The Dualism of ius ad bellum and ius in bello - Traditionally Rooted or Chimera?

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Abstract
One of the fundamental questions of Just War Theory is whether the rules applying to armed conflict, ius in bello, can be separated entirely from the question of a just cause to go to war, ius ad bellum. It has been largely argued that Vattel's treatise on the law of nations was among the first to introduce a separation of those two regimes, thus giving way to the evolution of a set of rules governing any conflict regardless of its cause as witnessed especially in the late 19th and 20th century. This paper argues that Vattel does in fact develop his argument on the basis of traditional Just War Theory and explores the interrelation of just causes to war and the formal rules that govern inter-state conflict as presented by Vattel. The paper shows that Vattel's distinction between the formal rules of warfare and the law of just war is far from being absolute and argues that very similar lines of reasoning continue to inform today's debate on the interrelation of these two legal regimes. While a strict separation of ius in bello and ius ad bellum is desirable from both a doctrinal and a pragmatic standpoint, the early example of Vattel and its striking resemblance to recent debate show the intrinsic difficulties of putting this dualism into practice.

Introduction: Misconceptions in reading Emer de Vattel's Droit des Gens and today's debate on ius ad bellum and ius in bello

Emer de Vattel's treatise on international law, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains¹, is often considered to mark a paradigm shift regarding the laws of war from traditional just war theory to a positivist approach, introducing a strict separation of the just cause to war (ius ad bellum) and the regime regulating warfare (ius in bello).² While Vattel's contribution to the theoretical development of international

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law has been an issue of much discussion, it cannot be disputed that his work had great practical influence and was amongst the most popular references for leaders in the Western world throughout the 19th century. Carl Schmitt's well-known interpretation of Vattel as an exemplary codifier of what we refer to today as classical international law based on the principles of sovereign equality and non-intervention has been largely reiterated by various authors in the second half of this century. However, this interpretation has also been called into question, with several authors highlighting the importance of natural law in Vattel's conception. This paper argues that Vattel's theory, including his theory of war, is rooted in traditional just war theory. His analysis of just causes to go to war is more than mere “empty phraseology” and has some very concrete consequences. At the same time, Vattel was arguably the first to explicitly detach the concept of a just enemy, justus hostis, from the actual existence of just causes to go to war in the bilateral relationship between two warring states. The paper will examine the “traditional” interpretation of Vattel and connect it to a detailed reading of Vattel's treatise on international law. It deduces that the pivotal point is the declaration of war, which has a double function as condition of a just war and to trigger the qualification of a conflict as a guerre en forme. It is only for guerres en forme that Vattel introduces a separation of ius ad bellum and ius in bello, and whether or not a conflict can be qualified as guerre en forme is governed by ius ad bellum considerations. It is here that Vattel resorts to traditional just war theory, albeit introducing an interesting twist.

Subsequently, I will highlight some parts of recent debates where the dualism of ius ad bellum and ius in bello has been blurred. I will show that ad bellum argumentation is mainly used to justify the application of a specific in bello regime. Post 9/11, the Bush administration entered into what was


4 Nussbaum, A concise history of the law of nations, supra n. 3, at pp. 161/162 shows that Vattel was popular not only in Europe, but especially in the USA. On Vattel's influence on political leadership of his time see also Johannes Manz, Emer de Vattel – Versuch einer Würdigung unter besonderer Berücksichtigung seiner Auffassung von der individuellen Freiheit und der souveränen Gleichheit, Schultlthess Polygraphischer Verlag, Zürich (1971), pp. 168 et seq.

5 See presentation of Koselleck's and Remec's positions infra, at p. 5.


7 Nussbaum, Just War – a legal concept?, supra n. 2, p. 471.
labelled as a “global war on terror”. In legal scholarship, a controversy broke out debating whether this new type of violence required a reconsideration of the paradigm to separate the *ius ad bellum* from *ius in bello*. It seems that the Obama administration no longer holds that there exists a “global war on terror”, but rather that the US is in a state of armed conflict with Al-Qaeda, the Taliban and associated forces. I argue that disputed *in bello* policies such as targeted killings or detention measures are mainly justified by introducing an *ad bellum* component to the discussion, and that this problem has not changed with the new administration. While a strict dualism of *ius ad bellum* and *ius in bello* would need to consider both questions independently of each other, I submit that recent debate does not consistently do so, suffering from an *ad bellum* component that, in Vattel's theory, constitutes a legal principle.

*Emer de Vattel revisited – an examination of the theory of war in Le Droit des Gens and its traditional reception*

In his main work on the law of nations, *The nomos of the earth*, Carl Schmitt proposes that the Age of Enlightenment has achieved to put the phenomenon of war under a certain amount of control by separating the problem of just war from the problem of *justa causa* and regulating it through formal, legal criteria. Schmitt argues that determining the means that are allowed in a war, through whether or not the war is just, will eventually lead to total war. Against this, he holds that the separation of the laws of *justa causa* and the laws regulating warfare meant that two states could regard each other as *justus hostes* without needing to resort to the laws of *justa causa*. Vattel, Schmitt proposes, is the last in a string of authors who detached the laws regulating the conduct of war from its just cause. According to Schmitt, Vattel's statements on just causes to go to war are void of any substantial meaning. Schmitt does not go into more detail as regards Vattel's text. This

