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The Jus in Bello in Historical and Philosophical Perspective

Nicholas Rengger

The traditional distinction that is often held to define the just war tradition – between *jus ad bellum* (justice of war) and *jus in bello* (justice in war) – is, of course, a very familiar one to us today. It is as well to remember, therefore, that in fact, it has a history and that the history it has is by no means devoid of general philosophical interest. My chief task in this chapter is to look at the history and emergence of the *jus in bello* and I shall get onto that task shortly. But I want to dwell for a moment on that "general philosophical interest" that I take the history to have, since I shall want to return to it towards the end of this chapter.

I have elsewhere argued[1] that among the more[2] important aspects of the recent development of the tradition has been the move to a particular kind of jurisprudential logic for it, one that has partially replaced or overlaid the earlier casuistic form that the tradition took in its medieval and Scholastic heyday and that included a rather different form of jurisprudential reasoning. Without repeating that argument in detail here, let

[1] See Nicholas Rengger "On the Just War Tradition in the Twenty First Century," *International Affairs* 78, no. 2 (April 2002): 353–63, and "The Judgment of War: On the Idea of Legitimate Force in World Politics," *The Review of International Studies*, special issue December 2005. Of course other scholars have noted this as well, as I pointed out in both those articles. See, especially, Geoffery Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994) and James Turner Johnson, *Ideology Reason and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton, NJ: Princeton University Press, 1975).

[2] I am grateful to Larry May for inviting me to contribute to this project, for some very helpful conversations in the Interstices of the 2006 meeting of the St Andrews "Rethinking the Rules" project, and for general (though rapidly diminishing) forbearance over my rather relaxed attitude towards deadlines. I would also like to thank Chris Brown, Bob Dyson, Caroline Kennedy-Pipe, Tony Lang, and Steven P. Lee for discussions about the just war tradition from which I always learn.

me just suggest that among the reasons for this shift is the dominance of the *jus in bello* in the literature of the just war roughly from the early to the mid-seventeenth century onwards. This fact has not, perhaps been as much discussed as it really warrants: in Geoffery Best's very apt words, during the modern period "while the *jus ad bellum* withered on the bough, the *jus in bello* flourished like the Green Bay Tree."[2] In other words, the particular history of the *jus in bello* in the early modern – and then the later modern – periods has played a large role in shaping the just war tradition as a whole in the modern world. The significance of this in more general terms I shall return to later on but wanted merely for the moment to comment on the obvious implication that it is the *jus in bello*, and not, in fact, the *jus ad bellum* – in recent times much the more fully discussed part of the tradition – that has structured the inner logic of the tradition in the modern context.

This has a number of implications for the way we think about the tradition itself, for example, if we ask the obvious question as to what the tradition allows us to do. In the first place, the just war tradition cannot tell us – and is not designed to tell us – whether this or that particular instance of the use of force is "just" or not in the generality. To quote Oliver O'Donovan:

> It is very often supposed that just war theory undertakes *to validate or invalidate particular wars*. That would be an impossible undertaking. History knows of no just wars, as it knows of no just peoples. . . . One may justify or criticize acts of statesmen, acts of generals, acts of common soldiers or of civilians, provided one does so from the point of view of those who performed them. I.e., without moralistic hindsight; but wars as such, like most large scale historical phenomena, present only a question mark, a continual invitation to reflect further.[3]

What, then, *is* the tradition designed to do? We can grasp something of this, I think, if we reflect for a moment on one aspect of the tradition little considered by moderns: right intention. James Turner Johnson, in his account of the tradition, accepts that this aspect of it is "not explicitly addressed" in the modern just war, being subsumed under questions of just cause and right authority.[4] Yet in classic just war writing, from

[2] Best, *War and Law*, p. 20.

[3] O'Donovan, Oliver. *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), p. 15.

[4] Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), p. 30.

Augustine to the sixteenth century, right intention was most emphatically not so subsumed. Partly this was because it cut across the "dividing line" of *jus ad bellum* and *jus in bello*.[5] While part of the "right intention" discussion is meant to apply to rulers – they must not have the intention of territorial or personal aggrandizement, intimidation, or illegitimate coercion – part of it is also meant to apply to those who do the fighting: the enemy is not to be hated, there must be no desire to dominate or lust for vengeance, and soldiers must always be aware of the corruption that can flow from the *animus dominandi*.

