the organization of the State that, to be and for being so, exercises the monopoly of coercion according to precise rules. State coercion is part of the preservation of peace. If it is not exercised in the cases provided for by the law, it would cease to comply with its own determinations and would expose society to a situation of alteration.

Professor Häberle examines the State as the protagonist of peace through international treaties; through constitutions, in their preambular and operative parts, and also through the symbolic elements of the State, such as national anthems, flags and coats of arms. Locating the references and representations of peace is an original inquiry and the author delves into the links between culture and constitutions.

Häberle takes up and renews the legacy of Montesquieu when he speaks of the "spirit of the Constitution", in reference to the culture of peace. The concern for peace is present in the *Spirit of the Laws*, but in a different dimension to that now proposed by Häberle. Although Montesquieu stated at the begin-

---

4 Reform to Article 1 of the Constitution, published on June 10, 2011.

5 Häberle, Peter, *Sobre el principio de la paz. La "cultura de la paz". El tópico de la teoría constitucional universal,* [On the Principle of Peace. The "Culture of Peace". The Topic of Universal Constitutional Theory], Buenos Aires, Ediar, 2022. Edited by Raúl Gustavo Ferreyra, translated by Laura S. Carugati and Gastón R. Rossi. The original title is: *Die «Kultur des Friedens» – Thema der universalen Verfassungslehre. Or: Das Prinzip Frieden*, Berlin, Duncker & Humblot, 2017.

ning of his work that peace is the first law of nature,[6] he later turned his attention to other aspects that are well known and left this concept undeveloped. Kant would rectify this, stating that peace is not proper to nature and, on the contrary, it must be deliberately established.[7] Häberle formulated an innovative synthesis: the spirit of the Constitution is not in nature but in culture, which, like the norm, is also an artificial construction. Between the extremes of nature and rationality alone, a path is proposed that associates rational decision with perceptions, emotions, intuitions, traditions and convictions, in short, with culture.

Perhaps Machiavelli had already perceived a similar notion when he stated that Numa Pompilius, successor of Romulus, applied the "art of peace" to appease the "most ferocious people".[8] This art was proper to "civil living" and, according to the Florentine, was based on law, custom and religion, that is, on the binomial law and culture. He reiterated the idea by evoking the words with which Castruccio Castracani instructed his successor, Pagolo Guinigi, pointing out to him that reigning is based on the art of peace.[9]

I share Häberle's thesis that the cosmopolitan constitutionalism of our days is directly related to the development of human rights and their guarantees, and to the better regulation of the international order. To bring us closer to this reality, the author formulates an authentic constitutional theory of peace that will undoubtedly give rise to new doctrinal developments. The author himself indicates, towards the end of the work, that this reflection on the cooperative Constitutional State as a peace project is a first step, since it is a matter "too big" to be fully assumed by a single researcher. In doing so, he does not minimize his efforts or assume an artificial modesty; he simply states the truth: building a constitutional culture of peace will take time and will demand vigorous efforts of imagination and work.

One of the preliminary steps to be taken is the concept of peace itself. The negative concept, according to which peace is the absence of war, is well known and has been widely used. It is understandable that theories of peace are linked to theories of violence, whatever their expressions, but the apparent simplicity of the negative statement resolves very little, because if violence were defined as the absence of peace, one would enter a self-referential circle with no way out.

---

6 Montesquieu, *The Spirit of the Laws*, I, 2.

7 Kant, Emmanuel, *La paz perpetua* [*Perpetual Peace*], Madrid, Tecnos, 1985, p. 14 (second section).

8 Machiavelli, *Discourses on the First Decade of Livy*, I, 11; I, 19.

9 Maquiavelo, *La vita de Castruccio Castracani*, en *Opere*, Turín, Einaudi, t. III, p. 297.

It is necessary to point out a central problem of peace vis-a-vis politics. The criterion formulated by Clausewitz that war is the continuation of politics by other means[10] can be read as a recognition of the agonistic essence of politics. Clausewitz was not an apologist for violence; he only recognized that conflict interrupts political action, but his goal is the return to peace so that politics can resume the leadership of the State through legal and political procedures, not instruments of war.

