

HIGHER SCHOOL OF ECONOMICS
NATIONAL RESEARCH UNIVERSITY

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**JUST WAR THEORY AS WAR,
JUSTICE AND THEORY**

Working Paper WP20/2014/03

Series WP20

Philosophy of Culture and Cultural Studies

Moscow
2014

УДК 17
ББК 87.75
К22

Editor of the series WP20
«Philosophy of Culture and Cultural Studies»
Vitaly Kurennoy

Kashnikov, Boris. Just War Theory as War, Justice and Theory : Working paper WP20/2014/03
K22 [Text] / Boris Kashnikov ; National Research University Higher School of Economics. – Moscow :
Publishing House of the Higher School of Economics, 2014. – 24 p. – 23 copies.

The Just War Theory is becoming more and more popular in the contemporary political ethics. The theory passed through considerable development in the last thirty years, but its structure and normative message remains the same. The theory outscored realism, which reigned supreme as a normative philosophy of war for decades. Unlike realism JWR strives to provide moral justification for wars. The JWT is based on a number of assumptions, constituting its paradigm. The assumptions are threefold: the assumptions of War, Justice and Theory. In what follows I am trying to reveal and evaluate these assumptions and the theory itself from the point of view of its capability to restrict political violence.

УДК 17
ББК 87.75

Key words: Just War Theory, War, Justice, Theory, Morality, Ethics

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Acknowledgements: This study (research grant No 12-01-0138. “Ethics of Exceptions”) was supported by The National Research University–Higher School of Economics (Moscow). Academic Fund Program in 2013–2014.

**Препринты Национального исследовательского университета
«Высшая школа экономики» размещаются по адресу: <http://www.hse.ru/org/hse/wp>**

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Introduction

The Just War Theory is back on the agenda. In the late 70th it was resurfaced, renovated and set in motion by Michael Walzer.¹ The Theory passed through considerable development in the last thirty years, but its structure and normative message remains practically the same. The theory has found rather wide practical application (a branch of applied ethics as it is), it is used to determine to what extent this or that particular war may be rendered just. At the time being it unites hundreds of scholars. In its birthplace, the USA, it outscored realism, which reigned supreme as a normative philosophy of war for decades. The realists tend to share with Hobbes one important indoctrination, namely: “Where there is no common power, there is no law: where no law, no injustice.”² The international relations know neither law, nor justice. That is exactly what JWT is ready to challenge. Even if there is no law, there should be justice, more than that: the international law should be improved by inflicting war on the perpetrator of justice. Like any theory, JWT strives to explain the world, like any moral theory, JWT – to give it moral meaning. The JWT is based on a number of widely shared assumptions, constituting its paradigm. The assumptions are threefold: the assumptions of War, Justice and Theory. In what follows I am trying to reveal and evaluate these assumptions. Some of the assumptions are evidently false, some are harmful. The wrong and harmful assumptions of the JWT are suspending the theory between Theory and Ideology and make it an easy prey for the contemporary politics of violence. It tends, in the other words, to justify violence, not to restrict it.

¹ See Michael Walzer. *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Basic Books, 1976). Michael Walzer. *Just and Unjust Wars*. (New York: Basic Books, 1992). See also Paul Christopher, *The Ethics of War and Peace*, 2nd edition (Boulder, CO: Westview Press, 1999); Nick Fotion, *War and Ethics. A New Just War Theory* (London: Continuum, 2007); Paul Christopher. *The ethics of war and peace: an introduction to legal and moral issues* (Englewood Cliffs: Prentice-Hall, 1999). In what follows I will deal mostly with the normative side and structure of the theory.

² Thomas Hobbes. *Leviathan*. Michael Oakshott (ed). (New York: Macmillan, 1962) 101.

The background

The original just war doctrine is of course only a distant relative to the contemporary JWT. It was not a theory. Even as a doctrine it was not a philosophical doctrine, but a rag tag collection of views, prescriptions and traditions, a joint venture of the theologians, philosophers, canonists, jurists and practitioners. At least three layers of the doctrine are at starkest display, each with its own aspiration, assumption and practical implication. I will briskly look through the classical legacy just to find out what exactly, if anything at all, fits the new theory. The former doctrine had three major sources: Theology of the middle ages, humanitarian law and modern philosophy of international law. The theological source is comprised by Augustine, Humanitarian Law – by the body of the jus in bello norms. The philosophical source is provided by the successive line of thinkers from Suarez to Kant.³ In what follows I will refer to these sources as subsequently the legacy of Augustine, the legacy of Dunant⁴ and the legacy of Kant. I claim that it is the legacy of Augustine and Aquinas from where the JWT draws its aspiration. The spirit of Kantian deontology is completely foreign to it. The legacy of Dunant and the Humanitarian Law is only opportunistically used.

