Just War and Regular War in Sixteenth Century Spanish Doctrine*

by Peter Haggenmacher

The ethical and legal problems raised by war loom large in the thinking of the theologians and jurists of Spain's Golden Age. In their reflections and pronouncements on these problems, however, they were not starting from nothing. They had before them a large body of teachings, mostly dating from the Middle Ages. An accurate assessment of their role in this field must therefore begin by recalling those mediaeval teachings on war. We shall thus start with an outline of those teachings, before moving on to consider how they were assimilated and modified by the Spanish authors of the sixteenth century.

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The mediaeval conception of the law of war is usually reduced to the so-called doctrine of just war. Yet this expression, which since the end of the last century has obtained general currency, is not wholly adequate, inasmuch as it implies the existence of a single coherent theory. In fact, that is far from being the case. The law of war of the Middle Ages actually comprises several tendencies, which do overlap but cannot be reduced to the sole idea of just war as commonly understood.[1]

From the legal standpoint there are two main approaches to war. One leads to the notion of just war, the other to that of regular war. Let us briefly outline these two conceptions.

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[1] For an outline of the development of this doctrine, see Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, PUF, Paris, 1983, pp. 11-49 (Publications de l'Institut universitaire de hautes études internationales, Genève).

The doctrine of just war focuses first and foremost on the lawfulness of the use of force, which it allows only in reaction to a wrong that the responsible party refuses to repair. Just war is thus primarily a sanction aimed at restoring the law which has been violated. As a unilateral act of enforcement, it implies by definition the legal inequality of the adversaries, who confront each other in quite distinct capacities, one as an offender, the other as a dispenser of justice. The latter alone is fighting a just war, nay, strictly speaking he is the only genuine belligerent, his wrongful adversary being merely the rebellious object of armed coercion. Central to this conception is therefore the wrong committed: for the injured party it represents the just cause, and hence the basis for the material claim it is pressing by means of its just war. In the face of this fundamental substantive requirement, the formal aspects of war — in particular the legal status of the belligerents, the declaration of war and the law governing the conduct of hostilities — recede to the background.[2]

In the concept of regular war,[3] on the other hand, the formal side takes precedence over the material legal situation underlying the conflict. Instead of focusing attention on the lawfulness of the war, on the wrongs committed by one party and the rights conferred thereby on the other, one simply notes the formal existence of a state of war, which in turn presupposes a clash between sovereign entities. On that condition, both adversaries are considered *a priori* as belligerents in the full sense of the word; from the legal standpoint, they are therefore placed on an equal footing, as in a duel, and are entitled to exert the same prerogatives against each other. Arms alone will in principle decide not only the military outcome of the conflict, but also the resulting legal effects, which may take the form, for example, of acquiring property or, negatively, of impunity in the event of homicide. War thus becomes in itself a source of legal effects, which occur on both sides without distinction, irrespective of the cause of the war. These are then bilateral rights of war, as against a unilateral act of sanction.

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[2] A variant of this conception, already hinted at in the sixteenth century by Francisco de Vitoria, is policing by one or more States acting on behalf of the international community, with or without the blessing of an international organization.

[3] For this somewhat unusual expression, see e.g. Maurice Bourquin, "Grotius est-il le père du droit des gens?" in *Grandes figures et grandes œuvres juridiques*, Geneva, 1948, pp. 92-93 (Mémoires publiés par la faculté de droit de l'Université de Genève, No. 6). The adjective "regular" is used in the same sense as in "regular combatant" or "regular armed forces", the expression "regular war" being intended simply to generalize the connotation they have in common, namely that of a purely formal congruity with certain "regulations", as perfectly symbolized by the "Hague Regulations".

Accordingly, while the *jus ad bellum* has pride of place in the just war, attention will center here on the *jus in bello*. This would even seem to be the only way of conceiving a genuine law of war, an objective rule of conduct applying equally to all adversaries, irrespective of the material legal situation. In the just war, on the other hand, *jus in bello* is merely an extension of *jus ad bellum*; as such, it benefits only one belligerent by legitimizing all the acts necessary to secure his rights; it is essentially relative in nature, varying according to the initial wrong and the unjust resistance of the adversary.

