

## NEW JUST WAR THEORY OF THE 20TH CENTURY: THE REBIRTH OF GROTIUS AND THE UNITED STATES\*

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### *Introduction: Rebirth of the Just War Theory*

Jean Bethke Elshtain, a famous American political philosopher, who has been speaking actively about the war against terror, stated that, “the reemergence of the doctrine and theory of the just war or justifiable war” is “an important story of our epoch” in the contemporary world.<sup>1</sup> Leaving aside whether the rebirth of the just war theory is a positive or a negative phenomenon, its rebirth is notable in the intellectual world in Western countries. Moreover, for example in Britain, not only politicians, military officials and the media, but also the general public used classical terms from the just war theory, such as “just cause” “competent authority” “last resort” “right intent” and “discrimination”, when discussing issues concerning the Gulf War and the war in Iraq.<sup>2</sup>

This trend was promoted with the breakout of the Gulf War, war in Kosovo, war in Afghanistan, and the war in Iraq between the late 20th and early 21st centuries. Since wars and conflicts that were avoided or concealed during the Cold War began to erupt in the post-Cold War era, the discussion on war has been re-examined and the tradition of just war theory has once again come to the fore. However, that is not the only reason. The reason why just war is being discussed at the present is because the conflicts and wars mentioned above are interconnected to the thought of international justice. The unlawful violation of international peace and violations of the life and human rights of victim nations and oppressed people is being prioritized, rather than the interest of each state. “To save the oppressed people from the aggressor or tyrant, and to conduct war to punish the assailant. This is the just war.” Those who agreed to the military intervention of the Gulf War proposed this kind of argument. It is clear that this logic is closely related to the rebirth of the just war theory.

However, the respect for international justice and peace, and the judgment of whether a certain war is just or unjust is not a phenomenon that suddenly appeared in the late 20th century. Rather, it can be found in the wave of “the transition of the view on national sovereignty, the solidarity of international society, and the reform in thoughts concerning international law after the First World War.”<sup>3</sup> The reemergence of the just war theory had

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<sup>1</sup> Jean Bethke Elshtain, Foreword, in: Charles Reed, *Just War?*, New York, 2004. vii.

<sup>2</sup> C. Reed, *op. cit.*, p. 4.

<sup>3</sup> Susumi Yamauchi, “Joron: Seisen, Seisen, Goho Senso” (Introduction: Holy War, Just War, Legal War) in Susumu Yamauchi ed. “*Tadashii Senso*” to *iu Shiso* (Thoughts of “Justifiable War”) (Keiso Shobo, 2006) p. 39.

also started then. The revival and the rebirth of the new just war theory had taken place in the international society in the first half of the 20th century. Moreover, this was not simply a reemergence of the theory. The reborn just war theory has its own characteristics and in that sense, it is possible to call it a new just war theory, as opposed to the traditional just war theory.

Moreover, the contemporary just war theory of the 21st century is also grounded on the new just war theory of the 20th century, and discussed interchangeably. Therefore, it is necessary to understand the transition in international society and the new just war theory that was the state of the art expression in the first half of the 20th century, in order to understand the characteristics of the contemporary just war theory. In terms of this perspective, this paper will consider the new just war theory of the 20th century.

## I. *Grotianism*

### **Tokyo War Crimes Tribunal Judge Röling**

One of the judges at the Tokyo Tribunal (International Military Tribunal of the Far East) was Judge Bernard Victor Aloysius Röling (1906-1985), a professor of international law. He demonstrated an opinion that differed from that of the majority of the judges and opposed the death penalty of Koki Hirota. Röling stated the following anecdote at a symposium in commemoration of the 400th anniversary of the birth of Grotius, held in 1983:

“In February 1946 I arrived in Japan to participate as the Netherlands’ judge in the Tokyo Trial, the International Military Tribunal for the Far East(IMTFE)-the Asian “Nuremberg”. At my first meeting with the President of the Tribunal, Sir William Webb, he said: “We will deliver an impressive judgment and base the verdict on the teachings of Hugo Grotius”. Sir William suggested that the Dutch judge would be precisely the man to write that part of the decision”.<sup>4</sup>

Röling mentioned that he had denied this, because it seemed to him “inadmissible” to “invoke Grotius” in support of a decision of punishing the Japanese defendants. This is true to a certain degree. It is rather Eurocentric and presumptuous for a Dutch judge to write a judgment based on the teachings of a Dutch international law theorist of the 17th century. However, though Röling does not mention it here, the reason why Webb referred to Grotius was not only because Röling was Dutch. At the time, for those who participated in the International Military Tribunal, the name of Grotius was an expression that represented one influential position of international legal thought. Therefore, a verdict based on “the teachings of Hugo Grotius” implied that the judgment would be grounded on this position. Webb believed that this position was universally right. Thus, Webb was demonstrating a special sentiment by mentioning the name of Grotius to Röling.

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<sup>4</sup> B. V. A. Röling, *Jus ad bellum and the Grotian Heritage*, T. M. C. Asser Institute, *International Law and the Grotian Heritage*, The Hague, 1985. p. 111. Röling was skeptical and denied the application of the just war theory of Grotius in the contemporary context. He asserted that “the just war theory of Grotius has become a dangerous theory” (ibid., p. 135). The anecdote during the Tokyo Tribunal is also introduced in B. V. A. Röling and A. Csesse, N. Kosuge trans. *Reling Hanji no Tokyo Saiban (The Tokyo Trial and Beyond Reflections of a Peacemonger)* (Shiyo Publishing, 1998) p. 164.

What is the ideological position represented in the name Grotius as mentioned by Webb? The answer to this question is the just war theory.

### Grotianism

The reason why the just war theory was symbolized by Grotius was because the reemergence of the just war theory in the first half of the 20th century took place in a form whereby it was closely connected to the name of Grotius. The first person who expressed Grotianism was a Dutch scholar of international law, namely van Vollenhoven.

Vollenhoven presented the concept of “*crimen juris gentium*” during the First World War, and expressed the legitimacy of the international use of military force of the Great Powers toward such crimes.<sup>5</sup> He deemed the use of military force to be punitive war. The concept of punitive war or war as punishment is one of the factors that constitutes the traditional just war theory, therefore, it can be said that Vollenhoven brought back and reminded us of the just war theory that had been forgotten after the 19th century. Vollenhoven significantly emphasized that just war comprised the core of Grotius’s just war theory, and referred to Grotius’s just war theory as grounds for just war. He further claimed that Grotius’s work (*Laws of War and Peace*) was a “contemporary piece of work” even though it was written in Latin and quite old fashioned in terms of style. He stated that, “it is because public interest concerning the issue of punishing a criminal state became apparent during the First Peace Conference (1899) or at the breakout of this war (1914).”<sup>6</sup>

For Grotius, what was essential for just war was a just cause. A just cause consists of “defense” “recovery of what’s our own” and “punishment”. Punishment can be phrased as sanctions, however, because it can be used in the context of international society, it can be applied to states as well as leaders. The reason why this kind of punitive war can exist in international society is due to the supposition of the thought of the community of humankind. The basis of the thought of punitive war is that an act that violates the interests of the community must be punished. The logic behind it is clear cut. Moreover, Grotius affirms humanitarian intervention based on this logic. It seems as though the idea of solidarity among humankind is behind this logic. However, the idea of humankind is not only claimed by Grotius. The concept of humankind was also of great significance to classical philosophers belonging to the Stoic school, such as Cicero, and those who belong to the early modern Spanish scholastic school, such as Vitoria and Suarez and Vollenhoven has also acknowledged this point.