Foucault reversed the order of the statements formulated by Clausewitz to indicate that politics is the continuation of war by other means.[11] Through a different path than that followed by Carl Schmitt, the French philosopher arrived at similar conclusions by emphasizing the agonistic characteristics of political action. He was not wrong, but it is precisely there that it is shown that the concept of peace is far from alluding to an Arcadian dream.

If peace were a kind of natural state, it would make no sense to postulate its constitutional concretion. Law and peace are acts of will that enact a reasonable order. In this sense, peace is not only the absence of violence; peace consists of the presence of a binding order established deliberately to resolve disputes through instances of mediation regulated by law and applied by the State.

Peace is built and preserved through well-designed balances. War seeks victory over the adversary; peace means victory over oneself, not because it depends on self-discipline but because it involves the decision of the eventual contenders to adhere to the available mediation options. This is where the State comes into action to provide the mechanisms for resolving disputes within its internal sphere, and to participate in international determinations aimed at avoiding conflicts.

In the international domain, the possibilities of managing peace are more limited than within States, among other things due to the asymmetrical relations that exist in the international reality. The specific weight of each State within the international community is associated with its military, scientific, cultural, economic and technological resources, and although various contents of international law are consolidated, there are many that still remain subject to the determinations of the great powers.

By focusing the issue of peace within the State, the possibilities of its realization are more accessible, although the final objective consists of extending it to the international order. An effective strategy is the one followed by Latin

[10] Clausewitz, Karl von, *On War*, London, Pelican, 1968, p. 119.
[11] Foucault, Michel, *Il faut défendre la société*, París, Gallimard, 1997, p. 43ff.

America. The Argentine jurists Carlos Calvo and Luis María Drago provided the keys to overcome foreign interventionism in the hemisphere; interventionism that was a factor of violence and instability in the region. The Calvo doctrine (1868) postulated the priority of local justice over diplomatic intervention, in the case of disputes between nationals and foreigners; the Drago doctrine (1902) provided the instruments to prevent the use of force in the collection of foreign debts. In Mexico, president Venustiano Carranza upheld the legal equality of States and non-intervention, and foreign minister Genaro Estrada replaced the express recognition of governments with the accreditation, maintenance or withdrawal of diplomatic agents. A crucial step was the signing of the Treaty of Tlatelolco (1969), promoted by Alfonso García Robles, by virtue of which the countries of the region agreed to ban nuclear weapons.

Actions for peace have earned the Nobel Peace Prize to Adolfo Pérez Esquivel (Argentina), Alfonso García Robles (Mexico), Óscar Arias Sánchez (Costa Rica), Rigoberta Menchú (Guatemala) and Juan Manuel Santos (Colombia). The five winners were active promoters and actors of peace. There has also been an intense effort to defend human rights on a continental level, tasks in which the contributions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights stand out. In the hemisphere, the constitutional acceptance of treaties on the subject and the figure of the ombudsman have prospered.

Among Häberlian contributions to the constitutional theory of peace, one can add what he calls "peace with the environment" or "peace with nature."[12] At this point, global efforts have encountered resistance where the single-person decision of heads of state and government prevails. These are the cases of the United States and Brazil. These examples show to what extent environmental problems resulting from the concentration of power transcend the national states. The damage to nature caused by the decisions of two presidents goes beyond their borders. In one case, during Donald Trump's presidency, the United States abandoned the Paris Agreement: in another, Brazil, during Jair Bolsonaro's period, continued deforestation in the Amazon. Both actions affect the planet.

The remedy for such actions is not within the reach of international bodies, especially when the offending countries include the world's leading economic and military power; but it is also unreasonable to accept that what is done to the detriment of the planet by a single person, in a single country, is not sub-

[12] *Op. cit*., pp. 239, 254.

ject to control by the international community. At this point, culture and the right to peace can play a crucial role. Responses that are not within the reach of nations or international organizations could be within the reach of national communities if local consumers respond to grievances that harm humanity.

