

Cervantes' *Bellum Iustum* in His Narrative Texts

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Abstract: The aim of this article is to throw light on how Cervantes interprets the doctrine of *bellum iustum* to punish and to execute the law and why these fundamentals should be of contemporary interest. The progressive secularization of international society and its transformation into a plurality of sovereign states claiming power within their territory and independence in their relationships from religious or political authorities are seen in Cervantes' narrative texts. The emergence of powerful monarchies led to the final destruction of the universal claims of the Emperor and the Pope in secular (also spiritual) world. Together with the influence of humanism, this led to a gradual 'nationalization' matters of civilian jurisprudence. This study explores the thoughts of theologians and jurists of the School of Salamanca and civil law scholars in Cervantes's thought.

Key Words: Cervantes - Law - *Ius Gentium* - Just War - Civilized - Uncivilized - Freedom - Rights - Christianity

"Wars, then, ought to be undertaken for this purpose, that we may live in peace, without injustice; and once victory has been secured, those who were not cruel or savage in warfare should be spared." Cicero, *On Duties*, Book I, par. 35, at. 14-15.

(A) INTRODUCTION

This article focuses on identifying the fundamentals of the sixteenth-century's *bellum iustum* in *The Ingenious Gentleman Don Quixote of La Mancha* (1605),¹ although the other novels written by this remarkable author are also taken into account.² *Don Quixote* is a source of literary and linguistic reality, customs, history, aesthetics, art, medicine, science, criminology, law³ and the *ius gentium*.

The commemoration of *Don Quixote's* publication over a century ago aroused the interest of jurists in Cervantes's work. Antonio Royo Villanova (1869-1958), a liberal journalist, conservative politician and professor of international law at the University of Zaragoza, extolled the elements of the *ius gentium* in *Don Quixote*.⁴ This author praised Cervantes,⁵ highlighting some elements of the

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¹ In this study we will use the edition of F. Rico (dir.), *Don Quijote de la Mancha* (Instituto Cervantes/ Real Academia Española, Crítica, Madrid, 2 vols., 1998).

² J. L. Alborg, *Historia de la Literatura española*. Vol II. *Época barroca* (Editorial Gredos, Madrid, 1973), 25 - 195.

³ R. Álvarez Vigaray, *El derecho civil en las obras de Cervantes* (Granada, Comares, 1987); B. Aguilera Barchet (coord.), *El Derecho en la época del Quijote* (Madrid, Thomson/Instituto de Estudios Jurídicos Internacionales/ Faculté de Droit, Paris 12, 2005); A. Botero Bernal, "El Quijote y el derecho: las relaciones entre la disciplina jurídica y la obra literaria", *Revista jurídica de la Universidad Autónoma de Madrid* (2009), 37-65, and S. Byrne, *Law and History in Cervantes' Don Quixote* (University of Toronto Press, Toronto/Buffalo/London, 2012).

⁴ A. Royo Villanova, *Cervantes y el Derecho de gentes. La guerra en el Quijote* (Universidad de Zaragoza, 1905).

ius gentium in *Don Quixote*, in particular war, but he neither took into account the historical context in which Cervantes wrote his work,⁶ nor mentioned the contradictions found in it.⁷ For his part, José Canalejas (1854-1912), a liberal lawyer and a regenerationist politician, presented Cervantes as a precursor of international law,⁸ as a liberal intellectual with advanced ideas, a “genius” and “expression of his age”,⁹ and his work as stemming from an unequal and unjust society. Also, Rafael Altamira y Crevea (1866-1951), a legal historian and judge at the Permanent Court of International Justice,¹⁰ recovered the legacy of Cervantes as an exponent of Spanish civilization.¹¹ The *quixotic* attitude is the one that Altamira requests for the resolution of international conflicts.¹²

The aim of this study based on (re)reading *Don Quixote* and the other texts by Cervantes is to value his literary output as an indirect source for establishing a line of continuity between the *ius gentium* in the Middle Ages and the contemporary situation. We will retrace the development of *bellum iustum* from the Late Middle Ages to the law of armed conflicts in the twentieth and twenty-first centuries.

Interpreting Cervantes is no easy task despite appearances to the contrary given the comical nature of the main character, Don Quixote.¹³ Cervantes’s life straddled two centuries and two ideologies, in the golden age of the Spanish Empire.¹⁴ Yet he was more a man of the sixteenth century than of the seventeenth: his “circumstance” was more embedded in the Spain of Philip II¹⁵ than in that of Phillip III.¹⁶ As an artist, he was a creator, and as a critic, a classic representing the antiquity he found through (Jesuit) Italian humanism.¹⁷

⁵ *Ibid.* at 9 and 11.

⁶ *Ibid.* at 13.

⁷ *Ibid.* at 13 and 14.

⁸ J. Canalejas, *Don Quijote y el Derecho* (Discurso de recepción en la Real Academia de Legislación y Jurisprudencia, Madrid, 1905), at 443.

⁹ *Ibid.* at 444.

¹⁰ See Y. Gamarra, “Rafael Altamira y Crevea (1866-1951). The International Judge as Gentle Civilizer”, *The Journal of the History of International Law* (2012) 1, 1-49.

