rected by footnotes of the Editor, leaving the original text undisturbed. Professor Wilson also contributed an admirable introduction on "Henry Wheaton and International Law," and a "Sketch of the Life of Richard Henry Dana, Jr.," and supplied a chronological list of editions and translations of Wheaton's *Elements*.

On the numerous happy occasions when the undersigned was fortunate to have the privilege of working with Professor Wilson, he frequently met many of his former students. Without fail each and every one of them spontaneously expressed his affection and admiration for his former teacher. Even in Manchuria where our paths crossed at Mukden in the summer of 1929, I was met at the railway station by a delegation of his former Japanese and Chinese students, who proudly informed me they had a surprise for me at the hotel, where I found Professor Wilson waiting. Although he could not stay the march of time in years, he remained young in thought and action. Every year of the summer sessions at Ann Arbor and Montreal he personally drove his automobile both ways to the meetings, accompanied by Mrs. Wilson. He took pleasure in entertaining his friends at dinner in a variety of interesting places. During the summer, when not otherwise occupied, he lived the life of a country squire at his summer home in Vermont, around which he gradually acquired more land and built homes for his children and grandchildren. It was the happy place of his honeymoon which he later purchased and, with his wife, developed into a haven of family gathering, rest and recreation.

The world in which George Grafton Wilson moved is better off because he was a part of it. His reputation for sincerity of purpose, calm judgment, fidelity to duty, abilities *par excellence,* and, above all, his fatherly sympathy, will live in the hearts and minds of thousands of young men and women whom he started and guided on their careers. His loss is felt in more circles of associations and friendships than most men have been vouchsafed to form, and he retained them throughout a lifetime slightly less than a decade short of a century.

GEORGE A. FINCH
Editor-in-Chief

BELLUM JUSTUM AND BELLUM LEGALE

In 1914 and long before the right of every sovereign state to go to war was recognized by the practice of states and by the overwhelming majority of writers, war, the "*ultima ratio regum,*" served in the primitive international community a double purpose: a method of self-help to enforce a right, in the absence of international courts with compulsory jurisdiction, and a method of self-help to change the law, analogous to internal revolution, in the absence of an organ of international legislation in the true sense of this term.

In this century the old *bellum justum* doctrine, which played so great a rôle in the literature from the times of St. Augustine to Vattel, was, first,

historically re-studied in great detail.[1] After the first World War, even attempts at the revival of this doctrine were made: it was asserted that this doctrine is a norm of positive international law, often coupled with the further assertion that recent developments in international organization constitute a return to this doctrine. These assertions, however, are not tenable in law, but are only political ideologies or the consequence of a theoretically incorrect analysis.

While Catholic international lawyers, such as Mausbach and Cathrein, retained the traditional concept of *bellum justum,* the revival was inspired by very different motives in other writers. Louis Le Fur,[2] an adherent of Catholic natural law, used the doctrine as a political instrument to prove the Treaty of Versailles to be a *justa pax* in the beginning struggle over the revision of this treaty. Leo Strisower [3] could in his book state with the utmost sincerity that he was not inspired by political motives. His approach was wholly ethical, a consequence of his basic philosophical conviction that law is a part of ethics. But exactly for this reason his argumentation is moral rather than legal. Hans Kelsen, the bitter antagonist of natural law, became the principal champion of the doctrine of *bellum justum,* which he felt compelled to defend for wholly logical reasons: If war cannot be interpreted either as a delict or as a sanction against a delict, then it is no longer possible to consider international law as law at all. But in his most recent treatment [4] he does not decide whether this doctrine is a norm of positive international law, and states forcefully the grave objections against the workability of this doctrine.

That this doctrine was not positive law in 1914 and long before, seems settled; [5] even in earlier times it was hardly ever a norm of positive interna-

[1] See, apart from monographs on St. Augustine, St. Thomas, Victoria, Suárez, Gentili, Grotius and others, the following works: A. Vanderpol, *Le droit de la guerre juste d'après les théologiens et les canonistes du Moyen-Âge* (1911); *idem, La doctrine scholastique du droit de la guerre* (1919); G. Salvioli, *Il concetto della guerra giusta negli scrittori anteriori a Grotius* (1915); P. Yves de la Brière, *"Les droits de la juste victoire selon la tradition des théologiens catholiques," Revue Générale de Droit International Public, Vol. XXXII* (1925); *idem, "Les étapes de la tradition théologique concernant le droit de la guerre juste, ibid.,* 1937, pp. 129 ff.; *idem, Le droit de juste guerre* (Paris, 1938); V. Beaufort, *La guerre comme instrument de secours ou de punition* (The Hague, 1933); Regout, *La doctrine de la guerre juste de St. Augustin à nos jours d'après les théologiens et canonistes catholiques* (1935); Kipp, *Moderne Probleme des Kriegsrechts in der Spätscholastik* (1935); J. von Elbe, "The Evolution of the Concept of Just War in International Law," this JOURNAL, Vol. 33 (1939), pp. 665–688.

