REFRAMING THE CATHOLIC UNDERSTANDING OF JUST WAR

Two Contrasting Approaches in the Inter-War Period

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ABSTRACT

During the inter-war period, European Catholic authors exhibited two different approaches to the question of just war. One approach was articulated at the "Fribourg Conventus" a 1931 meeting of French, Swiss, and German theologians, whose subsequent declaration (*Conventus de bello*, published 1932) called for a reformulation of Catholic teaching based on the premise that the traditional just-war doctrine had been superseded by developments in international law. A competing approach was articulated by the Dutch Jesuit Robert Regout, who maintained that the just-war doctrine could contribute to the formation of international law by providing a much-needed normative foundation for the use of armed force by individual states in redress of their violated rights. After presenting these two approaches and explaining how they differ, this essay shows how the outlook of the *Conventus de bello* is reflected in subsequent papal statements on armed force – to the detriment of the traditional terminology of just war.

KEYWORDS**:** *Fribourg Conventus*, *international law*, *just war*, *Luigi Sturzo*, *papal teaching*, *Robert Regout, peace, Catholic ethics*

The renewal of just war thought in our time is usually traced to the work of Paul Ramsey and Michael Walzer who began writing on this topic in the 1960s and 70s. It is much less known that the status of just war was an important topic of discussion among European Catholic authors during the inter-war period (and most especially in the 1930s). Like Walzer (but unlike Ramsey) these authors were mainly concerned with situating just war in relation to developments in international law. In this connection, a notable divergence arose.

One approach called for a reformulation of Catholic teaching based on the premise that the traditional just-war doctrine had been superseded by developments in international law. The obsolescence of just war was voiced in the late 1920s[1] by Luigi Sturzo (an Italian sociologist

[1] A half century before, during the First Vatican Council, the Armenian synod had petitioned the pope for a revision of the Church's teaching on just war. This was part of a broader initiative, led by the Protestant

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who was also a Catholic priest and politician), whose book on the international community and the right of war (*La comunità internazionale e il diritto di guerra*, 1928),[2] written while he was exiled in London, set the stage[3] for a reassessment of war by a group of theologians who assembled in Fribourg, Switzerland in 1931 (the "Fribourg Conventus" as it is often called). The following year they published[4] the "Conclusiones conventus theologici Friburgensis de bello"[5] and its main lines were further developed inter alia by the Dominican Joseph T. Delos,[6] who, like Sturzo, promoted a sociological approach to the problem of war that drew heavily on the work of Luigi Taparelli d'Aziglio (1793–1862).[7]

On the contrasting account, the just war doctrine was deemed to have a permanent applicability. Originally articulated by Thomas Aquinas and developed by later scholastics, this

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diplomat David Urqhart, to work toward a restoration of the *jus gentium*. See Joblin 1988, 221–23 for an overview.

[2] Sturzo had earlier published an initial statement of his views on war and peace in the *Bulletin Catholique International* (Sturzo 1926). *La comunità internazionale e il diritto di guerra* first appeared in the English translation (while Sturzo was exiled in London), which is cited here (Sturzo 1929). A French translation appeared shortly thereafter (Sturzo 1931). The first Italian edition did not appear until many years later (Sturzo 1954).

[3] George Minois (1994, 400–1) credits Sturzo with providing the intellectual framework for the Fribourg Conventus. René Coste (1962, 59) had earlier voiced the same conclusion. Indeed, a passage by Sturzo on the "state of necessity" is reproduced in the annotated selection of primary sources ("Documents annexes") that was appended to the published version of the declaration. Joseph T. Delos, O.P. and Albert Valensin, S.J., who in all probability drafted the declaration (see *infra* n. 37), were listed as editors of the documentary annex (Delos and Valensin 1932, 86). It can be conjectured that the influence of Sturzo on the Fribourg Conventus passed through Delos, who had developed his sociological perspective on war in close resemblance to ideas that Sturzo had first launched in his programmatic essay "Sur le droit de guerre" (1926). Documenting these lines of influence, by examination of published and archival sources, merits further study.

[4] Henceforth the declaration will be referred to as the *Conventus de bello*. It was published (February 1932) in facing Latin and French, with a set of supporting documents ("Documents annexes"). Two identical versions appeared in the same layout, but with different pagination: (1) *Les documents de la vie intellectuelle* (vol. 3.1, pp. 199–213), and in short book *Paix et guerre*, along with an introductory essay "Des deux façons d'aimer la paix" (presumably by the general editor of *Les documents de la vie intellectuelle*, although no author named). In what follows, all citations of the *Conventus de bello* are taken from the text as it appeared in *Paix et guerre* (*Conventus de bello* = Charrière et al. 1932). An English translation of the declaration (but without the annex) appeared in Eppstein 1935, 138–42.

[5] "Conclusions of the Fribourg Conventus on War." The corresponding French title was "Le problème de la moralité de la guerre."

[6] Delos published a thesis in 1929 on *La Société internationale et les Principes du Droit public* (Delos 1929). Its preface was written by the jurist Louis de Fur, who two years later wrote the preface to the French edition of Sturzo 1929. Delos gave his most systematic articulation of the *Conventus de bello* outlook at the 1953 conference of the "Semaines Sociales de France" (Delos 1953). This was followed by Delos 1959.

[7] Especially the treatise on natural rights, *Saggio teoretico di dritto natural appoggiato sul fatto* (Theoretical Treatise on Natural Right Based on Facts) that Taparelli had published in Palermo between 1840 and 1843. Henceforth I cite here from the French translation (originally published 1857, with the "approbation of the author") of 1875.

doctrine could contribute to the formation of international law by providing a much-needed normative foundation for the use of armed force by individual states in redress of their violated rights. The leading proponent of this approach was the Dutch Jesuit Robert Regout, whose doctoral thesis, *La doctrine de la guerre juste de Saint Augustin à nos jours* (Regout 1934), had been written with this goal in mind.[8] After presenting these two accounts and explaining how they differ, I show how the outlook of the *Conventus de bello* is reflected in subsequent papal statements on armed force, to the detriment of the traditional terminology of just war as had been articulated by Regout.

1. The Fribourg Conventus: Moving beyond Just War

At the close of their meeting ("conventus") in October 1931, eight Catholic theologians (from France, Germany and Switzerland) [9] signed a consensus document (dated Oct 19) on the "morality of war." Published early the next year in French and Latin the stated aim of the signers (articulated in the "avant-propos") was to formulate a "doctrinal position of the problem" as "it is posed today before one's conscience" (*Conventus de bello*, 1932, 33). The fruit of three years of work, with regular meetings held under the auspices of Marius Besson (Bishop of Lausanne, Geneva, and Fribourg), the impetus for these consultations appears to have been twofold. First, there was a perceived need to provide a Catholic endorsement of the "condemnation of war" as had been declared by the Kellog-Briand Pact (August 27, 1928). Second, one of the eventual signers, the German Dominican Stratmann, had created much controversy by his public statements in support of pacifism. In a meeting with the Lyonnaise abbé Laurent Remillieux,

[8] Regout later died in the Dachau concentration camp, after airing legal views critical of the German occupation of his country. See Henri de Waele 2005.

