Ideals of limited war predate Enlightenment theories of regular war. Grotius refers to the practice of “single combat” in Ancient Greece and medieval warfare, by which rulers agreed to settle disputes through a combat either between appointed combatants or between the rulers themselves—whichever side won the combat would have its way. Grotius was ambivalent about the practice’s validity. On the one hand, it was a valuable way to avoid afflicting “whole peoples with very serious evils” (II.xviii.10, 563), but on the other, it was wrong for combatants to essentially throw their lives in a game, and “if the issue at stake, such as the safety of many innocent persons, is worthy of war, we must strive with all strength to win it (III.xx.43, 821). Deciding disputes through single combat could not quite match the seriousness of just warfare, notwithstanding the fact that much destruction and suffering could be avoided by deferring to the procedure.
Grotius’s ambivalence reflects a deep tension between the ideals of just war and conventionally limited war.¹ Theorists of regular war resolutely defended the latter, which Vattel describes succinctly in the following key passage:

But should two nations encounter each other with the collective weight of their whole force, the war would become much more bloody and destructive, and could hardly be terminated otherwise than by the utter extinction of one of the parties […] It is therefore with good reason that the contrary practice has grown into a custom with the nations of Europe—at least with those that keep up regular standing armies or bodies of militia. The troops alone carry on the war, while the rest of the nation remain in peace. And the necessity of a special order to act is so thoroughly established, that, even after a declaration of war between two nations, if the peasants of themselves commit any hostilities, the enemy shews them no mercy, but hangs them up as he would so many robbers or banditti (III.226, 613; also III.147).²

Emphasis on limitation motivated regular war theorists to largely abandon traditional just war views on *jus in bello*, and forced them to construct an alternative basis of legitimacy for the laws of war. This paper examines how Wolff, Vattel, and Martens defended the ideal of limited war—why they thought it was valuable enough to justify radical departures

---

¹ The tension is in a sense “perennial” in normative theories of war. Writing in 1975, the philosopher Peter Mavrodes argued that the ideal of war as a “counter-forces convention” (a clash exclusively between conventionally designated forces) was in several ways superior to the Christian just war ethics of Anscombe and Ramsey. Their claim that liability to attack should be based on the target’s lack of innocence was impracticable, and the convention was strongly justified by its likely results: minimizing social costs, reducing pain and death (Mavrodes 1975). More recently, Roberts, Sloane, and Waldron have defended the value of the war conventions against challenges by just war theorists (Roberts 2008, Sloane 2009, Waldron 2009).

² Similarly G F von Martens: “These laws [of war], which are sanctioned by custom, and in some cases even by treaty, have been observed with greater punctuality since war has been carried on by the means of regular troops” (Martens and Cobbett 1795, VIII.3.1, 279).
from natural law principles of just war; why they thought limitations could be efficacious; and when and how such limitations were expected to break down.

The form of limited war they advocated is not single combat but the use of well-disciplined and self-restrained regular forces, which are the instruments of sovereign rulers, to be deployed according to reason of state. Political prudence and the rational pursuit of legitimate state interests—interests that could be framed in terms of a state’s right to security—were expected to have limiting effects in many areas of war, not only or mainly in pitched battles: siege war, requisitions of private property, protections of POW, trade, and so on. However, as hinted in Vattel’s passage above, the possibility of a breakdown of limitations is always present. Peasants spontaneously took arms against regular occupying forces; irregular forces were brought to fight alongside regular forces; insurgents challenged their ruler’s forces; “savages and barbarians” engaged in war and piracy. These cases put pressure on the ideal of limitation. It is a somewhat paradoxical and neglected feature of regular war theory that unlimited violence was deemed justified in order to enforce the limitations of regular war.

The paper starts by discussing, in section 1, the theoretical background against which the doctrine of regular *jus in bello* was articulated, mainly in the works of Christian Wolff and Emer de Vattel. I present a stylized account of the doctrine of *jus in bello* in Thomistic just war theory, which essentially conceives of *jus in bello* as stipulating conditions of rightful vindication of right, and reconstruct Wolff’s and Vattel’s objections.

---

3 Unless otherwise indicated, all citations of Vattel are from *The Law of Nations* (Vattel, Kapossy, and Whatmore 2008 [1758]). I indicate book number followed by paragraph number, and include page number when quoting. Unless otherwise noted, all citations of Wolff are from his *The Law of Nations Treated According to a Scientific Method* (Wolff and Drake 1934 [1750]). I indicate paragraph number, followed by page number when quoting.
These combine epistemic and consequentialist arguments and result in a defense of belligerent equality and in the rejection of personal guilt as a basis for liability to attack or punishment during and after war. Regular wars pitch legally equal forces against each other; they can use force only as long as enemies actually threaten force.

Section 2 examines the efficacy of regular war limitations, mainly as discussed by Vattel and G F Martens. I proceed by reconstructing, in various areas of warfare, the strategic logic of reciprocity, which largely underpins the belief on the viability of limited warfare. The normative logic of regular *jus in bello* can be understood as form of rule-consequentialism with a realist constraint: only those norms that could plausibly be upheld in a self-enforcing equilibrium can belong to the laws of war. It was assumed that sovereign rulers have an interest in limiting the impact of war on their own goods, forces, and populations. This interest, together with the expectation of retaliation for breaches, provides the main leverage for sustaining the laws’ efficacy.\(^4\)

Section 3 turns to the dark side of limitation: the permissibility of unlimited force against irregular and unlawful forces, i.e. against agents of violence that do not fit the conditions of the limited ideal. While the contrast between “civilized” vs “barbarian nations” is certainly relevant, the most pertinent opposition is between regular and irregular forces. Once these forms of violence are factored in, the extent to which violence was effectively limited through regular warfare has to be qualified. While Enlightenment regular war theo-

\(^4\) Contrary to James Whitman, then, I argue that limitation in 18th-century European warfare resulted not from a convention regarding pitched battles and their termination, but rather from a more encompassing appeal to self-interest and the avoidance of wasteful or self-defeating violence (cf. Whitman 2012). This certainly applied in the rare occasions of pitched battles—which were the closest regular war got to the old model of single combat—but also and more relevantly in sieges, private property requisitions, protection of POWs, and protection of neutral trade.
rists objected to the just war *jus in bello* for multiplying and escalating righteous violence, their emphasis on conventional regularity led to its own distinctive forms of violent escalation: reprisals and counter-reprisals, harsh disciplining of partisans and resistance, extermination of “savage nations.” A truly limiting ideal must contemplate limitations that apply to the treatment of irregular and unlawful forces, but this is not something that the Enlightenment theorists attempted.

1. **Just war, unlimited war, regular war**

18th-century jurists and theorists of regular war fundamentally transformed the two main strands of thought regarding the proper conduct of warfare that can be found in Grotius. The first strand comes from the Thomistic tradition of just war theorizing, which reached its peak in 16th- and early 17th-century Spain. The second came largely from jurists trained in Roman law, who emphasized the role of *jus gentium* and civil law as the basis for a more permissive model of warfare (Haggenmacher 1983, Tuck 1999, 16-77, Panizza 2014, Keen 1965, 7-22, 63-81). Wolff and Vattel rejected both the just war conception of *jus in bello*, which they thought set impossibly demanding standards, and the more permissive model.

