ARTICLES

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JUST WAR THEORIES FROM JUS AD BELLUM TO JUS POST BELLUM – LEGAL HISTORICAL AND LEGAL PHILOSOPHYCAL PERSPECTIVES

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Abstract: The aim of the article is to elucidate the issue of a universally accepted normative definition of the terms 'jus post bellum' and 'armed conflict' from the legal historical and legal philosophical perspectives. The main concept of just war theories is based on the human desire to control interracial aggression. It is known that the "morally justifiable war" based on a series of criteria is split first into two, and later into three groups: right to go to war (jus ad bellum), right conduct in war (jus in bello), and right after the war (jus post bellum). Jus post bellum approach appeared just after the Second World War. In the author's opinion, **jus post bellum** is the most important part. The author's task is to find a generally acceptable working definition, or at least a generally acceptable meaning of **jus post bellum** in the mirror of just war theories, and an **armed conflict** from the perspective of war and aggression, as well as to describe the historical evolution of the two classic parts of just war theories: **just ad bellum** and **jus in bello**.

Keywords: just war theories, jus post bellum, just ad bellum, jus in bello, armed conflict, definition, war.

Just War Theories (Jus bellum justum)

The law of armed conflicts is based on the pillars of jus ad bellum/jus contra bellum, jus in bello and jus post bellum.[1] The evolution of the law of armed conflict based on the

[1] Dieter Fleck, Jus Post Bellum as a Partly Independent Legal Framework. In Stahn-Easterday-Iveson: *Jus Post Bellum*. 2014, Oxford, Oxford University Press p. 43.

just war theories and later on the general and objective prohibition of aggression. Neither jus post bellum, nor armed conflict as a term of art have a universally accepted normative definition, but several scholars, international organizations and bodies tried to find the significance of them. The first task of my research is to find a generally acceptable working definition, or at least a generally acceptable meaning of **jus post bellum** in the mirror of just war theories, and **armed conflict** from the perspective of war and aggression. If we understand the meaning of armed conflict, we can define **the end of armed conflict as a starting point of the applicability of transitional justice and jus post bellum.**

In the medieval ages or before we cannot find any evidence that a distinction was made between jus ad bellum and jus in bello, and jus post bellum approach appeared just after the Second World War. According to the early Christian writers, the conduct of war was an integral part of jus ad bellum and just war had a punitive character.[1] **Ian Clark** points out that "since war was a limited activity, and since what was justified was only that which was strictly necessary to its purpose, there was no felt need to proceed to elaborate a separate set of principles for its conduct…".[2] The work of Scholastics and the Salamanca School became a mark of a transitional interval from the **punitive approach to just war to the non-punitive one**.[3] The first marks of the distinction between jus ad bellum and jus in bello emerged in the works of Hugo Grotius with the separation of **bellum justum and bellum lege**.[4] Starting after the Peace of Westphalia treaties had an emerging importance in international relations and just war thinking as well, and in the nineteenth century **positive law** based on **customary law and treaties** took the place of natural law approach,[5] and at the same time the jurists took the place of theologians and philosophers in just war thinking.[6] The revival period of history reaffirmed the distinction between jus ad bellum and jus in bello.[7] The restrictions of use of force were set in treaties and by customs, and efforts were made to proscribe war (League of Nations 1920; Kellog Briand Pact 1928).[8]

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1 Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In Carsten Stahn-Jann K. Kleffner (eds.), Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 10. See also: W. L. La Croix, War and International Ethics: Tradition and Today. London, 1988, University Press of America, p. 69.

2 Ian Clark, Waging War: A Philosophyical Introduction. Oxford, 1990, Clarendon Press, p. 38.

3 Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In Carsten Stahn-Jann K. Kleffner (eds.): Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 13.

4 Hugo Grotius, The Law of War and Peace. In Hugo Grotius: A háború és béke jogáról. Budapest, 1999, Pallas Stúdió/Attraktor Kft.

5 Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In Carsten Stahn-Jann K. Kleffner (eds.), Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 15.

6 *Ibid.*, p. 15.

7 *Ibid.*, p. 11.

8 *Ibid.*, p. 17.

After the Second World War, Article 2(4) of the United Nations Charter restricted the use of force and the threat of force as well with the sole exceptions of self-defence and enforcement actions authorized by the UN Security Council.[1] This made the relation of jus ad bellum and jus in bello questionable. Some scholars even question the existence of jus ad bellum, and instead of it they use the phrase jus contra bellum when they refer to the just war thinking after 1945.[2]

According to Sulyok, the law of armed conflict – international humanitarian law or with the pre-U.N. denomination: the law of war – is a widely used term for those consuetudinary and contractual rules, that aim

1) to resolve humanitarian problems emerged directly because of the existence of armed conflicts – both international and non-international ones – with the help of the limitation of the Parties' right to choose the military equipment and measures and

2) to protect the victims and their possessions.[3]

From a different approach, humanitarian law is just a part of the law of armed conflict, and it is a synonym for the law of the Geneva Conventions. In this context, the adjective 'humanitarian' means an ambition to reduce brutality and sufferings caused by an armed conflict.[4]

Nevertheless, the main concept of just war theories is based on the human desire to control intraracial aggression. The "morally justifiable war" based on a series of criteria and first split into two, later three groups: right to go to war (jus ad bellum), right conduct in war (jus in bello), and right after the war (jus post bellum). Jus post bellum deals with the moral problems of post-war settlement and reconstruction. From my reserach perspective, **jus post bellum** is the most important part, but to have a complete picture, we have to describe the historical evolution of the two classic parts of just war theories: **just ad bellum** and **jus in bello**. The history of international law contains a significant red line border which divides the interval before and after the Second World War. The interval before the end of the Second World War can be described as the jus

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[1] Charter of the United Nations, Ch. 2(4), www.un.org/aboutun/charter/.

[2] Robert Kolb, Jus contra bellum. Le droit international relatif au maintien de la paix. Helbing/Lichtenhahn-Bruylant, Bâle-Bruxelles, 2003. Bruhács János, Jus contra bellum –Glosszák az erőszak nemzetközi jogi tilalmához, http://acta.bibl.u-szeged.hu/34781/1/juridpol_077_069-084.pdf. Serena K. Sharma, The Legacy of Jus Contra Bellum: Echoes of Pacifism in Contemporary Just War Thought. Journal of Military Ethics, Volume 8, 2009, Issue 3: James Turner Johnson and the Recovery of the Just War Tradition, pp. 217-230. P. Ramsey, The Just War: Force and Political Responsibility. New York, 1968, Charles Scribner's Sons, chs. 12, 17.

[3] Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata.* Budapest, 2004, Gondolat, p. 17. See also: Gasser, H-P., *International Humanitarian Law: An Introduction.* Separate print from Hans Haug, Humanity for All, The International Red Cross and Red Crescent Movement. Haupt, 1993, Henry Dunant Institute, p. 3, 16. Herczegh, Géza, *A humanitárius nemzetközi jog fejlődése és mai problémái.*Budapest, 1981, Közgazdasági és Jogi Könyvkiadó, p. 79-81. Partsch, K. J., Humanitarian Law and Armed Conflict. In Bernhardt, Rudolf (ed.): *Encyclopedia of Public International Law.* Vol. 3. Use of Force, War and Neutrality, Peace Treaties (A-M). New York-London, 1982, North-Holland Publishing Co. – Collier Macmillan Publishers, p. 215-216.

[4] Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata.* Budapest, 2004, Gondolat, p. 18.

ad bellum epoch, while with the Geneva Conventions a new epoch emerged where aggression was generally not accepted and the jus contra bellum interval started.

1. The historical experience of just war theories from jus ad bellum to jus contra bellum

According to the minimalist interpretation, international law is based on the contracts among states, while many thinkers view international law as a conglomerate of customary practices and ethical principles of natural law as well.[1] There are several common contact points between international law and just war theory – like just cause, self-defense, last resort, resist aggression, proportionality, etc. – but there are differences as well: for example, international law does not explicitly reinforce the right intention as a just war rule.[2] International law and just war theories are basically new elements of the history of law. According to the generally accepted scientific thesis of Lassa Oppenheim, international law – and just war theory as well – is the product of the Christian civilization[3], and it is not older than five hundred years. However, there are scholars like Rory Cox, who expands the time interval of the existence of just war theories as far as the Ancient Egypt.[4] Ian Brownline presses the idea that since the beginning of the written history of humankind it was rare for advanced societies to leave war completely unregulated.[5] On the other hand, we have to admit that before the Christian writers, or more precisely, before Hugo Grotius, most of the remarks on legal termination of war were more or less incidental and based on ethical, religious and moral discussions. However, it is useful to mark some critical historical points in different times and cultures which show that the desire to control of intrararcial aggression occurred almost everywhere, where human beings started to live on society level.

1.1. Pre-Christian just war theories

In the Sumerian Epic of Gilgamesh, slaying prisoners – as Enkidu persuaded Gilgamesh to do so – was an act against the gods' favor.[6] This statement, or more precisely this opining tells nothing about jus ad bellum, but gives us a picture of the generally accepted moral attitude in and after war (jus in bello and jus post bellum) in Mesopotamia.

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1 Hans Kelsen, Principles of International Law. New York, 1966, Holt, Rinehart & Winston. J.L.Brierly, The Law of Nations. New York, 1963, Waldock. H. Lauterpacht, International Law. Cambridge, 1978, Cambridge University Press.

2 Brian Orend, Jus Post Bellum: A Just War Theory Perspective. In Carsten Stahn-Jann K. Kleffner (eds.): Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 32.

3 Oppenheim, Lassa, *International Law: A Treatise*. Vol. I. Peace- London-new York-Bombay, Longmans, Green&Co., 1905, p. 45.

4 Cox, Rory, Expanding the History of the Just War: The Ethics of War in Ancient Egypt. *International Studies Quarterly*. 2017, no. 61 (2), p. 371.

5 Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 3.