¹¹ R. Altamira y Crevea, “Comentarios histórico-jurídicos al Quijote”, *Anales de la Universidad de Oviedo* (1905-1907), IV, 1-13. For more information see M^a A. Esquembre Cerdá, “Los escritos cervantistas de Rafael Altamira”, in E. Martínez Mata and M^a F. Fernández Ferreiro (coords.), *Comentarios a Cervantes. Actas selectas del VIII Congreso de la Asociación de Cervantistas, Oviedo, 11-15 June 2012* (Fundación M^a C. Masaveu Peterson, Oviedo, 2014), 279-287.

¹² *Ibid.* at 286 and 287.

¹³ See J. García López, *Cervantes: La figura en el tapiz. Itinerario personal y vivencia intelectual* (Pasado&Presente, Barcelona, 2015), at 12 and 13.

¹⁴ On the Spanish origins of international law see A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press, 2005, and M. Koskenniemi, “Empire and International law: The Real Spanish Contribution”, *University of Toronto Law Journal* (2011) vol. 61, at. 3 *et seq.* In this study we will use the Spanish translation of M. Koskenniemi, “Imperio y Derecho internacional. La verdadera contribución española”, in Y. Gamarra and I. de la Rasilla, *Historia del pensamiento Iusinternacionalista español del siglo XX* (Thomson Reuters / Aranzadi, Cizur Menor (Pamplona), 2012), 37-77.

¹⁵ A. Domínguez Ortíz, “La España del “Quijote”, in Rico, *supra* n. 1, at LXXXVII.

¹⁶ On the periodization of international law see O. Diggelmann, “The periodization of the history of international law”, in B. Fassbender, A. Peters, and D. Högger, (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012), 997-1011.

¹⁷ M. de Cervantes Saavedra, *El ingenioso hidalgo Don Quijote de la Mancha* (Estudio Preliminar de J. M^a Castro Calvo. Círculo de Lectores, Barcelona, 1965), at 20 *et seq.*

The progressive secularization and absolutization of international society, so well described by Q. Skinner,¹⁸ and its transformation into a plurality of sovereign states claiming power within their territory and independence in their relationships from religious (the papacy) or political authorities (the empire) are seen in Cervantes' work. Our protagonist paints an age crowned by the conquest of America that led to a series of doctrinal studies on the (il)legality of the Spanish occupation of the New World.¹⁹

Cervantes's work combines the premises of the prevailing *ius gentium* in sixteenth-century Spain: (neo-)scholastic and humanist.²⁰ Both schools influenced Cervantes's thinking and his vision of the *ius gentium*.²¹ A spotlight on Cervantes's legacy enables us to infer the extent of humanism in the law of war and how the vast practice of the law of war in the nineteenth century was contained in a variety of international legal instruments, for example the 1899 and 1907 Hague Peace Conventions and, later, the 1949 Geneva Conventions and 1977 additional protocols.

A century after the first reconstructions focusing on the *ius gentium* in *Don Quixote*, studies of Spanish doctrine on the development of its international legal thought continued to be *rara avis*.²² In English doctrine and doctrine on the literature and international law combination, Theodor Meron rediscovered the work of William Shakespeare (1564-1616) to establish a line of continuity between international law and the Later Middle Ages to our times.²³ Two Shakespearean tragedies, *Macbeth* (1606) and *King Lear* (1605-1606), were published at the same time as Cervantes's *Don Quixote*. Shakespeare and Cervantes used imaginary characters and jesters to claim freedom. Cervantes's *Don Quixote* is similar to Shakespeare's work in its amazing power of assimilation and synthesis.²⁴

This article explores whether the thoughts of theologians and jurists of the School of Salamanca, Francisco de Vitoria (1483-1546) and Francisco Suárez (1548-1617),²⁵ or civil law practitioners (Romanists), for instance Balthazar Ayala (1548-1584),²⁶ can be found in Cervantes's work. The purpose is to throw light on how Cervantes interprets the doctrine of *bellum iustum* to punish and to execute the law and why these fundamentals should be of contemporary interest.²⁷

¹⁸ Q. Skinner, *Les fondements de la pensée politique moderne* (Bibliothèque de « L'Évolution de l'Humanité », Éditions Albin Michel, Paris, 2001).

¹⁹ Such as Francisco de Vitoria or Domingo Soto's works, among others. See L. Pereña et al. (eds.), *Escuela Española de la paz. Primera generación 1526-1560* (Consejo Superior de Investigaciones Científicas, Madrid, 1981).

²⁰ R. Lesaffer, "Roman Law and the Intellectual History of International Law", in A. Orford, F. Hoffmann, and M. Clark (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, Oxford, 2016), at 51-57.

²¹ See M. Bataillon, *Erasmus y España* (Fondo de Cultura Económica, México/Buenos Aires, 1950), at 777 et seq.

²² Except for isolated cases as revealed in Gamarra and Rasilla, *supra* n. 14, 21-35.

²³ Th. Meron, "Shakespeare's Henry the Fifth and the Law of War", *American Journal of International Law* (1992), vol. 86/1, 1-45, and *Henry's Wars and Shakespeare's Laws. Perspectives on the Law of War in the Later Middle Ages* (Clarendon Press, Oxford, 1993).

