War 1, Law 0: The 21st Century Decline of Legal Restraint Against War

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Abstract

This paper investigates the decline of the relevance of *jus ad bellum*, or the law governing the right to war, in the 21st century. Despite its foundational role in international law, *jus ad bellum* presents a complex and discordant framework, exacerbated by conflicting state practices and institutional limitations. Drawing on historical insights and contemporary examples, the paper highlights the ambiguities surrounding key concepts such as anticipatory self-defence and humanitarian intervention, illustrating the tension between established legal norms and the actions of states. The case of the 2003 Iraq War serves as a focal point, exposing the erosion of legal standards as powerful nations prioritise self-interest over compliance with international law.

Additionally, the dysfunctionality of the United Nations Security Council, particularly its gridlock caused by the veto power of its permanent members, underscores the challenges facing the enforcement of jus ad bellum. Ultimately, this paper argues for a critical re-evaluation and reform of the legal frameworks governing the use of force, emphasising the necessity to align legal principles with the realities of international relations in order to promote justice, accountability, and global stability.

Introduction

Jus ad bellum, literally translating from Latin as 'the right to war', refers to the set of rules that govern the circumstances under which states may resort to war, providing justifications for the use of force. In this way, it contrasts with the broader 'law against war', which generally prohibits armed conflict. These rules are derived from a variety of international sources, as outlined in the Statute of the International Court of Justice, including international conventions, customary international law, general principles of law, and judicial decisions.[1] Since its inception centuries ago, *jus ad bellum* has evolved throughout history into the complex and wide-ranging body of law that governs the use of force today, with the United Nations Charter serving as its cornerstone.[2]

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[1] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) UNTS, ch 2, art 38(1).

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

However, in the midst of ongoing conflicts in Ukraine and Palestine, it becomes clear that international law is failing to provide the security and justice people around the world seek. Although the regime of *jus ad bellum* is foundational to global order and has in some form existed for centuries, it is a complex and discordant concept. As one scholar aptly states, 'international law has consequently no alternative but to accept war, independently of the justice of its origin'.[3] This highlights the inherent challenges in applying jus ad bellum in contemporary contexts. This essay will explore the development of the model over time; analyse the impact it has had on the global community and discuss the different elements that have made the concept what it is today. This paper will also argue that the right to war is a flawed and frictional notion and will highlight examples of its acrimoniousness in operation. It will also discuss controversial and disputed areas of international law and what this means for *jus ad bellum*.

***Jus ad bellum*: Historical insights for today's context**

Jus ad bellum is an enigma: it derives from many dissimilar sources which makes it difficult to define and understand. The foundations of modern recourses to war stem from Hugo Grotius. In 1625, his principles on the justice of war, maintained that war is justifiable only if the state faces imminent danger, and the use of force is proportionate and necessary.[4] The cracks in *jus ad bellum* began to show with the failed League of Nations period (1919-1928) and the Kellogg-Briand Pact (1928–1939): While both were widely ratified, they highlighted early signs of discord and ambiguity in the concept. The League of Nations did not prohibit war outright, and the Kellogg-Briand Pact only renounced war when used as an instrument of national policy – leaving open the possibility that war for other reasons could be permissible.[5] Crucially, both doctrines failed to prevent the Second World War, and the interpretation of permissible self-defence remained unclear. Following this, the UNC was drafted in 1945, and it is here that many of the rules regarding the right to go to war can be found.

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[3] William Edward Hall, *International Law* (Clarendon Press 1880) 52.

[4] Hugo Grotius, *The Rights of War and Peace*, vol 1 (Jean Barbeyrac and Richard Tuck eds, Indianapolis: Liberty Fund, 2005).

[5] General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (adopted 27 August 1928, entered into force 24 July 1949) 94 LNTS 57-63, art 1.

