

*How does the public international law prohibition of the use of force between States (jus contra bellum) relate with international humanitarian law (IHL), also known as the law of armed conflict (jus in bello)? What aims does each body of law pursue? Why should their application be kept strictly separated? All these questions tackle a key element of international law: the absolute distinction between public international law on the use of force (jus ad bellum, that has evolved to jus contra bellum – see below) and international humanitarian law (jus in bello). Indeed, they are two independent legal frameworks, whose rules are not intended to be mixed: while jus contra bellum governs the rules on the legality of the use of force by States, jus in bello sets humanitarian rules to be respected in warfare. This highlight will address the main aspects of each body of law, why and how their application is and must be kept strictly distinct, as well as key unfolding consequences.*

VERSION FRANCAISE (PDF) => CLIQUEZ SUR LE LIEN SUIVANT: Coup de projecteur sur *Le même DIH s'applique à toutes les parties au conflit : différencier le jus contra bellum (le droit interdisant le recours à la force entre États) et le jus in bello (le droit limitant les effets de la guerre) disponible sur le site du blog Quid Justitiae de la Clinique de droit pénal et humanitaire (traduction de l'Université Laval).*

### **From jus ad bellum to jus contra bellum**

There was a time when States were not prohibited to resort to armed force to address disputes, whereby their *jus ad bellum* (i.e. the law authorizing the resort to armed force) was recognized. However, international law evolved to a point where it currently prohibits such use of force under Article 2(4) of the UN Charter. This provision establishes a prohibition on the use of force or threat thereof by States against the territorial integrity or political independence of other States. This obligation has been crystalized as a peremptory norm of international law prohibiting States to use force. Thus, *jus ad bellum* became *jus contra bellum* (i.e. the law prohibiting war). There are, however, at least two exceptions to such a prohibition. First, the UN Charter allows using force in the exercise of States' right to (individual or collective) self-defence (UN Charter, Art. 51). Second, the UN Charter allows the use of force in cases of collective security measures adopted by the United Nations Security Council (UN Charter, Chapter VII). Besides, the right of peoples to self-determination has also been interpreted as a possible exception to the prohibition of using force (UNGA Resolution 2105 (XX) of 20 December 1965; ICCPR, Art. 1; ICESCR, Art. 1). In sum, the *jus contra bellum* seeks to clearly prohibit resort to force in inter-State relations and strictly regulate exceptions, namely the reasons or justifications under which States may exceptionally resort to force against others under international law. Conceptually, in nearly all cases only one side of an international armed conflict may be justified to use force under one of the exceptions and therefore nearly no international armed conflicts would exist (and IHL of

international armed conflicts would never apply) if the *jus contra bellum* was respected.

### **About *jus in bello***

Based on the fact that international armed conflicts may still erupt in practice, *jus in bello* is another body of international law seeking to regulate the effects of warfare so as to limit material destruction and human suffering. It establishes humanitarian standards that must be respected in any armed conflict. This framework is also known as international humanitarian law (IHL) or the law of armed conflict (LoAC). It seeks to limit the effects of warfare through obligations protecting persons who do not or no longer participate in hostilities and limitations/prohibitions on means and methods of warfare. Unlike *jus contra bellum*, *jus in bello* is not concerned with the question of whether the armed conflict could be considered – or not – lawful. It will apply and deploy its protective rules nevertheless, provided the situation can be classified as an armed conflict (either of international or non-international character), based on its own objective criteria, and looking at facts on the ground. If such is the case, *jus in bello* then sets humanitarian rules that parties to armed conflict must absolutely abide by, no matter whether resort to force triggering the armed conflict was deemed lawful or not under *jus contra bellum* (see 2020 Updated Commentary to GC III, Art. 2, para. 248).

### **Why *jus contra bellum* and *jus in bello* are – and must stay – distinct from one another**

There are at least three important reasons why maintaining a clear distinction between *jus contra bellum* and *jus in bello* is so crucial (see e.g. United States Military Tribunal at Nuremberg, The Justice Trial).

First, applying IHL norms once rules prohibiting the use of force may have been breached is a **logical step**. That is because IHL of international armed conflict rules today precisely apply to situations where *jus contra bellum* rules may have been violated in the first place. It hence aims to provide a ‘safety net’ for persons affected by armed conflicts.

Second, taking **humanitarian** reasons into consideration, persons affected by armed conflicts are not responsible for violations of *jus contra bellum* committed by States: in practice, anybody affected by armed conflict is entitled to protection, regardless of whether they are nationals of a State which complied with *jus contra bellum*, or of a State which violated it. If otherwise, such persons would be arbitrarily deprived from IHL protections they are entitled to (see 2020 Updated Commentary to GC III, Art. 2, para. 249).