[2] *"Guerre juste et juste paix," Revue Générale de Droit International Public,* Vol. XXVI (1919), pp. 9–75, 268–309, 349–405.

[3] *Der Krieg und die Völkerrechtsordnung* (Vienna, 1919).

[4] H. Kelsen, General Theory of Law and State (1945), pp. 331–338. He is followed by P. Guggenheim, *Lehrbuch des Völkerrechts,* Vol. I, pp. 590–593.

[5] Naturally, an ethical and political critique of a concrete war has always existed; the ethical critique of the positive law, whether municipal or international, is socially indispensable. For, as the Romans said, *Non omne quod licet, honestum.*

tional law.[6] It is of Catholic origin, anchored in natural law, a theological, not a legal concept. That is proved by its content as well as by its historical origin. The early Church under the pagan Roman Empire took a strictly pacifist attitude, an attitude preserved even today by some Protestant sects. It was the anti-state attitude of the early Christians which led to their persecution. The Romans of the Empire had long ceased to believe in Roman mythology; many foreign cults were not only tolerated in imperial Rome, but some of them were extremely fashionable among the "élite." The Romans further failed entirely to understand the transcendental importance and future of Christianity; for them the Christians were no more than an insignificant Jewish sect. The persecutions were not directed against a religion, but against what would be called today a "subversive movement."

But when, with Constantine, Christianity became the official religion of the *orbis terrarum*, when Christian persecutions were followed by those of the pagans, the Church had naturally to revise its attitude toward the Empire. In this connection the purely theological problem arose: How can a Catholic participate in a war, without committing a sin? It was a theological, not a legal problem. To this theological problem St. Augustine gave the answer: He can do so, provided the war is just. Transforming the formal criterion of the ancient Roman *jus fetiale* into the substantive criterion of objective, intrinsic justice of the cause of war, he created this doctrine, which was later elaborated by other theologians, consolidated by St. Thomas of Aquinas, Victoria, Suarez and others, and secularized, divorced from its Catholic soil, by Gentili, Grotius and their successors.

In its purity the doctrine is wholly an ethical one. There must be an objectively just cause of war, waged by the authority of the prince, and he must be inspired by the "*recta intentio.*" Even the prince who has a just cause of war, can make an unjust war, if he acts from wrong motives, such as territorial aggrandizement or elimination of the enemy as a competitor in the future. And, if all these are fulfilled, the war can still cease to be just, if the prince imposes an "*injusta pax.*" Thus Victoria lays down that the victor in a just war can impose upon the vanquished only conditions proportionate to the wrong committed, must always act with moderation and Christian modesty, and never has the right to ruin the vanquished enemy as a nation.

Just war is, therefore, a reaction against a wrong,[7] a procedure either in tort (restitution, reparations, guarantees) or in criminal law (punishment, sanctions).[8]

[6] See also A. Nussbaum, "Just War—a Legal Concept?" Michigan Law Review, Vol. 42 (1943–44), pp. 453–479.

[7] Thus Victoria: "*Unica est et sola causa justa inferendi bellum injuria accepta*"; Grotius: "*Causa justi belli suscipiendi nulla alia esse potest nisi injuria.*".

[8] Thus, *e.g.*, Cayetano: "*Habens justum bellum gerit personam judicis criminaliter procedentis.*"

The *bellum justum* doctrine presupposes, therefore, the continuance of war and distinguishes between objectively just and unjust wars. If all the conditions of a just war are fulfilled, just war can be either a war of self-defense against the *"injustus aggressor"* or a war of execution to enforce one's right. In both cases it makes no difference whether the just war is, from a military point of view, waged defensively or offensively, nor is the factor who resorts to war first, decisive.

This doctrine in its purity, even if it might have been or were a norm of positive international law, would be practically valueless because of the grave objections against its workability. This very circumstance forced later writers to develop the doctrine in such a way as to deform it.

