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The function of Jus Post Bellum in international law

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1. Past – The Deep Roots of *Jus Post Bellum*

A. Introduction

To discuss *jus post bellum* is inevitably in part to discuss the Just War Tradition. This tradition holds that questions regarding the morality and legality of war are worth answering and require close examination to properly answer. Consider, in contrast, Realism, which holds either prescriptively that these question are not worth answering or are not answerable, or descriptively that whatever one's answer to these question, they have no bearing on what states actually do. Or from another perspective, consider Pacifism, which holds that the questions of the morality of war are worth answering but do not require close examination to properly answer in any particular instance, because regardless of the conditions, the answer is always going to be against violence—against fighting of armed conflict in general, against any permitted methods of waging war, and always in favor of armed conflict's termination.[1]

Brian Orend considers James Turner Johnson to be the authoritative historian of the Just War Tradition.[2] Johnson's early volume *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*[3] is a good starting point to introduce the

[1] For more on this division between Just War Theory, Realism, and Pacifism see Orend, Brian. The morality of war. Broadview Press, 2013.

[2] See Orend, Brian. The morality of war. Broadview Press, 2013.

[3] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975).

basic historical framework for the tradition. Johnson posits that there before about 1500 C.E., the classic just war doctrine did not really exist.[4] This means that to speak of the "just war tradition" without further qualification or explanation with respect to Aristotle, Cicero, Augustine, or the theologians or canonists of the High Middle Ages (pre-1500) is misleading. Not that there was no writing on the moral and legal questions of war before that point, but rather, it had not resolved itself into a single tradition.[5] Before around 1500 C.E., there were two traditions, a religious (theological and canonical) tradition focused on the right to make war (*i.e.*, *jus ad bellum*) and a secular, chivalrous code focused exclusively on allowable methods of fighting (*i.e.* the Law of Arms, or *jus in bello*).[6] *Jus in bello* in medieval Europe was defined primarily by the knights' chivalric code.[7] The principal divide in the late Middle Ages regarding war doctrine was between two approaches to *jus ad bellum* particularly with respect to war for religion (*bellum sacrum*): the approach that took war for religion to be the most just kind of war imaginable, and another that ruled out religious justifications for war and emphasized only natural-law (mainly political) just causes for war.[8]

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[4] ibid. 8.

[5] ibid 8.

[6] ibid 8.

[7] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), p. 47

[8] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), pp. 8-9.

It is a fair criticism to note that there are limits to the import of a tradition primarily based in Europe. A truly comprehensive, encyclopaedic approach to the history of legal and normative thinking regarding the transition from armed conflict to peace would be of great value, but is beyond the scope of this work. While not universal, there remains a good deal of value in analyzing a discrete tradition that has been largely rooted in Europe. A critique that a particular analysis is Eurocentric holds particular weight if the analysis is blithely unaware of its bias or selectivity. The following analysis is fully aware of the selectivity employed, and acknowledges its limitations, while insisting on its continued value.

Over time, there were three positions that went by the name "just war doctrine."[9] The first, the medieval just war doctrine, was itself the product of at least two distinct traditions, religious and secular.[10] Within those two broader traditions, the religious tradition included the canon law after Gratian and the theological tradition (to which Thomas Aquinas made a vital contribution), and the secular tradition included the renewed work of civil lawyers to understand and make current the concepts of Roman law, and the influence of the chivalric codes.[11] One can see the separate roots combining in the idea of non-combatant immunity for example: for the church this derives from the

[9] ibid 29.

[10] i 8-9, 29.

[11] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), pp. 79, 122.

right of the (often religious) noncombatant, for the knight this derives from the magnanimity of the knight and his obligations under the chivalric code.[12]

The second, post-Reformation holy war doctrine, applied the term "just war" to the doctrine generally described by Roland Bainton[13] and others as a "crusade."[14] Medieval Christian "just war" also did not apply to infidels or heretics the restrictions on warfare they applied to themselves,[15] but the context changed to actively justify war post-Reformation. The third "just war" is the modern "just war doctrine" which emerged in the 1500s and 1600s, developing into secular international law.[16] Modern attempts to limit war have, in part, their origin in the demise of "Christendom" and the rise of the sovereign state—in the attempts by scholars such as Francisco de Victoria and Hugo Grotius to ground the already existing limits on war in universal, natural law.[17] The first

[12] ibid 138-9.

[13] Bainton, Roland H., *Christian attitudes toward war and peace: a historical survey and critical re-evaluation*. Wipf and Stock Publishers, 2008. In short, Bainton asserted that Christian thought began primarily in a pacifist mode, then developed the medieval just war doctrine, then developed the idea of holy war and crusade. This work was originally published in 1960.

[14] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 29.

[15] ibid 149.

[16] ibid 29.

[17] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), p. 149.

(medieval) doctrine spawned both the second holy war doctrine and the third secular tradition.[18]

For those focused exclusively on the secular international law doctrine, it is worth noting the role of the medieval as the parent to the secular doctrine, and the arguable incomprehensibility of such modern developments as the "Responsibility to Protect" doctrine without reference to the grander, richer, Just War Tradition. The rhetoric, mind-set, and accusations of "crusade" are also not without contemporary relevance. In all, a broader intellectual history is necessary for a fully formed theory of *jus post bellum* and its place in the Just War Tradition.

The pre-Christian influence analyzed in this work is limited, because its influence is limited. Take the Roman practice limiting warfare of demanding redress formally through a *repetio rerum*.[19] This diplomatic document would list the wrongs allegedly done and the conduct needed to satisfy Rome. After thirty-three days, if satisfaction had not been obtained, the next step was legal authorization in the name of the Senate and the people of Rome. Only then would the fetial priests issue a formal declaration of war, and military measures could commence. While of potential interest when discussing later methods of addressing abrogations of a peace treaty, the particulars role of fetial priests did not outlast Rome.

[18] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 29.

[19] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), pp. 153-4.

In contrast, Cicero's Republic was a source for Augustine and others[20], who was the foundation for Aquinas, who laid the foundation for the theological strain of law that was fundamental to the medieval just war tradition. The continuity of the modern tradition on the restraint of war and its growth out of medieval just war thought became evident in the decades between World War I and World War II. Studies such as Alfred Vanderpol's *La Doctrine scholastique du droit de guerre*,[21] James Brown Scott's *The Spanish Origin of International Law*,[22] John Eppstein's *The Catholic Tradition of the Law of Nations*,[23] the Carnegie Institute series *Classics of International Law,* and Reinhold Niebuhr's *Moral Man and Immoral Society*[24] were all important in rediscovering and making the connections between medieval just war thought and contemporary law clear.[25]

It is worth noting that there have been specific challenges against the existence of any historical pedigree to the concepts now referenced as *jus post bellum*. Most notably, Grégory Lewkowicz contributed an article to an issue of the *Revue belge de droit*

[20] ibid 154.

[21] Vanderpol, Alfred, and Emile Chénon. La doctrine scolastique du droit de guerre. A. Pedone, 1919.

[22] Scott, James Brown. The Spanish Origin of International law: Francisco de Vitoria and his Law of Nations. Oxford University Press, 1934.

[23] Eppstein, John. The Catholic Tradition of the Law of Nations. The Lawbook Exchange, Ltd., 2012. Originally published: Washington, D.C.: Published for the Carnegie Endowment for International Peace by the Catholic Association for International Peace, 1935.

[24] Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Charles Scribner's Sons, 1932).

[25] See more generally *The Contribution of the Medieval Canon Lawyers to the Formation of International Law*, James Muldoon, Traditio, Vol. 28, (1972), pp. 483-497.

international focused on *jus post bellum* critiquing existing references to the historical development of the subject.[26] In part, Lewkowicz could be taken to argue that further development of this area of scholarship is needed. Lewkowicz goes further, however, arguing that by disagreeing with a few selected examples of basing *jus post bellum* on historical sources, "*il n'existe pas dans cette tradition de droit de la transition du conflit à la paix*."[27] This is an extremely broad claim, one which would require a more exhaustive study that Lewkowicz provides, and it is one which the following section should certainly complicate.

In *Law and the Jus Post Bellum* Robert Cryer sounds a somewhat different note of caution than Lewkowicz.[28] He seems to be arguing that it is not defensible for *jus post bellum* scholars (he primarily cites Brian Orend and Carsten Stahn) to reference the just war tradition to discuss *jus post bellum*, if *jus post bellum* is taken to be the area of law that applies to the post-conflict phase (what will be discussed in Chapter 3 *infra* as a temporal approach). But, as Cryer seems aware, other conceptions of *jus post bellum* (such as they hybrid functional approach discussed in Chapter 3 *infra*) emphasize laws and principles that have an explicit normative goal (achieving a just and sustainable peace) in mind. If this is what is meant by *jus post bellum*, then it becomes clear not only

[26] Lewkowicz, Grégory. "Jus Post Bellum: vieille antienne ou nouvelle branche du droit? Sur le mythe de l'origine vénérable du Jus Post Bellum." *Revue belge de droit international* 1 (2011).

[27] Ibid.

[28] Cryer, Robert. "Law and the Jus Post Bellum", *Morality, Jus Post Bellum, and International Law*. Ed. Larry May and Andrew Forcehimes. 1st ed. Cambridge: Cambridge University Press, 2012. pp. 223-249, p. 226 ff (see generally the section *Jus Post Bellum: Historically Defensible?*).

that the just war tradition cannot be understood without reference to its treatment of the transition to peace, but that contemporary thinking on the transition to peace benefits from an awareness of how the problem has been conceptualized historically.

The legal and normative tradition regarding the transition to peace has been under-examined in part due to the retrospective application of the terms of the twentieth century (*jus ad bellum* and *jus in bello*) to encompass the entirety of thinking about armed conflict. This reductive pattern of thinking poorly serves contemporary understanding of these important works. While the following authors did not use the term *jus post bellum* just as generally they did not use the terms *jus ad bellum* or *jus in bello*, the understanding of these concepts is enriched by looking at the substance of the works with an eye towards understanding how the difficult problems of our present moment were dealt with in the past.

A note on the methodology and structure of this chapter—each of these authors have earned hundreds of years of secondary writing. Each could merit a lifetime of study. The purpose of this chapter is not to summarize their work or impact, but to trace to the source some of the most important writings on what might be called *jus post bellum avant la lettre* to provide an inevitably partial genealogy of a venerable line of thought.

B. Historical Development

1. Augustine of Hippo (354-430)

a) Introduction

The influence of Aurelius Augustinus, more commonly known as St. Augustine of Hippo (hereafter "Augustine") on western religion and philosophy is profound, pervasive, and enduring. He played a pivotal role in in merging Greek philosophy and Judeo-Christian religion. His writings were cited as deeply authoritative not only in early philosophy but in the medieval (e.g. Aquinas and Gratian) and modern (e.g. Descartes and Malebranche) periods. He was a North African Bishop and Doctor of the Roman Catholic Church, living and teaching mainly in Thagaste (now in Algeria) and Carthage (now in Tunisia) with a brief but important period in Milan, where he was baptised, became a professor of rhetoric, and developed what would later be called a Neoplatonic framework that would organize his later writings. He was enamoured of Latin classical works, particularly Cicero and Virgil.

Several important elements come out when Augustine's writings are examined with an eye towards discovering thoughts on the transition to peace. First, war is seen as evil, even when just. Second, war has purposes that may or may not be fulfilled by the transition to peace. Third, Augustine is primarily concerned with the effect on the individual, not the state—and his concern is not death or suffering per se, but vice, and is brutal and fatalist by modern standards. Fourth, the transition to peace is not always

better than war—he is concerned about achieving a just peace. He describes a positive peace like a body with harmonious appetites. Fifth, mercy must guide war and allow a successful transition to peace.

b) Writings and relation to *jus post bellum*

Augustine is credited with deriving the original principles in much of Christian thought, including Christian thought about war. He did not provide the formulas or lists of criteria commonly referred to when discussing the just war tradition, but he provided the authority to which others such as Aquinas and Gratian would later refer.[29]

The following passage from *Ad Bonifacium* is repeated by both Aquinas and Gratian:

> For Peace is not sought in order to the kindling of war, but war is waged in order that peace may be obtained. Therefore, even in waging war, cherish the spirit of the peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace.[30]

For Aquinas, in *Summa Theologica*, this statement by Augustine is authority for the criterion of right intention in what we would now call the *jus ad bellum*. Aquinas defines the concept of right intention in part in the negative, using Augustine's words: "the desire for harming, the cruelty of avenging, an unruly and implacable animosity, the rage of

[29] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 27.

[30] Aquinas, *Summa Theologica*, II/II, Quest. SL, Art. 1; CJC, *Decretum*, Quaest. I, Can. III; Augustine, *Ad Bonifacium*, CLXXXIX. Referenced in Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 40.

rebellion, the lust of domination and the like—these are the things which are to be blamed in war."[31] So for Aquinas, as he creates the rules for what makes a just war, the key thing to derive from the earlier passage ("For Peace…") has to do with the right to wage war in general—without the right intention, a potential party to an armed conflict (the sovereign) lacks the right to wage war. That is, it has to do with what is normally described as *jus ad bellum*.

For Gratian, the focus is different. Instead, he uses this same passage to discuss not the sovereign but the general question of whether Christians may without sin participate in war.[32] This does not fit neatly within *jus ad bellum* or *jus in bello*. Unlike *jus ad bellum* considerations, it is not addressed to the sovereign. Unlike *jus in bello* the concern is not directly the conduct within and armed conflict but the intent behind overall participation. This helps to demonstrate that the just war tradition does not always neatly divide into the modern *jus ad bellum/jus in bello* dichotomy.

Returning to the original passage from Augustine, one can find the type of principle that lies at the root of *jus post bellum*—the obligation during armed conflict and afterwards to

[31] Aquinas, Summa Theologica, II/II, Quest. XI, Art. 1.) Referenced in Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 40. Also translated as: "What is the evil in war? … The real evils in war are love of violence (*nocendi cupiditas*), revengeful cruelty (*ulciscendi crudelitas*), fierce and implacable enmity, wild resistance, and the lust of power (*libido dominandi*) and such like. (Against Faustus, Augustine, 887:301) AUGUSTINE *City of God, De libero arbitrio, Against Faustus,* and *Commentary on the First Letter of John*, Book XV, p. 595.

[32] CJC, *Decretum*, Quaest. I, Can. IV. Referenced in Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 40.

preserve the possibility of a transition to a just and sustainable peace. "Therefore, even in waging war, cherish the spirit of the peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace."[33] When does this obligation apply? Both during armed conflict ("in waging war") and plausibly afterwards during early peace ("conquering those whom you attack"/ "lead them back to the advantages of peace"). This is precisely the time span discussed in the theoretical discussion *supra*. More importantly, it plays the functional role emphasized by the theoretical discussion *infra*. One waging war is obliged to make choices that may lead the opposing party to see the advantages of peace, and not return to war. This means avoiding "the desire for harming, the cruelty of avenging, an unruly and implacable animosity, the rage of rebellion, the lust of domination and the like."[34]

The nature of the peace following war, whether it is just or unjust, is of interest to Augustine. This appears to be true more due to the inner morality of the individuals involved than the external effects—for Augustine, peace is a natural goal, but a corrupted nature seeks an unjust peace.[35] Augustine's concern to minimize the evils of war can be characterized as an ethics of personal virtues (concerned with how to be good) rather than

[33] Aquinas, *Summa Theologica*, II/II, Quest. SL, Art. 1; CJC, *Decretum*, Quaest. I, Can. III; Augustine, *Ad Bonifacium*, CLXXXIX. Referenced in Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 40.

[34] Aquinas, Summa Theologica, II/II, Quest. xI, Art. 1.) Referenced in Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 40.

[35] Augustine, 1950:687-690, The City of God, tr. Marcus Dods. New York: Modern Library.

an ethics of principles (concerned with how people can live together to each other's benefit).[36] This approach seems to be widespread amongst contemporaries. See for example, Aphrahat's Demonstration V "Of Wars", which refers to the internal effect as the most important aspect of wars.[37]

Augustine says "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."[38] Augustine's vision is ultimately not one of pure self-defence, or a state of anarchy and war of all against all, but rather one in which there is a system of international peace and authority, and those who violate that peace and authority can be rightly punished. In a sense, Chapter 7 authorization under the UN Charter for acts not clearly characterized as self-defense echo this ancient conception. It is modern, but in a sense deeply conservative, again strongly biased in favor of the *status quo.*

[36] The Elements of St. Augustine's Just War Theory, John Langan, The Journal of Religious Ethics, Vol. 12, No. 1 (Spring, 1984), p. 32.

[37] Nicene and Post Nicene Fathers: Series II, Volume XIII, Ephraim the Syrian and Aphrahat, Select Demonstrations of Aphrahat, Demonstration V "Of Wars", Phillip Schaff et al.. For more on Aphrahat, writing in 337, see Nicene and Post Nicene Fathers: Series II, Volume XIII, Ephraim the Syrian and Aphrahat, Introductory Dissertation, Ephrahat the Persian Sage, Philip Schaff et al..

[38] Contra Faust. xxii, 75.

In *City of God*, (Book XIX, Ch. 7 "Of the Diversity of Languages, by Which the Intercourse of Men is Prevented; And of the Misery of Wars, Even of Those Called Just.") discusses the evil and suffering of war, even just war. [39]

> But, say they, the wise man will wage just wars. As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. For it is the wrongdoing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be matter of grief to man because it is man's wrong-doing. Let every one, then, who thinks with pain on all these great evils, so horrible, so ruthless, acknowledge that this is misery. And if any one either endures or thinks of them without mental pain, this is a more miserable plight still, for he thinks himself happy because he has lost human feeling. [40]

Augustine is not in love with war. Even a just war is terrible,[41] and the misery that they cause must be acknowledged, at the risk of dehumanization.

