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'Protecting the non-combatant': Chivalry, Codes and the Just War Theory

Over the centuries historians and scholars have documented the devastating effects that war has upon society; yet whilst it is known how destructive warfare can be, wars continue to be waged. There have, however, been attempts to provide rules and regulations to limit the damaging effects of conflict. The Greeks attempted to place restraints on the recourse and conduct of war, whilst the Romans developed a more comprehensive account of the laws of war, suggesting the possibility of universal legal restraints. The aftermath of the Peloponnesian war (431-404 BC) brought new forms of philosophy to Ancient Greece, prompting news ways of thinking about war.[2] Plato directly addressed the question of war, suggesting that the aim of the state was to establish peace and that war should only be waged for this reason.[3] Aristotle continued this idea and according to him, justice depended on human relations and that all humans had their own position within nature. From this perspective he formulated the first ideas about legitimate causes of war and even used the term 'just war'.[4] Antiquity saw further thought on the subject expressed by the likes of Cicero, who argued that war may only be fought to protect the safety or honour of the state.[5] He also went on to echo Plato and say that the 'only excuse for going to war is that we may live in peace."[6] However, it was St Augustine of Hippo, writing in the later part of the fourth century, who then connected it to Christian doctrine in his work *The City of God against the Pagans*.[7] For Augustine, it was 'clear that peace is the desired end of war'.[8] This idea not only continued to be the over-riding theme in his work relating to just war, but it remained a constant as the theory developed further. The modern theory of Just War is presented under two

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[2] Alex Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006), p. 17.

[3] Plato, *The Laws,* trans. by T. Saunders, rev. edn (London: Penguin, 2004), p. 31.

[4] Aristotle, *The Politics,* trans. by Ernest Barker, rev. by R.F. Stalley (Oxford: Oxford University Press, 1995), p. 199.

[5] Cicero, *De Re Publica. De Legibus*, trans. by Clinton Keyes (Cambridge, MA: Harvard University Press, 1928), pp. 211-13.

[6] Cicero, *De Officiis,* trans. by Walter Miller, rev. edn (Cambridge: Harvard University Press, 1961), p. 38.

[7] Augustine, *City of God against the Pagans*, ed. and trans. by R.W. Dyson (Cambridge: Cambridge University Press, 1998). See Book XIX for discussions of 'just war', pp. 909-65.

[8] *Ibid*., p. 934. It is here that he echoed the thoughts of both Plato and Cicero.

major headings: first, *jus ad bellum* or 'the right to war', which seeks to specify principles that define the right of one sovereign power to engage in violent action against another; and second, *jus in bello* or 'right in war', which specifies the limits of morally acceptable conduct in the actual prosecution of a war. Despite dedicating less attention to the second of the two parts of the theory, St Augustine provided two principles of *jus in bello*: proportionality and discrimination. It is these concepts that this paper will discuss, looking at how theorists tried to develop this part of the theory throughout the medieval and early modern periods before analysing whether the theory was put into practice and what impact, if any, it made on warring societies.

The first principle – that of proportionality – dictated that only minimum force, consistent with military necessity, could be used. Violent means, which caused gratuitous suffering or otherwise caused unnecessary harm, fell outside the scope of what is 'proportional'.[9] The second principle – discrimination – provided protection for the non-combatant, suggesting that soldiers were to distinguish between combatants, meaning those actively fighting, and non-combatants, which included women, children, the aged, the infirm, and wounded soldiers. These two principals were designed in order to reduce the amount of 'collateral damage' that warfare could cause, yet it raises the question: could conduct ever be regulated? Simply formulating and speculating on a theory is very different to actually executing it in practice.

Jus in bello, therefore, received less attention than its partner principle, *jus ad bellum*, perhaps because it is more difficult to place realistic restrictions on conduct. The concept of chivalry, a traditional code of conduct idealised by the knightly class relating to times of both peace and war, dominated the medieval period and many of the scholars who contributed to the principle of *jus in bello* were in fact writing about chivalry. There is, therefore, a clear distinction between the medieval and early modern periods. The scholars of the medieval world tended to base their ideas upon the chivalric code; whereas, the writers of the early modern period seem influenced by the law of nations and natural law.

Proportionality

The first real attempt to regulate conduct in warfare appeared in the form of the *Pax Dei* or the Peace of God movement in the tenth century. *Pax Dei* was a movement of the Catholic Church

[9] John Mattox, *Saint Augustine and the Theory of Just War* (London: Continuum, 2006), p. 11.

that applied spiritual sanctions to limit the violence of private war in feudal society. Peace councils were first held in Aquitaine and Burgundy during the last quarter of the tenth century. In 975, Bishop Guy of Le Puy convoked a large meeting in an open field outside his episcopal city to deal with those who had pillaged the churches of his diocese and he forced those gathered, both knights and peasants, to take an oath to maintain peace.[10] The earliest council, from which Peace canons survive, was held at Charroux in 989. It ordered 'anathema against those who break into churches. If anyone breaks into or robs a church, he shall be anathema unless he makes satisfaction.'[11] Following this, the Truce of God was established in an attempt to limit fighting by forbidding it on holy days. There were as many as 168 recognized saint's days, which translates to almost half of the year being classified as a holy day.[12] Any violation of this would result in excommunication or similar punishment. Whilst these peace movements were nowhere near to being fully established rules for regulating conduct, the Peace of God attempted to protect the clergy and agricultural labourers as non-combatants; whilst the Truce of God aimed to circumscribe the extent of warfare between knights, which provided a successful foothold for scholars to continue the tradition of attempting to provide ways to regulate conduct. [13]