Incoherence and discordance in international norms: The case of anticipatory self-defence

Some norms on the use of force are more settled than others. For instance, Article 2(4) of the Charter is a 'law against the use of force', used to ensure that no unnecessary threat or force is being used 'against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations'.[6] This norm has been supported since its inception, and violations against it have been widely treated as such. However, it is subject to two exceptions – collective security as authorised by the Security Council (UNSC),[7] and self-defence.[8] It is within these exceptions that there are higher levels of controversy.

Armed attack threshold:

One condition for states to use defensive force is based on an 'armed attack threshold', which comes from the Resolution on the Definition of Aggression, wherein an incursion must pass a certain level of violence to be deemed an armed attack.[9] This has been supported by other institutional bodies like the International Court of Justice (ICJ), who adopted the threshold in *Military and Paramilitary Activities in and against Nicaragua*,[10] and again later in *Oil Platforms.*[11] However, some states have taken a much more lenient approach to the threshold for using defensive force and make no reference to an armed attack threshold, as explained by Hakimi and Cogan.[12] For example, in 2012 when Türkiye responded with armed force to stray Syrian mortar shells killing Turkish citizens,[13] some states encouraged Türkiye to exercise restraint,[14] but others wholeheartedly agreed and supported their right to defensive force.[15] The policy that states endorse in these circumstances is entirely in conflict with that of the UN, hence representing a clear example of the incoherence of *jus ad bellum* and

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[6] *UNC* (n 2), art 2(4).
[7] ibid art 24(1).
[8] ibid art 51.
[9] UNGA Res 3314 (XXIX) (14 December 1974).
[10] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 1.
[11] *(Iran v. United States)* [2003] ICJ Rep 161.
[12] Monica Hakimi and Jacob Katz Cogan, 'The Two Codes on the Use of Force' (2016) 27(2) European Journal of International Law 292.
[13] Martin Chulov, 'Turkey Strikes Syrian Targets after Cross-Border Mortar Bomb Kills Five' *The Guardian* (London, 3 October 2012) <www.theguardian.com/world/2012/oct/03/turkey-syrian-mortar-bomb> accessed 18 January 2022.
[14] UNSC (15 October 2012) UN Doc. S/PV.6847, 18-19.
[15] Matthew Weaver and Brian Whitaker, 'Turkey-Syria Border Tension' *The Guardian* (London, 4 October 2012) <www.theguardian.com/world/2012/oct/04/turkey-syria-threat-security-live> accessed 17 January 2022.

support for Hakimi and Cogan's 'Two Codes' theory.[16] Within their article, they continue in stating that 'although the institutions insist that the armed-attack threshold is law, they have never provided sufficient guidance on the level or kind of violence that satisfies that threshold. Rather, they have preserved considerable ambiguity when the armed-attack threshold is met'.[17] This again demonstrates such discordance, as international institutions which develop policies do not provide clear guidance on the policies themselves. Furthermore, the article highlights that when, in the same conflict, stray weapon fire crossed from Syria into Israel and caused damage to an Israeli military vehicle, 'Israel's forcible response was met with near silence'.[18] This shows further inconsistency with how these policies are treated, even horizontally between the states that engage with them against the will of the institutions.

Anticipatory self-defence:

Another controversial area of international law lies in the concept of anticipatory self-defence. Despite Article 51 theoretically requiring actual occurrence of an armed attack before a state can respond, in practice the nature and scope of this right has been interpreted with much wider meaning. In reality, it has become customary for states to enforce self-defence prior to an attack, the argument being that it would be 'absurd and unreasonable' for states to wait for their own demise with a 'suicide pact'.[19] Justification for anticipatory self-defence therefore lies in the idea that states would be digging their own grave in waiting to be attacked first, as it would be impossible to determine if they could maintain the military and financial resources to conduct a response. This was the approach also taken by the failed and highly controversial Bush Doctrine,[20] where the US were ready strike first despite no imminent threat, and regardless of uncertainty remaining as to the time and place of a feared attack. The doctrine disregarded uncertainties regarding the time and place of a feared attack, pushing the boundaries of anticipatory self-defence. This shift challenges both the wording of Article 51 of the UN Charter and the precedent set in the *Caroline* incident,[21] which was resolved through an exchange of diplomatic notes. In the *Caroline* case, it was established