The legacy of Augustine

The just war doctrine was set in motion by Christian theologians and religious philosophers, by St. Augustine and St. Thomas Aquinas.⁵ As that theory evolved, its content became standardized by secular thinkers and jurists, which later led to a different line of thought and to the emergence of the con-

³ The development of the Philosophy of International Relations from Suarez, Victoria to Grotius, Vattel and Kant was marked by consistent secularization and contraposition to theology, including the theological just war theory. The turning point here is the refusal of the concept of the Just War in Hugo Grotius (De Jure belli ac pacis. 1625. Hugo Grotius, *The Law of War and Peace*, translated by Francis W. Kelsey (Indianapolis: Bobbs-Merrill, 1962). Although Grotius, Vattel and Kant refused the concept and even the language of the Just War Doctrine they did not reject the idea of the constraint on war. There is a misunderstanding here related to the murky meaning of the term “justice”. The Just War may mean both a moral one and a necessary one. Kant was against any moralization of international relations. Although, war must be constrained.

⁴ Henry Dunant is the founder of the International Red Cross and to no small extent of the contemporary Humanitarian Law.

⁵ Frederick H. Russell, *The Just War in the Middle Ages* (London: Cambridge University Press, 1975).

temporary international law. The initiation of the doctrine by Augustine had much to do with the tragic challenge posed to Christianity by its new role of the state religion. The genuine Christian was not supposed to wage war, much less to kill or partake in any violence on behalf of the state. The philosophical conundrum was solved by Augustine by means of the principles of legitimate authority, just cause and good intentions, which constituted the basics of the just war theory.

The indisputable *authority* of God may sometimes urge to take up arms. This authority is beyond doubt. Augustine indeed considered wars undoubtedly just when they were directly ordained by God Himself. The *authority* of a magistrate may also be sufficient for a Christian. Even if the magistrate errs, the sin will be on the magistrate, not on the Christian soldier, if the soldier is moved by obedience. The magistrate is supposed to have a just cause to wage a war, if it is not directly dictated by will of God.

The *cause* may vary from wars on strictly religious motives, like Holy War or Crusade to wars on political motives. Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. But unlike any other state, the Christian state is supposed to wage its wars for the purpose of just peace and not for vain glory or terrestrial richness. The just peace is different to peace as simply the absence of strife: “He then who prefers what is right to what is wrong, and what is well organized to what is perverted, sees that peace of unjust men is not worthy to be called peace in comparison with peace of the just.”⁶ The just peace is the peace, where the Christian virtues flourish. It is not peace itself, but the just peace of fully realized Christian values, which matters.

For Augustine, just wars, if not directly prompted by God, should be waged with the *intention* of achieving just peace. “It is therefore with the desire for peace that wars are waged.”⁷ The desire of Christians to be faithful to the Christian message of non-violence had to be reconciled with the need for a state to base its defense on loyal and obedient citizens. He wrote in “Contra Faustum” that “the real evils of the war are love for violence, revengeful cruelty, fierce and implacable animosity, wild resistance and lust for power and

⁶ Saint Augustine. “The City of God” Book 19, ch. 12, translated by Marcus Dods, in: *Great books of the Western World*, Vol. 16: *Augustine* (Chicago, Encyclopaedia Britannica, 1990) 587.

⁷ Saint Augustine. “The City of God” 586.

such like ...”⁸ No other intentions should be blended with the intentions to reach just peace. He thus remained mainly concerned with the personal intentions of various individuals who had the responsibility for military policies. He defended the state as a means of maintaining peace and order, but the state itself was of no much value to Augustine, he was striving for the global Christian order. It can be noted that the Islamic tradition of just war (jihad), which emerged many centuries after Augustine, is based on a number of similar considerations. The only right intention possible in a war is the desire to serve Islam. All selfish motives, be it hatred, lust, greed, or glory, are strictly prohibited and are unjust. The only worthy cause is the peace under Islamic Caliphate. The only authority is the authority of Allah, which may be interpreted by rightful religious and political leaders.⁹ The contemporary JWT has very similar inspirations.¹⁰ It should be regarded as an instrument to introduce the global order based on the common religion of Human Rights.

The legacy of Dunant

The foundations of the second layer were constituted by Christian canonists, who scrupulously codified the way the war should be waged. The knightly class, which enjoyed the monopoly on waging wars in the Middle Ages, had a great deal of shared values. It was in the common interest of the warring parties to wage wars honorably and according to rules. The humanitarian law has thus evident militaristic background. Of course, it did not apply to the wars on pagans or heretics. For wars of Christian states, the Catholic Church was trying to extend non-combatant immunities to the clergy, women and children.¹¹ These efforts were not absolutely fruitless, but gained little results.

⁸ Saint Augustine. "Contra Faustum" 22. 74, in Marcus Dods (ed.), *The Works of Aurelius Augustine*, Vol. 6, Writings in connection with the Manichean Heresy, trans. Richard Stothert (Edinburg: T. and T. Clark, 1872).

⁹ John Kelsay. *Islam and War* (Louisville, Ky.: Westminster John Knox Press, 1993) 29.

¹⁰ Augustine recommended the use of force against the heretics in very similar to JWT words: "Does anyone doubt that it is preferable of people to be drawn to worship God by teaching rather than forced by fear of punishment or by pain? But because the one type of people are better, it does not mean that the others, who are not of that type, ought to be ignored. Experience has enabled us to prove, and continue to prove, that many people are benefitted by being compelled in the first place through fear or pain; so that subsequently they are able to be taught". Letter from Augustine to Boniface, no. 185 (p. 414). In *Augustine: Political Writings*. E. Atkins and R. Dodado (eds.) (Cambridge: Cambridge University press, 2001) 186.