[9] François Charrière (Switzerland), Joseph T. Delos, O.P. (France), Franz Keller (Germany), Joseph Mayer (Germany), Constantine Noppel, S.J. (Germany), Bruno de Solages (France), Franziskus Stratmann, O.P. (Germany), Albert Valensin, S. J. (France). The Swiss theologian Charles Journet, who at the time taught alongside abbé Charrière at the major seminary of Fribourg, credited Delos (1891–1974) and Valensin (1873–1944) with authorship of the *Conventus de bello* (letter to Jacques Maritain dated 21 March 1932 – Journet and Maritain, 1997, 215). Journet suggests that this was related to him by Charrière.

Stratmann had asked "to what point am I, a Catholic, entitled to be a pacifist?" This in turn led Remillieux to seek out an answer from the nuncio in Berlin, Eugenio Pacelli (later Pope Pius XII). Responding that it was not the Magisterium's role to decide such a question, Pacelli encouraged Remillieux to create a high-level study group that would examine the question. After further discussion with the nuncio in Paris, it was decided that the group would assemble in Fribourg, with the support of Mgr. Besson. Thus, although the signers of the Conventus made clear that the meetings and subsequent declaration resulted from their private initiative, it was understood that they enjoyed the tacit support of the Church hierarchy. Some dissent may have existed nonetheless, as some participants in the earlier consultations, for instance the Jesuit theologians Henri de Lubac and Gaston Fessard, did not sign the final declaration.[10]

In the introductory *status quaestionis*, the co-signers emphasized how the very legitimacy of war must be critically assessed. In so doing, they took as their starting point "the natural sociability of states" (*Conventus de bello* 1932, 34–36).[11] This sociability entails, in their eyes, a historical development toward a progressively more structured set of juridical relations. Whereas the theologians and moralists of times past had deemed war a given, such that they concerned themselves exclusively with "determining the conditions of its legitimacy," the approach more attuned to the implications of natural sociability would entail the recognition that this legitimacy is an "accidental" feature of relations between states. It pertains to a historical phase, in their eyes now superseded, in which "States [were] sovereign," such that each "[had] a monopoly" over the defense of [its] rights and the use of force" (Delos 1959a, 315). Thereby resulted a form of international society in which its members "do not recognize, *de facto*, the superiority of the social body," i.e., the common good" (Delos 1959a, 317). The signers emphasized that society need not be organized this way; in their eyes arrangements such as the League of Nations pointed

[10] This historical account is taken from Droulers 1981, 329–31.
[11] Delos later traced this idea back to Aquinas and Vitoria (Delos 1959b, 550–52).

to another, better, shape of international society in which key executive and legislative functions would be rooted more directly in this trans-national common good. In such an arrangement, the exercise of armed force is taken from "the anarchical hands of the sovereign states in order to make of it the monopoly of the international society and the auxiliary of the public order" (Delos 1959b, 540–41)

Underlying the *Conventus de bello* was the idea that although war is characteristic of certain phases of historical development, states are fully capable of interacting without it. War is, in other words, not an essential feature of interstate relations. By its very telos, our natural sociability moves us toward the renunciation of war. Although this last point was not stated explicitly by the *Conventus de bello*, it was integral to the background assumptions they had inherited from Sturzo. He had written, for instance, that "War . . . as a legal institution may disappear if the other conditions rendering it still effectual and actual can be changed—that is, if the social environment, by its development in accordance with the historical process, deprives war of its *raison d'être* as a legal institution" (Sturzo 1929, 225).[12] In alluding to the possibility of achieving a future condition of interstate organization in which the right of war would be eliminated, they were not claiming that this condition would be equivalent to the cessation of all interstate violence. Their argumentation was directed rather at showing how the *right* to wage war ("le droit de guerre"), on the part of individual states, can, and indeed should, be done away with. Or to put the same point somewhat differently, we must, as Delos later stated, move beyond a "strictly inter-state . . . conception of war" Delos, 1959, 317.

[12] In developing this viewpoint Sturzo was building on the earlier work of Taparelli, who had argued that once international society ("ethnarchy" he called it) was fully constituted with a centralized structure of authority, individual states would no longer have a need, nor consequently a right, to wage war (Taparelli d'Azeglio 1875, §§ 1377–1378, vol. II, 67–68). By the same token, standing armies would no longer be needed (for discussion see Coste 1962, 452–53, who earlier comments how "Alongside Taparelli there was Sturzo whose doctrine of just war seemed in close dependence upon the thought of his predecessor" (58, my translation). Coste further notes that Taparelli's treatise was held in high esteem by Popes Benedict XV, Pius XI, and Pius XII, a fact that accounts for the readiness with which Pius XII integrated the *Conventus de bello* viewpoint into his own numerous statements on war (Coste 1962, 58).

Whereas Regout would later speak of "le droit de guerre" in the *objective* sense of an exigency of justice (namely an unjust state of affairs that warrants a resort to force), the drafters of the Fribourg Conventus spoke of right in the *subjective* sense of an entitlement. Under this conception, when the state is viewed as a "moral person," war becomes "the means of maintaining and enforcing a state's rights" (Delos, 1959, 315).[13] This is not an a-temporal condition. Rather it is an entitlement that has been invested on states as the outcome of a determinate social process. By it, states acquired the right to wage war, but at a later time this right might no longer obtain.

As already noted, the entitlement in question was linked to a particular phase of historical development. In other phases it would not obtain. Although the Conventus drafters did not say expressly, they were insinuating that the entitlement to wage war is not a natural right (an emanation of *lex naturalis* that holds in all times and places); rather it is a tacit convention, akin to what early modern jurists had termed the "voluntary law of nations." This again was of a piece with the analysis of Sturzo, who explained, how "[t]he word 'war' . . . we reserve for what the old publicists called a 'public war'—that is a war between State and State. . . . We therefore say that war is the 'right' to settle a dispute between State and State by armed force; the concept of war is thus restricted to its function and aspect as a lawful institution" (Sturzo 1929, 89). In this connection, he added that

> the evolution of the idea of a right of war, in the sense in which we understand it today, is wholly modern. It does not mean simply the possession by the State—or by the political society in general—of the faculty or power to make war, but a legal institution, regulated by intrinsic law. . . . The real formation of the right and law of war was not reached till the International Community was conceived as an organization on a juridical basis (Sturzo 1929, 919).

The signers of the *Conventus de bello* thus operated with a very precise definition of the right under examination. This right can only be exercised by a particular kind of agent—a sovereign

[13] As will be explained shortly, this idea of war as an enforcement of a subjective right derives from the teaching of the medieval civil lawyers. It runs counter to the emphasis on just cause that the scholastic authors had made central to their account of just war.

state—within a determinate social context in which the different members of the community each recognize the sovereignty of the others. Within such a community, resort to war is a socially recognized (hence legitimate) procedure by which disputes are resolved in such fashion that new legal facts are created.[14] As Delos later put the point, in modernity war had come to be invested with a legislative function. [15]

Having defined the essential characteristics of the traditional *droit de guerre*, the signers of the Conventus proceeded to explain how the right in question has been greatly limited by developments in international law—notably the League of Nations Covenant (1920) and the Kellogg-Briand Pact (1928). States no longer enjoy an unrestricted right of war. To suppose otherwise, the *Conventus de bello* deemed condemnable not only as a matter of positive law ("en Droit publique") but also and even more importantly before the court of conscience ("devant la conscience"). On this conception, not only do states have an obligation to abstain from violating the rights of others, but moreover, legal justice, the paramount virtue of social life (hence it is also termed "general" justice[16]) requires of each state that it subordinate its specific national interests (*fins*) to the wider interest (*la fin plus générale*) of international society (*Conventus de bello* 1932, 40–41). Decisions resulting from arbitration and related initiatives of international authority must be observed scrupulously, as these are especially apt to promote the common good.

