Origin of the twin terms

*jus ad bellum/jus in bello*

by Robert Kolb

The august solemnity of Latin confers on the terms *jus ad bellum* and *jus in bello* the misleading appearance of being centuries old. In fact, these expressions were only coined at the time of the League of Nations and were rarely used in doctrine or practice until after the Second World War, in the late 1940s to be precise. This article seeks to chart their emergence.

The doctrine of just war

The terms *jus ad bellum* and *jus in bello* did not exist in the Romanist and scholastic traditions. They were unknown to the canon and civil lawyers of the Middle Ages (glossarists, counsellors, ultramontanes, doctors *juris utriusque*, etc.), as they were to the classical authorities on international law (the School of Salamanca, Ayala, Belli, Gentili, Grotius, etc.). In neither period, moreover, was there a separation between two sets of rules — one *ad bellum*, the other *in bello*.  

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Original: French

1 *Jus ad bellum* refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.

From earliest times, the Western tradition sought to place war in a legal framework by formulating a doctrine of just war. The aim was to reconcile might and right, Sein and Sollen, by making the former serve the latter, or by curtailling might with right. On the basis of those premises, war was seen as a just response to unprovoked aggression, and more generally as the ultimate means for restoring a right that had been violated (consecutio juris) or for punishing the offender. The material causes for which a just war could be waged fell into four categories: defence, recuperation of property, recovery of debts and punishment. An act of war was considered lawful if it was just; and it was considered just if it met the conditions enumerated above.

In the doctrine of bellum justum, therefore, legal analysis bore exclusively on the act of resorting to war, and more particularly on the causes pursued. War was viewed from the subjective angle as a concrete act carried out by a specific belligerent for specific reasons, and such an act

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3 There is an abundant literature on the concept of just war.


On the relationship with the Muslim doctrine of war, see J.T. Johnson, Just war and Jihad: Historical and theoretical perspectives on war and peace in Western and Islamic tradition, New York/London, 1991; R. Steinweg, Der gerechte Krieg: Christentum, Islam, Marxismus, Frankfurt am Main, 1980.


5 Grotius, De iure belli ac pacis (1625), Book II, chap. 1, 2, 1. See Hagenmacher, Grotius, op. cit., pp. 549 ff.
brought into being a legal regime that reflected the validity of the causes invoked or, so to speak, the belligerent’s right to resort to force. This meant that war was not seen as a de facto situation to which the same set of rules applied in all cases. In other words, there was no general jus in bello; the rights and obligations of belligerents were unequal and depended exclusively on the causes which they claimed to be pursuing and on the material justness of those causes.\(^6\)

Thus, for example, Grotius’s temperamenta belli (restrictions on warfare), which it is tempting to equate with contemporary jus in bello, applied only to belligerents resorting to war for a just cause;\(^7\) they broadened the concept of just war while defining its limits. Here, too, everything revolved around the notion of just cause. A belligerent without a just cause had no rights; he was simply a criminal who might be executed. Consequently, no legal restraints could be imposed on his behaviour.

For these reasons, there was no room for jus in bello as we understand it today, that is, a body of independent, objective and suprapersonal rules applying to all belligerents alike and governing the conduct of hostilities in a de facto situation.\(^8\) This explains why both the term jus in bello and the concept to which it refers are absent from the classical texts.

As for the term jus ad bellum, its absence is more surprising. However, the simple right to wage war that was vested in public authorities was also irrelevant in the doctrine of bellum justum.\(^9\) Legal analysis looked deeper, focusing instead on causes and hence on the lawfulness of resorting to war. Moreover, the predominance of ad bellum considerations in general over the in bello aspect made it impossible even to conceive of such terms, whose existence would have implied a more extensive, evenly balanced and fully articulated development of two mutually exclusive branches of the law.\(^10\) We are reminded of the early philosophers’ theory whereby a


\(^{7}\) Grotius, op. cit., Book III, chaps. XI-XVI (see Haggenmacher, Grotius, op. cit., pp. 600 ff.).

\(^{8}\) Haggenmacher, Grotius, op. cit., pp. 600 ff.