¹¹ See Maurice Hugh Keen. *The Laws of War in the Late Middle Ages* (London: Routledge & K. Paul, 1965).

It was only by the middle of the 19th century, when the humanitarian international law emerged. In fact it emerged as a result of the increase of the violations of the humanitarian norms, which existed, were usually honored, but were not codified. The background idea was to codify, as if the codification could save the fading practice. This body of international law was based on the principles of proportionality and discrimination, linked to the pre modern practice of limiting excessive violence and sparing the civilians in battles. The Red Cross, created by Dunant in 1864, have been oriented towards indoctrination of norms and traditions of honorable wars. Jean Pictet expressed the general idea of the process: “A State engaged in a conflict will seek to destroy or weaken the enemy’s war potential . . . in three ways: death, wound or capture. . . All three are equally capable of eliminating the enemy’s strength. Humanitarian reasoning is different. Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as far as possible; that wounds inflicted are be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.”¹²

The promulgation in 1863 of the so-called Lieber Code for the US armies should be regarded as one of the first successful efforts in this direction. Soon after, in 1868, the Imperial Cabinet of Russia initiated an agreement titled “Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammas Weight”. Other milestones in the codification of the laws of war (international humanitarian law) were the Fourth Hague Convention of 1907 and the Geneva Conventions of 1929 and 1949. This process still continues. It should be mentioned that Humanitarian Law had very little, if anything to do with the just war doctrine. Jean Henry Dunant, the founder of the Red Cross, detested the very idea of the Just War. It is true, the JWT, always includes the principles of Jus in Bello in the list of its principles, but these principles are only of minor importance, since they may be overcome by stronger jus ad bellum principles, which may render any particular war absolute, unlimited and total.¹³ The goal may be so morally just and ideologically elevated that any means may implemented.¹⁴ Besides, the JWT, like its forefather

¹² Jean Pictet. *Development and Principles of International Humanitarian Law* (Dordrecht/Geneva: Martinus Nijhoff and Henry Dunant Institute, 1985) 62.

¹³ According to Walzer there may be cases of supreme emergency, which allow, justify and even necessitate the violation of the Jus in Bello. The strategic bombing of the German cities during the War was the case. The war on terror is also the case.

¹⁴ This is the case with the American “War on Terror”. It is waged without any restrictions and in total violation of the international law. The rhetoric of this war is remindful of the Holy

Augustine, is only interested in the intentions not to violate the humanitarian norms. Any collateral damage is justified, if it was not directly intended according and thus no vicious feelings were merged to it.

The legacy of Kant

The third layer is constituted by the works of jurists and philosophers, from Gentilis, Suarez, Victoria, Grotius, to Vattel and Kant. These thinkers, unlike Augustine, developed the contemporary international law as the law of states, rather than law of citizens of the City of God. In the nutshell it is the idea of peaceful coexistence of the enlighten states. The relations of the states should be coordinated by rational interest and not by any murky moral considerations. Grotius, Vattel and Kant never employ the language of justice, but they are not realists. The war should be restricted, it may be necessary, but it could hardly be just. A necessary war of self-defense should be regarded as morally valid, but still unjust. Besides, Kant was confident that the usage of moral qualifications in the delicate matters of international relations could make bad things worse. The justification of war should always go after the war, not before the war. Belligerent motives may be brewed by moral considerations. They could endanger peace and rend further coexistence impossible. With the founding of the United Nations the Charter regime banned the recourse to force with the only exception for self-defense, according to the Article 51 of the UN Charter. This international system of rules was based on what is known by ‘Westphalian order’ (1648). The collective security, which was created at the end of the World War II was capable to give some guarantees to the peaceful strivings of the nations. After the fall of the Soviet Union we expected the further growth of democratic constitutionalism, security and peace based on the general idea of nonintervention. It did not happen. What we have now is a slow reverse process from the ideal of peace based on international law, state sovereignty, coexistence and non interference of peaceful states to the pre modern ideal of peace based on common religion (of human rights), authority of church (or a sole superpower) and diminishing sovereignty of the states.

Such a system of international laws must be aimed at respecting the rights of states equally, the same as the domestic laws are supposed to protect equal

War. See: Paul W. Kahn. *Sacred Violence. Torture, Terror and Sovereignty* (Ann Arbor: The University of Michigan Press, 2008). It goes nevertheless, according to the leading just war theorists as a justified one. See: Jean Bethke Elshtain. *Just War Against Terror. The Burden of American Power in a Violent World* (New York: Basic Books, 2003).

rights of citizens. But the rights of citizens and the rights of states do not mix. The human rights are the domestic affair of each state. The states rights are the following: 1. The right of negative freedom from force and fraud in the international state of nature. 2. The right of positive freedom to self-governance or the right of political sovereignty. 3. The right to employ and dispose of one's natural resources as one sees fit, provided such use does not violate the rights of other states. 4. The right of property in one's territory or the right of territorial integrity. 5. The right to enter into lawful contractual relations with other states at one's will.