6 Cox, Rory, Historical Just War Theory up to Thomas Aquinas, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas.

Manoj Kumar Sinha, a visiting Professor at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, argues that the laws of armed conflicts were founded in ancient **India** on the principle of humanity.[1] The epic narrative of the Kuruksetra war in the Indian Hindu Mahabharata indirectly refers to the criteria of proportionality and just cause. The Dharma Sastras prescribe the rules of society and they distinguish between righteous war (Dharma Yudda) and unrighteous war (Adharma Yudda).[2] The Mahabharata war is considered as a war fought according to the rules of Dharma (righteousness). The two sides agreed that it was forbidden to attack combatants in distress, i.e. none of the warriors may kill or injure a warrior who has surrendered, an unarmed warrior, a person or animal not taking part in the war; a warrior whose back is turned away, and fighting must begin no earlier than sunrise and should end by exact sunset. The rules protect the lives of women, prisoners of war, and farmers and specify the rules for each weapon. According to the text, chariots cannot attack cavalry, only other chariots. The fact that attacking cities and farmers were forbidden has two major consequences: first from the perspective of jus in bello, as it was a restriction during the conduct of war, but from an indirect perspective it has an effect on the life of the population after the war. Since cities and farmers were not ruined and killed, reconstruction became an easier task, and the "civil" population suffered less after the war, no matter which side won. The basic logistic tasks of society were not ruined. In my opinion this adumbrates the need of the existence of after-war rebuilding and reconstruction laws, in another world, jus post bellum.

There is another peculiar spot of proportionality, when Rama and the enemies of Rama ask help from Krishna. The idea of proportionality occurs when Krishna says that they have to choose between himself and his army: Rama chose Krishna so the army of Krishna fought for the other side.[3]

In **China**, in the Ch'unch'iu Period (722-481 B.C.) war was a legal institution and the Parties were strictly defined. War could exist between equal states, but not between a feudal state and its dependencies, nor between Chinses family of states and barbarians.[4]

The Babylonian Talmud made a distinction between voluntary wars, where the aim was the extending of the territory, and obligatory wars, which were conducted against an enemy attacking Israel or against the seven nations inhabiting Canaan.[5]

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[1] Manoj Kumar Sinha, Hinduism and international humanitarian law. International Review of the Red Cross. Volume 87 Number 858 June 2005, p. 285, https://www.icrc.org/eng/assets/files/other/irrc_858_sinha.pdf

[2] Manoj Kumar Sinha, Hinduism and international humanitarian law. International Review of the Red Cross. Vol. 87, no. 858, June 2005, p. 287.

[3] More on the topic: Manoj Kumar Sinha, Hinduism and international humanitarian law. *International Review of the Red Cross*. Volume 87 Number 858 June 2005. pp. 285-294, https://www.icrc.org/eng/assets/files/other/irrc_858_sinha.pdf.

[4] Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 3.

[5] *Ibid.*

In ancient **Egypt,** the creation of a jus ad bellum doctrine based on universal and absolutist claims to justice interfered in the development of jus in bello.[1]

In ancient **Greece**, from informal socially obliged standards the rules of war were formed for the wars among different Hellenic tribes (formal declaration of war, intervals of truce for sacred holidays, special rules for prisoners, etc.).[2] Plato examined war from an ethical point of view, and established the categories of proper war (against barbarians, unlimited and natural) and faction (unnatural and limited). In Plato's work, Socrates made a distinction between wars fought amongst Greeks, and wars fought between Greeks and barbarians (non-Hellenes).[3]

Philosophical background – Aristotle and the *Nicomachean Ethics*: Aristotle followed Plato in distinguishing between intra-Hellenic and „international" armed conflicts and declared that "we wage war in order to have peace".[4] This maxim, deriving from Plato (Laws, 628e, 803d), was passed down to medieval theorists via Cicero (*De Officiis*, bk. 1, §35), Augustine (Letter 189 to Boniface), and Gratian (Decretum, Causa 23, q. 1 c. 3).[5] However, there is an outstandingly important element of the philosophy of Aristotle, which later occurs in Grotius and it can be described as one of the basic elements of the future ius post bellum thinking. Aristotle made an equivalence of the results of pleionexia and meionexia.[6] Pleionexia– taking too much – as a vice, not different from meionexia – taking too little. Justice requires to take as much, as one's due,[7] but there are other interpretations which argues that meionexia is a requirement to accept, or demand less than what they are due if this is necessary for achieving justice in a wider sense.[8]

In the **Roman Empire**, formal legality of war and formal concept of just war were established; the category of *iustum bellum* dealt with the formalities and *pium* was in accordance with religious sanctions and implied commands of gods (*bellum iustum et*

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1 Cox, Rory, Expanding the History of the Just War: The Ethics of War in Ancient Egypt. International Studies Quarterly. 2017. 61 (2) : 371. Cox, Rory, Historical Just War Theory up to Thomas Aquinas, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas.

2 Adriaan Lanni, The Laws of War in Ancient Greece. *Law and History Review*. Vol. 26, no. 3 (Law, War, and History: A Special Issue), Fall 2008, pp. 469-489.

3 Plato, *The Republic of Plato*, trans. A. Bloom (New York: Basic Books, 1968), bk. 5, 470c, p. 150.

4 Arisztotelész, *Nikomakhoszi etika*. Budapest, Európa Könyvkiadó, 1987, trans: Szabó Miklós, 1177b, p. 293.

5 Cox, Rory, Historical Just War Theory up to Thomas Aquinas, p. 5, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas. See also J. Barnes, 'The Just War', in The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100-1600, ed. N. Kretzmann, A. Kenny, J. Pinborg (Cambridge: Cambridge University Press, 1982), p. 771-84, at 780.

6 Arisztotelész, *Nikomakhoszi etika*. Budapest, Európa Könyvkiadó, 1987, trans: Szabó Miklós, 1129 pp. 121-124.

7 Dieter Fleck, Jus Post Bellum as a Partly Independent Legal Framework. In.: Stahn-Easterday-Iveson: *Just Post Bellum*. Oxford, 2014, Oxford University Press, pp. 43-57.

8 Larry May, Jus Post Bellum, Grotius and Meionexia. In: Stahn-Easterday-Iveson: *Just Post Bellum*. Oxford, 2014, Oxford University Press, p. 21.

pium). The moral content of the rules of war became the base of early Christian writers' just war theories.[1] Cicero (106-43 BC) in the first book of his work *De Officiis* wrote a well summarized explanation of the just war theories of the pre-Christian classic world (sections 33-41.). Referring to principle of Plato and Aristotle he wrote: "The only excuse, therefore, for going to war is that we may live in peace unharmed; and when the victory is won, we should spare those who have not been blood-thirsty and barbarous in their warfare."[2]

1.2. Just war theories at the early Christian period: Saint Ambrose, Augustine, Byzantium and the just war idea in the Islam religion

Until 170 AD the early Christian attitude was simply restrictive towards war and for Christians it was forbidden to be soldiers.[3] **Saint Ambrose** in *De Officiis* accepted the idea that there are some situations in which war might be justified.[4] **Augustine of Hippo** continues the tradition of "waging war to gain peace" idea when he writes the aphorismatic sentence: "For every man seeks peace by waging war, but no man seeks war by making peace."[5] He held to the opinion that the involvement in a just war is not forbidden for Christians. "Do not think that it is impossible for anyone to please God while engaged in active military service" – he wrote in a letter to Boniface.[6] But when war was not started in accordance with an order of God (*bellum Deo auctore*), than it can be a just one in that case, if it is necessary and imperative. Waging war has to be in obedience to the divine command, or in conform with God's laws in any other way. In Augustine, the main characteristic of just war is the punishment of an unjust act.[7] In his work, *The City of God*, he emphasized that wise man wage exceptionally just war, and if it is not just, he would not wage one at all.[8] Augustine tried to justify the Christian participation in warfare.[9] In Byzantium, a special concept of holy war emerged, which

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1 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 4.

2 Cicero, *De Officiis*, Book 1, section 35, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0048%3Abook%3D1%3Asection%3D35#note-link1.

3 John Cecil Cadoux, The Early Christian Attitude to War. London, 1919, Headley Bros. Publisher Ltd., pp. 96-97 seq., http://oll.libertyfund.org/titles/cadoux-the-early-christian-attitude-to-war.

4 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 5.

5 Augustine, *The City of God.* Book XIX, Chapter 12 – That even the fierceness of war and all the disquietude of men make towards this one end of peace, which every nature desires, p. 511, http://www.unilibrary.com/ebooks/Saint%20Augustine%20-%20City%20of%20God.pdf.

6 Augustine, *Epistula ad Bonifatium CLXXXIX*. (Letter to Boniface CLXXXIX), 4, http://www.ccel.org/ccel/schaff/npnf101.vii.1.CLXXXIX.html?letter,boniface,war

7 Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 26.

8 Augustine, *The City of God*. Book XIX, Chapter 7, p. 508, http://www.unilibrary.com/ebooks/Saint%20Augustine%20-%20City%20of%20God.pdf

9 Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In: Carsten Stahn-Jann K. Kleffner (eds.): Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 15.

may have been derived from the Islamic concept of jihad, a war against the unfaithful. The Islamic concept was based on the religious doctrine as a guidance on lawful reasons for resort to war – jihad – (defence, punishment for apostasy, action against non-Moslems).[1] While according to Brownline, at the territory of Russia in the XI-XII century amoral states occurred, where peace was not regarded as the normal state.[2]

1.3. Just war at the Scholastics, some XIV-XVIth century scholars and the School of Salamanca

Gratian arrived at basically the same principles as the pervious Christian scholars, while **Saint Thomas Aquinas** summarized the conditions under which a war could be justified. It is important to note that his explanations were based on more theological and philosophical principles than pure legal ones. According to Thomas Aquinas, just war is waged by a properly instituted authority. It must be based on a just purpose and not merely on self-gain. The third principle of Thomas Aquinas is the rightful intention – the advancement of good, or the avoidance of evil. Thomas Aquinas wrote detailed answers on the questions of jus in bello (whether a bishop can take part in the war, the acceptability of ambushes, or fight on holy days), but the jus post bellum approach is not recordable in his works.