Around 1140, the Benedictine monk Gratian completed a massive compilation of canon law in the shape of a textbook known as the *Concordia Discordantium Canonum* or more frequently the *Decretum*. Whilst the principle of *jus ad bellum* was given significant attention, Gratian was vague in his dealings with this aspect and made only passing references to the idea that some groups should be immune from the ravages of war and that its conduct be limited to actions deemed necessary.[14] According to Frederick Russell, Gratian felt that if a war was necessary and just then all possible means to victory must be employed including the use of more effective weapons.[15] Similarly, Thomas Aquinas, writing in the mid-thirteenth century, and arguably one of the most famous medieval scholars associated with the theory, also dedicated less time to this principle in

[10] Thomas Head and Richard Landes, 'Introduction', in *The Peace of God: social violence and religious response in France around the year 1000,* ed. by Thomas Head and Richard Landes (Ithaca: Cornell University Press, 1992), pp. 1-20 (p. 3).
[11] Mansi, 'Sacrorum Conciliorum Nova, et Amplissima Collectio', 19:89-90, trans. by T. Head, in *The Peace of God,* ed. by Head and Landes, pp. 327-328 (p. 327).
[12] *A Handbook of Dates,* ed. by C.R. Cheney, rev. edn, rev. by Michael Jones (Cambridge: Cambridge University Press, 2000), pp. 61-62. It is important to note that many saints were local and so may not have been worshipped by every community. This number is an approximation.
[13] Matthew Strickland, *War and Chivalry: Conduct and perception of War in England and France, 1066-1217* (Cambridge: Cambridge University Press, 1996), p. 34.
[14] Bellamy, p. 37.
[15] Russell, p. 234.

his *Summa Theologica,* and very little regarding the idea of proportionality. He did discuss whether it was considered lawful to lay ambushes and concluded that 'ambushes since they are a kind of deception, seem to pertain injustice. Therefore it is unlawful to lay ambushes even in a just war'.[16] Whilst both the Peace and the Truce of God had sparked an interest in regulating conduct, little attention was actually given to this part of the theory by canonists during the medieval period.

It was, in fact, those writing about chivalry who contemplated the idea of regulating conduct in this period. The Middle Ages was famous for chivalry and the chivalric code, by which knights would spend their career modeling themselves on the ideal in order to gain honour and recognition from their peers. Maurice Keen noted chivalry as 'a word that came to denote the code and culture of a martial estate which regarded war as its hereditary profession'.[17] During this period, *jus in bello* became intertwined with the concepts of chivalry, with many contemporaries writing about the chivalric code. The first of the chivalric scholars was Ramon Llull, a Majorcan philosopher writing in the second half of the thirteenth century, who wrote the *Book of the Order of Chivalry*. He outlined the duties of a knight and what he considered to be acceptable behaviour during times of war, writing 'for chivalry is to maintain justice'.[18] When going out to fight, the knight was expected to maintain justice and act in a chivalrous way, and this can be seen to be in keeping with the principle of proportionality, for only just and necessary military action was expected. The idea of honour was of great importance, in times of both war and peace. The concept of respect during war relates to Augustine's principle of proportionality because the chivalric code demanded honour and respect during battle. Llull suggested that 'A knight ought more to doubt the blame of the people and his dishonour then he should [feel] the peril of death',[19] signaling how important the idea of honour and respect was in the chivalric code, and in turn the theory of *jus in bello,* at this time.

A century later, Geoffrey de Charny, who lived and died in arms, wrote about chivalry around the time of the founding of the Order of the Star – the French rival to Edward III's Order of the

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[16] Thomas Aquinas, *The "Summa Theologica" of St Thomas Aquinas: Part II (second part)*, trans. by Fathers of the English Dominican Province (London: Oates and Washbourne, 1916), p. 506.
[17] Maurice Keen, *Chivalry* (New Haven: Yale University Press, 1984), p. 30. See also Strickland, and Richard Kaeuper, *Chivalry and Violence in Medieval Europe* (Oxford: Oxford University Press, 1999) for a comprehensive discussion of the topic. Bellamy also discusses the negative effects of chivalry in conjunction with the theory.
[18] Ramon Llull, *The Book of the Ordre of Chyualry*, trans. by William Caxton, ed. by Alfred T.P. Byles (London: Early English Text Society, 1926), p. 77.
[19] *Ibid*., p. 62.

Garter. Charny discussed in detail war, tournaments, and jousting, which focused more upon courtly chivalry and the concept as a way of life. Nevertheless, there was some discussion dedicated to proper conduct within battle and when considering the idea of barbaric behaviour during combat, he condemned this, asserting that 'those who use arms in this dishonourable way behave like cowards and traitors'. [20] He then criticized knights for committing certain crimes within war, such as robbery and pillaging for no good reason and plundering and stealing from the Church, all of which were classed as unacceptable conduct. Yet, whilst Charny did discuss regulations for conduct within war, he was more concerned with encouraging knights to follow certain protocols, like proper warning, than actually mitigating against brutal behavior. He concerned himself with providing restrictions for knights when out in battle; however he also observed, '[a]nd yet one should praise and value those men-at-arms who are able to make war on, inflict damage on and win profit from their enemies, for they cannot do it without strenuous effort and great courage'.[21] It is here that one can detect differences between the concept of chivalry and the Just War theory. Some of the fundamentals of the chivalric code directly contradicted those regulations put in place by the Just War theory, as shown by Charny. This is perhaps partially due to the fact that men writing about chivalry had different concerns when writing about the code. Charny, for example, concerned himself more with courtly chivalry and participation in jousting, tournaments, and glory in warfare as opposed to non-combatant immunity. It is understandable therefore that as result of this, in the main, the *jus in bello* principle remained fairly inadequate as a set of rules for regulating conduct by the end of the medieval period.