While the *Conventus de bello* did not mention the possibility of achieving an end-state of historical development in which war as an institutionally recognized social procedure would no longer exist, this was an integral aspect of the broader vision that had earlier been articulated by

[14] "So soon as a number of States or organized political groups came into being the links of a certain common life were established between them and little by little a society was formed" (*Conventus de bello* 1932, 38–39; Eppstein 1935, 139).

[15] "War . . . is the *ultima ratio* of a legislative procedure. Due to the lack of qualified organs to make law, [in un-organized international society] social need manifests itself in a *conflict* which brings to grips the states most directly interested, and the war which will resolve the conflict is a procedure of legislative substitution" (Delos 1959a, 322).

[16] See Thomas Aquinas, ST II-II, Q. 58, A. 5.

Sturzo (and by Taparelli before him).[17] On this vision, states would renounce the right of individual resort to war. But for Sturzo this would not be equivalent to pacifism, what he terms the "Outlawist" position, because on his understanding, within the international community the organization of armed force will be permanently necessary. In the event that resort to war is eliminated, "armed forces will be needed exclusively as police, in particular for work on frontiers, on the sea, and in the air" (Sturzo 1929, 240). In this connection he advocated for "the internationalization of the use of force for police work" (Sturzo 1929, 240), and to this he added that "the more such functions develop the more will the necessity for States to keep their own armaments [will] diminish, in relation to the lessening probability of war" (Sturzo 1929, 241).

The writers of the *Conventus de bello* recognized that this end-state, where war would be replaced by international policing, was still well off in the future. On the other hand, they deemed that the historical phase in which states could freely resort to war as a method to settle their disputes was definitively over. The problem was to conceptualize what uses of force could be deemed legitimate (namely "consistent with the common good and . . . the higher interests of the human person" – *Conventus de bello* 1932, 38–39[18]) in this intermediate period.

Having explained how the authority to wage war[19] is henceforth tightly restricted, the signers of the *Conventus de bello* proceeded to consider what situations might warrant resort to armed force ("just cause" in the language of the earlier tradition), a term that was avoided by the Conventus in favour of "legitimate defense".[20] In contrast to Regout who had prescinded from legitimate authority in considering just cause, the Conventus proceeded in the opposite direction.

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[17] Sturzo 1929: "The eliminability of war is a consequence of our theory, inasmuch as the hypothesis of a society so organized as not to require the use of force for the settlement of international disputes contains no intrinsic contradiction and entails no theoretical objection" (223); to clarify this possibility, he compares the abolition of war as a recognized social practice to the abolition of slavery (224–25).

[18] The full sentence read as follows : "[I]t is necessary to enquire whether, at the stage of evolution which we have reached, war is still the social process which, in default of all others, alone conduces to the common good and the higher interests of the human person" (Eppstein 1935, 139).

[19] This issue was taken up under the heading: "War Declared by the Sovereign Authority of a State" (*Conventus de bello* 1932, 40–41 ; my translation).

[20] The heading for section II.2 is "Le cas de légitime défense" (*Conventus de bello* 1932, 42–43).

An altered conception of legitimate authority entailed, on their view, a radical re-thinking of just cause.[21]

Whereas the traditional just war theorists (roughly Aquinas through Grotius) had recognized several legitimate rationales for the use of armed force, to which they contrasted a host of illegitimate rationales,[22] the *Conventus de bello* worked from a binary distinction between "legitimate defense" on the one hand, and resort to war by an appeal to "necessity" on the other. The first was allowed and the second was prohibited. "Necessity" was a category that had been emphasized by Sturzo.[23] Borrowing the term from classical realists, whatever might be deemed requisite for the vital interests of the state had *ipso facto* the character of "necessity."[24] He explained that the term, as used by its proponents, was inherently misleading; it suggests a war that is foisted upon the aggrieved party, leaving it no alternative. "In a given moment it is believed that there is no other human means of settling the dispute, or that every peaceful means has been tried in vain, or that one may presume from the position of the moment that any peaceful means would prove useless and dangerous" (Sturzo 1929, 108). This is, Sturzo stressed, "a dangerous optical illusion": although they present themselves to the human mind "as products of *necessity,*" "the wars of today are [nonetheless] unquestionably voluntary in character" (Sturzo 1929, 108).

Whenever a resort to force has for its aim some particular juridical outcome—whether to create new facts on the ground (for instance, gaining international recognition that an invaded territory is one's own) or to cement recognition of the status quo against claims to the contrary —such military action is always undertaken as a matter of choice. This seems self-evident in the

[21] See Delos 1959b, 539.
[22] For a summation, see Grotius, *De jure belli ac pacis*, bk. II, chaps. 1 and 22.
[23] See, in particular, Sturzo 1929, 107–9.
[24] This was summed up in the Roman adage *just is the war that is necessary* ("iustum enim est bellum quibus necessarium.").

case of territorial aggression, but it holds true of defensive wars as well. Delos later explained that

> every war involves a social will, that is to say that the belligerent pursues a social end, and that he aims at affecting the status or the state of the international community. To wage a purely defensive war is to seek to maintain an international situation considered as already existing and as having received the sanction of law. . . . To conquer is to force acceptance of a new juridical situation; it is to inscribe in a treaty of peace or to have accepted by customary law a new division of state jurisdictions….. The purpose of the war is only realized at the moment when the character of law is socially recognized in those situations defended or created by the belligerent. That is truly the formal object of its undertaking.(Delos 1959a, 318).

The signers of the Conventus took for axiomatic that the juridical outcomes sought by war could *always*, under the international legal regime that was then theirs, be achieved by means other than war. Because these other means also exist, appeals to "necessity" are ultimately baseless, and now that war is banned as a procedure to solve inter-state disputes, such appeals were henceforth morally wrong.

In sum, no resort to arms can properly be deemed "last" or "ultimate." This too was an implication of Sturzo's trenchant criticism of war rationales based on "necessity": "The juridical premise of war is the alleged impossibility of finding another suitable means of settlement—than that of the use of armed force—an impossibility expressed by the condition that there must be a state of necessity. Yet . . . a true state of necessity never arises in the relations between civilized states" (Sturzo 1929, 223). As a corollary, the *Conventus de bello* spoke disparagingly of standing armies ("ce désordre qu'est la paix armée"), and to replace this multitude of separate armed forces ("milices") it encouraged instead the establishment of a "pacifique entente" among nations (*Conventus de bello* 1932, 44–45).

Sturzo had likewise cautioned against armies because they make resorting to war as a settlement procedure all the easier and natural, as it were. "When every nation is organized and prepared for war, like a brigand that carries a gun loaded and his knife in his pocket, it is unlikely that crucial moments of international dispute should fail to lead to war" (Sturzo 1929, 113). To

this disquisition against standing armies, the *Conventus de bello* added the related but further claim that modern warfare, by virtue of its technological sophistication and its inherent tendency to absolutization ("a kind of necessity that is inherent to its very nature"), is a means disproportionate to the very end which had been set for it by the traditional advocates of just war: "the restoration of peace and a better condition of human order" (*Conventus de bello* 1932, 41–43).[25] Thus, as can be seen from the citations above, the sorts of wars that the *Conventus de bello* had included under the forbidden category of "necessity" were exceedingly broad, and comprised much of what the just war tradition had included under the heading of both offensive and defensive war.