In the fourteenth and fifteenth centuries, the approaches towards just war were based on either theological statements or practical aspects of law (postglossators). **Bartolus** (1314-57) made an equivalence between war and reprisals. He and Giovanni da Legnano saw the legality of the use of force very similarly. In 1360 Giovanni da Legnano in his *Tractatus de bello, de represaliis et de duello* described war as part of creation, since it can clear out the diseases of the world. The war is lawful if it is declared by the highest authority or if it occurred between equal parties and legalized by a just cause.[3] The conclusion of their work is that the Pope has the right to wage war against infidels. In accordance with the war between Teutonic Knights and the Kingdom of Poland[4], **Stanislaw of Skarbimierz** (1360-1431) formalized the just war theory in his work *De bellis justis* (c. 1410). **Martino da Lodi** in *De Bello* (cc. 1455) also made a distinction between just war and unjust war, but he emphasized the importance of the pervious warning and the imperative manner of use of force to enforce rights.[5] **Tomaso da Vio** (1469-1534) described war as a judicial procedure, where the main motive was the punishment of the guilty party.[6]

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[1] More on this topic: Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 6.

[2] *Ibid.*

[3] *Ibid.,* p. 7.

[4] Polish-Lithuanaian-Teutonic War 1409-1411.

[5] Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 7.

[6] Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 8. Tomaso da Vio: Summa Theologicae, 1517. Tomaso da Vio: Summula, 1524.

Philosophical background – Thomas More and *Utopia*: In *Utopia,* **Thomas More** (1478-1535) describes the ideal attitude of the ideal people towards war as inglorious and despised, although war as a necessity is accepted. The inhabitants of Utopia wage war in the following three circumstances: if they have to protect their borders, if they have to chase off the enemy from their friends' state, or if they have to free a deprived nation from slavery. Since this is the ideal state, we can suppose that according to More, these are the just causes of waging war. More argues that not only the defensive war is acceptable, but taking revenge on an unjust act can be a just cause as well. He sums the attitude towards war in a slightly different way, then we saw it in Plato and Augustine. In his opinion, the one and only aim of war is gaining the result, which would have been gained previously, if the war had not been waged. It is kind of a restriction – it limits the results of war. More initiates the idea of extraterritorial preemptive strike, when he accepts waging war out of the territory of Utopia, if another state threatens the peace, territorial integrity and sovereignty of Utopia. More described some parts of jus ad bellum, first of all the just causes, and refers to jus in bello as well, when he endorses the idea of war with the necessary minimum level of human suffering. In the book there is a detectable farseeing post-war attitude, but it is hardly describable as a jus post bellum initiative: "...they never lay their enemies' country waste nor burn their corn, and even in their marches they take all possible care that neither horse nor foot may tread it down, for they do not know but that they may have use for it themselves." It is more like an economic focus since not post-war justice is the key element, rather than rationality from the perspective of the occupational forces (use for themselves).

Pierino Belli (1502-75) established five requirements of just war: a just person, a just matter, a just intent, a just cause and an adequate authority.[1]

The representatives of the **School of Salamanca** described war as the worst evil and they accepted a war as a just one only if it was waged because of self-defense, to prevent an attacking tyrant or punish the guilty enemy. The wider social acceptance of waging war was a new element: governing authorities may declare a war, but if the people oppose it, it is illegitimate. The key element of just war was using force as a last resort. From ius post bellum perspective, they still focused on the punishment element rather than the rebuilding part. **Francisco de Vitoria** (1480-1546) argued that the committed wrong should be punished on the base of proportionality, and he also advanced an opinion that the injured state can obtain satisfaction. Vitoria made attempts to apply the theory of **natural law** across cultural, religious and geographic boundaries in connection with the Spanish conquest of the Americas,[2] and also made the first efforts to approach just war theory from a non-punitive perspective.[3] **Balthasar Ayala** (1548-84) in *De Iure et Officiis*

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1 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 8.

2 W. L. La Croix, War and International Ethics: Tradition and Today. London, 1988, University Press of America, p. 78.

3 Francisco de Vitoria, On the Law of War. Question 1(3): What are the Permissible Reasons and Causes of Just War? In A. Pagden and J. Lawrence (eds.): Vitoria: Political Writings (Cambridge, 1991, Cambridge University Press, p. 303.

Bellicis et Disciplina Militari Libri wrote about just war from an orthodox point of view. He is of the opinion that there can be a just war on both sides.[1]

1.4. The European state system and the Protestant school

Philosophical background – Niccolo Macchiavelli and *The Prince*: The European state system and the colonizing interests brought a new, more pragmatic philosophy. **Niccolo Macchiavelli** (1492-1550) did not elaborate specific categories of just war, but declared that "that war is just which is necessary", and every entity which has its own sovereignty may wage a war.[2] Macchiavelli points out the disadvantages of imposing extraordinary taxes related to war or the problem when a prince must "rob his subjects",[3] and he emphasizes that war is desirable only as an ultima ratio.[4]

Alberico Gentili (1550-1608) was the first scholar who developed a secular and originally legal system of norms for state relations.[5] He also states that a war must be fought between sovereigns, and a just cause is necessary as well, but he also declares that a war can be just on both sides objectively, and not just because one of the parties made a mistake in the judgement. Gentili denies the justice of war for religious motives.[6]

The rebuilding part of jus post bellum appears in **Hugo Grotius** (1583-1645) in an indirect way: all the soldiers that have participated in common acts are responsible for the total damage, and he adds that there are certain duties which must be performed toward those from whom you have received injury. Grotius referred to the previously mentioned meionexia principle as well. The pragmatic limitation (or more precisely the pragmatic self-limitation) as a key element of jus post bellum goes back to the logic system of Aristotle. Grotius – as a writer of the first comprehensive and systematic book about the law of nations[7] – used a rationalist and secular basis which originated in natural law. In Grotius's opinion, third parties could support the side which they considered had a just cause. His conclusion, which was strengthened by the Bible, as well as several Roman sources and Christian scholars, was that war was a judicial and punitive procedure, and

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1 Balthasar Ayala, De Iure et Officiis Bellicis et Disciplina Militari Libri III. J. Westlake (Ed.), Vol. 2, Washington, 1912, The Classics of International Law, Book I, ch ii, p. 34-35. In Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 10.

2 Niccolo Machiavelli: *Il Principe*. chs. 3 and 26. https://www.victoria.ac.nz/lals/about/staff/publications/paul-nation/Prince-Adapted2.pdf.

3 Niccolo Machiavelli: Il Principe. ch. 14. p. 25.

4 *Ibid.,* ch. 26. p. 42. „war is just which is necessary, and arms are blessed when there is no other hope but in them".

5 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 11. More on this topic: Van der Molen, *Alberico Gentili and the Development of International Law*. Amsterdam, 1937.

6 Alberico Gentili, De Iure Belli Libri Tres, The Classics of International Law, Oxford, 1933, Book I. chs. IX, X, XI. Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 12.

7 Hugo Grotius, *De Iure Belli ac Pacis Libri Tres.* First published in 1625. In Hungarian: Hugo Grotius: *A háború és béke jogáról.* Budapest, 1999, Pallas Stúdió – Attraktor Kft.

public war must have been distinguished from a private one.[1] Compared with Gentili, it is an important difference that Grotius did not accept the probabilistic idea of "just war on both sides", however he accepted the existence of factual deception (fallibility).[2]

1.5. Positivist views of just war theories

After the signature of the general settlement of the **Peace of Westphalia** (1648), the role of the Papacy as a political regulator weakened and the role of public law as a base for public peace was becoming more and more important. A new epoch emerged, where the public opinion became more important and the governments tried to find reasons of righteousness of the war they waged.[3] It is just a minor note here, that this efforts have been increasingly important since the 17th century. Later, at the beginning of the 20th century, with the cheap printed newspapers and the increasing role of media it became more and more crucial and in the 21st century a new type of war – the mass media war – emerged, which became almost as important as the real war itself as we will see in the chapters of the Iraqi conflict (2003) or the Russian-Georgian conflict (2008).

The concept of neutrality was defined by **Cornelius van Bynkershoek** (1673-1743) and **Samuel Pufendorf** (1632-94). Bykershoek argued that the only correct ground for war is defense and recovery. Pufendorf in the *Law of Nations* followed the moralist natural way which was described by Grotius.[4] **Richard Zouche** (1589-1660) expressed his opinion that if the belligerents are acting in good faith, their act cannot be unjust.[5] From my point of view, **Johann Wolfgang Textor** (1638-1701) has a great importance, since he tried to give a definition of war as a "condition of lawful hostile offence existing for just cause between royal or quasi-royal powers, declared by public authority".[6] **Emerich de Vattel** (1714-67) in *Le Droit des gens* (1758) followed the legal philosophic way of the law of nature and accepted the view of justice of war on both sides.[7] According to Vattel, the sovereigns have the right to make war and he gave a number of just causes like preventive self-defence, the maintenance of rights and the maintenance of the Balance of Power: „En traitant du Droit de sûreté, nous avons montré, que la Nature donne aux hommes le droit d'user de force, quand cela est nécessaire, por leur défense et por la conservation de leurs droits."[8] After the collapse of the Ancien Régime, the French constitution of 1791 became a milestone

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1 Hugo Grotius, *A háború és béke jogáról*. Budapest, 1999, Pallas Stúdió – Attraktor Kft. Book I. ch. 2; 3.

2 *Ibid.,* book II, ch. XXIII. 13. 2, p. 135.

3 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 14.

4 Samuel Pufendorf, *De Iure Naturae at Gentium Libri Octo*. 1672, The Classics of International Law, no. 17. London, 1934, Vol. II. Chs. III and IV.

5 Richard Zouche, *Juris et Judicii Fecialis sive Juris inter Gentes Explicatio*. Oxford, 1650.

6 Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 15.