During the sixteenth century, the Spanish philosopher, theologian, and jurist Francisco Vitoria questioned how much may be done during a 'just war', but then went on to state that 'in the just war one may do everything necessary for the defence of the public good.'[22] This, of course, did not place restrictions upon the amount of damage inflicted and, if anything, went against the original principle of proportionality provided by St Augustine. He also discussed whether it was lawful to plunder. Whilst he believed that if the war could be waged without plundering then plunder was not lawful, he also thought that it was 'certain that we may plunder them of the

[20] Geoffroi de Charny, 'Le Livre de chevalerie', trans. by Elspeth Kennedy, in Richard Kaeuper and Elspeth Kennedy, *The book of chivalry of Geoffroi de Charny: text, context, and translation* (Philadelphia: University of Pennsylvania Press, 1996), pp. 84-200 (p. 179).
[21] *Ibid.,* p. 99.
[22] *Political writings / Francisco de Vitoria*, ed. by Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 304.

goods and property which have been used against us by the enemy'.[23] Although Vitoria acknowledged the medieval concept of proportionality he did not provide any further thought regarding the principle. It seems that he believed that one could do all that was necessary in order to secure peace. If anything, there were fewer attempts to build on this part of the theory than in the earlier centuries and Vitoria was not the only early modernist guilty of this. Hugo Grotius, a Dutch jurist and philosopher, famous for his role in laying the foundations for international law, alongside Vitoria and Alberico Gentili, also dedicated little attention to the proportionality principle, simply stating that where the punishment is just, all means of force and violence can be used to execute such a punishment.[24] Like Vitoria, Grotius believed that in order to achieve peace and avenge injury, men were able to employ any means possible, which in essence is a failure to regulate the amount of damage that could be inflicted.

Writing in the late-seventeenth century, Samuel Pufendorf, a German jurist and philosopher who provided commentaries and revisions of the natural law theories of Grotius and Thomas Hobbes, simply echoed the sentiments of Vitoria and Grotius, arguing that an army fighting for a just cause had the right to 'apply whatever means seem to be most appropriate'.[25] He did, however, provide a slight qualification, believing that it was only 'lawful for me to use *Violence* against my Enemy till I have repulsed the Danger he threaten'd me'.[26] Nevertheless, in general these three early modernists' contributions to the development of the proportionality principle were limited compared to the medieval writers. A century later, Swiss jurist Emer de Vattel was no different in his treatment of this principle, writing that, 'we have a right to do against the enemy whatever we find necessary for the attainment of that end, for the purpose of bringing him to reason and obtaining justice and security from him.'[27] What differentiates Vattel from his contemporaries is that he made an attempt to discuss tactics within warfare, as Aquinas had, in order to provide some form of regulation. He concluded that assassination and poisoning were contrary to the laws of war, and equally condemned by the law of nature and the consent of all civilised nations.[28] Although only a half-hearted effort in applying restrictions to conduct, it was at least an attempt.

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[23] *Ibid*., p. 317.
[24] Hugo Grotius, *The Rights of War and Peace: in Three Books*, ed. by Jean Barbeyrac (London, 1738), p. 517.
[25] Samuel Pufendorf, *Of the Law of Nature and Nations: Eight Books*, ed. by Jean Barbeyrac (London, 1729), p. 837.
[26] *Ibid*., p. 837.
[27] Emer de Vattel, *The Law of Nations: or, Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, trans. by anon. (London, 1797), p. 346.
[28] *Ibid.,* p. 360.

Overall, the principle of proportionality received little attention from the majority of Just War writers. The medieval period saw the rise of chivalry within the knightly class and, whilst aspects of the chivalric code contributed to the theory of *jus in bello,* it equally had negative consequences. The fact that it only applied to the knightly class meant that there was no general set of rules for all of society. Similarly, the idea of glory and honour within warfare did not always mean that knights would act in a just manner. Despite the disparity between concepts, chivalry did contribute to the theory of just war by providing some form of code highlighting acceptable behaviour. If anything it opened the door for future scholars to develop the theory as they had done with the concept of *jus ad bellum.* However, the theory still encountered major obstacles; for example, though theologians customarily condemned the pillaging and destruction of feudal wars and mercenary bands, they continued exempting these acts when they were performed in a just war.[29] This less-than-satisfactory treatment of the principle continued through into the next period. Early modern scholars produced few new ideas regarding the principle of proportionality, which resulted in the concept remaining fairly unsophisticated. Whilst writers like Vitoria and Vattel briefly discussed ways to restrict damage inflicted upon society, they were vague and therefore made only a weak impact upon the theory. Although most scholars agreed upon the basic principle of only using the necessary amount of military force, few developed this principle and those who did still failed to produce a solid solution as to how the regulation could be put into practice. That said, ravaging and pillaging were intrinsic elements of warfare and tended to be the most effective methods for submission. Trying to regulate effective warfare was near to impossible.

Non-combatant Immunity

The subject of non-combatant immunity was discussed under the principle of discrimination, which received slightly more attention than that of proportionality. The Peace of God threatened 'anathema against those who injure clergymen', and similarly the acts of the council of Elne-Toulouges in 1027 stated that 'no one would assail in any way a monk or cleric travelling without arms, or any man going to or returning from the church with his kin, or any man accompanying women'.[30] Whilst this could refer to both times of peace and war, it shows that there was at least a developing thinking regarding protecting civilians. The principle of discrimination therefore

[29] Russell, p. 275.
[30] Mansi, 'Sacrorum Conciliorum Nova, et Amplissima Collectio', 19:89-90, trans. by T. Head, in *The Peace of God,* ed. by Head and Landes, pp. 327-328 (p. 334).

was in the minds of even the earliest medieval scholars and it was clear to them that rules needed to be provided in order to protect the common person from the violence and instability that early medieval Europe witnessed. The Peace of God and the Truce of God signalled significant progress within thinking regarding conduct of war and yet Gratian provided little profound thought on the subject in his *Decretum*. The closest Gratian came to a concept of non-combatant immunity was the demand that pilgrims, clerics, monks, women, and unarmed peasants be immune from violence, on pain of excommunication.[31] This idea was of course no different to the rules provided by the Peace of God.

