

Rafael Fulgosius
(1367 – 1427)
In primam Pandectarum partem Commentaria, ad Dig., 1, 1, 5¹

But since belligerents happen to acquire property and make slaves on both sides – as shown below in [The Justinian’s Digests], – how is it that the one who wages an unjust war acquires the ownership of the things he captures through his unjust action? I respond that, as it was uncertain which side waged war rightfully, and as there was no common judge above the parties by whom this could be ascertained in terms of civil law, the nations with the best of reasons decided that war would be the judge in this matter; i.e. that whatever would be captured in war or through war should become the property of the capturing party, as if it had been adjudicated by a judge; see *Institutes* [4, 17, §7], and this of Lucan: “Let war be the judge.” And again: “To him who is armed, one yields all if one refuses his due.” For victory in war comes about as it were by the judgment of God, because God is a righteous and just judge of all, as Lucan likewise testifies: “The victorious cause pleased the gods.” [...]

For the war which we are discussing took place only between independent nations and kings, as in the said law *Postliminii*.² And this is how one ought to temper what John [the Teutonic] noted with respect to the canon *Ius gentium*, in the first distinction of [Gratian’s] *Decretum*: in public war no distinction should be made as to which side wages an unjust war in order to deny it the acquisition of persons and things taken from the opposite side. For how can it be known, and who is to be the judge in this matter, deciding that one side wages a just war, the other an unjust war... . Nothing more should therefore be asked than whether the war was just, that is, public, and whether it was declared by someone who could do so, that is, an independent nation or an independent king. And so is also to be understood the gloss to the said canon *Ius gentium*. [...]

For my part I hold that the war which is spoken of here, from which flow captivity and postliminy, is that sort only which is declared between independent nations or kings, [...], without any inquiry into the cause for which the war was begun, nor about whose cause is just.

Balthazar Ayala
(1548–1584)
De jure et officiis bellicis et disciplina militari (Book I, Chap. II)

Cicero lays it down that in a well-ordered State the laws of war should be scrupulously observed. Alike in beginning a war and in carrying it on and in ending it, law has a most important position and so has good-faith. The rules of fecial law, to which we have just alluded, aim at securing this. [...] [T]he use of force against those who will not submit to what is fair

¹ HERMOGENIAN (*Dig., 1.1.5*): As a consequence of this *jus gentium*, wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring.

² Tzv. postliminium (*ius postliminii*) označovalo v římském právu právní fikci, že osoba nebo věc, která se po pobytu v cizině nebo v moci nepřítelů vrátí zpět na území římské moci, získává zpět své dřívější právní postavení, jako by nikdy nebyla ztracena. V kontextu války to např. znamená, že věc (kořist) zabavená nepřitelem a znovu získaná se vrací původnímu vlastníkov. Toto pravidlo se uplatňovalo i v tradičním mezinárodním právu.

nor be restrained by reason is not unjust. Nevertheless, a general, like a surgeon (it was a saying of Scipio's) ought to use steel only in the last resort for effecting his cures.

War, therefore, is justifiable when its object is to procure peaceful existence and freedom from outrage, and when begun in such a way as that peace may appear to be its sole object. [...] [A]n honorable war, according to the saying of Demosthenes, is ever to be preferred to a disgraceful peace.

Just wars are, indeed, enjoined by the Law of Nations (*jus gentium*), and are permitted both by the canon law and by the law of God [...]. Now in order that a war may be styled just, it ought in the first place to be declared and undertaken under the authority and warrant of a sovereign prince, in whose hands is the arbitrament of peace and war. For a private person has no business to begin a war, seeing that he can, and ought to, assert his right in the courts; and it is a breach of the prince's prerogative for a private person, unwarranted by law, to assert his right himself with royal hand. [...]

[W]ar may not be made save for just and necessary cause, and there should be an entire absence of the passion to do hurt and of vengeful savagery and of the lust of conquest. It was the securing of this that was the object of the rules prevailing among the Romans under their feacial law. Now he who makes war for an unjust cause not only sins, but the opinion is widely spread among men that he is nearly always beaten. [...]