7 Emerich de Vattel, *Le Droit des gens*. 1758

8 Emerich de Vattel, Le Droit de Gens, Book III, ch I, para. 3. and Book II, ch IV, para 49. „En traitant du Droit de sûreté, nous avons montré, que la Nature donne aux hommes le droit d'user de force, quand cela est nécessaire, por leur défense et por la conservation de leurs droits."

in the history of just war theories, since it contained a prohibition of aggressive war and a regulation using the army for defensive acts.[1] Vattel was the last writer who referred to natural law as a basis of discussions about war.[2] From the nineteenth century positive law based on customs and treaties took the place of natural law.[3]

Philosophical background – Immanuel Kant and *The Philosophy of Law*: Immanuel Kant (1724-1804) in *"The Philosophy of Law"*[4] divided the right of nations to wage a war into three parts: (1) the right of going to war; (2) the right during war; and (3) the right after war.[5] This is the first mention of the three pillars of just war as a logic system, although it is important to note that Kant divided the subject as a whole into not three, but six subchapters as parts and elements of jus gentium and the Right of Nations. Kant gave the title of the main chapter "The Right of Nations and International Law" and as a subtitle he gave "Jus Gentium". He separated the right of going to war (jus ad bellum) whether it is related to the subjects of the state or to hostile states, gave a subchapter to the right during war (jus in bello), and another one to the right after war (jus post bellum), and he separately dealt with the right of peace and the right against an unjust enemy as well.[6]

Kant accepts that free juridical states have the right to go to war.[7] But since free states are juridical equals, punitive wars (bellum punitivum) are not acceptable: "for punishment is only in place under the relation of a Superior (imperantis) to a Subject (subditum); and this is not the relation of the States to one another".[8] Kant uses the term "right after war" slightly different then we use it nowadays: according to him, right that follows war begins not earlier than the Treaty of Peace was signed, and Kant refers to the conquerors rights, but he emphasizes that the conquered State do not lose its political liberty by conquest of the country.[9]

Kant was also the precursor of jus contra bellum idea, since he criticized contemporary international lawyers for their efforts to regulate war instead of abolishing it.[10]

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1 The Constitution of 1791 National Assembly, 3 September, 1791, TITLE IV OF THE PUBLIC FORCE 1. http://www.historywiz.com/primarysources/const1791text.html

2 Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In: Carsten Stahn-Jann K. Kleffner (eds.), Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 16.

3 *Ibid.*

4 Immanuel Kant, Metaphysiche Anfangsgründe der Rechtslehre (The Philosophy of Law: An Exposition of the Fundamental Principles of Jusirprudence as the Science of Right, originally pusblished 1887, Edinburgh, tr. W. Hastie), https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/kant/sciencelaw.pdf

5 *Ibid.,* pp. 213-225.

6 *Ibid.,* pp. 215-223.

7 *Ibid.,* p. 215.

8 *Ibid.,* p. 219.

9 *Ibid.,* p. 221.

10 Immanuel Kant, Perpetual Peace: a Philosophical Proposal. trans. by H. O'Brien (London, 1927). Serena K. Sharma: Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In: Carsten Stahn-Jann K. Kleffner (eds.), Jus Post Bellum – Towards a Law of Transition from Conflict to Peace. The Hague, 2008, TMC Asser Press, p. 17.

1.6. The Final Act of the Congress of Vienna and the First World War

The Final Act of the Congress of Vienna (1815) re-established the principle of the Balance of Power in Europe.[1] The right of the states to wage war was unlimited. The general opinion was that the right to go to war was more a moral and political question then a legal one.[2] Most of the contemporary scholars described war as a judicial procedure involving deaths.[3] Following the failure of peaceful negotiations, war was waged as a last resort in cases of extreme necessity. Although the World Wars may show something different, the instruments of peaceful settlements improved. Just before the First World War, in 1914 the Hungarian Prime Minister, Count István Tisza argued that war was the ultima ratio, which must had not waged until all other methods of finding a peaceful solution had failed, but on the other hand, for which every state must be prepared for.[4]

At the same time "The Treaties for Advancement of Peace" (Bryan Treaties) provided a buffer zone in timing, since they guaranteed the agreeing parties that they would not declare war or begin hostilities during the investigation and report period of a dispute. Although the results of the report were not binding, the parties must observe a moratorium for twelve months.[5] As a result of the different treaties and alliances, several diplomatic and political discussions occurred about the meaning of "provocation" and "aggression". The meaning of "aggression" more or less covered a cross-border military attack. As I previously mentioned, the cheap and numerous newspapers pass the daily news about wars and foreign political steps to society. Before the 20th century, war had been an affair of monarchs and professional armies, but after the millennium, it became a national issue. New terms occurred in the newspapers to avoid "war" as a term of art. Nowadays we would say that politically more correct and justifiable terms appeared like "reprisals", "pacific blockades", "justifiable interventions", "naval demonstrations" from one side and "unprovoked aggression", "self-defense", "self-preservation", "defense of vital interests" from the other one.[6] Diplomats, politicians and journalist edited a new dictionary of war and pre-war steps, and experts of international law tried to find the exact and confineable legal and practical meaning of these words. Later this new and sophisticated terminology led the way from "war" to the "arm conflict" as a term of art.

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1 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 19.

2 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 20. Lawrence, The Principles of International Law (1911), p. 333. John Westlake, International Law, II (1907), pp. 3-4.

3 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 21. Holland, Studies in International Law (1898), p. 163. Lester Hood Woolsey, Introduction to the Study of International Law (1860), sect. 116. Wheaton, Elements of International Law (1866).

4 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 22.

5 *Ibid.,* p. 23.

6 *Ibid.,* p. 26.

1.7. The State of War Doctrine

From the nineteenth century, state practice has accentuated an absurd and weird approach of war. Although it was absurd, it influenced the legal and etymological evolution of the armed conflict as a term of art. According to the contemporary scholars, war as a term of art is not a legal concept which can be recognized by intensive and large-scale hostilities between armed forces of organized state entities and similar objective phenomena, but a legal status "the existence of which depends on the intention of one or more states concerned".[1] If the parties did not declare that a "state of war" existed between them, the situation was not accepted as a war, despite of the hostilities, the number of wounded or dead, etc. War as a term of art gained a meaning of "de jure war", or "war in the legal sense", and sometimes "war in the sense of international law".[2] From the nineteenth century to the beginning of the First World War, numerous invasions, occupations, blockades and conflicts took place without the declaration of state of war.[3] I can absolutely agree with Brownlie's harsh statement: "war became such a subjective concept in state practice that to attempt a definition was to play with words."[4] The declaration of war brought and brings many inconveniences for the governments, such as the cut of diplomatic and economic ties, the preparation and mobilization of society, putting pressure on public opinion, sometimes the uncalculated steps of different states, and it brakes the "pacific sentiment". It is much more convenient not to declare a war, even if the armed forces are acting the same as in wartime. The freedom of using war as a term of art brought uncertainty and made the nature of the term unsatisfactory, since it might include situations without hostilities and might not include conflicts with human loses and full scale military activity.[5] That was the legal status at the time of the First World War.

1.8. The First Geneva Conventions of 1864 and the Hague Conventions of 1899 and 1907

Here we need to point out that new approaches emerged also in connection with jus in bello. Henry Dunant witnessed the Battle of Solferino in 1859 and published his account *Un Souvenir de Solferino*. Based on this work and with the help of Geneva Society of Public Welfare, the International Committee of Red Cross was established in 1863. In the same year Abraham Lincoln signed the **Lieber Code,**[6] the first codified law

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1 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 26.

2 *Ibid.,* p. 27.

3 American naval operations against France 1798-1801; Battle of Navarino 1827; French military operations in Annam and the blockade of Formosa 1882-1885; Collective intervention in China 1900-1901; Joint blockade of Venezulea by Germany, Great Britain and Italy 1902-1903; United States landing at Vera Cruz 1914; etc.

4 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 27.

5 *Ibid.,* p. 40.

6 Lieber Code of 1863. https://archive.org/stream/pdfy-NG4E2nsEimXkB5mU/The+Lieber+Code+Of+1863_djvu.txt , https://fr.scribd.com/document/180878118/The-Lieber-Code-of-1863-pdf

about regulations of martial law and the legal rules of engagement. In 1864 the Swiss government invited the governments of European and some American countries to an official diplomatic conference in Geneva and the conference adopted the first Geneva Convention "for the Amelioration of the Condition of the Wounded in Armies in the Field". Based on the Lieber Code, the **Hague Conventions** in 1899 and 1907 tried to formalize and unify the laws of war and war crimes as a part of international law. The First Hague Conference took place in 1899 on the proposal of the Russian Tsar Nicholas II. Several conventions were signed and adopted at both of the conferences. The Hague Convention (I) for the Pacific Settlement of International Disputes 1899 created the Permanent Court of Arbitration.[1] Convention (II) on the Laws and Customs of War on Land regulated the rules of engagement among the signatories and included the provisions of the Geneva Conventions 1864. Convention (III) dealt with maritime warfare and provided protection to marked hospital ships. Convention (IV) prohibited the discharge of projectiles and explosives from balloons, the use of projectiles to spread poisonous gases and expansive bullets. The Second Hague Conference in 1907 created a few advancements in fourteen treaties. Convention (I) of 1907 expanded Convention (I) of 1899; **Convention (III) of 1907 set out the procedure for a state making a declaration of war.** Convention (IV) dealt with the laws and customs of war on land and contained minor modifications of Convention (II) of 1899. The other conventions of 1907 regularized the legal positions of merchant ships, war ships, the rules of laying automatic submarine contact mines, the bombardment of naval forces during warfare and the adaptation of the maritime warfare principles of the 1906 Geneva Conventions. The third conference was planned for 1914 and rescheduled for 1915, but because of the First World War, it did not take place at all.

1.9 The Treaty of Versailles, the League of Nations and the Kellogg-Briand Pact

After the First World War ended, a **Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties** was founded.[2] The Commission was a product of the newly emerging post war legal mentality, but as its name says, it focused on the retribution and reparations instead of rebuilding. The Treaty of Peace 1919 (**Treaty of Versailles**)[3] brought the First World War to an end and in Article 227 and Article 231 (War Guilt Clause) created a basis for moral conviction and material reparations. The initiation of the League of Nations in 1920 started a new era in international relations. One might say that it was the first attempt of the globalization of international law. Although a lot of criticism was expressed against the unsatisfactory

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[1] Convention pour le règlement pacifique des conflits internationaux. https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-FR.pdf; https://pca-cpa.org/en/home/

[2] *The American Journal of International Law*, Vol. 14, No. 1/2 (Jan. – Apr., 1920), pp. 95-154 (60 pages). Published by: Cambridge University Press. https://www.jstor.org/stable/2187841?origin=crossref&seq=1#metadata_info_tab_contents. Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 52.