In *Against Faustus*, Augustine describes an explanation for war that will be widely discussed by subsequent authors, such as Aquinas.

> Now, if this explanation suffices to satisfy human obstinacy and perverse misinterpretation of right actions of the vast difference between the indulgence of passion and presumption on the part of men, and obedience to the command of God, who knows what to permit or to order, and also the

[39] Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library, Book XIX, Ch. 7.

[40] ibid.

[41] For more on the horrors of civil war, what today might be called non-international armed conflict, *see e.g.*, Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library, Book III, Ch. 23 "Of the Internal Disasters Which Vexed the Roman Republic, and Followed a Portentous Madness Which Seized All the Domestic Animals."

> time and the persons, and the due action or suffering in each case, the account of the wars of Moses will not excite surprise or abhorrence, for in wars carried on by divine command, he showed not ferocity but obedience; and God in giving the command, acted not in cruelty, but in righteous retribution, giving to all what they deserved, and warning those who needed warning. What is the evil in war? Is it the death of some who will soon die in any case, that others may live in peaceful subjection? This is mere cowardly dislike, not any religious feeling. The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars, when they find themselves in such a position as regards the conduct of human affairs, that right conduct requires them to act, or to make others act in this way.[42]

This is an exceedingly interesting passage. It is putting forward the inverse of what Kenneth Waltz put forward in *Man, the State, and War*:[43] instead of arguing that war happens because of the faults of individuals (what Waltz puts forward as a "first frame" analysis) Augustine is asserting that war is evil because it makes individuals faulty, that is, sinful.

To Augustine, God commands wars for 1) "retribution" and 2) "warning those who needed warning." In other words, just deserts and deterrence, two of the cornerstones justifying criminal law. These are arguably well tied to *jus post bellum* – if the purpose of the war is retribution, as the transition from war to peace proceeds one would ask whether and to what degree that purpose has been fulfilled. If it is deterrence (general or

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[42] Nicene and Post-Nice Fathers: First Series: Volume IV: Against Faustus, Edited by Philip Schaff, p. 300-301, para. 74.

[43] Waltz, Kenneth Neal. *Man, the State, and War: a theoretical analysis*. Columbia University Press, 2001.

specific) one would ask whether and to what degree the unwanted conduct is deterred. In a modern context, if the purpose of engaging in armed conflict is in response to aggression, one might question whether a peace agreement that effectively rewards aggression was just. Later in the passage, participation in war is justified because of "public safety", another classic justification of criminal law and governmental use of force outside of criminal law.

The passage also discusses the evil of war, not from a consequentialist view (suffering, violence) and more from a perspective of human virtues ("The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power") – these are the evils in war and also the evil conduct war is meant to punish and deter. It also discusses the ethics of serving in the military, basically blessing it because striking, wounding, or disabling people in war, when authorized by law, and when not carried out from a soldiers vengeance but to defend the public safety.

In *City of God*, (Book III, Ch. 28 "Of the Victory of Sylla, the Avenger of the Cruelties of Marius.") Augustine uses Roman history to emphasize the importance of a *just* peace. [44] After surrender, he discusses mass murder, gruesome torture, and injustice after a

[44] Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library, Book III, Ch. 28 "Of the Victory of Sylla, the Avenger of the Cruelties of Marius."

victory.[45] The peacetime atrocities seem to derive from the fact that "when hostilities were finished, hostility survived."[46]

> These things were done in peace when the war was over, not that victory might be more speedily obtained, but that, after being obtained, it might not be thought lightly of. Peace vied with war in cruelty, and surpassed it: for while war overthrew armed hosts, peace slew the defenceless. War gave liberty to him who was attacked, to strike if he could; peace granted to the survivors not life, but an unresisting death. [47]

Augustine favors peace, as the natural order, over war—but he is not pushing for peace at any cost.[48] While he is well-aware of the evils of war, he is also wary, based on the lessons of history, of peace that leaves innocent people defenseless and subject to collective punishment for wrongs, perceived or actual, during the previous conflict. Similarly, in Book XXI, Ch. 15, Augustine emphasizes the need for a just peace, preferring a hard conflict to a peace "under the dominion of vice:"

> Better, I say, is war with the hope of peace everlasting than captivity without any thought of deliverance. We long, indeed, for the cessation of this war, and, kindled by the flame of divine love, we burn for entrance on that well-ordered peace in which whatever is inferior is forever subordinated to what is above it. But if (which God forbid) there had been no hope of so blessed a consummation, we should still have preferred to endure the hardness of this

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[45] ibid, Book III, Ch. 28 "Of the Victory of Sylla, the Avenger of the Cruelties of Marius."

[46] ibid, Book III, Ch. 28.

[47] ibid, Book XXI, Ch. 15.

[48] See, e.g., Nicene and Post-Nice Fathers: First Series: Volume IV: *Against Faustus*, Edited by Philip Schaff , p. 301: "for the natural order which seeks the peace of mankind".

> conflict, rather than, by our non-resistance, to yield ourselves to the dominion of vice. [49]

In contrast, in Book III, Ch. 19, Augustine describes the possibility of a war being so protracted that the victors, at the end, were more liked the conquered than conquerors.

> As to the second Punic war, it were tedious to recount the disasters it brought on both the nations engaged in so protracted and shifting a war, that (by the acknowledgment even of those writers who have made it their object not so much to narrate the wars as to eulogize the dominion of Rome) the people who remained victorious were less like conquerors than conquered. [50]

So how does one build peace, according to Augustine? Not through monuments, apparently. In *The City of God*, Book III, Ch. 25, "Of the Temple of Concord, Which Was Erected by a Decree of the Senate on the Scene of These Seditions and Massacres", Augustine derides the idea that a temple of concord, built on the site of massacres, will create peace. What will create peace? In part, he suggests something akin to a protean version of the democratic peace hypothesis:

> The wicked war with the wicked; the good also war with the wicked. But with the good, good men, or at least perfectly good men, cannot war; though, while only going on towards perfection, they war to this extent, that every good man resists others in those points in which he resists himself. [51]

Augustine suggests that "good men" do not go to war with other "good men." He further seems to indicate that there are degrees of goodness, and as they approach perfection, the

[49] Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library, Book III, Ch. 28.

[50] ibid, Book III, Ch. 19.

[51] ibid, Book XV, Ch. 5.

likelihood of war goes down. This is surprisingly reminiscent of the idea that as the democratic level of a dyad of states increases, the likelihood of armed conflict in a given year decreases, that is, the democratic peace hypothesis. [52] It is also similar to Kenneth Waltz's "first frame" (peace-making through change in individuals) in *Man, the State, and War*:[53]

Of course, Augustine's vision of an omnipotent God controlling all that occurs is at odds with a human-centered vision of war. In *City of God*,[54] (Book V, Ch. 22 "The Durations and Issues of War Depend on the Will of God.") Augustine discusses evils of long-continued wars, but in the same register one might talk about "natural evils," like an earthquake.

> Let them, therefore, who have read history recollect what long-continued wars, having various issues and entailing woeful slaughter, were waged by the ancient Romans, in accordance with the general truth that the earth, like the tempestuous deep, is subject to agitations from tempests—tempests of such evils, in various degrees[.][55]

For Augustine, the duration of wars is determined by the God.

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[52] Maoz, Zeev, and Bruce Russett. "Normative and Structural Causes of Democratic Peace, 1946–1986." American Political Science Review 87.03 (1993): 624-638; Russett, Bruce. Grasping the Democratic Peace: Principles for a Post-Cold War World. Princeton University Press, 1994; Russett, Bruce, et al. "The Democratic Peace." *International Security* (1995): 164-184..

[53] Waltz, Kenneth Neal. *Man, the State, and War: a theoretical analysis*. Columbia University Press, 2001.

[54] Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library

[55] ibid, Book V, Ch. 22.

> Thus also the durations of wars are determined by Him as He may see meet, according to His righteous will, and pleasure, and mercy, to afflict or to console the human race, so that they are sometimes of longer, sometimes of shorter duration. [56]

This also undercuts the humanitarianism within the idea of Christian reluctance towards violence, as well as the underdeveloped state of the laws of war during biblical times. In *The Church History of Eusebius,* Book IV, Ch. 6, Augustine describes the law of war allowing an occupied country to be reduced to complete subjection.[57] He describes the indiscriminate killing of thousands of men, women, and children without describing it as a violation of those laws. [58]

> AS the rebellion of the Jews at this time grew much more serious, Rufus, governor of Judea, after an auxiliary force had been sent him by the emperor, using their madness as a pretext, proceeded against them without mercy, and destroyed indiscriminately thousands of men and women and children, and in accordance with the laws of war reduced their country to a state of complete subjection. [59]

But in the end, Augustine's vision of peace is as an underlying order—one that allows the possible existence of war. For Augustine, there is a universal peace which the law of nature preserves through all disturbances. Peace is not synonymous with equality or universal joy—some may be justly miserable in a well-ordered peace. In a chapter

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[56] ibid, Book V, Ch. 22.

[57] Nicene and Post-Nicene Fathers: Series II, Volume I, Church History of Eusebius, Book IV, Ch. 6, Philip Schaff et al.

[58] Ibid.

[59] Ibid.

comparing international peace to the peace of a well-proportioned body, with harmonious appetites, Augustine describes peace as follows:

> The peace of all things is the tranquillity of order. Order is the distribution which allots things equal and unequal, each to its own place. And hence, though the miserable, in so far as they are such, do certainly not enjoy peace, but are severed from that tranquillity of order in which there is no disturbance, nevertheless, inasmuch as they are deservedly and justly miserable, they are by their very misery connected with order. […]As, then, there may be life without pain, while there cannot be pain without some kind of life, so there may be peace without war, but there cannot be war without some kind of peace, because war supposes the existence of some natures to wage it, and these natures cannot exist without peace of one kind or other. [60]

In his letter to Darius, Augustine calls conflict prevention more glorious than war making. The goal of good people is peace, even if good men fight.

> But it is a higher glory still to stay war itself with a word, than to slay men with the sword, and to procure or maintain peace by peace, not by war. For those who fight, if they are good men, doubtless seek for peace; nevertheless it is through blood. Your mission, however, is to prevent the shedding of blood. [61]

Augustine's love for peace and distaste for war was not universally shared. For example, Theodoretus, Bishop of Cyrus, makes the striking claim that war brings more blessings than peace because of the effects on inner nature.[62]

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[60] Augustine 1950 *The City of God*, tr. Marcus Dods. New York: Modern Library, Book XIX, Ch. 13.

[61] Nicene and Post-Nicene Fathers: Series I, Vol I, Letters of St Augustin, Ch. 160.

[62] Nicene and Post-Nicene Fathers: Series II, Vol. III, Theodoret, Ecclesiastical History, Book V, Ch 38, Philip Schaff et al.

> These wars and the victory of the church had been predicted by the Lord, and the event teaches us that war brings us more blessing than peace. Peace makes us delicate, easy and cowardly. War whets our courage and makes us despise this present world as passing away. But these are observations which we have often made in other writings.[63]

Contrast this with St Jerome:

> We must seek peace if we are to avoid war. And it is not enough merely to seek it; when we have found it and when it flees before us we must pursue it with all our energies. For "it passeth all understanding;" it is the habitation of God. As the psalmist says, "in peace also is his habitation." The pursuing of peace is a fine metaphor and may be compared with the apostle's words, "pursuing hospitality." It is not enough, he means, for us to invite guests with our lips; we should be as eager to detain them as though they were robbers carrying off our savings.[64]

A final note on Augustine is worth review, regarding his ideas on peace as the ultimate goal, even during war—demanding mercy due to the vanquished or captive:

> Peace should be the object of your desire; war should be waged only as a necessity, and waged only that God may by it deliver men from the necessity and preserve them in peace. For peace is not sought in order to the kindling of war, but war is waged in order that peace may be obtained. Therefore, even in waging war, cherish the spirit of a peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace; for our Lord says: "Blessed are the peacemakers; for they shall be called the children of God." If, however, peace among men be so sweet as procuring temporal safety, how much sweeter is that peace with God which procures for men the eternal felicity of the angels! Let necessity, therefore, and not your will, slay the enemy who fights against you. As violence is used towards him who

[63] Ibid.

[64] Nicene and Post-Nicene Fathers: Series II, Vol. VI, The Letters of St. Jerome, Letter 125, Philip Schaff et al.

> rebels and resists, so mercy is due to the vanquished or the captive, especially in the case in which future troubling of the peace is not to be feared.[65]

c) Conclusion

As described above, several critical elements of Augustine's thought must be remembered as the work later scholars are considered. Even a just war is an evil. For a war to be just, it must have a purpose, and the purposes of war may not be fulfilled by the transition to peace. It is possible to evaluate the justice of war and the subsequent peace based mainly on the effect on the individual rather than the state. The transition to peace is not always better than continued warfare. Ultimately, mercy must guide the conduct of war and allow a successful transition to peace.

2. Institutes of Justinian (533)

a) Introduction

While Caesar Flavius Justinian (Justinian I) is credited as the author, in fact he was the sponsor of the text. The work was authored collectively, supervised by Tribonian.[66] The Institutes of Justinian are the core of a larger work known as the *Corpus Juris Civilis*, a codification of Roman law. The Institutes (or *Pandects*, roughly akin to encyclopedia, and signifying comprehensiveness) of Justinian is largely based upon the Institutes of

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[65] Nicene and Post-Nicene Fathers: Series I, Vol I, Letters of St Augustin, Ch 142, Philip Schaff et al.

[66] *Justinian's Institutes*, Introduction and translation Peter Birks and grant McLeod, Cornell University Press 1987, with the Latin text of Paul Krueger, Introduction, p. 8.

Gaius,[67] a celebrated Roman jurist who wrote from 130-180 A.D, but also upon Marcian, Forentinus, Ulpian, and Paul.[68] It was intended as a textbook for new law students, but were essentially binding as law. Properly translated, the name of the Institutes (*Institutiones*) would be closer to "basic principles".[69] Justinian also called this work "*Elementa*", providing the sense of basic principles on which to grow.[70] It is essentially an anthology of excerpts of classical jurists. These excerpts were generally at least three hundred years old when Justinian's commission compiled the Institutes.[71]

b) Writings and relation to *jus post bellum*

The main text of the Institutes of Justinian is not principally concerned with the law of war and peace generally or the transition to peace specifically, the work itself is framed in the context of war, peace, conquest, and justice. From the preamble:

> The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes.
> With deepest application and forethought, and by the blessing of God, we have attained both of these objects. The barbarian nations which we have

[67] Gordon, William M., and Olivia F. Robinson. *The Institutes of Gaius*. Duckworth, 1988.

[68] *Justinian's Institutes*, Introduction and translation Peter Birks and grant McLeod, Cornell University Press 1987, with the Latin text of Paul Krueger, Introduction, p. 12.

[69] Ibid.

[70] Ibid.

[71] Ibid 10.

> subjugated know our valour, Africa and other provinces without number being once more, after so long an interval, reduced beneath the sway of Rome by victories granted by Heaven, and themselves bearing witness to our dominion. All peoples too are ruled by laws which we have either enacted or arranged.[72]

Law and justice applied not only to Romans during peacetime. Rather, at least implicitly, government could be good or bad during war, Caesar could be judged as just or unjust with respect to defeated people; and dominion and promulgation of law after war is a chief result of war. The result of war, however, is not necessarily just.

From Book I, Title II:

> But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free.[73]

This famous passage, describing the law of nations as common to the whole human race, based in natural law but directed towards human ends, dwells directly on one of the profound issues that arose in early history in the wake of armed conflict, the problem of captivity and slavery. These are contrary to the law of nature, but not barred by the law of nations. The issue of captivity arises repeatedly in the Institutes of Justinian.

Book I, Title III “Of the Law of Persons” states:

> Slavery is an institution of the law of nations, against nature subjecting one man to the dominion of another.
> 3 The name 'slave' is derived from the practice of generals to order the preservation and sale of captives, instead of killing them; hence they are

[72] Moyle, John Baron, ed. *The Institutes of Justinian*. Clarendon Press, 1906, p. 1.

[73] Ibid 4.

> also called mancipia, because they are taken from the enemy by the strong hand.
> 4 Slaves are either born so, their mothers being slaves themselves; or they become so, and this either by the law of nations, that is to say by capture in war, or by the civil law, as when a free man, over twenty years of age, collusively allows himself to be sold in order that he may share the purchase money. [74]

This possibility of capture and enslavement during war and recovery during the transition to peace touched on many areas of the law, including family law. As stated in Title XII "Of the Modes in which Paternal Power is Extinguished": "A captive who is recovered after a victory over the enemy is deemed to have returned by postliminium" [75]—that is, he will recover all of his former rights including paternal power over his children through the fiction that the captive has never been absent. *Postliminium* could serve as a restoration of the *status quo ante* in the aftermath of war, or simply the successful escape from captivity.[76] Capture of people was an extension of the capture of things from the enemy by the law nations: "Things again which we capture from the enemy at once become ours by the law of nations, so that by this rule even free men become our slaves, though, if they escape from our power and return to their own people, they recover their

[74] Ibid.

[75] Ibid.