The point here, of course, is that what the tradition – from Augustine onwards – insisted upon, and what right intention was meant to gesture towards, was the extension into the realm of war of the normal practices of moral judgment. Of course, classic just war thinkers – Augustine above all – also recognized that war was an extreme realm and so such an extension represents (in O'Donovan's formulation) "an *extraordinary extension* of ordinary acts of judgment"[6] but an extension of them all the same. This was why the two poles of the classic just war tradition were always authority on the one hand and judgment on the other, and why, when we come to think about judgment, the two central terms of reference were (as they are now known to us) discrimination and proportion. In the classic treatments of the tradition it is *these* distinctions that give rise to discussions about just cause, right authority, and right intent (for example) not the later tendency to divide questions about war into the *jus ad bellum* and the *jus in bello*. O'Donovan refers to this distinction as a "secondary . . . and not a load bearing"[7] distinction, which I think nicely captures how we should view it. It is a useful heuristic, no more. The problem, as we shall see, is that the modern revival of the tradition has elevated it to an architectonic. It is the implications of this that I want to examine in the concluding section of this chapter; for the moment, however, we need to turn to the emergence of the distinction itself and the evolution and significance of the *jus in bello*.[8]

[5] For an extremely powerful account of the views on war of the school of Salamanca in general and Vitoria in particular, see the introduction to Anthony Pagden and Jeremy Lawerence, ed., *Francisco de Vitoria: Political Writings* (Cambridge: Cambridge University Press, 1991). An extremely good account of the background can also be found in Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–1800* (New Haven, Ct.: Yale University Press, 1995).

[6] O'Donovan, *The Just War Revisited*, p. 14, emphasis added.

[7] O'Donovan, *The Just War Revisited*, p. 15.

[8] The preceding couple of paragraphs draw on Rengger, "The Judgment of War."

I. The Just War Tradition and the *Jus in Bello*

At this point we should perhaps introduce a further distinction. As a number of scholars have noted, normative attitudes on what it is permissible to do in war are features of virtually every culture and period. In European history, such constraints can certainly be traced back to classical antiquity, if not before. The Greek practice of war, for example, operated under a series of conventions that were, for the most part, adhered to and that, when violated, drew genuine opprobrium, and sometimes worse, on the heads of the violators. The ransom of prisoners, the possibility of burying the dead who had fallen on the battlefield, the honoring of certain sacred truces (such as those celebrating the Olympic Games): these were conventions that had the effective force of law, and when they were violated, the shock and anger were heartfelt, as Thucydides makes clear in his account of the Peloponnesian War.[9] Though it is perhaps worth adding that many of these restraints were meant to apply in general only in intra-Greek wars, they were not held to apply to wars with others (though some, perhaps including Plato, may have dissented from this view).[10] The Romans, by contrast, while they also had complex conventions concerning war – indeed, in Rome the whole process of going to war was heavily formalized – had few *in bello* constraints at hand once a war was itself deemed legitimate, and that led some medieval writers to invent a class or type of war – the *bellum Romanum*, a war without limits or restraints.[11]

The just war tradition itself, however, emerges out of the encounter of such general practices of war fighting and legitimation with specifically

[9] See Thucydides, *The Peloponnesian War*, trans. Thomas Hobbes, ed. David Grene (Chicago: University of Chicago Press, 1989).

[10] See, for a good introduction, Josiah Ober, "Classical Greek Times," in Michael Howard, George Andreopoulos, and Mark R Schulman, ed., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994). Plato's ambivalence to the traditional Greek "particularist" view of conventions in general, and war in particular, can perhaps be seen in a number of places in the Dialogues and Letters (notwithstanding the dubious authenticity of many of the latter), perhaps most clearly in the passage in the *Republic* where Socrates refers to the city built in speech as viable also for non-Greeks "beyond the limits of our vision" (though, of course, there is a question about how one interprets the specific sense of any remark in the Dialogues). It is also perhaps not entirely without significance that a number of the Hellenistic schools that were avowedly critical of traditional Greek civic morality – for example, the Cynics and the Epicureans – claimed Platonic licence for this view.

[11] A good discussion of how the Romans saw war in general is in F. E. Adcock, *Roman Political Ideas and Practice* (Ann Arbor: University of Michigan Press, 1964). See also the discussion in Bruno Coppieters and Nick Fotion, eds., *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002).

Christian concerns about the legitimacy of fighting at all.[12] And it is this encounter that gives the tradition its early logic, much of its power, and a good deal of the tensions that still exist within it and, in particular, creates the assumptions out of which the distinction between *jus ad bellum* and *jus in bello* grow. However, it is worth pointing out that the distinction does not appear at all in the work of those thinkers most associated with the early development of the tradition, Augustine of Hippo and Thomas Aquinas. Indeed, one of the most influential contemporary interpreters of the tradition today, James Turner Johnson, goes so far as to say that to all intents and purposes, "there is no just war doctrine, in the classic form as we know it today, in either Augustine or the theologians or canonists of the high Middle ages. This doctrine in its classic form, including both a *jus ad bellum*... and a *jus in bello*... does not exist before the end of the middle ages. Conservatively, it is incorrect to speak of classic just war doctrine existing before about 1500."[13]

Johnson's argument here is predicated on the claim that what joined to create what he terms "classic just war doctrine" were a religious (that is to say, theological and canonical) doctrine largely concerned with questions about the right to make war and a secular doctrine whose content was largely confined to discussions of the proper mode of fighting and that was derived from cultural constraints on violence, such as the knightly code and the civil law.