[3] Treaty of Peace between the Allied and Associated Powers and Germany, 28. June, 1919, Versailles.

actions of the **League of Nations** and the Covenant of the League of Nations[1], it was an important legal step that Article 10 of the Covenant expressly forbid aggressive war aiming at territorial enlargement or political advantage.[2] However, the other problem – namely, a gap between the legal meaning of war and war as reality – still existed. In 1927 the Report of the Secretary-General of the League of Nations stated that "…from a legal point of view, the existence of a state of war between two States depends upon their intention, and not upon the nature of their acts".[3]

Philospohical background – Hans Kelsen and *The Pure Theory of Law*

Hans Kelsen (1881-1973) in his neo-Kantian work about the normative description of the theory of law establishes the connection between State and International Law. The role of Kelsen is important not only because of The Pure Theory of Law, but also because he dealt with jus post bellum in practice: after the end of World War I, Kelsen was a legal adviser to the Austrian government, and he wrote several drafts of the constitution for the newly established Austrian republic, one of which became the Austrian Constitution of 1920. According to Kelsen, international law is based on those norms, which were enacted by states for the regularization of their interstate affairs, and which originated from customary law.[4] He tries to resolve the pseudo-antagonism between international law and state law.[5] Kelsen argues that international law has the same characteristic as state law, since it originates rights and obligations for states and points out the primacy and at the same time the primitivism of international law, which has not developed such centralized executive organs as state law. Kelsen describes war and reprisal as the specific consequences of breaking the international law.[6]

After the First World War, states and governments were well aware of the importance of pacific settlement of disputes. A number of different conferences, treaties and protocols between 1920-1945 show us that several experts of international law, diplomacy and foreign and security policy tried to find a solution for a safer future.[7] Here I will

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1 See Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 61.

2 Covenant of the League of Nations, 28 Apirl 1919, Article 10. https://www.crimeofaggression.info/documents/6/1919_The_Covenant_of_the_League_of_Nations_Art_10_to_16.pdf

3 Report of the Secretary-General of the League of Nations 1927. http://digital.library.northwestern.edu/league/le00207a.pdf . Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 38.

4 Hans Kelsen, Reine Rechtslehre (1934) ch. 9. Hans Kelsen: Tiszta jogtan. Budapest, 1988, ELTE Bibó István Szakkollégium, Fordította: Bíbó István, p. 72.

5 Hans Kelsen, Tiszta jogtan. Budapest, 1988, ELTE Bibó István Szakkollégium, Fordította: Bíbó István, p. 80.

6 *Ibid.,* p. 73.

7 Draft Treaty of Mutual Assitance; The Geneva Protocol 1924; The Locarno Treaties of 1925, the Resolution of the Sixth International Conference of American States; The General Treaty of the Renunciation of War, 1928; The Chaco Declaration of 1932; The Anti-War Treaty of Non-Aggression and Conciliation of 1933; The Seventh International Conference of American States, Montevideo, 1937; Inter-American Conference for the Maintenance of Peace, Buenos Aires, 1936;

mention one as an example, i.e. the **General Treaty for the Renunciation of War as an Instrument in National Policy of 1928** (Kellogg-Briand Pact), ratified by sixty-three states, where the parties condemned war as a solution of international disagreements and renounced war as an instrument in their relation with each other.[1] On the other hand, it is important to note that the rule of "using force except in self-defence" had not been definitively established as illegal in this period of international law.[2]

1.10. The UN Charter, the Geneva Conventions, their Protocols, International Tribunals and ICRC opinion papers

The **Charter of the United Nations of 1945** was the first legal document which declared expressis verbis that the use of force or threat of force otherwise than in self-defence or with the authority of the United Nations was illegal.[3] With the adaptation of the UN Charter a new era started in international law: the epoch of jus contra bellum instead of the pervious jus ad bellum.

The period between 1945 and our current days (2019) can be divided into four intervals from the perspective of just war theories and especially just post bellum:[4] (1) The most important legal achievements of the period between 1945-1980 were the **1949 Geneva Conventions** and the two **1977 Additional Protocols**.[5] However, I need to mention the **1972 Biological Weapons Convention** (BWC) as well. (2) Between 1980-2000 two international criminal tribunals were established, i.e. the International Criminal Tribunal for the former Yugoslavia (**ICTY**) and the International Criminal Tribunal for Rwanda (**ICTR**), as well as the **Rome Statute of** the International Criminal Court (**ICC**).[6] A major achievement was the signing of the **1993 Chemical Weapons Convention** (CWC). (3) Between 2000 and 2010 five legal documents of major importance were published in accordance with the regulation of jus in bello and jus post bellum. In **2005 Additional Protocol III** was edited. In the same year, **ICRC** published a study with the title of "**Customary International Humanitarian Law**"[7] as

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1 General Treaty for the Renunciation of War of 1928, Article I.

2 Ian Brownline, International Law and the Use of Force by States. Oxford, 1963, Oxford University Press, p. 107.

3 The Charter of The United Nations, San Francisco, 1945, Art. I. 4. „All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". https://treaties.un.org/doc/Publication/CTC/uncharter.pdf

4 ILA, Final Report on the meaning of Armed Conflict in International Law (2010). https://www.scribd.com/document/221733348/Final-report-Meaning-of-Armed-Conflict. http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf

5 ILA, Final Report on the meaning of Armed Conflict in International Law (2010), p. 10.

6 *Ibid.,* p. 14.

7 J.M. Henckaerts – L. Doswald-Beck: Customary International Humanitarian Law I-II (Cambridge University Press, 2005). https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf . https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

a practical guide, and three years later it published a working paper about the differences between international and non-international armed conflicts with the title "**How is the Term "Armed Conflict" Defined in International Humanitarian Law?**"[1] And in 2009 another important document came out about the widening applicability of the rules of non-international armed conflicts in the case of organized armed groups identified as armed forces of a non-state party: the **"Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law**"[2]. (4) The interval between 2010 and 2019 brought detailed **Commentaries of the First Geneva Convention** from **2016** and from **2017** (the later do not contain major differences regarding the definition of armed conflict).[3]

2. Summary of jus ad bellum/ jus contra bellum and jus in bello

2.1. Jus ad bellum – Jus contra bellum

The criteria of jus ad bellum and jus in bello were based on the Christian philosophical and legal construction. Jus ad bellum summarizes the criteria system of the right to go to war. Starting a judicial (just) war it was essential to fulfill a list of requirements. Sulyok summarizes the criteria as follows: first of all, the cause of the war must have been a fair one – a **just cause**. It meant that the pure goal of punishing people who have done wrong cannot be a just cause, although the fight against the evil as a moral obligation was accepted. From a slightly different point of view, we can call a cause of using force a just one, when the parties use force to stop aggression or violation of basic human rights of the population.[4] It was necessary to start the war according to the **adequate process**. Further on, it was necessary to have the **right intention**: peace as a final result. However, the UN Charter and Geneva Conventions disqualified the existence of jus ad bellum, the right intention as a cause of an armed conflict still exists as a moral obligation. Pure material gains or economic interests cannot be described as right intentions, while correcting a suffered wrong is considered as acceptable intention. The importance of a just cause, a moral cause is still an important factor in armed conflicts and their resolution. During the recent armed conflicts, for example in Bosnia and Herzegovina, the coalitional forces were called Implementation Force (IFOR) and Stabilization Force (SFOR); in Iraq in 2003, the US led operation was called Operation of Iraqi Freedom (OIF). It is obvious that the political leadership of the international forces felt an obligation to explain the world, why the military involvement is necessary: because of stabilization, because of freedom, in

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[1] ICRC, How is the Term "Armed Conflict" Defined in International Humanitarian Law? (2008). https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm

[2] ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf

[3] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518

[4] US Catholic Conference, 1993

other words because of a morally acceptable intention. The Western allies used positive worlds to describe their armed presence.

It has to be proved that aggression occurs as ultima ratio. The **probability of success** and **proportionality**[1] were also key elements. Before 1945, the right to go to war contained the element of comparative justice: the injustice suffered by one of the parties must be greater than the injustice suffered by the other one. The competence of the constituted public authority can make a distinction between war and peace and justice and injustice, and it implemented the right to wage a war, but dictatorships or deceptive military actions were ruled out. The use of force had to be a last resort. Before the use of force, all peaceful alternatives must be tried, and the benefits of waging a war must be proportionate to the wrong that has been done.

2.2. Jus in bello – Right Conduct in War

The main characteristic of the right conduct in war is the distinction between belligerents and non-belligerents and the obligation to spare the non-belligerents. Furthermore, this part of the just war theories makes a distinction between intended and non-intended results. Generally speaking it defends the civilian life and property and as an added criteria, it expects proportionality of the used military equipment and measures.[2]

The rules of the fight must be based on the **distinction between combatants and non-combatants.** It is prohibited to attack civilian residential or neutral areas, committing acts of terrorism or reprisal against civilians, shipwrecked people, etc. **Proportionality** is also a part of jus in bello, since the suffering of civilians and the harm to their property cannot be bigger than the concrete military advantage. We have to note here that this is quite a subjective category and hard to find a generally accepted exchange rate between military advantage and civilian suffering or harm to civilian property. **Military necessity** and proportionality are inseparable terms of art. The right conduct in war limits unnecessary death and destruction. Military actions must be based on the concrete aim of defeating the enemy and not on other goals like punishing civilians or any other forms of reprisal. The surrendered and captured enemy combatants are not involved in active military operations anymore and they deserve a fair treatment as prisoners of war. Unacceptable methods, treatment and weapons of uncontrolled effect are ruled out either.

The fair treatment of prisoners of war became an important element as well as the distinction between *malum prohibitum* – wrong because it is prohibited – and *malum in se* – wrong or evil in itself. Malum in se is not acceptable according to jus in bello.

3. Jus post bellum

It is generally accepted that jus post bellum as the youngest part of just war theories is not as well settled as jus ad bellum and jus in bello. Jus post bellum concerns justice after a war, or armed conflict ended. In a wider meaning, jus post bellum governs the

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[1] Sulyok, Gábor: *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 27.

[2] *Ibid.*

justice peace treaties, reconstruction, war criminal trials and war reparations. In a tighter meaning, jus post bellum deals with exclusively the settlement and reconstruction and let the work of war criminal trials and war reparations on the international criminal tribunals. I myself prefer the narrow interpretation, since it focuses on the positive side of the reconstruction of social institutions and ordinary daily life, while war criminal trials always have a subjective and negative element (rebuilding contra revenge).