An example of the greatest interest is that offered by the growing demand for fair trade. This movement, which began around fifty years ago, took a long time to consolidate. Today, the World Fair Trade Organization brings together more than a thousand social enterprises in almost eighty countries. This is a laudable effort because its objectives are aimed at ensuring that the human rights of workers and the environment are respected in the production identified as fair trade. Certification is applied to consumer goods from countries suspected of having labor policies that are adverse to their inhabitants. The response of high-consumption societies has been beneficial in preventing the exploitation of minors, women and workers in general, and in protecting the environment in these regions. This is a case of social culture because those who apply the measures are the consumers themselves, who often prefer to pay higher prices for certified products and reject cheaper ones of dubious manufacture.

In the future, we will have to trust that consumers around the world will demand that products from large economies have environmental protection certificates. This will give people some kind of control of the powerful who damage nature. To achieve this high level of cultural development, the orientation adopted by the constitutional State is essential. The collective maturity required to achieve high cultural and environmental standards presupposes, according to Häberle, robust pluralistic democracies; effective models of well-being, human rights and access to justice, and systems of government whose design makes legal, social and political controls on power functional.

Häberle highlights the way in which the elements of the constitutional State must be aligned with the objectives of the culture of peace. These factors are already present in the legal systems, but they need to be understood in accordance with the purpose of peace, which is the context where fundamental rights, and social and cultural rights can prosper, and democratic institutions grant coexistence of societies. "The culture of peace must be formed with sufficient effort through the constitutional order, traditions, mentalities, attitudes, modes of behavior and similar things, as well as with citizens,"[13] and this culture includes both international and internal peace. This conceptual breadth

[13] Häberle, *op. cit.*, p. 252.

opens another horizon for peace studies already carried out by research and higher education centers.

At the end of the Second World War, the French sociologist Gaston Bouthoul coined the concept of polemology[14] to undertake the study of war through the social sciences. His central thesis was that, to avoid conflict, its causes and its channeling through reasonable means had to be known. Shortly afterwards, another proposal emerged, irenology, the scientific study of peace. *Irenism* denotes an attitude, a current, a doctrine and a branch of study whose objective is to identify the elements that contribute to the preservation of peace. In essence, although with different methodological approaches, both disciplines converge in their objectives.

Today, a significant number of prizes contribute to the culture of peace. The most well-known and influential is the Nobel Prize. In addition, work on war and peace is carried out in around four hundred study centers established in various countries. When in 1959, during the Cold War, Johan Galtung founded the International Peace Research Institute, other convergent efforts multiplied. Its objective has been to apply social sciences to "achieve peace through peaceful means."[15]

It is a paradox that in Latin America, one of the areas most affected by internal violence, this type of center has not yet found expressions of regional institutional collaboration, in accordance with the magnitude of the problems of internal violence that it has suffered and continues to suffer.

There are also relevant and timely indicators that account for the magnitude of the serious problems for a peace that is continually threatened. Since 2007, the Institute for Economics and Peace in Australia, with an extensive network of collaborating entities, has published the Global Peace Index. This index includes military and violence aspects, with an emphasis on criminal violence and, in addition to the global panorama, it offers the results of some national research.

Studies on war and peace are well established and consolidated. Peace sciences are the pillar of the culture of peace. In all cases, these sciences include legal institutions, although these are not always the core element. The emphasis that Peter Häberle gives to peace studies, focusing them on the relationship between law and culture, corresponds to a different approach to those adopted until now, in which anthropological, communicational, economic, political,

[14] Cfr. Bouthoul, Gaston, *Essais de polémologie*, Paris, Denoël, 1976.

[15] Galtung, Johan, "TRASCEND: 45 years, 45 conflicts", in Galtung, Johan, *Searching for peace*, London, Pluto Press, 2002, p. 173.

sociological and technological issues have been privileged. The symbiosis of law and culture allows us to contemplate an angle that complements and enriches the efforts underway.