[76] *See also* Book I, Title XX "Of Atilian Guardians, and Those Appointed Under the Lex Iulia" section 2 "On the capture of a guardian by the enemy, the same statutes regulated the appointment of a substitute, who continued in office until the return of the captive; for if he returned, he recovered the guardianship by the law of postliminium."; Book I, Title XXII. Of the Modes in which Guardianship is Terminated" section 1 "Again, tutelage is terminated by adrogation or deportation of the pupil before he attains the age of puberty, or by his being reduced to slavery or taken captive by the enemy." Moyle, John Baron, ed. *The Institutes of Justinian*. Clarendon Press, 1906.

previous condition."[77] Captivity and return also influenced the disposition of property in wills.[78]

c) Conclusion

While the focus of the Institutes of Justinian is neither war nor peace, the legal effects of the transition to peace are integrated into the rationale of many issues. Because this work is largely compilations of earlier statements from Roman jurists, the treatment of the transition to peace reflects hundreds of years of past practice and law. The Institutes of Justinian became the core of Roman civil law for hundreds of years after its publication. While it had a limited influence on the development of medieval law and thought, it has proven influential in certain legal traditions over time.

3. Raymond of Penafort (1175-1275) (Decretals of Gregory IX)

a) Introduction

Raymond of Penafort was an older contemporary of Thomas Aquinas. Raymond compiled the Decretals of Gregory IX providing the basis for canon law for hundreds of years thereafter.[79] Raymond was ordered by Pope Gregory IX to take the expansive body

[77] Book II, Title I, "Of the Different Kinds of Things" Section 17, Moyle, John Baron, ed. *The Institutes of Justinian*. Clarendon Press, 1906.

[78] Book II, Title XII, "Of Persons Incapable of Making Wills" Section 5, Moyle, John Baron, ed. *The Institutes of Justinian*. Clarendon Press, 1906. *See also* Book III, Title I "Of the Devolution of Inheritances on Intestacy" Section 4.

[79] Kuttner, Stephan. "Raymond of Peñafort as Editor: The Decretales and Constitutiones of Gregory IX." *Bull. Medieval Canon L.* 12 (1982).

of papal rulings (*Compilationes antiquae*) and tighten it into a definitive Book of Decretals.[80] More to the point for *jus post bellum*, Raymond also composed the *Summa de poenitentia [Summa de casibus poentitentialis]*, which has sections specifically relating to the conduct of war.

b) Writings and relation to *jus post bellum*

Raymond lists five conditions, all of which are necessary, for a war to be just:

> 1. The person making war must be a layman and not an ecclesiastic, since the latter may not draw blood.
>
> 2. The object must be to recover goods or defend one's country.
>
> 3. The cause must be to obtain peace after all other means have failed.
>
> 4. The intention must include no hatred, vengefulness, nor cupidity and must be to obtain justice.
>
> 5. The authority may come from the church, when the war is of the faith, but otherwise it proceeds from the order of the prince.[81]

Of particular note for *jus post bellum* are points three and four. While this list would ordinarily and simply be categorized as a precursor to Aquinas requirements for waging a just war in terms of *jus ad bellum*, points three and four oblige a party to an armed conflict to use the armed conflict to "obtain peace after all other means have failed." The

[80] Kuttner, Stephan. "Raymond of Peñafort as Editor: The Decretales and Constitutiones of Gregory IX." *Bull. Medieval Canon L.* 12 (1982).

[81] *Summ. Ram.*, Lib. II, tit. V. 12; Vanderpol, Alfred, and Emile Chénon. *La doctrine scolastique du droit de guerre*. A. Pedone, 1919., p. 55; Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 49.

only way this can make sense (waging war to obtain peace) is if the peace obtained is of a different quality than the alternative, specifically, a more just peace. This is clarified in the next point, stating that the intent must be to obtain justice. Further, a party to the armed conflict must avoid the intents that make the transition to a just and sustainable peace difficult: hatred, vengefulness, or cupidity.

c) Conclusion

Raymond sets the stage for Aquinas's important contributions to *jus post bellum* thinking. The goal of war is to obtain a just peace after all other means have failed, and to avoid war making with intentions that make it difficult to sustain that peace.

4. Thomas Aquinas (1225-1274)

a) Introduction

Thomas Aquinas (St. Thomas, hereafter "Aquinas") wrote at a moment when the Latin West came into contact with the ideas of Greek, Jewish, and Arabian philosophers, including Aristotle, Avicenna, Algazel, Averroes, Avicebron, Maimonides, Alexander of Aphrodisias, Themistius, Philoponus, Simplicius and Proclus.[82] Aquinas continued the contemplative orientation of Augustine but with a practical approach received from

[82] Anton C. Pegis, Introduction, in Basic Writings of St. Thomas Aquinas:, Volume 1, Anton C. Pegis ed., Hackett Publishing 1997, p. xxxv.

Aristotle.[83] His *Summa Theologica* thus develops moral theology as applied to human action in a manner and breadth that was unequalled at the time.

b) Writings and relation to *jus post bellum*

Aquinas's summary analysis of the law and normative principles of warfare is found in Question 40 of the *Secunda Secundae* in the *Summa Theologica*.[84] Aquinas begins, as is his custom throughout much of the *Summa Theologica*, with Objections to the questions posed. He poses four questions:

(1) Whether some kind of war is lawful?

(2) Whether it is lawful for clerics to fight?

(3) Whether it is lawful for belligerents to lay ambushes?

(4) Whether it is lawful to fight on holy days?

Of these, the first is of the most interest to *jus post bellum*. He makes four objections to the idea that it is sinful to wage war. Of those, two are of particular interest:

> Objection 2: Further, whatever is contrary to a Divine precept is a sin. But war is contrary to a Divine precept, for it is written (Mat. 5:39): "But I say to you not to resist evil"; and (Rom. 12:19): "Not revenging yourselves, my dearly beloved, but give place unto wrath." Therefore war is always sinful.

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[83] Jean-Pierre Torrel, *Thomas Aquinas (1224/1225-1274), Thomism.* In Encyclopedia of the Middle Ages, (Vauchez André ed., James Clarke & Co. 2002)

[84] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*. Available as Aquinas, Thomas. "Summa theologica. 3 vols." *Trans. By the Fathers of the English Dominican Province. New York: Benziger Brothers* 48 (1947). *See* The Elements of St. Augustine's Just War Theory, John Langan, The Journal of Religious Ethics, Vol. 12, No. 1 (Spring, 1984).

> Objection 3: Further, nothing, except sin, is contrary to an act of virtue. But war is contrary to peace. Therefore war is always a sin.

Peace is seen as a natural, good, virtuous thing. So why should the violation of that peace ever be just? Aquinas answers that three things are necessary for a war to be just: authority, just cause, and rightful intention. With respect to authority, he argues:

> First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. […] Hence it is said to those who are in authority (Ps. 81:4): "Rescue the poor: and deliver the needy out of the hand of the sinner"; and for this reason Augustine says (Contra Faust. xxii, 75): "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."[85]

Aquinas, quoting Augustine, espouses the idea of a natural order conducive to peace. War, *bellum*, is not a conflict between private individuals, *duellum*, but something commanded by the sovereign. Authority is important, at least in part, not simply because it is a requisite to a just war, but because it is conducive to peace. What are those with authority to do with that authority? To rescue the poor and deliver the needy from the hand of the sinner, presumably creating a link between the existence of poverty and need and a sin, an injustice. A major point of authority as a requisite for just war then is not only because it is conducive to the natural order of peace, but a just peace, where the poor

[85] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

are rescued and the needy delivered, and where the common weal is defended.[86] This may seem to be a particularly modern focus not just on justice, but on distributive or transformational justice.[87] In fact, it is an ancient concern.

Aquinas also requires a just cause for any war to be considered just:

> Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault. Wherefore Augustine says (QQ. in Hept., qu. x, super Jos.): "A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."[88]

Again, Aquinas leans on Augustine for authority, but derives a more general principle. The last point in the list, to “restore what [the nation or state attacked] has seized unjustly is perhaps most interesting to a modern audience, as it describes most clearly the desired state of peace after war, something like the *status quo ante*. Particularly in the case of territory acquired through aggression, the territory must be returned to the aggrieved sovereign for a just peace to return. This ties in with the original requirement given by Aquinas, that of authority—as without authority (usually given by just war scholars, but not by Aquinas here as “right authority) there can be no just return of that what has been seized unjustly from that authority. Then, as now, *jus ad bellum* places a positive value on the international *status quo* and a negative value on actions and powers that challenges

[86] Ibid.

[87] See e.g. Mani, Rama. *Beyond Retribution: Seeking Justice in the Shadows of War*. Polity, 2002.

[88] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

and destabilizes that *status quo*. The obverse of this is a tendency of *jus post bellum* to emphasize, as a default position, a return to the *status quo ante*. This is not without its difficulties. The *status quo ante*, after all, was the situation that generated the conflict. Larry May, for example, asserts that total justice should not be demanded, but that it should be tempered by the principle of *Meionexia* (something akin to moderation in one's demands for justice). [89] It is uncertain May would go so far as to advocate that territory taken by aggressors not be disgorged and returned to the original sovereign.

Thirdly, and perhaps most importantly for the analysis of *jus post bellum*, Aquinas asserts that "it is necessary that the belligerents should have a rightful intention".[90] Again, Aquinas relies on Augustine as a source to make a generalizable principle: "Hence Augustine says (Contra Faust. xxii, 74): "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war."[91] And again, citing Augustine (erroneously),[92] Aquinas states "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good." While peace is not the only

[89] See e.g., *Jus Post Bellum*, Grotius, and *Meionexia*, in Jus Post Bellum: Mapping the Normative Foundations, edited by Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford University Press 2014); Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012).

[90] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

[91] Ibid.

[92] These words cannot be found in Augustine's works, but can be found in Can. Apud. Caus. xxiii, qu. 1.

right intent listed, it is the first listed. As analyzed regarding Augustine supra, Aquinas can be read as saying that wars waged with the right intent to be in a sense "peaceful," perhaps in that they are not waged with the type of intent that make return to a just and sustainable peace difficult or impossible.

Aquinas makes a specific Reply to Objection 2, which is essentially the Christian pacifist objection based on Matthew 5:39: "But I say to you not to resist evil". He suggests, using Augustine as authority,[93] that this approach:

> should always be borne in readiness of mind, so that we be ready to obey them, and, if necessary, to refrain from resistance or self-defense. Nevertheless it is necessary sometimes for a man to act otherwise for the common good, or for the good of those with whom he is fighting. Hence Augustine says (Ep. ad Marcellin. cxxxviii): "Those whom we have to punish with a kindly severity, it is necessary to handle in many ways against their will. For when we are stripping a man of the lawlessness of sin, it is good for him to be vanquished, since nothing is more hopeless than the happiness of sinners, whence arises a guilty impunity, and an evil will, like an internal enemy.[94]

This is interesting to those interested in *jus post bellum*, both as a call to what Larry May has suggested using the Aristotelian concept of *Meionexia*,[95] and as a direct response to Christian concern for (even) those who cause harm. Aquinas is not saying that the idea

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[93] Augustine, De Serm. Dom. in Monte i, 19

[94] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

[95] See e.g., *Jus Post Bellum*, Grotius, and *Meionexia*, in Jus Post Bellum: Mapping the Normative Foundations, edited by Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford University Press 2014); Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012).

of “turning the other cheek”[96] is irrelevant, but that indeed sometimes resistance and even self-defence should be refrained from. This is remarkable for those taking the mistaken approach that the Just War doctrine is essentially a simple apologia for war making. This, in a sense, mirrors Larry May’s idea of *Meionexia*,[97] that total justice should not be demanded, in the service of something other than deontological (just deserts) justice.

In addition, the passages above suggest that the reason why pacifism is not obligatory is due to *concern for those with whom one fights*. For Augustine and Aquinas, one punishes with “kindly severity”[98] and vanquishes for the good of one’s enemy. In a sense, Aquinas is performing a slight-of-hand, dividing the enemy into two entities, with the real war being fought against the “evil will”[99] and “guilty impunity”[100] of the opponent, not the opponent *per se*. This may seem self-deluding, but it has potentially interest regarding *jus post bellum*. Again, this would militate against the kind of war and warfare that would make improbable a successful transition to a just and sustainable peace. While it is too much to expect that the opposing side would truly accept that the intent of war was “kindly”, this type of framing may none the less restrain those adopting it and

[96] The full Matthew 5:39 is as follows: “But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also.” (New International Version).

[97] See e.g., *Jus Post Bellum*, Grotius, and *Meionexia*, in Jus Post Bellum: Mapping the Normative Foundations, edited by Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford University Press 2014); Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012).

[98] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

[99] Ibid.

[100] Ibid.

make the framework both for prosecuting the war and transitioning to peace more restrained.

With respect to Objection 3, Aquinas is even more to the point. He states, again relying on Augustine:

> Reply to Objection 3: Those who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace, which Our Lord "came not to send upon earth" (Mat. 10:34).[101] Hence Augustine says (Ep. ad Bonif. clxxxix): "We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace."[102]

Again, we have an interesting entanglement of what might later be called *jus ad bellum*, *jus in bello*, and *jus post bellum*. Right intent is required for a war to be just, and is typically categorized as a *jus ad bellum* criterion. But that intent is shown in a specific way, according to Augustine (and highlighted by Aquinas), to conduct war in a fashion that does not foreclose the prosperity of peace-not an evil peace, but a prosperous, just peace.

c) Conclusion

Aquinas' contribution to just war thinking was profound and well-acknowledged. Less well-acknowledged is his contribution specifically to the law and normative principles of

[101] Matthew 10:34 states in full "Think not that I am come to send peace on earth: I came not to send peace, but a sword." (King James Version).

[102] Question 40, Of War (Four Articles), *Secunda Secundae* in the *Summa Theologica*.

the transition from armed conflict to peace. Following Augustine's lead, he espouses the idea of a natural order conducive to peace. [103] Right authority is important, not merely for its own sake, but because it is conducive to peace. [104] That peace should be a just peace, where the poor are rescued and the needy delivered.[105] The right intent should be securing peace, punishing evil-doers, and uplifting the good. [106] Aquinas answers the argument for pacifism, not by an absolute demand for rights-based self-defence, but due to concern for the enemy, who has fallen into sinful conduct. [107] The ultimate goal of a prosperous peace controls not only post-conflict behaviour but the warring itself. [108]

5. Baldus de Ubaldis (1327-1400)

a) Introduction

Baldus de Ubaldis[109] was a student of Bartolus of Sassoferrato (d. 1352)[110] and Federicus Petrucci.[111] Bartolus and Baldus were both pre-eminent jurists of the late Middle

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] For more on Baldus de Ubaldis, see Canning, Joseph. *The Political Thought of Baldus de Ubaldis* . Cambridge, U.K.: Cambridge University Press, 1987; Kenneth Pennington, Baldus de Ubaldis, 8 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 35 (1997); Wahl, J. A. "Baldus de Ubaldis and the Foundations of the Nation-State." Manuscripta 21.2 (1977):80.

Ages.[112] Bartolus also taught Johannes (Giovanni) de Ligano, who wrote an early, perhaps the first tract to focus exclusively on the law of war in 1360*, Tractatus de bello, de represaliis et de duello*.[113] This work was mostly influential through vulgarizations (translations from Latin), particularly in *L'Arbre des Batailles* by Honoré Bonnet. *Tractatus de bello, de represaliis et de duello* adds little to reflections *on jus post bellum*, mostly echoing Augustine with statements like "The end of war, then, is the peace and tranquillity of the world." [114] Amongst other accomplishments, Baldus and Bartolus provided a legal foundation for the modern conception of the state.[115] The conception of a state that transcended the position and prerogatives of the ruler and recognized the people's sovereignty was necessary for a more permanent conception of peace. Baldus wrote on the *Digest*, the *Codex Iustinianus*, including the last three books (*Tres libri*), the Institutes, the *Decretales* of Pope Gregory IX, the *Liber feudorum*, and *Liber de pace*

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[110] Magnus Ryan, Bartolus of Sassoferrato and Free Cities. The Alexander Prize Lecture, *Transactions of the Royal Historical Society*, Vol. 10 (2000), pp. 65-89. Published by: Cambridge University Press on behalf of the Royal Historical Society.

[111] Baldus de Ubaldis, Petrus, The Oxford International Encyclopedia of Legal History, (Stanley N. Katz ed.), Oxford University Press, 2009.

[112] Kenneth Pennington, Baldus de Ubaldis, 8 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 35 (1997).

[113] Da Legnano, Giovanni, Thomas Erskine Holland, and James Leslie Brierly. *Tractatus de bello, de represaliis et de duello*. Printed for the Carnegie Institution of Washington at the Oxford University Press, 1917.

[114] Ibid 244.

[115] Wahl, J. A. "Baldus de Ubaldis and the Foundations of the Nation-State." Manuscripta 21.2 (1977):80.

constantiae, a commentary of the Peace of Constance of 1183.[116] This last work will be the focus here, as it has the greatest relevance to *jus post bellum*. [117]

b) Writings and relation to *jus post bellum*

In *Liber de pace constantiae*[118] when Ubaldis writes: "*Imperator vult istam pacem esse perpetua…. quia Imperator facit hanc pacem nomine sedis non nomine proprio ... et Imperium non moritur*"[119] Baldus is distinguishing between peace agreements (such as the Treaty of Constanz) and a private contract that a ruler might enter into. Under this understanding of the state and the methods the state has for transitioning from armed conflict to peace (peace agreements), the peace agreement can be the basis for a lasting peace, binding on successive rulers. He pioneered the idea of *dignitas* or Royal Dignity, which "referred chiefly to the singularity of the royal office, to the sovereignty vested in the king by the people, and resting in the king alone."[120] Royal Dignity was not

[116] Baldus de Ubaldis, Petrus, The Oxford International Encyclopedia of Legal History, (Stanley N. Katz ed.), Oxford University Press, 2009.