The concept of regular war obtained in ancient Rome, although it was not expressed in an elaborate theory.[4] It also prevailed in classical international law, between the end of the seventeenth and the beginning of the twentieth centuries. As such, it forms the basis of the Hague Conventions and Regulations respecting war on land of 1899/1907, and of humanitarian law as embodied in the Geneva Conventions.

In the Middle Ages, on the other hand, it is generally held that the doctrine of just war predominated more or less exclusively. As we have said, this view has to be qualified. What is true, however, is that the notion of just war, although a very ancient *idea* dating back at least to Saint Augustine and even Cicero, was paradigmatically developed as a genuine *doctrine* only by medieval scholasticism. In this sense, it was very definitely dominant in the Middle Ages. The classic formulation conferred on it by Saint Thomas Aquinas in his *Summa theologica* immediately comes to mind. Drawing inspiration from the work of previous canonists and theologians, starting with Gratian who around 1140 had devoted an important section of his *Decretum* to the subject,[5] he defines just war on the basis of three conditions: first, it must be undertaken or ordered by a sovereign person *(auctoritas principis)*; secondly, it must be founded on a just cause *(justa causa)*; finally, it must be motivated by a pure intention *(recta intentio)* and hence never aim at seeking vengeance, but only at restoring law and peace.[6]

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[4] To be sure, the Romans were not unaware of the notion of just war *(bellum justum vel pium; purum piumque duellum)* and the idea of just cause of war does appear in Cicero's philosophical reflections (e.g. *De officiis*, I, (11) 36) or in Livy's historical accounts (*Ab urbe condita*, I, 32). The fact nevertheless remains that in their eyes *bellum justum* implied above all observance of certain formal requirements; this is the conception implicit in the texts of professional jurisconsults such as Ulpian or Pomponius (*Digest*, 49, 15, 24 and 50, 16, 118), whence it passed on to the Middle Ages.

[5] P. Haggenmacher, *op. cit.*, pp. 23-32.

[6] Saint Thomas Aquinas, *Summa theologica*, IIa IIae, q. 40, art. 1.

The purpose of that doctrine was to assign war a place in the Christian theological and moral universe. As such, it constituted an attempt to impose restrictions on a practice of recourse to force which was virtually endemic, and could not simply be outlawed given the fragility of the institutions. The only option was thus to incorporate it in law, while subjecting it to certain conditions. The doctrine which endeavoured to set those conditions enjoyed a broad consensus in mediaeval society. Whatever the practical difficulties encountered in its application — except possibly by the victor, in retrospect — it represented the official view on the subject.

Consequently, the Roman idea of regular war should have been precluded, since it was logically incompatible with the concept of just war. Yet this is not the case. Some texts of the *Corpus Juris Civilis* did include the notion of regular war[7] and, insofar as the whole collection of texts applied *ipso jure* in the mediaevel Empire which was considered as the "renovated" Roman Empire, it was difficult to ignore it. Moreover, people were all the more willing to accept the concept of regular war as it fitted in very well with the actual practice of belligerents. War was indeed a profession for a whole category of individuals who lived on the earnings they derived from it in the form of pay, ransoms or booty. In this sense, war at that time was as much an economic and social fact as a military and political reality. Hence, it was only natural that such an activity should give rise to a host of disputes, which the jurists were called upon to settle. Their reflections, which were based on Roman and canonical texts or on customary usage resulting from practice, gradually generated a whole body of rules, which were assembled for the first time around 1360 by the Italian Giovanni da Legnano in a treatise entitled *De bello, de reprae-saliis et de duello.* That work prompted a whole current of legal literature which, through authors like Honoré Bonet, Christine de Pisan, Juan López and Pierino Belli, was to continue until the late sixteenth century.[8]

Unlike the theologians' speculative constructions on just war, this mediaeval *jus belli* was anything but systematic, owing to the pragmatic and casuistic approach of the jurists. However, its lack of systematic cohesion did not prevent it from having a kind of practical cohesion, thanks to the ties it maintained with the military profession. In this sense, it is reminiscent of the *jus mercatorum* which governed

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[7] See note 4 above, i.f.