Rights give way to duties: 1. Do not employ force and fraud in one's relations with other states. 2. Do not interfere in the internal matters, or self-governance, of another state, including the rights of citizens. 3. Do not invade or capture the rightful property or territory of another state. 4. Do not break lawful contractual agreements one has freely made with other states.¹⁵

The international state of nature is characterized: 1) there is no overarching political authority to rule effectively over states; 2) states rely solely on their own subjective interpretation of their rights claims, human rights included; and 3) states are prone to violence when their rights claims conflict with those of other states. Free, rational states, fearful of others and prone to violence wage a war on each other. The result is that no state, in the current global context, can enjoy reasonably secure possession of the objects of its state rights. Nevertheless, unlike Augustine's, international federalism, but not a world republic, is Kant's solution to the problem of just peace. Kant was confident that a federation will grow to encompass all states, inferring perpetual peace. As we can see his theory is still an ethical one, it is aimed at limiting the incidence of war and the achievement of perpetual peace. Still, Kant separates the war from personal moral motives of the politician. The contemporary JWT does exactly the opposite, it bridges the gap set by Kant between moral motives of the politician and the war. It allows unleashing a war on moralistic considerations.

The contemporary post modern just war theory progressively removed the Kantian legacy and returned to its pre modern roots, to the legacy of Augustine. It holds that the state sovereignty is of little value. The universal and almost religious values of Human Rights are more important than peace. The JWT is promoting the religion of Human Rights and is ready to wage war on

¹⁵ See Immanuel Kant. *Perpetual Peace*. (New York: MacMilan, 1917). Brian D. Orend, *War and International Justice: A Kantian Perspective* (Waterloo, ON, CAN: Wilfrid Laurier University Press, 2000) 57.

perpetrators to the extent of the Holy War and Crusade. Self defense is also allowed to the state, but the burden of Humanitarian Norms became so heavy, that it renders self defense strictly speaking impossible. Only the super power may allow itself to violate Humanitarian Norms as well as the international law and render no responsibility. All the rest of the states and state leaders can be almost always found guilty of the violations of the obscure humanitarian norms.

There is a general misunderstanding that Jus in Bello works as a constraint on war. It is not necessary so. It may be the contrary. In fact, Just in Bello has militaristic background. By making war more humane and esthetically attractive it paves the way to making war a permanent state of affairs, rather than an exception, which is exactly the case with the contemporary war. The theistic Just War Doctrine at least never filled the gap between the militaristic and theistic parts. In contemporary Just War Theory these are two different parts. But the moralistic and teleological part of the theory (jus ad bellum) is considered to be more important. In case of super emergency, the Jus in Bello considerations may be completely ignored. The JWT does not really pay much regard to international law either. The considerations of justice may always supersede the humanitarian law on the considerations of supreme emergency.

What is now called just war theory is by and large a set of principles, which do not really fit each other. The justification of the principles may be different. I claim that theoretical justification has very little relevance to the theory. Let us now have a look at the list of the major principles, which constitute the structure of the JWT.¹⁶

1. Just Cause. Three particular causes are rendered just in the JWT: self-defense against aggression, defense of the others (as victims of the aggression), humanitarian intervention. The latter is indispensable. Humanitarian intervention is the *raison d'être* for the JWT. The principle of Just Cause is a dangerous principle, since it may pave the way to aggression. It may also lead to treating the combatants and noncombatants of the other side as criminals. Just war tends to violate the principle of the moral equality of combatants. In reality, the majority of wars can not enjoy this clear cut distinction of perpetrator and sufferer of the aggression. This principle is Augustinian by its na-

¹⁶ See *Moral Constraints on War. Principles and Cases*. Nick Fotion and Bruno Coppieters (eds.) (Lanham: Lexington Books, 2008) 73–101.

ture. For Kant only self-defense could be rendered just. For Dunant any war is a stupid violence whatever the cause.

2. Last Resort. This principle has very little genuine force in it. It is almost always possible to claim both that this very resort was the last or that there could be one more try. Neither Kant, nor Augustine, not to mention Dunant, deem any meaning to this principle. The principle adopted some relevance for the contemporary JWT due to the democratic procedures of the decision making. The public should be confident that the decision to wage war, taken by the government was really a hard choice. It does not make war less likely although. The democratic public may be even more violent and vicious than the dictator.

3. Likelihood of Success. This is in fact amoral principle, related to rationality rather than to morality. It rings equally hollow to Augustine, Kant and Dunant. This principle may equally trigger the war and prevent it. It simply reminds the politician of the importance of being earnest, or that “the war is a serious mean for the serious goal”, as Clausewitz used to claim.

4. Legitimate Authority. This is one of the basic principles. Generally, rebel groups cannot satisfy this principle of legitimate authority. This is the only principle to which Augustine, Kant and Dunant would full heartedly agree. But some writers have in fact enlarged the scope of the legitimate authority by legitimizing certain freedom fighters (Kosovo Liberation Movement, for example). Since there are no universally agreed criteria for such an inclusion, it makes the principle (and the theory) very opportunistic and extremely prone to misuse. Who is to be deemed the human fighter and who the terrorist is never certain. Different theorist come out with different criteria.