Neo-scholastic accounts of just war derived the constraints and permissions of *jus in bello* from natural law principles of corrective and punitive justice. Just wars are vindications of right, and the function of *jus in bello* is to establish the terms governing the proper or rightful way to vindicate and remedy violations of right (Haggenmacher 1983, 416-422, 600-2). Thus understood, just wars carried two main *in bello* restrictions. Firstly,
only actions that are necessary to vindicate and correct the injury are permissible. The original injury—the violation of right that justifies the war—sets a baseline of permissible force, i.e. force necessary to attain the rightful ends of a just war, which include recovering one’s goods or taking equivalent compensation, as well as punishing wrongdoers (see e.g. Vitoria OLW q1 a4; Suarez OW VII.6; also Grotius III.1.2).

Secondly, only those who directly contribute to the wrong that justifies the war are permissible targets. Contribution to the wrong could be either a matter of personal guilt, which could be met by punishment, or simply of opposing force to the just warriors, which could happen blamelessly. In Vitoria’s benign view, soldiers should usually be excused for fighting unjust wars because they have an obligation to defer to their ruler’s judgment (OLW q2 a2). Non-blamable but unjust soldiers could still be targeted, but only insofar as they resisted by force and they could not be punished post bellum. By contrast, Suarez held that guilt should be presumed, so that, except children, women, and clergy, “all other persons are considered guilty; for human judgment looks upon those able to take up arms as having actually done so,” and as such were punishable at the end of war (OW VII.10, 843).

Two features of this conception of jus in bello are relevant for present purposes.

First, the just belligerent could exercise criminal jurisdiction over captured enemies; even Vitoria’s presumption of innocence could be defeated in some cases. Second, the just war doctrine of jus in bello is asymmetrical. All in bello rights, permissions, and constraints are

---

5 Vitoria made clear that if it could be shown that unjust soldiers could or should have known that their war was unjust, they could be punished after taken as prisoners (OLW q3 a4-5; OAI q3 a8). When discussing the treatment due to Amerindians, Vitoria initially called for moderation in virtue of their ignorance and moral infancy—“weak and childish foes”—but went on to defend full offensive war powers if they persisted “in their wickedness” and refused to deliver what they owed. Full offensive war powers could then be applied, including punishment, “plunder, enslavement, deposition of their former masters, and the institution of new ones” (OAI q3 a1).
conditional on having an original right that could be rightfully vindicated through war. Force by the unjust side is in principle wrong and beyond the reach of *jus in bello*—there is no point in regulating wrongful acts, other than by proscription (Vitoria OLW q2 a4; Suarez OW VII.4; also Grotius II.1.18).

Wolff and Vattel were particularly troubled by these two features of just war approaches. They rejected the unequal status of belligerents and defended instead the principle of belligerent equality, and they jettisoned individual guilt as a criterion of liability to attack and punishment and defended instead the immunity of (regular) POWs.

Wolff’s argument for belligerent equality *in bello* is succinct and formal, essentially a logical derivation from the principle of belligerent equality *ad bellum*. Since no sovereign could pretend to stand as the judge of another, all states must be seen as equals during war—belligerent equality is implied by sovereign equality (§888). Wolff added the Grotian caveat that belligerent equality was strictly a matter of legal not moral standing. Relative to natural law and before God, at most one side at war could have true rights, and therefore belligerent equality would often give legal sanction to wrongdoers and aggressors.

However, a less formal and more persuasive argument can be found in Wolff’s discussion of the proper management of armed conflicts and their legal effects. The argument is a sort of consequentialist *reductio*, and hinges on the powerful insight that strict adherence to the imperatives of natural law would multiply the occasions of conflict without providing the means for solving them. If just belligerents became excessively punitive or used force beyond necessity, then as a matter of natural law some remedies would have to
be made available to the unjust side for defense. An otherwise unjustified belligerent would be justified in using force against an otherwise just belligerent if the latter used dis-proportionate force or was excessively vengeful. Wolff believed that these micro-conflicts over *jus in bello* rights and duties were bound to multiply in war and had no prospects of resolution:

Therefore, the rights of belligerents are so involved with their underlying causes, that they cannot be untangled by any one, even if an arbiter should especially be appointed, much less without a judge or arbiter, such as nations free by nature are not bound to recognize. Since a natural obligation cannot be extended beyond what is possible, necessity itself demands that as regards the results arising from warlike acts the war should be considered as just on the part of each belligerent. (§892, 457)

Practical feasibility thus forces a departure from the strictness of natural law. Strict adherence to natural law, moreover, would undermine the imperative of “ending difficulties between nations and terminating suits” (§887, 454). The laws of war should facilitate, not obstruct, the termination of war, and for that purpose they should reduce the occasions for disputes, not multiply them. Underlying this approach is a strong sense of the impossibility of fighting “morally clean” wars—“just as no state is ruled without great wrong, so also a war cannot be waged without wrong” (§892, 457). The hope of perfectly adjusting war to natural law is vain and must be given up; the aspiration should rather be to facilitate the termination of war.

---

6 A similar argument was made by Gentili but for different purposes in *De Iure Belli* I.xiii.
Vattel appropriated and further developed this line of reasoning. Like Wolff, he argued that if belligerence rights were limited to the just side, it would be impossible to effectively regulate war—belligerent equality is a condition of possibility of effective legal regulation (III.190). He argued that strict adherence to natural law would not only multiply conflict but was also likely to cause their escalation. As he wrote in a passage famously celebrated by Carl Schmitt (Schmitt 2003, 156-157),

[E]ach party asserting that they have justice on their own side, will arrogate to themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so many acts of robbery, so many infractions of the law of nations, in the punishment of which all states should unite […] the quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate (III.188, 589).  

Absent a higher authority that could settle disputes and credibly enforce its rulings, it would be reckless to make belligerent rights conditional on the satisfaction of jus ad bellum criteria.

In sum, it was thought that if jus in bello was derived directly from natural law and individual moral responsibility, conflicts would multiply and violence escalate in interstate disputes. However, neither Wolff nor Vattel were prepared to altogether abandon natural law—it had to play a different role. A valuable feature of natural law that they

---

7 It is remarkable that authors as diverse as Carl Schmitt, Hersch Lauterpacht, and Hedley Bull voiced similar concerns relative to the dangers of violent escalation as a consequence of belligerent inequality. Lauterpacht defended belligerent equality in bello on the basis of the escalation argument, but argued that adjudication of jus ad bellum could and should proceed ex post (Lauterpacht 1953, 98). This may alleviate the worry of escalation to some degree, but if belligerents believe that they are likely to be treated as criminals at the end of war, they may have strong incentives to keep on fighting (cf. Bull 1966, 70-72).
sough to retain is that it imposed constraints on (just) belligerents, which could be adapted to the distinctive normative logic of regular wars. Regular wars are not vindications of claim rights but rather pursuits of legitimate state interests, i.e. interests that could be couched publicly in the language of a state’s right to security. Regular jus in bello could analogously be re-conceived as not rightful vindication but legitimate pursuit of legitimate rights. I come back to this point in the next section.