[8] On this literature, see P. Haggenmacher, *op. cit.*, pp. 39-40.

the area of trade. Both were professions whose interests and business relations stretched beyond borders, each one being ruled by a complex code of transnational scope, made up of written and customary law.[9]

The use of the word "transnational" rather than "international" is deliberate here, in order to avoid any confusion with international law of war as we know it today. While the mediaeval *jus belli* did extend beyond frontiers and jurisdictions by virtue of its general validity, it applied to individuals rather than to sovereign States, which were at the very most in their infancy. Moreover, it was almost entirely devoid of the humanitarian restrictions which are central to modern law of war. The predominant concern was business; potential humanitarian implications were merely incidental. Thus it is unlikely that a prisoner worth a heavy ransom would have been put to death; but such scruples would hardly have been harboured for a common mercenary.

On the other hand, mediaeval *jus belli* bears some similarity to classical law of war on another score: in practice, it ignored the problem of the cause of war and hence benefited all the belligerents and combatants alike, at least insofar as the parties were able to claim sovereign authority in law or in fact. Bilateral rights of war, though not yet expressed in theoretical terms, were thus accepted in practice. It was probably even on purpose that they failed to be proclaimed openly, in order not to offend the reigning orthodoxy which, faithful to the concept of just war, clung to unilateral rights of war.[10] The doctrinal tension which these antithetical principles might have produced was attenuated to a large degree by the overlap between them, which obscured the respective theoretical premises behind bulky compilations of texts, whole layers of commentaries and a jungle of glosses and casuistry. Hence the impression of a single doctrinal body, with a speculative pole where it strove to incorporate war in Christian thought and a practical pole where it laid down rules governing the armed profession, and in this sense there is some justification in speaking of one single mediaeval doctrine of war.

The contradictions did not surface before attempts were made to clarify the doctrine and to articulate its components by taking a closer look at its theoretical foundations. This is what happened in the wake

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[9] The mediaeval *jus belli* is admirably described by Maurice H. Keen, *The Laws of War in the Late Middle Ages*, London and Toronto, 1965. See also, from a slightly different point of view, Theodor Meron, "Shakespeare's Henry the Fifth and the Law of War", *American Journal of International Law*, 86, 1992, pp. 1-45.

[10] One notable exception to this silence should however be highlighted in the person of Raphaël Fulgosius; see P. Haggenmacher, *op. cit.*, pp. 203-206 and 284-288.

of the intellectual fervour which swept across the Western world in the waning of the Middle Ages. The Spanish masters of the Golden Age were to play a vital role in this effort to reassess, consolidate and restructure the traditional doctrine.

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We shall thus leave the Middle Ages and move over to Early Modern Times. This transition coincides with the emergence of Spain as a major power, thanks to its political unification brought about by the marriage of the Catholic kings and the completion of the *Reconquista* with the fall of Granada in 1492. It was as if the Holy War for the fatherland had immediately found an extension abroad, with the discovery and colonization of the New World; and the transatlantic conquests were in turn to confer a new dimension on the debate on war in Spain, resulting in a profound renewal of the doctrinal corpus.

Spanish doctrine of war in the sixteenth century may be divided into two main camps, by and large corresponding to the mediaeval developments outlined above. The first, probably the better known, is in line with the scholastic theologians; the second, quite as important but less coherent, follows in the wake of the jurists. Let us consider them in turn.

The field is clearly dominated by the so-called jurist-theologians, that is, theologians who concerned themselves *inter alia* with what today would be termed general theory of law, insofar as it was taught as a part of moral theology. First of all, we should mention Francisco de Vitoria, and then his successors, be they Dominican, like Domingo Báñez, or Jesuit, like Gregorio de Valencia, Gabriel Vásquez, Juan Azor, Luis Molina and Francisco Suárez. They took up the teachings of the mediaeval scholastics, including their speculative and systematic elements. By the same token, they did not hesitate to incorporate the jurists' practical casuistry, tidying it up and inserting it as far as possible in their own concept of just war. As an extreme simplification, one could say that they took Saint Thomas' *Quaestio de bello* as a framework into which they fitted the various rules empirically developed by the jurists.