5. Good Intentions. This is one of the most important principles for Augustine. It demands that intentions should correspond to the declared just cause. Augustine had a certain advantage to the contemporary theorist. He could rely on the watchful eye of God. This totally subjective principle means nothing to Kant or Grotius. Nobody cares about intentions in international relations. Since Machiavelli, the politicians are generally regarded as not the most sincere people, to say the least. Dunant would be even less impressed by this principle. The insistence of the JWT on this principle means that the criterion of the theory becomes progressively subjective and vulnerable to misuse.

6. Proportionality (*ad bellum*). This principle does not mean anything to Augustine. It is meaningful to Kant but only in terms of self-defense. For Dunant any war is disproportional by nature.

7. Justice in War or *jus in bello* (The principles of proportionality and discrimination). Both principles of Justice of the War constitute the foundation of the contemporary humanitarian law. They are of little interest to both Augustine and Kant but for different reasons. No proportionality or discrimination could have any value when it comes to Crusade, not to mention the Holy War. Supreme emergency renders this principle useless. Kant had special reasons to disavow the principles. Perpetual Peace should be the goal of international relations. On the contrary, any cosmetics to the harsh face of war, which could make it deceptively attractive, could only distract efforts for discarding war.

Special mention should be made to what is known as the Principle (or Doctrine) of Double Effect (PDE). Strictly speaking, this principle is not one of the principles of the Just War Theory. It does not belong to the legacy of Kant, Dunant or Augustine either. But in the way of paradox it plays the central role in the JWT as a kind of a shadow fundamental principle. Our actions often have more than one effect or consequence. At war, of course, it is even more so. According to Clausewitz war resembles most of all the game of cards. Actions performed by a military may have many different consequences; they can lead to victory, but also to the death of by-standers, the destruction of schools, harm to the environment, or even the death of nationals as in the case of friendly fire.

The PDE should be regarded as a permissive one. It provides consolation and a ready excuse. It is in fact the replica of the theological idea of the merciful God and the Augustine's stress on the peaceful intentions. Not to wish the death of civilians, while launching the strategic missile on a highly populated city is not enough. Perhaps an important step in the right direction was recently taken by John Tirman, who decided to add some objective background to the notorious principle as well as to the objective calculus of damage in war. He found out that the wars may be different in terms of civilian's death toll in proportion to the death of the military. Tirman came to the conclusion, that there is a phenomenon of almost total disregard to the death of others, which is typical of the American wars. There must be some more objective ways to measure the harm. The principle of PDE, for instance could be modified to include the ration of the military killed to the deaths of others in this or that war. Here is, for example the table of the tolls of the recent American wars.

The tolls of America's wars¹⁷

	Korean war	Vietnam war	Iraq war
Total deaths	3 million	2 million	700,000
Population	30 million	43 million	29 million
Deaths as proportion of population	1 out of 10	1 out of 10	7 out of 290
The ratio of Americans killed to the deaths of the others	1–100	1–40	1–200

Our intuition tells us, that there must be some limitations on the ratio of the killed military and the deaths of the civilians of the opposite side. We do not yet know what that ration should be. The just war theorists still think of war together with Augustine as if the spear and the sword are mostly the weapons.

War

Now we turn to the assumptions of war and will try to make out to what extent the JWT really fits the reality of the contemporary war. A number of books have been recently published, whose authors claim to find a clue to what is taking shape in terms of transformation of warfare. Since the classical understanding of war is provided by Clausewitz, the authors claim to transform the old definition. One of the most noteworthy is Van Creveld.¹⁸

Clausewitz begins by examining the essence of war as an abstract concept, which he also calls “absolute” war and the “pure concept of war.” War is “nothing but a duel on a larger scale,” or “War therefore is an act of violence intended to compel our opponent to fulfill our will.”¹⁹ Conflict may escalate to extremes, for there is no logical limit to the force. Clausewitz takes it as a “logical fantasy”. The real war is never absolute. This is because a state cannot bring all of its resources, including, “the fighting forces proper, the country... and its allies” – to bear all at once, and also because both sides may try

¹⁷ John Tirman. *The Deaths of others. The Fate of Civilians in American Wars* (New York: Oxford University Press, 2011) 3–12.

¹⁸ Martin van Creveld. *The Transformation of War* (New York: The Free Press, 1991).

¹⁹ Carl von Clausewitz. *On War*, trans. and eds. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976) 75–87.

to overcome initial shortcomings later in the conflict. From this analysis follows Clausewitz's famous formula that "War is merely the continuation of policy by other means," which establishes the superiority of political over military considerations. "Policy, then, will permeate all military operations, and, in so far as their violent nature will admit, it will have a continuous influence on them."²⁰ It seems contrary to the overall text of Clausewitz's work to argue that he advocates war for its own sake or that he takes war lightly. Clausewitz holds that war is a weighty decision: "No one starts a war – or rather no one in his senses ought to do so – without first begin clear in his mind what he intends to achieve by that war and how intends to conduct it."²¹ A moderating effect seems to follow from this logic. In discussing the process of critical analysis, which evaluates the appropriateness of means based on the purposes to be served, Clausewitz contends that, "In many cases, particularly those involving great and decisive actions, the analysis must extend to the ultimate objective, which is to bring about peace."²² Further, Clausewitz argues that war should not be an end in itself: "War is no pastime; it is no mere joy in daring and winning, no place for the irresponsible enthusiasts. It is a serious mean to a serious end..."²³

