The relationship between jus ad bellum and jus in bello

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Themes

- Aims
- Self-defence and armed conflict
- Self-defence and NSA
- Proportionality
- Necessity
- UNPKO
Jus ad bellum

When a state may or may not use force under international law

- Prohibition of the use of force (Art 2.4 UN Charter)
- Right to individual and collective self-defence (Art 51 UN Charter)
- Collective security action [enforcement action] (Chapter VII UN Charter)
Jus in bello

Means and methods of warfare and protections during warfare

- Hague Law
- Geneva Conventions and Additional Protocols I and II
General distinction between *jus ad bellum* and *jus in bello*

- **Purpose of the law**: peace-protection
- **How it applies**: unequal status – equality of belligerents
- **Legal consequences**: state responsibility and individual criminal responsibility for aggression – equal individual criminal responsibility and state responsibility
Principles governing the relationship between jus ad bellum and jus in bello

1. separation between jus ad bellum and jus in bello

2. Equal application of jus in bello to conflicting parties

3. Concurrent application of jus ad bellum and jus in bello
Principle of separation

(a) The legal status of the conflicting parties under the jus ad bellum does not affect the application of IHL

(b) The application of IHL does not legitimise any illegal use of force under jus ad bellum

- **Hostage case** (Nuremberg): there is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant
- **Common Art 1 GCs**: respect and ensure respect in all circumstances
- **Preamble API**: fully applied in all circumstances ... without any adverse distinction based on the ... origin of the armed conflict or the causes espoused by the parties
- **Art 4 API**: the application of GCs and API ... shall not affect the legal status of the parties to the conflict
Principle of equal application

1. Common Article 1 GCs: in all circumstances
2. ICRC: the principle of equality of belligerent underlies the law of armed conflict
**Principle of concurrent application**

- *jus ad bellum* and *in bello* are applicable at the same time and not one after the other
- They can be complementary (not mutually exclusive)
- Strategic v. operational/tactical execution

- **Nuclear Weapons AO**: a use of force that is proportional under the law of self-defence must, in order to be lawful, also meet the requirements of IHL
Distinction and relationship in the case of self-defence

• Threshold of application
  • Self-defence: armed attack [use of force of gravity and scale] (Nicaragua case) between states
  • What is a use of force?

• IHL of IAC: armed conflict (CA2)
  • What is an armed conflict? armed force between states (Tadic case)
  • Intensity?

- IHL applies equally to aggressor and victim state; the victim state cannot justify violations of IHL or violations of jus ad bellum
- When does IHL apply? From armed attack or from self-defence [9/11]
- Pre-emptive self-defence (no armed attack)
Self-defence and non-state actors

- Self-defence as interstate attribute: armed attack by a state or through proxies under a state’s effective control (Nicaragua case, Wall AO)
- International AC: overall control (Tadic, Lubanga)
- If there is no effective control, there is no armed attack and self-defence is not permitted. According to ICJ this is a use of force but no forcible reaction is permitted. Is there an IAC (overall control) because of the unilateral use of force?
- If the victim state reacts it violates jus ad bellum (if reprisals are prohibited) but triggers an IAC or NIAC or both
Self-defence and non-state actors

- Do armed attacks by NSA with no state support trigger the right to self-defence?  **No** or **Yes**
- Attack by state A against NSA in state B not supported by any state (US action against ISIS in Syria)
  - self-defence against ISIS and NIAC between ISIS and US
  - self-defence against ISIS and (i) NIAC between ISIS and US and (ii) IAC between US and Syria even if no hostilities
Proportionality in self-defence: balance between armed attack and aim to halt and repel it (Nicaragua, Armed Activities)
- target selection
- geographical scope (Iraq/Kuwait, Falklands/Malvinas, 2006 Lebanon)
temporal scope (instant, continuous, accumulation)
Proportionality in IHL

Art 51 (5) API: incidental loss of life or damage which is excessive in relation to the concrete and direct military advantage anticipated

- Operational and tactical use of military force against strategic use of force
- For example: jus ad bellum proportionality may justify attacks on civilian objects but IHL proportionality limits side effects on civilians and civilian objects
Principle of necessity in self-defence and IHL

- Necessity in self-defence: force only means available
- Military necessity only if permitted by treaties
- Wall AO (i) jus ad bellum justification: wall as self-defence (necessary); (ii) ASR justification: necessity as CPW; (iii) Art 53 GCIV: destruction of property demanded by the necessities of war
Intervention by foreign armies

1. With consent of government fighting AG: lawful per jus ad bellum and NIAC

2. Supporting AG against government: unlawful per jus ad bellum but (i) IAC if AG under effective control; (ii) NIAC between government and AG and an IAC between intervening state and government [but is exchange of hostilities required?]
Chapter VII UN Charter and jus in bello

- Breach of the peace/act of aggression: IAC
- Threat to the peace: IAC or NIAC
- Role of SC in beginning and end of armed conflict
- Recognition of applicability of IHL, respect, implementation and enforcement (ICTY/ICTR)
- Can Ch VII decisions prevail over IHL pursuant to Art 103 UN Charter? [SC Res 1483 (2003)]
1999 S-G Bulletin 1.1: IHL applies ‘when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.

Double key: (i) the existence of an armed conflict in the area and time of their deployment, and (ii) the engagement of members of the Force in the conflict as combatants

Rejection: standard criteria according to CA2 and CA3 even if no armed conflict exists
UNPKO and IHL

- Who is party? IO or TCC? [command and control or attribution?]
- Party to IAC or NIAC?

- PKO v AG = party to NIAC
- PKO and government v AG = party to NIAC
- PKP supports government (logistics, intelligence, planning, coordination) in pre-existing NIAC = party to NIAC [ICRC]
Peacekeeping forces

- Combatants or civilians actively participating in hostilities? **Combatants**
- For how long? Entire armed conflict
- Whole mission or only military component or only specific unit? **Intervention Brigade**
- Civilians DPH [threshold of harm; direct causation; belligerent nexus]
POW?

- Detention in NIAC
  - authorised by SC [Al-Jedda, Serdar Mohammed; SC Res 1546; SC Res 169]
  - detention by armed groups?

- Detention by UN forces: S-G Bulletin
- Detention of UN forces? POW? Civilians?