[117] For contextualization of Baldus de Ubaldis as a predecessor to later scholars, see Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 356.

[118] Baldus, on *Liber de pace constantiae,* 'Nos Romanorum' in *Corpus iuris civilis* (Lyons, 1553), fol. 76, as cited in Wahl, J. A. "Baldus de Ubaldis and the Foundations of the Nation-State." Manuscripta 21.2 (1977):80, 81.

[119] Very roughly translated: "Because the emperor, who wants this peace to be permanent, makes this peace not in their own name but in the name of the empire, it does not die[.]"

[120] Ernst Kantorowicz, *The King's Two Bodies* (Princeton, 1957), p. 384.

something that touched the king alone, but rather his entire government.[121] Immortality was a characteristic of *Dignitas*—like a species or like the phoenix, the natural body of the king might die but the king's "public body" could not.[122] This idea of what would now be called a legal person or an international legal personality is a critical foundation for later developments in *jus post bellum*—most obviously for peace treaties that resolve international armed conflict, but also for non-international armed conflicts resolved by peace agreements to which a state is a party. Contracts made by the king must be honoured by his successors because such contracts were governed by natural law—and no prince was above natural law or divine law, nor free to disregard the public welfare.[123] The law of was only somewhat distinguishable from general contract law at this point.[124]

Personal crimes of the king could not be imputed to a successor, however, as that would affect the *dignitas* of the king.[125] This is interesting from the perspective of individual criminal responsibility of heads of government and heads of state, important *jus post*

[121] Ibid.

[122] Wahl, James A. "Baldus de Ubaldis and the Foundations of the Nation-State." *Manuscripta* 21.2 (1977): 80-96, p. 83.

[123] Ibid 84.

[124] Randall Lessafer, "The Medieval Canon Law of Contract and early Modern Treaty Law", 2 *Journal of the History of International Law* (2000), p. 178, 185; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 224.

[125] Wahl, James A. "Baldus de Ubaldis and the Foundations of the Nation-State."*Manuscripta* 21.2 (1977): 80-96, p. 84.

bellum issues. It is in tension with the idea of the king not only animating *ius* or justice (*iustum animatum*)[126] but the king *as* the law (*nota quod lex est princeps*).[127]

c) Conclusion

Baldus plays an important part in establishing that peace treaties and peace agreements could and should endure. Without the idea that such agreements could be permanent, outlasting the king, a key foundation of *jus post bellum* would be lacking. Baldus manages to lay this foundation without sacrificing the idea that kings should be individual responsible for their personal crimes.

6. Francisco de Vitoria (1492 – 1546)

a) Introduction

Since the pioneering work of James Brown Scott in the 1920s[128] and 1930s,[129] the Spanish neo-scholastics of Francisco de Vitoria (or Victoria) and Francisco Suarez have been recognized as the principal point of origin for the modern doctrine of the law of

[126] Ibid 88.

[127] Ibid.

[128] James Brown Scott, *The Spanish Origin of International Law: Lectures on Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-16717)*, Washington, 1928.

[129] James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria, founder of the modern law of nations; Francisco Suarez, founder of the modern philosophy of law in general and in particular of the law of nations; A critical examination and a justified appreciation*, Washington, 1934.

nations.[130] Vitoria had a wide influence, both in his time and thereafter. The New Laws of the Indies of 1542 relied heavily on his works *De Indis* and *De Jure Belli*.[131] These theologians are the best known members of the "School of Salamanca" or the "second scholastic," building on Aquinas to address new issues.[132] Vitoria was a theologian, not a lawyer—a Professor of Theology in the University of Salamanca.[133] Vitoria moved away from Aquinas styling of *ius gentium* as purely a natural law phenomenon as opposed to one also based on agreements between humans, what would now be called positive law.[134] That said, Vitoria relied heavily on natural law, and held to Thomas Aquinas's belief that natural law could be known through reason, not revelation.[135] Using this approach, he legitimized the Spanish conquest of the Indies not based on arguments that indigenous inhabitants of the Americas were heathen or allegedly irrational, but because

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[130] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 224.

[131] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 158

[132] Annabel Brett, *Francisco De Vitoria (1483–1546) and Francisco Suárez (1548–1617)*, The Oxford Handbook of the History of International Law, Edited by Bardo Fassbender and Anne Peters (Oxford University Press, 2012).

[133] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), pp. 94-95.

[134] Annabel Brett, *Francisco De Vitoria (1483–1546) and Francisco Suárez (1548–1617)*, The Oxford Handbook of the History of International Law, Edited by Bardo Fassbender and Anne Peters (Oxford University Press, 2012).

[135] Johnson, James Turner, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, (Princeton University Press 1981), p. 76.

of the alleged violation of the *ius communicandi*, the right of communication.[136] Strikingly, he held that "Difference of religion is not a cause of just war"[137] and that a just war may only be waged for causes provided in natural law.[138]

b) Writings and relation to *jus post bellum*

(1) Peace as the aim of armed conflict—and the problems that can cause

Like Thomas Aquinas, Vitoria relies on Augustine as weighty authority. With regards to the aim of armed conflict, Vitoria states:

> If after recourse to all other measures, the Spaniards are unable to obtain safety as regards the native Indians, save by seizing their cities and reducing them to subjection, they may lawfully proceed to these extremities. The proof lies in the fact that "peace and safety are the end and aim of war," as St. Augustine says, writing to Boniface. [139]

Vitoria continues:

> And since it is now lawful for the Spaniards, as has been said, to wage defensive war or even if necessary offensive war, therefore, everything

[136] Annabel Brett, *Francisco De Vitoria (1483–1546) and Francisco Suárez (1548–1617)*, The Oxford Handbook of the History of International Law, Edited by Bardo Fassbender and Anne Peters (Oxford University Press, 2012).

[137]Franciscus de Victoria, *De Indis et De Jure Belli Relectiones*, ed. Ernest Nys, in *The Classics of International Law*, ed. James Brown Scott (Washington : Carnegie Institute, 1917 : *De Jure Belli*, sect. 10)

[138] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 157

[139] De Vitoria, Francisco. *Francisci de Victoria De Indis et De ivre belli relectiones*. No. 7. The Carnegie Institution of Washington, 1917, p. 155 (On the Indians, Section III)

> necessary to secure the end and aim of war, namely, the obtaining of safety and peace, is lawful[140]

This absolutist language demonstrates an old difficulty with *jus post bellum*—the aim of transitioning to a sustainable peace, instead of restricting practice *in bello*, can be used to serve as an unlimited license.

Post bellum concerns can also undermine *ad bello* restrictions. Again relying ultimately on Augustine, Vitoria states on the issue of whether Christians may make war at all:

> A sixth proof is that, as St. Augustine says (De verbo Domini and Ad Bonifacium), the end and aim of war is the peace and security of the State. But there can be no security in the State unless enemies are made to desist from wrong by the fear of war, for the situation with regard to war would be glaringly unfair, if all that a State could do when enemies attack it unjustly was to ward off the attack and if they could not follow this up by further steps.[141]

Similarly, he states shortly thereafter:

> Not only are the things just named allowable, but a prince may go even further in a just war and do whatever is necessary in order to obtain peace and security from the enemy; for example, destroy an enemy's fortress and even build one on enemy soil, if this be necessary in order to avert a dangerous attack of the enemy. This is proved by the fact that, as said above, the end and aim of war is peace and security. Therefore a belligerent may do everything requisite to obtain peace and security. Further, tranquillity and peace are reckoned among the desirable things of mankind and so the utmost material prosperity does not produce a state of happiness if there be no security there. Therefore it is lawful to employ all appropriate measures against enemies who are plundering and disturbing

[140] Ibid.

[141] Ibid 167.

> the tranquillity of the State. […] This shows that even when victory has been won and redress obtained, the enemy may be made to give hostages, ships, arms, and other things, when this is genuinely necessary for keeping the enemy in his duty and preventing him from becoming dangerous again.[142]

(2) Post-conflict justice

Vitoria also directly addresses issues of post-conflict justice.

> It is lawful for a prince, after gaining the victory in a just war and after retaking property, and even after the establishment of peace and security, to avenge the wrongs done to him by the enemy and to take measures against the enemy and punish them for these wrongs.[143]

Again, linking the aims of peace to potential over-reach, even *post bellum*:

> Not only is all this permissible, but even after victory has been won and redress obtained and peace and safety been secured, it is lawful to avenge the wrong received from the enemy and to take measures against him and exact punishment from him for the wrongs he has done. […] It is, therefore, certain that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge. Confirmation hereof is furnished by the fact that in reality peace and tranquillity, which are the end and aim of war, can not be had unless evils and damages be visited on the enemy in order to deter them from the like conduct in the future. […] Moreover, shame and disgrace are not wiped away from a State merely by its rout of Its enemies, but also by its visiting severe punishment and castigation on them. Now, among the things which a prince is bound to defend and preserve for his State are its honor and authority." [144]

[142] Ibid 171.

[143] Ibid 163.

[144] Ibid 172-3.

Vitoria does, however, restrict some post-conflict measures:

> Merely by way of avenging a wrong it is not always lawful to kill all the guilty. […] We ought, then, to take into account the nature of the wrong done by the enemy and of the damage they have caused and of their other offenses, and from that standpoint to move to our revenge and punishment, without any cruelty and inhumanity. In this connection Cicero says (Offices, bk. 2) that the punishment which we inflict on the guilty must be such as equity and humanity allow. And Sallust says: "Our ancestors, the most religious of men, took naught from those they conquered save what was authorized by the nature of their offenses." [145]

Similarly:

> [I]t would involve the ruin of mankind and of Christianity if the victor always slew all his enemies, and the world would soon be reduced to solitude, and wars would not be waged for the public good, but to the utter ruin of the public. The measure of the punishment, then, must be proportionate to the offense, and vengeance ought to go no further, and herein account must be taken of the consideration that, as said above, subjects are not bound, and ought not, to scrutinize the causes of a war, but can follow their prince to it in reliance on his authority and on public counsels. Hence in the majority of cases, although the war be unjust on the other side, yet the troops engaged in it and who defend or attack cities are innocent on both sides. And therefore after their defeat, when no further danger is present, I think that they may not be killed, not only not all of them, but not even one of them, if the presumption is that they entered on the strife in good faith. [146]

This idea, that individuals can enter into strife in good faith, even if there side is not just, is one of Vitoria's most influential ideas in the just war tradition. For example, the

[145] Ibid 182.

[146] Ibid 182.

English jurist Fulbecke takes the same approach on this subject, sometimes called "invincible ignorance" as Vitoria.[147]

(3) *An integrated view of* jus ad bellum*,* jus in bello*, and* jus ad bellum

Vitoria does not view the legal authority to make war and secure peace as separate domains, but rather, relying on Augustine, views them as an integrated whole.

> A prince has the same authority in this respect as the State has. This is the opinion of St. Augustine (Contra Faustum): "The natural order, best adapted to secure the peace of mankind, requires that the authority to make war and the advisability of it should be in the hands of the sovereign prince." Reason supports this, for the prince only holds his position by the election of the State. Therefore he is its representative and wields its authority; aye, and where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace."[148]

Vitoria also connects the just cause of war to the nature of the domestic regime, well before there was any thought of a "democratic peace." He extend this not just to the overall just cause of war (a *jus ad bellum* concern with important effects on *jus post bellum*) but to the rules of war (a *jus in bello* concern).

> Neither the personal glory of the prince nor any other advantage to him is a just cause of war. […] [W]ere a prince to misuse his subjects by compelling them to go soldiering and to contribute money for his

[147] Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 189.

[148] De Vitoria, Francisco. *Francisci de Victoria De Indis et De ivre belli relectiones*. No. 7. The Carnegie Institution of Washington, 1917, p. 169

> campaigns, not for the public good, but for his own private gain, this would be to make slaves of them.[149]

The connection between *jus ad bellum*, *jus in bello*, and *jus post bellum* also extends to the question of acquiring territory as a fine, or mulct, during war and after war.

> It is also lawful, in return for a wrong received and by way of punishment, that is, in revenge, to mulct the enemy of a part of his territory in proportion to the character of the wrong, or even on this ground to seize a fortress or town. This, however, must be done within due limits, as already said, and not as utterly far as our strength and armed force enable us to go in seizing and storming. And if necessity and the principle of war require the seizure of the larger part of the enemy's land, and the capture of numerous cities, they ought to be restored when the strife is adjusted and the war is over, only so much being retained as is just, in way of compensation for damages caused and expenses incurred and of vengeance for wrongs done, and with due regard for equity and humanity, seeing that punishment ought to be proportionate to the fault.[150]

(4) Post bellum *tribute*

Distinctly *post bellum* is the question of a lawful tribute imposed on conquered enemies. Vitoria thinks this is decidedly lawful, stating: "Whether it is lawful to impose a tribute on conquered enemies. My answer is that it is undoubtedly lawful, not only in order to recoup damages, but also as a punishment and by way of revenge."[151]

[149] Ibid 170.

[150] Ibid 185.

[151] Ibid.

(5) Post bellum *regime change*

Also distinctly *post bellum* is the question of deposing the princes of conquered enemies. Vitoria thinks this can be lawful, but it must be proportionate.

> Whether it is lawful to depose the princes of the enemy and appoint new ones or keep the princedom for oneself. First proposition: This is not unqualifiedly permissible, nor for any and every cause of just war, as appears from what has been said. For punishment should not exceed the degree and nature of the offense. Nay, punishments should be awarded restrictively, and rewards extensively. This is not a rule of human law only, but also of natural and divine law. Therefore, even assuming that the enemy's offense is a sufficient cause of war, it will not always suffice to justify the overthrow of the enemy's sovereignty and the deposition of lawful and natural princes; for these would be utterly savage and inhumane measures.[152]

When is it acceptable to change the enemy regime? It can be due to the power of the just cause (*jus ad bellum*) of the war, but it is especially true when it is necessary to achieve a sustainable peace (a *jus post bellum* concern).

> It is undeniable that there may sometimes arise sufficient and lawful causes for effecting a change of princes or for seizing a sovereignty; and this may be either because of the number and aggravated quality of the damages and wrongs which have been wrought or, especially, when security and peace can not otherwise be had of the enemy and grave danger from them would threaten the State if this were not done. This is obvious, for if the seizure of a city is lawful for good cause, as has been said, it follows that the removal of its prince is also lawful. And the same holds good of a province and the prince of a province, if proportionately graver cause arise.
> Note, however, with regard to Doubts VI to IX, that sometimes, nay, frequently, not only subjects, but princes, too, who in reality have no just

[152] Ibid 185-7.

> cause of war, may nevertheless be waging war in good faith, with such good faith, I say, as to free them from fault; as, for instance, if the war is made after a careful examination and in accordance with the opinion of learned and upright men. And since no one who has not committed a fault should be punished, in that case, although the victor may recoup himself for things that have been taken from him and for any expenses of the war, yet, just as it is unlawful to go on killing after victory in the war has been won, so the victor ought not to make seizures or exactions in temporal matters beyond the limits of just satisfaction, seeing that anything beyond these limits could only be justified as a punishment, such as could not be visited on the innocent.[153]

Vitoria summarizes his canons of warfare as follows:

> 60. All this can be summarized in a few canons or rules of warfare. First canon: Assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should, if possible, live in peace with all men, as St. Paul enjoins on us (Romans, ch. 12). Moreover, he should reflect that others are his neighbors, whom we are bound to love as ourselves, and that we all have one common Lord, before whose tribunal we shall have to render our account. For it is the extreme of savagery to seek for and rejoice in grounds for killing and destroying men whom God has created and for whom Christ died. But only under compulsion and reluctantly should he come to the necessity of war.
>
> Second canon: When war for a just cause has broken out, it must not be waged so as to ruin the people against whom it is directed, but only so as to obtain one's rights and the defense of one's country and in order that from that war peace and security may in time result." [154]

In short, avoid war when possible and only with proper authority, and wage war so as to achieve lasting peace and security. Vitoria again takes an integrated approach to *jus ad bellum*, *jus in bello*, and *jus post bellum*.

[153] Ibid 185-7.

[154] Ibid 185-7.

c) Conclusion

Vitoria covers a wide field of material that relates to *jus post bellum*. Critical subject areas include: first, peace as the aim of armed conflict; second, post-conflict justice; third, an integrated view of *jus ad bellum*, *jus in bello*, and *jus post bellum*; and fourth, post bellum regime change. Together, Vitoria's writings amount to a new foundation for *jus post bellum*.

7. Francisco Suarez (1548-1617)

a) Introduction

As mentioned previously, Since the pioneering work of James Brown Scott in the 1920s[155] and 1930s,[156] the Spanish neo-scholastics of Francisco de Vitoria and Francisco Suarez have been recognized as the principal point of origin for the modern doctrine of the law of nations.[157] These theologians are the best known members of the "School of Salamanca" or the "second scholastic," building on Aquinas to address new issues.[158]

[155] James Brown Scott, *The Spanish Origin of International Law: Lectures on Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-16717)*, Washington, 1928.

[156] James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria, founder of the modern law of nations; Francisco Suarez, founder of the modern philosophy of law in general and in particular of the law of nations; A critical examination and a justified appreciation*, Washington, 1934.

[157] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 224.

[158] Annabel Brett, *Francisco De Vitoria (1483–1546) and Francisco Suárez (1548–1617)*, The Oxford Handbook of the History of International Law, Edited by Bardo Fassbender and Anne Peters (Oxford University Press, 2012).

