INTERNATIONAL LAW REGARDING THE CONDUCT OF WAR

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Summary

This article provides an overview of the body of international law, known as *jus in bello* or the law *in* war. The twentieth century saw the emergence of many of the principles of the law regarding the conduct of war, most notably those set forth in the Geneva Convention regime and the Hague Convention regime. The twenty-first century portends to see development of an apparatus to sanction those individuals who depart from these principles, as well as further development with regard to United Nations peacekeeping operations, protection of the environment, and internal conflicts. This article will attempt to give a general overview of the rules, developments, and future directions of the international law regarding the conduct of war.

1. Introduction

A body of international law, the *jus ad bellum*, establishes when a nation may be justified in declaring war or using force against another nation or, following the events of September 11, 2001, against a non-state actor. *Jus ad bellum* therefore creates limits to the act of going to war. In situations where military engagement may be justified,

international law does not leave the methods of combat entirely in the hands and at the discretion of the warring parties. In fact, international law prescribes a fairly detailed regime that regulates how nations are to conduct war. This body of law is called the *jus in bello*. Sometimes the term "international humanitarian law" is also used to describe the law regulating the conduct of war. *Jus ad bellum* and *jus in bello* together comprise what is generally referred to as the "law of war." The focus of this article is the *jus in bello* **(see *International Law and the Use of Force*).**

Jus in bello largely emerges from international treaties. However, important elements of the law regarding the conduct of war have crystallized into what is called "customary international law." Customary international law arises out of a general and consistent practice of states that is followed from a sense of legal obligation. Customary international law applies to all states. As a result, those elements of the *jus in bello* that are deemed to constitute customary international law (namely those that have been consented to or accepted by states either explicitly or implicitly though international practice) will apply to all nations, even those that have not signed international treaties regarding the conduct of war.

The content of *jus in bello* is also determined in part by the general principles common to the world's major legal systems. These general principles may arise from domestic law regulating military activities, domestic judicial or arbitral decisions, and perhaps even the content of domestic military operating manuals or rules of engagement. In fact, when either customary or treaty-based *jus in bello* fails to address a specific action, the international community has agreed that "the usages established among civilized peoples, the laws of humanity, and the dictates of public conscience" will determine the legality of that action at international law (the Martens Clause of the 1899 and 1907 Hague Conventions).

Jus in bello is particularly important in minimizing the effects of war, or at least restricting these to the armed forces of the belligerents. *Jus in bello* has had some success in this regard. It has made strides in limiting the impact of war on civilians, in safeguarding prisoners of war, in prohibiting the use of weapons designed to inflict unnecessary suffering, in protecting places of cultural and religious significance, and in mitigating the indiscriminate use of weapons. Many of these strides arose incrementally, building on religious doctrine and the literature of ancient Greece, Rome, and India. Nonetheless, the most rapid development of codified doctrines to ensure that war is waged in a rightful manner occurred during the twentieth century. War is no longer a free-for-all with no rules in which the ends of victory justify the use of any means necessary. Von Clausewitz's notion of war as bereft of normative perimeters, and of international law as a "self-imposed, imperceptible limitation . . . hardly worth mentioning," no longer prevails. This is not to deny, however, that gaps remain between the normative content of the *jus in bello* and the application of these norms to the daily experience of armed conflict.

The international community now finds itself at an important turning point in the development of *jus in bello*. Whereas the twentieth century saw the emergence of many of the principles of the law regarding the conduct of war, the twenty-first century portends to see development of an infrastructure and apparatus to sanction those individuals who depart from these principles. The International Criminal Court (ICC),

which entered into force on July 1, 2002, will provide a permanent apparatus to punish breaches of the *jus in bello*. Such breaches are called "war crimes." The use of criminal tribunals designed to punish egregious violations of international human rights law and sanction breaches of the *jus in bello* is giving rise to important linkages between the *jus in bello*, international criminal law, and human rights.

Evidence of these linkages emerges from the activities of the *ad hoc* criminal tribunals investigating mass atrocity in the former Yugoslavia and Rwanda that have built on and vastly contributed to the jurisprudence on war crimes established by the Nuremberg and Tokyo Tribunals. However, it is not only the enforcement of *jus in bello* that is receiving the attention of the international community. The scope of *jus in bello* has also expanded to cover the deliberate use of the environment as a tool of war and activities by United Nations (U.N.) personnel. It now also applies, in part at least, to internal conflicts (and not just international war).

2. Principles of the *jus in bello*

Much of the *jus in bello* has emerged in response to the horrors of war. As technologies of warfare have become more sophisticated and more destructive, there has been a corresponding acceleration of the legal regimes that prohibit impermissible methods of warfare. Principles of the *jus in bello* are developed in customary international law as well as conventional law.

2.1. Customary International Law

Four basic principles govern the law of war: necessity, proportionality, distinction, and humanity. Each of these principles has developed into a norm of customary international law **(see *Law Regarding Protection of the Environment During Wartime*).**

First, the principle of necessity inquires whether the target, weapon, or tactic is necessary in order to achieve a legitimate military advantage. This customary principle has also been codified in international agreements: the Declaration of St. Petersburg, written in 1868, stipulates that the "only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy."

Next, the principle of proportionality prohibits attacks (even necessary attacks) on military objectives when these are likely to have an effect on civilians or otherwise create suffering that outweighs the anticipated military advantage of the attack. This principle gave rise to the concept of collateral damage, by which the legality of a military intervention would at least in part derive from its collateral effects. Mitigating collateral damage is one of the reasons that "carpet bombing" (prevalent in World War II) has been superseded by more precise "smart bombs."

Third, the principle of distinction derives from the principle of proportionality. It requires an attacker to distinguish between civilians and civilian objects, on the one hand, and military objectives (combatants or objects) on the other, and to use weapons capable of distinguishing between the two. In all cases, customary international law

forbids reprisals against civilian populations for violations of the *jus in bello* by another state (unless the civilians are taking direct part in the hostilities). Here we see an interesting paradox: although technological advancements make weaponry more precise (and therefore better able to respect the principles of proportionality and distinction), the growing reliance on civilian activity and civilian industrial installations for the purposes of armed conflict may increase the number of lawful civilian targets.
Finally, the principle of humanity demands that armed forces use only the minimal force necessary to subdue the enemy.

2.2. Conventional Law

International treaties supplement and expand these customary principles **(see *International Trade Agreements*).** Treaties in the area of *jus in bello* can be divided into two broad categories generally referred to as "Geneva law" and "Hague law."

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