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10 Schmitt, supra n 2, p. 113.
11 Ibid., p. 138
12 Ibid.: “Vattel behält, wie alle Autoren seines Jahrhunderts, einige Gemeinplätze vom gerechten Krieg im Sinne der *justa causa* bei. Das ist aber im 18. Jahrhundert ein leerer Topos, ein echter Gemeinplatz.” According to Nussbaum, *Just War – A Legal Concept?*, supra n. 3, at p. 471, Vattel is a prime example of “the degeneration of the inherited doctrine. (...) Such degeneration was bound to come as soon as the religious basis of the just-law doctrine was abandoned.”
is understandable in view of Schmitt's aim in *The nomos of the earth*, which is a historical analysis of changing *nomoi* rather than an in-depth analysis of the various scholars he cites. However, in the case of Vattel, I believe that this omission leads to a misconstruction of his theory of war, especially regarding the interplay of *ius ad bellum* and *ius in bello*, as shown below.

Vattel devotes the third book (out of four) to the rules of war. A war according to Vattel is any situation in which a sovereign nation pursues its right by force. However, only public wars, i.e. wars between sovereign nations, are subject to regulation by international law. A war, Vattel writes, must only be undertaken if a nation has the right to wage a war, a *raison justificative*. Such a justificatory reason, or *juste Cause de la Guerre*, is constituted by an infringement of a perfect right. A nation is entitled to undertake a war of aggression to claim something that is owed to it or to ensure its safety by punishing the other nation if the injury it has suffered is irreparable; it is entitled to undertake a defensive war in order to fend off unjust violence. Both defensive wars as well as wars of aggression are thus only based on a just cause if the war is used as a last resort. In other words, the requirement of necessity is part of the just cause to go to war.

This presentation of just causes to go to war suggests that Vattel bases his doctrine of war law on just war theory. However, Vattel goes on: “la Guerre en forme, quant à ses effets, doit être regardée comme juste de part et d'autre”, and: “tout ce qui est permis à l'un, en vertu de l'état de Guerre, est aussi permis à l'autre”. While at first glance, this seems to contradict Vattel's statement that war cannot be just on both sides, it is explained by the fact that Vattel classifies the right to go to war, or *justa causa*, as natural law (labelled “Droit des Gens Nécessaire” or “interne”) whilst the effects

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15 Vattel, DG, III, §§ 25-28. In § 26, Vattel writes: „Le droit d'user de force, ou de faire la Guerre n'appartient aux Nations que pour leur défense et pour le maintien de leurs droits...le fondement, ou la Cause de toute Guerre juste est l'injure, ou déjà faite, ou dont on se voit menacé.” This last statement indicates that Vattel also makes room for the concept of preventive wars.
16 For wars of aggression, see Vattel, DG, III, § 37: „S'il est donc question d'une chose évidemment juste...et si on ne peut obtenir justice autrement que par la force des armes; la Guerre offensive est permise.“ For defensive wars, there is no requirement of necessity, as it is only permitted to repel force. See § 35: „La Guerre défensive est juste, quand elle se fait contre un injuste agresseur.” There will evidently be no other way to repel armed force than through using armed force in return.
17 Vattel, DG, III, § 190.
19 Vattel, DG, III, § 39: “La Guerre ne peut être juste des deux côtés”. However, the following paragraph already indicates Vattel's unease regarding cases of doubt: “puis donc que les Nations sont égales et indépendantes et ne peuvent s'ériger en juges les unes des autres; il s'ensuit que dans une Cause susceptible de doute, les armes des deux parties qui se font la Guerre doivent passer également pour légitimes, au moins quant aux effets extérieurs”.

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of a Guerre en forme pertain to voluntary international law (or “Droit des Gens Volontaire”). The distinction between Droit des Gens Nécessaire and Droit des Gens Volontaire is introduced in the Préliminaires of the treatise and plays a fundamental role in Vattel's conception of law. Droit des Gens Nécessaire is natural law as applied to the Nations which is binding upon each Nation's conscience; it is absolute and immovable.21 Droit des Gens Volontaire is the law that follows from the principles of equal sovereignty of all states and the peaceful coexistence of states in a société des nations.22 This société des nations is rooted in the basic and underlying principle that all nations are to be considered as free and on equal footing, and it is thus that Vattel explains that

“Il est donc nécessaire, en beaucoup d'occasions, que les Nations souffrent certaines choses, bien qu'injustes et condamnables en elles-mêmes, parce qu'elles ne pourraient s'y opposer par la force, sans violer la liberté de quel qu'une et sans détruire les fondements de leur Société naturelle”23

Droit des Gens Volontaire is the body of rules necessary to ensure the peaceful coexistence of sovereign states in a société des nations, rooted in a presumed consensus of all states.24 Vattel explicitly categorizes the Droit des Gens Volontaire as part of positive law and emphasizes that it is this body of rules which will determine the extent of rights that one nation has towards another.25