Like Vitoria, Francisco Suarez emphasized the positive law nature of *ius gentium*, based not on natural law but on custom.[159]

b) Writings and relation to *jus post bellum*

If James Brown Scott was correct that Francisco de Vitoria was the founder of international law, Francisco Suarez was the philosopher, and Hugo Grotius was the organizer[160]—what did the philosopher have to say about the transition from armed conflict to peace? Suarez is noteworthy in large part due to his systematic commentary on the writings of Aquinas.[161]

Scholars often cite the primary contribution of Suarez to the just war tradition is the emphasis on what would now be called *jus in bello*, the importance of the means of warfare.[162] To understand Suarez's approach to the transition to peace, one must focus first on *jus ad bellum* factors, specifically on just cause. Suarez did not consider aggressive war to be necessarily evil, rather he argued that it might be right and necessary if punishment was merited.[163] He did not consider it a problem that sovereigns would be

[159] Ibid.

[160] James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria, founder of the modern law of nations; Francisco Suarez, founder of the modern philosophy of law in general and in particular of the law of nations; A critical examination and a justified appreciation*, Washington, 1934, pp. 183-184.

[161] Ibid

[162] May, Larry. "Grotius and Contingent Pacifism." *Studies in the History of Ethics* (2006): 1-24.

[163] *Selections from Three Works of Francisco Suárez, S. J.* Prepared by Gwladys L. Williams, Ammi Brown, and John Waldron. Oxford: Clarendon Press, 1944, *Disputatio de Bello* (disp. 13),

judges in their own case, both at the outset, during, and after war—because there is no other option.[164]

Suarez also emphasizes the role of charity with regards to the pursuing a just cause with an eye towards the post-conflict situation.[165] Even if a war is just, or a demand for payment is just, if "the debtor incurs very serious losses in consequence, while the property in question is not in great degree necessary to the creditor".[166] Suarez also condemns disproportionate risk of post-war loss and peril for the realm of a justly aggrieved prince:

> [I]f one prince begins a war upon another, even with just cause, while exposing his own realm to disproportionate loss and peril, then he will be sinning not only against charity, but also against the justice due to his own state. The reason for this assertion is as follows: a prince is bound in justice to have greater regard for the common good of his state than for his own good; otherwise, he will become a tyrant.[167]

Suarez was also interested in the probability of a successful *post bellum* result as a condition of starting a war.[168] He disagreed with Cardinal Thomas de Vio (known as

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Is War Intrinsically Evil, pp. 803, 818. Available at http://www.heinonline.org/HOL/Page?handle=hein.beal/sftw0002&id=901&collection=beal&index=beal/sftw

[164] *Selections from Three Works of Francisco Suárez, S. J.* Prepared by Gwladys L. Williams, Ammi Brown, and John Waldron. Oxford: Clarendon Press, 1944, *Disputatio de Bello* (disp. 13), Is War Intrinsically Evil, p. 819.

[165] Ibid 820-21.

[166] Ibid 821.

[167] Ibid.

[168] Ibid 822.

Cajetan) that "for a war to be just, the sovereign ought to be so sure of the degree of his power, that he is morally certain of victory." [169] Suarez does not think this condition of certitude is absolutely essential, because it is almost impossible to realize, because it can lead to undue hesitancy, and also because it effectively discriminates against weaker sovereigns (*vis a vis* stronger sovereigns). [170]

c) Conclusion

Suarez's view of the law of war necessarily informed his writings dealing with the transition to peace. He does not condemn aggressive war necessarily[171] but insists on the role of charity with regards to pursuing a just cause, due to the need for a sustainable post-conflict peace.[172] The likelihood of a just peace must be evaluated before beginning a war,[173] but certainty of outcome is not required.[174]

[169] Ibid 822.

[170] Ibid 822.

[171] Ibid 803, 818.

[172] Ibid 820-21

[173] Ibid 821.

[174] Ibid 822.

8. Alberico Gentili (1552- 1608)

a) Introduction

It is not unreasonable to trace the key origins of modern international legal thought to Alberico Gentili.[175] His application of the concept of sovereignty is strikingly modern, and his development of jurisprudence separate from the church was a pivotal contribution.[176] Working shortly before Hugo Grotius, he was a Professor of Civil Law in Oxford, bringing a history-infused Italian outlook to his efforts to describe the law. Nonetheless, he draws heavily on earlier scholars for authority and understanding, again demonstrating the deep conceptual roots of his subject matter. [177]

b) Writings and relation to *jus post bellum*

Gentili's most famous work, and his most important work with respect to *jus post bellum* and the just war tradition in general, is *De Iure Belli Libri Tres*.[178] Gentili first published

[175] For a concise introduction to Gentili and his historiography, see Scattola, Merio Fassbender, "Alberico Gentili (1552-1608)" in Bardo, et al. *The Oxford handbook of the history of international law*. Oxford University Press, 2012.

[176] See T.E. Holland, An inaugural lecture on Albericus Gentilis (1874); Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in H. Bull, B. Kingsbury, and A. Roberts (eds), Hugo Grotius and International Relations (1990), at 133; G. van der Molen, Alberico Gentili and the Development of International Law: His Life, Work and Times (1937).

[177] For contextualization of Alberico Gentili as a predecessor to later scholars, see Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 356-7.

[178] The best treatment of Gentili and his relevance for *jus post bellum* is Lesaffer, Randall. "Alberico Gentili's just post bellum and Early Modern Peace Treaties." in Kingsbury, Benedict,

his thoughts on the law of war in 1589 under the title *De Jure Belli Commentationes Tres*. *De Iure Belli Libri Tres* (three books on the law of war), an expanded version of *De Jure Belli Commentationes Tres* was first published in 1598. The third of the three books that make up this work is of particular interest. The three books roughly match the contemporary *jus ad bellum*, *jus in bello*, *jus post bellum* framework in widespread use today. Before reviewing that third book, however, some initial stops in the first and the end of the second book are warranted.

Book I, Chapter XXIV deals with "Whether war is handed on to future generations."[179] This is framed as a question of what would now be called *jus ad bellum*, the transmissibility of just cause against "successors and posterity" or as Gentili puts it: "is it lawful to make against successors and posterity a war which it would have been lawful to make against their predecessors?" [180] In modern conceptions of armed conflict as an interaction between socially and legally constructed entities, not natural persons, this question is not normally asked. The idea of the natural persons inheriting the sins of their predecessors is not the framework a modern public international lawyer normally asks, and indeed for the secular-oriented Gentili shows the pressure of religious thinking at the

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and Benjamin Straumann. *The Roman foundations of the law of nations: Alberico Gentili and the justice of empire*. Oxford University Press, 2010.

[179] 2 Alberico Gentili, De Iure Belli Libri Tres (John C. Rolfe trans.), p. 120 (1933)

Whether War is Handed on the Future Generations, available at http://heinonline.org/HOL/Page?handle=hein.beal/cilnaa0002&id=180&collection=unaudvis&index=beal/cilnaa#180

[180] Ibid 120.

time. If the answer given was no, then this would serve as a structural check on war's recurrence. Unfortunately, perhaps, the answer given by Gentili (and, in a sense, by current law) is that biological succession from one generation to the next is not itself a check on grievances between sovereigns. Gentili rationalizes this on normative and legal terms by pointing out that positive inheritances may also be undeserved, but are nonetheless not seen as immoral or unlawful. [181] On the other hand, he stands against those who would not make binding agreements been sovereigns on public matters endure past the deaths of those who made the oaths—the framework for lasting peace and enduring treaties. [182] Again, this question would not arise today, but that is because Gentili and others established the framework that is now (usually) used without question or reflection.

In Book II, Chapter XII "Of Truces" strongly argues that the mere cessation of violence caused by truces does not amount to peace.[183] While truces may be long (he cites truces lasting 100 years) and the land can seem at peace during truces, they are not permanent. Truces "do not interrupt hostility, but only bring hostile acts to an end."[184] The subject of

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[181] Ibid.

[182] Ibid 121.

[183] Ibid 186 (Of Truces).

[184] Ibid 187.

the nature of truces, whether they amount to a third state between peace and war, is hotly debated, and Gentili notes this debate without being overly committed to any side. [185]

In Book III, Chapter I "On Peace and the End of War", Gentili enters into what could be called *jus post bellum* proper. The opening paragraph is worth noting in full:

> Up to this point we have discussed the laws of both of beginning and of carrying on war. Hence but one point still remains; namely, to tell of the rules for bringing war to an end. And indeed the end of war for which all ought to strive is peace. 'War should be entered upon in such a way', says Cicero, 'that its aim should seem to be nothing else than peace.' Augustine also and the Canons declare that 'peace should be one's desire, war a necessity. For peace is not sought in order to arouse war; but war is waged in order to win peace'. Therefore victory is the end of the general's art, says Aristotle, when the victory is characterized by honour and by justice, which is peace.[186]

Gentili is integrating the transition from war as part of the overall law of war. He cites Cicero, Aristotle, Augustine, and Canon Law to insist that this transition to peace infuses the entire enterprise of armed conflict, from its overall goals to the general's art of achieving victory with honour and justice.

Gentili is interested in the definition of *pax*, citing Festus and Ulpian for the etymology deriving the term from agreement (*pactio*), and Isidore who derives compact (*pactum*)

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[185] Ibid.

[186] Ibid 289 (On Peace and the End of War)

from peace (*pax*).[187] Peace agreements put an end to war, or prevent its occurrence.[188]

Gentili ultimately defines peace as follows:

> But peace is define in a general way of Augustine as 'ordered harmony'; and order is the proper distribution of things, which in the opinion of our own jurists and others is the nature of justice. We therefore define peace here as the orderly settlement of war. Baldus calls it a complete cessation of discord, declaring that peace cannot exist while war remains. This is true, and we shall maintain that view later at some length. But our definition also contains this point, and besides has the provision about justice, which is what we seek in this cessation of war, along with order and the assignment of his own to each man.[189]

This definition of peace, insisting on not only justice but distributional justice, and that the goal is not only to end a conflict but to prevent its occurrence, seems strikingly contemporary. Here is a foundation for an insistence on not just "negative" peace but a just and sustainable peace as the goal of the third part of the just war tradition, *jus post bellum*.

Gentili continues:

> And as to this order or right distribution we shall now speak, saying that it is brought about by the victor alone, or by both sides together; and that both sides commonly consider, not only the past, but also the future, and indeed ought to do so. This is taught by Homer, that father of all wisdom, and is observed by the great authority Plutarch. Also our own omniscient and all-defining Baldus set it forth in his *Responses*. The past has an eye to vengeance, the future to a permanent establishment of peace; nay, the

[187] Ibid 290.

[188] Ibid.

[189] Ibid.

> past also has regard to this permanence, as will appear from what follows. But the two topics must be considered separately.[190]

The future-oriented nature of the function of *jus post bellum* has ancient roots. It is not, however, free to ignore the past, but must resolve past grievances to secure a just peace.

This leads Gentili to Book III, Chapter II "Of the Vengeance of the Victor."[191] This chapter is not actually celebrating vengeance,[192] but rather is a treatment of post-conflict justice. Citing Baldus, Gentili states:

> [I]t is not fitting for a judge to give his attention to establishing peace until the faults which led to war are punished; so in this subject we must first provide for a just penalty, in order that when all the roots of war have, so to say, been cut away, peace may acquire greater firmness. [193]

Gentili here connects the *justice* of a peace to its *sustainability*. The promise of post-conflict justice is necessary for war's cessation: "There would never be peace, and war would be to the death and contrary to nature, if the will of the victor controlled everything and the vanquished could lose everything." [194]

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[190] Ibid.

[191] Ibid 291 (Of the Vengeance of the Victor)

[192] Gentili defines vengeance as the other side of the coin to punishment, where "punishment is one thing, which has regard to the one who suffers it; and vengeance is another, which relates to him who inflicts it[.]" Ibid 295

[193] Ibid 291.

[194] Ibid.

Gentili is not only considered about negative repercussions for the vanquished in war, but to the potentially pernicious effects of victory on the victor. Following Augustine, he is concerned with the effect of war on internal character, not only external results:

> [O]ne should ask the question, not what the victor is able to do and what victory may demand, but what befits the character of the victor, as well as that of the vanquished; but in the case of the victor in particular, it should be considered what becomes him and also the nature of the war which is being carried on. But everything must be directed towards the true purpose of victory, which is the blessing of peace. 'Lead those whom you defeat to the advantages of the peace brought about by their defeat', says Augustine.[195]

Gentili does not think post-conflict justice requires an equal approach to "cultivated peoples" and "barbarians" or "uncivilized nations," holding that "with barbarians violence is more potent that kindness."[196] Similarly, haughty or proud defeated peoples should be treated with harshness, according to Gentili.[197] That said, Gentili insists that "the penalty ought never to exceed the deserts of the offender, but it ought to be determined according to the measure of each offence. The punishment, too, ought to fall upon the one by whom the crime is committed."[198] Here is the seed of principles dear to modern post-conflict justice: proportionality of punishment and individual criminal responsibility. He continues arguing for a bar on unnatural punishment:

[195] Ibid 293.

[196] Ibid.

[197] Ibid 294.

[198] Ibid 295.

> Punishments which any respect for Nature would forbid should have no place here. We leave to others the special discussion of those penalties which are forbidden by the civil law, and which seem to me to be forbidden by respect for Nature, such as the cutting off of both hands and feet.[199]

He continues barring cruel punishment, citing Baldus for the idea that "nothing which is cruel is just."[200] He ties these restrictions on punishment to the goal of achieving a sustainable peace: "It is such conduct [cruel or disfiguring punishment] which keeps a war which is finished from being permanently at an end, and this conduct Augustine censures at great length."[201]

In Book III, Chapter III "Of the Expenses and Losses Due to War", Gentili analyses the difficult issue of war reparations. He compares the issue to legal disputes in which:

> [T]he loser must refund the costs to the victor, not only in civil but also in criminal cases, if he did not have a just cause; this is especially true in case the plaintiff is defeated […] But if the loser appears to have had ground for litigation, he is not condemned.[202]

Gentili argues that the law regarding the transition to peace is "subject to a special law"—specifically including:

> [T]hat the goods of private individuals, for the sake of peace, may be given away by the state or the sovereign. And it is common doctrine that

[199] Ibid.

[200] Ibid.

[201] Ibid 296.

[202] Ibid 298 (Of the Expenses and Losses Due to War).

> the wrongs and losses of subjects may for the reason be remitted by their sovereign, and that the subjects in their turn may never make complaint, either in a civil or a criminal suit.[203]

The sovereign in turn is bound to restore goods taken from his or her subjects in accordance with the law of nations and the demands of peace, but unjustly according to domestic law.[204] Citing Baldus, Gentili raises the issue of waiving public rights before individuals, and the idea that agreements between sovereigns should not disadvantage particular private individuals, but be general[205]—but in the end comes out against pursuing reparation for violations of the law of war after the peace is made and the terms of peace agreed upon.[206]

Gentili's remarks "On Exacting Tribute and Lands from the Vanquished"[207] are part reasonable justification for taxation, part apology for empire. While Gentili endorses the right of conquest and *jus victoriae*, including exacting tribute and lands, the right of the victor is not unlimited. He states "property may be taken from the enemy, provided that in so doing justice and equity are observed. The victor will not make everything his own which force and his victory make it possible to seize."[208] In "Of Despoiling the

[203] Ibid 300.

[204] Ibid.

[205] Ibid.

[206] Ibid 302.

[207] Ibid 303 (On Exacting Tribute and Lands from the Vanquished).

[208] Ibid 305.

Conquered of Their Ornaments"[209] Gentili limits looting religious objects "only if the gods themselves were destroyed when their statues were lost. For it is not permitted the victors in dealing with the conquered to violate the laws of God or of Nature." [210] His preference to the general looting he finds the laws permits is "to show respect to moderation and honour, and to refrain from doing what is permitted by the laws."[211] But while "it is always proper to consider the reason for making war and to bring all the actions of the war into harmony with it, so far as possible"[212] things which are not sacred may undoubtedly be seized by the victor, according to Gentili.[213] After much debate, Gentili comes out against executing captive leaders of the enemy, and restricts perpetual imprisonment of enemy leaders if the victor has other means to achieve a sustainable peace.[214] In a chapter likely to be abhorrent to the modern reader but reflective of state practice at the time, he comes out forcefully in favour of the legality of slavery in the law of nations[215] but points out the custom of *postliminium* in which a slave, including those captured in war, one may be freed by escaping and returning home during wartime. He generally treats the capture of slaves as a matter of chattel, but holds that "an enemy may

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[209] Ibid 310, Of Despoiling the Conquered of Their Ornaments (Book III, Chapter VI).

[210] Ibid 311.

[211] Ibid 313.

[212] Ibid 315, Of the Destruction and Sacking of Cities (Book III, Chapter VII).

[213] Ibid.

[214] Ibid 327, Of the Captive Leaders of the Enemy (Book III, Chapter VIII).

[215] Ibid 328, Of Slaves (Book III, Chapter IX).

not be held captive perpetually and must not be sold."[216] He dismisses religious arguments against slavery with this strikingly secular analysis: "For in divine affairs man is nothing; and in establishing the law between God and man, which is religion, he has no weight; but it is not so in human affairs nor in establishing human law."[217] While much of Gentili's writings evince a much greater concern with religious teachings and history than would be the norm in later years or today, it is this clear effort to divide religion from human law that is so striking for Gentili at the time, compared to the religious scholars opining on the law of war before him.

Book III, Chapter X "On Changing One's Condition"[218] regards what Immanuel Kant might have called changing the constitution of a people, or what might be called today "transformative occupation" or perhaps just the form of local government in an empire. Gentili has no compunction about the right of the victor to change local governments: "[I]t is just for the vanquished to be forced to adopt the government of the conquerors; or if they do not yield, it is right to crush them."[219] For forced changes in religion, however, Gentili is sceptical except for "those who are enslaved to a perverse religion" when "their

[216] Ibid.