Now the principal just causes of war are: the defense of our own empire, of our persons, of our friends, of our allies and of our property; for no other warrant than the law of nature is needed to justify even private persons in defending themselves. A war, therefore, as Caius Pontius, the Samnite general, used to say, is a just one for those to whom it is necessary, and recourse to arms is a duty for those who have no hope left save in arms. A war is based on a just cause, again, when it is waged in order to regain from the enemy something which he is forcibly and unjustly detaining, in the same way as the authors of a wrong or harm done with private and not public intent are handed over to punishment: we have shown above that this is provided for by the feacial law.

Another just cause of war is to take vengeance for some wrong which has been unjustifiably inflicted. Thus we read that King David made war on the king of the children of Ammon for his contemptuous treatment of David's messengers. And on the same ground of a wrong done, a war will be ranked as just which arises on a State's refusal to allow passage over its territory, provided such passage is innocent; by the law of human society such passage ought to be open.

And then a prince has a most just cause of war when he is directing his arms against rebels and subjects who abjure his sovereignty; for it is a heinous offense, against both God and the prince, for subjects to resist his authority [...]. Rebels ought not to be classed as enemies [*hostes*], the two being quite distinct, and so it is more correct to term the armed contention with rebel subjects execution of legal process, or prosecution, and not war. There is, therefore, no need of the authority of the prince; the authority of a local magistrate will suffice.

[T]he laws of war will only apply in a war waged by the authority and in the name of the prince; for it can not otherwise be called war.

From the foregoing it may be gathered that our remarks so far about just causes of war deal rather with considerations of fairness and goodness and propriety, and not with the character of the legal result which is produced. Now, seeing that the right to make war is a prerogative of princes who have no superiors, discussion of the equity of the cause is inappropriate.

A war may in one sense be styled just and yet not be waged for just cause; for the word “just” has varying meanings (as Budaeus has remarked) and does not always indicate justice and equity but sometimes signifies a certain legal completeness. It is in this latter sense that we use the word “just” in connection with marriage and matrimony [...]. And Livy speaks of a just battle, using the word in the same sense: and it is in a like manner that the phrase “just war” is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war.

We accordingly read in Ulpian: “Enemies are those on whom the Roman people has publicly declared war or who have publicly declared war on the Roman people, but others are termed brigands or robbers. And Pomponius says, “The term ‘enemies’ implies that they have publicly declared war on us or we on them; all others are thieves or robbers.” In such a war, even though it be not begun with just cause, the laws of war and captivity and postliminy, such as are appropriate in the case of enemies, are called into operation. This is abundantly evidenced by the fact that, though the Romans never began war save on just, yet their enemies, who could not have just cause (for both sides could not have it), became owners, even by Roman law, of the property which they captured in such a war and reduced captured persons into slavery; and that held good even where the enemy’s case was palpably unjust.

Nothing more is needed, then, so far as concerns the legal effects which are produced and the bringing into operation of the laws of war, than that the war should be waged by parties who are within the definition of “enemies” and who have the right to wage war. And, on this way of looking at the matter, it seems possible to defend the opinion of Alciatus and of Fulgosius, namely, that there can be a just war on both sides. This is contrary to the opinion which is accepted by experts and which, if it be just cause of war that is adverted to, is highly reasonable, seeing that, enemies being in conflict with each other, their rights must be in conflict too, and one and the same cause of war can not be just both for this side and for that.

Otázky k textu:

1. Z jakých důvodů se Fulgosius domnívá, že válka může být spravedlivá, i když není vedena ze spravedlivého důvodu? Pokuste se v tomto smyslu stručně rekonstruovat Fulgosiovu argumentaci.
2. Jaké nové úvahy, postoje či argumenty – v porovnání s Augustinem – vnáší do diskuze o spravedlivé válce Ayala? Identifikujte dva až tři body, které považujete za zásadní, a pokuste se krátce zdůvodnit, proč je za zásadní považujete.