In these considerations, it is necessary to add a relevant category for peace in the cultural and legal orders: secularism. At present, the importance of the secular State has been predominantly oriented towards the forms of adaptation and relationship of emigrants, especially of Islamic origin, in the host countries. However, the deficits of the secular State have a lot to do with expressions of violence that affect women and members of the LGBTTTIQ+ community in countries where religious organizations continue to have high political influence. Of these, there are numerous cases in Latin America.

The secular State requires strong cultural support to overcome the resistance that prevents women from being granted rights over their bodies and outlawing any form of discrimination derived from sexual orientation. Even in States where the reference to their secularity has been expressly incorporated, rules and practices that contravene the normative statement persist, turning it into a precept alien to normality.

It is also desirable to promote the inclusion of a specific subject for teaching the law of peace as a curricular topic in schools that train communication specialists, historians, lawyers, political scientists, public administrators, social anthropologists and sociologists. A concerted effort is indispensable to promote in national societies the conviction that the constitutional system will contribute to making possible the harmonious coexistence that defines a civilized community.

Political restraint, characteristic of democracies, is compatible with the conviction that peace is not interrupted by disagreement. The contention over power is part of freedom and to that extent cannot be limited. It is worth bearing in mind Madison's dilemma. When Madison asked himself what to do in cases where factions fought driven by the impulse of passion "or by an interest adverse to the rights of other citizens or the permanent interests of the community," he replied that there were only two possible solutions: to eliminate the causes of the conflict or to address its effects. If the causes were to be eliminated, freedoms would be harmed, which would be contrary to the constitutional order, so there was only one viable solution: to correct the effects.[16] This is one of the functions of law: to resolve conflicts.

[16] See Jay, John; Hamilton, Alexander, and Madison, James, *The Federalist*, X.

The constitutional State has the means to absorb tensions. It is necessary to bear in mind that there will never be perfect solutions and that even the solutions of one time can become the problems of another. The constructive work of this State is permanent; there is no room for conservative positions that opt for immutable rules. Like culture, law is movement. Both accompany each other, feed off each other reciprocally and are shaped according to social and individual expectations for more equal, fair and free-living conditions.

In the 19th century, Benito Juárez, an enlightened statesman and lawyer, led a double struggle in Mexico: to transform the confessional State into a secular State, and to confront the invasion of French troops in the country. At the end of the period of internal and international violence, he declared: "Among individuals, as among nations, respect for the rights of others is peace."[17] He was right in his thesis, because the legal system is the axis of peaceful conduct; it is the area in which all people and all nations can influence on equal terms.

At this point it is worth making a conclusion: neither peace nor war can be qualified in absolute terms in the light of law or culture. In the culture of nations there are valuable convictions and traditions associated with war episodes, such as wars of independence, those fought in defense of national sovereignty, and social revolutions, for example. Conversely, undesirably peace can be imposed in situations contrary to freedoms, as happen with dictatorships. Thus, regardless of the concepts and typologies that are preferred or coined about peace, it is possible to point out that, accordingly to its contents, *peace is a situation in which, in a context of freedoms, the legal system provides the instruments for harmonious, cooperative, respectful and supportive coexistence of nations, promotes international collaboration and, in adverse conditions, preserves minimum acceptable levels for dignified coexistence and to prevent conflicts from leading to violence.*

[17] Manifesto of July 15, 1867, in Tamayo, Jorge L., (compiler), *Benito Juárez. Documentos, discursos y correspondencia*, Mexico, Libros de México, 1974, v. 12, p. 275.

JUST VERSUS UNJUST WAR: SOME REMARKS

Dr. h. c. prof. JUDr. Peter Mosný, CSc.
professor emeritus, legal historian
E-mail: fridman@zoznam.sk

I believe that war is always evil, no matter whether it is "just" or "unjust". Nevertheless, I find it indisputable that just and unjust wars are qualitatively different, and so it is possible to formulate criteria by which they can be distinguished.