The late-thirteenth-century philosopher Ramon Llull went into a detailed account about the duties of chivalry, stating that the primary duty of the knight was to defend the Church against unbelievers as well as to protect his secular ruler, the weak, women, and children.[32] Yet, regarding actual conduct and non-combatant immunity, Llull says very little on the subject. This also appears to be the case with Geoffrey de Charny. He observed that it was forbidden 'to harm those persons who are ordained to perform such a noble office as to serve God', but, in the main, his work was concerned with chivalry as a way of life rather than just during warfare and so, little attention was given to immunity of the non-combatant.[33] Matthew Strickland remarked that the Hundred Years' War offered the catalyst for increasing formation and development of rules of conduct, and this was reflected by the production of tracts concerned specifically with the ethical and juridical aspects of war.[34] It was Honore Bonet, a Benedictine monk writing in the fourteenth century, and Christine de Pisan, an early fifteenth-century Italian poet and court writer to several dukes in the French court, who made important contributions to the development of thinking about non-combatant immunity. Together, their views expanded the categories of protected people and offered further justification for their immunity. Bonet's ideas were consistent with earlier works, but he furnished a concept of non-combatant immunity more complete than any previous work connected with either chivalry or canon law. He expanded the canonical idea that certain groups should be immune from war because of their social function during peacetime (e.g., clerics, farmers, merchants) to include the chivalrous idea that groups that

[31] Gratian, 'Decreti Secunda Pars Causa', in *Corpus Juris Canonici,* 2nd edn, rev. and ed. by A. Friedberg, 2 vols. (Leipzig: Tauchnitz, 1879), I, pp. 995-97.
[32] Llull, p. 25.
[33] Geoffroi de Charny, p. 179.
[34]Strickland, p. 32.

were too weak to bear arms should also be exempt.[35] The thinking behind this idea was that if the men were too weak, too old, too young, or too sick, 'the battalion would be of little worth.'[36]

Christine de Pisan devoted time to the subject of prisoners, stating that children and old men were not to be taken prisoner, and that the killing of prisoners was unjust. She also discussed non-combatant immunity by posing the question of whether it was lawful to imprison the common people, defining them as 'labourers shepherds and such folk', and concluded that it was only lawful to imprison them if they had assisted the enemy, for it is not their 'office' to be involved in wars.[37] She used the same example for her dealings with priests, commanding that they should be immune unless they meddled in war. As well as condemning the use of violence against priests and clerics, de Pisan also forbade their involvement in arms, writing that 'they ought not to come out of their place for no manner a case but only is permitted to them the defence of the city', meaning only self-defence was a justified reason for their involvement.[38] Bonet also speculated over the subject of prisoners, with similar result to de Pisan; however, he believed that while it was unlawful to kill prisoners, there were instances where it was acceptable, such as the possibility of escape.[39] De Pisan's work clearly compliments that of Bonet, and A.T.P. Byles observed in the preface of his edited text of de Pisan that 'her indebtedness to Honore Bonet in the last two parts of the book is so great that collation was impracticable'.[40] Whilst the writings of chivalry were, in the main, dedicated towards the duty of the knight, the concept of immunity of the non-combatant was addressed by a few of the famous chivalric writers, providing a more solid framework as to who was classed as a non-combatant.

Russell believes that medieval canonists sought to exempt non-combatants from hostilities through the Peace of God.[41] This was not a sufficient regulation for non-combatant immunity, nor was it specific enough in determining exactly who was classed as the non-combatant. In general, medieval scholars devoted little attention to *jus in bello,* and whilst a little more time was given to ensuring that non-combatants were given some form of protection, there was still

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[35] Honore Bonet, *The Tree of Battles,* trans. by G.W. Coopland (Liverpool: Liverpool University Press, 1949), p. 130.
[36] *Ibid*., p. 130.
[37] Christine de Pisan, *The book of fayttes of armes and of chyvalrye*, trans. by William Caxton, ed. by A.T.P. Byles (London: Oxford University Press, 1932), p. 225. Charny also discusses the idea of prisoners in his work *Demands pour la joute, les tournois, et la guerre*, which was written for the Order of the Star. See Geoffroi de Charny, 'Demands pour la joute, les tournois, et la guerre', trans. by Michael A Taylor, in *Joust and Tournaments: Charny and the Rules for Chivalric Sport in Fourteenth-Century France*, ed. by Steven Muhlberger (Union City: The Chivalry Bookshelf, 2002), pp. 96-143.
[38] de Pisan, p. 283.
[39] Bonet, p. 152.
[40] de Pisan, p. vii.
[41] Russell, p. 273.

questions relating to whom these people were. Thomas Aquinas wrote that 'the life of righteous men preserves and forwards the common good, since they are chief part of the community. Therefore it is no way lawful to slay the innocent.'[42] That said, he did not explain what he felt defined the righteous or the innocent, and for many knights and soldiers their perception of who was classed as innocent may have differed from that of Aquinas and his fellow theologians and canonists. It has been argued that, rather than attempting to eliminate war altogether, the scholastics, more realistically and modestly, tried to reduce the incidence of violence.[43] However, their attempts seem feeble and therefore of very little use to the continuing plight of regulating conduct within warfare.