For example, Vollenhoven refers to the following words of Suarez and recognizes their significance: “Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion (*Tractatus de legibus ac Deo legislatore*, Section 9, Chapter 19).” However, according to Vollenhoven, “But neither Vitoria nor Suarez nor any other of them became aware of the fact that this foundation required a new theory of punitive war.” In other words, Suarez was not successful in combining the new theory of world community with the traditional theory concerning punitive war. This was the conclusion Vollenhoven reached.

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<sup>5</sup> Cornelis van Vollenhoven, “Peace and International Police”, Idem., *Verspreide Geschriften 2*, ‘s-Gravenhage, Haarlem, 1934, p. 350.

<sup>6</sup> “The Land of Grotius”, Idem., *Verspreide Geschriften 1*, ‘s-Gravenhage, 1934, p. 379.

Vollenhoven claimed that Grotius was different. He maintained that Grotius brilliantly combined the traditional notion of the right to punishment, which is a notion that belongs to an individual or a state, with the concept of universal humankind. He further stated that this was where Grotius's theory was progressive and contemporary.

In terms of Vollenhoven's understanding, what is important in the Grotius's theory is the recognition that the punishment of someone having committed a crime is not limited to the person with the right to punish. In Grotius's theory on punishment, whether the criminal is an individual or a state, that individual or state must place itself inferior to others due to the crime he/she/it has committed. Moreover, the individual or state having committed the crime is not only inferior to the individuals or states that were victim to the crime, but in a sense, is inferior to all those individuals and states that are superior to him/her/it in that they are representatives of humankind. Therefore, regardless of whether the individual or state that has fallen victim to the crime executes a punitive war, other individuals or states can execute a punitive war as well. Vollenhoven refers to the following excerpt from Grotius: "Punishment...is by nature permitted to any one (Grotius, *Laws of War and Peace*, II, 20, 7.)."

What Vollenhoven had focused on particularly in Grotius's theory on punitive war was the metaphor of the "father" (*Laws of War and Peace*, II, 3, 24). According to this metaphor, there is potentially logic stating that punishment is not "revenge" but rather punishment or discipline that a father gives his child. War must not be a vengeance by the victims grounded on hatred, but a punishment or discipline to redress the criminal. Vollenhoven's insistence on Grotius's theory on punitive war was due to this perspective. Vollenhoven states that, "the righteous state that punishes criminal aggressive war or other state crimes has to assume the character, not of an enemy thirsting after revenge, not of a foe seething with hatred, but the character of a well-meaning superior (ruler), that is of a father." Therefore, the regulations stipulated by Grotius concerning war are neither regulations for states to mutually dispute with one another nor regulations to protect each other's traffickers, but "rules to be observed by the police forces which are hunting the bootleggers, by the men-of-war which are hunting the pirates, by the righteous states inflicting punishment on criminal states."<sup>7</sup>

Thus, Grotianism is an ideological stance that is grounded on the perspective of the solidarity of humankind and on Grotius's just war theory, especially his theory on punitive war, and this logic was later developed into an international law of the 20th century.<sup>8</sup>

### Grotius in the United States

Grotianism was closely connected to the new trend in international society and international law that could be identified in the Treaty of Versailles and in the establishment of the League of Nations. Vollenhoven was the leading international lawyer that promoted this trend. He emphasized that the "period of Grotius" had begun and sought to promote Grotianism. His famous work, *The Three Stages in the Evolution of the Law of Nations* (1918) announced the arrival of the age of Grotius, and has been read widely as two editions have been printed in Dutch and it also has been translated into English, French, and German. What is most

<sup>7</sup> Cornelis van Vollenhoven, "Grotius and Geneva", *Ibid.*, p. 425.

<sup>8</sup> Refer to Susumu Yamauchi, "Ambivalence of Grotius: Common Interest for Sovereignty and Humanity" in Yoshio Otani ed. *Concept of Common Interest and International Law* (Kokusai Shoin, 1993) p. 33 regarding the thoughts of Grotius. Also refer to H. Bull, B. Kingsbury, A. Roberts (ed.), *Hugo Grotius and International Relations*, Oxford, 1990. Renne Jeffery, *Hugo Grotius in International Thought* (New York, 2006) p. 85.

interesting is the connection between Vollenhoven and the United States.

Vollenhoven delivered lectures three times consecutively at Columbia University in 1925. In these lectures, he emphasized the tradition of Grotius in American international legal studies as well as his modernism and acclaimed this great tradition in the U.S. There is a “close relationship” between the U.S. and the works of Grotius. Vollenhoven claimed that Grotius was a “son of the Netherlands” but also was “a kind of foster son of North America”.

That is to say, it was the Americans that had once again focused on Grotius, whose influence had diminished in the shadows of Vattel. It was the American international legal theorist, Wheaton, who was the first to claim this. Wheaton demonstrated the significance of Grotius, who had lost his influence in the shadows of Vattel, in the history of international law. Moreover, during the First Peace Conference in The Hague in 1899, by the order of U.S. President McKinley and Secretary of State Hay, the U.S. Delegation, headed by Andrew White, had sent a flower made of silver to Grotius’s grave at a church in Delft. Furthermore, Woodrow Wilson’s speech at the Congress (April 2nd 1917), in which he announced the U.S. entry into the First World War, also included the phrase voicing “Grotius’ ideals”. The speech proclaimed that all states were to be responsible for any state which committed a crime or violated human rights. Vollenhoven praised Wilson and stated that, “Woodrow Wilson’s words of 1917 and 1918 were as radiant a light to nations walking in darkness as Grotius’s book had been in 1625.”<sup>9</sup>

Vollenhoven was indeed insightful in paying attention to the relationship between the just war theorist Grotius and the U.S. when we consider the trend that followed. However, there are matters that Vollenhoven recited that could be considered quite assertive. For example, let us consider Wheaton. It was Wheaton that was successful in establishing Grotius in American international legal studies. Moreover, it is true that Wheaton praised Grotius. Wheaton mentions in his work, *Elements of International Law: With a Sketch of the History of the Science*, that, “the publication of his great work, which made a deep impression upon all the liberal-minded princes and ministers of that day, and contributed essentially to influence their public conduct.” The influence was so great that, “Alexander carried the Iliad of Homer in a golden casket, to inflame his love of conquest; whilst Gustav Adolf slept with the treaties on the *Laws of War and Peace* under his pillow...”<sup>10</sup>

Wheaton praised Grotius, however, he did not adopt the framework for universal humankind based on solidarity nor just on the war theory. On the contrary, his logic was clearly based on the sovereignty of states and was oriented toward modern international law. He refutes the just war theory as follows:

A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. A war in form, or duly

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<sup>9</sup> Cornelis van Vollenhoven, “Grotius and Geneva”, *Ibid.*, p. 437.