There are many causes, or rather pretexts, for which unjust wars are fought, whether as undisguised open wars or proxy wars. Among these are the alleged need to expand so-called living space, the preservation or expansion of spheres of influence, flagrant violation of bilateral or multilateral treaty arrangements, etc.

In any case, the waging of unjust wars depends on the policies of the currently ruling elites of a state. It does not matter whether the form of that state is democratic, authoritarian or totalitarian. A reason for war is always found, or it is fabricated as attractively as possible for the citizens.

To wage an unjust war, it is also important to reframe the mood and opinion of the majority of society living in its monotonously comfortable shell of ordinary life, with joys and sorrows in the context of trying to ensure one's survival. The only and most efficient form for this becomes political propaganda devoid of any legal basis and frequently referring to past injustices. And this initially by milder means, growing into the unrestrained use of violent means. Effectiveness is always guaranteed. The result is brainwashed crowds, gloriously and publicly presenting odes to war,[1] yearning for total war,[2] etc.

The society becomes ready, and at the same time irresponsible, for further developments. Later, after losing the war, it justifies itself with excuses, placing responsibility on the ruling political elites. In the throes of wartime frenzy,

[1] For example, the fanatic crowds in Hungary, strongly influenced by governmental militaristic propaganda at the beginning of the First World War, shouted "Long live the war!".

[2] A crowd of Nazis on February 18, 1943, at the Sport Palace in Berlin, when asked by Josef Goebbels, the propaganda minister of Hitler's Germany, "Do you want total war?" without hesitation and enthusiastically answered yes.

society is unaware, or unacknowledged, even dismissive, of the possible later reality of retributions on its account.

Thus, in the connection of the broadest strata of society with the ruling political elite, the preconditions are created for an unjust war, which cannot be attributed character of a defensive war. It is always an unjustifiable war of attack.

A just war differs from an unjust war in several ways. Above all, it changes the rhetoric of the ruling political elite. However, it also takes propaganda to reshape public opinion, not infrequently with international support, pointing necessity and legitimacy of defense against an aggressor.

When there is a military threat by the enemy, patriotic appeals appear, mobilizing the population in defense of the state, but also increasing its loyalty and obedience to the ruling elite. In authoritarian and totalitarian states, this happens by repression, aimed at the layers of society that stood in opposition to the ruling regime in the pre-war peacetime period. In democratic states, although the rights of the population are limited and the powers of the government are strengthened in times of war, defense of the homeland is motivated by preserving a social order that is not only beneficial to a narrow ruling class, whose authority is thus more natural than enforced.

A just war is distinguished from an unjust war not only by the fact that it is fought for a just reason, but also by the legality and legitimacy of the military acts that take place in the course of it. In other words, a just side should defend itself against an aggressor according to certain rules and respect certain constraints, e.g., not to attack civilians directly, which in the reality of war is often difficult or even impossible to ensure. The defensive war of the just side can turn into an offensive if it is necessary and beneficial, e.g., to prevent a recurrence of the attack.

History teaches us that even an objectively unjust war can be just if the victor declares it to be so. It is therefore important to examine the justice of war not only in terms of the respective theoretical premises and legal norms but also empirically.

Peter Vyšný
Monika Martišková
Ingrid Lanczová
Marek Prudovič
(editors)

JUST WAR IN THE CONTEXT OF THE SALAMANCA SCHOOL AND OTHER INTELLECTUAL TRADITIONS

CONFERENCE PROCEEDINGS

Editor-in-Chief: Mgr. Peter Kolník
Graphic design: Jana Janíková
Cover design: Mgr. Marek Petržalka

For the Faculty of Law, University of Trnava in Trnava
published by Typi Universitatis Tyrnaviensis,
a joint workplace of the University of Trnava
and VEDA, the publishing house of the Slovak Academy of Sciences,
as the 435th publication.
Printed by VEDA, the publishing house of the Slovak Academy of Sciences.

ISBN 978-80-568-0715-6