²⁴ A. Close, "Cervantes: Pensamiento, Personalidad y Cultura", in Rico, *supra* n. 1, at LXXIII.

²⁵ See Koskenniemi, *supra* n. 14, at 37 et seq.

²⁶ B. Ayala, *De iure et officiis bellicis et disciplina militari libri*, 1582 (Ed. J. Westlake. J.P. Bate translated. 2 vols., Carnegie Institute, Washington, 1912). In Spain the work was translated by M. Fraga Iribarne, *Del derecho y de los oficios de la guerra* (Biblioteca española de escritores políticos, Instituto de Estudios Políticos, Madrid, 1948).

²⁷ On a general approach to the war in the middle age see S.Ch. Neff, *War and the Law of Nations. A General History* (Cambridge University Press, Cambridge, 2005). Also, Q. Wright, *A Study of War* (Chicago University Press, 5 vols. 1942).

(B) 'ARMS' (WAR) AND 'LETTERS' (LAW)

The years when Cervantes wrote his work coincided with the criticism of chivalric literature.²⁸ The renaissance ideas of Erasmus of Rotterdam (1466-1536), Thomas More (1478-1535), Luis Vives (1492-1540) and Juan de Valdés (1509-1541) and those introduced by the Protestant reform (religious battles) begun by Martin Luther (1483-1546) predominated at the end of the sixteenth century.²⁹ Cervantes acknowledged that Juan López de Hoyos (1511-1583), a writer and humanist, was his mentor and master.³⁰ He was also a contemporary of Francisco Suárez, a representative of the School of Salamanca in its Jesuit stage, whose ideas are included in various texts by Cervantes. Suárez is considered the forerunner of Grotius in distinguishing between the *ius naturale* and the *ius gentium*.³¹

In *Life in Algiers* (1582) we find references to wealth, avarice and their consequence: war. The Christian protagonists demonstrate the purity of their bodies and souls against the aggressions of a strange culture (Berber). In this fable, Cervantes attributes the corruption of mortal men to purely human reasons and not to the divine punishment of men. He writes:

“Oh blessed age, now gone through our sins,
To which our forebears gave
The sweet name of the golden age [...]

The air did not resonate with the complaint
Of the wretched captive [...]

Sweet freedom reigned then [...]

But afterwards, without reason, without light [...]

Blinded by greed, the mortals [...]

Discovered the fair-coloured minerals
Of the gold hidden in the earth,
Main cause of our afflictions [...].”³²

Cervantes's attitude to theory is complex and ironic.³³ In Chapter II of Part One, “Of what befell Don Quixote with some goatherds”, Don Quixote spends the night with some goatherds who share with him the food they have for dinner: a stew, and acorns for pudding. Holding a handful of them, Don Quixote delivers the golden age speech, reminiscent of the classical world “when there was neither *yours* nor *mine*”.³⁴ This is utopia spoken to people that are so tired and bored that they fall asleep. Grand words actually spoken out loud merely send others to sleep.

Cervantes was brought up in the modern humanist ideology that placed man at the centre of the universe. The influence of Italian humanism is present in *Don Quixote* because of Cervantes's

²⁸ See E. Williamson et al., *El Quijote y los libros de caballerías* (Taurus, Barcelona, 1991), and S. Roubaud, “Los libros de caballerías”, in Rico, *supra* n. 1, at CX-CXXXVIII.

²⁹ B. Paradisi, *Storia del diritto internazionale nel medio evo: L'età de transizione* (Jovene Napoli, 2nd. augmented Ed., 1956).

³⁰ A. Alvar, *Un maestro en tiempos de Felipe II: Juan López de Hoyos y la enseñanza humanista en el siglo XVI* (La Esfera de los Libros, Madrid, 2014).

³¹ Koskenniemi, *supra* n. 14, at 69-76.

³² M. de Cervantes y Saavedra, *El trato de Argel*, dated in 1582. Recast years later with the title *Los baños de Argel*.

³³ García López, *supra* n. 13, at. 24 *et seq.*

³⁴ Denial of property in the topos of the Golden Age appears in *Il vendimmiatore* of Luigi Tansillo. See Rico, *supra* n. 1, at 121.

relationship with Italy. Giovanni Pico della Mirandola (1463-1494) wrote in his *Oration on the Dignity of Man* (1486) than humans were nothing and everything.³⁵

Américo Castro (1885-1972) depicted Cervantes as a son of his “age”.³⁶ Cervantes is interested in the idea of humanity as a global person. This concept of humanity is linked to reality, as a character such as Don Quixote, who experiences (and rejects) the world of grand ideals and the fiction of books of chivalry, evidences.

Quotes by classical authors from the Greek (Homer, Virgil, Heliodor, Aristotle)³⁷ and Roman (Cicero, Horace) worlds abound in his work.³⁸ In Chapter 21 of Part One, “On the exalted adventure and happy acquirement of Mambrino’s helmet, along with other events that befell our invincible knight”, Don Quixote refers to the “stolen Helen”, whose abduction unleashed the Trojan War.