[217] Ibid 332, Of Slaves (Book III, Chapter IX).

[218] Ibid 336, On Changing One's Condition.

[219] Ibid 338.

religion made the conquest less decisive."[220] Generally, Gentili finds forcible changes to religious practice not to be helpful to consolidate the peace.[221]

Nor should unnecessary changes to custom be imposed. Gentili states there are many instances:

> [I]in which natural justice is offended and with respect to which the victor has no rights. These are all things which furnish a natural cause for war, and the purpose is, that the victor may not propose to the vanquished to undertake things which offer a natural cause for making war.[222]

He gives the example of forced prostitution as a condition of peace that would lead to future war, as it violated honour and natural law.[223] Disarmament of the conquered, however, is legal and routine.[224] While the victor may set up memorials of his victory, it is inexpedient to do so as they may prompt rebellion.[225]

Perhaps the most crucial series of chapters in *De Iure Belli Libri Tres* with respect to *jus post bellum* begins with Book III, Chapter XIII: "On Insuring Peace for the Future."[226] Gentili begins by reiterating the importance of future orientation, saying that punishment

[220] Ibid 342, On Change of Religion and Other Conditions.

[221] Ibid.

[222] Ibid 346.

[223] Ibid.

[224] Ibid 347 On Change of Religion and Other Conditions.

[225] Ibid 350 When There Is a Conflict between What Is Honourable and What Is Expedient.

[226] Ibid 353, On Insuring Peace for the Future.

(*ultio*) fulfils both the desire for solace for injury and also for security for the future.[227] He states that "the victor should grant a peace of such a kind as to be lasting, since it is the nature of peace to be permanent."[228] What specifically makes a peace lasting? Citing Augustine, Gentili notes compassion and restraint on anger in punishment as critical.[229] From Epictetus's definition of peace as "liberty combined with tranquillity"[230] Gentili derives the "one enduring principle, namely justice"[231] for creating a lasting peace. He discounts marriage,[232] oaths,[233] and temporary strength over the conquered[234] as unreliable foundations for peace if justice is absent. That said, in the peace which the victors grant to the conquered, "[e]verything is in the hands of the victor, save for such exceptions as are suggested by the laws of nature"[235] including keeping women hostages.[236]

[227] Ibid 353.

[228] Ibid.

[229] Ibid.

[230] Ibid 354.

[231] Ibid.

[232] Ibid 355.

[233] Ibid 356.

[234] Ibid 358.

[235] Ibid 359.

[236] Ibid.

Gentili makes a distinction between peace granted to the conquered and the settling of war by both belligerents, a subject he takes up in Chapter XIV, "On the Law of Agreements."[237] Citing Baldus, Gentili emphasizes the aim of a permanent quiet, and more colourfully citing Hippocrates, compares injustice in the peace agreement and its effect on peace to what remains after a crisis "since in diseases it is what remains after the crisis that usually causes death."[238] Echoing Baldus, Gentili asks:

> But shall we also say that a war which springs from a former one is the same war, as if it came from a root which has been left in the ground? That certainly is not peace which does not do away with all controversy; a disease is not cured unless the root is destroyed.[239]

Gentili inveighs against subtlety, deception, and exceptions in peace treaties, saying that fine points of law are not suited for trustworthiness.[240] No exception is made to the binding nature of a peace treaty due to fear or duress, since (citing Baldus) Gentili points out that fear is natural after victory, and "hence one must keep his agreement who makes one because he is conquered in war; and the same thing applies to the agreements of prisoners of war."[241] That said, Gentili carves out exception for those subject to unjust force and fear while imprisoned,[242] fraud,[243] or unforeseeable change of circumstances.[244]

[237] Ibid 360.

[238] Ibid.

[239] Ibid.

[240] Ibid.

[241] Ibid 363, On the Law of Agreements

[242] Ibid 363-4.

He argues for a framework in which to evaluate potentially conflicting obligations from multiple peace treaties and treaties of alliance, starting with feudal obligations,[245] restricting aiding both sides in a conflict,[246] aiding just causes,[247] aiding the party with the prior claim,[248] to avoid providing aid when in doubt as to conflicting claims,[249] and to favour an ally waging defensive war over one waging offensive war.[250] Gentili argues for making peace treaties (but not alliances) with non-Christian sovereigns[251] and places arms control squarely into his Book III analysis regarding the transition to peace.[252]

c) Conclusion

In *De Iure Belli Libri Tres* we find a tri-partite hybrid functional approach to the just war tradition that is in many respects strikingly contemporary. The first of three books covers

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[243] Ibid 365.

[244] Ibid.

[245] Ibid 390, Of Friendship and Alliance.

[246] Ibid 390, 393.

[247] Ibid 391.

[248] Ibid 392.

[249] Ibid.

[250] Ibid.

[251] Ibid 397, Whether It Is Right to Make a Treaty with Men of a Different Religion.

[252] Ibid. 404 Of Arms and Armies; Ibid 407, Of Citadels and Garrisons.

not the start of war, but the overall justice and theory of entering into war.[253] The second book covers the more detailed practice of fighting war.[254] The third book covers not the period after war, but the ending of war and the practice of crafting a new era of peace.[255] For skeptics of the pedigree of this hybrid functional approach to *jus ad bellum*, *jus in bello*, and *jus post bellum* (re-)reading Gentili may be useful.

[253] The subjects in the first book include the following chapter titles, allowing the reader to make a relatively speedy evaluation of the contents of the volume: I. Of International Law as applied to War; II. The Definition of War; III. War is waged by Sovereigns; IV. Brigands do not wage War; V. It is Just to wage War; VI. That War may be waged Justly by Both Sides; VII. Of the Causes of War; VIII. Of Divine Causes for making War; IX. Whether it is Just to wage War for the sake of Religion; X. Whether a Sovereign may justly resort to War to maintain Religion; among his Subjects; XI. Should Subjects war against their Sovereign because of Religion?; XII. Whether there are Natural Causes for making War; XIII. Of Necessary Defence; XIV. Of Defence on Grounds of Expediency; XV. Of Defence for the sake of Honour; XVI. On Defending the Subjects of Another against their Sovereign; XVII. Those who make War of Necessity; XVIII. Those who make War from Motives of Expediency; XIX. Of Natural Reasons for making War; XX. Of Human Reasons for making War; XXI. Of the Misdeeds of Private Individuals; XXII. On not Reviving Old Causes for War; XXIII. Of the Overthrow of Kingdoms; XXIV. Whether War is handed on to Future Generations; XXV. Of an Honourable Reason for waging War.

[254] The subjects in the second book include the following chapter titles, allowing the reader to make a relatively speedy evaluation of the contents of the volume: I. Of Declaring War; II. When War is Not Declared; III. Of Craft and Strategy; IV. Of Deception by Words; V. Of Falsehoods; VI. Of Poisoning; VII. Of Arms and Counterfeit Arms; VIII. Of Scaevola, Judith, and Similar Cases; IX. Of Zopyrus and other Deserters; X. Of the Compacts of Leaders; XI. Of Agreements by the Soldiers; XII. Of Truces; XIII. When a Truce is Violated; XIV. Of Safe-conduct; XV. Of the Exchange and Liberation of Prisoners; XVI. Of Captives: that they are not to be Slain; XVII. Of Those who Surrender to the Enemy; XVIII. Of Cruelty towards Prisoners and Captives; XIX. Of Hostages; XX. Of Suppliants; XXI. Of Women and Children; XXII. Of Farmers, Traders, Pilgrims, and the Like; XXIII. Of Devastation and Fires; XXIV. Of the Burial of the Slain.

[255] See supra.

9. Petrus Gudelinus (1550-1619)

a) Introduction

Petrus Gudelinus's work *De jure pacis commentaris*,[256] was published posthumously in 1620.[257] He builds on Baldus de Ubaldis and Bartolus of Sassoferrato, and likely influenced Hugo Grotius.[258] Like Baldus de Ubaldis, he was not interested in parsing the peace treaty he was analysing, the Peace of Constanz, article by article—rather he would comment on the phenomenon of peace treaties in general.[259]

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[256] Petrus Gudelinus, *De jure pacis commentarius, in quo praecipuae de hoc jure quaestionis distinctis capitibus eleganter pertractantur*, Louvain, 1620. References initially from Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651. The 1628 Louvain edition was titled *De jure pacis commentaries ad constitutionem Frederici de pace Constantiense*. References here are from the edition in *Opera Omnia* (Collected works), Antwerp, 1685.

[257] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 223.

[258] Ibid 224.

[259] Ibid 228. For contextualization of Petrus Gudelinus as a predecessor to later scholars, see Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 356-7.

b) Writings and relation to *jus post bellum*

De jure pacis commentaris is only 14 pages in the *Opera omnia*[260] and has twelve sections or *capita.* The first section includes a section on methods and a definition of peace (*description Pacis*).[261] He recognizes peace as having many definitions,[262] but defines it specifically in contrast with war[263] and as freedom in tranquillity[264]. Peace was created by a treaty and was intended to be permanent, like a marriage.[265]

The second section describes the right authority to make peace treaties, mirroring the classic requirement under Aquinas for proper authority and public declaration to make war, which would later be echoed by Grotius.[266] Appealing to the authority of Bartolus

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[260] Petrus Gudelinus, *De jure pacis commentarius, in quo praecipuae de hoc jure quaestionis distinctis capitibus eleganter pertractantur*, Louvain, 1620. References initially from Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651. The 1628 Louvain edition was titled *De jure pacis commentarius ad constitutionem Frederici de pace Constantiense*. References here are from the edition in *Opera Omnia* (Collected works), Antwerp, 1685.

[261] Petrus Gudelinus, *Opera Omnia*, p. 551.

[262] "*Ut pluribus verbis Pacem definiam"* Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, p. 551

[263] "*bello contraria"* Ibid. 551

[264] "*pax est tranquilla libertas*" Ibid.

[265] Ibid.

[266] Ibid 552-3.

but ultimately disagreeing with him in substance, Gudelinus distinguishes between military truces (that could be made by generals) and proper peace treaties.[267]

Section three discussed the contents of peace treaties going back as far as Livy and Athenian history, analogizing them with contracts between private parties that could have explicit and implicit sections.[268] Two substantive components were always part of such peace treaties that would guide the transition to peace—the cessation of hostilities and agreements regarding conquered and seized objects.[269] Gudelinus also describes amnesty as a standard part of treaties, including the Peace of Constanz, but does not include actions in compensation as part of the general practice of amnesty.[270]

Section four discusses the *post bellum* restitution of goods and rights.[271] Gudelinus is concerned not only with the need for peace treaties to specifically address the restitution of property, but also to explicitly address the release of prisoners of war. By the second

[267] Ibid 552.

[268] Ibid 553-4. Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 232.

[269] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/0144036230853965, pp. 232-3.

[270] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 553-4. Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 233.

[271] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 554-5. Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 234.

paragraph, Gudelinus is addressing the ancient Roman doctrine of *postliminium*, whereby Roman soldiers captured by the enemy (*intra praesidia*) are regarded as legally dead, but that liberated soldiers reassumed their suspended civil and property rights.[272] (*Postliminium* is now used to refer to the right under international law, post-belligerent occupation, to invalidate acts such as transfers of property performed by the occupying belligerent in the occupied state's territory. *Postliminium* can be translated to mean "a return to one's threshold." It is a critical element of the Institutes of Justinian's treatment of the transition to peace.) [273] Gudelinus's stance on this issue meant that the release of prisoners of war could not be assumed *post bellum*. Rather, the solution to the problem of prisoners of war had to be specifically addressed after every conflict. Prisoners of war held by a legitimate authority could be held for ransom, and other war booty could be legitimately held—but those that could not legitimately gain under the law of war (*jure belli*) could not legitimately gain in the transition to peace.[274] The transition to peace did not operate identically with sovereigns and with pirates (*piratis*), robbers, (*latronibus*) or rebels (*rebellibus*).[275] What would now be called non-international armed conflict (with rebels) was to some degree consigned to the realm of criminality (robbers and pirates), leaving the transition from international armed conflict in its own category. That said,

[272] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, 2009, Oxford University Press.

[273] Ibid.

[274] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, p. 555.

[275] Ibid 555.

loot and territories taken from rebels were considered legitimate prizes of war, and through peace treaties rebels could have property returned to them.[276]

Section five builds upon section four, providing general rules for restitution clauses in peace treaties, while noting that treaties could provide for specific situations. Private individuals could also be covered by restitution clauses, not just states. Armed conflict was not a license for states to gain property—the rights of private parties could survive war. Gudelinus distinguishes profits gained from estates during wartime and the goods themselves—during armed conflict an occupier could enjoy the profits of occupied goods. Rebels had no right to enjoy such profits, however.[277]

Sections six and seven deal further with the difficult questions of costs, restitution, and indemnification with regards to private property in order to achieve the public good of peace.[278] Gudelinus applies the equitable principle whereby all owners of cargo on a ship would compensate the owner of cargo that had been thrown overboard to save the ship to the problem of an individual who loses private property as part of a treaty. Peace treaties

[276] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, p. 555; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 235.

[277] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 555-7; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, pp. 235-6.

[278] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 557-9; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, pp. 236-8.

may, in effect, violate the normal natural law protecting property rights for the greater collective good of building a lasting peace, but if the private party losing property is blameless, they should be compensated to the extent possible. Section eight serves as a brief precursor to the limitations on occupying powers that now exist—limiting occupying powers from making enduring one-sided legal acts.[279]

Section nine and ten are somewhat in tension with each other, with section nine minimizing the amount religious principles may be diminished by agreements with heretics (only in necessity) but emphasizing the sanctity and binding power of peace treaties in section ten.[280] Of particular interest to *jus post bellum* scholars, Gudelinus links the laws of war to the rationale for obeying peace treaties—arguing that if it is required to keep faith with an enemy in wartime, this requirement of oath-keeping was even stronger in peacetime. In section eleven, Gudelinus extends this requirement of fidelity to peace treaties to include not only treaties with other sovereigns, but to rebels.

Section twelve emphasizes that peace treaties bind not only the individual, mortal sovereign, but also their successors. Like Baldus, Gudelinus argues that treaties are not private, temporary affairs. Gudelinus asserts that it is not the oath of the sovereign that binds the successor sovereign (which would be questionable) but the *conventio*, the

[279] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 238.

[280] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 560-2; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, pp. 238-240.

agreement itself. This is a step from inter-sovereign agreements resembling temporary, private contracts to autonomous, permanent inter-state treaties and peace agreements more generally that is a foundation of the modern *jus post bellum*.[281]

c) Conclusion

In *De jure pacis commentaris*, Gudelinus takes peace seriously, not merely as a simple natural state but as a creation and an institution—something to be built and treasured, like marriage.[282] He recognized important constituent parts of a constructed peace, including the cessation of hostilities,[283] the distribution of[284] and restitution[285] for goods and rights, amnesty,[286] and exchange of captives.[287] He noted the difference between conflicts

[281] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 563-4; Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, pp. 241-2.

[282] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, p. 551.

[283] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/0144036230853965, pp. 232-3.

[284] Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/0144036230853965, pp. 232-3.

[285] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 554-5. Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 234.

[286] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, pp. 553-4. Randall Lesaffer (2002) An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice, The Journal of Legal History, 23:3, 223-252, DOI: 10.1080/01440362308539651, p. 233.

between sovereigns and those involving rebels.[288] This short work is important, not least due to its likely influence on Hugo Grotius.

10. Hugo Grotius (1583-1645)

a) Introduction

Hugo Grotius was a wunderkind, writing Latin poetry as a child, entering university at eleven, receiving his doctorate in law at fifteen, publishing his first book[289] and beginning practice as a lawyer in sixteen. He received international acclaim in his lifetime. He counted the Dutch East India Company as a client, which lead to his treatise *De Iure Praedae*, a chapter of which (*Mare Liberum*) was first published anonymously with a view to influencing the truce negotiations with Spain.[290] His *Inleidinge tot de Hollandsche Rechts-geleerdheid* (Introduction to Dutch Legal Learning)[291] published in 1620, proved influential in The Netherlands. In 1625 he published his most famous

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[287] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, 2009, Oxford University Press.

[288] Petrus Gudelinus, *De jure pacis commentarius* in *Opera Omnia*, (Collected works), Antwerp, 1685, p. 555.

[289] *Parallelon Rerum Publicarum de Moribus Ingenioque Populorum Atheniensium, Romanorum, Batavorum* (1601-1603).

[290] Laurens Winkel, *Grotius, Hugo* in The Oxford International Encyclopedia of Legal History (Stanley N Katz ed. Oxford University Press 2009).