Third, from a **practical** point of view, States involved in an international armed conflict never agree on who the “aggressor” may be (i.e. the State violating *jus contra bellum*). Thus, the more polarized the environment is, the more *jus in bello* has chances to be respected by parties to an armed conflict if the question of its application is kept completely separated from that of the violation of *jus contra bellum*. Indeed, under Common Article 1 to the four Geneva Conventions of 1949, all parties are bound to respect the same rules limiting the effects of warfare under *jus in bello*.

### **Consequences of the distinction**

The absolute separation between *jus contra bellum* and *jus in bello* generates important consequences. Indeed, the key IHL rule of equality of belligerents can also be derived from it. According to this rule, parties to armed conflicts are, under *jus in bello*, considered as equal because they are bound to respect the same obligations and benefit from the same rights.

Also, as seen above, *jus in bello* will apply in situations classified under its own very rules as armed conflicts, based on circumstances prevailing on the ground, and independently from how resort to force is classified under *jus contra bellum*. In such situations, IHL will then apply to any military operation carried out in the context of such armed conflicts.

Furthermore, arguments under *jus contra bellum* may never be used to interpret *jus in bello*. The exceptions to the prohibition of the use of inter-State force, for instance, only derogate from the general prohibition of the use of force under *jus contra bellum*, but can never be used to interpret or justify violations of *jus in bello* by parties to armed conflicts.

Conversely, while *jus contra bellum* cannot be interpreted or applied to prevent States from abiding by *jus in bello*, the latter may not prevent the application of *jus contra bellum*.

In sum, both bodies of law may apply concomitantly through their own, distinct rules, but can never influence the application of one another. This separation must be strictly maintained, globally adhered to and widely shared: only thus can humanity still have a chance to be preserved in armed conflicts.

## **The Law**

More detailed developments and explanations on the above can be found in the “The Law”. For the fundamental distinction between *jus contra bellum* and *jus in bello*, please refer to the chapter on “Fundamentals”. For the collective security system under the UN Charter (one of the exceptions to the prohibition on the use of force), please refer to Section VIII (“The United Nations”) in the chapter on “Implementations Mechanisms”.

## **The Practice**

A selection of related case studies from The Practice further illustrates:

### **The prohibition of the use of force and its exceptions**

- International Law Commission, Articles on State Responsibility (See Part A, Art. 21, Art. 25 and Commentary)
- Iraq/Syria/UK, Drone Operations against ISIS
- U.S., Lethal Operations against Al-Qa’ida Leaders

### **The complete separation between *jus contra bellum* and *jus in bello***

- Colombia, Constitutional Conformity of Protocol II
- Federal Republic of Yugoslavia, NATO Intervention
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo (see Judgement, para. 345(1); Separate opinion, paras. 55-63)
- ICJ, Nicaragua v. United States (see paras. 242-243 and Question 8.a)
- ICJ, Nuclear Weapons Advisory Opinion (see paras. 30, 39, 43, 96, 97 and 105)
- Iran, Victim of Cyber warfare
- UN, UN Forces in Somalia
- United States Military Tribunal at Nuremberg, The Justice Trial
- United States Military Tribunal at Nuremberg, United States v. Wilhelm List
- Yemen, Potential Existence and Effects of Naval Blockade

### **Other issues on *jus contra bellum***

- African Commission on Human and Peoples' Rights, Human Rights in Conflict Situations in Africa (on the relationship with IHRL)

### **A to Z**

Application; Equality of belligerents; *ius ad bellum*, *ius in bello*; *ius cogens*; Use of force; Peace operations; Military necessity; Reciprocity; Self-defence

### **Teaching resources**

- International Humanitarian law Guide – GP Sangroula (see #3 Interrelationship between *Jus in Bello* and *Jus ad Bellum*)
- Year-Long Interdisciplinary Seminar (see 2. Programme for the first semester, Meetings No. 4 and No. 7; and 3. Examples of research topics, Questions 10 and 11)
- Suggested Programmes for Seminars (see B. Seminar centered on the substantive rules of international humanitarian law: 1. Programme/Meeting No. 1 and 3. List of proposed research topics/Question 1)

### **To go further**

- UN Charter and Statute of the International Court of Justice
- ICRCblog – What are *jus ad bellum* and *jus in bello*?
- ICRC – 2019 Report on International Humanitarian Law and the challenges of contemporary armed conflict (see page 33)
- ICRC – 2015 Report on International humanitarian law and the challenges of contemporary armed conflicts (see pages 21-22)
- ICRC – 2011 Report on International Humanitarian Law and the challenges of contemporary armed conflicts (see pages 30-31)
- IRRC - Classifying the conflict: A soldier's dilemma (also available in French, Spanish and Russian)

- IRRC - Can "*jus ad bellum*" override "*jus in bello*"? Reaffirming the separation of the two bodies of law (also available in Spanish and French)
- IRRC - The equal application of the laws of war: a principle under pressure (also available in French, Spanish and Chinese)
- YIHL – Jus ad bellum, jus in bello and non-international armed conflicts
- JIB/JAB – The laws of war podcast

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