It is this distinction that Reinhart Koselleck, following Schmitt's interpretation of Vattel, has emphasized in his analysis.26 He argues that the jus publicum europaeum which evolved over the 18th century was based on a strict separation between the morally unchallengeable internal forum of a state and their external, political interaction from which any moral considerations were to be strictly excluded. While states are always bound internally and in their conscience by the Droit des Gens Nécessaire, it has no place in the regulation of external affairs. In Koselleck's interpretation, Vattel subordinates moral conscience to politics mainly due to pragmatic considerations: While

20 Vattel, DG, III, § 188: “Celui-là seul est en droit de faire la guerre...à qui la Justice et la nécessité ont mis les armes à la main. Telle est la décision du Droit des Gens Nécessaire” (italics in the original).
22 This term appears in the headline of DG, Préliminaires, § 17. A more accurate label is the one Vattel introduces in Préliminaires, § 16: a State, as a legal entity, “est donc obligée de vivre avec les autres Sociétés [of individuals], ou Etats, comme un homme était obligé avant ces Etablissements, de vivre avec les autres hommes, c'est-à-dire suivant les Loix de la Société naturelle établie dans le Genre humain” (highlight not in original).
23 Vattel, DG, Préliminaires, § 21. While the term “société naturelle” might indicate a reference to Hobbes' state of nature, Vattel explicitly dissociates himself from Hobbes' conception of international law, stating that a mere adaptation of the principles of natural law to states as their subjects would not suffice. It is precisely with the Droit des Gens Volontaire that this position becomes clear.
24 Vattel, DG, Préliminaires, § 21: “Et puis qu'elles sont obligées de cultiver cette Société, on présume de droit, que toutes les Nations ont consenti au Principe [the principle just quoted, n. 23] que nous venons d'établir.”
26 Koselleck, supra n. 2, pp. 32 et seq. Koselleck explicitly refers to Carl Schmitt in the preface and references him in the chapter on Vattel, p. 34.
morally speaking, only one side will be justified in the case of war, factually, both sides will claim that they are in the right. It is for this reason, says Koselleck, that Vattel strictly excludes the *Droit des Gens Nécessaire* from the domain of the *Droit des Gens Volontaire*, and that only the latter will have any effect in regulating inter-state conduct.\footnote{Ibid., p. 35.}

In a similar vein, Peter Paul Remec argues that Vattel's conception of the law of nature is one of only imperfect rights, rights that cannot be enforced and belong to the realm of simple morality. Perfect obligations or rights in Vattel's understanding, Remec asserts, can only be created through a contractual relationship through which one subject transfers to the other subject a right to expect certain behavior which originally only rested in its own faculty of judgment.\footnote{Remec, supra n. 2, p. 138.} In Remec's understanding, only those rights can create binding obligations on other states. Because they have an externally binding effect, they must pertain to the *Droit des Gens Volontaire*\footnote{Ibid., pp. 144/145.}, which, as part of positive law, supersedes the *Droit des Gens Nécessaire*.\footnote{Ibid., pp. 239, 241/242.}

**Droit des Gens Nécessaire and Droit des Gens Volontaire – two distinct regimes or codependent?**

The above positions share an understanding that Vattel's conception implies a complete separation of the *Droit des Gens Nécessaire* from the complex of rules pertaining to the *Droit des Gens Volontaire*. However, such an interpretation is not necessarily evident, especially if considering Vattel's explicit references to Christian Wolff, who was his teacher and in whose immediate context Vattel must be situated.\footnote{In the preface to the DG, at pp. xiv et seq., Vattel explicitly refers to Wolff's main work on international law, *Ius gentium metodo scientifica pertractatum* (1749). Originally, Vattel intended to make Wolff's work more accessible to the greater public by translating it into French and detaching it from Wolff's sophisticated methodological approach, p. xv.} It has been pointed out that Wolff's doctrine implies that certain perfect rights, including the rights to equality, liberty and security, are conferred upon individuals by nature itself.\footnote{Gabriella Silvestrini, supra n. 6, at pp. 50 et seq.} While Vattel distances himself explicitly from Wolff's idea of a presumed *civitas maxima*,

\footnote{Emanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, Editions A. Pedonne, Paris (1998), equally considers perfect rights to be part of the *Droit des gens volontaire*, p. 153, but submits that the idea of a presumed will of nations is proof of a natural foundation ("fondement naturel") of this type of rules, disguised by the term “voluntary”, p. 155.}
he does not do so regarding the distinction between perfect rights and imperfect rights.\textsuperscript{33} This, in turn, implies that the principle of sovereign equality, from which the \textit{Droit des Gens Volontaire} stems, is in itself a natural perfect right.\textsuperscript{34} The \textit{Droit des Gens Volontaire}, if this reading of Vattel is correct, does not stand independently from the \textit{Droit des Gens Nécessaire}, but only modifies it insofar as is necessary in order to secure a peaceful coexistence of sovereign states.