[291] Grotius , Hugo . *Inleidinge tot de Hollandsche rechts-geleerdheid.* 1st ed. 1631. Latin version: J. van der Linden, *Institutiones juris hollandici et belgici*, 1835, edited by H. F. W. D. Fischer. Haarlem, Netherlands: H. D. Tjeenk Willink, 1962. English translation: R. W. Lee, *An Introduction to Roman-Dutch Law* (Oxford, U.K.: Clarendon Press, 1915 [5th ed. 1953]). Standard edition: Eduard M. Meijers, Folke Dovring, and H. F. W. D. Fischer (Leiden, Netherlands: Universitaire Pers Leiden, 1952 [2d ed. 1965]).

work, *De Iure Belli ac Pacis* (On the Law of War and Peace).[292] Peter Haggenmacher claimed that *De jure belli ac pacis libre tres* was not a general study on the law of nations but specifically focused on the laws of war.[293] That said, it was a work that would prove influential in legal philosophy, private law,[294] and international law. If James Brown Scott was correct that Francisco de Vitoria was the founder of international law, Francisco Suarez was the philosopher, and Hugo Grotius was the organizer[295]—what did the organizer have to say about the transition from armed conflict to peace? [296]

b) Writings and relation to *jus post bellum*

When describing the structure of *De jure belli ac pacis libre tres*, Grotius summarizes the third book as follows:

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[292] Grotius , Hugo , *Libri tres de jure belli ac pacis, in quibus ius naturae et gentium, item iuris publici praecipua explicantur*, 1st ed. (Paris, 1625). English translation: Francis W. Kelsey, et al. (Oxford, U.K.: Clarendon Press, 1925). Recent standard edition: Hugo Grotius , *Libri tres de jure belli ac pacis, in quibus ius naturae et gentium, item iuris publici praecipua explicantur*, edited by B. J. A. de Kanter-van Hettinga Tromp, (Aalen, Germany: Scientia Verlag, 1993).

[293] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, 1983.

[294] Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law*. London: Longmans, 1927. Reprints, Hamden, Conn.: Archon Books, 1970, and Union, N.J.: Lawbook Exchange, 2002.

[295] James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria, founder of the modern law of nations; Francisco Suarez, founder of the modern philosophy of law in general and in particular of the law of nations; A critical examination and a justified appreciation*, Washington, 1934, pp. 183-184.

[296] For contextualization of Hugo Grotius as a predecessor to later scholars, see Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 354-8.

> The third Book treats first of what is lawful in War; and then, having distinguished that which is done with bare Impunity, or which is even defended as lawful among foreign Nations, from that which is really blameless, descends to the several Kinds of Peace, and all Agreements made in war.[297]

To use contemporary terminology, Book III addresses not only *jus in bello*, but also *jus post bellum*.

Of particular interest is Book III, Chapter XX. "Concerning the publick Faith whereby War is finished; of Treaties of Peace, Lots, set Combats, Arbitrations, Surrenders, Hostages, and Pledges."[298] Early on in this chapter, Grotius describes the authority needed for peace treaties: "They who have Power to begin a War, have likewise Power to enter upon a Treaty to finish it[.]"[299]

Grotius places limits on what may be agreed to in a peace treaty:

> Now let us see what Things are subject to such an Agreement. Most Kings in our Days, holding their Kingdoms not as patrimonial, but as usufructuary, have no Power by any Treaty to alienate the Sovereignty in Whole, or in Part: Yea, and before they come to the Government, at what Time the People are their Superiors; such Acts may [by] a fundamental Law, for the future be rendered absolutely void and null; so that even as to Damages and Interest, they shall be no ways binding. For it is probable, that Nations thought fit to ordain that in that Case, the other Party should have no Action against the King for Damages and Interest, since, if that took Place, the Goods of the Subjects might be seized, as answerable for

[297] Hugo Grotius, The Rights of War and Peace, edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005). Vol. 1.

[298] Ibid Vol. 3.

[299] Ibid Vol. 3., p. 1551.

> the King's Debt; and so the Precaution that might have been taken to hinder the Alienation of the Sovereignty, would become entirely useless.[300]

Grotius is limiting the scope of the treaty making authority of government in most cases[301] particularly in the case of alienating the goods of the country. While the State may use the goods of private men to procure a peace, it must restore its subjects when it is able.[302] The State is not obliged to make its nationals whole if they suffer damage from the war itself, however.[303]

Grotius argues that peace treaties should be read in light of the stated reasons for going to war, and not for further gain or punishment:

> Wherefore where the Meaning of the Articles is ambiguous, it should be taken in this Sense, that he that has the Justice of the War on his Side, should obtain what he took up Arms for, and also recover his Costs and Damages, but not that he should get any Thing farther by way of Punishment, for that is odious. [304]

Grotius is generally conservative in his approach to changing the facts on the ground with peace treaties. He cites Thucydides for the general principle "ἔχοντες ἃ ἔχουσι, That

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[300] Ibid Vol. 3, pp. 1553-4.

[301] He notes the possibility of absolute rulers to go beyond the power of sovereignty if they have property rights over the goods in their lands, as in the case of the Pharoah.

[302] Ibid Vol. 3, p. 1556.

[303] Ibid Vol. 3, p. 1557.

[304] Ibid Vol. 3, p. 1558.

Things should remain as they are"[305] unless specifically agreed to, including returning captives,[306] restoring fugitives,[307] or claiming property.[308] If there is no clause dealing with damages from war, those damages should be considered forgiven.[309] Similarly, the right to punishment for grievances that might make the peace incomplete should be considered forgiven.[310] He sums up the overall function of peace agreements saying "it is humane to believe that those who make Peace intend sincerely to stifle the Seeds of War."[311]

Grotius places particular duties on a conqueror, forbidding unjust action (especially extrajudicial execution and expropriation) and commending clemency, liberality, and a general pardon:

> But the Conqueror, that he may do nothing unjustly, ought first to take Care that no Man be killed, unless for some capital Crime; so also, that no Man's Goods be taken away, unless by Way of just Punishment. And even by keeping within these Bounds, as far as his own Security will permit it, it is honourable (to a Conqueror) to shew Clemency and Liberality, and sometimes even necessary, by the Rules of Virtue, according as

[305] Ibid.

[306] Ibid.

[307] Ibid.

[308] Ibid Vol. 3, p. 1559.

[309] Ibid Vol. 3, pp. 1561-2.

[310] Ibid Vol. 3, p. 1563.

[311] Ibid Vol. 3, p. 1564.

> Circumstances shall require. Admirable are the Conclusions of those Wars which are finished with a general Pardon[.][312]

c) Conclusion

Grotius is not silent on the issue of the transition to peace. Indeed, his ideas of transitions to peace that could build a pacific order were reflected in the Peace of Westphalia, and while not all that was in the Westphalia treaties matched Grotius' ideas,[313] in general Grotius' theory and Westphalian practice matched.[314] Give Grotius' long fame, there is an overwhelming surfeit of secondary material on Grotius' writing, yet his contribution to *jus post bellum*, when *jus post bellum* is conceived of as playing a particular function in the international community, to manage the transition to a just and sustainable peace, is under-recognized.

11. Christian Wolff (1679-1754)

a) Introduction

Christian Wolff[315] was trained both as a mathematician and philosopher.[316] A prolific author, his works shifted over time from pure mathematics[317] to ethical philosophy, never

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[312] Ibid Vol. 3, p. 1586.

[313] Hedley Bull, "The Importance of Grotius in the Study of International Relations", Bull, Hedley, Benedict Kingsbury, and Adam Roberts, eds. *Hugo Grotius and international relations*. Oxford University Press, 1992, p. 75.

[314] Ibid 77.

[315] Sometimes referenced as "Christian von Wolff" or in the Latin e.g. *Instiutiones Juris Naturae et Gentium* "Christiano L.B. de Wolff". See Wolff , Christian. *Jus naturae methodo scientifico pertractatum*. 8 vols. Leipzig, Germany: Prostat in Officina Libraria Rengeriana, 1741–1748. This is Wolff 's main work, abridged *as Institutiones juris naturae et gentium: In quibus ex ipsa*

leaving his insistence on the application of logic to deduce natural laws through syllogisms.[318] Wolff wrote *Jus Gentium Methodo Scientifica Pertractatum*[319] at the end of his career—the name of the work (roughly *The Law of Nations According to the Scientific Method*) is revealing both of his mathematical training and his faith that there was agreement between ethical duty, natural laws based on human behaviour, and positive laws.[320]

b) Writings and relation to *jus ad bellum* and *jus in bello*

Before discussing Wolff and *jus post bellum*, it may be worth noting his discussion of *jus ad bellum and jus in bello*. As noted previously, Robert Kolb tentatively credited Josef Kunz with coining the terms *jus ad bellum* and *jus in bellum* in their contemporary sense

hominis natura continuo nexu omnes obligationes et jura omnia deducuntur (Halle and Magdeburg, Germany, 1750). Wolff saw *Jus naturae* as complimentary to his *Jus gentium* Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 426. Translation by Francis J. Hemelt.

[316] Katz, Stanley N. *The Oxford International Encyclopedia of Legal History,* Wolff, Christian von. Oxford University Press, 2009.

[317] See e.g. Wolff, Christian. "Dissertatio algebraica de algorithmo infinitesimali differentiali quam gratioso indultu amplissimi philosophorum ordinis." (1704).

[318] Katz, Stanley N. *The Oxford International Encyclopedia of Legal History,* Wolff, Christian von. Oxford University Press, 2009.

[319] Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 426. Translation by Francis J. Hemelt.

[320] For an interesting review of Wolff's approach to mathematical method in areas outside mathematics, see Frängsmyr, Tore. "Christian Wolff's mathematical method and its impact on the eighteenth century." *Journal of the History of Ideas* 36.4 (1975): 653-668.

in 1934.[321] Stahn has identified the emergence of the terms in the 1920s,[322] with Guiliano Enriques using the term *jus ad bellum* in 1928.[323] That said, it is perhaps worth noting that the *terms jus ad bellum* and *jus in bello* had been used before, even in relatively close proximity to each other. For example, Christian Wolff, in the 1764 edition of his *Jus Gentium Methodo Scientifica Pertractatum* states:

> Since hostilities in war are due to the force by which we pursue our right in war, which consists either in collecting a debt or imposing a penalty, and therefore all our right in war is to be determined thereby, the right to destroy the property of an enemy is not to be determined otherwise, unless you should wish to assume a thing which can be assumed only in contravention of the law of nature, that there is absolutely no place left in war for justice, which orders us to give each one his right, and that *right in war* disappears in mere licence, to which none can be entitled.[324]

The italicized text, "right in war" corresponds to the term "*jus in bello*" on page 300 of the original Latin text. On the next page of the original text, Wolff asserts:

> The law of nature, which gives us a *right to war*, gives also a right against the property of enemies, as far as that is necessary in waging war; for otherwise the former right would be useless, if it were not allowable to claim the latter.[325]

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[321] Kolb, Robert, *Origin of the twin terms jus ad bellum/jus in bello*, International Review of the Red Cross (1997), 561.

[322] Stahn, Carsten, *Jus Post Bellum*: Mapping the Discipline(s), 23 Am. U. Int'l L. Rev., 311, 2007-2008, 312.

[323] *See* Enriques, Giuliano, *Considerazioni sulla teoria della Guerra nel diritto Internazionale* (Considerations on the Theory of War in International Law), 7 Rivista Di Diritto Internazionale (Journal of International Law) 172 (1928).

[324] Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 426. Translation by Joseph H. Drake and Francis J. Hemelt. (Emphasis supplied.)

[325] Ibid 427. (Emphasis supplied.)

The translated text "right to war" is in the original text: "*jus ad bellum*."

What does this tell us about the contemporary usage of the term? Nothing definite, to be sure. Reviewing the terms as they were used does not indicate any clear link to the current usage. Nor is there any evidence that these terms, as used by Wolff, were identified by subsequent scholars. It is unsurprising that those particular words should come together in a long book in Latin about international law.

That said, this usage is still interesting with respect to the question of the normative and historical foundations of *jus ad bellum*, *jus in bello*, and their sister term, *jus post bellum*. Wolff, in these passages seeking to determine the natural law pertaining to the right to destroy enemy property, appears to distinguish between justice during war[326] and the right to go to war.[327] He may not have been have meant exactly what contemporary scholars mean by these terms or concepts—again, hardly surprising given the development of international law over almost 250 years. But it is also relatively clear that the general questions of right to war and right in war, whatever term was used, have a long genealogy.

c) Writings and relation to *jus post bellum*

As for Wolff's approach to *jus post bellum*, his main contribution is to build upon Grotius (see *supra*) and inspire Vattel (see *infra*), particularly on the matter of peace agreements.

[326] Ibid 426..

[327] Ibid 427.

Chapter VIII of *Jus gentium methodo scientifica pertractatum*[328] "Of Peace and the Treaty of Peace" spends two introductory paragraphs on the nature of peace[329] before stating the duty "Of cultivating peace": "Nations are bound by nature to cultivate peace with each other."[330] From this general precept and others, Wolff derives "How long a just war may be continued"[331] ("until the enemy no longer opposes your righteous force"[332]). This bold prescription for potentially endless war is softened by his analysis of the length of war "How long in a doubtful case" (until compromise is accepted).[333] While Wolff discusses the possibility of war continuing until the other party has been completely conquered[334] (what Lesaffer, following Gentili, references as *ius victoriae*)[335] most of Wolff's chapter considers peace established through treaty (what Lesaffer, following Gentili, references as *ius ad pacem*).[336]

[328] Ibid 486.

[329] Ibid 486, paras. 959, 960.

[330] Ibid 487, para. 961.

[331] Ibid 490, para. 969.

[332] Ibid.

[333] Ibid 491, para. 970.

[334] Ibid. 492, para. 972.

[335] Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 357.

[336] Ibid.

The link between what we now might call *jus ad bellum* and *jus post bellum* is referenced, arguing in this chapter "Of Peace and the Treaty of Peace" that there is no right to continue an unjust war[337] and that even a war that begins on a justifiable basis should be ended if the belligerent has "acquired his right" or if "in a doubtful case he should be unwilling to accept fair terms of peace." [338] Wolff emphasises the need for compromise if every right is insisted upon, stating "Peace, then, cannot be made in such a way that the one to whom a right is due can acquire it completely. […] [P]eace can be made only through a compromise."[339] Wolff prefigures May's valuable contributions on Meionexia (detailed elsewhere), [340] making much the same point but without reference to Aristotle.

Alongside proportionality, Wolff mentions the uses of an amnesty as part of a peace treaty (as understood at the time) whereby "all deeds are consigned to perpetual oblivion and everlasting silence."[341] The point of a treaty of peace is not to convict the other of wrong, he asserts that in every such treaty there is such an amnesty, "even if there should be no agreement for it."[342] His approach to such amnesty is consistent with his overall approach towards a peace agreement serving as a final settlement on the injustices of an armed conflict, whereby "things captured in

[337] Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 493. Translation by Joseph H. Drake and Francis J. Hemelt, para. 973.

[338] Ibid 493, para. 974.

[339] Ibid. 500, para. 986.

[340] See e.g., *Jus Post Bellum*, Grotius, and *Meionexia*, in Jus Post Bellum: Mapping the Normative Foundations, edited by Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford University Press 2014); Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012).

[341] Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 502. Translation by Joseph H. Drake and Francis J. Hemelt, para. 989.

[342] Ibid 502, para. 990.

war may not be declared to have been wrongfully seized, but a compromise must be made on the terms which can be agreed upon; that which has been agreed upon is to be considered as law."[343] Similarly losses in war are not recoverable unless there has been an agreement otherwise,[344] nor debts or obligations unrelated to the war discharged.[345]

Wolff is primarily concerned in this chapter with laws and principles concerning peace treaties between sovereigns, what would now be called International Armed Conflicts. Wolff does note, however the possibility of what might now be called non-international armed conflicts, including rebellion (where subjects have an unjust cause)[346] and civil war (where subjects have a just cause). [347] Of particular interest in terms of modern peace treaty law is Wolff's practical assertion that "A treaty of peace is not invalid because it has been extorted by warlike force or by fear" because otherwise "it will always be possible to renew war[.]"[348]

d) Conclusion

Wolff continues the genealogy of *jus post bellum avant la letter* from Grotius to Vattel. He demonstrates how the general obligation of nations to cultivate peace with each other[349] Like others before him, he notes that the absolute demands that might be

[343] Ibid 503, para. 991. See also para. 996 on movable property.

[344] Ibid 504, para. 993.

[345] Ibid 504, para. 994.

[346] Ibid 513, para. 1010.

[347] Ibid 514, para. 1011.

[348] Ibid 522-3, para. 1035.

[349] Ibid 487, para. 961.

expected from the justifications for war must be tempered with compromise and admit the possibility of error and doubt in order to create the possibility of a successful peace treaty, and a sustainable peace.[350] He applies his analysis not only to what would now be called international armed conflicts, but recognizes that laws and principles apply to the resolution of what would now be called non-international armed conflicts as well.[351] Finally, Wolff's emphasis on the desired sustainability of peace is shown by his emphasis that even "A treaty of […] extorted by warlike force or by fear" is valid and binding.[352]

12. Emer de Vattel (1714-1767)

a) Introduction

Vattel's[353] *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*[354] is a classic of international law. Emmanuelle Jouannet has gone so far as to consider Vattel a principal founder of modern

[350] Ibid 500, para. 986.

[351] Ibid 513-14, para. 1010-11.

[352] Ibid 522-3, para. 1035.

[353] Vattel was christened "Emer." Some authors have mistakenly given him a German name, "Emerich." See the Introduction for Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury,* edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008).

[354] E. de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains (1758), The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008).

international law.[355] A follower of Christian Wolff, Vattel has had a profound and continuing impact on public international law. With respect to *jus post bellum*, as in many areas, he took Wolff's work and expanded it into a more comprehensive treatise on the transition to peace, paying particular attention to the law applicable to the formation and results of peace treaties.

b) Writings and relation to *jus post bellum*

Out of four books in *Le Droit des Gens,* Vattel devotes an entire volume to largely to the subject of the transition to peace: "Of the Restoration of Peace; and of Embassies". This ultimate book in *Le Droit des Gens* begins with a definition of peace as the natural state of mankind, *contra* Hobbes.[356] Sovereigns were not free to take the obligation of cultivating peace lightly, but were bound to it by a "double tie"—as an obligation both to the people and to foreign nations.[357] This restricts the sovereign not only from "embarking in a war without necessity," but also "persevering in it after the necessity has ceased to exist."[358]

[355] Jouannet, Emmanuelle. *Emer de Vattel et l' émergence doctrinale du droit international classique*. Paris: A Pedone, 1998.