Although the *Conventus de bello* did not expressly make reference to the traditional doctrine of just war (apart from an allusion to "punitive" and related measures – *Conventus de bello* 1932, 42–45), Sturzo had expressly criticized this doctrine. Premised on the rationale of punishment, in his eyes the theory of just war entailed a "substratum of illogical elements" (Sturzo 1929, 195).[26] It was this punitive dimension of just war that he deemed especially "inapplicable to an organization composed only of autonomous and sovereign States" (Sturzo 1929, 195–96).

Having ruled out all resorts to force that were premised under the disqualified category of juridical "necessity," the signers of the *Conventus de bello* recognized "legitimate defense" as the sole remaining ground for allowable participation in war. In this connection they made abundantly clear that the concept in question must *not* be broadly construed. On their conception, its scope must be restricted to what the "traditional [just war] doctrine" had termed the "repelling

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[25] "[M]odern war… ceases to be a means proportioned to the end which alone can justify the use of force, namely the establishment of a more humane order of things and of peace" (my translation).

[26] Thus, as Sturzo further explained, "Instead of one authoritative judgment we find two judges, who are the two parties to the dispute, neither of whom recognizes that the other has any judicial authority. . . . And if a war is declared, each of the two ends up formulating a contradictory verdict, one of which cancels out the other" (196). See the similar (although even broader) critique of traditional just war theory in Delos 1953, 207–13, especially (on the punitive rationale), 211–12.

of violence by violence" (*vim vi repellere*), namely an armed reaction that had as its exclusive aim the repulsion of immediate injury. The paradigm of individual self-defense was made explicitly applicable here: Just as private persons could be allowed to employ force solely within strict bounds of proportionality and in the measure that the enforcement authority of a superior was lacking; similarly these were the conditions placed on individual states within the order established by international law, in conformity, moreover, with historical progress and reason.[27]

In this respect also the *Conventus de bello* clearly departed from the traditional just war theorists for whom the range of legitimate acts that might be taken in view of defense was much wider for states than for individuals[28] (hence the notion of "defensive war"[29]). The declaration was framed in such manner as to rule out this broadening. In the eyes of its signers, the concept of "legitimate defense" should not become a cover for smuggling back in the practice (forbidden in their reading of international law, particularly the Kellogg-Briand pact) of righting perceived wrongs by resort to force.[30] Delos accordingly differentiated "legitimate defense" from "a war of legitimate defense" (or simply a "defensive war"). According to the first, violence is employed in protection of one's life (be it the existence of an individual or a collective), and by the second, violence is employed to uphold one's right, namely to maintain the juridical status quo that had

[27] According to "the traditional doctrine… legitimate defense is understood to be an ensemble of acts, including the use of force, by which a state fills a lacuna left by a superior authority [that would ordinarily be] the guardian of the rule of law (*protectrice du Droit*). Repelling violence by violence is in this sense permitted" (*Conventus de bello* 1932, 42–43; my translation).

[28] Thus Suárez wrote that more is "allowable to a given city or commonwealth with regard to its own defense than to a private person" (Disp. XIII de bello, sect. II, no. 3; cited in Reichberg et al. 2006, 345); likewise Grotius, who noted how self-defense for individuals is only momentary ("it ceases as soon as circumstances permit the approach of a judge") while "public powers" exercise their authority where courts cease to function," so that "public wars . . . are prolonged" (bk. II, chap. I, sect. XVI ("Concerning defense in public war"); cited in Reichberg et al. 2006, 404.

[29] For an apt description of defensive war (in contrast to "on-the-spot reaction" and "other measures short of war"), see Dinstein 2001, 192 and 207.

[30] "One thereby dignifies with the name of defensive war all the initiatives of an extreme nationalism, avid for conquest and prestige" (*Conventus de bello* 1932, 42–43; my translation). This last clause might suggest that the *Conventus de bello* was intended only to exclude the sorts of wars that the earlier just war tradition had also excluded, namely those waged for the sake of territorial aggrandizement, etc. But in the paragraph that follows it is made clear that all military initiatives, apart from defense narrowly construed (repelling armed attack), are also to be excluded.

been called into question by the armed attack.[31] Despite the linguistic similarity, there is a radical incompatibility between *legitimate defense* on the one hand, and a *defensive war*, on the other. In the latter, defense no longer has a provisional character; nor is its exercise purely substitutional for the absent judicial authority; moreover, it has enduring legal effects.

The radicalness of this narrowed concept of defense is obscured within the terminology employed by the *Conventus de bello*. Legitimate defense is framed, as we have seen, in terms of the "traditional doctrine." This is an allusion to the teaching of the medieval canon lawyers who examined how such violence could permissibly be employed by private individuals in the interests of self-protection. These lawyers had explained how such action must be constrained by principles of necessity (no other means of defense available, due to an absence of law enforcement authority), immediacy (defensive action temporarily exercised only in the heat of the moment), and proportionality (using only so much force as is needed to repel the attack). Theologians subsequently enlarged this concept of defense so it would fit the special needs of states. This process began with Aquinas[32] but was made more fully explicit by Suárez and Grotius. But it was not this enlarged concept of defense that the *Conventus de bello* designated in its appeal to the "traditional teaching," but the considerably narrower teaching of the canon lawyers. On the matter of just cause, the *Conventus de bello* was more restrictive than its just war predecessors, on two counts; offensive war was emphatically ruled out (whether construed as "punishment" or "vindication"), and so too was defensive war. Only "legitimate defense" remained, and it was equated with a momentary (on-the-spot) reaction against armed attack.

2. Regout's Traditional Articulation of Just Cause

[31] "A *war of legitimate defense*… [is] distinct from *legitimate defense*. The former has an operation with its own proper end, namely to maintain a prior juridical situation that had served as basis for the relation between states…. The latter [by contrast] is the violent reaction of someone who defends, not his *right*, but his *life*, i.e., his individual existence" (Delos, 1953, 217; my translation with emphasis added).

[32] See Reichberg 2017, 129–31.

Regout's doctoral thesis was intended to be a historical exposition of the just war doctrine as it had been elaborated by theologians and canonists from the fourth to the twentieth century. Regout makes clear at the opening of his thesis that he will leave aside issues pertaining to the *jus in bello*, in order to focus on the *jus ad bellum*, which to his mind constitutes the center of gravity of "traditional doctrine of just war." After an introductory overview of the standard criteria of a just war (legitimate authority, just cause, right intention), he concludes that the heart of the theory resides in the second—just cause—and for this reason he largely forgoes in the remainder of the book any detailed consideration of the other two. He advanced as rationale for this narrowing the fact that legitimate authority had become largely unproblematic in the modern era.

Unlike the middle ages, when authority was distributed among various princes whose placement in the war-making hierarchy was unclear, hence in need of careful examination (was this particular prince under a king, and was a given king under the authority of the emperor, and how did the later stand in relation to the pope?), in modernity it was understood that only leaders of sovereign states (those recognized under formal diplomatic protocols) would have authority to initiate war. Intention, likewise, could be set aside, as it was a matter for the confessional and could have no bearing on the objective determination of war-grounding rights and wrongs, or post-bellum obligations of restitution. This exclusive focus on just cause, which for Regout hardly required justification, is highly significant for our purposes, as the neglected criterion of legitimate authority was the basis on which Sturzo and the theologians of the Fribourg Conventus had sought to move beyond the traditional just war doctrine.