Another important element of Clausewitz's understanding of war pertains to his depiction of war as a trinity. Even though war is an instrument of policy, its violence means that emotions inevitably play a role, and it will always be subject to elements of chance: "As a total phenomenon its dominant tendencies always make war a paradoxical trinity – composed of primordial violence...of the play of chance and probability within which the creative spirit is free to roam...and of its element of subordination, as an instrument of policy, which makes it subject to reason alone. The first of these three aspects mainly concerns the people; the second the commander and his army; the third the government."²⁴ These two characteristics of war, namely: political nature of war and war as a trinity, have been subjected to significant modifications. The face of war is changing. What follows is a short list of these undeniable changes, which may be empirically verified, without applying any theory.²⁵ The question is what meaning these changes may signify.

²⁰ Clausewitz. 87.

²¹ Clausewitz. 579.

²² Clausewitz. 159.

²³ Clausewitz. 86.

²⁴ Clausewitz. 89.

²⁵ See Michael I. Gross. *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge: Cambridge University Press, 2010).

1. The contemporary war is no longer a competition of near equals. These are by and large asymmetric warfare. It does not necessary mean that life is becoming easier for the stronger side, but in any case a war does not look like a duel any longer.

2. The targeted killings are widely used in contemporary war. It may be used in conjunction with the use of drones, or separately. In any case it could not even be imagined by Clausewitz as a possibility. The United States uses unmanned drones and specially trained teams to hunt guerrillas. The most famous of this attacks occurred In November 2002, when a precision-guided missile killed five most important al-Qaeda operatives in Afghanistan. The legal problems with the drones are many. But what is probably even more important, they may be operated by civilians, and not even necessary at the front line. This makes the distinctions of combatants and non combatants extremely vague.

3. The contemporary war has a tendency to become zero-casualties, from the side of the strongest. The use of robots and smart weapons makes it very likely.

4. The contemporary tendency to outsourcing makes it very likely that war will shortly become outsourced completely to the Private Military Companies. This tendency reverses the tendency known to Clausewitz. He was certain that mercenary armies are in decline and citizen-soldier is emerging.

5. Abolition of traditional distinctions between civilians and combatants.

6. The cyber war is emerging.

Van Creveld starts his revision of Clausewitz with a simple question of what motivates a soldier to risk his life. This motives may be different and war may be conducted by entities other than states, by means other than armies and not necessary for the benefit of people, or without the people. The trinity fades away. Technology has enabled sophisticated weapons, which till now were too complex, expensive, and unwieldy to be used by any but highly trained armies. But the contemporary states got the ability to wage war by their own; the contemporary technology makes it possible. In a nuclear war there is no real need for armies at all. The will of the people is of little value too. Armies and the people began to lose significance. Simultaneously the contemporary military power (even military power is not that important if one can clash two or more high tech non military devices with the effect of using

WMD) can also go in the hands of entities other than the state armies or entities controlled exclusively by states, to militants and rebels. State armies increasingly had to deal with opponents whom it is hard to track down, or even to recognize. Besides, the conventional forces are often disadvantaged when facing nontrinitarian foes. They have to become unconventional to deal with the threat.²⁶

One more evident mistake of Clausewitz, which has to be taken into account, is that post modern violence is likely to adopt absolute, ontological character, which means that war is no longer a break in continuity of peace, or it is controlled by politics. The wars of modernity were based according to Schmitt²⁷ on conventional enmity. Modernity also knew both real enmity and absolute enmity, which were paving the way to absolute war. The contemporary violence in the forms of war on terror and humanitarian intervention is making war absolute and less dependable on politics. Many researches hold that the sovereign authority of nation-states, even the most dominant nation-states, is declining and there is instead emerging a new supranational form of sovereignty, a global Empire, the conditions and nature of war and political violence are necessary changing. War is becoming a general phenomenon, global and interminable. Politics is becoming a continuation of war by other means, not the other way around. The JWT may be even regarded as a major instrument of this war.²⁸

War as it was once understood by Clausewitz does not exist any longer. I would make a claim that war does not exist at all. The war is dead in a way. It does not mean that violence also ceased to exist. On the contrary, violence has become stronger and all embracing. In fact war is becoming progressively undistinguishable from other forms of primordial violence such as, terrorism, torture, genocide, and police operation. The transformation of contemporary war makes a mockery of the attempts to attach to it any moralistic classifications. One may claim, of course, that even violence may be just. I do not agree with that. Violence may be legal, or it may be necessary in the case of self defense, but it can never be just. In any case, the theory of just violence

²⁶ Creveld. vii.

²⁷ Carl Schmitt. *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976). In this book Schmitt applies his famous criticism to the idea of humanitarian wars of the JWT: "Humanity as such cannot wage war because it has no enemy, at least not on this planet" (p. 54).