Cervantes’s literary culture was fed by studying Latin grammar and examining authors and texts: Cicero’s letters, Terence’s comedies, Virgil’s eclogues, the *Epistulae ex Ponto* and the *Tristia* by Ovid, fragments by Seneca and Sallust.³⁹ He also enjoyed reading works by Garcilaso de la Vega (1498-1536), Joan Martorell (1410-1465), Jorge de Montemayor (1520-1562) and Lope de Vega (1562-1635) (even though he was his great enemy), among many others. In addition, he read the Bible and works by Antonio de Guevara (1480-1545), a classic of philosophy written in Spanish. The education Cervantes received was humanist, although his intimate knowledge of Spanish and Italian science —poetry, fiction, theatre, history and law— was self-taught.

From the Renaissance tradition Cervantes gleaned a concept of justice found in Michel de Montaigne (1533-1592) and other sixteenth-century thinkers, closely linked to the doctrine of natural morals. In particular, Castro put forward that Cervantes forged an ethical system set down in the form of a novel rather than as theory, rivalling Montaigne in beauty and originality and demonstrating the same rationalist and secular slant.⁴⁰

Alongside praise for simple, reasonable justice, Cervantes violently condemned the justice that reigned in the sixteenth century, which he viewed as starkly opposed to reason and fairness.⁴¹ The tyranny and the despotic barbarity meted out by judges and mayors strengthened, in contrast, the idea the Renaissance conveyed of a pure society governed by criteria that were as exact as they were ingenuous.

In Chapter 37 of Part One, “In which the story of the famous princess Micomicona continues, along with other droll adventures”, Don Quixote favours distributive justice, giving everyone their due, compared with commutative justice. Commutative justice focused on the (horizontal) relationship between individuals (individualist justice), while distributive justice focused on the

³⁵ G. Pico della Mirandola, *Discurso sobre la dignidad humana* (Translation, introduction and notes edition by P.J. Quetglas, Textos universales, PPU, Barcelona, 2002).

³⁶ A. Castro, *El pensamiento de Cervantes* (Editorial Noguer, s.a., Barcelona/Madrid, 1980), at 18 and 19.

³⁷ Cervantes Saavedra, *supra* n. 17, at 201 and 202.

³⁸ Rico, *supra* n. 1, at 227.

³⁹ Close, *supra* n. 24, at LXVIII-LXIX.

⁴⁰ Castro, *supra* n. 36, at 55.

⁴¹ On the idea of justice see C. Prat Westerlindh, *La justicia en el Quijote* (Dykinson, Madrid, 2006). Also, the classical work of A. Pons y Umbert, *El ideal de Justicia de Don Quijote de la Mancha* (Editorial Reus, Madrid, 1922).

(vertical) relationship between community and individuals.⁴² At the heart of distributive justice, Cervantes defended a set of individual rights.⁴³

Cervantes accepts the fact of war as a reality to attain peace. Our protagonist considers that the sole purpose of arms is peace. He says that “the purpose of arms is peace, which is the greatest benefit that men can desire in this life”.⁴⁴ This is how Don Quixote understood the well-known adage *si vis pacem para bellum*. This point reminds us of Cicero or Aristotle for whom “the purpose of war is peace”.⁴⁵

(C) RELIGIOUS INTERVENTION: THE HOLY LEAGUE AND THE INFIDEL

The law of the Middle Ages and considering war against the infidel as lawful overlapped in the sixteenth century.⁴⁶ At the same time, new values and a new law fostered by the Renaissance and the colonization of the New World emerged.⁴⁷ Cervantes was immersed in the problem affecting the century’s very structure: idealistic literature (heroic, tragic) and literature with a strong leaning towards matter (realism, naturalism).

Cervantes introduces the Holy League’s crusade against the infidel in certain passages in *Don Quixote*.⁴⁸ Spain, France and England signed the Treaty of Cateau-Cambrésis (1559) that enabled Philip II to wage war against Islam, mainly against the Turks and the Berbers.⁴⁹ These agreements were in force for a century and led to Spanish preponderance.

However, control of the Mediterranean was gained with victory in the Battle of Lepanto (1571), which Cervantes fought in. As his arm was badly wounded (useless), he was nicknamed “the one-armed man from Lepanto”. In the Battle of Lepanto, the Ottoman Empire lost control of the Mediterranean Sea after almost two centuries of supremacy to the Holy League (comprising Philip II’s Spain, Pius V’s Papacy, Republic of Venice, Order of Malta, Republic of Genoa and Duchy of Savoy).⁵⁰

In *Epistle to Mateo Vázquez* (1577), Cervantes looked back with emotion on his wounds and glory in the Battle of Lepanto:

⁴² See P. Haggemacher, “Droits subjectifs et système juridique chez Grotius”, in L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (Kimé, Paris, 1997), at 73 *et seq.*

⁴³ See A. S. Brett, *Liberty, Right and Natures: Individual Rights in Later Scholastic Thought* (Cambridge, Cambridge University Press, 1997).

⁴⁴ Rico, *supra* n. 1, at 442.

⁴⁵ *Ibid.*, at 443. See also the morality approach of the war in the sixteenth century, A. C. Arend and R.J. Beck, *International Law and the Use of Force. Beyond the United Nations Charter paradigm* (Routledge, London/New York, 2^a ed. 2013), at 13 *et seq.*

⁴⁶ F. H. Russell, *The just war in the middle ages* (Cambridge University Press, London/New York/Melbourne, 1975).