1. There are no objective criteria between "just" and "unjust" wars. If the just war is one of self-defense, it is just, if directed against a present or imminent unjust attack. When is an attack in a concrete case unjust? Gentili went so far as to call just wars even preventive wars, wars "which anticipate dangers, not premeditated, but probable or possible." In a war of execution to enforce a right, the right and its violation need definition.

2. Who is to decide in an objective way, which belligerent has a just cause and who is the *"injustus aggressor"*? This decision must be left to each state itself, a consequence which, as Verdross states, deforms the *bellum justum* doctrine. Hence, even the classic doctrine distinguished between "absolute" and "relative,"[9] between "objective" and "subjective" justice. Therefore, war can be subjectively just on both sides, Gentili's *"bellum justum ex utraque parte"*; the same is proclaimed by Guggenheim today. Hence, practically every war is just, a doctrine identical with the traditional freedom of a state to resort to war. Sociological jurists therefore go so far as to see in this doctrine, which "invites subjectivism and abuse by State practice," nothing but a "degeneration into a mere ideology of power politics."[10]

Many other problems arise:[11] What of a belligerent who joins a war only in the last moment to participate in the advantages of victory? Or who changes sides during the course of the same war? Or who, with regard to partial wars constituting the same world war, has a just cause in one partial war, but is an *"injustus aggressor"* in others? The two world wars have given examples for all these hypotheses.

3. There is, further, the gravest objection that war is not an adequate means of enforcing the law: the *"injustus aggressor"* may be the victor. That is why Cayetano advises the prince not to go to war, even if he has a

[9] One belligerent can have a just cause, whereas the other has a "still more just" cause.

[10] Thus G. Schwarzenberger, "Jus Pacis ac Belli," this JOURNAL, Vol. 37 (1943), pp. 460–477, at p. 465.

[11] See Antonio Truyol y Serra, *"Crímenes de guerra y derecho natural," Revista Española de Derecho Internacional*, Vol. I, No. 1 (1948), pp. 45–73.

just cause, if he has not also the moral certainty of victory. Suárez' probabilism asks, at least, for the probability of victory. These statements show the radical deficiency, the "tragic confession of the negligible practical range of the classic bellum justum doctrine." [12]

Recent developments through the League of Nations, Kellogg Pact and United Nations, here mentioned as representative of the newer trend, do not constitute a return to the classic *bellum justum* doctrine.[13]

First, it must be emphasized that these treaties, as well as writers such as Strisower and Kelsen, are in a fundamental point different from the classic doctrine. They understand by the term "wrong" exclusively a violation of *positive* international law, whereas the classic doctrine means by "wrong" a violation both of positive and of *natural* law.[14] A just war can be waged to enforce not only a positive, but also a *natural* right, *e.g.*, the natural right of commerce. It is exactly by the enforcement of this *natural* right that Victoria ultimately justifies the conquest of America. Thus just war is given a *double* function: enforcement of *law* and enforcement of *justice;* law and justice need not be identical.

The League of Nations Covenant did not abolish war, but discriminated between different wars. The basis of distinction was *not,* as in the classic doctrine, between just and unjust wars, but between legal and illegal wars. The concept of *bellum legale* replaced the concept of *bellum justum.* The illegality of resort to war was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement. Hence, a legal war could have been waged even between Members of the League by a state which had no just cause of war, whereas a state which fully had a just cause of war could have been guilty of resorting to an illegal war. This is a very different thing from the *bellum justum* doctrine. The military "*action commune*" under Article XVI was a sanction in a truly legal sense, not against the "*injustus aggressor*" but against an *illegal* belligerent who had "resorted to war in disregard of his covenants under Articles XII, XIII or XV."

The Kellogg Pact, if taken at its surface value, could not constitute a return to the classic doctrine, as it did not distinguish between wars, but renounced war completely as an instrument of national policy. But the admitted legality of self-defense and the delegation to each state of the right to be the only judge to determine whether the conditions of self-defense exist, make this Pact practically only a restatement of general international law.

[12] *Ibid.*, at p. 60.

[13] See Verdross, *op. cit.;* Alf Ross, Constitution of the United Nations (New York, 1950), pp. 140–141; W. Schätzel, "*Friede und Gerechtigkeit,*" *Die Friedenswarte,* Vol. 50, No. 2 (1950), pp. 97–107.

[14] This essential distinction is pointed out in Josef L. Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna, 1935), p. 2, note 3, and in A. Verdross, *Völkerrecht* (Vienna, 1950), p. 339.

Compared with the classic doctrine, war is also renounced as a war of execution to enforce a right.