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[16] *Hakimi and Katz Cogan* (n 12).
[17] ibid 271.
[18] ibid.
[19] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 412.
[20] The White House, 'The National Security Strategy of the United States of America: Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction' (September 2002) <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> accessed 17 January 2022.
[21] *The Caroline v. United States* 11 U.S. 7 Cranch 496 (1813).

that self-defence must meet strict criteria: the necessity must be 'instant, overwhelming, with no moment for deliberation and leaving no other choice'. Moreover, anticipatory self-defence opens several questions surrounding justice and opens the door to abuse of the doctrine – where is the line? How far in advance can it be anticipated? How could this function without violating Article 2(4), as well as notions of justice and peace? The answer to these questions is unclear and leaves self-defence open to various interpretations, which in turn weakens *jus ad bellum*.

Although the UN and other institutions are highly sceptical of any claims regarding the expansion into anticipatory self-defence,[22] particularly considering the Armed Activities judgment that has called its legality into question,[23] some states continue to openly challenge this restrictive position. A study by Reisman and Armstrong,[24] showed that several states have expressly claimed a right to anticipatory self-defence – without limiting that right to imminent attacks. This again highlights a potentially dangerous, frictional discordance in the law.

The integration of humanitarian intervention into *jus ad bellum*

The increasing acceptance of humanitarian intervention as an exception to Article 2(4) represents another contentious area that highlights the ambiguity and lack of consensus surrounding current legal rules among states. As defined by Holzgrefe: humanitarian intervention is 'the threat or use of force…aimed at preventing/ending widespread violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied'.[25] This action would also be without the permission of the UNSC, such as actions carried out by Vietnam in Cambodia in 1979, and actions taken by the US in response to Iraq's invasion in Kuwait in 1991. The main issue surrounding humanitarian intervention, however, is that it poses a great dissension with Article 2(4), and it is difficult to find legal justification for the protection of fundamental rights.

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[22] *Hakimi and Katz Cogan* (n 12) 283.
[23] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 168.
[24] Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', (2006) 100 AJIL 525.
[25] J Holzgrefe and Robert Keohane, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 18.

Intervention in another State, without the approval of the Security Council, principally goes against both collective measures and international peace and security, and therefore is not consistent with the purposes of the United Nations. While some supporters have tried to argue that humanitarian intervention is not actually aimed at violating the 'territorial integrity or political independence of a State', and so should be lawful, these justifications have been explicitly rejected cases like *Corfu Channel*,[26] and *Nicaragua*.[27] Consequently, humanitarian intervention has been dismissed as a valid ground for the use of force.

Despite this, state practice often reflects a clear defiance of these established laws. For instance, during the Kosovo intervention in 1999, very few states that participated in the bombing of Serbia relied on humanitarian grounds to justify their actions; the pleadings in *Serbia v. NATO members,*[28] illustrates the complexities and differing legal positions of the states involved, although the case did not reach the merits stage. This dissonance between the theoretical framework of international law and the practical realities of state behaviour underscores the weaknesses inherent in *jus ad bellum* and highlights its status as a fractured enigma.

The great divide between paper and practice

As earlier referenced, the 'Two Codes' theory',[29] provides us with a clear explanation of the discordance in our international law. In their article, Hakimi and Cogan distinguish between an 'institutional code' and a 'state code' and illuminate the imbalance and inconsistency extant between the two. While the former 'institutional code' represents the rules and emissions from institutional bodies, the latter comprises of the rules emitting from states themselves and how they play out in practice – of course, the two rarely correlate. The reason for this is that 'each code lacks a key attribute that the other retains',[30] and so neither one nor the other can prevail. It is this battle between the institutional code and state code, or alternately 'legal rules' and 'customary rules', that is the foundational cause of such disunity in our international law. The accuracy of this theory can further be supported by an illumination of some recent high-profile conflicts.