⁴⁷ See Lesaffer, *supra* n. 20, at 51. And the same author, *European Legal History. A Cultural and Political Perspective* (Cambridge University Press, Cambridge, 2009), at 303-308.

⁴⁸ See Rico, *supra* n. 1, at 629.

⁴⁹ Peace Agreement signed between Philip II of Spain, Henry II of France and Elizabeth I of England. The major peace treaties of the sixteenth century developed the laws and customs of peace treaties and laid the basis for the general European practice of later times. See Lesaffer, “Peace treaties and the formation of international law”, in Fassbender, Peters, and Högger, *supra* n. 16, at 76, 80.

⁵⁰ H. Bicheno, *La batalla de Lepanto 1571* (Ariel, Barcelona, 2005).

“[...] and, on the fortunate day that, such
 loss was the destiny for the armed enemy,
 when it was favourable and right for us,
 accompanied by fear and effort,
 I was present at the event in person,
 armed with hope rather than iron.
 I saw the formed squadron shattered and undone
 and of barbarians and Christian people
 Neptune's bed red in a thousand places [...]”
 [...] At that sweet time, I was sad
 with one hand grasping my sword,
 and blood pouring from the other; ...
 But the joy reaching my soul
 was so supreme, seeing the
 coarse infidel people defeated by Christians
 that I did not care if I was wounded,
 even though my pain as so overwhelming,
 that it sometimes took my breath away [...]”⁵¹

As we can infer from this fragment, the Christians' (religious) superiority runs through his work. Cervantes establishes a division between Christians (in the Holy League) and the infidels, the barbarians (of Islam). Our protagonist acknowledges the superiority of emperors, kings and (civilized) Christian lords over the (uncivilized) infidel. The civilized character was grounded in religious orthodoxy as part of the classical Spanish humanism of the Golden Age.

We can find another example in Chapter 18 of Part One, “In which the reasons Sancho Panza gave his master, Don Quixote, are related and other adventures worth telling”.⁵² In this passage Don Quixote believed he saw two armies (in Sancho's reality they were two herds of ewes and rams) that were fighting because of a pagan's (Alifanfarón) love for a beautiful, graceful Christian lady, Pentapolín's daughter. Pentapolín did not want to hand her over to the pagan king if he did not first relinquish the law of the false prophet Mahoma and convert to his own. That was when Don Quixote said to Sancho “You will do what you have to here”.⁵³ And he continues: “Hey, knights, those following and fighting under the banners of the brave emperor Pentapolín of the Naked Arm, follow me now! You'll see how easily I give him revenge on his enemy Alifanfarón of Trapobana!”⁵⁴

The Battle of Lepanto was followed by his captivity in Algiers (1575-1580) and his return to the Iberian Peninsula (1581). Cervantes was captured by corsairs (Berber pirates), by men outside the law, any law that was not money.⁵⁵ The English also pursued privateering, theft and kidnapping as the Algerians did.⁵⁶

⁵¹ M. de Cervantes Saavedra, “Poesías sueltas”, *Comedias y entremeses* (ed. Schevill-Bonilla, Madrid, 1922, vol. VI.), at 25 and 26.

⁵² Rico, *supra* n. 1, at 186-198.

⁵³ *Ibid.* at 189.

⁵⁴ *Ibid.* at 194.

⁵⁵ See W. G. Grewe, *The Epochs of International Law* (Translated and revised by Michael Byers, Walter de Gruyter, Berlin/New York, 2000), at 141 *et seq.*

⁵⁶ J. Alcaide Fernández, “*Hostes humani generis*: Pirates, Slavers and other Criminals”, in Fassbender, Peters, and Högger, *supra* n. 16, at 120 *et seq.*

The mark left by captivity pervades his comedy *The Baths of Algiers* (1615). This play is an example of his cosmopolitan view of the Muslim world remembering his period of captivity in Algiers. He was detained there for five years after he was captured by a fleet of pirates when he was sailing from Naples to Spain. All these misfortunes had a profound effect on his thinking and on *Don Quixote*, the *Exemplary Novels*, *The Trials of Persiles and Sigismunda* and his other narrative texts.

Defending free men and the hope of freedom appear in Chapter 40 of Part One, “In which the story of the captive continues”, in which the ingenious knight reflects on one of the effects of the Battle of Lepanto: captivity. This passage portrays captivity as an intermediate situation, similar to a slave’s situation, yet different from a prisoner’s, as conceived in the 1899 and 1907 Hague Peace Conventions, and in other international legal instruments in the twentieth century.⁵⁷ In this episode, he defends the humane treatment proffered by the Turks in their treatment of captives.⁵⁸