Regout also made clear at the outset—and again returned in his conclusion to *La doctrine de la guerre juste*—that the book was not written simply out of historical curiosity (although the author showed plenty of it) but also in view of a more principled end, namely to provide a foundation for advances in international law. He observes in this connection that a notable shift

had occurred from the sixteenth to the eighteenth centuries. From an original focus on the *jus ad bellum*, international law progressively became dominated by *jus in bello* concerns, as manifested for instance in the the Hague Conventions of 1899 and 1907. Accompanying this shift was a discrediting of *jus ad bellum*, which in light of the then reigning legal positivism, was largely relegated to the private conscience of sovereigns. It was deemed inapplicable within the "real world" of state-to-state relations, and the earlier just war writings were considered to be an alien body of doctrine, with no relevance for the elaboration of public international law.

With the Covenant of the League of Nations (1920) the *jus ad bellum* re-entered international law; Regout viewed this as a salutary development. He was aware, however, that the League set forth rules that were procedural; the underlying substantive issues of justice had been set aside. It was in this domain that Regout saw a key role for just war theory. It "was capable," in his words, "of furnishing directing principles and luminous ideas for the indispensable development of international law" toward "the prevention and mitigation" of war (Regout 1934, 17).

As Regout explains in the book's conclusion, the League had outlawed any resort to war that proceeded without prior submission of the dispute to arbitration and juridical assessment. Such a breach would condemn one's resort to force as illicit, regardless of the substantive justice of one's claim. In this way the League sidestepped just cause in favor of purely procedural justice (Regout 1934, 313). Regout sees value in this approach insofar as it allowed for assessing resort to force on a criterion that was objectively determinable (Regout 1934, 313). But he was quick to point out that this arrangement had a notable limitation. Should one state-party allege that another had seriously infringed on its rights, and this other refused to enter a process of arbitration, a situation could easily arise whereby the aggrieved state, despite its willingness to submit the matter to arbitration, would, by reason of the other's refusal, find itself compelled to suffer the wrong with no legal process of rectification in sight. Regout concludes that the

aggrieved party could justifiably resort to war under this scenario, provided of course that the wrong suffered was sufficiently grave as to warrant such a weighty remedy. He admits that cases of this sort will arise only with extreme rarity. He emphasizes nonetheless that preserving the order of law among peoples[33] (or, when necessary, restoring it[34]), is of paramount importance; to allow its suppression, even in the interests of peace, can result in an even graver moral disordering of human society. Positive law does not have the final say on justice; indeed the rules of positive law lose their internal power of obligation when they enter into conflict with the superior principles of justice (Regout 1934, 312), this "emanation of the divine Being" (Regout 1934, 314).[35]

Ultimately, the order of justice (of right, *le droit*) must be respected; its persistent denial can justify resort to force so this order can be reestablished. Indeed, this is the sole basis on which war can justifiably be waged.[36] Regout's project, accordingly, was to show how the authors of the just war orientation had defined the sort of wrongs that could justify resort to force. In this respect his argument proceeded along two paths.

First, Regout sought to explain how these authors had rarely, if ever, limited their consideration to wrongs arising from unjust invasion. While admitting that these are especially egregious, he took care to elucidate how wrongs of another kind (for instance unjust expropriation of property) could warrant military action in response. As a consequence, the traditional just war position did allow for some modes of offensive war. Such war could be good or bad depending on its underlying rationale. The same could be said of defensive war. As such,

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[33] "To assure the maintenance of law (*du droit*) between peoples" (Regout 1934, 314; my translation).

[34] "La restauration du droit" (Regout 1934, 21). The phrase later appears in the plural: "la restauration des droits légitimes" (306). On the same page Regout adds that this restoration of right consists ultimately in the defense of an order willed by God ("une défense de l'ordre voulu par Dieu"). For this reason, we should willingly accept the sacrifices entailed by war. Resort to war on behalf of justice is for this reason consistent with charity, a theological virtue that derives from God.

[35] "[T]his veneration of law (*droit*) and order also explains why Christian charity admits the licitness of war" (Regout 1934, 306; this and all subsequent translations from Regout 1934 are my own).

[36] "No war [is permissible] unless it be for the maintenance of law (droit)" (Regout 1934, 19).

both were "morally neutral" designations that were subsequently divisible into "good" and "bad," or "just and unjust" (Regout 1934, 309).

Regout recognizes nonetheless how in a modern context the qualification "defensive" often has a moral connotation, whereby it signifies an armed action that is reactive to a serious violation of rights. In this broad construal even an "offensive" war (in the morally neutral sense of the term) can be qualified as defensive (moral sense). Thus understood, "defense" no longer signifies a second use of force (repelling armed attack); rather the term is coextensive with the very notion of just cause, namely the maintenance of rights against their manifest suppression (even if this suppression should occur by means other than violence).[37] In the end, however, Regout cautions against this broad usage of "defense," as it can easily serve as a cover for projects of aggression.[38] He accordingly prefers to limit the term to its morally neutral sense.

Regout's second line of argument focused on the question whether the just cause which gives rise to war must presuppose a *culpable offense* on the part of one's adversary. His predecessor in just war theory, Alfred Vanderpol, had affirmed that offensive just war could be waged only when the culpability of one's adversary had been demonstrated.[39] Modelling the resort to force after the standard of criminal justice, Vanderpol spoke of war as though it were a form of punishment. The bar was accordingly set very high for any permissible first use of force. Instances of wrongdoing wherein the culpability (*mens rea*) of the unjust side could not be shown would accordingly not warrant an armed response. In formulating this requirement, Vanderpol sought to discredit a more permissive view that he associated with Molina and Vitoria. The Spanish Jesuit Molina was singled out for criticism in connection with his argument

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[37] "In a certain sense every war in view of the maintenance of rights (*maintien de droits*) can be called defensive" (Regout 1934, 309). See also 269: "Just cause consists in the necessity to eliminate by force the obstacles that stand in the way of the free exercise of one's rights. Vitoria emphasizes the inherently defensive character of such a war."

[38] "The abuse of this term, in the past and still in the present, requires that we employ it only when it is a question of resistance to an armed invasion, of defense against those who have effectively created a state of war (Regout 1934, 309). See, similarly Neff 2005 on the emergence of a "bloated" concept of defense (327–34).

[39] This was the main argument of Vanderpol 1919; see Reichberg 2017, 147-48.

that the commission of (material) injustice, apart from any inner culpability (formal injustice), was sufficient to warrant a response of just war. Vanderpol thus maintained that the Jesuit scholastic had opened the door to the idea, later to be taken up in nineteenth-century international law, that states were entitled to resort to war as a legitimate means of resolving their grievances. Just war, on Molina's logic as understood by Vanderpol, was akin to a civil lawsuit undertaken by parties who were juridically equal. By abandoning the paradigm of criminal law, the moral barrier to war was thereby lowered to the point whereby it could be viewed as a normal procedure for resolving conflicts in the international sphere (Regout 1934, 250–75).