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[26] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4.
[27] *Nicaragua* (n 10).
[28] *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections, Judgment) [2004] ICJ Rep 279.
[29] *Hakimi and Katz Cogan* (n 12) 257.
[30] ibid 258.

The 2003 Iraq War is a key example of unlawful action, and an illumination of the neorealist readiness of states to diverge from *jus ad bellum* when it best fits their vies for power and self-interest. In this instance, self-defence had been cited as a primary justification for the attack, on the grounds that Iraq had posed the conjoined threats of mass destruction weapons and terrorism under the leadership of Saddam Hussein. However, such justification is apocryphal. Bush and Blair went ahead with their attack in clear defiance of the law and other states, as they had no authorisation from the Security Council, and they did not wait for weapons inspectors in Iraq to verifiably confirm that Saddam posed such a threat. France, for example, had made it clear that they saw 'no justification for a decision to resort to war',[31] and the Iraq Inquiry has also confirmed that there was no legal basis for the attack, fundamentally undermining the UN.[32] This transnational violation of *jus ad bellum* opens up a key question- if powerhouse states like the US and UK choose to ignore the doctrine, what does that say for its effectiveness? How can it be deemed a concordant doctrine if this is true? And what does this spell for the future of international law?

Further, discordance within the United Nations Security Council itself is another telling example of the issues within our international legal system. Due to the five permanent members on the Council, who hold the most power and influence along with a veto power, it is near impossible for resolutions to pass effectively. There is the frequent use of politically motivated vetoes, especially by the US and Russia, and there is often a gridlock position between the key institutions when deciding to intervene in other nations: though this is a prison of our own making that was inevitable with the way the Council, and the UN, was formulated. Today, this can be seen in Palestine, as well as Ukraine, as the Russian veto has left the Security Council in 'deadlock',[33] and unable to assist the Ukrainians against obvious war crimes. This inherent power imbalance entrenched within the very system crafted to aid nations truly encapsulates the status of our international law and *jus ad bellum* – fragile, bleak, and ineffective. How can justice ever be achieved for Ukraine when it is their aggressors who are dictating the very system who could help them?

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[31] 'Threats and Responses; Chirac's View, 'A Heavy Responsibility'' *New York Times* (New York, 19 March 2003) A14 <www.nytimes.com/2003/03/19/world/threats-and-responses-chirac-s-view-a-heavy-responsibility.html> accessed 24 September 2024.
[32] HC Deb 6 July 2016, vol 612, cols 883-885.
[33] Devika Hovell, 'Council at War: Russia, Ukraine and the UN Security Council' (*EJIL: Talk!*, 25 February 2022) <www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council/> accessed 24 September 2024.

Conclusion

Jus ad bellum serves as a foundational element of international law and the regulation of military force. However, this paper has demonstrated that it is a complex, fractured, and discordant doctrine that struggles to maintain its relevance in contemporary geopolitical contexts. Some norms are heavily disputed, and there is much discrepancy in the reactions of states to uses of force – this is particularly visible in the exceptions to Article 2(4) of the UN Charter, as self-defence is a contested concept, and the UNSC are frequently gridlocked due to political tactics by its five permanent members.

Much of *jus ad bellum* is controversial, such as the notion of humanitarian intervention and pre-emptive self-defence, and differing opinions and actions by states have created inharmonious laws, norms and rules, as has been shown by several examples from international law – as exampled through the willingness of states to act pre-emptively, like in the 2003 Iraq War, erodes established legal norms and raises critical questions about the legitimacy of their actions. Furthermore, the disconnect between the 'two codes' of institutional rules and state practices creates a dissonance that diminishes the credibility of the legal framework.

As we move further into the 21st century, it is crucial to reconsider the enigma of rules making up the frameworks governing the right to war. The complexities and contradictions of *jus ad bellum* signal an urgent need for reform that aligns legal principles with the realities of international relations. By bridging the gap between theory and practice, we can work toward a more coherent legal standard that upholds justice, accountability, and respect for human rights, ultimately fostering a more stable and peaceful global order.