The captive (slave) was the property of whoever seized him, not a prisoner of the victorious state. The captive was disposed of, transferred or inherited. The captive was a means of providing economic utility, considered as either “value in use” (the crew of unfortunates that went out to work for their owner) or as “exchange value”, since it was assumed that the so-called “captives for ransom” had someone who would pay for their freedom given their high status. He describes three types of captives in the above-mentioned passage: “Christian captives, whether belonging to the King and to private individuals, and those they call “magazine” slaves, in other words the captives of the council (public authority), who serve the city in its public works and other roles; and it is very difficult for these captives to obtain their freedom, since, as they have no particular master and belong to the community, there is no one to negotiate their ransom with [...] some private individuals in the town usually take their captives, mainly when they are captives for ransom. Neither do the King’s captives for ransom go out to work with the rest of the crew [...]”.⁵⁹

Human freedom is a constant in *Don Quixote* as individual rights (*dominium*) had also been a core aspect of the thinking of Vitoria and the other authors of the School of Salamanca.⁶⁰ As far as Vitoria was concerned, everyone had *dominium* over their actions as part of their natural freedom.⁶¹

Cervantes defended everyone’s freedom (in various spheres, including the economic one) based on the Spanish scholars’ model. Don Quixote cannot stand seeing captive men, as observed in the episode of the galley slaves in Chapter 22 of Part One, “Of the freedom Don Quixote gave to several unfortunates who were being taken against their will where they did not want to go”.⁶² Don Quixote actually says: “[...] the sorrow I felt seeing those grey hairs and that venerable face in such a painful situation, on account of his being a pimp, has been removed by the additional fact that he is also a

⁵⁷ See Articles 4 and 6 of the Regulation II annexed to Hague Convention of 29 July 1899 concerning the Laws and Customs of War on Land. On the Hague Peace Conventions see A. Pearce Higgins, *The Hague Peace Conferences and other international conferences concerning the laws and usages of war: text of conventions with commentaries* (Cambridge University Press, Cambridge, 2014).

⁵⁸ Rico, *supra* n. 1, at 462.

⁵⁹ *Ibid.*, at 462 and 463.

⁶⁰ As described so well by Koskenniemi, *supra* n. 14, at 51-54.

⁶¹ *Ibid.* at 54

⁶² Rico, *supra* n. 1, at 235.

sorcerer. Although I am well aware that there are no sorceries in the world that can move and force the will, as some simple folk think: we have free will.”⁶³

This passage contains the contradiction between generosity, the altruism of a being such as Don Quixote, and the meanness of the captives. Another contrasting example is between realism/naturalism and idealism.

In the same passage on the galley slaves, referring to free men, we find references to God and the *ius naturale*. He writes: “[...] it is wrong to make slaves of men who God and nature made free [...] there is a God in heaven who does not neglect to punish the wicked nor reward the good, and it is not right for honourable men to be tormentors of other men as they gain nothing from this.”⁶⁴

These passages present the ideas of Suárez, which coincide with Vitoria's. For scholars, the *ius naturale* had been proclaimed by God to ensure freedom, common property and peace. It was not subject to any change. However, its content was understood “negatively”, given the lack of an express prohibition. As a result, the subjective individual freedom of men operated as a legitimate right to create republics as well as to divide and exchange properties. The *ius naturale*, Suárez wrote, left “this matter to be managed by men, and this management should agree with reason”.⁶⁵

(D) THE LAWFUL WAR OF A KNIGHT-ERRANT

The concept of the international community as a natural society of sovereign entities made it possible to establish a new doctrine of legitimation for war defined as reparation for *iniuriae* and, consequently, as an instrument to execute the law, as a type of corollary.⁶⁶ Simply put, it led to a legal configuration of war as a punishment aimed at ensuring the effectiveness of the *ius gentium* that perpetuated and lasted to Kelsen.⁶⁷

War is lawful and necessary precisely because the states are subject to the *ius gentium*. As there is no superior court, its reasons can only be defended by war.⁶⁸

Two ideas on the man Cervantes were related to war. On the one hand, in “The Lawyer of Glass”⁶⁹ (1613), war is an essential adventure, a way of discovering the world, Italy and Flanders in this particular case. On the other, concerning his captivity in Algiers, Cervantes criticizes his lack of freedom (which he constantly rebels against) more than the way of life and the institution of captivity themselves.

⁶³ *Ibid.*, p. 240.

⁶⁴ *Ibid.*, p. 244.

⁶⁵ F. Suárez, “On Law and God the Lawgiver (*De legibus, ac Deo legislatore*)”, in F. Suárez, *Selections from Three Works* (vol. 2, translated by G. Williams, Clarendon Press, Oxford, 1944).

⁶⁶ See J. Verhoeven, “Vitoria ou la matrice du droit international”, in A. Truyol et al., *Actualité de la pensée juridique de Francisco de Vitoria*. Proceedings of the Study Days organized in Leuven, 5 December 1986 (Bruylant, Brussels 1988), at 112 et seq.

⁶⁷ M. Keen (ed.), *Medieval Warfare: A History* (Oxford University Press, Oxford, 1999).

⁶⁸ This interpretation of the texts of Vitoria is suggested by J. Brown Scott, *El origen español del derecho internacional* (Cuesta, Valladolid, 1928), at 107.

⁶⁹ M. de Cervantes Saavedra, *El Licenciado Vidriera*, 1613. This work is one of the twelve novellas that make up the *Novelas Ejemplares*, originally published by Juan de la Cuesta.