<sup>10</sup> Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science*, Union, 2002 (reprint of 1836), p. 28. This work by Wheaton was brought into Japan through a Chinese translation, as the first Western writing on international law. The translation was titled *Bankoku Koho* (Laws of Nations). Refer to Susumu Yamauchi, *Civilization and International Law in Japan during the Meiji Era (1868-1912)*, *Hitotsubashi Journal of Law and Politics* Vol. 24 (1996).

commenced, is to be considered, regarding its effects, as just on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other..<sup>11</sup>

## II. *Enforcement of the Just War Theory*

### **American International legal studies and the Thought of the Government**

In American international legal studies, the Grotian theory of just war was not generally adopted, as Wheaton was one of those who did not adopt the theory. However, thought concerning just war theory appeared just before and after the First World War and was greatly influential. The person responsible for promoting the just war theory was Quincy Wright, a progressive international legal theorist in the new era. During the debate on war crimes after the Second World War, Wright stated at the Nuremberg International Military Tribunal that the principle “Nulla poena sine lege (no punishment without law)” was not violated since the aggressive war in 1939 was already a subject to criminal punishment.<sup>12</sup> However, the works and activities of Wright and those of various international lawyers have been masterfully illustrated in Hatsue Shinohara’s work, therefore I would defer any further reference in these regards to her work<sup>13</sup>; in the meantime, I would like to make a note of just two points, making reference to the works of Shinohara.

Firstly, the communal aspect of international society, or the emphasis on the solidarity of human society, was considered more important than the absoluteness of sovereignty, and this new approach to international legal studies was strongly promoted in the U.S. It is true that numerous prestigious scholars still considered the importance of traditional international legal studies in the U.S., therefore it is difficult to say that the works of the reform group led by Wright composed the mainstream of the academia. Moreover, similar kinds of movements can also be seen in other countries. However, the most active discussions on the new international law took place in the U.S. and “it was the American international lawyers that played a guiding role in this movement during wartime.”<sup>14</sup> In this sense, Vollenhoven’s was right in having high expectations of the U.S.

Secondly, even though the new thinking was not dominant in the world of American international legal studies, it was influential politically. It is clear that that the U.S. government proposed policies in line with the reform group such as advocating the treaty for the renunciation of war. This progressive thought, which was not entirely recognized by academic society, on the contrary became a keystone of real world politics; in this sense, it was a peculiar phenomenon. Of course there was certain manipulation in the world of politics, however, the U.S. government, taking the approach of the just war theory, had confronted and opposed Germany in Europe and Japan in the Asia-Pacific.

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<sup>11</sup> Ibid., pp. 212-3.

<sup>12</sup> Carl Schmitt, *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978*, hg. V. G. Maschke, Berlin, 2005, S. 573.

<sup>13</sup> Hatsue Shinohara, *Senso no Ho kara Heiwa no Ho e — Senkanki no Amerika Kokusai Hogakusha* (Laws of War to Laws of Peace: American International Legal Theorists during the Wartime) (Tokyo University Press, 2003).

<sup>14</sup> Ibid., Shinohara, p. 279.

For example, the American stance is well illustrated in the declaration made by the U.S. Attorney General, Robert Jackson, at the Havana Inter-American Bar Association in March 1937, where he stated the abandonment of the traditional policy of neutrality. In this declaration, he emphasized that the theory of international law before the 19th century was based on the “distinction between just and unjust war” and that “from that distinction there was logically derived the legal duty of members of the international society, bound by the ties of solidarity of Christian civilization, to discriminate against a state engaged in an unjust war — in a war undertaken without a cause recognized by international law.” Moreover, in this declaration, he clearly indicated that the duty “was voiced by Grotius, the father of modern international law.”<sup>15</sup>

To Jackson, “the discriminatory response to the state involved in war” signified the “return to the sound morals of the past”. Aggressive war was a “civil war toward the international community” and a war against such an offender was a just war. What more, this was an “obligation” that had been claimed by Grotius.

#### **Joseph Berry Keenan, Chief Prosecutor at the Tokyo War Tribunal**

Robert Jackson was the chief prosecutor at the Nuremberg Trials. He distributed the “Report to the President on Atrocities and War Crimes; June 6, 1945” to all members of the delegation at the London Conference (June-August 1945) for the preparation of the Nuremberg Trials, which stated that there was no question that “making unjustifiable war” constitutes a crime. Moreover, he stated that, “International Law as taught in the Nineteenth and the early part of the Twentieth Century, generally declared that war-making was not illegal and is no crime at law.” He goes on further to state that, “this, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just or unjust war — the war of defense and the war of aggression.”<sup>16</sup>

The chief counsel for the United States at the Tokyo War Crimes Trial, Joseph Berry Keenan, also shared the same perspective as Jackson. Keenan’s idea of international law is clearly indicated in the work *Crimes against International Law*, published in 1950 in tandem with the judicial consultant at the Tokyo Trial, Brendan Francis Brown. The logic demonstrated in this work is valuable as it provides us with materials with which to consider the characteristics of the effectiveness of the 20th century just war theory, therefore, I would like to briefly introduce this logic in the following.

Firstly, one will immediately notice on the back of the cover the printed words “to the memory of Francisco Suarez and Hugo Grotius”. The Suarez referred to here is the Spanish theologian and legal theorist Suarez, who was also mentioned by Vollenhoven. It is evident from this one sentence that Keenan wished to conduct the trials from the perspective of the international community and in the name of Grotius.

One can confirm that this impression is correct in the first sentence of the preface, “crimes

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<sup>15</sup> Address of Robert H. Jackson, Attorney General of the United States, Interamerican Bar Association, Havana, Cuba, March 27, 1941, *The American Journal of International Law*, vol.35(1941), p.351. Refer to Susumu Yamauchi, “Grotius and the Transformation of the International Legal Thought in the 20th Century” in *50 year Anniversary Memorial Journal of the Hitotsubashi University Law and International Relations during the Period of Transformation* (Yuhikaku, 2001) p.3.