\(^{9}\) The rule limiting the competence to wage war to the public authorities (i.e. the sovereign) is affirmed in an oft-quoted passage of St Thomas Aquinas which sets out the three prerequisites for such competence: auctoritas principis, justa causa and recta intentio (Summa theologica, II, II, 40, 1). See O. Schilling, Das Völkerrecht nach Thomas von Aquin, Freiburg im Breisgau/Berlin, 1919. On recta intentio, see Haggenmacher, Grotius, op. cit., pp. 401 ff.

\(^{10}\) See below.
term or a concept can come into existence only in relation to its absolute opposite. They claimed, for example, that ugliness existed only in relation to beauty; it could not be conceived of except in contrast to beauty.

Although the time was clearly not ripe for the emergence of the terms that concern us here, they sometimes crept in, used in a non-technical sense far removed from their modern meaning. Grotius, for instance, wrote that he was “fully convinced (...) that there is a law common to all nations governing both recourse to war and the conduct of warfare...”.\(^{11}\) This law ad bella and in bellis obviously remained subordinate to the doctrine of just war.\(^{12}\)

To sum up, the subjective notion of the right to wage war in pursuit of certain causes precluded the emergence of an independent jus in bello; at the same time, however, the doctrine of lawful causes for waging war inhibited the affirmation of the simple right to make war (jus ad bellum). In such a system, both concepts lay outside the scope of the law, which was concerned with antecedent issues.

**War as a de facto situation**

Throughout the seventeenth and eighteenth centuries, the doctrine of just war lost ground to the idea that States had discretionary powers to wage war and that those powers could be used as a means of pursuing national policy. That was the era of raison d’Etat. This concept of war became permanently entrenched in the nineteenth century, in parallel with the erosion of the concept of war as a just act. War was now seen as a de facto and intellectually neutral situation.\(^{13}\) Quite logically, the result was a major shift in the legal emphasis from the subjective lawfulness of resorting to war to the rights and duties relating to hostilities as such, in other words to rights and duties durante bello.\(^{14}\) This new edifice appears

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\(^{11}\) Grotius, *op. cit.*, prolegomena, para. 28: “Ego cum ob eas, quas jam dixi, rationes, compertissimum haberem, esse aliquod inter populos ius commune, quod & ad bella & in bellis valeret...”. See also Book I, chap. I, 3, 1: “De iure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod iustum, & deinde quid in bellum iustum sit”. (In giving our treatise the title *The law of war*, we first wish to examine, as we have said, whether war can be just and what is just in war. — ICRC translation.)


\(^{13}\) Haggenmacher, “Mutations”, *art. cit.*, pp. 113-117.

to be a mirror image of the previous one. A system based on the material lawfulness of war (war as a sanction) gave way to a system focusing on its formal regulation (rules pertaining to the opening of hostilities and the effects of war). To quote an eminent specialist on the subject: “Now that the field of vision had been restricted, greater attention could be paid to the conduct of hostilities: for owing to this indifference [to the causes of war], armed violence came to be seen first and foremost as a process to be regulated in itself, regardless of its causes, motives and ends.”

This opened the door to jus in bello as it is understood today. The distinction which Vitoria had already begun to make between lawful reasons for resorting to war and just limits in the law of war was upheld by Wolff, the first to see rights and duties durante bello as being independent of the underlying causes of war, and was later firmly established by Vattel, who incorporated into the law of nations a series of rules setting legal restrictions on means of warfare. Kant made an explicit and modern distinction between the two branches of the law (Recht zum Krieg and Recht im Kriege), but neither he nor any of the other authors mentioned used the terms jus ad bellum and jus in bello.

The explanation for this lies in the lack of any doctrinal need to draw a conceptual distinction between the two branches of the law rather than in random developments of terminology or the decline of Latin. The fact is that for reasons that were different in nature but identical as to their effect, the mere competence to resort to war (jus ad bellum) aroused no more legal interest than it had previously. As one of the sovereign’s absolute and discretionary powers, it was seen as the cornerstone of the rules of law relating to war, their logical prius, and thus basically remained an implicit dogma. Legal endeavours had focused entirely on the formali-