[356] Book IV, Chapter I: Of Peace, and the Obligation to cultivate it, in E. de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains (1758), The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008).

[357] Ibid, Book IV, Chapter I, Section 3.

[358] Ibid, Book IV, Chapter I, Section 6.

Vattel is applying his law "Of the Restoration of Peace" functionally, before peace starts and during war, not limited by time. Many of the themes sounded by Vattel are, unsurprisingly, along the same lines of Wolff. A sovereign "may carry on the operations of war till he has attained its lawful end, which is, to procure justice and safety"[359]—showing that the object in mind is a peace both just and safe (and thus not unsustainable). The power to determine the conditions of peace, and "regulate the manner in which it is to be restored and supported," is the same power to make war.[360] The power of the king to alienate that which belongs to the state is limited, but if made with the nations consent cannot be invalidated.[361] The sovereign may dispose of the property of individuals if necessary via eminent domain, but the state is bound to indemnify those who suffer as a result.[362]

A treaty of peace is inevitably a compromise, in which the rules of strict and rigid justice are not observed; otherwise it would be impossible to ever make peace.[363] A peace treaty extinguishes any grievance that gave rise to war, and creates a reciprocal obligation to preserve perpetual peace (at least with regards to that subject).[364] Amnesty is implied in

[359] Ibid.

[360] Ibid, Book IV, Chapter II, Section 9.

[361] Ibid, Book IV, Chapter II, Section 11.

[362] Ibid, Book IV, Chapter II, Section 12.

[363] Ibid, Book IV, Chapter II, Section 18.

[364] Ibid, Book IV, Chapter II, Section 19.

all peace treaties, as peace should extinguish all subjects of discord.[365] Peace treaties take effect as soon as possible.[366] In case of doubt, any interpretation of the peace treaty should be read against the party who prescribed the terms of the treaty.[367]

The best scholarship on Vattel with respect to the transition from armed conflict to peace was written by Randall Lesaffer in his contributions to two edited volumes (*Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle* and *The Oxford Handbook of the History of International Law*).[368] The author has no wish to be repetitive of Lessafer's excellent summation, but would like to draw out certain highlights. For a more comprehensive synopsis of the work of Vattel, including Wolff's impact on Vattel, with respect to *jus post bellum*, the aforementioned works are recommended.

First, in *A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties*,[369] Lessafer places Vattel (along with his intellectual muse Christian Wolff) as

[365] Ibid, Book IV, Chapter II, Section 20.

[366] Ibid, Book IV, Chapter II, Section 26.

[367] Ibid, Book IV, Chapter II, Section 32.

[368] For more on peace treaties in general, see e.g. Lesaffer, Randall. "The Westphalia peace treaties and the development of the tradition of great European peace settlements prior to 1648." *Grotiana* 18 (1997); Lesaffer, Randall, ed. *Peace treaties and international law in European history: from the late Middle Ages to World War One*. Cambridge University Press, 2004.

[369] Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384.

the leading voice on the law of peace treaties in the 17th and 18th centuries.[370] Lesaffer notes that Wolff and Vattel both emphasised the need for compromise and a less-than-maximalist approach to just claims in order to achieve peace.[371] Vattel emphasizes from the outset that there is an obligation on all nations to cultivate peace.[372] Lessafer notes the underlying issues that Vattel identifies must be resolved by a peace treaty: disputes that led to war, the termination of the state of war, and the organization of and preservation of the peace.[373] Like Wolff,[374] Vattel considered an amnesty for all claims, civil and criminal, for actions during and because of the war to be an implicit part of every peace treaty—a common feature of peace treaties since the 15th century.[375] In Vattel's commentary on *postliminium* (see discussion on the Institutes of Justinian, Gentili, and Gudelinus *supra*) is limited, but he does insist that prisoners had to be released, even if not mandated by a peace treaty.[376]

Like Wolff, Vattel argues that duress does not invalidate peace treaties, but he blurs the issues somewhat by claiming that in the case of an extremely oppressive peace imposed

[370] Ibid 358.

[371] Ibid 363

[372] Ibid 366.

[373] Ibid 369.

[374] Wolff, Christian, *Jus gentium methodo scientifica pertractatum*, Clarendon press (1934) Volume Two, p. 502. Translation by Joseph H. Drake and Francis J. Hemelt, para. 989.

[375] Lesaffer, Randall. "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties." *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle*. Brill, 2011. 353-384, 373.

[376] Ibid 375.

by a victor, the exception of duress did apply.[377] Vattel was aware of the tension and possibility for abuse of this uncertain argument. Should the peace treaty be breached, the injured party had the right to annul the treaty, ask for compensation, and if compensation was refused, resort to war.[378]

Second, Lesaffer also integrates his analysis of Wolff and Vattel's emphasis on the practical need to compromise in his concise over view of the impact of peace treaties on international law in *Peace Treaties and the Formation of International Law*.[379] Lesaffer emphasizes that Wolff and Vattel both found that basing the resolution of an armed conflict on the *jus ad bellum* question alone was impracticable, because determining *jus ad bellum* claims was usually impossible and because sovereigns would not subject themselves to other sovereign's judgment on this matter.[380] Lesaffer points to the overall effect of this approach and of state practice in Europe at the time, peace treaties from the 1500s to the early 1900s did not demand compensation for the act of fighting an unjust war or restrictions on the military capacity of the unjust belligerent.[381]

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[377] Ibid 377.

[378] Ibid, 379.

[379] Lesaffer, Randall. "Peace treaties and the formation of international law." *The Oxford Handbook of the History of International Law* (2012): 71-94.

[380] Ibid 88.

[381] Ibid

c) Conclusion

Vattel not only provided specific content to the law applicable to the transition to peace, but made it the foundation of diplomacy and further relations between states. He considered this law necessary,[382] immutable,[383] and obligatory.[384] Vattel was interested in making a profound and lasting contribution to analyzing the possibilities available to secure liberty against constant interruption by war.[385] Like many of the authors listed above, he was a product of his time and circumstances—writing mostly in absolute monarchies, taking the feelings of their patrons into account. Some of his views would be considered retrograde by modern standards, but his interest in establishing a means to achieve a just and sustainable peace addresses a problem that remains current, and pressing.

13. Immanuel Kant (1724-1804)

a) Introduction

Immanuel Kant's contributions to thinking on the transition to peace and the tripartite conception of the law of armed conflict are relatively well known. In Carsten Stahn's

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[382] E. de Vattel, Le Droit des Gens, Preface, Section 7.

[383] Ibid, Preface, Section 8.

[384] Ibid, Preface, Section 9.

[385] See the Introduction for Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury,* edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008).

foundational essay on *jus post bellum*, he cites Kant as a conceptual founder of the idea.[386] Like all of the authors above, Kant did not use the term "jus post bellum" but for modern purposes can be seen to be outlining the concept *avant la lettre*. Kant was building on an Enlightenment tradition of an optimistic view of mankind that could construct a peaceful order for Europe. This tradition includes William Penn's suggestion of a European confederation in his *Essay towards the Present and Future Peace of Europe* (1693).[387] Abbé de Saint-Pierre's *Projet pour rendre la Paix perpétuelle en Europe* (Fayard Utrecht 1713)[388] imagined a federation of Christian states. Kant builds on this tradition without positing a supranational entity as such.

b) Writings and relation to *jus post bellum*

Kant's vision of the possibility of perpetual peace was based partially on states sharing "republican" constitutions. By "republican," Kant was referring to certain basic elements core to what is thought of as "democratic today: liberty, equal treatment under the law, representative government, and separation of powers.[389] Kant's vision was thus very much a precursor of our modern conception of a democratic peace. Kant's ultimate hope

[386] Stahn, Carsten. "'Jus ad bellum', 'jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943.

[387] William Penn, The Political Writings of William Penn, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

[388] See Perkins, Merle L. *The moral and political philosophy of the Abbé de Saint-Pierre*. Vol. 24. Librairie Droz, 1959.

[389] See Immanuel Kant, Toward Perpetual Peace, 1932, U.S. Library Association, Westwood Hills Press, Los Angeles, California, U.S.A; Russett, Bruce. Grasping the democratic peace: Principles for a post-Cold War world. Princeton University Press, 1994, p. 4.

was not merely that single states be made free or peaceful, but that there could be a systematic effect on the international plane, what he called a "federation of free states."[390]

Preliminary Articles for Perpetual Peace Among States[391] is an essay filled with relevance to *jus post bellum*. His goal was, as far as feasible, to propose a system that would have a particular function: to make a *permanent* transition to peace—and because he was first and foremost a moral philosopher, Kant would only support such a peace that was just. He lists six preliminary articles for perpetual peace among states and three definitive articles for perpetual peace among states. Each article will be addressed in turn.

Kant's first preliminary article was "No treaty of peace shall be esteemed valid, on which is tacitly reserved matter for future war."[392] Kant connects *jus post bellum* to *lex pacificatoria* – connecting the validity of peace treaties to whether they comprehensively address the issues needed to establish a sustainable peace. His second article stated "Any state, of whatever extent, shall never pass under the dominion of another state, whether by inheritance, exchange, purchase, or donation."[393] Here, Kant connects *jus post bellum* to the law of occupation and the prohibition against aggression. His third article reads

[390] Ibid.

[391] Ibid 67-109.

[392] Ibid.

[393] Ibid.

"Standing armies (*miles perpetuus*) shall in time be "totally abolished." [394] Kant is connecting armed control and military expenditure to *jus post bellum*. The fourth preliminary article holds that "National debts shall not be contracted with a view of maintaining the interest of the state abroad." [395] Kant here connects the internal dynamics of empire and national finance to *jus post bellum*. The fifth article states that "No state shall by force interfere with either the constitution or government of another state." [396] This principle connects *jus post bellum* to occupation law, the prohibition against aggression, and the need for self-determination. Article six proclaims "A state shall not, during war, admit of hostilities of a nature that would render reciprocal confidence in a succeeding peace impossible: such as employing assassins (percussores), poisoners (venefici), violation of capitulations, secret instigation to rebellion (perduellio), etc." [397] This principle connects what would now be termed *jus in bello* norms (no unnecessary suffering/heinous means) to *jus post bellum* ends (permanent peace).

In addition to the six preliminary articles listed above, Kant suggests three definitive articles. Firstly, "The civil constitution of every state ought to be republican." Given his definition of republican, Kant was referring to certain basic elements core to what is thought of as "democratic" today: liberty, equal treatment under the law, representative

[394] Ibid.

[395] Ibid.

[396] Ibid.

[397] Ibid.

government, and separation of powers.[398] Secondly, "The public right ought to be founded upon a federation of free states." Kant here connects municipal law to the structure of the international system (including sovereignty) to *jus post bellum*. Thirdly, "The cosmopolitical right shall be limited to conditions of universal hospitality." Kant is underlining the importance of the rights of foreigners to receive diplomatic protection.

c) Conclusion

Kant's ideas of perpetual peace still haunt the international system. While not yet achieved, they informed the creation of the League of Nations and the United Nations, and served as a precursor for the idea of a Democratic Peace. While limited, admitting the validity at the time of the idea of conquest,[399] he repudiated the flexibility of earlier thinkers such as Hugo Grotius, Puffendorf, and Vattel as "miserable comforters,"[400] in reality he built upon a long tradition, reinforced it with new ethical imagination, and laid the foundation for future efforts.

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[398] Ibid; Russett, Bruce. Grasping the democratic peace: Principles for a post-Cold War world. Princeton University Press, 1994, p. 4.

[399] Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, originally published 1887, tr W. Hastie, The Lawbook Exchange 2002)

[400] Kant, Immanuel, The Advocate of Peace (1894-1920), Vol. 59, No. 5 (May 1897), pp. 111-116, p. 114.

C. Conclusion

While not encyclopaedic, it is worth emphasizing some of the highlights of the material reviewed above. From Augustine we know that war has purposes that may or may not be fulfilled by the transition to peace that the transition to peace is not always normatively better than continued war—and that, mercy must guide war and allow a successful transition to a just and sustainable peace. From Aquinas we know that Right authority is important, not merely for its own sake, but because it is conducive to peace; that peace should be a just peace, where the poor are rescued and the needy delivered; that the right intent should be securing peace, punishing evil-doers, and uplifting the good; and that that the ultimate goal of a prosperous peace controls not only post-conflict behaviour but the warring itself. Baldus de Ubaldis plays an important part in establishing that peace treaties and peace agreements could and should endure. Without the idea that such agreements could be permanent, outlasting the king, a key foundation of *jus post bellum* would be lacking. Baldus manages to lay this foundation without sacrificing the idea that kings should be individual responsible for their personal crimes.

Francisco de Vitoria covers a wide field of material that relates to *jus post bellum*, including: first, peace as the aim of armed conflict; second, post-conflict justice; third, an integrated view of *jus ad bellum*, *jus in bello*, and *jus post bellum*; and fourth, post bellum regime change. Together, Vitoria's writings amount to a new foundation for *jus post bellum*. Francisco Suarez insists on the role of charity with regards to pursuing a just

cause, due to the need for a sustainable post-conflict peace, and it is form Suarez we have the idea that the likelihood of a just peace must be evaluated before beginning a war.

In Albericio Gentili's *De Iure Belli Libri Tres* we find a tri-partite hybrid functional approach to the just war tradition that is in many respects strikingly contemporary. Petrus Gudelinus likely influence Grotius with his writings on important constituent parts of a constructed peace, including the cessation of hostilities, the distribution of and restitution for goods and rights, amnesty, and exchange of captives; and he noted the difference between conflicts between sovereigns and those involving rebels. When describing the structure of *De jure belli ac pacis libre tres*, Grotius says that, in part, book III describes "the several Kinds of Peace, and all Agreements made in war." To use contemporary terminology, Book III addresses not only *jus in bello*, but also *jus post bellum*.

Christian Wolff and Emer de Vattel not only provided specific content to the law applicable to the transition to peace, but made it the foundation of diplomacy and further relations between states. Vattel considered this law necessary, immutable, and obligatory. Immanuel Kant's ideas of perpetual peace still haunt the international system. While not yet achieved, they informed the creation of the League of Nations and the United Nations, and served as a precursor for the idea of a Democratic Peace.

To critics of *jus post bellum* who would state that "*il n'existe pas dans cette tradition de droit de la transition du conflit à la paix*"[401] the above summary should serve as an adequate response. For others, such as Robert Cryer, the note of caution regarding using venerable authors who "were working in a very different tradition", it has merit as far as it goes in terms of making a legal argument in a court, for example.[402] Unlike Lewkowicz, Cryer is not arguing that *jus post bellum* (*avant la lettre*) is not part of the just war tradition.

Cryer is of course correct in his implication that if one were to simplistically assert that writings of past scholars constituted binding law today, one would be mistaken. However, neither Orend nor Stahn do so. It is far from useless to discuss the ancient traditions of normative and legal thinking on the justice of war and peace, and indeed failure to reevaluate and consider the traditions that gave rise to contemporary international law is to doom oneself to a curious form of self-imposed blindness—not only to the beneficial analysis of past authors, but also to their errors (such as using *jus post bellum* as a general license to violate other norms). Contemporary international law theorists and practitioners would be well served to be better grounded in the tradition they have inherited and may be invoking without even knowing it. Cryer's overall approach

[401] Lewkowicz, Grégory. "Jus Post Bellum: vieille antienne ou nouvelle branche du droit? Sur le mythe de l'origine vénérable du Jus Post Bellum." *Revue belge de droit international* 1 (2011).

[402] Cryer, Robert. "Law and the Jus Post Bellum", *Morality, Jus Post Bellum, and International Law*. Ed. Larry May and Andrew Forcehimes. 1st ed. Cambridge: Cambridge University Press, 2012. pp. 223-249, p. 226 ff (see generally the section *Jus Post Bellum: Historically Defensible?*).

of caution, on the other hand, is well placed. This should not be a call to reject the utility of historical legal scholarship, but rather to expand and clarify the intellectual traditions that underpin the way lawyers approach their work. While this chapter could be expanded into its own volume, there is current added value in taking a fresh look at classic works with the particular, coherent perspective of a hybrid functional approach to *jus post bellum*.

Various approaches to the transition to peace are considered so natural as to be invisible today—that one needs a certain amount of authority to conclude a peace treaty or peace agreement, that a peace treaty has binding effect even after the natural person who agreed to it has died, that the victorious power should not be utterly unfettered in his treatment of those who lose a conflict. One today may nod and say "of course"—but why does this seem natural today, whereas it required careful explanation earlier? Precisely because a tradition so powerful as to become the intellectual water in which we swim has been developed by the very authors some would disregard.

The preceding review of deep roots of *jus post bellum* is inevitably incomplete. Examinations of the writings of Grotius analyzed elsewhere in this work are not repeated here. The ambition of this chapter is less an encyclopaedic recitation of the evolution of the concept than an exploration of the particular tradition from which *jus ad bellum* and *jus in bello* also derived. There is a temptation to naturalize these terms: to assume they represent something unchanging and inherent. Upon realization that they are of relatively recent coinage, one might have an overreaction in the other direction, assuming that the

fundamental issues addressed are purely contemporary. The powerful legal and normative tradition that informs the development of these ideas is best approached carefully. Contemporary *jus post bellum* is best addressed with awareness of its history, respect for experience and past scholarship, but without a false presumption of being bound by past moral or legal precepts if they do not meet contemporary standards of positive legal authority or the needs of those attempting the difficult task of constructing a positive peace.