This interpretation is supported by Vattel's own statements on the relationship between \textit{Droit des Gens Nécessaire} and \textit{Droit des Gens Volontaire}:

\begin{quote}
"Le Droit des Gens Nécessaire et le Droit des Gens Volontaire sont donc établis l'un et l'autre par la Nature; mais chacun à sa manière: Le premier, comme une Loi sacrée, que les Nations et les Souverains doivent respecter et suivre dans toutes leurs actions; le second, comme une règle, que le bien et le salut commun les obligent d'admettre, dans les affaires qu'ils ont ensemble. Le Droit Nécessaire procède immédiatement de la Nature; cette Mère commune des hommes recommande l'observation du Droit des Gens Volontaire, en considération de l'état où les Nations se trouvent les unes avec les autres, et pour le bien de leurs affaires."
\end{quote}

The \textit{Droit des Gens Volontaire} hence modifies the rules pertaining to the \textit{Droit des Gens Nécessaire} where and only where such a modification is required in the interest of maintaining the peaceful coexistence of states and safeguarding the sovereign equality of all states. The \textit{Droit des Gens Volontaire} strikes a balance between the obligations a state has towards itself, as a result of the \textit{Droit des Gens Nécessaire}, and the fundamental obligation to contribute to the welfare of the \textit{société des nations}.\textsuperscript{36} As such, it is an expression of the principle of sovereign equality. If this interpretation of Vattel's theory is correct, it brings about two consequences vis-à-vis the positivist interpretations outlined above: Firstly, the distinction between \textit{Droit des Gens Nécessaire} and \textit{Droit des Gens Volontaire} does not correspond to the distinction between perfect and imperfect rights.\textsuperscript{37} Secondly, and more importantly, the \textit{Droit des Gens Volontaire} does not supersede the \textit{Droit des Gens Nécessaire} as an independent body of rules. It rather amends the \textit{Droit des Gens Nécessaire} as far as is necessary in order to secure a peaceful coexistence of states. If a rule of the \textit{Droit des Gens

\textsuperscript{33} Vattel's criticism of Wolff's \textit{civitas maxima} can be found at p. xvi of the Préface: “Dès le commencement de mon Ouvrage, on trouvera que je différe entièrement de M. Wolff dans la manière d'établir les fondements de cette espèce de Droit des Gens, que nous appellons Volontaire. M. Wolff le déduit de l'idée d'une espèce de grande République (\textit{Civitatis Maxime}) instituée par la Nature elle-même, et de laquelle toutes les Nations du Monde sont les Membres. Suivant lui, le Droit des Gens Volontaire sera comme le Droit Civil de cette grande République. Cette idée ne me satisfait point...Je ne reconnais point d'autre Société naturelle entre les Nations, que celle-là même que la Nature a établie entre tous les hommes.”

\textsuperscript{34} See also Silvestrini, \textit{supra} n. 6, p. 55 and p. 57.

\textsuperscript{35} Vattel, \textit{DG}, \textit{Préface}, p. xxi. Italics in the original; highlighting added.

\textsuperscript{36} I have already cited § 21 of the \textit{Préface}, where Vattel explains the main function of the \textit{Droit des Gens Volontaire} to preserve the \textit{société des nations}. In this same paragraph, he also mentions that every state has an obligation to cultivate this society.

\textsuperscript{37} This conclusion is also put forward by Silvestrini, \textit{supra} n. 6, p. 53.
Volontaire is detrimental to the well being of the société des nations, if on the whole the modification does not serve its original aim, it is the Droit des Gens Nécessaire that will determine the legal assessment of a specific situation.\(^{38}\) I submit that such a reading is not inconsistent with Vattel's statements regarding the law of war.

Recalling that Vattel argues that the Droit des Gens Volontaire modifies the rules of just causes to go to war insofar as the war needs to be regarded as “just” on both sides, granting each side the same rights and duties with respect to the conduct of war,\(^{39}\) the meaning of the interplay between Droit des Gens Nécessaire and Droit des Gens Volontaire becomes visible: While only one side will be entitled to a genuine right to war, a juste cause to go to war, guaranteeing the coexistence of states in the société des nations requires that states be entitled to the same means of warfare. This modification, and Vattel explicitly states this, is necessary for the sake of the société des nations. If both states claim to have a just cause to go to war, and accordingly deprive their enemy of all rights, this will lead to a perpetuation of violence, argues Vattel.\(^{40}\) It is an essentially humanitarian interest that motivates Vattel to introduce this modification of the just war law with regard to its effects. However, and this is important to note, the Droit des Gens Nécessaire is only modified when the conflict in question is a guerre en forme.\(^{41}\)

**The notion of “guerre en forme” and distinction from mere brigandage**

The notion of guerre en forme is closely connected to the declaration of war. In Vattel's conception, the declaration of war has a double function: Firstly, it is a condition to wage a just war; and secondly, it is also a condition for qualifying a war as guerre en forme. The first function of a declaration of war as a condition to wage a just war results from the requirement of necessity. War, as seen above, must always be the last resort when invoking the injury of a right and claiming reparation or, in case of irreparable infringements, a right to punishment.\(^{42}\) The declaration of war does not only give the other nation an adequate amount of time to prepare, but also presents a last

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38 Reibstein, *supra* n. 6, p. 620; and Manz, *supra* n. 4, p. 76. Both conclude that the dependence of any rule of Droit des Gens Volontaire on the aim of safeguarding the sovereign equality and peaceful coexistence of states must lead to its suspension wherever this aim is not met.

39 Vattel, DG, III, §§ 188, 190, 191 and *supra* p. 4.

40 Vattel, DG, III, § 188. “Chacun [of the parties to a conflict] tirant la justice de son côté, s'attribuera tous les Droits de la Guerre, et prétendra que son Ennemi n'en a aucun...La décision du Droit, de la Controverse, n'en sera pas plus avancée, et la querelle en deviendra plus cruelle, plus funeste dans ses effets, plus difficile à terminer.”