Cervantes establishes a distinction between a private (informal) war and a public (formal) war. A private war corresponds to chivalry and to the masses. Public war is engaged in by republics, kingdoms and cities. The brave knight speaks about this in his famous speech on arms and letters in Chapter 38 of Part One, “Which deals with the curious speech Don Quixote delivered on arms and letters”, in which he writes: “Letters say that arms cannot be supported without them because war also has its laws and is subject to them and laws come under letters and men of letters.”⁷⁰ And next, highlighting the purpose of the army, he says: “Arms respond that laws cannot be supported without them because arms defend states, preserve kingdoms, guard cities [...] rid the seas of pirates [...] and, finally, if it were not for them, states, kingdoms, monarchies [...] Would be subject to the rigours and confusion brought by war as long as it lasts and has permission to use its privileges and its strengths”⁷¹

In Chapter 8 of Part One, “Of the good fortune that the brave Don Quixote had in the dreadful and inconceivable adventure with the windmills and other events worth recording”, Don Quixote sees 30 or 40 giants that he all intends to fight and kill, “we will begin our fortune with their plunder, for this is a good (as it is righteous) war and it is God great service to remove such bad seed from the face of the earth”.⁷² And again in Chapter 27 of Part Two, “Where he realizes who master Pedro and his monkey were, and the mishap that Don Quixote had in the braying adventure, which did not turn out as he had wished or expected”, Don Quixote refers to the justice of war or the cause(s) that makes it legitimate. It includes five conditions:

“Prudent men and well-ordered states ought to take up arms, draw their swords and put themselves, their lives and their properties at risk for four reasons: the first is to defend the Catholic faith; the second is to defend their life, which is a natural and divine law; the third is to defend their honour, their family and their properties; the fourth to serve their King in the just war; and if we wanted to add a fifth, which we could count as the second, to defend their country.”⁷³

This construction includes public wars, legitimate (personal) defence and civic duty. We can glean a series of elements from this construction of a just war, which coincide with Vitoria’s ideas.⁷⁴ First, war can only be lawfully declared by republics, kingdoms and lords and never by private individuals.⁷⁵ On the one hand, this implies a limitation, delegitimizing the scourge of civil wars and, on the other, a significant and unmistakable characteristic of the incipient external sovereignty of states that, from then on, could be conceived as *respublicae perfectae* only as long as they began to be *sibi suficientes* in ownership of *ius ad bellum*. The right to war becomes a principle and identification criterion of the

⁷⁰ Rico, *supra* n. 1, at 447.

⁷¹ *Ibid.*

⁷² *Ibid.*, at 95.

⁷³ *Ibid.*, at 859 and 860.

⁷⁴ See F. de Vitoria, “On the Law of War”, in F. de Vitoria, *Political Writtings* (ed. by A. Pagden and J. Lawrence. Cambridge, Cambridge University Press, 1991)

⁷⁵ See Koskeniemi, *supra* n. 14, at 68.

state and, at the same time, the most specific sign of its emancipation from the traditional external link with imperial authority.⁷⁶

Second, the king, prince or lord that declares a just war is a competent judge of its aspirations. It is of little importance that attaining these aims depends on force and not law, which is equivalent to taking justice into one's own hand, and that such fighting judges are also judges pursuing their own cause.⁷⁷ If for Vitoria slander was the only cause to justify war, it is no less true that war was the only just punishment possible.

A third effect of this concept of war as a punishment is a long list of limits for both its premises (*ius ad bellum*) and its types (*ius in bello*). Not every slander can justify a war, given that such a serious and terrible punishment should be in proportion to the offence, and the king, prince or legitimate lord, unlike a tyrant, cannot endanger the life of his subjects without a just reason. Especially, as war has been devised as a punishment "aimed at peace", it cannot degenerate into unlimited violence, but must instead remain subject to law (*ius in bello*).⁷⁸

Consequently, in Chapter 21 of Part Two, "In which Camacho's wedding continues, and other pleasant events", Don Quixote considers that the issues of love and war are one and the same and says, "just as in war it is allowable and common to use wiles and ruses to conquer the enemy, in romantic rivalries and competitions, tricks and lies to obtain the desired end are viewed as good, as long as they do not damage or dishonour the loved object".⁷⁹ These lawful war methods are stated in Article 24 of the regulation annexed to the Hague Convention II on the Laws and Customs of War on Land, 29 July 1899: "Ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered allowable."⁸⁰

Lastly, booty as a social reflection of war. In a just war, Don Quixote says to Sancho in Chapter 21 of Part One, "Which deals with the exalted adventure and rich acquirement of Mambrino's helmet, along with other events that befell our invincible knight", it is lawful to take booty from the vanquished:

"So Sancho, leave that horse or ass or whatever you want it to be, for when its owner sees that we are gone, he will return for it." "God knows that I would like to take it," Sancho replied, "or at least exchange it for my own [...] The laws of chivalry are indeed strict, because they do not extend to allowing an ass to be exchanged for another; and I would want to know if I could exchange the harness at least."⁸¹

⁷⁶ Lesaffer, "Peace treaties and the formation of international law", in Fassbender, Peters, and Högger, *supra* n. 16, at 76 and 77.

⁷⁷ See L. Ferrajoli, *Derechos y garantías. La ley del más débil* (Trotta, Madrid, 1999), at 131.