3.1. Jus Post Bellum – Normative approach and principles

Brian Orend, one of the earliest theorists of justice after war identified five principles of jus post bellum, such us: **just cause termination, right intention, public declaration and authority and proportionality**. In his interpretation, a state can end a war if the aggressor is willing to negotiate the terms of the surrender and the vindication of violated rights or if the just goals cannot be reached. Revenge is not permitted and the victor state must investigate the war crimes committed by its own armed forces on objective grounds. A legitimate authority must state the terms of peace and another legitimate authority must accept it. Proportionality must be accepted as the initially violated rights are the base of terms of surrender.[1]

Larry May suggests that just post bellum and transitional justice relate to each other, and it has an importance when we examine the documents like the Transitional Administrative Law of Iraq (TAL) or the Dayton Peace Accord. According to May, there are **six post bellum principles: retribution, reconciliation, rebuilding, restitution, reparations and proportionality (5R&P**).[2] It is questionable at the very minimum, whether May is right when he asserts that retribution would be one of the most important conditions after a war is over. I myself as an eyewitness of the results of armed conflicts in Bosnia-Herzegovina and Iraq can declare that for those, who suffered from the losses, food supply, the daily work of hospitals, potable water, electricity, heating, etc. – in other words, reconstruction – were much more important than retribution. Reconciliation as a second principle is an important factor as a basis of normal daily life, but in my opinion rebuilding should be named as the first and most important among jus pots bellum principles. Restitution and reparation help to restart normal life, since they are important as an integrated part of rebuilding, while proportionality assures that application of jus post bellum principles do not cause more harm to the population than the harm that is alleviated by the other principles. May refers to meionexia – demanding less than we can – and Grotius's idea about the limits of possible actions even in a "lawful war"[3] as principles of post bellum justice. May emphasizes the **transitional characteristic** of just post bellum, and says that after the mass atrocity or oppressive conditions (i.e. armed

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[1] Brian Orend, Jus Post Bellum: A Just War Theory Perspective. In Carsten Stahn – Jahn K. Kleffner, *Jus Post Bellum. Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, T.M.C. Asser Press. pp. 31-52.

[2] Larry May, Jus Post Bellum, Grotius, and Meionexia. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum. Mapping the Normative Foundations.* Oxford, 2014, Oxford University Press, p. 15.

[3] Hugo Grotius: *De Jure Belli ac Pacis* Book III, ch. 11.

conflict) have been stopped, a new, **more democratic** regime must be formed.[1] In my opinion, it has a major importance that May uses the phrase "more democratic" instead of "democratic". The "more democratic" term points out the limits of just post bellum, the rebuilding of legal and administrative instructions after the end of an armed conflict. Later I will describe the importance of understanding the capacities of the export of democracy and building new administrative organs after an armed conflict. However, May also points out the differences between transitional justice and jus post bellum. According to his opinion transitional justice focuses on a democratic or at least less repressive regime and the requirement of Responsibility to Protect (R2P), while in the goal of jus post bellum are achieving peace and the previously mentioned 5R&P. I argue with May's opinion that jus post bellum seeks only the just end to military operations, but accept the view that transitional justice and just post bellum aim at the long-term just peace.[2] Later, discussing Dieter Fleck's proposal, we will see a more constructive interpretation of the role of jus post bellum.

Mark Evans brings up a practical approach of jus post bellum in his essay "At War's End: Time to Turn to Jus Post bellum?".[3] His idea of a "conceptual toolkit for just post bellum"[4] has some minor similar characteristics to my idea about a practical algorithm, or protocol, an "international legal first aid", which can help to reorganize the daily normal life at the shortest time after the end of an armed conflict, and which I mentioned in the chapter about methodology. Evans argues with Seth Lazar's argument that the morality of peacebuilding must be distinguished from just post bellum, and Darrel Mollenforff's views about the limited focus of just post bellum on how a just war should be ended.[5]

The previously mentioned **Dieter Fleck** summarizes the value of jus post bellum as a key tool to achieve a lasting peace with normative regulations. Although he emphasizes the temporary characteristics of jus post bellum, and as a result he describes jus post bellum as a special discipline, distinct from other branches of international law. Fleck adds that the typical rules of just post bellum are **(1) assistance in creating a new constitutional order; (2) robust law enforcement post-conflict and (3) organization of an international territorial administration.** I myself can fully accept these views instead of those, which focuse on retribution and reconciliation. Fleck refers to the antagonistic problem between Article 2(7) of the UN Charter, which does not permit any foreign state to introduce institutional changes in an occupied territory and the need for post-conflict peacebuilding, where the maintenance of the previous status quo may

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1 Larry May, Jus Post Bellum, Grotius, and Meionexia. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 24.

2 *Ibid.,* p. 25.

3 Mark Evans, At War's End: Time to Turn to Jus Post Bellum? In, In: Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum.Mapping the Normative Foundations*. Oxford, 2014, Oxford University Press, pp. 26-42.

4 *Ibid.,* p. 26.

5 *Ibid.*, p. 27.

be counterproductive. And to make the picture more complex: the limitations of the law of occupation may no longer be adequate after the armed conflict has to come an end.[1] Fleck also emphasizes that the law of armed conflict is based on the pillars of jus ad bellum, jus in bello and jus post bellum.[2] According to him, the main principles of jus post bellum are the following: **pragmatic limitation**, instead of meionexia, in the meaning of taking what is one's due;[3] **conciliation**, since criminal justice has its limits in post conflict situations; widest possible **participation** of all actors of the peacebuilding process; and **temporary nature of post bellum rules**. According to my field experience, Fleck's approach is the most practical and operable in real life in post-conflict situations.

James Gallen sees jus post bellum as an interpretive framework which should be concerned with transition from armed conflict to peace.[4] He accepts the views of Ruti Teitel about the uncertainty of the length of the post bellum interval, since there is not an adequate measurement and boundary between conflict, post-conflict situation and peace.[5] In his opinion transition is not an exact date, but a flexible and dynamic process and transition and jus post bellum have an overarching and overlapping character. He refers to Brian Orend phrase: "it is unclear when night ends and day begins, the period of dawn is a gradual period that is difficult to ascertain".[6] According to Gallen, international law has not fixed the exclusive meaning of jus post bellum, but the role of jus post bellum and the relevant subjects can be determined, such as transitional justice, peacebuilding, security sector reform, economic development, statebuilding, peace agreements, refugee and migration law, constitutionalism, elections, democracy.[7] Jus post bellum has an integrative character. Although complexity is important for post-conflict environments, fragmentation must be avoided, since it can lead to restarting the conflict. **A coherent approach of jus post bellum** would not necessarily solve the problems of the transitional period of a state or society, but it **can make the significant issues of transition more public and explicit**.[8]

Jens Iverson traces the historical roots of transitional justice and jus pots bellum to Grotian tradition.[9] In his opinion, jus post bellum completes the logic and temporal idea of

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1 Dieter Fleck, Jus Post Bellum as a Partly Independent Legal Framework. In Stahn-Easterday-Iveson, *Jus Post Bellum*. 2014, Oxford, Oxford University Press, pp. 43-57.

2 *Ibid.*, p. 43.

3 Aristotle, Nicomachean Ethics, 1129.

4 James Gallen, Jus Post Bellum: An Interpretative Framework. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 58.

5 Ruti Teitel, Rethinking Jus Post Bellum in an Age of Global Transitional Justice. European Journal of International Law, 2013. 24(1). pp.335-339.

6 Brian Orend, Jus Post Bellum: The Perspective of a Just-War Theorist. 20 Leiden Jorunal of International Law. 2007, p. 574. James Gallen, Jus Post Bellum: An Interpretative Framework. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 59.

7 James Gallen, Jus Post Bellum: An Interpretative Framework. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 60.

8 *Ibid.*, p. 79.

9 Sir Hersch Lauterpacht, The Grotian Tradition in International Law. 1946. 23 British Year Book of International Law 1.

the law of armed conflict. Jus ad bellum refers to the beginning of an armed conflict, jus in bello governs the acts during the conflict and jus post bellum sets the rules for the aftermaths of it.[1] He declares that the post Cold War period generated the framework of jus post bellum from the mixture of occupation, peacebuilding and international territorial administration. Iverson accepts and cites Ruti Teitel's definition of **transitional justice** as "a conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[2] Iverson sees the aims of transitional justice in stopping violations and establishing a new political order. While no authoritative definition for **jus post bellum** is given, Iverson finds that the main characteristics of jus post bellum can be found in the Kantian philosophy: jus post bellum is "a body of legal norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace".[3] The main conglomerate is the term of art of armed conflict, which concerns the use of armed force. Jus post bellum cannot be separated from the context of jus ad bellum/jus contra bellum and jus in bello, and all of them are existing in the frame of the armed conflict.[4] Iverson emphasizes the system aspects of jus post bellum and the importance to understand that transitional justice is not a special kind of justice, but more like a method, which has the goal to establish peace in the interval of transition from conflict.[5] Iverson points out a critical problem of the acceptability of jus post bellum: to apply jus post bellum, the identification of states and governments (or in my opinion at least authorities) is evitable.[6]

3.2. Jus Post Bellum – Applicability in transitional period

Kristen E. Boon deals with a very specific part of the application of jus post bellum, namely the usage of jus post bellum in non-international armed conflicts (NIACs).[7] The importance of the essay is in the fact that non-international armed conflict is still the predominant form of conflicts.[8] Boon makes a distinction between international and

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1 Jens Iverson, Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 83.

2 Ruti Teitel, Transitional Justice Genealogy. 2003. 16 Harvard Human Rights Journal 69. James Gallen, Jus Post Bellum: An Interpretative Framework. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 85.

3 Jens Iverson, Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 85.

4 *Ibid.*, p. 85.

5 *Ibid.*, p. 86. See also: International Center for Transitional Justice (ICTJ), What is Transitional Justice? https://www.ictj.org/about/transitional-justice (accessed 11th December, 2018).

6 Jens Iverson, Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 94.

7 Kristen E. Boon, The Application of Jus Post Bellum in Non-International Armed Conflicts. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 259.