The constraining force of natural law contrasts sharply with the model of ius infinitum, which Grotius used as the basis for his “public solemn warfare,” and which was defended later on by Pufendorf (Rech 2013, 75-78). Grotius reduced the ius gentium externum, which governs solemn warfare, to a very thin form of customary law. It consists essentially in the lowest common denominator of a rich assortment of Roman, ancient Greek, and Biblical sources (Remec 1960, 114). There are virtually no in bello restrictions in solemn wars. “All persons who are in enemy territory” were liable to attack, including children, women, prisoners of war, soldiers who surrendered, and foreigners; property and territorial takings were unlimited (III.4.6-12). However, having listed the wide array of in bello permissions in solemn warfare, Grotius famously went on to “retrace his steps” and “deprive those who wage war of nearly all the privileges which I seemed to grant, yet did

---

8 As Peter Haggenmacher insightfully notices (Haggenmacher 1983, 600-601). Walter Rech’s claim that Vattel was the first theorist to advocate systematically for limited warfare overlooks these procedural constraints of just warfare. They are certainly different in nature to those of regular warfare, but no early modern just war theorist held that unlimited war was permissible (cf. Rech 2013, 158-170).

9 The only clear in bello restriction is the customary proscription of poison, agreement on whose prohibition, Grotius explained, “arose from a consideration of the common advantage, in order that the dangers of war, which had begun to be frequent, might not be too widely extended” (III.4.15, p. 652).
not grant them” (III.x, 716), which he did on the basis of natural law and Christian love in his \textit{temperamenta belli} (III.x-xvi).

Two separate systems of right coexist in Grotius, each with inconsistent regimes of \textit{jus in bello}, neither having supremacy (Lauterpacht 1946, 1-15). Wolff and Vattel proceed differently: they sought to integrate as much natural law as feasible into \textit{jus in bello}. The “voluntary law of nations” again performs the complex mediating role—not altogether detached from natural law, not custom, but departing from the strictness of natural law only as much as necessary to maximize “perfection” in the \textit{civitas maxima} (Wolff’s somewhat obscure formulation in §892).

Wolff and Vattel claimed that the doctrine regular \textit{jus in bello} simply makes the natural legal \textit{jus in bello} applicable to both sides in war, but this is oversimplified and misleading (Wolff §890; Vattel III.191). For in addition to opposing belligerent inequality, they denied the admissibility of punitive wars and rejected the image of \textit{jus in bello} as a form of rightful vindication. Very significantly, Vattel—but not Wolff—defended the permissibility of belligerent reprisals, i.e. breaches of the laws of war made for the sake of legal enforcement. Far more than Wolff, whose remarks on \textit{jus in bello} are overall limited and rather Scholastic, Vattel tried to create a real synthesis, which incorporated both contemporary customs and practices of warfare and natural legal constraints. His views on regular \textit{jus in bello}, and those of the 18\textsuperscript{th}-century jurists who followed his lead, are not simply a bilateralized version of traditional just war.
2. State interest and the efficacy of war limitations

The Spanish Scholastics largely entrusted the constraints inherent to rightful vindication to the moral conscience of rulers, officers, and soldiers. It was thought—or expected—that fear of damnation for fighting unjustly would be a robust disciplining mechanism. Personal guilt is thus at the heart of Scholastic *jus in bello* in two ways: the desire to be free of guilt supports an expectation of compliance, and the guilty are liable to lethal force and punishment.

Wolff and Vattel jettisoned personal guilt in these two roles. Only those who were actually in a position to use force could be targeted, and only for as long as they threatened hostile force. Individual responsibility for wrongdoing is excluded from legal consideration, except possibly for “heinous outrages” in the conduct of war (Vattel III.162, 567; Wolff §792; also Martens 1795, 282-3). Awareness of the epistemic and moral uncertainty prevailing in international conflicts, and the fact that belligerents at war typically claim justice for their own causes and actions during war, led Wolff and Vattel to radically deemphasize the *jus ad bellum* requirement of just cause, and to adjust the *jus in bello* accordingly.

But if the image of rightful vindication is abandoned, along with the associated roles of moral guilt, then the motivational bases of *jus in bello* must be fundamentally re-

---

10 Assisted as it was by the institutionalized practice of religious confession in the midst of war, this assumption may not have been altogether implausible in the Iberian Peninsula and elsewhere in Catholic Europe. It bears noting that in the 16th and 17th centuries there was unprecedented doctrinal attention to questions of moral conscience in matters of *jus in bello*, so that “the attempt to discipline the consciences of captains and soldiers produced a new lexicon to classify the sins and crimes committed by soldiers in their lives and, above all, on the battlefield,” a process in which Jesuit military chaplains were particularly involved (Lavenia 2014, 456). On the practical impact of theological doctrine during the Spanish conquest of America, see (Hanke 1949, 133-146, Pagden 2012).
thought. Vindication of right and avoidance of sin can no longer do. One obvious alternative is social standing—honor and traditional chivalric customs. If these are brought to the fore, the laws of regular war could be understood as setting the terms for the *honorable pursuit* of legitimate state interests through force. This is how war historians often describe the laws of 18th-century warfare; the motivational force of legal restraints would derive from aristocratic culture and the pressures of social standing. Along these lines, David Bell has recently argued that in the 18th-century, “what governed the experience of warfare for European ruling classes and kept it functioning as a system was aristocratic culture.” This culture was pervaded by an “obsession with honor,” which fits remarkably well with the structure of regular *jus in bello*: just as regular war theorists de-emphasized the role of *iusta causa*, honor was “curiously amoral, more concerned with from, process, and appearance than with cause and right,” which made it possible to “fight honorably for a bad cause or dishonorably for a good one” (Bell 2007, 50, 36).¹¹

While both Wolff and Vattel acknowledged the practical force and normative relevance of ideals of honor and social standing, they tended to criticize their vanity and backwardness, and suggested ways to rationalize them. Rather than frame *jus in bello* in terms of honor, they were in the business of subjecting long-standing chivalric and aristocratic codes of conduct to the modern tenets of centralized statehood and reason of state. ¹²


¹² Wolff focused on the honors and deference due to rulers, objecting to Prussian excessive concern with the “vanity of titles” (§249, 127). The higher “excellence” of a ruler over another was only “accidental,” he argued, and could not undermine the genuine and always equal honor of being a sovereign (§250, 128). True honor or “renown” is based on the quality of political rule, not on “excellence” (§249). Vattel, arguing more directly against traditional practices, condemned aristocratic
Long-standing aristocratic codes had evolved within a more or less independent and self-contained professional ethos, which got its original legal articulation from pan-European civil jurists (Lesaffer 2007, 197, Keen 1965, 19-22).