In this chapter I shall largely agree with Johnson that, understood as an identifiable part of the just war tradition and as a coherent body of thought, the *jus in bello* does not predate the sixteenth century. While I do think that there is much of interest that touches thinking about how war should be conducted in earlier writers (most especially, I think, Augustine), Johnson's argument has the merit of allowing us to concentrate on the key periods in the evolution of the *jus in bello*, roughly the early modern period (about 1500–1758) and what I shall call the period of —

[12] It is well known that early Christian communities were largely pacifist, influenced by a literal reading of the Sermon on the Mount and by a particular view of the character of Christian witness. It is this view that one finds held up as the legitimate way of thinking about war in many modern Christian pacifists, perhaps most notably John Howard Yoder and Stanley Hauerwas. See for a brilliant historical interpretation of the debates between early Christians on this topic Peter Brown, *The Rise of Western Christendom*, 2nd edition (Oxford: Blackwell, 2003). Yoder's account of the Christian basis of pacifism can be found in his *The Politics of Jesus* (Grand Rapids, Michigan: Eerdmans, 1972).

[13] See Johnson, *Ideology, Reason and the Limitation of War*, pp. 7–8.

international legalization (roughly 1800–1950). Let me say something about each period in turn.

A. *The Early Modern* Jus in Bello

Johnson's basic argument is that the modern *jus in bello* comes about largely through the rejection, initially by the Neo-Scholastics and after them by many others, of the key arguments developed in the late medieval period for a parallelism between the just war doctrine and holy war doctrine. In this respect, it is a critique of the familiar claim – made by, amongst others, Roland Bainton – that thinking about war in the medieval period and after can basically be divided into a tryptich: pacifist, just war, and holy war.[14] By contrast, Johnson's view (and mine) sees holy war doctrine in the late medieval and early modern periods as a version of just war, not as something separate from it – that is to say that for Johnson the language of holy war in the sixteenth and seventeenth centuries arises out of the same heritage of Christian thinking about war that generates what he refers to as modern just war thinking. The reason for this is straightforward enough. Holy war theorizing comes out of the medieval just war doctrine partly as a reaction to the political events of the late medieval and early modern periods, specifically the Reformation and Counter Reformation and the wars these movements engendered. As Johnson puts it, "Holy war doctrine and modern just war doctrine developed out of their common source during the same period of time – the approximately one hundred years of serious and virtually continuous warfare between Catholics and Protestants, the end of which might be put at the close of the thirty years war, but which in truth did not finally conclude until the Puritan revolution was fought in England."[15] The point, then, is that holy war theorizing is really about how and why God might require us to use force to pursue his ends; it is about war for religion.

This claim can be strengthened still further if we ponder the additional claim, found perhaps most persuasively in Quentin Skinner's *Foundations of Modern Political Thought*, that many humanist responses to war – such as Erasmus's celebrated *Querela Pacis* (*The Complaint of Peace*), to which Bainton alludes in his discussion of pacifism – were also in very large

[14] The mature statement of this view is to be found in Roland Bainton, *Christian Attitudes towards War and Peace* (Nashville, Tenn: Abingdon Press, 1960).

[15] See Johnson, *Ideology Reason and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton, NJ: Princeton University Press, 1975), p. 82.

part reactions to – and in some cases adaptations of – the medieval just war doctrine. As Skinner says, glossing Erasmus, "Christians often claim, [Erasmus] says, to be fighting a 'just and necessary war,' even when they turn their weapons 'against another people holding exactly the same creed and professing the same Christianity.' But it is not necessity and justice that make them go to war; it is 'anger, ambition and folly' that supply 'the compulsory force.' If they were truly Christian, they would instead perceive that 'there is scarcely any peace so unjust that it is not preferable, upon the whole to the justest war. For Peace is 'the most excellent of all things' and if we wish to 'prove ourselves to be sincere followers of Christ' we must embrace Peace at all times."[16]

We can agree, then, that rather than there being three separate doctrines justifying war we have at most two and even pacifism is strongly dependent upon the way that the just war is understood. That takes us to the real origins of the manner in which we have come to understand the *jus in bello* in the modern period. The wellspring from which all else flows in this context is simple enough in outline; it is the school of Salamanca. To be sure, there are also influential voices in England (especially) and the Netherlands who shaped this particular climate of opinion – Johnson, for example, mentions especially Mathew Sutcliffe, William Fulbecke, and William Ames – but the essential logic – which is what is central for us here – was provided by the school of Salamanca, and by two members of the school in particular, Francisco de Vitoria and Francisco Suarez.