<sup>16</sup> Justice Jackson’s Report To President Truman on the Legal Basis for Trial of War Criminals, *Temple Law Quarterly*, Vol. 19-3, 4, 1946, p. 153.

against international law are once again being committed — this time in Korea.” Keenan stated that, “In the light of the decisions reached at the Tokyo and Nuremberg war crimes trials there can be no question but that the communist Koreans are waging a criminally unjust war. For “although the South Koreans were not guilty of any legal or moral wrongdoing, they are nevertheless being deprived of those inalienable rights of life and property which are essential for the survival of rational life”<sup>17</sup>

### Aggressive War and Defensive War

The phrase “criminally unjust war” appears repeatedly in the work, *Crimes against International Law*. On the one hand, aggressive war is a type of aggression that is conducted even though “no legal nor moral crimes” have been committed by the other state, and is “a war that is criminally unjust”. Keenan claimed that general participants could be subject to criminal punishment, even though the concept of crime does not exist in international law, which differs from national law, and moreover, there is the traditional recognition that the responsibilities of individuals cannot be questioned. The reason for this is because unjust war is clearly a crime and is not simply an unlawful conduct or violation of contract. Keenan questions that, “Whether an act is criminal or tortuous depends on its nature and consequences. But what could be more criminal than an unjustified war, which includes the taking of countless human lives and incalculable destruction of property?”

Keenan stresses the difference between aggressive war and defensive war. He states that, “of course, not all wars are crimes. A war in self-defense is not criminally unjust.”

According to Keenan, there are two rights to self-defense, (1) the right to protect its own basic interests and (2) the right punishing the attacker.

- (1) “The essence of the concept of self-defense in international law is the same as that found in the idea of self-defense in domestic law. The waging of a just war is a lawful method of protecting an inalienable national interest against the criminal activity of another state. A defense may be made against the activity of aggressive or unjust war.”
- (2) “By waging a just war, the nation which is defending itself inflicts lawful mass punishment upon the enemy. The criminally guilty nation has forfeited its inalienable right of cooperate life.” The people may not know about this. “But objectively they are sustaining the cooperate life of a guilty nation and preventing punishment of their guilty leaders. The inalienable right to the quiet and peaceful use and enjoyment of property, belonging to the guilty nation and its nationals, is also lost.”<sup>18</sup>

Keenan refers to aggressive war as unjust war and defensive war as just war. Moreover, self-defense here also includes the act of punishing the aggressor. Therefore, it does not merely recognize the right to self-defense against attack, but also that the right to attack, in order to punish the entire state that conducted the aggressive war, can be recognized. There is significant discussion regarding the extent of the range of self-defense, however, Keenan included “lawful mass punishment upon the enemy” in self-defense. The grounds for the

<sup>17</sup> Joseph Berry Keenan & Bredan Francis Brown, *Crimes Against International Law*, Washington, D.C., 1950, Preface p. V. Regarding the Tokyo Tribunals refer to Kentaro Awaya, *Tokyo Saiban he no Michi (Jo) (Ge)* (Road to the Tokyo Tribunals, Vols. 1 & 2) (Kodansha, 2006). This work is extremely valuable because it refers to various new documents from the U.S.

<sup>18</sup> *Ibid.*, p. 62.

infliction of punishment are that defensive war is just war. Keenan was indeed a Grotian who stressed the concept of punitive war.

### III. *New Just War Theory*

#### **War and Morals**

As many of you know, war theory alone has a long history and the content varies depending on the period and theorists. Would it be possible that, even though Grotianism was revived due to the just war theory, the revived just war theory could have its own distinct uniqueness? It is only natural that such questions arise. In fact, it is unique in the sense that it is possible to refer it as the new just war theory or the just war theory in the 20th century. Keenan's logic clearly demonstrates this nature of a new just war theory. In order to clarify this point, I would like to follow the claims of Keenan a bit further.

There is a question that is always raised when discussing the Tokyo War Crimes Tribunal, namely whether or not the punishment of the leaders of the state for crimes against peace violates the basic tenant that there be no punishment without a law, and the relevant application of the alleged criminal action to that law. The grounds for this claim are that at the least, no regulations of international law existed to punish those responsible for war at the beginning of the Second World War. To this, Keenan replied that he acknowledged that the grounds for the right to punishment were not enacted as statutory law, however, he did think that the law existed.

Keenan's reason for his claim was that even though the international criminal law that was inserted in the Nuremberg Charter was not enacted, it was already "customary law and law based on the recognition of international morality by treaties, by a long and distinguished line of juridical experts, by the School of Natural Law Jurisprudence, and by a great part of world public opinion." Keenan further mentioned that, "the principles underlying this law had been given universal application in the analogous sphere of national society by the legal systems of all civilized peoples."<sup>19</sup>

The problem is the distinction between just and unjust war, and the recognition and non-recognition of the moral characteristics of law and international law. The lawyers at the Tokyo War Crime Tribunals utilized the denial of ex post facto law as their main argument, in which the premise was that law must be enacted by a legitimate power and must be disclosed beforehand. To this, Keenan claimed that there are notions that exist and are recognized as law even though they are not enacted in such a way. He wrote in a chapter "A War of Aggression as an International Crime" that "In so far as the International Military Tribunal for the Far East recognized that there is a vital distinction between just and unjust wars, between wars of aggression and wars of self-defense, it sustained a most important part of the original conception of the science of international law." According to Keenan, this distinction had already been implemented in international law.

Keenan continues on to state that that international law during medieval and early modern times stressed the difference between just and unjust war. However, with the appearance of sovereign states, states were deemed as "neither legally nor morally wrong".

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<sup>19</sup> Ibid., p. 43.

International law became a product of the mutual will between infallible states that are not bound by morals, and the distinction between just and unjust war was no longer supported. In modern times, “war was completely detached from morals. No war was considered unjust.”

However, the result of the will of the infallible state was the atrocities of the First World War. The world reflected upon the course of the international legal order, and promoted the new construction of “international social and legal orders.” Similar to the case regarding national law, the recognition of the conduct of crime was internationally reborn. Here, international society was considered an organic entity, within which a certain type of conduct could violate the peace and order of the entire community, which is a form of aggression. People started to recognize the “necessity of distinguishing between aggressive war and war in self-defense.” According to Keenan, this differentiation was the “revival of the old classification between unjust and just war.”

### **New Just War Theory**

However, this revival was not a revival of the old theory. There is a distinct style to it which could be called a new theory of just war, which made a clear distinction between aggressive and defensive war and stressed the decisive significance of the same. Aggressive war and defensive war corresponded to unjust and just war, respectively. Moreover, as Keenan clearly identified, defense included not only the self-defense of individual states, but also included collective defense and the battle to maintain “the peace and order” of the entire international society. It implied the defense of not only the state and the people, but also that of international society and humankind. Aggression included not only the attack on the individual state, but also the violation of the international peace, meaning defense also corresponded to this notion and included the meaning of not only self-defense, but also the defense of international society. Firstly comes the violation (aggression) of the peace, which is followed by measures for self-defense; by principle, it cannot be *visa versa*.