The consecration of Thomas Aquinas' *Summa theologica* in the sixteenth century as the basic textbook for the teaching of theology was a crucial event in this regard. The work was to become one of the principal stimuli of the revival which started from the University of

Salamanca under the impetus of Francisco de Vitoria, and it was also to have a lasting influence on the doctrine of war. Up to then, it had been Peter Lombard's *Book of Sentences* which had fulfilled that role for nearly three centuries; yet that work contained not a single passage directly relating to war, which was tackled only incidentally in the context of other problems, such as restitutions in connection with the sacrament of penance. Saint Thomas' *Summa*, on the contrary, included a question dealing specifically with war, which thus came to be taught as a matter of course and almost as an obligatory subject.

Even before Vitoria, the ground had been prepared by Cajetan's commentary on the *Summa theologica*, which contained some important remarks on the *Quaestio de bello*. Vitora carried on in the same vein, first by commenting himself on the Question in his lectures on the *Summa*, and later in the two famous *Relectiones de indis* he delivered in 1539, both of which featured war as a central theme.

The first of these solemn lectures examines Spain's legal claims and titles with respect to "those barbarians of the New World, commonly called Indians, who came under Spanish domination forty years ago, and beforehand were unknown to our world".[11] Already in this first lecture, the law of war plays a key role in the discussion of possible legal titles. It constitutes the sole theme of the second lecture, where it is considered in more general terms, independently of the Indian problem; the lecture is therefore usually referred to by its subtitle, *Relectio de jure belli*.

This second lecture on the Indians is so important for the subsequent development of the just war doctrine that it is worth dwelling on it briefly. It is divided into four main parts, the fourth of which, the most innovative, alone represents some three-quarters of the whole.

The first three parts address the traditional questions already raised by Gratian and Aquinas — whether Christians are allowed in general to wage war; who is entitled to have recourse to war; and what are the just grounds for war. The fourth part is entitled *Quid et quantum liceat in bello justo*. Looking at the problem from the point of view of the "just" belligerent, Vitoria inquires into the types of harm the latter is authorized to inflict on his — hypothetically "unjust" — adversary, and within what limits.

It is above all in this last part that he takes account of the jurists' teachings. This leads him virtually to rule out Saint Thomas' third

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[11] Francisco de Vitoria, *De indis recenter inventis relectio prior*, i. pr., in *Obras de Francisco de Vitoria, Relecciones teológicas*, ed. by Teófilo Urdánoz, Biblioteca de Autores Cristianos, Madrid, 1960, p. 642.

condition for just war, namely *recta intentio*, which had been central to the latter's thought, and to replace it with what the sixteenth century was to call *debitus modus*, the right manner of waging war, the limit not to be exceeded. This is then a *jus in bello* conceptually dissociated from the *jus ad bellum* dealt with in the first three parts. Yet despite a superficial similarity, we are still a long way from the "means of injuring the enemy" set out in Articles 22 and following of the Hague Regulations respecting war on land. For Vitoria's *jus in bello*, in line with the logic of just war, is ultimately no more than a unilateral extension of the *jus ad bellum*.

It is true that at the heart of Vitoria's considerations lies an idea which appears to herald the modern principle of protection of civilian persons: only the individuals responsible in one capacity or another for the wrongful act and its persistence may be fought, since they alone are the offenders, the *nocentes*; all other subjects of the enemy are by definition *innocentes* and should thus be spared. This principle recurs as a leitmotif throughout the fourth part of the *Relectio*.

Vitoria was enough of a realist, however, to know that war does also hurt innocent people and that it is even often difficult to avoid hurting them; one need only think of the effects of artillery, which had transformed the face of war since Aquinas' time! Thus, to avoid too obvious a discrepancy between law and practice, he introduces several additional considerations, which may in certain cases justify the effects of attacks on the innocent. First of all, he includes a chronological criterion, according to whether the matter is being considered during or after the fighting: during the operations, he allows some room for military necessity. Secondly, he draws a distinction between actual deliberate harm and indirect harm, which hurts innocent victims as a side-effect of a military operation, for example during a siege. Finally, as a last criterion, Vitoria distinguishes between harm done to the enemy's person and harm done to his property, showing greater lenience for the latter, even if the property belongs to innocent victims.