Experience had shown that the Covenant and the Kellogg Pact, because of the aura of uncertainty hovering around the legal concept of "war," made it possible to wage "wars in disguise." Hence, the United Nations Charter, in making great progress from the point of view of legal technique, replaced the concept of "war" by that of the "threat or use of force." The Charter, therefore, distinguishes between legal and illegal use of force; the distinction is again based on the legality, not on the intrinsic justice of the cause. Use of force is, generally speaking, forbidden; but under Article 51 force can legally be used against an "armed attack," "until the Security Council has taken the necessary measures." If the Security Council is paralyzed by the veto, we are back to general international law. On the other hand, the military measures which can be decided by the Security Council are, contrary to Article XVI of the Covenant, not necessarily sanctions in a juridical sense.[15]

Furthermore, these new developments have hardly been able to avoid the grave objections which have been stated above against the *bellum justum* doctrine.[16]

Roscoe Pound has stated that a primitive and weak law wants, first of all, to establish peace, *i.e.*, absence of violence, and to guarantee the *status quo*. It puts peace above justice, whereas the intrinsic justice of the cause was the heart of the classic doctrine. This emphasis on security, more than justice, can be seen in recent developments. The Kellogg Pact renounces war, the Charter forbids the use of force—except in self-defense—without giving the states as a substitute the compulsory peaceful settlement of international conflicts, without guaranteeing the enforcement of their rights, without creating a workable procedure of peaceful change, without a guarantee that United Nations force will be brought to bear not only against an illegal aggressor, but also against a state which, without using force, does not fulfill an international obligation, without guarantee that, if such force is exercised by the United Nations, its use will be reasonably assured of success.

Two world wars and the fear of more catastrophic wars have made the avoidance of war more important than the achievement of justice. The first aim in the preamble of the United Nations Charter is "to save succeeding generations from the scourge of war." The first purpose in Article 1 is not to achieve and maintain justice, but to "maintain international peace and security." Again, we are faced with the antinomy between the two juridical values of security and justice. Security is the lower, but

[15] H. Kelsen, The Law of the United Nations (London, 1950), pp. 732–739; Alf Ross, *op. cit.*, p. 141.

[16] See Robert W. Tucker, "The Interpretation of War," The International Law Quarterly (London), Vol. 4, No. 1 (1951), pp. 11–38.

most basic value. *"La sécurité d'abord,"* as the French thesis ran after the first World War; only then the intrinsic settlement of conflicts; here lies the difference between Chapters VI and VII of the Charter, between, within the Pan American orbit, the Rio Treaty and the Pact of Bogotá. First to establish security is the philosophy of recent developments, in the conviction that security is the indispensable pre-condition of later achieving justice. This philosophy may be wholly justified, but it is not the philosophy underlying the *bellum justum* doctrine.

JOSEF L. KUNZ

THE HUMAN RIGHTS COMMISSION AT THE CROSSROADS

The Commission on Human Rights is engaged in a valiant struggle to carry forward the banner raised in the Universal Declaration of Human Rights.[1] The "common standard of achievement" proclaimed in that Declaration was to be advanced, according to its terms, by teaching and education and by progressive measures, national and international, to secure the universal and effective recognition and observance of basic rights and freedoms. In attempting to obtain acceptance at this time of a universal covenant for national guarantees of basic civil and political rights, the Commission appears to us to have reached and passed a crossroads at which it should have stopped, looked and listened. It should now, in our opinion, return to the crossroads and consult anew the compass of human experience.

It was inevitable that the proposal of a covenant limited to civil and political rights would meet opposition from those who, on motives good, bad or mixed, demand equal guarantees for social, cultural and economic rights. It was inevitable that questions of great difficulty would arise with respect to the enforcement of national guarantees of even a limited group of basic rights in the constituent states of federal unions. The long discussions by which the proposed Covenant has been brought to the present stage may possibly be regarded as a part of the processes of teaching and education envisaged in the Universal Declaration. The Covenant itself, even if it is accepted in some form, cannot be regarded as a progressive measure to secure observance of human rights and freedoms.

The compass of human experience, which the Commission should consult in charting a new course, points to the methods which another international body has followed with success, over a period of thirty years, with respect to a significant part of the problem of human rights. The International Labor Organization, now one of the specialized agencies of the United Nations, was established in 1919 for the purpose of improving the conditions of labor throughout the world. It has pursued that purpose constantly by drafting and procuring the adoption of conventions and recommendations on one small subject after another, by recording the actual performance of

[1] See Supplement to this JOURNAL, Vol. 43 (1949), p. 127.