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16 Haggenmacher, Grotius, op. cit., p. 599.
17 De iure belli relectiones, Nos. 15 ff. (lawful motives for war) and Nos. 34 ff. (just limits in the law of war). See Haggenmacher, Grotius, op. cit., pp. 171-172 and 611.
20 Metaphysik der Sitten, Rechtslehre, para. 53.
21 As N. Politis puts it with his usual elegance in Les nouvelles tendances du droit international (Paris, 1927, pp. 100-101): “Sovereignty killed the theory of justum bellum. The States’ assertion that they did not have to account for their deeds led them to claim the right to use the force at their disposal as they saw fit” — ICRC translation.)
ties to be observed in initiating hostilities and on the respective rights and obligations of belligerents, that is to say on matters subsequent to the subjective right to resort to war. Yet the term *jus in bello* was still not used. The lack of any opposition or equivalence between the two branches of the law prevented the emergence of such a term, which could only come into existence when the two aspects of war assumed approximately equal importance and it became necessary to underline the distinction between them.

It was at the time of the League of Nations that the two branches came to be considered on an equal footing and found their place in positive law. In the expression of the time, the aim was to "outlaw war". The former absolute power to resort to war was replaced by the rules of *jus contra bellum*. From then on, the problem of recourse to force was at the centre of legal concerns, standing in opposition to law *in bello*. The theoretical distinction between laws aimed at preventing war and the laws and customs of warfare was thus clearly established. All that remained to be done was to find appropriate terminological expression for this distinction, which had finally crystallized under the pressure of history.

*The terminological aspect*

Neither in the Middle Ages nor in the Age of Enlightenment did the law lack terms for what is now known as *jus in bello*. At least certain analogies can be drawn providing the conceptual differences outlined above are taken into account. Many texts from these periods contain terms such as *jus belli*, *usus in bello*, *mos et consuetudo bellorum*, *modus belli gerendi*, *forma belli gerendi*, *quid quantumque in bello liceat et*

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23 See for example Saint Augustine, *De civitate Dei*, I, 1, and Epistula CXXXVI.

24 Saint Augustine, *De civitate Dei*, I, 1; I, 6; XIX, 23.

25 Ibid.

26 Grotius, *De iure praedae*, chap. VII, art. III-IV.

27 Ibid.
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quibus modis, jus armorum, lex armorum, jus militare, jura et usus armorum, droiz de guerre, droit d'armes, drois, usages et coutumes d'armes, usance de guerre, droit et usage d'armes, Kriegsmanier, etc. Not all these terms pertain to public international law as we understand it today: they did not apply only to armies set up under public authority. Jus armorum was the professional code for warriors — knights, for example — and constitutes jus gentium.

34 See the cases of David Margnies vs Prévôt de Paris (Parlement de Paris, ca 1420) and of Jean de Melun vs Henry Pomfret (Parlement de Paris, 1365), in Keen, The laws of war, op. cit., pp. 18 and 260.
35 S. Luce, Histoire de Bertrand du Guesclin et de son époque. La jeunesse de Bertrand du Guesclin, 1320-1364, Paris, 1876, pp. 600-603.
40 Keen, The laws of war, op. cit., pp. 7-22. It was only in the sixteenth century, at the time of the School of Salamanca, that jus belli took on the meaning that it has today in public law. See Haggenmacher, Grotius, op. cit., p. 283.
One important expression in the context of public international law is *jura belli*, which can be traced back to Livy.\(^{42}\) In the nineteenth century it was sometimes used to mean *jus in bello* in the modern sense (Heffter used it this way in his influential handbook).\(^{43}\) The Latin terms *jura belli* and *jus belli* both seem to have been derived from the Greek expression "oi tou polemou nomoi" used by Polybius.\(^{44}\) The English expression "laws of war" is also quite old. During the reign of Charles I, the Earl of Essex decreed the *Laws and ordinances of war* governing the conduct of the parliamentary forces during the civil war that brought Cromwell to power.\(^{45}\) The term can be found in the literature as well.\(^{46}\) In French, the expression *lois de la guerre* rapidly gained acceptance.\(^{47}\)