Writing his book in large measure as a critique of Vanderpol's historical narrative, Regout countered that framing just cause in terms of punishment entailed that grave wrongs would go unanswered, if for instance they were committed out of invincible ignorance. The harm done to the recipient of this wrong would thereby be left to stand, an outcome hardly incompatible with justice,[40] namely the "free exercise of [legitimate] rights" (Regout 1934, 26). The primacy of maintaining justice in interstate relations thereby led Regout to prefer Molina's interpretation of just cause as founded on a material injury, namely objective fault. War can rightly be waged to repair (overturn) such a wrong, even if the adversary is not shown to be subjectively culpable for having committed the wrong in question. This is what Regout termed a war for "*récuperation*" or "*vindication*."[41] The standard to be met in declaring war was therefore considerably lower than on Vanderpol's account. For Regout, demonstration of wrongful *actus reus*, even in the absence of *mens rea*, could warrant such a measure.

In addition, Regout was keen to add an *in bello* restriction not mentioned by Vanderpol. Even in circumstances where it is deserved on the part of determinate individuals, punishment of

[40] See Regout 1934, 296–97 where he sums up this assessment.

[41] Regout employs the terms "*redressement*," "*vindication*," "*récuperation*,"and "*restitution*" interchangeably, usually by contrast to "*punition*" on the one hand, and "*défense*" (in the narrow sense of repelling attack) on the other; see Regout 1934, 291–97.

the guilty should be secured only after war's end (*post bellum*). To put the same point otherwise: just war can be a means to apprehend the guilty such that they are brought to justice afterwards, but war itself should never be imposed as a form of punishment.[42]

Vanderpol's further contention that Molina had paved the way for the view, prominent among lawyers in the nineteenth and early twentieth century, that war could be accepted as an ordinary means of resolving intractable disagreements between states was emphatically denied by Regout. The "war-contract,"[43] namely the idea that states might jointly consent to let the "dice of Mars" (namely victory) determine which side of a dispute should prevail in law, was to Regout's eyes fundamentally inconsistent with the traditional notion of just cause.[44] This theory, on Regout's understanding, has for a central postulate the maintenance of *substantive* justice; under no means should it be conflated with the alien idea that war can be a *procedure* to resolve disputes by conferring on victors the *ex post facto* legitimacy of their claims. He does acknowledge, nonetheless, that the just war idea is not perfect in all respects (Regout 1934, 228–30). He views as especially problematic the arrangement, endorsed by Suárez, whereby a sovereign can be both judge and plaintiff in its own case. In its place, Regout supports a mode of international organization by which a designated third party can adjudicate complex disputes between states ("doubtful cases"), and subsequent to such judgment, guide its execution for the upholding of international law. He is quick to admit however that this right to juridical self-help

[42] Regout notes how Vitoria never uses the term "punitive war" (*bellum vindicativum*), preferring instead to speak of war "for the sake of vindication" (*bellum ad vindicandum*), with the understanding that this punishment is exercised only *post bellum* or after capture in the course of a war (Regout 1934, 168–69). At this juncture Regout (building on the earlier work of Vitoria and Molina) is distancing himself from Cajetan who had conceived of just war as an exercise in vindicative justice (see Reichberg 2017, 155-57; 166-67).

[43] This signifies that "each party would have the right of resort to war, just as every private person has the right to seek redress in a court of law. On can thus consider war to be the legal means to resolve an uncertain claim (*un droit uncertain*). A war in this sense is objectively justified on both sides; and the premise is tacitly accepted that incertitude regarding who is in the right will be definitively settled by force of arms to the advantage of the victor. War thus assumes the character of dual…. » (Regout 1934, 249).

[44] "This theory differs fundamentally from that of the theologians of the middle ages and the sixteenth century,and, we can add, that of later Catholic moralists. Nowhere in their works can we find the defense of such ideas" (Regout 1934, 249).

("le droit . . . des Ètats à se faire justice eux-mêmes"), despite its considerable defects, is inalienable so long as states interrelate in a condition of juridical anarchy (Regout 1934, 230).

Regout concludes his book with a comment on *ad bellum* proportionality. Technological advances in modern warfighting capabilities have resulted, he observes, in a destructiveness that far exceeds what was possible in earlier periods. For this reason the signers of the *Conventus de bello* (whom he cites in this connection) had questioned whether modern war could henceforth be considered proportionate to its (purportedly) justifying end: the establishment of a more humane order of peace (Regout 1934, 314n1). If the implication is that war in the modern era can never be permissible[45]—even after pacific alternatives have been tried and the worst injustices have been perpetuated—Regout makes clear he is unwilling to give his assent to this proposition.[46] Justice, he suggests, cannot be wholly sacrificed for the sake of our physical security. As long as a stable order of *right* has not been achieved between nations, resort to war must remain a viable option.[47] International law requires this option. Although Regout refrained from spelling out the details, writings a decade or so later by Hans Kelsen indicate what direction the Dutch Jesuit might have taken had he survived the Second World War.[48]

3. Summing Up How the Two Approaches Differ

Regout made only brief allusions to the position articulated by the *Conventus de bello*. As we have seen, he was sceptical about its insinuation that modern warfare, by reason of the widespread destruction it causes, can ever be a fit instrument to prosecute violations of justice. In

[45] "… that the initiation of war can *never* be permitted in our days" (Regout 1934, 314).

[46] "For our part we are unable to subscribe to so absolute a thesis" (Regout 1934, 314).

[47] "No realist depiction of the horrors of war will succeed in preventing war if at the same time we have not found means that can effectively assure an order of law of (*maintien du droit*) between peoples (Regout 1934, 314).

[48] He (Kelsen 1945, 330–41) advocated for a conception of just war theory the main goal of which was the enforcement of international law. Once the international community had established norms prohibiting international aggression, a violation of these norms would have the character of a delict (a legally designated wrong). He did not however equate violations of international law purely and simply with territorial aggression. For instance, the breach of a treaty could, if serious enough, warrant the application of an armed sanction. Kelsen does not explicitly refer to texts in the Catholic just war tradition, although he seems to have had knowledge of its main tenets (he converted to Catholicism as a university student, but later adhered to the Lutheran confession).

the same passage Regout also suggested that the *Conventus de bello* operated with a concept of last resort that was all too stringent, as it would seemingly exclude resort to force as a remedy for injustice.[49] It was perhaps for this same reason that he characterized Sturzo's *The International Community and the Right of War* as "somewhat muddled" (Regout 1934, 11). | This said, it is clear that Regout took aim at the *Conventus de bello* only obliquely; his main target in writing *La doctrine de la guerre juste* was to refute Vanderpol who, in line with his pacifist internationalism, had equated just cause with punitive justice—so as to set the bar for resort to force very high. Regout, we have seen, sought to set the bar considerably lower, such that non-culpable wrongdoing could also warrant resort to war for the redress of "objective" injustice.

On the other side, the signers of the *Conventus de bello*, whether in their joint paper or in their other writings, often sought to demarcate their position from the stance of the earlier just war tradition. In this connection Regout's historical survey was often cited. However, in so doing they showed a regrettable tendency to conflate the just war approach (as it had been articulated by Aquinas, Vitoria, Suarez and other scholastics) with the competing stream of thought that had been advanced by Raphaël Fulgosius and other medieval civil lawyers (see Reichberg 2008, 193–213, at 200).

Despairing over the possibility of any objective determination of just cause in concrete cases, Fulgosius had introduced in its place the "war-contract," namely a consensual agreement between states to settle their differences by dint of arms.[50] This, not the just war theory, was the source of the subjective right of war that led in modernity to the idea that war could serve as a means to adjudicate conflicts.[51] Regout had sought to combat the conflation between these two

[49] "…the ultimate means to obtain remedy (*redressement*) for an injustice (Regout 1934, 313–14); the point is reinforced in 314n1.