Before turning to the specific arguments relevant to our concerns here, let me say something about the school itself. Salamanca was one of the most important and prestigious universities in Catholic Europe, and its most important chair of theology was held by Vitoria for 20 years until his death in 1546. His lectures, on a wide variety of subjects, became central to the revival of Scholastic and Thomistic philosophy both in his own day and for several centuries afterwards. He is generally regarded as the founder of the school, broadly Neo-Scholastic and Neo-Thomist in general philosophical and theological orientation, and sharing with Aquinas and with many of his own successors membership in the Dominican order. The school went on to boast a distinguished roster of theologians, including Vitoria's two immediate successors in the Pontifical Chair of Theology, Melchor Cano and Ferdinand de Soto; his supporter and representative of the school in their debate with the Spanish Crown at the

[16] Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 1. *The Renaissance* (Cambridge: Cambridge University Press, 1978), p. 246.

famous Valladolid debates in 1550, Bartoleme de Las Casas; and perhaps his greatest philosophical descendant, Suarez.

Vitoria lectured many times on topics connected with war, including on conquest and the laws of war.[17] But the issues that occasioned his most influential reflections on the topic were all connected with the Spanish conquest of America and its treatment of the native inhabitants, and his two most influential *relectiones*, *On the Indians* and *On the Laws of War*, both delivered in 1539, came about through his reflections on it.

Vitoria showed the direction his recasting of the just war was to take quite unambiguously in *De Indis* (more properly *De Indis et de Jure Belli Relectiones*).[18] Vitoria is straightforward: "Difference of religion," he says, "is not a cause of just war"; the only justification for war is wrong received, and the only way of identifying wrong received and therefore whether a war is just or not is through the application of the natural law, common to all, Christian and non-Christian alike. It was this claim that led him to state, controversially in his own day (to say the least), that the Spanish Crown was not justified in using force against the non-Christian inhabitants of its new world colonies in order to deprive them of their property. This basic argument was supported and then developed by Suarez, and it is important to see that while the basic position is predicated on traditional questions of what becomes (during the process of this elaboration) what we now call the *jus ad bellum*, it, in fact, begins to create that part of the tradition we call the *jus in bello* as well.

The pivot on which this evolution hinges is what Johnson calls the problem of simultaneous ostensible justice. The traditional view, in earlier just war thinkers and still in much of the secondary literature, both historical and philosophical, is that it is plainly incoherent to talk of a war's being "just on both sides." Aquinas, for example, is usually read as insisting that a just war is one fought in response to some fault, a view we have seen Vitoria agreeing with. Yet if this *is* the case, then clearly there cannot be

[17] The best contemporary collection of Vitoria's writings relevant to our concerns is Anthony Pagden and Jeremy Lawrence, eds., *Vitoria's Political Writings* (Cambridge: Cambridge University Press, 1991).

[18] Vitoria, as was the custom of the day at Salamanca, has left us with two collections of texts: lectures on Aquinas's *Summa Theologiae* and the *Sentences* of Peter Lombard, on both of which he lectured every year at Salamanca, during his 20-year tenure of the chair, and a set of "Relectiones" – literally "Re-Readings" – delivered on more formal occasions and as commentaries of particular passages or problems in a text. *De Indis* was initially delivered as a relection at Salamanca in 1539, after a period of growing concern on Vitoria's part with both the practice and the justification of the actions of the Spanish Crown in its new world colonies.

justice on both sides, and, indeed, this is the traditional view: "In the case of each of the prospective belligerent's having a claim on something in dispute, there must be no war, and if one occurs, it is not just but unjust on both sides at once."[19]

But the position in Vitoria in particular is far more complex than this. He suggests that the possibility of justice on both sides presents us with an ethical *dilemma*: "If each side is just, neither side may kill anyone from the other and therefore such a war both may and may not be fought."[20] One reading of Vitoria on this topic suggests that he counsels (as many later Catholic thinkers, for example, Jacques Maritain, have also done) arbitration in these contexts. But he also suggests that one has to make a distinction between *genuine* just cause and *believed* just cause, or what he calls, in a key passage in *De Indis*, "invincible ignorance." The relevant passage is as follows:

> There is no inconsistency . . . in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance. . . . The rights of war which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and the ignorant.[21]

The point about this is that, as William Fulbecke makes clear,[22] it behooves people fighting a war to assume that those opposing them are guilty of ignorance rather than genuine malfeasance; in other words, it emphasizes – and this is something Vitoria and Suarez both elaborate later in their work – that while *in truth* (i.e., in the sight of God) there is no such thing as a war just on both sides, human knowledge is not up to judging this with any degree of accuracy. The natural implication is that in fighting a war, one should develop as many restraints as possible, given that those who oppose you may not be guilty of genuine fault, but merely of invincible ignorance.