41 Vattel, DG, III, § 190 and § 68. In § 68, Vattel states that none of the laws of war apply to an incident of simple banditry, “brigandage”.

opportunity to resolve a war peacefully.\textsuperscript{43} It is therefore a necessary precondition for waging a just war.\textsuperscript{44}

At the same time, observing the formalities attached to declare a war will lead to a qualification of that war as \textit{guerre légitime et dans les formes}. This term is introduced with reference to Grotius and his notion of \textit{justum bellum}. It is this \textit{guerre en forme} to which the rules pertaining to the conduct of hostilities apply. If the enemy observes all rules of a \textit{guerre en forme}, he needs to be considered as on equal footing, as a \textit{justus hostis}, regardless of whether or not an infringement of rights has actually taken place; it is then at least presumed that the other side is acting in good faith.\textsuperscript{45} Such a presumption of good faith can be made only because the declaration of war has the double function introduced above.

The counterpart to the \textit{guerre en forme} is the \textit{guerre informe}, or \textit{illégitime}. In fact, in Vattel's understanding, those are wars fought without legitimate authority or without apparent subject, to simply pillage and without formalities.\textsuperscript{46} Vattel cites an illuminating example: The \textit{Escalades de Genève}. In this incident, the people of Geneva repelled an attack by Charles Emmanuel II, Duke of Savoy, who tried to infiltrate and occupy Geneva with the exclusive aim of conquering the city. Vattel states that the treatment the Savoyards received (the ones who had infiltrated Geneva were all hanged without process) was not unlawful, because the attack did not constitute a \textit{guerre en forme}.\textsuperscript{47} A simple brigandage, a \textit{guerre informe}, exists if the formalities of a declaration of war are not observed, and the attacker does not at least pretend to act on a just cause. Parallel to the distinction between \textit{guerre en forme} and \textit{guerre informe}, or brigandage, Vattel distinguishes between \textit{ennemi public} and \textit{ennemi privé}. A public enemy, \textit{justus hostis}, is an enemy, says Vattel, whose actions are

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\item \textsuperscript{43} Vattel, DG, III, §§ 51, 54.
\item \textsuperscript{44} Vattel makes one important exception from this principle, namely for defensive wars. If a state has already been attacked, he says, there is no need to declare war as the other nation has already used armed force. Vattel, DG, III, § 57.
\item \textsuperscript{45} Vattel, DG, III, § 190: “Si l’Ennemi observe toutes les règles de la Guerre en forme, nous ne sommes point reçus à nous plaindre de lui, comme d’un infracteur du Droit des Gens: Il a les mêmes prétentions que nous au bon Droit; et toute notre ressource est dans la Victoire, ou dans un Accommodement”
\item \textsuperscript{46} Vattel, DG, III, § 67: “Ces brigandages..se font, ou sans Autorité légitime, ou sans sujet apparent, comme sans formalités et seulement pour piller.”
\item \textsuperscript{47} Vattel, DG, III, § 68: “La Nation attaquée par des ennemis de cette sorte [of the sort of the Savoyards] n’est point obligée d’observer envers eux les règles prescrites dans les Guerres en forme; elles peut les traiter comme des brigands. La Ville de Genève échappée à la fameuse Escalade fit prendre les prisonniers qu’elle avait faits sur les Savoyards, comme des voleurs, qui étaient venus l’attaquer sans sujet et sans Déclaration de Guerre. Elle ne fut point blâmée d’une action, qui serait détestée dans une Guerre en forme.” Silvestrini, supra n. 6 at pp. 61/62, has demonstrated that by choosing this example, Vattel makes it clear that his distinction between \textit{guerre en forme} and \textit{guerre informe} is not based on the nature of the belligerents, but rather on the (pretended) motive one party brings forward.
\end{itemize}
based on claims against oneself, or who refuses a claim that is made against him.\(^{48}\)

In this sense, the declaration of war is part of the *justa causa* in itself\(^{49}\), as condition for a *guerre en forme*, a *justum bellum*. The requirement of a declaration of war constitutes a link between the *Droit des Gens Nécessaire* and the *Droit des Gens Volontaire*: While its nature as a precondition of waging a war at all locates it in the *Droit des Gens Nécessaire*, the effect of observing this requirement will result in the qualification as *guerre en forme*, which will in turn lead to a presumption of good faith for that side and bring about the modification of the rules of war to the extent that they apply to both sides.

It becomes clear that the distinction between *guerre en forme* and *guerre informe* is an indispensable precondition for determining the applicability of the *ius in bello*. This is a necessary modification of the *Droit des Gens Nécessaire* by the *Droit des Gens Volontaire*, made for the benefit of the *société des nations*. It is not independent from the *Droit des Gens Nécessaire*, but its necessary modification, and as such is rooted in nature itself. The *Droit des Gens Nécessaire* and *Droit des Gens Volontaire* are two mutually reinforcing bodies of norms; their interplay can also be characterized as a dialectical relationship.\(^{50}\) A consideration of the enemy as *justus hostis*, as an enemy on even footing, bearer of the same rights, is not necessary if the conflict in question is not a *guerre en forme*. It is the qualification of conflict which determines the applicability of a more humane, restricting *ius in bello*. This qualification is essentially dependent on the (pretended) motive of the nation engaging in war, which pertains to the realm of *Droit des Gens Nécessaire*. Therefore, Vattel's statements on *justa causa* are not, as is argued by the positivist interpretations, devoid of any real meaning, but rather a necessary precondition to understand in which types of conflict the *ius in bello* is applied and where a treatment of the enemy as simple brigands is justified.