²⁸ See Michael Hardt and Antonio Negri. *Multitude: War and Democracy in the Age of Empire* (New York: the Penguin Press, 2004).

is another story.²⁹ The just war theory has lost its subject matter. What we call war is more likely to be an extended global police operation. The one, which does not hesitate to use terror and torture if needed. If it is war, it is certainly not the one of Clausewitz.

Justice

The mere combination of words “justice” and “war” sounds rather clumsy in many languages, including Russian and German. The inevitable deaths of innocents in any contemporary war render any war unjust (if justice is a moral term) to say the least. The war may be necessary but hardly ever just. There is a noteworthy difference between justice and justification. Justice is a moral justification. There is one more possible way to justify war morally, which I would call existential. Existence predates morality, as well as essence; it is linked to biological instincts and is deeply rooted in the will to life. The existential motive to war is both amoral and irrational but it is valid.³⁰ Existentially justified war is a reactive, not proactive one. Russian philosopher Ivan Ilyin (1883-1954), who developed a doctrine of necessary war, based on Kantian legacy holds: “Resistance to evil with the sword is permissible not when it is possible, but when it is necessary; but if it is in fact necessary, man does not have a “right”, but a “duty” to follow this path”. Still, “the way of the sword is an unjust path.”³¹ Self defense is the only possible necessary war.

²⁹ The theory of Just Terrorism does already exist. It was developed by the Russian terrorist Nikolay Morozov in his seminal “On Terrorist Struggle”, which is closely linked with the argumentation of Clausewitz. The contemporary ideology of terror also justifies terrorism. In fact the contemporary full scale war presupposes terror and terrorism. See Nicholas Fotion, Boris Kashnikov and Joanne Lekea. *Terrorism. The New World Disorder*: (London: Continuum, 2007) The theory of Just Torture is under construction. See Bob Brecher. *Torture and the Ticking Bomb* (Oxford: Blackwell Publishing, 2007). As Kahn holds torture and terror are linked together. They provoke and perpetuate each other as a chain of permanent violence. See Paul W. Kahn. *Sacred Violence: Torture, Terror and Sovereignty* (Ann Arbor: the University of Michigan Press, 2008). There would not be much surprise, if the theory of just genocide once emerges.

³⁰ The uprising and national liberation movement may also have existential justification, which does not refer to Justice as a moral term. See Franz Fanon. *The Wretched of the Earth*. Translated from French by Richard Philcox with commentary by Jean-Paul Sartre and Homi K. Bhabha (New York: Grove Press, 1963).

³¹ I.A. Ilyin. *O soprotyvlenii zlu siloyu // I.A. Ilyin. Put k ochevidnosti* (Moskva: Respublika, 1993) 114.

The just war theory simply ignores the difference of justice and justification. In particular, it blends justification of necessity and justification of justice. The war of necessity is mixed with the war of choice. The necessary war of Kant and Ilyin may be justified morally, but it is justified re actively, not pro actively. Morality itself should never serve as a driving force for war. The just war theory simultaneously moralizes necessity and necessitates morality. Since justice is both necessary and moral, there are, strictly speaking, no criteria to separate existential necessity and moral necessity. The JWT poses moral necessity as if it is existential necessity. For Augustine there was no existential necessity, one was not even supposed to fight for the survival of his kin. On the contrary, one is totally excused to do violence of Crusade or a Holy War, if there is no hatred in one's heart.

But even if we put aside the existential necessity, the moral necessity of the just war theory is also rather murky. There are four possible interpretations of justice of the Just War: the justice of the Holy War, the justice of the Crusade, the justice of the political goal and justice of the military means (*Jus in Bello*). The just war theory should be regarded as a teleological doctrine. To be more exact it is a version of the utilitarianism of human rights.³² Utilitarianism, of course, is end-focused; in the case of utilitarianism, the focus is on maximizing the greatest happiness for the greatest number, or in our case – the greatest human rights for the greatest number.

The utilitarian nature of the JWT looms large even if we examine the most deontological version of the just war theory, say, John Rawls's "The Law of Peoples."³³ Even this professed deontologist and a follower of Kant cannot change the teleological stance of the just war theory in its contemporary (Augustinian) interpretation. According to Rawls, people are supposed to stick in their domestic affairs to the two basic principles of justice, the first of which is the principle of inviolability of the basic human rights. "First: each person is to have an equal right to the most extensive basic liberty compatible with

³² I will make no distinction between teleology, utilitarianism and consequentialism. It is not relevant for my purpose, although it does exist, of course. Augustinianism is a classical example of Christian teleological teaching. the problem with teleology as with utilitarianism is its incompatibility with both rights of states and individual rights. Even if it is the utilitarianism of human rights.

³³ John Rawls, "The Law of Peoples," in *On Human Rights: The Oxford Amnesty Lectures, 1993*, edited by Stephen Shute and Susan Hurley, (New York: Basic Books, Harper Collins Publishers, 1993). In 1999 Rawls publishes a book by the same title (Cambridge and London: Harvard University Press).

a similar liberty for others,”³⁴ and, which is even more important: “There principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of the equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages.”³⁵ According to both Kant and Rawls there is no such social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. The first principle of justice is supposed to work as a side constraint on all possible violation of individual human rights, whatever the social goals, even if it is the goal of increasing human rights. Using one of these people for the benefit of others uses him and benefits others. Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means. Side constraints express the inviolability of other persons. The humanitarian intervention is a case of utilitarian victimization of some for the benefit of greater human rights to all.