[50] For a translation of the relevant text, see "Raphaël Fulgosius (1367–1427): Just War Reduced to Public War," in Reichberg et al. 2006, 227–29.

[51] Stephen Neff sums up this difference well: "According to just-war theory, there was never any pretense that a war actually *resolved* a legal dispute. A just war was purely a remedial or enforcement measure, which might be successful or not as the material fortunes of the struggle dictated. It did not *create* any legal rights for the winning side that the party had not possessed previously. Only the law itself could create or extinguish rights. The contractual theory of war parted company with just-war theory on this important point.

theories.[52] But his words went unheeded, to judge by the post-*Conventus de bello* writings of Delos, who blamed just war authors for the emergence of subjective war rights.[53]

That said, the signers of the *Conventus de bello* targeted the theory of just war only as an afterthought, namely insofar as it had supported, in their eyes, the subjective right of war and all that it entailed. It was this idea, and not just war as such, that they sought to undermine and thereby to transcend. The doctrine that resort to force can serve as a conflict-resolution method had opened wide the gates of war, since any dispute between states could, in the event negotiations or other pacific means fail, be settled by means of war. Sturzo, earlier, had traced this conception (drawing undoubtedly on Vanderpol) to Suarez and Molina (see Sturzo 1929, 181–82).[54]

To combat this overly permissive understanding of war, the signers of the *Conventus de bello* sought, by way of reaction, to underscore developments in international law that were apt to promote restraint. Vis-à-vis legal positivism a paradox emerged. On the one hand, the signers criticized the traditional theory of just cause for carrying the seed of what would later go by this

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The essence of the war contract was that the winner of the duel would acquire full legal title to the *res* that was being fought over, without regard to how strong or weak its legal claim might have been beforehand. . . . In the strictest sense of the word, then, might made right according to the contractual perspective . . . something that had never been accepted in tradition just-war doctrine" (Neff 2005, 139–40).

[52] See Regout 1934, 206–28, and 253–61 where it is explained how this conflation resulted from Gabriel Vazquez's misreading of some passages by Suárez and Molina, which was later assumed into Vanderpol 1919.

[53] "If war determines rights, as would the sentence of a judge, or if it is the foundation of rights, as in the case of an annexation ratified by the peace treaty, it is because in both cases international society accepts the fact that that war is a means of creating rights. It sees in war an instrument of the judicial order (Delos 1959a, 331). "The moralists [that is, just war theorists] have favoured this confusion by the manner in which they state the problem of war. They have also placed themselves, for the most part, in the position of viewing the state as a moral person, and they have considered war as the means of maintaining and enforcing a state's rights. This subjective point of view is so similar to the one imposed by the theory of the absolute sovereignty of the state that the moralists, when adopting it, have re-enforced a doctrine whose excesses they otherwise reject" (315); "None of the medieval or modern writers—not even Vitoria—avoided the temptation to connect war with the judiciary function. War, in their writings, seems always to be the result of a litigation which could have been determined through the application of law and through the offices of a judge" ((Delos 1959b, 554); "The international community is despoiled to the detriment of the sovereign state" (557).

[54] Without mentioning Sturzo in this connection, Coste (like Regout before him) refutes the contention that Suarez, Molina, and other traditional just war thinkers viewed war as a method of dispute settlement (Coste 1962, 160). Coste correctly associates this idea with eighteenth–nineteenth century public international law, which was an extension of the regular war paradigm that had earlier been advanced by Fulgosius and other medieval civil lawyers. On the conflation of just war with the regular-war outlook of Fulgosius et al., see Reichberg 2018b.

name. A means to prosecute one's violated right in the absence of an overarching superior, just cause, as read by Sturzo and his followers, was another name for a dispute-settlement procedure, and they objected to this procedure on the grounds that might cannot establish legal right. On the other hand, the signers adopted legal positivism themselves insofar as they could see no way in which natural justice could serve as a standpoint for individual states to make decisions about armed force. Remedies for injustice would have to be made solely under the aegis of international law and by an international body formally constituted for that task; states may resort to force themselves only to repel armed attack and never to address past wrongs or to undertake preventive measures. Regout, having a very different target in mind—namely Vanderpol's construal of just cause in terms of criminal justice—argued that international law would be strengthened if it allowed for individual states to resort to force against objective injustice, as had earlier been endorsed by Vitoria and Molina.

Despite the notable differences in the lines of thought outlined above, it remains the case that some authors attempted to coordinate the two, to explain where exactly they differed in substance and in what respects they might be deemed complementary. An example of this genre may be found in a work, *Le droit de juste guerre*, published in 1938 by the French Jesuit Yves de la Brière.[55] After providing a careful overview of the just war outlook, and a critique based on arguments drawn from the Sturzo/*Conventus de bello* outlook, he observed how it is fallacious to suppose that the right of war would disappear with the advent of a collective authority for the world community, an authority possessed of enforcement powers. Under such a scenario, the right in question would pass to this authority, and its employment of armed force would represent an authentic instance of what the tradition had termed "just war."[56] He similarly noted

[55] Brière 1938. For background on Brière and other Catholic just war theorists who wrote during the first three decades of the twentieth century, see Mayeur 1984.

[56] Brière 1938, 193 (the paragraph that ends with "But we do not really see how one could seriously claim that this would amount to a *suppression*, an *abolition* of the right [to wage] war (*Droit de Guerre*) (my translation).

how the emphasis on placing enforcement measures solely in the hands of the international community might, in light of the Machiavellian aggressions looming on the horizon, risk to create a fallacious sense of security.[57] An echo of Regout's call for a robust opposition to injustice can be detected here.[58]

4. Impact on Papal Teaching

Although the two approaches described above are still reflected in debates among Catholic and Protestant thinkers,[59] the path marked out by the *Conventus de bello* has found its way into contemporary papal teaching from Pope Pius XII forward.[60] For one thing, in line with the *Conventus de bello*, the Roman Magisterium hardly, if ever, speaks of "just war,"[61] favoring instead the language of "legitimate (or "lawful") defense," "armed force" and related terms. The absence of reference to "just war" is far too pervasive to be counted as non-intentional, although to my knowledge no reason for this silence has expressly been given in the papal texts.

[57] "The unjustified resort to arms by certain powerful states (*Puissances*) (Brière 1938, 196; my translation).

[58] Jacques Maritain would articulate this viewpoint during the years 1940–42. See Reichberg 2018a.

[59] For an overview see Reichberg 2002. In its most recent permutation the debate has been framed in terms of the contrast between "just war" and "just peace"; see Morkevicius 2012.

[60] Popes rarely cite the secondary sources that have been used in preparing their documents, thus such attributions must ordinarily be made on the basis of circumstantial evidence (on the hermeneutical difficulties in reading papal texts, see, Coste 1962, 12–14). In this vein, Coste notes (60) that there exists a close similarity between positions adopted by Pius XII and the text of the *Conventus de bello*. The resemblance is such that it cannot be the result of mere accident. It is not conceivable, he adds, that Pope Pius was unaware of the *Conventus de bello*. After all, as recounted above, the idea of carrying out a theological consultation on the moral problem of war was due to Pius's intervention as nuncio in Germany. Finally, in this connection it can be noted that from October 1944 to 1968 Delos resided in Rome, where he served as legal advisor (*conseiller ecclésiastique*) at the French embassy to the Holy See (see Monnet 2016). From this position, he may very well have exerted an influence on papal writing—from Pius XII to Paul VI—on matters relating to war and peace.