It is this that raises the significance of the *jus in bello* and begins the process of separating out the two parts of the tradition as we understand it today. And Vitoria, for example, was very well aware of the significance of this. It is in Vitoria that we first find the development of the Augustinian notions of right intent and the existing contemporary restrictions via canon law and the customs of arms, *taken together*, as a restriction on how

[19] This is Johnson's formulation; Johnson, *Ideology, Reason and the Limitation of War*, p. 186. He is here citing and discussing a classic "traditional" Catholic reading, Alfred Vanderpol, *La Doctrine Scholastique du droit de guerre* (Paris: Pedone, 1919).
[20] Johnson, *Ideology, Reason and the Limitation of War*, p. 187.
[21] Vitoria, *De Indis*, section III, 7. This passage is highlighted also by Johnson.
[22] See Johnson, *Ideology, Reason and the Limitation of War*, p. 189.

we should understand who is legitimately a combatant. The *jus in bello*, in other words, grows out of the notion of noncombatant immunity, and it does so because, as we have already seen, for Vitoria a just war can only be waged to right a wrong done, and wrongs are not done by an innocent person and thus war cannot be waged on the innocent.

Working from the position established by the school of Salamanca, the *jus in bello* develops in leaps and bounds in the ensuing period, although hardly in a linear fashion. It is generally assumed that the two most important contributors, after Vitoria and Suarez, were the Dutch humanist, jurist, and political actor Hugo Grotius (1583–1645) and the German philosopher Samuel Pufendorf (1632–94), and that this movement of thought reaches its climax in the thought of Emmerich de Vattel (1714–67).

Grotius, for example, develops the arguments of his Neo-Scholastic predecessors in various ways, especially with regard to the *jus ad bellum*, but in the case of the *jus in bello*, his views are somewhat less restrictive than Vitoria's had been, though he admits that charity (at least for Christians) should limit the manner in which wars are prosecuted.[23] Then also, Grotius's thought has rather more to say about the *jus ad bellum* than the *jus in bello*, though he also has a good deal to say about the latter. The principles of noncombatant immunity and their root in the *jus gentium* rather than theological speculation – and thus their significance for the *jus in bello* – are carried much further, however, by Locke and then by Vattel, in whom the tradition very much in its modern form is very clear. Indeed, it is in Vattel that the kinds of distinction relating to noncombatant immunity and indeed other kinds of restrictions of war's destructiveness begin to emerge recognizably in its modern form. For Vattel it is not merely what one might call the "attitude of innocence" that matters but rather the social function an individual performs.

B. From Jus Gentium *to the Laws of War*

Key to the development of the *jus in bello* in its modern form were the developments sketched previously, but to those we should add also the changes in military tactics and technology that the modern period

[23] The key text is, obviously, *De Jure Belli ac Pacis*. For the most interesting and thorough recent treatment of Grotius's arguments in connection with war and international relations see Renee Jeffery, *Hugo Grotius in International Thought* (London; Palgrave Macmillan, 2006). A discussion of the material relevant to Grotius, Locke, and Vattel can be found in Chris Brown, Terry Nardin, and Nicholas Rengger, *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War* (Cambridge: Cambridge University Press, 2002). See especially chapter 6.

witnessed. As is well known, beginning in the seventeenth century European armies began to develop levels of organization and discipline[24] unknown since Roman times, and this, coupled with the accelerating pace of technological change, led to new strategies and tactics, new military institutions and processes, and, of course, new attempts to restrain war and new developments in the context of theorizing about both war and its restraint. But there was already at hand the just war tradition as we have seen it emerge from the fifteenth and sixteenth centuries, with the *jus in bello* very much to the fore, and so it is hardly surprising that it was in the language of this tradition that much of the new context was stated.

To begin with, the changes to this were relatively mild. The eighteenth century, often seen as a period of "limited war," of course saw the emergence of various different versions of the just war, most especially Vattel's as discussed earlier, but after the Napoleonic wars more radical changes were made to the established *jus in bello*.