8 International Committee of the Red Cross(ICRC): International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 31st International Conference of the Red Cross and Red Crescent (ICRC 2011) 5-6.

non-international armed conflicts based on the text of the Geneva Conventions and their Protocols. He emphasizes the differences between Common Article 2 and Article 3, and later on tries to minimalize the distinction, which is based on the historical roots of state sovereignty.[1] Boon uses three different ways of description based on Geneva Conventions and the commentaries on the Geneva Conventions[2], the international criminal law perspective and the application of human rights obligations to internal conflicts.[3]

Freya Baetens analyses the role of the United Nations Peacebuilding Commission (PBC) in post-conflict resolution.[4] Baetens points out that the UN Security Council (UNSC) is connected to the present conflict situations, the Economic and Social Council (ECOSOC) deals with stable states and the purpose of the **Peacebuilding Commission (PBC) is to establish institutional background for recovery, reintegration and reconstruction of states**, which are emerging from a conflict.[5] The legal and operative framework of the Peacebuilding Commission is based on Article 7, 22 and 29 of the UN Charter, and was established at the 66th plenary meeting of the United Nations General Assembly in 2005.[6] The PBC proposes integrated strategies for institution-building and sustainable development.[7]

Yaël Ronen in his essay about post-occupation law[8] deals with the **state dependence on a former occupant state**. He makes an important point that although the length of occupation may interfere with the dependence of the occupied state, there are long term occupations which do not create such dependence at all (4 year occupation of Belgium by Germany in the First World War, the 3 year occupation of Germany by the Allied Forces in the Second World War, etc.)[9], and points out the overlaps between occupation and colonialism.[10]

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1 Kristen E. Boon, The Application of Jus Post Bellum in Non-International Armed Conflicts. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 262.

2 Jean S. Picket, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field (ICRC 1952).

3 Kristen E. Boon, The Application of Jus Post Bellum in Non-International Armed Conflicts. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 263.

4 Freya Baetens, Facilitating Post-Conflict Reconstruction: Is the UN Peacebuilding Commission Successfully Filling an Institutional Gap pr Marking a Missed Opportunity? In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 346.

5 *Ibid.*, p. 346.

6 UNGA Res. 60/180 (2005) UN Doc. A/RES/60/180.

7 UNGA Res.60/180 (2005) para.2.

8 Yaël Ronen, Post-Occupation Law. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 428.

9 *Ibid.,* p. 430.

10 *Ibid.*, p. 439.

Matthew Saul examines the problem of creating **popular governments in post-conflict situations**.[1] He defines just post bellum as a process of creating the norms of justice to end war and build peace.[2] Saul examines the problem from a prescriptive and an effectivity view (namely what are the impacts of the law), and what kind of impacts has the extant law of political participation on the post-conflict interim governments.[3] Saul emphasizes that although the value of an electoral process in a post-conflict situation is more than questionable, the element of popular input can improve the legitimacy of the rebuilding.[4] International law has a major responsibility when domestic legal system in a post-conflict geographic territory cannot guarantee functional rebuilding.

Aurel Sari tries to find the answer to the prickly question of the status of foreign armed forces in post-conflict environments.[5] Sari knots together the end of armed conflict with the presence of foreign armed forces which may remain there for several years.[6] The reason of the presence of the foreign forces can be different: they can be previous parties of the conflict, like it happened in Germany, after the Second World War, or they can be third parties like in Bosnia-Herzegovina, after the Dayton Peace Accord.[7] In Sari's opinion, one of the greatest challenges of the presence of foreign troops is the transition from a non-consensual (occupation, or quasi occupation) to consensual presence.[8] Sari point out that the legal status of the deployment and actions of foreign armed forces is not adjusted by a self-contained regime of international law, but derives from multiple sources, and this makes the normative regulation difficult.[9] Although, I have to admit that the case-by-case approach helps to avoid using unconsidered law transplantations and analogies. Sari refers to recent examples as test-cases (Kosovo and

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1 Matthew Saul, Creating Popular Governments in Post-Conflict Situations: The Role of International Law. In, Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 447.

2 *Ibid.*, p. 447.

3 *Ibid.*, p. 448.

4 See also Jennifer Widner: Constitution Writing in Post-Conflict Settings: An Overview. 2008. William & Mary Law Review , Volume 49, Issue 4, 1513. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1151&context=wmlr

5 Aurel Sari, The Stetus of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, pp. 467-501.

6 Aurel Sari, The Stetus of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 467.

7 General Framework for Peace in Bosnia and Herzegovina (Dayton Agreement), 14 December 1995, 35 International Legal Materials 75.

8 Aurel Sari, The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 468.

9 *Ibid.*, p. 499.

Iraq) to certify the close legal link between the presence and status of foreign forces and the combination of consensual and non-consensual elements for legal and for practical reasons, and to establish the legal framework of foreign military deployments.[1]

3.3. Jus Post Bellum and the export of democracy[2]

As for the export of democracy, the main question is how can the system be transformed from authority to democracy after the end of the armed part of the conflict? How can we avoid the situation when the winner party represents exclusively its own interests? Going from one extreme to the other: how can we avoid the situation when the victorious powers shuffle a puppet-government? Or how can we avoid the previous regime gaining power again?

Philosophical background: democracy and fallibilism

The knowledge of fallibility is an important part of the discussion of democracy. It does not mean that we can never know the truth, but rather we are never justified in behaving as if we know it. We always ought to know that we might be wrong. Fallibilism is the acceptance of the fact that our knowledge is never absolute, but it always exists in a continuum of uncertainty.[3]

Fallibilism is a bridge between the superior knowledge and the contingent knowledge: most of our so called superior knowledge is a contingent knowledge at the same time, because generally it has a connection to a special, technical reality. Saward gives the example of a garage mechanic: it is obvious that a garage mechanic knows better than an average person how to fix a car. This is a superior knowledge and a contingent knowledge at the same time.[4]

It is coherent with the ideas of Plato, who says that dealing with political issues is not different from any other special knowledge or competence. The political reality is the reality of the contingent knowledge: those who hold the relevant abilities and skills will always be better than those, who do not.[5]

In the international conflicts after World War II, democracy, the export of democracy and the initiation of democracy became the key element of the resolution process. Before the conflict the 'defense of democratic values', after the conflict the 'democratic settlement' became battle-cries in the media and in the rhetoric of – generally western oriented – countries involved in the conflict to support the social acceptance of the intervention.

Why the social acceptance is important in the Western culture? Democracy is the central element of western civilization. Because of the dominance of democracy-idea,

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[1] *Ibid.*, p. 501.

[2] Spindler Zsolt, International Conflicts and the Costs of Democracy. In Smuk Péter (ed.), Costs of Democracy. Budapest, 2016, Gondolat. pp.195-208. https://dfk-online.sze.hu/images/egyedi/Smuk_Costs_of_Democracy%20.pdf

[3] Saward, Michael, Democraic Theory and Indices of Democratization. p. 6. In Beetham David (ed.), *Defining and Measuring Democracy.* Sage Modern Politics (36). London, UK: Sage. http://oro.open.ac.uk/16187 (24th April, 2016), p. 9.

[4] *ibid.*

[5] Plato: *The Republic*

and the relative welfare of these states, pure economic advantages are not strong enough to build a stabile social background for the political authority which decides to intervene. Without the stabile social background not only the success of the military intervention, but also the position of the political power came under question: in western type democracy, the government comes to power by the vote of the constituents.

A profane remark: during an armed conflict the political authority invests into the constituent and their relatives as human resources, and a significant part of the taxes of the citizens as material resources to gain economic advantages. In our prudish western civilization – and by the way, also in the eastern one – justification of an intervention by economic interests is just not acceptable. We cannot declare that human rights are more important in Iraq than in North-Korea just because there are a lot of oil in Iraq, while in North-Korea there is not even a drop; Iraq has no nuclear weapons, so it is a softer target than North-Korea.

In the western civilization the keywords are 'democracy' and 'human rights', among them 'women rights' and 'equality' are of high priority, as well as 'freedom', 'torture and humiliating and degrading treatment', 'weapons of mass destruction', 'not peaceful use of nuclear energy', 'terrorism', 'financing terrorism'. These are the categories 'for what' or 'against what' we need to fight (i.e. 'fight against terrorism', 'war on terrorism').

In the eastern civilization, especially in the Muslim world, these keywords are 'sharia', 'Quran', 'Allah', the 'true religion'.

If we intervene into a conflict just because we want cheaper oil, it is not 'appropriate' according to our own standards. It makes us look acquisitive, and if we suffer losses involving our own human resources, it is more condemnable. On the other hand, if we want to 'liberate people', we are already on the moral side, we fight for a majestic, sacred goal, our losses are heroes (…and by the way, we can fuel up cheaper for a good Sunday shopping with the kids). It means that we want to export our own views, our own democracy to other countries in the hope of economic advantages.

In reality, international conflicts are based on economic and cultural causes. The cause of World War I was the emergence of new international economic and political actors (Germany, Italy, USA, Japan) who wanted their own share in colonial raw materials and markets.[1]

The conflicts of the second half of the 20th and the first decades of the 21st centuries occurred exactly there, where Huntington (1993) draw the borderlines and buffer-zones of different civilizations. From this point of view the Balkan Wars were not the mere fight for regional dominancy among Croats, Serbs and Bosnians, but a clash of western catholic, Slavic orthodox and Islamic civilizations.[2] Cultural clashes interweaves with economic interests: in case of Yugoslavia, whether the pro-Russian Serbs, the pro-western Croats and the pro-Islamic Bosnians should dominate the region? According to

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[1] Tóth Benedek, A jog és a gazdaság megváltozó viszonyrendszere (Changing Relation between Law and Economy), *Európai Jog,* Vol. 2013/5 pp. 7-8.

[2] Huntigton, Samuel P., The Clash of Civilizations? *Foreign Affairs,* Vol. 72. No. 3., Summer 1993, pp. 22-49.

the categories of Huntington (1996)[1], the Balkan Wars were clashes among the Western, Orthodox and Islamic civilizations like nowadays for example the Syrian conflict. In Syria, the Orthodox civilization supports Asad, western civilization supports the 'moderate opposition', while radical Islam supports ISIS.

Source: Huntington, Samuel P., *The Clash of Civilizations and Remarking of the World Order*. New York, Simon&Schuster, 1996.