Vitoria's thoughts on the principle of discrimination followed suit by simply employing the doctrine of double effect, a set of criteria first proposed by Aquinas in his treatment of homicidal self-defence in his *Summa Theologica*. It claimed that sometimes it is permissible to cause such a harm as a side-effect (or "double effect") of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end. Although the innocent might not be deliberately targeted, Vitoria permitted their accidental killing in certain circumstances, stating that 'it is never lawful in itself intentionally to kill innocent persons'.[44] He then proceeded to define the innocent as children, women, travellers or visitors, clergy and monks. Whilst this provides a satisfactory restriction, Vitoria then went on to agree that 'it is occasionally lawful to kill the innocent not by mistake but with full knowledge of what one is doing if this is an accidental effect.'[45] This adoption of Aquinas' theory meant that there was no development in the aim to decrease the amount of damage and loss of innocent lives during times of warfare. Vitoria continued to discuss what was lawful in the dealings with enemy combatants in terms of when it was considered legitimate to kill them and enslave them, yet there was still minimal distinction between the combatant and non-combatant. He permitted the innocent to be taken for ransom but not imprisonment, yet the means of enforcing this point was not discussed. He also wrote that 'one may lawfully enslave the innocent under just the same conditions as one may plunder them', meaning that if they assist the war effort then they may be imprisoned.[46] Yet, as with many of his points, Vitoria failed to consider that at times of war, soldiers would fail to make such distinctions in the heat of battle or combat and most likely

[42] Aquinas, p. 507.
[43] Russell, p. 308.
[44] *Francisco de Vitoria*, p. 315.
[45] *Ibid.*, p. 315.
[46] *Ibid.*, p. 318.

enslave everyone, claiming that they were assisting the enemy. Vitoria did devote more attention to this principle, more so than the majority of his medieval predecessors; however, very few of his ideas were original and most were unsatisfactory in terms of providing real protection for the innocent.

Vitoria's contemporary, Alberico Gentili, a sixteenth-century Italian jurist best known for his work relating to international law, was less restrictive on the question of non-combatant immunity and his logic mirrored the canon law view that people should enjoy immunity from the ravages of war according to their peacetime function. He argued that women and children should not be killed; however, he permitted the killing of women if they undertook male duties or led the people into fornication. Likewise, clerics, farmers, traders, and travellers were given immunity because they performed important peacetime functions. Whilst Gentili added little to this strand of the Just War tradition, he insisted that prisoners should not be killed, even if their numbers were so large that they could not be guarded, because soldiers were not guilty of anything other than defending the rights of their sovereign.[47] Whilst this was aimed at the soldiers, this too provided protection to any innocent people who were unlawfully enslaved. Quite surprisingly, Hugo Grotius, like both Vitoria and Gentili, contributed little new thinking to the theory. This seems peculiar because Grotius' work, *De Jure Belli ac Pacis,* was a reaction to the Thirty Years' War (1618-48), self-consciously aimed at redressing what he saw as the disturbing trend towards the view that the sovereign could wage war for any reason.[48] That said, W.S.M. Knight suggests that, in actual fact, 'Grotius lays no claim to originality, but rather clearly and definitely indicates his indebtedness to others for all that he says on the subject'.[49] He adopted Aquinas' doctrine of double effect without revision and aligned his thinking with canon law and the chivalric tradition by identifying specific groups who should be immune from deliberate attack. Grotius believed that killing everyone found in the enemy's territory was not illegal, writing that 'when war is proclaimed against a nation, it is at the same time proclaimed against all of that nation'.[50]

It seems that even by Grotius' time, the principle of *jus in bello* was still providing scholars with considerable difficulty when attempting to produce a set of rules regulating the way in which war

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[47] Bellamy, p. 61.
[48] Charles Edwards, *Hugo Grotius, the Miracle of Holland: a Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), p. 116.
[49] William S.M. Knight, *The life and works of Hugo Grotius* (London: Sweet & Maxwell, 1925), p. 201.
[50] Grotius, p. 563.

was fought. Similar to Grotius' view, Vattel's approach held that all enemy citizens were potential enemies. However, he rejected the idea that this made them legitimate targets, writing:

> Women, children and feeble old men, and sick persons come under the description of enemies and we have certain rights over them, inasmuch as they belong to the nation with whom we are at war […] But there are enemies who make no resistance; and consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives.[51]

Unlike Grotius, Vattel proposed two safeguards. The first was a re-articulation of the doctrine of non-combatant immunity, not dissimilar to canon law. Individuals who offered no resistance, or clergy, whose manner of life was wholly apart from the profession of arms, were to be immune from violence.[52] The second was an early form of *jus in bello* proportionality. Vattel expressly ruled out the total destruction of cities and agricultural land, insisting that he who committed such acts declared himself an enemy to mankind. This may be seen as a more realistic view toward non-combatant immunity and definitely the most logical way of thinking.

The principle of *jus in bello* provided those contributing to the Just War Tradition with the same problems that have existed in both the medieval and early modern period. The development of this principle has been far less successful than that of *jus ad bellum,* and there has been little resolution to the various flaws within the theory. The chivalric code dominated the majority of the medieval period, and whilst this code lent certain concepts and ideas to the theory, there was also conflict between the two. Chivalry was not just a code for conduct within warfare, but also a lifestyle designed for the aristocratic warriors. Johan Huizinga believed that chivalry was the ferment that made possible the development of the laws of war. He wrote that 'the notion of a law of nations was preceded and prepared for by the chivalric ideal of a good life of honour and loyalty.'[53] Whilst this may be the case, and there is, of course, no doubt that chivalry did contribute to the theory, it would be incorrect to assume that its impact was completely positive. Traditionally, war had given men the opportunity to achieve honour through individual acts of valour and courage, which could lead to unnecessary violence. Adopting a less romantic