⁷⁸ Koskenniemi, *supra* n. 14, at 68 and 69.

⁷⁹ Rico, *supra* n. 1, at 807.

⁸⁰ The rules of this regulation remained in the IV Hague Convention of 18 October 1907 concerning the Laws and Customs of War on Land and the Regulations annexed. And were partly reaffirmed and developed in the Four Geneva Conventions of 1949 and their Additional Protocols of 1977. Article 37, par. 2 of the Additional Protocol I to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts states: "stratagems are not prohibited." See Pearce Higgins, *supra* n. 57.

⁸¹ Rico, *supra* n. 1, at. 227.

The right to booty or the right to take another's belongings was recognized by use, although it was condemned by the conscience of a man of letters (laws), a knight. Let us not forget that there were certain limitations, as Don Quixote says in the above-mentioned passage. These limits are stated in Article 28⁸² and Article 47⁸³ of the regulation annexed to the Hague Convention II on the Laws and Customs of War on Land, 29 July 1899.

(F) CONCLUSIONS

Cervantes' work introduces us to a cosmopolitan language imbued with *ius naturale* showing the reality of *iustum bellum* in the sixteenth century: the vanquisher's prudence and restraint, war against the infidel, lawful war, right to booty, humane treatment of captives and Christian peace. The public (formal) and private (informal) spheres, coercion and freedom, regulation and spontaneity, old and modern, lawful and unlawful overlap in Cervantes' narrative texts.

Cervantes's thought demonstrates the Christian legal conscience understood as a set of ideas shared by Italian, Spanish, French, English and Belgian authors writing in the sixteenth century. These ideas are based on the values and principles of freedom, peace, justice and lawful war for a just cause.⁸⁴ Following Vitoria and Suárez, Cervantes emerged as a defender of subjective natural rights. This is no other than the defence of respect for one's rights over oneself.⁸⁵

Cervantes's work mirrors established uses between Christian (civilized) nations, humane laws and the demands of public conscience. Spain was the centre of the Empire in the sixteenth century and the route to disseminate values, principles and standards to the other European and American lands. Spain acted as a bridge between the Muslim and the Christian worlds. The legacy of classical Greece and Rome regained through the Islamist thinkers arrived in Spain and spread throughout the European and American territories.

The ideas of sixteenth-century authors were reintroduced by bourgeois liberals (institutionalists) in the nineteenth and twentieth centuries. They were a source of inspiration for international law in the interwar period and also for contemporary internationalist jurists. Recovering the legacy of sixteenth-century Spanish authors enables us to better understand how current international law functions and to make sense of the fragmented situation it finds itself immersed in. Authors such as Cervantes and Shakespeare, or Vitoria, Suárez, Erasmus of Rotterdam and Luther, are cyclically re-read and reinterpreted to further our knowledge of their work and the situation in the sixteenth and seventeenth centuries.

Scholars of Cervantes still accept theories on his perspectivism and critical and conscious habit of reflection on all aspects of his art. Nevertheless, there are authors that have provided more detailed

⁸² Article 28 of the Regulations annexed to Hague Convention II of 29 July 1899 concerning the Laws and Customs of War on Land reads: "The pillage of a town or place, even when taken by assault, is prohibited".

⁸³ Article 47 of the Regulations annexed to Hague Convention II of 29 July 1899 concerning the Laws and Customs of War on Land says: "Pillage is formally prohibited".

⁸⁴ See G.D. Tassitch, "La conscience juridique internationale", *Recueil des Cours de l'Académie de Droit international* (1938) Vol. 65, 305 – 394.

⁸⁵ See the thesis of Koskenniemi, *supra* n. 14, at 72 and 73.

and precise versions of the intellectual and literary debts owed to Cervantes.⁸⁶ These authors have rejected the tendency to paint him as the precursor of seventeenth-century European rationalism and the subsequent secularization and expansion of his intellectual horizons.

In the twenty-first century, a (re)reading of Cervantes's work invites us to reassess a concern that his work revolves around: the idea of freedom. Like all men, Cervantes made mistakes, but he was an intelligent, cosmopolitan and pragmatic man, an idealist and a humanist who enjoyed exercising his freedom at all levels. Freedom is an increasingly questioned subjective right in contemporary times.

In Cervantes's work we can see elements of turn-of-the-century humanism, such as questioning the morality of war despite it being lawful and accepted. There is a series of principles, such as humane treatment, military need, proportionality and distinction present directly or indirectly in Cervantes's work. These principles were contained in the 1899 and 1907 Hague Conventions and in the 1949 Geneva Conventions for the Protection of War Victims. Looking back on the past, on the work and projects produced by singular men,⁸⁷ helps us to establish parallels to expand and improve our understanding of contemporary international law.

⁸⁶ Authors such as Marcel Bataillon, Francisco Márquez Villanueva o Albán Forciones restricted the Cervantes' contribution to the literature. See García López, *supra* n. 13, at. 15, 16 and 24.

⁸⁷ Following the path of S. Marks and A. Lang, "People with Projects: Writing the Lives of International Lawyers", *Temple International and Comparative Law Journal* (2014) 27, 437-453.