The World of Civilizations: post 1990 scanned image Archived March 12, 2007, at the Wayback Machine

At the beginning of the 21st century the interests of the USA dictates lower oil prices to support the industry and industrial investments. On the other hand, in the word or in thought, two thirds of the budget of the Russian Federation is still based on the price of oil and the oil exploitation in Russia is much more expensive than in the Arab World. (It is a result of a few coefficients, but the main factor is the climate condition: Russian oil is extracted from frozen earth, the technology is behind the times, and the exploitation cannot give a flexible reaction for the demands of world market. Nevertheless if the demand declines, exploitation cannot be stopped, because restart would cause huge extra expenses.)

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[1] *Ibid.*The World of Civilizations: post 1990 scanned image Archived March 12, 2007, at the Wayback Machine

The ideological basis of the war on Iraq in 2003 was the – un-existing – threat by Iraqi weapons of mass destruction and the – also un-existing – contact with Al-Quaida. When it cleared out that these motives were false, the Bush administration started to communicate that 'establishing Iraqi democracy' would have been the main goal of intervention from the first days of the war.

In November, 2003 Bush vocalized that a failure of the Iraqi democracy would strengthen the terrorists of the world and extend the hazard onto American citizens, and ruin the dream of millions in the region. As Bush said, a free and democratic Iraq in the center of the Middle East could cause a 'domino effect' of democratic revolutions in the region.[1] (Personal note: in my mind 'global democratic revolution' rimes a bit with the 'global communist revolution', or the slogan 'Proletarians of the world, unite!') As a matter of fact, the main motive of the Iraqi war was the control of the oil price on the world market. According to Ishakan (2012), the Bush-doctrine was written in colonial style, where 'civilized forces' try to liberate the barbarian non-western world from eastern despotism.[2]

During the time of 'Arab Spring', the main motive was also the same: the price of oil and the orientation of Islamic governments (whether they support western or orthodox civilization). At first glance, in Syria the story is about the 'tyrannical' Asad supporters, the 'moderate opposition', and the ISIS. In reality, Asad supports the orthodox civilization: the Russian fleet has an access to the Mediterranean Sea, because they can rent the port of Tartus. People from the 'moderate opposition' belong to those, who oppose this orthodox orientation and prefer the western type badinage. The goals of Turkey are particular: they want to reestablish the influence of the Ottoman Empire at least on an economic level, and at the same time, they want to solve radically the 'Kurd-problem'.

If you start writing about democracy, the first sentence should include the term 'ancient Greece'. However, most of the definitions of democracy belong to a liberal or a civil republican scheme. Ishakan & Slaughter (2014) claim that liberal democracy is a minimalist and elitist model: the role of people is limited in electing their representatives. The civil republican democracy is a more inclusive and participative way of governance, where people are involved directly in decision making.[3] To order to emerge for a democracy, it is an essential but not sufficient requirement to have an entity on a territorially unit, with borders and a group of people defined as nation.[4] Saward (1994) tries to examine some of the democracy definitions in his work.[5] In our case

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1 Barbash, Fred, Iraq Part of 'Global Democraic Revolution' *The Wahington Post*, 6th of June, 2003. Ishakan, Benjamin: *Democracy in Iraq: History, Politics, Discourse.* London, Ashgate, 2012, p. 119.

2 Ishakan, Benjamin, *Democracy in Iraq: History, Politics, Discourse.* London, Ashgate, 2012 p. 120.

3 *Ibid.*, p. 4.

4 Saward (2006), op.cit., pp. 402-403. Cites: Ishakan&Slaughter (2014), op.cit., p. 4.

5 Saward, Michael: Democratic Theory and Indices of Democratization. In: Beetham, David ed.: *Defining and Measuring Democracy*. Sage Modern Politics (36), London, UK: Sage, pp. 6-24.

democracy means exclusively the western type of democracy – which is not homogenous either as we will see in the case of death penalty – , an exportable social and cultural model which is acceptable and comfortable for western people. The Bush-doctrine from 2003 also made remarks on democracy. In Ishakan's opinion (2012), the doctrine declares that the United State of America – widely: the western world – is the only legitimate successor of democracy, and it has the right to democratize non-western world even with military force or occupation.[1]

The term of 'democratization' has an interesting connotation. 'Self-democratization' is an explainable term, because it refers to a voluntary decision of a group of people, while 'democratization' is a process which is forced from outside. 'Democratization' and the 'right of democratization' presuppose an outer power, and it is a pre-condemned antagonistic with self-determination and autonomy. It is a special paradox, but we can declare that those, who are democrats, do not have the right to democratize the others.

The problem of exporting democracy can be examined from two different points of view:

- Democracy 1.0 version: We fully accept the theory of democracy, including the freedom of self-determination (i.e. the right of people to self-determination). It means that democracy cannot be forced, people have to decide whether they want it or not, and if they want to live in democracy, they have to decide the contents of it. The actual society has to mature for the reforms, whether they are political or economic ones. Historical experiments show that top-down attempts to change of paradigms without social demand and basis are seldom successful. (The reforms of Kemal Atatürk in Turkey are among the few exemptions, but the Iraqi, Bosnian, and Russian reform attempts – Peter I, Catharina II, or the current Russian attempts of import substitution – were absolute failures.) First and last, democracy can develop and evolve, but we cannot clone it.
- Democracy 2.0 version: The other possible track is to declare that we call 'democracy' a social and political model what we – the representatives of the western civilization – think acceptable and comfortable for us. Other values may long term jeopardize the physical existence of our own democratic values (the pinch of living-space and niche, where the democratic values are accepted). In this case, as prevention, it can be reasonable to spread the democratic values as a crusade to prevent other, more 'combative' civilizations and values to sweep away our values. Although, it is questionable whether we can still call this model a democracy. Or is it just a special way of democracy? A western type democracy?

The legal resolution of an international conflict is a political evolution from military occupation towards political legitimacy.

The legal anthropology, the history of law, cultural history of law and comparative legal studies are of primary importance in ius post bellum.

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[1] Ishakan (2012), op.cit., p. 120.

Democracy is a broad term for a variable reality, which has its own evolution and its evolutionary path depending on time, place and culture. Democracy can be a philosophical or political term, but is not a legal category. Determining a non-legal category with legal terms will hardly give us positive or useful results.

Hassin & Ishakan (2016) declared that the neo-liberal state building model in Iraq – at least in most of its details – were a complete failure.[1] During the reconstruction, the minimalist and short term approach of neo-liberal state building model focuses on the governmental organizations and free trade. It tries to establish and strengthen military, police, legislation, central bank, taxation, healthcare, education.[2] Top-down paradigm means that the rule of law, strengthening economy, (re)establishment of key governmental organizations have the most important role and this is the main assurance of avoiding dictatorship and break humanitarian laws. This is the paradigm which was adopted in most of the international conflicts after World War II. (Especially in those ones, where foreign authorities wanted to minimize their post-conflict commitments with the help of a preferable local government supported by foreign military force.)[3]

According to the critics of neo-liberal state building model, this paradigm is not effective and it divides society socially, ethnically, politically and ideologically.[4]

If we want to reach an acceptable compromise, we have to study the legal anthropological conditions, legal historical development, legal cultural history of the states involved in the conflict, which means that in most cases we have to deal with religious, religious historical and religious legal issues as well. From an exclusively western point of view, we cannot decide what is important and what is not so important for the local people involved in the conflict. The science of comparative law has a key role in the process of conflict resolution in a legal way, because it can make comparison between the pre-conflict state, the current state and the required legal outcomes.

4. Summary of jus post bellum

As we have seen, there is no universal definition of jus post bellum. Some scholars emphasize the just cause termination, right intention, public declaration and authority and proportionality,[5] while others allocate six post bellum principles: retribution,

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[1] Hassin, Ahmed – Ishakan, Benjamin, The Failure of Neo-Liberal State Building in Iraq: Assessing Australia's Post-Conflict Reconstruction and Development Initiatives. *Australian Journal of Politics and Histrory*, Vol. 62, no. 1, 2016, pp. 87-99.

[2] Fukuyama, Francis, *State Building: Governance and World Order in the Twenty-First Century*. London, 2004, p. 159. Cite: Hassin&Ishakan (2016), op.cit., p. 89.

[3] Berger, Mark T., From Nation Building to State Building: The Geopolitics of Development, the Nation-State System and the Changing Global Order. *Third World Quarterly*. Vol. 27, 1, 2006, pp.5-25. Cite: Hassin&Ishakan (2016), op.cit., p. 89.

[4] Barbara, Julien: Rethinking Neo-Liberal State Building: Building Post-Conflict Development States. *Development in Practice*. Vol. 18, 3 (2008), pp. 307-318. Cites. Hassin&Ishakan (2016), ibid.

[5] Like Brian Orend. See also Brian Orend:, Jus Post Bellum: A Just War Theory Perspective. In Carsten Stahn – Jahn K. Kleffner, *Jus Post Bellum. Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, T.M.C. Asser Press. pp. 31-52.

reconciliation, rebuilding, restitution, reparations and proportionality (5R&P),[1] others make a stress on the assistance in creating a new constitutional order, post-conflict law enforcement and the organization of a territorial administration.[2] As a scholar who has some field experience, with the respect to other scholars' opinion, I consider Dieter Fleck's approach to be the most practical one with the amendments mentioned below.

As I examined different approaches of jus post bellum, I could highlight some general thoughts which can be defined as essential and imperious, although not necessarily sufficient elements of jus post bellum as follows:

1) jus post bellum is applicable after the end of an armed conflict and before peace;

2) jus post bellum has a temporary character and it is counterproductive to harshly separate it from transitional law;

3) although it has a transitional character, it is not a "special justice", but a practical working approach to gain justice;

4) jus post bellum has to help to create the base of legislative power and constitutional order;

5) based on the constitutional order, a new basis of executive branch (post-conflict law enforcement) has to be established;

6) also based on the constitutional order, the basis of jurisdiction and generally public administration (territorial state administration) has to be introduced.

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[1] Larry May: Jus Post Bellum, Grotius, and Meionexia. In: Carsten Stahn – Jennifer S. Easterday – Jens Iverson: Jus Post Bellum. Oxford, 2014, Oxford University Press, p. 15.

[2] Dieter Fleck: Jus Post Bellum as a Partly Independent Legal Framework. In.: Stahn-Easterday-Iveson: Jus Post Bellum. 2014, Oxford, Oxford University Press p. 43.

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