On the other hand, just war in medieval times was not limited to defensive war. It did not matter whether or not it was aggressive, because the most important aspect was to redress the evil or injustice of the other side. Keenan appropriately acknowledged this point, and indicated that in medieval times there existed a clear distinction between just and unjust war, however, unjust war was criticized as violating natural law. “Justice was the element which determined the moral allowability of war.” What was important was the justice of the reason for war, not the invasion or aggression of the enemy. In other words, to be just there was not necessarily the physically non-aggressive character for war. “A defensive war was not unjust. A war might not be just for both sides.” Furthermore, the just war theory at this time contained religious elements. “Unjust wars were considered sinful by theologians, as well as unjust, on a natural plane. Their wrongfulness was viewed from the violation of a duty owed by those responsible for such wars towards God. Wagers of unjust wars acted contrary to the Devine Will, as well as the reason of man.”<sup>20</sup>

What was important in the just war theory in medieval times was justice, ethics and God. However, in Keenan’s new interpretation of just war, he stressed the external and objective element of aggression, and individual and international measures in the broad sense of self-defense. Thomas Aquinas, who wrote a compilation on medieval just war theory, stated

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<sup>20</sup> *Ibid.*, p. 67.

the following elements essential for just war, which include: (1) legitimate authority; (2) just cause; (3) right intention. The revived new just war theory is primarily concerned with the parties involved, and neither objective justice nor the intention of the subjects of the war are decisive elements. What is important is the distinction between aggression and self-defense. Keenan states that, “the waging of a just war is a lawful method of protecting an inalienable national interest against the criminal activity of another state. A defense may be made against the activity of aggressive or unjust war,”<sup>21</sup> and such said “An aggression is an unjust attack.... Aggression usually, but not always, means the striking of the first physical blow. The striking of this blow is *prima facie* evidence of aggressive war. The aggression raises the presumption that the physical had launched a criminally unjust war.”<sup>22</sup>

Even though there is a distinction between aggression and self-defense theoretically, there is no doubt that aggression can be conducted in the name of self-defense. Moreover, a state that is ready to attack could fabricate a provocative incident because the state that had been attacked could claim that a crime had been committed in terms of international law and that its absolute right had been deprived. However, these wars are unjust. According to Keenan, Japan’s attacks on Mukden and Marco Polo Bridge are examples of such an attack. The attacks on Singapore, Hong Kong, Malaya, and Shanghai constituted aggression because the objective of the attacks was to expand one’s territory. “No actual criminal acts had been directed against Japan by any of the nations which were attacked.”

Keenan developed his discussion based on the distinction between aggression and self-defense. The concept of aggression became a significant issue during the Tokyo War Crimes Tribunal. This article will not question whether this concept is just or not, or whether it can be used legally or not. However, it is important to make note that the concepts of “aggression” and “self-defense” were extremely important under the new just war theory of the 20th century.

### **Kelsen’s Just War Theory**

Why was the distinction between aggression and self-defense so important under the new just war theory? As suggested earlier, it was for the establishment of the concept and the maintenance of international peace and international law. At least, the thought that placed high value on international peace was born from the reflection on the First World War and was widely accepted. The term ‘international community’ was also widely used.

Hans Kelsen’s (1881-1973) legal theory was one of the theories that expressed and also promoted this trend. His theory is explicit and had great influence, therefore, let us refer to his work *General Theory of Law and State*, which clearly conveys his perception and introduces his theory.

According to Kelsen, the “thesis of the *bellum justum* theory” is to “forbid war in principle.” The significance is placed on contradicting war. Kelsen does not recognize the sovereign state’s freedom to make war, because it can result in “intervention”. According to Kelsen, “intervention” is “forbidden by international law.” “Intervention” is the “dictatorial interference by a State in the affairs of another State” and “dictatorial interference means interference implying the use or threat of force.” Therefore, the duty of non-intervention

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<sup>21</sup> *Ibid.*, p. 62.

<sup>22</sup> *Ibid.*, p. 58.

concerning the foreign and internal affairs of other countries “is the consequence of the fact that international law protects the internal and external independence of the States.” “This principle is incompatible with the doctrine that the State, by virtue of its sovereignty, can resort to war for any reason against any other State, without violating general international law. War is an unlimited interference in the affairs of another state’s implying the use of force.”<sup>23</sup>

The “academic discourse that the State, by virtue of its sovereignty, can resort to war for any reason against any other State without violating general international law” is referred to as the theory of indiscriminate war. It has been mentioned earlier that this notion is closely connected to the sovereign states system in the 20th century.

Kelsen adamantly opposed this idea. Moreover, what was important to him was the “generally accepted principle of non-intervention presupposes the *bellum justum* doctrine.” The reason is because it is only in exceptional cases that another country can exercise “dictatorial interference” and the only exception can be called just war. In an article written by Kelsen in the early 1940s, he stated that just war is a war conducted “as a reaction against an illegal act, a delict” and that it is a war “directed against the state responsible for this delict.”<sup>24</sup>

For Kelsen, just war was a war solely for the self-defense and sanction of those who violate international law and was theoretically a premise on which to deny war in general. This was a new theory that opposed the theory of indiscriminate war that was (or appeared) dominant in the 19th century and the beginning of the 20th century. Moreover, just war theory was based on “highly important documents in positive international law, namely the Peace Treaty of Versailles, the Covenant of the League of Nations, and the Kellogg Pact.” This was a principle that had been implemented as statutory law. The Kellogg-Briand Pact forbade war. However, it only forbade “war as a means of national policy” and did not “forbid war as a means of international policy.” In other words, “war is not forbidden as a reaction against a violation of international law, an instrument for the maintenance and realization of international law. This is exactly the idea of the *bellum justum* theory.”

This understanding of Kelsen is closely related to his legal thought and stance on international law. For him, a law without a sanction by the use of force is not a law. Therefore, it is not natural law, but can be seen as international law because there is the opportunity for sanction. For Kelsen, general international law grounded on the principle of “self-relief” was understood in the similar manner as primitive legal order, which is characterized by the system of “vendettas”. This primitive law distinguishes between killing by illegal conduct and killing as a sanction. Killing as a measure of sanction of an illegal conduct was just. In a society where public power was not yet established, the legal order of the time could only be maintained by the just vendetta by the victim’s side. Just war is also understood in this context.

“Should we, however, contrary to the theory of “just war”, refuse to regard war as in principle forbidden and permitted only as a reaction against a delict, we would no longer be in a position to conceive general international law as an order turning the employment of force

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<sup>23</sup> Hans Kelsen, *General Theory of Law and State*, New York, 1961, pp. 332-3.

<sup>24</sup> Hans Kelsen, *Law and Peace*, p. 35. Also refer to Taira Nishi, “Senseo Gainen no Tenkan to ha Nanika: 20 seiki no Oushu Kokusaiho Rironka tachino Senso to Heiwa no Ho” (The transition of the concept of war: law on war and peace by international legal theorist in Europe in the 20th Century) in *Kokusaiho Gaiko Zasshi* (Journal on International Law and Diplomacy) (104-4, 2006) p. 68 and on.

into a monopoly of the community. Under these circumstances, general international law could no longer be considered as a legal order. If the unlimited interference in the sphere of another's interests called "war" is not, in principle, forbidden by international law, and if any State is at liberty to resort to war against any other State, then international law fails to protect the sphere of interests of the States subjected to its order; the States have no protected sphere of interests at all, and the condition of affairs created by so-called international law cannot be a legal state."<sup>25</sup>

Kelsen insisted that whether international law could be considered as real law would depend on the interpretation of international law in the context of the just war theory. In other words, it would depend on whether international law could exist based on the premise that war can be permitted as a sanction or measure against illegal conduct but prohibited under any other circumstances.