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[51] Vattel, p. 352.
[52] *Ibid*., pp. 352-53.
[53] Johan Huizinga, 'The political and military significance of chivalric ideas in the late Middle Ages', in *Men and ideas: history of the Middle Ages, the Renaissance: essays by Johan Huizinga*, trans. by James S. Holmes and Hans van Marle (London: Eyre & Spottiswoode, 1960), pp. 96-207 (p. 203).

viewpoint to Huizinga, Strickland acknowledged that given the nature of medieval warfare, the chivalric code was not realistic in granting immunity to non-combatants.[54] The fact that the peasantry, whether in battle or in the fields, might be cut down with little compunction only highlights the limitations of the code as a mechanism for limiting the misery of warfare. Because warfare was rapidly developing by the end of the Hundred Years' War – with the introduction of professional standing armies, stricter regulations and new weaponry, such as guns and gun powder – it became clear that the chivalric code was no longer suitable for regulating war. Keen has argued that chivalry was once a cultural and a social phenomenon which retained its vigour because it remained relevant to the social and political realities of the time.[55] Once times began to change and this secular code became less relevant, its influence faded.

Theory versus Practice

Despite limited development across the two periods, the theory still provided some degree of notional control over conduct. It would, therefore, be useful to examine whether there is any evidence of adherence to its basic rules in practice. In order to assess the impact of the *jus in bello* principle, a major war from each period will be examined with the hope of not only finding evidence of the theory being put into practice but also demonstrating contrasts and highlighting comparisons between the periods. Perhaps the most prominent war of the medieval period was the Hundred Years' War, fought in the fourteenth and fifteenth centuries between France and England. The second war to be discussed will be the Thirty Years' War, which was fought during the first half of the seventeenth century which pitted the Holy Roman Emperor, his Habsvburg forces, and their allies against the Protestant states of the Holy Roman Empire and their allies. It is likely that due to the limited progression of thought relating to *jus in bello* there will be less evidence of knights and soldiers respecting the vague restrictions surrounding conduct. Although this principle did not change much between the periods, there may still be some indication as to which period the theory impacted upon the most. The problem surrounding detecting evidence of the theory is that the chroniclers and contemporaries may well have been aware of the regulations provided by the Just War theorists and therefore altered their works in order to comply with these regulations. Nevertheless, despite this, contemporary accounts still provide an idea of how the theory impacted not just on the knights and their leaders, but also on the chroniclers and contemporary witnesses. The chroniclers of the Hundred Years' War tended to

[54] Strickland, pp. 335-37.
[55] Keen, p. 252.

focus their attention upon telling tales of chivalry, especially seen in the work of Jean Froissart, and they sometimes glorified acts of destruction in order to emphasise the bravery and strength of the force. Froissart created the legend that was the Black Prince, embellishing his chivalric actions in war whilst glossing over incidents that were perhaps less than honourable. The *chevauchée,* for example, was a raiding method designed to weaken the enemy by burning, pillaging, and generally wreaking havoc in enemy territory in order to weaken productivity. This was in direct conflict with the principle of *jus in bello*, especially the strand of proportionality, and so Froissart therefore said very little of the *grande chevauchée* of 1355/6. Although he was strongly supportive of Edward III, Jean Le Bel, a Flemish chronicler and an older contemporary of Froissart, provided perhaps a less romanticised portrayal of conduct within war. According to him, Edward and his marshals 'rode on at great speed, destroying all as they passed, to Mareuil, where they burned the town, the fortress and the priory, and so many small towns round about'.[56]

Proportionality appears to have been ignored during the medieval period, possibly owing the fact that warfare was not just about battle but also about submission. Not only is this shown in the works of Le Bel, but many other primary documents provide information suggesting this was the case. Despite its defiance of the principle of proportionality, the *chevauchée* was the most popular tactic used during the Hundred Years' War. An extract from a source recording the events of the *grande chevauchée* (1355/56) explained how the Prince of Wales [i.e. the Black prince] 'rode towards [the Ile-de-]France, burning and devastating the counties of Perigord and Limousin and all the country of French Gascony.'[57] Similarly, Enguerrand de Monstrelet, a French chronicler who wrote extensively about the later part of the Hundred Years' War, recounted how Henry V 'marched toward Arraines, burning and destroying the whole country, making numbers of prisoners and acquiring a great booty', which again must be seen as disproportionate use of military force therefore ignoring the restrictions of *jus in bello*.[58] Even the Prince of Wales himself admitted to causing extreme damage during his description of his *chevauchée* in 1355 when he explained how they 'rode through the country of Armagnac, laying waste the countryside. And then we marched through the country round Toulouse where many good towns and fortresses

[56] Jean Le Bel, 'Edward lands in Normandy', trans. by Peter E. Thompson, in *Contemporary chronicles of the Hundred Years War: from the works of Jean Le Bel, Jean Froissart and Enguerrand de Monstrelet*; trans. and ed. by Peter E. Thompson (London: Folio Society, 1966), pp. 57-68 (p. 66). See also *Froissart's Chronicles,* ed. and trans. by John Jolliffe (London: Harvill Press, 1968).
[57] 'The Poitiers Chevauchée', in *The wars of Edward III: sources and interpretations,* ed. by Clifford J. Rogers (Woodbridge: Boydell, 1999), pp. 164-66 (p. 164).
[58] *The chronicles of Enguerrand de Monstrelet*, trans. by Thomas Johnes (London: Smith, 1845), p. 337.

were burnt and destroyed.'[59] Whilst it is only to be expected that during times of war there will be damage to the land on which it is being fought, the proportionality principle dictated that the use such force was acceptable only when it was absolutely necessary. Moreover, the majority of accounts detailing this type of destruction emphasised that it was the innocent towns that suffered. An extract from the records of Bertrand Carit, Archdeacon of Eu, recorded that '78 parish villages large and small were completely or in large part burned, plundered, and laid waste by the enemy in the year [13]39'.[60]