In the “Law of Peoples” Rawls employs the same method concerning the terms of possible cooperation of peoples. Now the peoples should have to elaborate the fair terms of cooperation. But since this contract has to be established fairly, it is important that the contract negotiations take place under conditions that will not allow some of the participants to take advantage of others. By peoples, Rawls means societies. So now he applies the contract to societies by placing representatives of peoples into the original position. In this position, the representatives apparently will generate a cluster of principles of the JWT, which presuppose above anything else the possibility of the humanitarian war. But any humanitarian war itself is justified on solely teleological background. In no way it can apply deontological argumentation. The people of the hierarchical societies are evidently treated as means, not as ends. Rawls forgets about his deontology of Human Rights, when he turns to the Law of Peoples, he adopts teleology of human rights. The international relations unlike the sphere of the domestic affairs are shaped to be guided by the teleology of Human Rights and even Rawls, with all his deontology, cannot change it. Deontological justice simply cannot play any role in JWT or it will turn to Kant instead of Augustine, which is impossible to this theory. Not only because it must allow (unlike the notorious Kantian judgment) to deceive a

³⁴ John Rawls. *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971) 60.

³⁵ *Ibid.* 61.

murderer and an aggressor but also because it is about the goals, not the means.

But even the utilitarian results of just wars are usually poor. The Kosovo War, conducted in the name of human rights resulted not only in total violations of the same rights but in great amount of the so called ‘collateral damage’.³⁶ There is every reason to believe that on a purely utilitarian calculus (even if it is the utility of Human Rights) it would be less harm and more good simply to leave things as they were. The JWT is not strictly speaking a liberal theory. In fact, both liberalism and democracy give way, when it comes to Just War. When democracy claims justice to its aggressive war it deceives both democracy and war.³⁷ Liberalism is not supposed to deal with distant ends, much less holy or sacred; it is not supposed to be eschatological theory at all.

Theory

There are several considerations that suggest that just war theory is not really a theory.³⁸ First, it seems to be nothing more than a set of cobbled together rules and principles. It is evidently not a mono-principled theory. Second, it lacks the generality of a real ethical theory. A cluster of principles does not form a theory. Third, just war theory lacks a single background principle. As a lower level doctrine it can be justified by several overarching theories of ethics. Such a justification is thought of as an intrinsic part of a theory. Thus the principles are not complete until the justification is attached. The same principles attached to two different justifying theories are, thus, two different theories. There is not, then, one just war theory but as many as theories that serve a justifying role. A related problem is that just war theory does not seem properly justified if there is no preferred theory performing the justifying task. Fourth, the principles of just war theory cannot be applied consistently. Some just war theorists will apply justice of the war criteria so strictly to any and all war threatening situations that they will find themselves allied with paci-

³⁶ See Boris Kashnikov. NATO’s intervention in Kosovo Crisis. *Whose Justice? // Moral Constraints on War. Principles and Cases*. Nick Fotion and Bruno Coppieters (eds.) (Lanham: Lexington Books, 2008).

³⁷ See David Ross. *Violent Democracy*. (Cambridge: Cambridge University Press, 2004).

³⁸ See Nick Fotion. *Theory vs Anti-Theory a Misconceived Conflict* (Oxford: Oxford University Press, 2014). I agree that JWT is not a theory, but I also do not agree that it can go as a middle level theory

fists in opposing first this and then that war. The other just war theorists will stick to realism. In between, there will be all shades of grey. A theory should do better job. Everything gets on its place if we regard just war not as a theory, but as a new modification of the Augustinian just war doctrine based on a teleological version of the subjective natural law theory. What is, perhaps, even more important, the deficiencies of the theory make it possible to use the JWT in political games and there is every indication that contemporary political violence has found its justification in the JWT.

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Кашников, Б. Н. «Теория справедливой войны» как война, справедливость и теория: пре-принт WP20/2014/03 [Текст] / Б. Н. Кашников ; Нац. исслед. ун-т «Высшая школа экономики». – М. : Изд. дом Высшей школы экономики, 2014. – (Серия WP20 «Философия и исследования культуры»). – 24 с. – 23 экз. (на англ. яз.)

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Препринт WP20/2014/03
Серия WP20
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Кашников Борис Николаевич

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как война, справедливость и теория**

(на английском языке)

Зав. редакцией оперативного выпуска *А.В. Заиченко*
Технический редактор *Ю.Н. Петрина*

Отпечатано в типографии
Национального исследовательского университета
«Высшая школа экономики» с представленного оригинал-макета

Формат 60×84 $\frac{1}{16}$. Тираж 23 экз. Уч.-изд. л. 1,5

Усл. печ. л. 1,4. Заказ № . Изд. № 1584

Национальный исследовательский университет
«Высшая школа экономики»
125319, Москва, Кочновский проезд, 3
Типография Национального исследовательского университета
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