#### IV. *Arguments against the New Just War Theory: Carl Schmitt*

##### **President Wilson's Address to Congress**

Kelsen's argument is a theory that coherently expresses the new era of international law or the ideal form of international law. For Kelsen, international peace also meant international justice, and there exists no contradiction between peace and justice. What is important is international peace as one legal order, and effective sanction, or the lawful accomplishment of self-defense against an aggression which violates this order. This lawful sanction was just war. Just war theory was placed in relation to contradicting war, and sanction against the violation of international law, that is, the position of understanding war as "a measure to maintain and realize international law" served the demands of the time to maintain peace through the establishment of international organizations and a treaty for the renunciation of war.

However, for Kelsen and Quincy Wright, who strove to establish a new perspective on international law in the American International Law Society, the legal theory is quite idealistic, as it restricts the use of military force for self-defense to maintain international peace. The theory is a build up of norms on top of norms, and disregards the gray area. Therefore, the theory itself was subject to criticisms from the perspective of "reality" in the American International Law Society. However, the realpolitik in the U.S., as well as the president and high ranking officials, all supported this idealistic thought on international law. It cannot be denied that this position was carried into the Tokyo War Crime Tribunals and Nuremberg Trials. Moreover, Kelsen and Wright both had in mind the U.S. and Britain as the leaders of the new perspective on international law. What is peculiar is that this idealistic theory and the realpolitik of the U.S. were somehow strongly united, which was evident in the declaration by Robert Jackson. Was American diplomacy truly so idealistic?

It is not easy to determine possible answers to this question. However, this is a crucial point when considering the new just war theory, therefore, leaving the conclusion aside, let us consider this point for the time being. Hints can be obtained from President Wilson. President Wilson's moral diplomacy was idealistic and can be regarded as being grounded on the progress of humankind. Vollenhoven also praised Wilson's intervention in the war in Europe

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<sup>25</sup> Opt. cit., Kelsen, p. 340.

(First World War) and referred to it as a high duty that demonstrates the ideals of Grotius.

What Vollenhoven praised was Wilson's address to the Joint Session of Congress. In the speech, he stipulated that the indiscriminate attack by the German submarine was "a warfare against mankind" and strongly criticized this attack. What Wilson emphasized in his speech was the concept of "mankind". According to the president, the declaration of war against Germany is neither "revenge" nor "the victorious assertion of the physical might of the nation". It is rather the claim of the "vindication of right, of human right" that every human being possesses. The U.S. is not going to fight for the U.S. She is going to fight for "democracy" and "world peace". Wilson went on further and stated that:

We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them.<sup>26</sup>

By champion, Wilson was referring to a warrior (champion) of medieval Europe who would fight to defend the honor of a weak party, such as women, in a duel. Perhaps Wilson was equating the U.S. to those champions. In any case, Wilson's speech overturned the perception that the war was for the national interest of individual states. This claim to be fighting for peace, rights and human rights was striking.

### **"Concept of discriminate war" and the Revival of the Just War Theory**

What Wilson targeted was not a battle for national interest, but for peace and rights, and for the justice of the international community. The type of war stressed by Wilson seems to differ from the traditional war that emphasizes the *raison d'état*. Vollenhoven supported Wilson based on this understanding. However, even though the historical evaluation may be the same, there were those who opposed this concept of war. The most famous theorist who opposed was Carl Schmitt.

Carl Schmitt was a famous professor in public law during the Weimar Republic in Germany. He was also a prestigious legal philosopher. Moreover, he wrote many works in the field of international law. Among his famous works is *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, published after the Second World War, and in which he criticized the new order with the U.S. at its center. However, he had published many articles related to international law that were grounded on this claim in the 1920s, 30s and 40s, which demonstrated a prominent perspective through consideration of the transformation of international law in relation to the hegemony of the U.S.

Among these articles there is a piece of work in which Schmitt refers to Wilson's speech, titled "Transformation into the Concept of Discriminate War" (1937-38). According to Schmitt's understanding, at the address in which he announced U.S. entrance into the war on April 2nd, 1917, Wilson renounced traditional, indiscriminate war and the concept of neutrality for the freedom of the world and various nations, and sought for the beginning of a new era of international law; moreover, he also demanded for the determination of whether

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<sup>26</sup> Woodrow Wilson, *Address to a Joint Session of Congress: "We Must Accept War"* April 2, 1917. H. S. Commager, *Documents of American History* 6, New York, 1963, p. 131.

a war conducted by a certain party was just or unjust to be based on this international law. This was in fact discriminate war and also the theory of just war.

According to Schmitt, what is important is the “concept of war” and the “entire structure of the international legal order”. All attempts at the reform of international law after the First World War concerned this issue. From the perspective of the history of international law, the definition of aggression and aggressor, and the effort for the enforcement and execution of Article 16 of the Covenant of the League of Nations, were all efforts to omit the traditional indiscriminate concept of war through the legal criteria of just war. However, what was born of this was anarchy and chaos in international law. Schmitt states that the institutionalization and the embodiment of the decision of a “just or unjust war” is a “mistake”. He goes on further to state that it is not something that we are “better off with than without”. It was something we are better off without. Besides, the system of the League of Nations and the universalistic thought on international law may cause a total war in the name of just war.<sup>27</sup>

### The Global Dividing Line

Schmitt recognized that the transformation of international society and international law in the 20th century had started and that this transformation was inevitable. The problem was whether this transformation would be led by the League of Nations and the idea of a universalistic international community. Schmitt was quite skeptical about this, because it contained the following two problems. One is that because a war fought according to just war theory is based on morality, there is a danger that such a war may turn into a war of annihilation, which would result in a massive and atrocious war. The other problem is the issue of whether the universality of universal international law implies U.S. control worldwide. If so, then the just war theory as espoused by the U.S. is not an expression of idealism but rather a pretext for the U.S. control over the world. This, on the contrary, would be dangerous to world peace.

Schmitt wrote about this perception on a larger scale in his work titled “Transformation of International Law” (1943). In this work, similar to the core elements of the book *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, published after the Second World War, Schmitt begins by examining the history of international law. The theme of the article concerns the discovery of the New World and the creation of international law. The first period of this consideration begins with the voyage of Columbus. After the discovery of America, Spain and Portugal gained a global perspective, and from this perspective created the “world division line”. The first example is the Inter Caetera of Pope Alexander IV. The Tordesillas Treaty between Portugal and Spain that followed determined the monopolistic control and trade areas on a global scale. Schmitt terms this as “*raya*” (line) in Spanish. The *raya* was the dividing line that marked the partition.