In other, more contemporary terms, Vattel proposes this: The *in bello*-norms are dependent on the qualification of a certain conflict. This qualification is dependent on an *ad bellum*-criterion. While it does not matter whether a party to the conflict did in fact have a *ius ad bellum*, it does matter that it at least *pretended* to do so by adhering to the requirement of a declaration of war. However, the declaration of war goes beyond a mere formality. It shows that the nation “merits” the status of *justus hostis*, which stems from a presumption of good faith on both sides. Vattel's model is

\(^{48}\) Vattel, DG, III, § 69.

\(^{49}\) The *justa causa*, if this understanding is correct, is not only constituted by the infringement of a perfect right, but in addition by the requirement of necessity, to which the declaration of war belongs.

\(^{50}\) Reibstein, *supra* n. 6, at p. 615.
therefore far from a strict separation of *ius ad bellum* and *ius in bello* based on formal criteria, even though it was considered to introduce such a formalism. Rather, Vattel proposes a trigger model that is essentially dependent on state behavior. If a state claims to have *justa causa*, the *ius in bello* rules will apply. This conception, based on a mutual good faith presumption, tries to reconcile considerations of humanity and political reality, stemming from Vattel's practical experience as a diplomat, within a theoretical framework.

**Blurring the dualism of *ius ad bellum* and *ius in bello* in contemporary debate**

The dualism of *ius ad bellum* and *ius in bello* has experienced renewed discussions. While directly after the terrorist attacks on September 11, much discussion was focused on whether terrorists merited protection under international law or set themselves outside the realm of legal regulation, today, with the abandonment of the concept of a “global war on terror”\(^{51}\), the focus has rather shifted as to how the conflict between the United States and Al-Qaeda, the Taliban and other related actors can be qualified and which legal regime applies.\(^{52}\) I argue that the legal problem in today's discussion on the applicable legal regime is essentially one of qualification of conflict. While qualification of conflict and the question whether a certain type of conflict goes beyond the threshold of an armed conflict in the sense of international humanitarian law, thus triggering its application, is legally speaking independent from the question of legitimate use of force, recent debate has shown that both are often considered jointly where they should be separated. I believe that the separation of *ius ad bellum* and *ius in bello* is important to uphold if we do not want to go back to good faith assumptions, essentially leaving it up to one party to trigger the application of *ius in bello*. However, it is exactly the presence of such good faith assumptions, although not integrated into the legal regime, that explains the difficulty of rigidly applying the dualism of *ius ad bellum* and *ius in bello*.


\(^{52}\) See from recent literature for example Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflict*, 15 Journal of Conflict & Security Law (2010), pp. 245-274, Andreas Paulus and Mindia Vashakmadze, *Asymmetrical war and the notion of armed conflict – a tentative conceptualization*, 91 International Review of the Red Cross (2009), pp. 95-125, Mary O'Connell, *The Choice of Law Against Terrorism*, Journal of National Security Law & Policy (2010), pp. 343-368. This paper can only provide a cursory overview on recent debate; its main aim is to investigate whether Vattel's theory of war can inform this debate to some extent. While contemporary challenges to the applicability of international humanitarian law is not confined to terrorism only, but extends to other non-state actors as well, I believe that the issues debated regarding terrorism show best how and why *ius ad bellum* and *ius in bello* debates intertwine.
At the outset, I want to exclude one string of argumentation in recent debate that I believe suffers from a misconceptualization of international humanitarian law and general international law. In the past years, one question was whether terrorists such as Al-Qaeda “deserved” the protection of international humanitarian law, essentially arguing that because they had unjustly attacked, they should not benefit from a *ius in bello*. ⁵³

However, this question is misleading in today's international legal setting, due to an elaborate human rights system, which means that international humanitarian law is no longer “benefitting” the subjects to which it applies. While international humanitarian law was originally designed to minimize unnecessary harm during armed conflict ⁵⁴, an aim that still holds true today, contemporary international law offers the individual an even higher standard of protection through universal human rights. The International Court of Justice has stated that international humanitarian law as the law applicable to an armed conflict is *lex specialis* to general human rights law ⁵⁵, which would otherwise provide for a more rigid standard, especially in view of targeted killings and the right to life as provided for in Article 6 International Covenant on Civil and Political Rights. Therefore, the choice of law applicable to defense against terrorist attacks is not one between international humanitarian law standards or no legal protection at all, but rather between human rights law as the general international law and the less rigid standards of international humanitarian law as its *lex specialis* in times of armed conflict. ⁵⁶ This is an important difference in historical setting between Vattel's theory and any contemporary discussion on this matter. While in Vattel's theory, the rules pertaining to *guerre en forme* act as limitations to what is otherwise allowed to states and is not subject to scrutiny by other states, due to the principle of non-intervention which results from the sovereign equality of all states. ⁵⁷ the *ius in bello* today gives way to forms of state

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⁵³ For a discussion of this line of argument see Robert D. Sloane, “The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War”, in: Yale Journal of International Law 34 (2009), pp. 47-112, at pp. 70 et seq. Sloane introduces the “Aggressor-Defender Model”, which, he argues, has caused conflation of the dualism of *Jus ad Bellum* and *Jus in Bello*. He argues that “the postwar introduction of *jus ad bellum* begs the question why aggressors should continue to benefit from the *jus in bello*”.