Revealingly, Vattel was keen to stress the imperative of extending the long-standing customary protections of the warrior nobility to all professional soldiers, and of rationalizing and further restraining customary rules on e.g. sieges and looting, as we will see below. These, I want to argue, are token instances of the broader enlightenment project of using the law of nations to bring instrumental calculation and the rationality of state interest into the warrior ethos (conversely, chivalric customs deemed rational were incorporated as “civilized customs” into the law of nations.) G. F. von Martens expressed this re-orientation well in the second edition of his Précis, where he wrote that the “civilized powers of Europe” had, after slow and painful experience, come to understand that it was in everyone’s best interest to avoid unnecessary violence and diminish the “scourge of war” by upholding legal limitations on the means of war. Unlawful means might confer short time advantage, but they would eventually backfire against the deploying nation (Martens 1801, 398-399, 405-406, and on the historical significance of Martens see Koskenniemi 2008).13

13 “Les puissances civilisées de l’Europe […] convaincues par une longue expérience que même entre les moyens que la loi naturelle ne rejeterait pas déjà comme étrangers au but de la guerre, il y a quelques uns qui, en augmentent sans nécessité les maux, ou dont le mal auquel ils exposent les deux parties surpasses les avantages qu’on pourrait en espérer, elles sont convenues, soit expressément, soit tacitement de proscrire quelques mesures comme totalement inadmissibles” (Martens 1801, 398-399) Bell argues that during the Old Regime “monarchs and generals did not practice the new style of warfare because of conscious calculations” but rather “because it came naturally to
Montesquieu’s famous principle of the law of nations is perhaps the most compact and best summary of the enterprise: “the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests” (Montesquieu et al. 1989 [1748], I.3, p. 7). The defining aspiration is to limit the destructiveness of war—to make warfare a limited procedure of dispute resolution. The central motivational force behind the laws of regular warfare, as Vattel and other 18th-century jurists understood it, is enlightened, long-term state interest. Personal honor could and of course had a role, but when honor and political prudence clashed, the latter should prevail—as, for instance, in the case of (non-perfidious) deceit in war, which some thought dishonorable and cowardly but was permissible and even prudentially imperative (Vattel III.178; Wolff §882).

The regular war approach exploits the motivational efficacy of self-interest by incorporating the logic of reciprocity, which arguably underpins the Laws of Armed Conflict to this day (Morrow 2002, Posner 2013). Vattel and Martens defended the permissibility of retaliation—or “belligerent reprisals,” as they are called today—which both Wolff and Grotius had categorically rejected (Grotius III.11.16; Wolff §§823, 825). Their validation is a fundamental step towards seeing the laws of war as a positive legal system, which must depart from strict morality or natural law, and as such signals a fundamental re-conception of the nature of the laws of war and of war itself. To make *jus in bello* legally

---

14 Haggenmacher’s and Jouannet’s penetrating commentaries on the structure of the laws of war in the “classical period of international law” seem to neglect the significance of this crucial element (Haggenmacher 1983, 598-601, Jouannet 1998, 227-230).
actionable, Vattel and Martens submitted, force that would normally be unlawful must be
treated as permissible if used as a proportionate response to manifest breaches of the laws
of war. Vattel granted that reprisals were a dreadful and morally wrong recourse, but he
thought they were nonetheless a legally and also morally necessary evil—a disciplining
mechanism indispensible to secure legal efficacy.

Beyond reprisals, the role of state interests and their associated calculus in the regu-
lation of warfare belong to broader ideals of prudence and practical wisdom characteristic
of enlightened political rule. These ideals are the ultimate legitimating bases of regular *jus
in bello*—they enjoined rulers to strictly discipline their forces in the pursuit of limited
goals in war. Soldiers and auxiliaries, wrote Vattel, “are only instruments which [the sov-
ereign] employs in asserting his right” (III.164, 568). Along these lines, Frederick II sought
to make his troops “like the works of a watch, the wheels of which by artful gearing pro-
duce an exact and regular movement” (cited in Robson 1966, 176). Well-disciplined regu-
lar forces would stick to limited goals without superfluous violence, which is not only
cruel and inhumane but also, and no less importantly for Vattel, irrational and wasteful.

While Vattel highlights the humanitarian dividends of the limitations of regular
warfare, his emphasis is on limiting the destructiveness of war, i.e. reduce its impact on
social and economic life, in particular on trade. In this sense, Vattel’s theory of the laws of
war is best described as a rational economy of violence, rather than an early version of
humanitarianism—if humanitarianism is understood as aiming first and foremost at miti-

---

15 In his classic study of belligerent reprisals in international law, Kalshoven dates their origin in
international law to the 19th century, but they can be traced back at least to Vattel and Martens in
the mid 18th century (cf. Kalshoven 2005, 4-5).
gating the horrors of war and relieving suffering and distress. Of course, this is not to deny that Vattel valued the relief of suffering and mitigation of horror, but rather to locate the centre of gravity of his doctrine. While humanitarian relief was a valuable side-effect of the limitations of regular warfare, there is nothing in Vattel that matches the tenor of Grotius’ temperamenta belli, which is properly speaking a humanitarian exhortation (Grotius III.x-xvi; compare e.g. Vattel III.158, II.1-16).

The distinctive logic of regular jus in bello is best seen by examining concrete areas of application. In what follows I focus on two areas: the protection of prisoners of war, and the immunities of noncombatants during sieges and occupation. Each area has a unique rational structure, but both reveal the rational economy of violence at play.

2.1. Prisoners of War

In contrast to the Spanish Scholastics and Grotius, Wolff, Vattel, and Martens held cate-
gorically that after surrender soldiers were immune to attack and to virtually all forms of punishment, except for serious violations of the laws of war (Wolff §794; Vattel III.140-1). The reason for this immunity is that unarmed soldiers no longer pose a threat, and threat is the sole basis for liability to attack. This may bring to mind Rousseau’s famous passage in On the Social Contract where he circumscribed enmity in war to the fact of

---

16 It was by no means rare practice to kill POWs in the 15th and 16th centuries on charges of treason, rebellion, or lèse-majesté (Contamine 2000, 167-168). Still as late as 1680, the Grotian Johann Wolfgang Textor held that the “authors or instigators of the war” could and should be punished, “so that at times some greater protection might be afforded to public peace” (XVIII.19, Textor and Bate 1916 [1680], 188). This rationale had disappeared by mid-18th century.
bearing arms, but Wolff and Vattel’s limitation is narrower than Rousseau’s.17 Surrendered soldiers are still enemies, as are in fact all citizens of the enemy state and their property (Wolff §§725-6; Vattel III.69-77), but after surrendering they are no longer permissible targets. Enemy POWs could be lawfully detained for the duration of war, and ransom could be demanded for their liberation, but their life cannot be taken (Vattel III.153-4).