What appears next is the British type Amity Line. The Amity Line was drawn through the Atlantic and clearly divided their side and our side. On their side, free trade and battles for the

<sup>27</sup> Carl Schmitt, *Wendung zum diskriminierenden Kriegsbegriff*, in: Ders., *Ibid.* S. 518ff. Refer to Takeshi Gonza, “20 seiki ni okeru Seisenron no Tenkai wo Kangaeru: Carl Schmitt kara Habermas made” (Consideration on the Development of Just War Theory in the 20th Century: From Carl Schmitt to Habermas) in Susumu Yamauchi ed., “*Tadashii Senso*” to *iu Shiso* (Thoughts of “Justifiable War”) (Keiso Shobo, 2006) p. 175 and on regarding the Carl Schmitt’s criticism on just war. Moreover, opt. cit. work by Nishi also interprets Schmitt’s theory from an original perspective, and both works are extremely useful.

expansion of territory were conducted, while on our side peace and law were carefully maintained through a balance of power among the great powers in Europe. On the other side of the line there was war, and on this side of the line there was the rule of law. The only legal principle that existed in the war in America was effective occupation. Protection by law was given only to those who maintained occupation through war.

The concept of the Amity Line is unique, however, many know about these two lines in general. However, Schmitt masterfully demonstrated a third global line which is called the "American Demarcation Line of the Western Hemisphere." This was a line drawn by the Americans for their own interest, drawn after the period of the Amity Line. It may be helpful to remember the Monroe Doctrine. President Monroe referred to America as "this continent" or "this hemisphere". It was said that the distinction of America as a nation of the Western Hemisphere implied that, in contradistinction to the old world of Europe, the New World of the Western Hemisphere was a land of political liberty and democracy.

The American Demarcation Line of the Western Hemisphere was a line for self-defense that denied the aggression of Old Europe against America. However, this does not mean that America cut itself away from European civilization or international law. Neither was it anti-European. On the contrary, it was a way for America to avoid relations with the dirty Old Europe, and to create a true Europe in their land. In this sense, this line was a "line of self-isolation".

Schmitt continued on to state that America was a country of Calvinism and Puritanism. Of course, there existed an America that had no relation to these. "However, the secularization of this Puritan spirit defines the attitude of international Pan-Americanism."<sup>28</sup> An isolationist foreign policy was inevitable for the U.S. That is to say, the Western Hemisphere of America was recognized as a "new world not contaminated by the corruption of the Old World." In Europe, there was the potential for anyone to turn into a murderer or violator of the law, however, in America "the distinction between good and evil, law and the lawless, proper person and criminal" was maintained.

### **From Isolation to Intervention**

The U.S. was religious as well as moralistic. Schmitt stated that what the U.S. targeted was a "true form of the West" or a "true form of Europe". What the U.S. intended to do was to take over the position of Europe in the spectrum of world history and place itself in that position. What this meant was that within the line of isolation, based on their moralistic evaluation, the U.S. would divide the world into zones of good and bad, and become a virtuous leader. However, the rest of the world would tolerate this, because the U.S. would keep itself within the line of isolation.

However, Schmitt considered that this isolation line had changed. This line was either to distinguish the corrupt Europe and itself, or be the boundary of good and bad. However, in the late 19th century, the U.S. moved in a direction to transform the nature of this line to a line of discrimination. From this point, the U.S. was not an isolated country, but one who proclaimed and judged what was good.

According to Schmitt's understanding, the U.S. started to gear toward intervention from the state of isolation due to the disappearance of a frontier inside the U.S. After proceeding

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<sup>28</sup> Carl Schmitt, *Strukturwandel des Internationalen Rechts*, *Ibid.*, S. 660.

and advancing to the West, the U.S. had to inevitably gear their energy toward the line of the Western Hemisphere. When the line for isolation was not necessary for isolation anymore, the U.S., a country of Protestantism, changed this line into a line of good and evil, and adopted a mission to protect and proclaim what was good.

In the first part of the 20th century, the U.S. had hovered between isolationism and interventionism. At the presidential level, the policy swayed during the term of the presidency. Both Wilson and Franklin Roosevelt initially supported isolation, but later moved toward intervention. However, the isolation line in the end disappeared. The policy of neutrality, the symbol of isolation, was abandoned, and interventionism won based on the idea of the boundary line between good and evil. The world was differentiated, and enemies were considered as morally evil and as criminals. This is the idea of the just war theory.

However, Schmitt stated that this concept of just war differed from that of the just war theory in medieval times. Just war in the 20th century does not consider war as a one on one relation, but rather that of eliminating enemies on a global level, namely, the elimination of "criminals that commit a conduct in opposition to the entire world" as "absolute obstacles to world peace."<sup>29</sup> Just war became a war between the just world and unjust criminals, irrespective of whether the parties were just or unjust. According to Wilson's approach, war is a conflict between a state executing just war against criminal groups, not conflicts or military disputes between individual states. The enemy is not an equal but an enemy of humankind and is morally inferior. Because they are enemies of humankind, massive killing and indiscriminate bombing against the people living in the cities of the enemy state(s) can be permissible. Neutrality is not an option because the world must take sides with the side that is just. Just war is a war that involves the entire world and is fought on a global scale.

Schmitt illustrated the relation between interventionism and just war theory or with universalistic international law in terms of U.S. international relations. Schmitt also stated that consequently, the just wars in which the U.S. participates will inevitably become wars on a global scale.

This analysis by Schmitt provides implications concerning the problems of the new just war theory in the 20th century. Firstly, it questions whether the U.S., the advocator of self-defense and enforcer of sanction, acts only in terms of its religious or moral interventionism founded on its unique history and culture. It also questions whether the dualism of morality and good and evil creates bigger and more atrocious wars. If the new just war theory in the 20th century is closely connected to the U.S., then in reality although it is founded on universalism, the theory itself may be quite particular.

The U.S. that fought with Japan and Germany, U.S. at the Nuremburg Trials and Tokyo War Crime Tribunals had grounded itself on the theory of just war. They spoke of the universalism of the fight for the security and peace of humankind and the international community. However, Schmitt demonstrated his fear toward the unity of the theory of just war and American moralistic interventionism. It will not bring about peace, but on the contrary may be more dangerous. Schmitt stated that the speech by President Wilson was not idealism for peace, and illustrated his fear of the transition to moralistic intervention and the globalization of war between the good and the bad.

This argument regarding the U.S. by Schmitt is quite interesting, and one can detect the

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<sup>29</sup> *Ibid.*, S. 664

underflow of the idea of “crusade” and idea of “empire” that was carried over from medieval Europe.<sup>30</sup> The self-perception of being the “empire of liberty” (Thomas Jefferson) also existed in the U.S. It is safe to say that the idea of fighting against the evil and establishing the good is evident here. This is linked to the moralistic intervention of the U.S. referred to by Schmitt. That is not to say that these elements always control the U.S. in a one dimensional manner, however, it is too optimistic to say that such idealistic concepts and ideas may arise purely from the perspective of pacifism.