⁵⁴ Henry Dunant's *A memory of Solferino*, a detailed account of the atrocities committed during the Battle of Solferino, which lead to the adoption of the first Geneva Convention in 1864, which became the starting point for the development of modern international humanitarian law, is well-known.


⁵⁶ See the study on this issue by David Kretzmer, *Rethinking Application of IHL in Non-International Armed Conflict*, in: Israel Law Review, Vol. 42 (2009), pp. 1-38. Paulus and Vashakmadze, *supra* n. 52, p. 122, also conclude that there is no “law-free zone or a legal blackhole”, and that reciprocity is not a criterion for the applicability of international humanitarian law.

⁵⁷ Vattel, DG, II, § 54: “C'est une conséquence manifeste de la Liberté et de l'indépendance des Nations, que toutes sont en droit de se gouverner comme elles le jugent à propos, et qu'aucune n'a le moindre droit de se mêler du Gouvernement d'une autre.”
action such as targeted killings that would, under the general international law regime, be qualified as extrajudicial killings and be unlawful. It might therefore be advantageous for a state to argue that it is in a state of armed conflict, whereas the opposite was certainly true in Vattel's time, as the example of the Geneva Escalade and the tragic end met by the Savoyard soldiers clearly shows. There is another consequence from this development: While in Vattel's model, it is in the interest of the aggressor to undertake all necessary measures to trigger the application of *ius in bello*, in today's world, where aggression is *per se* unlawful, it is the defender who has an interest in arguing for a less rigid standard.

The subsequent presentation will present aspects of the debate as to whether the rigid human rights law regime is applicable on actions undertaken against international terrorism, or whether targeted killings and detention fall under the less constraining standards of international humanitarian law. The focus will be on highlighting interrelations between *ius ad bellum* and *ius in bello* arguments, arguing that presenting such arguments alongside each other serve the purpose of justifying the application of the less constraining international humanitarian law regime.

In his much-noticed speech at the Annual Meeting of the American Society of International Law, Harold Koh, Legal Adviser to the U.S. State Department, said that “the United States is in a state of armed conflict with Al-Qaeda, as well as the Taliban and associated forces”, and therefore, the US was entitled to use force in accordance with its inherent right of self-defense. He then evoked the principles of distinction and proportionality to which the US would be bound in all use of force. While the wording Koh employs to explain the principle of proportionality suggests that he understands proportionality in the sense of international humanitarian law, the wording used to justify targeted killings - “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force” - sheds clouds on this. Here, it appears, Koh uses a double justification, namely that the use of targeted

58 Koh, supra n. 9, p. 14.
59 Koh uses the following definition: “proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated”, p. 15 (italics not in original). This wording is taken from Rule 14, see Jean-Marie Henckaerts/Louise Doswald-Beck (Eds.), *Customary International Humanitarian Law*, Vol II, CUP 2005, practice relating to Rule 14, pp. 297 et seq.
60 Koh, supra n. 9, p. 15. Highlighting added by the author.
killings is admissible both from a *ius ad bellum* as well as a *ius in bello* perspective.\(^{61}\) This is contrary to the traditional dichotomy of *ius ad bellum* and *ius in bello*. Legally speaking, *ius in bello*-rules are to be applied independently from any *ius ad bellum* considerations. To international humanitarian law, it does not matter whether or not an armed conflict was based on the rightful use of force or not. In other words, the legality of the conflict is completely separated from the question of whether or not a conflict exists that triggers the application of international humanitarian law. In that sense, one can say that international humanitarian law is neutral.\(^{62}\) However, the way in which Koh phrases his argument, it can be interpreted to say that because the use of force is allowed as a means of self-defense, it is also proportional. Such an argumentation questions the independence of a proportionality standard exclusive to international humanitarian law, but rather ties proportionality considerations to the question whether there exists a *ius ad bellum* or not.

Robert D. Sloane has shown in a comprehensive study how proportionality of *in bello* actions are often connected to *ad bellum* aims.\(^{63}\) The argument, in short, is this: Proportionality in international humanitarian law measures the damage caused by a single armed attack against the concrete and military advantage anticipated. While military advantage needs to be considered from the point of view of the party that has used force, we are more inclined to accept proportionality if we share that party's point of view that the overall aim of the military engagement is lawful.\(^{64}\) However, while morally understandable, it is “a mistake, as a matter of law, to understand *in bello* proportionality to require combatants to weigh *in bello* harms...against architectural *ad bellum* good”.\(^{65}\) While I believe Sloane's legal analysis to be correct, the difficulty of determining proportionality of an *in bello* action without any consideration of the *ad bellum* aim shows that we are willing to believe that a party pursuing a legitimate aim, or in other words, having a *ius ad bellum*, will be less prone to commit *in bello* violations.