The imperative to preserve the life of prisoners, and the type of calculus that should go into enforcing it, illustrates the type of calculation that Vattel brought into the law of nations:

If the hostile general has, without any just reason, caused some prisoners to be hanged, we hang an equal number of his people, and of the same rank – notifying to him that we will continue thus to retaliate \([\text{lui rendre ainsi la pareille}]\) for the purpose of obliging him to observe the laws of war. It is a dreadful extremity thus to condemn a prisoner to atone, by a miserable death, for his general’s crime […]

Nevertheless, as a prince or his general has a right to sacrifice his enemies’ lives to his own safety and that of his men – it appears, that, if he has to do with an inhuman enemy who frequently commits such enormities, he is authorized to refuse quarter to some of the prisoners he takes. (III.142, 545)

Something is clearly wrong about retaliation: non-threatening soldiers are killed on the basis of breaches for which they are morally blameless. Even noncombatants could suffer from lawful reprisals in the form of denial of quarter in sieges and indiscriminate bombing

17 “Since the aim of the war is the destruction of the enemy state, one has the right over its defenders as long as they bear arms; but as soon as they lay down their arms and surrender, they cease to be enemies or the enemy’s instruments, and become simply men once more, and one no longer has a right over their lives.” (Social Contract I.iv) Rousseau’s argument was aimed at Grotius the theorist of public solemn war, not just war.
of cities (III.141, III.169). For Grotius and Wolff this was enough to make them unlawful; any form of punitive measure had to be fair. For Vattel retaliations were not a form of vicarious punishment but legal enforcement *in extremis*, admittedly ruthless and regrettable but in some cases necessary and as such defensible (cf. Walzer 1977, 207-216). The requirements of proportionality and public notification were meant to signal to enemy officials the seriousness and cost of breaches. Morally repugnant as they are, no comparable mechanism exists to enforce the valuable legal constraints of regular enmity (cf. Kalshoven 2005, 43-44). Moreover, if belligerents were foresighted enough and capable of retaliating, they would eventually abstain from breaches and retaliation will never happen. Reprisals, as game theorists like to say, are “off the equilibrium path.”

The strategic logic behind reprisals is remarkably simple. All nations may be assumed to have an interest in protecting the lives of their own soldiers, and hence all are bound to consent to a norm that limits the right to use lethal force against them. Vattel said that the norm of POW immunity was a “humane and salutary custom” (III.153, 556), but he could have said, more strongly, that it belonged to the voluntary law of nations. If war is understood as a contest of force, actually posing a threat is an obvious limiting condition, to which all potential belligerents could be assumed to consent. The difficulty, however, is that while all nations could benefit from the POW immunity norm, each has an incentive to defect—have its own soldiers protected while denying quarter or killing captives. In the 18th century, as today, professional soldiers were scarce and expensive to find and train, and so “generals did all they could to keep them alive” (Bell 2007, 45-6, Howard 2001, 70-

18 Proportionally killing enemy POWs, denial of quarter, and indiscriminate bombing of cities are the modes of belligerent reprisals validated by Vattel.
71). Eliminating competent soldiers was a straightforward way to weaken the enemy. Moreover, as Vattel noted, keeping POWs safely quartered could be onerous for their keepers in the midst of war (III.151).

Reprisals were meant to provide necessary incentives against defection.\textsuperscript{19} The Dutch rebellion in the late 16\textsuperscript{th} century provides a remarkable illustration.\textsuperscript{20} The duke of Alba’s initial ruthless policy was to deny quarter to rebel towns, treat all captured fighters as rebellious criminals and hang them on the spot. But as warriors in both sides could expect to face each other at war repeatedly, Spain’s unrestrained policy could be successfully checked through retaliation. After the Dutch responded in kind by taking and hanging some prisoners, prisoner exchanges became standardized and even formalized in conventions that were replicated later on (Parker 1994, 49-55). The shadow of reciprocity sustained moderation towards prisoners during the American War of Independence and elsewhere (Selesky 1994, 82-84, on German occupation in France during WWII, see Walzer 1977, 208-9).

Reprisals were of course very imperfect enforcement mechanisms. They could go wrong by escalating into a spiral of reprisals and counter-reprisals, either because of vindictiveness or because belligerents would disagree on the lawfulness of token actions during war. One party’s lawful action is another’s breach; consequently one side’s lawful reprisal is another’s breach which would merit counter-reprisals. This type of escalation is

\textsuperscript{19} But they were not the only or most benign incentive. It was common practice up to Vattel’s time to exchange prisoners and to demand ransom or political concessions in exchange for release (Contamine 2000, 186-193). Both created incentives to keep prisoners alive.

\textsuperscript{20} Vattel surprisingly describes the case as a rare instance in which POW immunities were \textit{not} observed (III.140, 544n; cf. more accurately Martens 1795, 283).
analogous to the self-righteous escalations that Wolff and Vattel thought would be caused by the unequal *jus ad bellum* standing of belligerents, which motivated their defense of belligerent equality. Why would things be different in the case of regular *jus in bello*? If *jus in bello* should be expected to be as clouded by uncertainty and disagreement as *jus ad bellum*, reprisals would be a self-defeating disciplining devise.

Vattel took this danger seriously and narrowed the scope of reciprocating measures accordingly. The voluntary law of nations serves again the necessary mediating role:

> [W]ith respect to hostilities against the enemy’s person, the voluntary law of nations only prohibits those measures which are *in themselves unlawful and odious*, such as poisoning, assassination, treachery, the massacre of an enemy who has surrendered, and from whom we have nothing to fear […] on the other hand, it permits or tolerates every act which in itself is naturally adapted to promote the object of the war, without considering whether such act of hostility was unnecessary, useless, or superfluous, in that particular instance, unless there be the clearest evidence to prove that an exception ought to have been made in the case in question (III.173, 574, emphasis added.)

Only transparently ascertainable acts can fall under the purview of reprisals. On this basis Vattel virtually denies that the principle of necessity could be a valid basis for complaint and retaliation—the allegation that certain action was unnecessary and hence unlawful can be raised and acted upon only in the most rare circumstances. For epistemic and prudential
reasons, Vattel thought, it must normally be left to each ruler or commander to decide on the scope practical necessity (III.137; cf. Wolff §783).\(^{21}\)

Such deference to the judgments of sovereigns and commanders opened the way to maximalist constructions of necessity. In the 19th century, Prussian war theorists infamously alleged that military necessity could trump all legal constraints on war—kriegsraison dissolved kriegsmanier (Best 1980, 166-179) This core tension between military necessity and legal limitation—which resembles but is not identical to that between necessity and humanity in the contemporary Law of Armed Conflict (Schmitt 2010, Luban 2013)—appears in Vattel (and Martens) in relative benign form. For them certain manifestly unlawful actions—e.g. the use of poison, treacherous assassination, and perfidy—could never be dissolved by claims of necessity or kriegsraison (Vattel III.155; Martens 1801, 399). These actions are categorically unlawful, “totalement inadmissibles” (Martens), under any circumstance. The underlying premise is that belligerent powers have limited goals, and as such can and should fight their wars with limited means—a premise that was largely valid during the 18th century.\(^ {22}\) Martens declared that the goal of war is never

\(^{21}\) Vattel suggested that Louis XIV’s ravage of the Palatinate was one such exception (III.167). He granted that scorched-earth tactics could sometimes be lawful—e.g. “to cover our frontier against an enemy whose incursions we are unable to check by any other means”—but denied that the French could justify their actions on that basis—“the whole proceeding exhibited nothing to the eyes of mankind but the revenge and cruelty of a haughty and unfeeling minister” (III.167, 571). And yet a case can be made in terms of necessity that is not easily refuted on Vattelian grounds: in 1689 Louis XIV arguably had no other means to defend Alsace against the growing hostile power of Austria and the League of Augsburg than to create a buffering “artificial desert” in the Palatinate region (Lynn 2002). The strategy of course backfired badly, but Vattel strong deference to sovereign judgments—only when there is “positive evidence,” i.e. certainty, could they be overridden (III.173)—together with his validation of scorched earth policies would make it hard to prove that even such glaring atrocity is unlawful.