In particular the growing significance of formal international law in the years after 1860 became central to the changing character of the *jus in bello*; another significant departure was the issuing of general regulations to established armies, the most celebrated example being the General Orders No 100, or *the Instructions for the government of armies of the United States in the Field* prepared and mainly written by Francis Lieber at the invitation of General in Chief Henry Wager Halleck, during the American Civil War.[25] In both cases the concern springs initially from the problem of defining who are combatants and who are not, and, of course, it does so in the context of a civil war that requires a treatment of irregular warfare that had previously not been discussed (except in the occasional discussions of the ethics of siege craft in medieval writing on the just war) and that gave rise to a considered discussion of duties owed to prisoners of war, a subject only cursorily treated by theorists such as Grotius, Pufendorf, and Vattel. At roughly the same time, the gradual process of the codification of international law – indeed what one might call the "project" of international law itself – begins to take shape,[26] and

[24] For a thorough and fascinating survey of the evolution of military technologies, strategies, and tactics in the modern period see, especially, Geoffery Parker, *The Military Revolution: Military Innovation and the Rise of the West 1500–1800* (Cambridge: Cambridge University Press, 1996).

[25] See, for an excellent discussion, James Turner Johnson, *The Just War Tradition and the Restraint of War* (Princeton, NJ: Princeton University Press, 1981).

[26] See the account offered in Marti Koskiniemmi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1880–1960* (Cambridge: Cambridge University Press, 2003).

this has pronounced effects, as the *jus in bello* includes the formal adoption of agreements limiting and banning certain classes of weapons or particular types of action.

Such attempts predated the nineteenth century, of course, as Roberts and Guelff point out, citing as an example the 1785 Treaty of Amity and Commerce between the United States and Prussia, which "concluded with two articles making explicit and detailed provision for observance of certain basic rules if war were to break out between the two parties. The first article defined the immunity of merchants, women, children, scholars . . . and others . . . the Second specified proper treatment of prisoners of war."[27] The latter part of the nineteenth century, however, saw a great increase of this kind of provision, and the high water mark was unquestionably the adoption of the 1899 and 1907 Hague conventions on the law of war.

And since that point, the "laws of war" have expanded and developed with new conventions being adopted and new machinery being developed on a fairly constant basis. These developments became yet more central after the Second World War with the Nuremberg and Tokyo tribunals and the adoption in 1948 of the Universal Declaration of Human Rights and the Genocide Convention. After the end of the cold war in 1991, with the old deadlock removed, still more effective legal action seeking to restrain types of warfare was promoted, culminating in the establishments of the ad hoc tribunals for Rwanda and the former Yugoslavia and then, in 1998, the creation of a permanent International Criminal Court, to mention merely the most prominent such attempts.[28]

By this point, however, the *jus in bello* had effectively become "juridicalized" in a manner unforeseen by its creators in the sixteenth century. The *jus in bello* had moved from being seen as part of the *jus gentium* (law of nations) to being seen as the laws of war, part of a *jus inter gentes* (law between nations). And given the prevailing view of the character of law, this marked a very real change in the way in which the *jus in bello* was understood. Since I will return to it briefly in a moment, it might be worthwhile saying something about the significance of this distinction. To explain this I should say something first about the origins of the term

Rawls

[27] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd edition (Oxford: Oxford University Press, 2000), p. 4.

[28] The best general treatment is Best, *War and Law since 1945*, though it does not include detailed discussions of the International Criminal Court.

jus gentium. The root, of course, is Roman law. The Romans distinguished between *jus*, that is, customary law, and *lex*, essentially enacted law. *Lex*, because it *is* enacted at a particular time and place, can be repealed or amended, but *jus* was part of what we would now call case law. Civil law governing relations between Roman citizens – specific allocation of rights and responsibilities – was therefore *lex*, but civil law governing relations between Romans and others, or between others generally, if under Roman authority, was a matter of *jus*. Hence the general term that came to be used for these kinds of discussions was the *jus gentium* (law governing *gentes* – nations).[29]

By the early modern period – when, as we have seen, the key moves in developing the distinction between the *jus in bello* and the *jus ad bellum* were made – there was a widespread discussion of the appropriate relationship between the *jus gentium* and other parts of law, especially natural law, but it gradually became clear that there are two distinct meanings to the term *jus gentium* that did not always sit happily together; it is significant that among the first to discuss this in detail was one of the most important thinkers in the history of the *jus in bello*, Franciso Suarez. Suarez insists that while *jus gentium* is used to refer to the common laws of individual states that are in accordance with similar laws elsewhere and thus "commonly accepted," it *ought* only to be used for "law which all the various peoples and nations observe in their relations with one another."[30]

Gradually, during the latter part of the seventeenth and in the eighteenth century this indeed is what happened. But even by Vattel's time, while the *jus gentium* was seen in this way, it was still seen also as part of the natural law, as being intimately connected with other aspects of law. Thus, *Law of Nations* contains discussions of matters internal to states as well as matters that would now be seen as matters of relevance to public law as well as to "international" law, as we understand it today. The real change – the change that marks, I suggest, a crucial difference – does not occur until the nineteenth century and the dominance of legal positivism and an international law constructed in its image. But more of that in a moment. What might we say, in conclusion, about the *jus in bello*?