The net result of this set of criteria is admittedly rather disappointing in terms of humanitarian law, since in the end there are but few offences against innocent victims which could not be justified one way or another in the name of the law of war. The principle of protection of the civilian population, which despite being frequently flouted in practice is fundamental to present humanitarian law, remains quite fragmentary in the *Relectio*, even in theory. Furthermore, as was already pointed out, Vitoria's law of war is essentially unilateral, whereas the classical law of war postulates equality of the belligerents

and hence bilateral, non-discriminatory application of the *jus in bello*, without any reference to the merits of the conflict. It is true that the idea of a bilateral right of war is not entirely lacking; Vitoria does inquire on occasions whether a war can be just on both sides at once, and accepts this possibility under certain conditions for soldiers, acting in good faith and fulfilling their duty to obey, while he denies political rulers and military commanders such a privilege.[12] Yet this point remains marginal and does not really affect the unilateral character of the rights conferred by just war. Attempts to see a humanization of war in this limited recognition of bilateral rights of war are misguided.[13] Not that Vitoria fails to display any humanitarian inspiration. Behind the dryness of his text, and despite his concessions to the imperatives of war, one does detect in him a genuine concern for the fate of the innocent; but there is no direct link with the question of bilaterally just war.[14]

The same applies to the other Iberian theologians, who, while orchestrating the themes set forth by their leader, consider it axiomatic that war can be just on one side only; just war on both sides remains on the whole a borderline case discussed almost as an oddity. Only a few Jesuits mention in passing a new hypothesis, that of a war waged by some kind of free consent of the adversaries, as if by contract, which would elicit similar legal effects on both sides, at least among men if not before God.[15] This hypothesis, not yet formulated by Vitoria, was borrowed from the jurists, to whom the idea of bilateral rights of war was familiar. This brings us to the other side of the Spanish doctrine of war in the sixteenth century.

Some of the jurists, such as Diego de Covarrubias y Leyva, Martín de Azpilcueta or Fernando Vásquez de Menchaca, address the problem

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[12] *Relectio de jure belli*, 32, in *Obras*, p. 838.

[13] See, e.g. James T. Johnson, *Just War Tradition and the Restraint of War. A Moral and Historical Inquiry*, Princeton University Press, Princeton, 1981, pp. 97-99.

[14] At the place in *Relectio de jure belli* indicated in note 12 above, there is no question of any humanitarian restriction, whether bilateral or even only unilateral; the problem which concerns Vitoria at that juncture is the duty to restore the property taken in an unjust war, as the rest of the text indicates (*Relectio de jure belli*, 33, in *Obras*, pp. 838-849). In *Relectio de indis*, III, 6, (*Obras*, pp. 712-713) where the question of just war on both sides is also raised, Vitoria does admit that on account of the Indians' excusable ignorance, the Spanish should not subject them to the utmost rigours of the law of war. Yet very significantly his view remains unilateral and totally within the logic of just war: the state of mind of the Indians is no more than an extenuating circumstance which the Spanish, who on account of their objectively just cause have in a way become judges of their vanquished adversaries, must take into account in deciding on the sentence.

[15] P. Haggenmacher, *op. cit.*, pp. 292-295 and 435-437.

of war only in passing in works of a more general nature. Others devote monographs to it, such as the disputation *De bello et ejus justitia* published by Francisco Arias de Valderas in 1533, and Alonso Álvarez Guerrero's *Tractatus de bello justo et injusto* of 1543. Alongside these two Neapolitan Spaniards, however, the most significant author in this field is probably a Belgian of Spanish origin, Balthazar de Ayala, who in 1582 issued a whole treatise entitled *De jure et officiis bellicis et disciplina militari libri tres.*

These authors certainly drew on the work of the mediaeval jurists. But, like their theologian colleagues, with whose teachings they were mostly familiar, they endeavoured to present in a more articulate and systematic manner what to some extent had remained confused in the works of their predecessors. Thereby they had to spell out the theoretical premises which had hitherto remained implicit. As a result, they retained the language of the doctrine of just war only superficially. Behind this facade, they more or less frankly conceded the bilateral nature of the rights of war and thus in practice ignored the question of the just cause, focusing solely on formal requirements. This development appears particularly clear and conscious in the work of Balthazar de Ayala, perhaps not by chance, since, as a prosecutor in the army of Alessandro Farnese in the Netherlands, he was in direct contact with war and its legal problems. He therefore strikingly reveals the contrast between the jurists' approach and that of the theologians.