\(^ {22}\) “In theory and in practice, eighteenth-century wars were wars of limited liability—about something concrete, rather than the earlier wars of righteousness and moral purpose—clashes between
to exterminate the enemy but only to force him to concede one’s terms in the ensuing peace (Martens 1801, 398). In the 1801 edition of his Précis he nonetheless laconically notes that the Napoleonic Wars may be changing the balance between kriegsraison and kriegsmanier.23

2.2. Immunity of noncombatants

It is somewhat misleading and anachronistic to distinguish sharply between combatants and noncombatants when discussing 18th-century legal theorists. Wolff and Vattel were indeed far from the contemporary insistence on the strict observance of the IHL principle of distinction. However, for present purposes it may be stipulated that noncombatants are those who do not participate in the deployment of hostile force against an enemy—or, as Wolff put it, those who “refrain from all violence, and do not show an intention to use force” (§792, 409). Combatants are those who do not refrain from violence, which need not be coextensive with the regular forces, as we will see in the next section.

From a contemporary perspective, some of the noncombatant protections defended by Wolff, Vattel, and Martens may appear strikingly meager. However, if compared with the practice of war before the 18th century, the scope of these protections, and the distinctive logic supporting their efficacy, can be better appreciated.

________________________

23 “On retrouve ces lois de la guerre au milieu même des reproches que presque dans chaque guerre l’ennemi fait à l’ennemi de les avoir violé; on les retrouve même dans ce moment vers la fin d’une guerre désastreuse qui en a fait changer quelques unes, et qui plus d’une fois semblait exposer les autres.” (Martens 1801, 399)
The norms governing sieges may be particularly shocking from a contemporary perspective. According to Vattel, it was permissible to starve noncombatants during sieges because “if there are hopes of reducing by famine a strong place of which it is very important to gain possession, the useless mouths are not permitted to come out” (III.148, 551). Compared to earlier times, however, Vattel defended a more limited practice. According to Keen, the laws that governed siege warfare prior to the 18th century were “unusual in their savagery and severity.” Once the siege works were set or the artillery fired, capitulations did not have to be accepted, and if the town was taken, the lives and property of all town dwellers, along with the garrisons, were entirely at the besiegers’ disposal (Keen 1965, 119-133, Lesaffer 2007, 177-183). According to Vattel, by contrast, besiegers had to offer or accept reasonable terms of capitulation at all times, and had to abstain from killing or harming noncombatants even if the town was stormed, except possibly as justified reprisals. The besiegers could at most take noncombatants as hostages and demand ransom for their liberation (III.148; Wolff §§811-813; Martens 1801, 424-426) (on ransoming, see Contamine 2000). Outrageous as this may still appear, the added restrictions were by no means insignificant at the time. Vattel was emphatic, and not altogether mistaken, in saying that they were clear proof of the growing “humanity” of “enlightened” warfare (III.143).

The strategic logic behind these constraints is again simple and powerful. Rather than forcing towns to hold out until the bitter end—if you will be killed or worse anyway,

---

24 It was often agreed in capitulations that soldiers would not be taken as prisoners (Rosas 1976, 52). Sometimes the besieging army would even pay honors to the surrendering force for its brave resistance (Robson 1966, 167-168, Steele 1990, 109-110). In line with this, and again contrary to earlier practice, Vattel objected to the use of punitive force for “obstinate defense” during sieges (III.143).
you might as well be killed while fighting—a legal procedure is made available to commanders through which, upon assessment of the tactical value of further resistance, agreements on capitulation could be reached. This avoided the complete destruction of besieged cities and the unnecessary waste of military resources (assuming, that is, that officers could adequately assess their chances of success and agree accordingly).

“Enlightened” norms on capitulation could certainly have humanitarian effects, but these were not their driving purpose. Had they weighed more substantively, a more demanding duty to evacuate noncombatants from besieged towns could be sustained, essentially for the same reasons that POW immunities could be sustained. As long as all belligerents could expect to have towns under siege, if they had a strong interest in sparing terrible suffering to their noncombatant subjects, the incentives would be there to sustain a general norm against “starvation as a method of warfare” (now proscribed in IHL, see Henckaerts and Doswald-Beck 2007, 186-189). Why this norm was codified only as late as Additional Protocol I (1977) is an interesting historical question; clearly the imperative to avoid harm to noncombatants was relatively weak before the human rights era, at any rate weaker than protecting the lives of well-trained and expensive soldiers.

A similar economy of violence underlies the regulation of requisitions of civilian property. In this case the relevant historical background is the long-standing principle, go-

25 The logic applies to all forms of surrender. As Selesky notes, during the American Independence War, “the fact that every American soldier could legally be hanged as a traitor to his king surely induced some Americans to fight harder and longer (Selesky 1994, 76). The flip side of the siege procedure is that commanders could have an easy way out and thus be tempted to surrender easily. This was tackled through the national regulation of treason (Lesaffer 2007, 188-190).

26 A similar illustration is the indiscriminate bombing of towns. Vattel claimed that, “at present we generally content ourselves with battering the ramparts and defenses of a place,” but went on to argue that bombing the town itself could be permissible if necessary or as an extreme form of reprisal (III.169, 572).
ing back to Roman law and practice, that all enemy property could be freely captured. Grotius registered this principle in his discussion of solemn warfare when he held that nations “have decided that the property of enemies should stand to enemies in the same relation as ownerless property” (III.vi.8). Vattel and Martens did not reject this broad nullification principle (Vattel III.161, III.173; Martens 1801, 412-3), but Vattel argued for limitations. Instead of pillaging indiscriminately, each belligerent should negotiate “contribution treaties” in enemy territory, which should stipulate sustainable amounts to be paid in exchange for security and restraint. By so doing, the belligerent “obtains a part of what is due to him; and the enemy’s subjects, by consenting to pay the sum demanded, have their property secured from pillage, and the country is preserved” (III.165, 569). Entering into such contribution treaties was not strictly legally mandatory, but it was sensible policy and had valuable effects.

In so arguing, Vattel echoed the evolving practice of requesting contributions in more or less centralized and disciplined fashion, instead of pillaging at each commander’s discretion. 27 He deemed the practice of Louis XIV a “very commendable” instance of “humanity and moderation,” as the king’s very competent administrators brought the exploitation of enemy and neutral villagers to unprecedented levels of efficiency. However, it was not out of the king’s heart that a system of sustainable contributions was set up; rather, it was indispensable to secure a constant source of revenue, foodstuff, and forage to sustain his prolonged wars. As John Lynn remarks, “for contributions to produce money reliably

27 The practice seems to have emerged during the Dutch Revolt (Parker 2004, 120-123, Piceu 2014) but during the Thirty Years’ War it became systematic, indeed the main source of revenue (Redlich 1959). Louis XIV and his ministers took the practice to unprecedented levels of rationalization (Lynn 1993).
over time, they had to function like a well-evolved parasite and draw sustenance from the host, not kill it” (Lynn 1993, 297). The system nonetheless could have the humanitarian side effect that peasants and villagers were better off than they would have been had free-booting been allowed as before.