Whilst it is clear that the principle of proportionality was ignored during active warfare, this is not to say that the intention of remaining within the limits of this principle did not exist, nor does it suggest that there was no awareness of such rules. The *Gesta Henrici Quinti*, for example, told how Henry V commanded the army that 'under pain of death there should be no more setting fire to places and that churches and sacred buildings along with their property should be preserved intact.'[61] Le Bel also recounted how Edward III had given orders that on pain of death no one was to rob or pillage the dead or the living without his permission.[62] This again shows that there was some constraint placed upon the soldiers. Whether or not these kings had any real intention of remaining within these restrictions is debatable and most contemporary documents which describe the horrific effects of warfare suggest that they did not, except of course documents that were clearly propaganda or written on behalf of the king. This might be deemed too cynical a view, for there is still some evidence of acknowledgement of the rules surrounding conduct. One news bulletin report that was in circulation between the political elites, reporting Edward III's Lochindorb *chevauchée* of 1336 does show that there was some compassion and good intention present in the minds of the men. Although it reported that there was burning of countryside, it did also relay that 'out of reverence for the Holy Trinity, in whose honour the church there was built, Elgin was spared burning.'[63] This may not seem particularly noteworthy, yet it does show that whilst it is evident that the principle of proportionality was rarely followed, it was not completely ignored.

Similarly, the discrimination principle was seldom adhered to. Primary documents relating to the wars in France all report men laying waste to the land and burning the entire countryside, and so

[59] Rogers, p. 153.
[60] *Ibid*., p. 75.
[61] *Gesta Henrici Quinti: The Deeds of Henry the Fifth,* trans. by Frank Taylor and John S. Roskell (Oxford: Clarendon Press, 1975), p. 27.
[62] Le Bel, p. 72.
[63] Rogers, p. 49.

one must conclude that during these instances it is unlikely that non-combatants would have been spared. A large majority of sources in fact say less about the treatment of the supposed innocent, but their discussions of the principle of proportionality indicates that the discrimination concept of *jus in bello* caused little impact during warfare. A further extract from the records of Bertrand Carit, Archdeacon of Eu, told of how the villages in devastated areas suffered greatly and the ones that suffered the most were 'many craftsmen, farmers, merchants, and also people of the church, in addition to many noble women and wives'.[64] Whilst these group of non-combatants were not killed during battle, they certainly were not protected either. Another contemporary account entitled 'The Ravages of War', by a Parisian named Jean de Venette explained how 'the English destroyed, burned, and plundered many little towns and villages in this part of the diocese of Beauvais, capturing or even killing the inhabitants'.[65] Whilst this source was written by a French author about English actions this is not to say that it exaggerated the killing of the innocent. Some sources, such as the *Gesta*, suggested that strict orders to treat civilians with respect were given, but the reality was that despite every set of rules for war, including that of *jus in bello,* for the majority of the time the non-combatants were not protected nor were they spared.

This seems to be the case also by the early modern period. The Thirty Years' War was initially caused by the increasing oppression of the Protestant states within the Holy Roman Empire. When European leaders such as Christian of Denmark and Gustavus Adolphus of Sweden became involved it was originally to protect the oppressed Protestants and put an end to the suffering within the Empire. Whilst it is obvious that the personal agendas of such leaders stretched further than solely protecting the innocent within the Empire, one would expect to see evidence of the rules provided by *jus in bello* being put into practice, for the protection of the non-combatants was arguably one of the main aims of the war.[66] However, due to the plethora of contemporary sources relating to the sufferings of the civilian population, it is clear that the regulations laid down by the Just War theory had just as little impact as it had done during the Hundred Years' War.

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[64] *Ibid*., p. 75.
[65] *Ibid*., p. 169.
[66] For example, see the manifesto of Gustavus Adolphus, in *The causes for vvhich the most high and mighty prince and […] Lord Gustavus Adolphus of the Swedes […] is at length constrained to move with an armie into Germany* (London, 1631), p. 1.

In the manifesto, Gustavus Adolphus claimed that he only took up arms for 'the public good, for his own safety and the preservation of his friends'.[67] Clearly the manifesto was a product of propaganda in order to align with the restrictions laid by the concept of *jus ad bellum*; however, this sentence corresponds with the second concept of the tradition. The 'preservation of […] friends', suggests that Gustavus Adolphus' motives were to protect the innocent; a concept that one would then expect to see followed through. However, as in the medieval period, the supposed intentions provided by the kings and leaders in their manifestos or commissioned biographies were very different to what actually happened during war. Both principles of *jus in bello* were mostly ignored, with little evidence suggesting that one was deemed more important than the other. The sack of Magdeburg in 1631 is famous for the utter brutality visited upon both the land and the population. The official Swedish report explained how the defenders were so outnumbered that no people were spared by the enemy and whoever the soldiers encountered, they slew. It reported how 'they raped wives and virgins, tyrannised young and old…and spared no one. The whole city was plundered until it was bare. Finally everything was set alight and totally burnt down.'[68] The source continues to tell of how badly treated the clergy were, revealing that 'they were first massacred in their library and then burnt along with their books. Their wives and daughters were tied behind horses, dragged into camp, raped and terribly molested.'[69] This report alone provides enough evidence to conclude that despite the general development in thought and etiquette that the early modern period experienced, actions within warfare had anything but evolved.