[61] "Just war" appears in the *Conventus de bello* as a label to describe the project that animated the traditional doctrine as was advanced by Vitoria, Suárez, et al. When describing their own account of the justifiable uses and limits of armed force, the term does not appear. A similar move is made in the *Catechism of the Catholic Church* (1992) where the term is placed in quote marks to describe how the older tradition had framed the conditions of legitimate defense ("the traditional elements enumerated in what is called the 'just war' doctrine"—section 2309; cited in Reichberg and Syse, 2014, 151), with the supposition that this terminology is no longer embraced by the Roman Magisterium as its own. For a good account of the transition away from just war terminology in the teaching of Pius XII, see Coste 1962. The final chapter (447–93) is aptly entitled "La disparition de la guerre juste" (the disappearance of just war).

The side-lining of "just war" in papal teaching bears an affinity with the special meaning that the *Conventus de bello* attached to the word "war." An institution by which states resort to force for the settlement of their disputes, war, we have seen, can no longer be applicable under our current stage of historical development. Thus understood as a subjective ("claim") right of individual states, "war" no longer enjoys the legitimacy it once had. "Never again war, war never again!" Pope Paul VI declared at the United Nations.[62] By this locution, he did not mean to say that a day would come when violent strife on earth would entirely cease.[63] The sense was rather, "no longer employ force to settle your disputes;" in the words of his predecessor Pius XII, "the idea of war as an apt and proportionate means of solving international conflicts is now out of date"[64] Implied therein is a rejection of the positivist (or "contractualist") notion that war can function as a consensual decision-procedure by which a new legal status quo (one assured by military victory) can be established. When "war" is conceived of in this way it is unsurprising that the very notion of "just war" would take on the appearance of an oxymoron.

That war could be initiated for other reasons, say to remove a gravely unjust status quo, is passed over in silence. Thus, whereas the traditional just war theorists had acknowledged a wider set of rationales for the use of force by states—in this vein Regout, echoing Suarez and Vitoria, had allowed for just "offensive war"—the contemporary Magisterium, in line with the *Conventus de bello*, consistently speaks of "defense" as the sole rationale still permissible. In this vein the United States Conference of Catholic Bishops summed up the thrust of the papal teaching when

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[62] Paul VI 1965 (para. 5), 37; in Reichberg and Syse 2014, 126). In this statement the pope was echoing the words of the Second Vatican Council, which, in its "Pastoral Constitution of the Church in the Modern World" (*Gaudium et Spes*) expressed how "we should give all our energies to hastening the day when by the common consent of the nations, war may altogether be banned. This obviously calls for the setting up of some universal public authority recognized by everybody, commanding effective power, to guarantee for everybody security, regard for justice and rights" (Vatican Council II 1965 [para. 82], 85; in Reichberg and Syse, 154).

[63] Later in the same discourse (para. 5), Paul VI noted that "so long as man remains the weak, changeable, and even wicked being that he often shows himself to be, defensive arms, will, alas! be necessary [and so too presumably their use]" (Paul VI 1965, 39; in Reichberg and Syse, 127).

[64] Pius XII 1961a [para 63], 202; in Reichberg and Syse 2014, 121; see also para. 58: We must "ban once and for all wars of aggression as legitimate solutions of international disputes and as a means of realizing national aspirations" (ibid).

they wrote (1983) that "Offensive war of any kind is not morally defensible."[65] The *Conventus de bello* had similarly spoken of the "dangerous equivocations of the traditional doctrine," when, under the cover of legitimate defense, it had allowed for punitive and other war-rationales that go well beyond the repelling of force by force (*Conventus de bello* 1932, 42-43).[66]

That said, whether the popes have consistently construed defense quite so narrowly as the *Conventus de bello* is difficult to ascertain. Although some papal texts seem to frame "defense" as limited to the repelling of cross-border armed attacks, others appear to operate with a wider definition, thereby countenancing humanitarian intervention,[67] repression of international terrorist networks,[68] and the similar forms of armed action. What is clear, however, is that the international community—as manifested in relevant institutions such as the United Nations—is increasingly viewed as the sole agency through which such armed action can legitimately be undertaken. No longer is it taken to fall within the purview of individual states nor for that matter can it rightly be called "just war," but instead is best understood as "enforcement" (or "police") action on an international scale.[69]

Although it is true that the critical mass of contemporary papal statements on war reflect the *Conventus de bello* approach, some glimmers of the older tradition occasionally resurface. Thus, Pope Pius XII wrote in 1947 that "Law and order may at times have need of the strong arm of force. . . . If that principle were everywhere accepted and acted on, there would be a greater sense of security among peoples today.[70] And a year later he emphasized how "some goods are of such importance to society, that it is perfectly lawful to defend them against unjust aggression.

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[65] *The Challenge of Peace*, from the opening summary of "principles, norms, and premises of Catholic Teaching" no. 3 (U.S. Catholic Bishops 1983, 2; reproduced in Reichberg et al. 2006, 670).

[66] Punitive rationales aside, it should not be excluded that some of what the older tradition had placed under the category of "offensive war" resurfaces in texts of the Magisterium under a widened concept of "defense"; see comments to this effect in Reichberg 2017, 275–81.

[67] John Paul II 1999; in Reichberg and Syse 2014, 131–32; also Benedict XVI 2008; in Reichberg and Syse 2014, 138–39).

[68] John Paul II 2004; in Reichberg and Syse 2014, 136–38.

[69] John Paul II 1999; in Reichberg and Syse 2014, 131-132.

[70] Pius XII 1954, 174; in Reichberg and Syse 2014, 122.

Their defense is even an obligation for the nations as a whole that have a duty not to abandon a nation that is attacked."[71] In 1968 Pope Paul VI expressed hope that "the exaltation of the ideal of Peace may not favor the cowardice of those who fear it may be their duty to give their life for the service of their country and of their own brothers, when these are engaged in the defense of justice and liberty. . . . Peace is not pacifism."[72] And closer to our own time, Pope John Paul II affirmed that "war cannot be decided upon, even when it is a matter of ensuring the common good, except as the last option," thereby indirectly affirming how in some rare cases an application of armed force can rightly be *initiated*.[73]

These few scattered sentences, emerging among hundreds of others, provide a slender link to the just war discourses of the past. On the whole, however, papal teaching has been reoriented in a very different direction.[74] In this essay, I have focused on re-telling the history, now largely forgotten, of this shift within Catholic social doctrine toward a new normative conception of armed force.

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[71] Pius XII 1961b, 125; in Reichberg and Syse 2014, 123. In an article published several years later, Charles Journet commented that when Pius XII referred in this Christmas message to "unjust aggression," it was thereby suggested that not every "aggression" (namely a first use of force) is inherently wrongful. Journet proceeded to argue that the pope's teaching not only allowed for but even on some occasions could render obligatory a first use of force to counter grave injustice (Journet 1952, 24).

[72] Paul VI 1968; in Reichberg and Syse 2014, 127-128.

[73] "John Paul II 2003, 544; in Reichberg and Syse 2014, 134.

[74] It goes without saying that the *Conventus de bello* was one among several sources for the contemporary papal teaching on armed force. An adequate history of how this teaching developed would have to take into account the full range of these sources. For a look at how this teaching might be retold, see Joblin 1988, 207-322.

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