A similar line of reasoning regards the applicability of international humanitarian law as *lex specialis* to a more constraining human rights standard. As a legal matter, the applicability of

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\(^{61}\) While it is clear that targeted killings are allowed under international humanitarian law under certain conditions, many questions regarding its concrete application, and especially the interplay of human rights law and international humanitarian law remain disputed. For a detailed account and possible solution see Marco Sassoli and Laura M. Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, 90 International Review of the Red Cross (2008), pp. 599 – 627.


\(^{63}\) Sloane, supra n. 53, pp. 72-76.


\(^{65}\) *Ibid.*
international humanitarian law does not depend on a lawful resort to force such as self-defense under Article 51 of the UN Charter. Rather, the existence of an armed conflict, either of an international or of a non-international nature, must be established as a necessary condition for international humanitarian law to apply. Any act of force can therefore potentially constitute a twofold violation of international law: First, with regard to *ius ad bellum* rules, because the use of force as such was illegal, and second, with regard to *ius in bello* rules, because the use of force did not comply with international humanitarian law and human rights standards. What Koh suggests is that a state acting in legitimate self-defense is not bound by human rights standards, but rather by international humanitarian law standards, implying that whenever self-defense can legally be exercised, the applicable standard is international humanitarian law. This, however, dissolves the dualism of *ius ad bellum* and *ius in bello*, tying the applicable *ius in bello* regime to a lawful resort to the use of force, and is not consistent with current international law. At the same time, an argument can be made that whenever the conditions of legitimate self-defense are fulfilled, the threshold of intensity of an armed conflict triggering the application of international humanitarian law is equally – albeit independently from the Article 51-threshold – met. Even if we don't subscribe to Koh's reasoning of a conditional relationship between legitimate self-defense and the triggering of international humanitarian law, we seem to be willing to accept that international humanitarian law applies and partially suspends more rigid human rights standards whenever the use of armed force was justified in the first place.

I submit that this type of argumentation in current debate, while morally rather than legally motivated, is not far from Vattel's legal model in which the aggressor state triggers the more advantageous *ius in bello* rules by invoking a *juste cause* (even if such cause is only pretended).

**Conclusion**

The cursory remarks on intertwined *ius ad bellum* and *ius in bello* arguments in ongoing legal

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66 It has been argued that international terrorism requires the development of a new type of “transnational armed conflict”. However, there is good reason to believe that current international humanitarian law can sufficiently deal with situations of armed violence as a result from international terrorism, and that each incident of violence needs to be examined in its specific context as to the question whether the threshold of armed conflict has been met. See e.g. Jelena Peijic, *The protective scope of Common Article 3: more than meets the eye*, 93 International Review of the Red Cross (2011), pp. 1-37, at pp. 7/8, and Kreß, *supra* n. 52, at pp. 255-258.

67 E.g. because there was no authorization of the use of force by the UN Security Council, or because the conditions of self-defense according to Article 51 UN Charter were not met.

68 Koh, *supra* n. 9, p. 15.

69 Kreß, *supra* n. 52, at pp. 258/259.
discourse show that we are expected to be more inclined to accept (and often are) that *ius in bello* standards have been kept if simultaneously presented with an argument as to why the resort to force, the *ius ad bellum*, was lawful as well. This is enhanced by the factual conversion of applicability of international humanitarian law standards and legitimate use of force, especially when use of force is exercised as legitimate self-defense. However, it does not reflect the current legal situation, where both regimes should be looked at independently, and questions of *ius in bello* legality of a specific act of armed force are not dependent on the legality of the resort to force.

Vattel elevated a similar line of reasoning to a legal rule. In his conception, *ius ad bellum* and *ius in bello* are not independent from one another. While Vattel could not conceive cases in which both parties objectively had just cause to go to war, he could conceive cases where both parties pretended to have a right to go to war, a *justa causa*, and should benefit from a good faith presumption that they indeed did. Invoking the legality of the resort to force was a legal condition to the applicability of *ius in bello* for Vattel; the motive to grant the other side the same rights to which, from a natural law perspective, only oneself was entitled to. Yet, despite the interrelation of *ius ad bellum* and *ius in bello* in Vattel's conception, traditional interpretation sees him at the root of a dualism of these two regimes that is today a legal principle. The misinterpretation – seeing Vattel's conception as one of decoupling the law regulating the conduct of hostilities from the law of the just cause rather than being rooted in tradition – is similar to today's conflation, where we tend to use *ad bellum* arguments to justify *in bello* behavior. The factual convergence of situations where an act of legitimate self-defense may at the same time amount to constituting an armed conflict passing the threshold to the application of international humanitarian law suggests that both are congruent. That is dangerously close to dismissing the dualism of *ius ad bellum* and *ius in bello* altogether. If we take this dualism seriously, the qualification of a conflict in order to determine the applicable regime – human rights law only, or international humanitarian law as its *lex specialis* – must remain completely independent from any *ad bellum* considerations. Vattel's theory has long been considered as one that holds this dualism high while in fact linking both regimes closely to each other. This shows the intrinsic difficulties that we face when putting this dualism into practice.

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