The logic of reciprocity has again some force in this context. To the extent that all sides in war could suffer from excessive spoliation, they all had an interest in agreeing on limitations. During the Dutch War (1672–78), demands of contribution escalated to such levels that France and Spain tried to negotiate a treaty to cap contributions and divide the disputed territory for extraction—neither could continue fighting at the pace of the other’s pillaging. Their treaty unraveled, but it may have set a precedent for future practice (Lynn 1993, 300-301, for more resilient agreements during the Dutch Revolt, see Piceu 2014, 174-177). Aside from such strategic agreements, the interest of belligerents to sustain their campaigns, and of peasants and villagers to minimize the harm they could suffer, sustained a series of traités by which contributions were exchanged for protection (Lynn 1993, 297-298). Compared to the freebooting baseline, centralized contributions were a Pareto superior state of affairs for both villagers and belligerent forces.

However, for all its relative moderation, the practice of mandatory contributions was nonetheless brutal. Villages that failed to contribute were usually burned to the ground; security from pillage by own or enemy forces was rarely effectively guaranteed; and money and goods were ultimately handed over to foreign and hostile powers under the

---

28 In addition to allowing for the creation of a system of centralized war taxation in foreign land, the centralization and rationalization of pillaging were also motivated by the need to keep discipline within the ranks and to avoid desertions. Soldiers could simply leave the army after a good “harvest,” or could take advantage of being let loose to pillage in order to escape (Contamine 2000, 181-2, Robson 1966, 168-9).
threat of force—it was quite simply robbery, if under the more or less legitimating façade of the laws of war. What is there to celebrate in the relatively more limited practice of requisition?

Consider, by contrast, Rousseau’s views on private property during war. He held that private property should be completely immune to taking and destruction. During war belligerents could target and seize only public property; “a just prince may well seize everything in the enemy territory that belongs to the public, but he respects the person and the goods of private individuals; he respect rights on which his own are founded” (*Social Contract* I.iv.10). Rousseau was of course aware that private property was normally seized during war, but he deemed this practice a degeneration of war into “brigandage,” a degradation of enemies and warriors into tyrants and thieves ("The State of War," in Rousseau and Gourevitch 1997, 175). It was a necessary condition of legitimate warfare that belligerents stick strictly to the public character of their dispute and leave private property untouched.

Rousseau and Vattel represent two radically different ways of thinking normatively about war. In a sense, Rousseau is morally correct: if war is deemed a public matter, then private goods and lives should be off limits and, more fundamentally, innocent civilians should quite simply be spared the horrors of war. However, Rousseau’s approach has the serious defect that, to paraphrase Terry Nardin, it demands the unattainable and makes life according to rules impossible (Nardin 1983, 270). In the 18th century, states could not yet

---

29 Current IHL is of course far more protective of noncombatants. Pillaging and wanton destruction of private property are now considered international crimes. The only type of lawful booty is military equipment and public property that could be used for military purpose in international conflicts. The one aspect in which IHL retains elements from the old contributions regime is in the permissibility of “requisitions” or “contributions in kind and services” during belligerent occupation, which according to the Hague Regulations should be paid off by the occupier (Henckaerts and Doswald-Beck 2007, 173-185)
fully supply their forces without relying on contributions and requisitions, not to mention engage in strategic or collateral destruction of noncombatant goods and persons. Rousseau might have retorted that, if such is the only way to fight they should have abstained, but fight they did. Vattel, by contrast, exhibits what is distinctive of the juristic approach: not so much moral condemnation but rather articulating grounds and conditions for effective limiting regulations. This task is constrained by the need to build from actual practice and enlist power-holders consent. It must start from understanding and in a way accepting, rather than condemning, how things are. From that understanding, ways to implement further feasible limitations can be imagined and defended. The task, as Koskenniemi famously argued, is structured around the two opposite poles of apology and utopia (Koskenniemi 2005). Vattel sought to persuade rulers of the value of a rational economy of violence, while at the same time pushing a normative agenda of further limitation and self-restraint. More limitation is no doubt better than less, but violence in war, even if lawful, is always nonetheless morally appalling.

3. Irregular force and the shadow of unlimited violence

I have argued that political prudence and the forms of rational calculation that belong properly to enlightened statecraft underlie the principles and constraints of regular war. Regular *jus in bello* has as its core principle the proscription of superfluous violence, and as distinctive virtues prudence and self-control. While the rational economy of violence is largely a matter of self-interest and instrumental reason, it could and did have indirect humanitarian effects—less goods destroyed, less harmless human beings hurt or killed.
In this final section I want to focus on the flip and indeed dark side of limitation. As Nathaniel Berman has argued, the laws of war not only aim to limit violence but also, and for Berman mainly, to construct and channel violence “into certain forms of activity engaged in by certain kinds of people, while excluding other forms engaged in by other people” (Berman 2004, 5). These limiting and channeling functions can be detected in regular war doctrine. In the laws of regular war, channeling has logical priority over limiting, for regular war limitations were thought to apply only to certain actors in certain contexts. Different types and levels of violence were permissible depending on the type of actors involved. For certain “channels,” as we shall presently see, nearly every limiting principle was abandoned.

Regular war doctrine at its most limiting is to be found in the encounters between regular troops and militia. A nation’s regular forces must conduct orderly requisitions among peasants and town-dwellers; sieges should allow for negotiated capitulations; regular soldiers should enjoy POW immunities, and so on. However, irregular agents of violence could permissibly be treated as criminals and summarily killed—no quarter is owed to them, no POW privileges. As Vattel wrote in the passage quoted above, “if the peasants of themselves commit any hostilities,” then “the enemy shews them no mercy, but hangs them up as he would so many robbers or banditti (III.226, 613).

This danger of internal degradation is different from a danger famously voiced by Montesequieu, Rousseau, and Kant. They feared that the growing power of regular troops would cause the whole enterprise of limited war to collapse under its own weight. Montesquieu deemed the spread and growth of regular troops in Europe a “contagious disease”
that would eventually lead to the “common ruin” of Europe (Montesquieu et al. 1989 [1748], XIII.17, pp 224-5). Instead of embodying a form of limited conflict, regular troops were growing threats that forced all states to follow suit and invest heavily on regular armies; eventually, war-related investments would erode all productive social activities. Most alarmingly for Rousseau, regular troops were “the plague and depopulators of Europe,” “good for only two purposes, to attack and conquer neighbors, or to shackle and enslave citizens.” His advise to the Polish was to set up citizen militia following the Swiss model, instead of investing on a regular army that would attempt to fight their surrounding great powers ("Considerations on the Government of Poland" in Rousseau and Gourevitch 1997, 232-239). Their common underlying worry was that the power unleashed by well-trained and disciplined regular troops, and the strategic dynamic of arms races and security dilemmas, would cause military life to spread uncontrollably into society and eat away economic production and trade.\footnote{Perhaps surprisingly, Vattel echoed Rousseau’s worry and suggested that a republican citizen militia, like the Swiss, was a model to follow (III.50). Martens, by contrast, held that citizen militia could permissible be treated more harshly than standing troops, e.g. denied POW privileges, as this was the only way to limit war to a contest between regular forces (Martens 1801, 271).}

The internal collapse alluded to in Vattel’s quote above does not seem to have generated comparable concern at the time. It is nonetheless very serious and belongs structurally to the enterprise of limited warfare. More or less spontaneous peasant violence would be unlawful unless expressly authorized by the sovereign ruler, and if unlawful it could merit punishment. However, in Vattel and Martens it is not so much the unlawfulness of force as its spontaneity that seems to call for exemplary and potentially unlimited counter-force, for even \textit{authorized} irregular force could be answered ruthlessly. The point of coun-
terforce is not necessarily punitive but rather to preserve regular forms and limitations. Somewhat paradoxically, the enforcement of limitations on violence could lead to unlimited violence.