## V. *Possibility for a New Just War Theory in the 21st Century?*

### **Just War or Lawful War**

The new just war theory that was reborn in the first half of the 20th century distinguished between aggression and defense, and established this as the standard for judgment. Aggression and attack are not always synonymous, and there are cases where these two terms do contain elements of morality, however, what was considered more important was the aspect of measures against the violation of peace, rather than the question of whether the cause was just. War and military conflict were understood as a problem not only for the parties concerned, but as a problem for the entire international community. Punitive war against the aggressor state was understood not as revenge, but as a form of police conduct. If we consider that medieval just war theory concerns the military conflict between the parties concerned, then this new theory on just war is certainly a progress; the theories of Kelsen are the typical form of this.

The aim of the new just war can be understood in theory. It is within reason when considering the emphasis on international peace and permitting sanction only then this peace is violated. However, the objective realization is quite difficult. Since the new just war theory is extremely moralistic, there is the potential for war to expand into a bigger scale, to become worldwide, and more violent. On the contrary, in order to maintain international peace, it is more effective to build functions for the deterrence of war between sovereign states than to build functions for international punitive war. This is what Schmitt demonstrated, and it is quite persuasive.

However, even though sovereign states still maintain power, it is impossible to imagine that there would be no intervention in contemporary international society, under the premise of humankind or human rights. To entrust everything to the will and the judgment on the commencement, execution and ending of the war to the sovereign state and to expect the balance of power to function for the maintenance or recovery of peace is similar to living under the 19th century European anachronism. The cooperation, agreement and joint execution of the international community is significant and can be extremely effective.

However, if we focus on the communal characteristics of international society, and if we discuss what is lawful in relation to international organizations, such as the League of Nations or United Nations, or the principle of international law, then it is not necessary to use the term just war in the exercise of international military force that is deemed legitimate. The concept of just war is a European and Christian concept, and does not correspond to the international society of the 21st century where there is respect for various civilizations and cultures. If we

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<sup>30</sup> Refer to Susumu Yamauchi, *Jujigun no Shiso* (Ideas of Crusades) (Chikuma Shobo, 2003).

were to adopt a concept, it is sufficient to adopt the concept of “lawful war”, which is less known, and does not follow in line with a particular history or culture.<sup>31</sup> Moreover, from the perspective of just war theory, intervention will immediately take the form of military action, however, various forms of intervention to the state by the international society are possible, and one cannot ignore this diversity. The sanction stressed by Kelsen is not by military force but refers to various methods based on the cooperation of the international society. One must not forget this point when discussing just war.

### Just War Theory in the 21st Century

However, in recent times, especially in the U.S., it is becoming common to call a war to protect and promote the good, such as positive values, freedom and human rights, a just war. Perhaps the term just war is convenient to use when emphasizing justice as a collective concept of a particular value. Of course, even in this case, the basic framework between aggression and defense is still maintained, however, the concept of self-defense is quite broad and reference is made not only to punishment but to pre-emptive attack (pre-emptive defense) as self-defense, such as in the works of Walzer.<sup>32</sup> This can be considered as self-defense, however, it seems as though it fits into the framework of the new just war theory in the 20th century. However, at this point in time, there is the possibility that U.S. moralistic intervention and theory of just war may unite, superseding the range of self-defense.

The new just war theory preserved the union of American interventionism and happiness. Ordinarily, the two are completely separate things. However, at least in the first half of the 20th century, the enemies of the U.S. were totalitarian and nationalistic states that denied liberty and human rights. In order to fight against such enemies, the U.S. became the champion of the international community. This action fits the claims by progressive theorists of international law. New theories on international law emphasized just war and the lawfulness of the International Military Tribunal, and the connection between the two was comparatively natural.

However, from the last half of the 20th century to the beginning of the 21st century, we have witnessed more American interventionism, and it seems as though it may exceed the framework of the just war theory of the 20th century. The reason why Walzer’s just war theory was able to function as a criticism toward the Vietnam War was because the theory still remained as a deterrent rooted in self-defense. This is where American interventionism and just war theory can be separated.

However, American interventionism has been reinforced and realized in the 21st century. The content of the just war theory in the 21st century may change greatly depending on whether we deter or affirm this. In any case, just war theory is a concept that permits war under certain conditions. If we make the conditions stricter, then the restrictions will be strengthened and war may be deterred, while if we ease the conditions, then the restrictions

<sup>31</sup> Refer to Tetsuo Sato “Kokusaiho kara mita ‘Tadashii Senso’ to ha nanika: Senso Kisei no Kouryoku to Genkai” (What is Just War in terms of International Law: Regulations on War and the Effectiveness and its Limits) in Susumu Yamauchi ed. “*Tadashii Senso*” to iu *Shiso* (Thoughts of “Just War”) p. 233 and on. Regarding this issue, refer to Wakamizu Tsutsuki, *Iho no Senso, Gohou no Senso: Kokusaiho de ha dou kangaeu ka?* (Unlawful War and Lawful War: in terms of International Law) (Mainichi Shimbun, 2005).

<sup>32</sup> Seijiro Sakaguchi, “Just War in Recent U.S.” opt. cit. “*Tadashii Senso*” to iu *Shiso* (Thoughts of “Justifiable War”) p. 218 and on.

will also weaken and war may be promoted.

The distinction between aggression and self-defense is one accomplishment of the just war theory in the effort to deter war. However, with the current emphasis on the concept of self-defense, the range of permissible types of war will expand, and therefore previous accomplishments are faltering before the “self-defense revolution”.<sup>33</sup> How should the accomplishments of the new just war theory in the 20th century be put into force in the 21st century? This is the difficult task that is facing us today.

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<sup>33</sup> Stephen C. Neff, *War and The Law of Nations: A General History*, Cambridge, 2005, p. 314 ff. Neff recognized the expansion of the tendency for just war theory after 1945, but claims that there are the phenomena of “self-defense revolution” and “humanitarian revolution”. Self-defense revolution signifies that the concept “self-defense” is being applied in a wider context. Moreover, “humanitarian revolution” emphasizes the law on warfare to minimize the damages to the people of the state who are the subject of the attack. In the latter, the just side must also follow the laws on warfare. This is related to the focus being placed on the methods of just execution of war rather than the just cause in the just war theory of the latter half of the 20th century. However, this problem is deeply related to the laws of warfare, therefore, instead of discussing along the lines of what is just or unjust, it may be more appropriate to discuss what is lawful and unlawful. Neff uses the word new just war theory to refer to the just war theory in terms of the institutionalization of the theory in the U.N. Also, refer to Richard Norman, *War, Humanitarian Intervention and Human Rights*, Richard Sorabij and David Rodin (ed.) concerning humanitarian intervention in relation to the recent trend on the expansion of the freedom to justify war.