It is extremely rare to find the terms *jus ad bellum* and *jus in bello* used before 1930. Neither was mentioned during the 1899 and 1907 Peace Conferences, among whose aims was codification of the law of war.\(^{48}\) Enriques used the term *jus ad bellum* in 1928, having apparently invented it on the spot to serve a specific need.\(^{49}\) Keydel drew a clear distinction between the two branches of the law in a well-researched thesis on recourse to war published in 1931 in a scholarly review edited by Professor Strupp, but did not use the terms in question.\(^{50}\) Keydel, like Strupp himself,\(^{51}\) diligently enumerated all the Latin words and expressions relating to the matter. It may be concluded, therefore, that up to the early 1930s

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\(^{42}\) *History of Rome*, Book II, 12, and Book XXXI, 30: "Esse enim quaedam belli jura, quae ut facere ià pati sit fas".


\(^{44}\) *Histories*, Book V, 9, 11.


\(^{47}\) See for example de Martens, *Précis du droit*, op. cit., p. 461, para. 270, "Loix de la guerre".

\(^{48}\) See *Actes et documents relatifs au programme de la Conférence de la Paix*, The Hague, 1899; and *Actes et documents: Deuxième Conférence internationale de la Paix, La Haye, 15 juin-18 octobre 1907*, 3 vol., The Hague, 1907.


\(^{50}\) H. Keydel, *Das Recht zum Kriege im Völkerrecht*, Frankfurter Abhandlungen zum moderne Völkerrecht, No. 24, Leipzig, 1931, p. 27.

the terms *jus ad bellum* and *jus in bello* had no currency. They began to
gain recognition towards the middle of the decade, in particular, it would
seem, at the prompting of the School of Vienna.\(^{52}\)

Among the first to use these terms was Josef Kunz, who may well be
the one who coined them. Kunz had a gift for formulating precise concepts
and giving them incisive Latin names (he later came up with the term
*bellum legale*);\(^{53}\) the phrases we are concerned with appear in an article\(^{54}\)
he published in 1934 and a book that followed in 1935.\(^{55}\) Two years later,
Alfred Verdross used the term *jus in bello* in exactly the same way as
Kunz, placing it in parentheses after the word *Kriegsrecht* in his handbook
on public international law.\(^{56}\) The chapter on recourse to force was pub-
lished only in the second edition, and here the term *jus ad bellum* ap-
peared.\(^{57}\) Around the same time, R. Regout made frequent use of both
terms in his book on the doctrine of just war,\(^{58}\) making it clear from the
outset that they reflected a fundamental distinction, and W. Ballis followed
suit.\(^{59}\) It is impossible to say whether these were independent develop-
ments or otherwise.

Interestingly enough, neither term can be found in the texts produced
by other major publicists during the interwar years, nor, according to our
investigations, were they used in the courses on war and peace given at
the The Hague Academy of International Law or in any other courses. The
breakthrough occurred only after the Second World War, when Paul
Guggenheim, another disciple of the School of Vienna, drew the termi-
нологical distinction in one of the first major international law treatises
of the postwar era.\(^{60}\) A number of monographs subsequently took up the


\(^{54}\) “Plus de lois de guerre?”, *Revue générale de droit international public (RGDIP)*, Vol. 41, 1934, p. 22.


\(^{56}\) *Völkerrecht*, Berlin, 1937, p. 289.


\(^{58}\) *La doctrine de la guerre juste de saint Augustin à nos jours*, Paris, 1935, pp. 15 ff.


terms, which soon gained widespread acceptance and were launched on their exceptionally successful career. In a thesis written under Guggenheim's supervision and published in 1956, Kotzsch gave them pride of place, treating them in the manner to which we have grown accustomed and which we now take for granted.

This article, the product of the author's curiosity and of research carried out for another study, does not claim to provide a complete overview of the emergence of the terms *jus ad bellum* and *jus in bello*. Indeed, there would be a lot more to say: many omissions would need to be remedied, and many imprecise points clarified. The purpose here is simply to shed some light on the origin of those terms and to dispel the general illusion that they have been used since earliest times. This false impression and the fact that so little is known on the subject, even by specialists, make this a fascinating field of research that yields surprising results.

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62 *The concept of war in contemporary history and international law*, Geneva, 1956, pp. 84 ff.

63 A contribution to the new edition of the *Dictionnaire de droit international*, edited by Jean Salmon and Eric David.