Evidence suggests that military leaders were aware of the restrictions and, whilst they had little control over the actions of their soldiers, one can detect a faint desire to remain in keeping with the rules. One such source of proof is taken from Maximillian of Bavaria's warning to his men about billeting in 1637. He told his men that billeting was a burden for the people and that they could no longer handle it, even if they had not suffered in any other way. He felt that 'the few still remaining, poor and oppressed subjects plead for redress in such lamentable circumstances, that it would make a stone feel compassion.'[70] He then forbade billeting,

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[67] 'Gustavus Adolphus's Manifesto, 1630', in *War, Diplomacy and Imperialism, 1618-1763,* ed. by Geoffrey Symcox (London: Harper and Row, 1973), pp. 102-14 (p. 113).
[68] 'The sack of Magdeburg', in *Der Dreissigjährige Krieg,* ed. by Hans Schulz, 2 vols (Leipzig: Teubner, 1917), I, pp. 95-96 (p.95). See also 'The sack of Magdeburg', in *Germany in the Thirty Years War,* ed. by Gerhard Benecke (London: Arnold, 1978), pp. 34-36 (p. 34). The report was taken from a letter from Salvius to the Riksrad, Hamburg in May 1631.
[69] 'The Sack of Magdeburg', in *Der Dreissigjährige Krieg,* ed. by Schulz, I, pp. 95-96 (p. 95).
[70]'Maximillian of Bavaria warns against billeting', in *Der Dreissigjährige Krieg,* ed. by H. Jessen, 2nd edn (Dusseldorf, 1964), p. 377. This extract is also in Benecke, p. 71.

whereby civilians were expected to provide lodging for soldiers, and ordered them to leave the people alone during winter in order to protect them from certain death. That said, a further argument could also suggest that there were other motives present when trying to protect the non-combatant that were not related to acknowledgment of the theory. Perhaps they were conscious of alienating a population that they were trying to win over. Whilst investigating rare incidences of non-combatant protection, it is imperative to be aware of the fact that ultimately in warfare the immunity of the non-combatant was not a priority in the minds of the military leaders. But despite this, actually regulating the actions of soldiers was difficult and from the majority of sources it could be argued that, even if it was not their priority, they did not do all that they could in order to ensure that rules were followed. Another example of the misconduct comes from the writings of Maurus Friesenegger, a Bavarian monk who was writing in 1633 about the brutality that his village experienced during the war. He recounted how soldiers arrived and 'after inflicting a number of wounds on an old man, they shot him dead […] everyone thought that they were Swedes but it later turned out that they were Imperial troops [i.e. Catholic troops who were supposed to be defending the Bavarian inhabitants from the Protestant Swedes].'[71] This shows a lack of acknowledgment of the principle of discrimination owing to the fact that the troops purposely inflicted unnecessary damage and pointless killing upon the non-combatant community.

Conclusion

The theory of *jus in bello* developed little during the medieval and early modern periods and so in turn the impact of the concept upon the warriors changed very little. There is evidence from both periods that kings and military leaders were aware of the theory and some portrayed themselves as having the intention of forcing their men to abide by its restrictions. That said, their efforts to ensure that their soldiers followed these rules remained minimal. It almost seems that they felt obliged to lay the ground rules without any real intention of enforcing them. Strickland writes that whilst rulers might be anxious to fulfil the criteria of *jus ad bellum*, to secure legitimacy for aggression and conquest, the impact of an ecclesiastically sponsored *jus in bello* on the warriors may be judged to have been far less significant.[72] This observation not only rings true regarding the uneven balance of attention given to *jus ad bellum* and *jus in bello*, as well as

[71] Maurus Friesenegger, 'The experience of a Bavarian monastery and its village, 1633', in *Tagebuch aus dem Dreissigjahrigen Krieg: Nach einer Handschrift im Kloster Andechs mit Vorw*, ed. by W. Mathaser (Munich, Suddeutscher, 1974), pp. 49-59. For translated version see Benecke, pp. 61-67 (p.63).
[72] Strickland, p. 34.

adherence to both, but it also touches on the transmission of the theory. It was all very well for contemporary scholars to profess ideas and suggestions of how to regulate conduct within times of war; however, soldiers were the least likely group to have had their heads buried in theoretical treatises. Although, this is not to suggest that if they had been avid readers, they would have behaved differently. It has been said that a copy of *De Jure Belli ac Pacis* lay in Gustavus Adolphus' tent at Lutzen, which supports the idea that the top military leaders were aware of the theory.[73] In reality the intellectual elites who wrote the theory would have had very little power of persuasion over the commanders and common foot soldiers, not least because many were unlikely to be familiar with such texts, or even be able to read them. It was expected that there might be some indication of a slight decline in unnecessary violence and brutality toward the non-combatant by the early modern period. Yet this does not appear to be the case for the primary documents, which provide an insight into the treatment of civilians and the land, outline just as much carnage and slaughter as was seen in the chronicles of the medieval period. In terms of general impact, it could be argued that the medieval period witnessed a stronger influence of military codes owing to the prevalence of the concept of chivalry. The chivalric code was of great importance to the knights of the medieval world, and whilst it would be incorrect to assume that they behaved any better than the soldiers of the later period, they were perhaps more affected by rules and regulations regarding conduct than those of the early modern world. That said, as shown in the various texts of the chivalric writers, the chivalric code only complemented the theory of *jus in bello* to a point. It supported the idea of honour within warfare and promoted the respect of those unable to protect themselves; however, one of the main ideals of the code was to win prestige during battle, which was in direct conflict with the theory of *jus in bello*, because instead of controlling excesses in the combat zone, it essentially promoted it. The main conclusion that can be drawn from examining the theory of *jus in bello* in the medieval and early modern periods is that there was little advance in dealing with the issue of non-combatant protection, and whilst this can be attributed in part to the fact that it was an incredibly challenging task, even if more attention was given to this principle there was still the predicament of transmission of ideas, a factor that would have been an obstacle even with the provision of more solid regulations.

[73] Huizinga, p. 341.

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