It may appear odd that regular war theorists did not require that regular troops or regular militia be the only lawful agents of violence. The jurists were pragmatic enough to realize that such over-demanding requirement would diverge too widely from actual practices of violence, but they still did not treat regular and irregular forces on a par (Schmitt 2007 [1963], 11-12). According to Vattel, privateers, resisters to occupation, partisans, and civil warriors could all lawfully use force (III.224-229; III.292). However, even though lawful, such irregular forms of violence could be counteracted by “very severe treatment from the enemy”—treatment that went beyond what was lawful vis-à-vis regular forces. For instance, organized resistance to foreign occupation was legally permissible, but it gave the occupier a liberty right to “call in the aid of terror to a certain degree” (Vattel III.228, 614). Since both resistance to occupation and terror to suppress it were lawful, violence during occupation could escalate without breaching any law in the process; the laws of regular war are not equipped to effectively regulate that violence (on the complexities of occupation, particularly in the 19th century, see Nabulsi 1999, 19-65).31

Limitations were also undermined when regular forces brought irregulars into their wars. Officers in regular armies often relied on them for strategic reasons—they were

31 Vattel foreshadows some of the acute problems dealt at the great diplomatic conferences of the 19th century, which Nabulsi discusses. She charges Vattel with overdrawing the separation between military conflict and civilian life and overestimating the subservience of noncombatants to occupying troops (Nabulsi 1999, 37), but this is neither accurate nor fair. It is true that Vattel did not focus at length on the distinct legal problems of preserving order during occupations, but he was well aware of the existence and troubling legal implications of irregular forces, and in fact thought they should be deemed authorized by sovereign rulers during occupations.
highly mobile, cheap to maintain, sometimes exceptionally courageous, and willing to do dirty work. During the Seven Years War, France and Britain recruited—or rather brought as allies—Amerindian tribes to fight in North America. France would have fared much worse without its Amerindian allies, but irregular warriors were barely under effective French command, rarely played by the rules of regular warfare, and were not covered by its protections (Steele 1990, Ward 2012).32 The Russians likewise brought Cossack, Tartar, and Kalmyk fighters to the Seven Years’ War. They were deployed against other irregular forces—Poles, Turks, Tartars—but also against European regular forces and noncombatants. The Russian strategy of sending irregular forces to prey upon Prussian farmers and townspeople for their resistance and refusal to supply their forces ultimately backfired, but it succeeded in undermining regular limitations in Eastern Prussia (Füssel 2012, 251-257).33 Even though regular officers brought in the irregular forces, regular limitations were impossible to enforce, and no legal protections covered the main agents of violence.

The most extensive breakdown of limitations came when dealing with agents deemed “savage” or “barbarian.” Having made a point of minimizing the use of punitive

---

32 Amerindian warriors traditionally ate some of their regular POWs. The infamous massacre of Fort William Henry in 1757 occurred because the Amerindians were unwilling to comply with the regular procedures—indeed the pomp and ceremony—of siege capitulations. The French commander of the besieging force was well aware of the risk of involving Amerindian warriors. In his first offer of capitulation to the British he stated: “I have it yet in my power to restrain the savages, and oblige them to observe a capitulation, as hitherto none of them has been killed, which will not be in my power in other circumstances.” It was however unclear that he did have such restraining power, as the tragic turn of events showed all too well (Steele 1990, 99, 84-90, 110-123). The mythology of Amerindian savagery that sprang from this event would be used as justification of much ruthless violence against Amerindian tribes in the 19th century.

33 The Prussian Field-Marshall took the trouble of advising his Russian counterpart that permitting such wanton destruction would be ultimately self-defeating and only cause a degradation of the war. Whether or not Russian regular officers could have controlled the irregulars is an open question, but arguably Lehwald’s assessment was correct—irregulars ended up being more a strategic liability than an asset (Füssel 2012).
language in war, Vattel made an exception in the case of savages and barbarians, who could be permissibly denied quarter and indiscriminately bombed as form of vicarious punishment.

When we are at war with a savage nation, who observe no rules, and never give quarter, we may punish them in the persons of any of their people whom we take (these belonging to the number of the guilty), and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity” (III.141, 544)

In this instance, there is an expectation that punishment would motivate the “savage nation” to eventually abide by the laws of war (III.167). But in other instances not even that hope appears tenable. Nobody could deny, argued Vattel, the right of Spain and Italy to “utterly destroy those maritime towns of Africa, those nests of pirates, that are continually molesting their commerce and ruining their subjects” (III.167, 570). The relevant contrast here may be between “nationhood” and mere “township.” For the latter, the point of violence was not punishment or reformation but extermination. African pirates, in contrast to Barbary pirates, were unredeemable. No distinction should or perhaps could be made between pirates and innocent town-dwellers in Africa.

34 Note, however, that for Vattel savage nations need not be non-European. For instance, he had high regard for Timur-Bec or Tamurlane (ca. 1336–1405), a Mongol warrior and founder of the Timurid dynasty in Central Asia, who “proved himself to be possessed of all that moderation and politeness which is thought peculiar to our modern warriors” (III.158, 565n; cf. III.34, I.39n). Conversely, he sometimes described European nations as savage and barbarian. Arguably for Vattel savagery was not based on status but on performance: a nation is savage if it does not observe the laws of war (or if it fails to duly justify their breach). The presumption that a nation deemed savage would be incapable of reciprocity and abiding by the laws of war seems to be a 19th-century phenomenon, as are the worst forms of violence and mistreatment in the name of civilization (Lindqvist 1997, Mégret 2006).

35 To hold that an agent deserves punishment presupposes a minimal recognition of her moral agency. Vattel contemplated punishment for breaches of jus in bello against both Europeans and
References


Keen, Maurice. 1965. The laws of war in the late Middle Ages. London; Toronto: Routledge & Kegan Paul.


---


Remec, Peter Pavel. 1960. The position of the individual in international law according to Grotius and Vattel. The Hague: M. Nijhoff.


Waldron, Jeremy. 2009. " Civilians, Terrorism, and Deadly Serious Conventions " *NYU School of Law, Public Law Research Paper* no. 9 (9).