[29] For a more elaborate discussion of this point see Brown, Nardin, and Rengger, *International Relations in Political Thought*, pp. 318–23.

[30] This reference is from Suarez, "On Laws and God the Lawgiver," *in Selections from Three Works*, trans. G. L.Williams (Oxford: Clarendon Press, 1944), cited in Brown, Nardin, and Rengger, *International Relations in Political Thought*.

II. The *Jus in Bello* Today: Problems and Perspectives

Today, in terms of the just war tradition as a whole, the *jus in bello* is still very much the dominant part, precisely because it can be and has been juridicalized so effectively. As international law and various kinds of legal instruments and institutional settings have proliferated, especially since the end of the Second World War, the body of law usually referred to as the laws of war (or now sometimes international humanitarian law) has expanded exponentially. While the *jus ad bellum* has, of course, become a matter of debate once more (as it was not for Vattel, for example), while many contemporary just war writers – most influentially Paul Ramsey and Michael Walzer[31] – have argued with subtlety and skill about it, and while it clearly becomes an issue of public debate – as in the case of the Iraq conflict in 2003 – it is still much harder to juridicalize effectively, in the required manner, than is the *jus in bello*. A clear example of this can be seen in the agreement to establish the Permanent International Criminal Court. The court has jurisdiction over four classes of crimes: (a) genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression. Of these, however, only the last is effectively an *ad bellum* crime, yet while the court has jurisdiction over it, its jurisdiction is essentially pointless, as there is no agreed definition as to what is to count as aggression.[32]

That the *jus in bello* in its juridicalized form is still the dominant partner does not mean that it has no critics, however, and before I return to the concern I flagged at the outset it is perhaps as well to rehearse some of the more general criticisms one can find of the contemporary state of the *jus in bello*. In what follows, I run together some criticisms that have been made severally, and I do not always attribute them; they are sufficiently general to make specific identification unnecessary.

One of the longest-standing criticisms of the *jus in bello* – indeed of the just war tradition as a whole – is that it simply encourages rather than discourages the use of force; that it is, effectively, complicit with a ruinously expensive (in both material and moral senses) war system. This kind of complaint goes back at least (as we have seen) to Erasmus. To this can be added the modern concern that the *in bello* constraints,

[31] See, of course, Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) and Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner's, 1968).

[32] See Rome Statute of the Permanent International Criminal Court in Roberts and Guelff, *Documents*, p. 673.

which effectively recognize and formalize the legality of at least some aspects of war fighting, clash with a presumed illegality of the use of force as such, which seems to be implied by some international agreements (for example, the Kellogg-Brian pact of 1928 and the United Nations Charter). As Roberts and Guelff point out,[33] however, neither of these two documents completely rules out resort to force, and the whole point and thrust of the development of the *jus in bello*, as we have seen, has been to seek their implementation even in situations where there may not be a "legitimate" *ad bellum* reason. Furthermore it seems unlikely (to put it mildly) that the use of force by states, or other agents in world politics, will cease, whether or not there is a just war tradition, and so it can hardly be said that the tradition "encourages" a practice that seems pretty permanently present anyway. The use of force for political ends, I suggest, hardly needs the just war tradition to encourage it.

A second criticism often made with respect to the evolution of the laws of war since the middle of the nineteenth century is that they are effectively a sliding scale, constantly playing a game of catch-up with new developments in military technology. The role of submarines in both the First and the Second World Wars is an example that has been often discussed here. Sinking merchant shipping was deemed to be against the laws of war, and yet no punishment was visited on the perpetrators and the rules were not basically changed. There is, I think, something to this and it might be added that the requirements of framing particular instances of law may often also run this risk since the very specificity necessary will require close attention to the particularities of whatever is involved (a particular weapons system, for example). However, it is certainly also true that some successes seem to have been had in (for example) banning certain classes of weapons pretty effectively (chemical weapons, land mines) even if there are some violations of such agreements. So it would seem that while this is a danger, and should be guarded against, it is by no means inevitable and so cannot be held to invalidate the *jus in bello* by definition.