In his treatise mentioned above, Ayala devotes a whole, fairly long chapter to the question of just grounds for war.[16] Yet shortly before the end of it, these considerations are suddenly cut short and virtually deprived of any legal relevance. Ayala asserts point-blank that in the final analysis all this relates solely to equity and to moral duties. It has nothing to do with the legal effects of war, which also occur if there is no just cause and even if the war is patently unjust, provided that the belligerents involved are sovereign. The cause of the war is thus discarded and with it the whole issue of the merits. The adjective "just", Ayala explains, can indeed have various meanings: instead of substantive justice, it may stand for a merely formal adequacy, and it is in this sense that he himself understands the concept of just war. This leads him to a purely formal legality, and hence to the concept of regular war. War in this perspective is no longer the unilateral execution of a legal claim predicated on a prior wrongful act, but rather a

[16] Balthazar de Ayala, *De jure et officiis bellicis et disciplina militari libri tres*, Douai, 1582, I, 2, folios 5-24.

duel between equal adversaries, both equally competent to wage war and between whom arms alone will settle the issue.

This brings to the fore what had remained somewhat implicit in the thought of the mediaeval jurists. The difference from the ideas of Vitoria and his fellow theologians is obvious. Their respective conceptions of war as a legal institution seem irreconcilable, no less so than the underlying general spirit. We thought we could detect a humanitarian streak in Vitoria's work, though paradoxally he accepts in principle only a unilateral right of war. Such humanitarian inspiration is more or less absent from Ayala's work, even though, paradoxically again, he for his part accepts the principle of bilateral rights of war between sovereign belligerents. In this respect, he and the other Spanish jurists display the (not too philanthropic) spirit of the mediaeval *jus belli*, with the difference that what had been a transnational law is gradually recast into a truly international law. This is indeed a feature common to the Spanish theologians and jurists in Early Modern Times: they take account of the new factor of the sovereign State, and in several places their writings already give an inkling of a society of princes and nations which foreshadows our present international community.

Despite this common ground, the doctrine of war at the end of the sixteenth century remains split into two clearly individualized and fairly disparate strands, one reformulating the mediaeval concept of just war while the other follows the logic of regular war. They coexist without truly confronting each other; their conflict remains virtual. Only rare attempts are made to reconcile the two. Francisco Suárez, for example, while adhering to the theological just war theory, nevertheless makes allowance for bilateral rights of war as understood by the jurists.[17] This does not however constitute a true combination of the antagonistic positions.

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Such a combination was not attempted before the seventeenth century, after the height of Spain's Golden Age. It was mainly due to the Protestant jurists who constitute the modern school of natural law, starting with Grotius and Pufendorf, and above all Wolff and Vattel. Their writings altogether reveal and promote the gradual crystallization

[17] P. Haggenmacher, *op. cit.*, p. 293.

of international law and classical law of war, which is bilateral in nature and hence applies equally to all belligerents, giving the limitation of war and its consequences precedence over its intrinsic justice. In practice, only the teachings of the jurists are retained; the doctrine of the theologians remains solely as a moral requirement. Yet at the same time the humanitarian components fostered by the theologians are taken over and made bilaterally applicable as objective legal rules constituting a *jus in bello* in the modern sense.[18]

This evolution therefore took place after the time of the Spanish authors examined in this article. At the most, they identified the basic elements which were to determine that development. But herein precisely lies their great accomplishment, since this formed the groundwork on which their successors were to build. As such, they constitute a decisive link between mediaeval and classical law of war.[19]

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[18] P. Haggenmacher, *op. cit.*, pp. 597-612.

[19] As a supplement to this study, see P. Haggenmacher "La place de Francisco de Vitoria parmi les fondateurs du droit international», in *Actualité de la pensée juridique de Francisco de Vitoria*, Travaux de la Journée juridique organisée à Louvain-la-Neuve par le Centre Charles de Visscher, 5 décembre 1986, pp. 27-80. For the subsequent development of ideas, see Peter Haggenmacher, "Mutations du concept de *guerre juste* de Grotius à Kant», in *La guerre*, Actes du Colloque of May 1986 (Coëtquidan-Saint-Cyr), Centre de Publications de l'Université de Caen, 1986, pp. 105-125 (Cahiers de Philosophie politique et juridique, n° 10).