A third area of criticism points to the inherently ambiguous character of the *jus in bello*. It claims to restrain war, for example, but acknowledges rules like military necessity that permit the overcoming of such restraints. Many other similar alleged contradictions can be found. The nub of this criticism is that, to all intents and purposes, the *jus in bello* – and again perhaps the just war tradition as a whole – is like trying to repair an amputated limb with sticking plaster. In the event of a clash, military necessity

[33] See Roberts and Guelff, *Documents*, p. 28.

always triumphs and so the rules are only obeyed when there is no real cost to obeying them, and that suggests that they are not really *rules* at all. At one level this criticism merely points out the inherent difficulty of restraint in an environment of extremes, which few, if any just war theorist would deny, and the fact that such judgments are inherently difficult and often messy does not imply that they cannot or should not be made at all. Another point is that the force of this criticism also rather depends on how the notion of a rule, in this context, is understood. On some understandings of what is involved in rule-bound behavior the criticism may have some weight, but on others it most certainly has not; a lot will stand or fall on how you understand the character of the rules in question.[34]

And that takes me to a third point on which I want to dwell for a moment here since it returns us to that phrase of Oliver O'Donavan's quoted at the outset, to the effect that the distinction between the *jus ad bellum* and the *jus in bello* should be seen as a secondary and not a "load bearing" distinction.

We have seen that the distinction grew out of the attempt by Vitoria to deal with the question of simultaneous ostensible justice and his suggestion that we assume a stance of ignorance rather than one of malevolence of our adversaries. In the early renderings of this view in the sixteenth and seventeenth centuries, however, this view was combined with the general concerns of what was rapidly becoming the *jus ad bellum* in a manner that sought to do justice to both. The distinction was then largely a secondary one and the manner in which the judgments were made blended custom, precedent, formal agreements, and experience in almost equal measures. This is what Johnson means, I think, when he suggests that the just war tradition between the fifteenth and the seventeenth centuries becomes "'non-ideological' – as opposed to the 'ideological' form it had taken during the religious wars that preceded this period."[35]

But one might characterize this change in a rather different way; the reason for the change, one might say, lies less in the character of the just war tradition itself than in the manner in which law itself was being understood.

As Koskiniemmi has argued,[36] the project of international law was one that was very much in keeping with both the progressive liberalism and

[34] For further elaboration of this point, see Anthony Lang, Jr., Nicholas Rengger, and William Walker, "The Role(s) of Rules: Some Conceptual Clarifications," *International Relations* 20, no. 3 (2006): 274–94.

[35] See Johnson, *Ideology, Reason and the Limitation of War*, p. 261.

[36] In Marti Koskiniemmi, *The Gentle Civilizer of Nations*.

the legal positivism that were largely dominant in the mid- to late nineteenth century and that were then to have a central role in shaping the way that the juridicalizing of the *jus in bello* took place. In this respect, one might say that the casuistic, flexible, and open discourse of the *jus in bello* from its infancy up until (roughly) the time of Vattel became much more constrained and hemmed in by a legal positivism that gave to it an "ideological" character it had up to that point surrendered. Of course the *content* of the ideology was very different – a liberal, progressivist, positivistic one, rather than a theological one justification for religious war – but its effect was not dissimilar. Rather than allowing the *jus in bello* to *balance* competing demands and competing claims – as the tradition from Vitoria down to Vattel had done very ably – it tended to force the *in bello* constraints into one particular shape, that of modern, positive international law. Understood in this way, some of the criticisms mentioned earlier do begin to take on a rather more serious form because it will be much more difficult for the laws of war to do what they were originally designed to do, which is to act as the bridge between moral reality and political necessity, human frailty and human agency.

What we perhaps need, then, in the twenty-first century, is to rethink the character of our understanding of the relationships among law, morality, and politics in ways not dissimilar to the ways in which Vitoria and his colleagues had to do in the sixteenth. But in doing that, we will, of course, have to rethink much of the manner in which we think about law as such and the role it plays in (and between) our societies. There is encouraging evidence that a number of political philosophers, international relations scholars, and legal theorists are beginning to do just that.[37] But in any event the example of the school of Salamanca is at least an optimistic sign; for as we saw, the result of their refiguring of the tradition gave it a new lease on life and helped develop an understanding of the possibility of combining morality, politics, and charity in ways that have helped to increase our understanding of, and mitigate the worst excesses of, one of the most terrible but persistent human practices. Perhaps it is time to look for our very own school of Salamanca.

[37] See, for example, amongst a wide set of encouraging signs, Terry Nardin, *Law Morality and the Relations of States* (Princeton, NJ: Princeton University Press, 1983); Philip Allott, *Eunomia* (Oxford: Clarendon Press, 1992); Allen Buchanan, *Justice, Legitimacy and Self Determination: Philosophical Foundations for International Law* (Oxford: Oxford University Press, 2003); and Larry May, *Crimes against Humanity* (Cambridge: Cambridge University Press, 2005) and *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007).