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The meaning of 'ius in bello'

by

This article was written by guest author Jasper Doomen, Lecturer at Leiden University.

A traditional way to characterize the norms that govern the laws of war is that between 'ius ad bellum' (the right to engage in war) and 'ius in bello' (the law of armed conflict, i.e., the right which applies in a state of war). These notions may seem unproblematic. They seem to simply refer to the rules that determine the circumstances under which one is absolved of any fault for belligerence, and those that stipulate how one should act once a state of war is a reality. Serious problems emerge, however, once the status of these rules is critically examined.

To what does 'ius in bello' amount? The notion implies the possibility to judge whether the rules in a state of war have actually been observed, which, in turn, implies the existence of an authority that is to act as the court of justice. The problems with such a stance are twofold.

First, this state of affairs conflicts with the nature of war, which is, by definition, characterized by the *absence* of rules, or at least the nonobservance of rules if they are presumed to exist. This may appear to evidence a dogmatic stance on my part with regard to the meaning of 'war': why should war by definition be characterized by a lack of rules? I would argue that the observance of (enforceable) rules to mitigate or resolve the conflict is a sign of the war already being at an end. Second, it presupposes that the transgressor acts upon the possibility that at some point in the future, the war will end, whereupon the defeated party (presuming that this is also the party that has failed to act in accordance with the rules) will be judged. For simplicity, I will hypothesize a two-party conflict. Several parties may be involved, and various conflicts may constitute a war, but that does not affect the present line of reasoning.

In situations of 'ius in bello', the transgressor is not judged *before* the war has ended, since a judgment would make no sense prior to the war's conclusion. Additionally, at that stage it is not clear whether all relevant acts that are to be judged can be brought to the fore since additional perpetrations may take place in the course of the, *ex hypothesi*, ongoing war. Once the war is over, a *victorious* transgressor will still not be judged unless the conflict is limited to a relatively small territory and/or a small number of people, in which case one or more outside parties may serve as judge(s), which is predicated on the power of the party that is to be judged being limited to such an extent that a judgment against it will carry actual consequences. The issue of enforceability is manifest at this point.

'Ius post bellum' (the law after a war) is a more appropriate phrase to characterize the situation than 'ius in bello'. The Geneva Conventions, for example, only make sense if (1) parties observing the rules take into account the possibility that they will lose the war (thus already contemplating the 'post bellum' reality, and incorporating it into their considerations), while (2) there is an organization with enough power to – eventually – enforce the rules laid down therein (which constitutes the 'ius' part of the phrase, demonstrating, incidentally, the difficulties involved in enforceability at the international level).

Parties presume that they will be victorious, or that the war will never end. They may then take into consideration the temporary cessation of violent activities even where a (stable) state of peace is not taken to be a viable outcome. In that case, the 'ius' either (1) cannot have concrete effects (the victorious party not acknowledging an international court of justice, which is a relevant factor if it cannot enforce its verdict), or (2) can never be taken to refer to a real state of affairs (since the state of war, *ex hypothesi*, does not reach an end).

On the basis of the foregoing, 'ius in bello' cannot be maintained as it involves a contradiction in terms, and must be replaced by 'ius post bellum'. Basically the same analysis applies to 'ius ad bellum': here, too, acts can only be assessed after the state of war has come to a conclusion. The only – slight – difference with 'ius in bello' consists in the fact that parties that appeal to 'ius ad bellum' can be judged without a state of war ever being reached in the first place. This applies if they conform to the rules because they acknowledge the rules' legitimacy, on that basis abstaining from any belligerent acts. Even in this case, however, the question arises whether they do not simply do so on the basis of a cost-benefit analysis.

In the most consistent interpretation, then, 'ius in bello' and 'ius ad bellum' are dissolved into 'ius post bellum', the latter remaining the only potentially viable notion. I say '*potentially* viable' since its presence still points to the existence of 'international law' as a significant domain of law. I do not presume to be able to address all relevant aspects of this issue here, as the room to do so to the extent the subject-matter would require does not suffice. This is not my version of Fermat's notorious escape, as I have dealt with the topic in some detail elsewhere, but merely a reflection of my awareness that limitations to discussions such as the present one are necessary, so as not to tax the reader (presuming, hopefully not inappositely, that this point has not already been reached). Suffice it to say that the absence of enforceable rules does not contribute to the convincingness of the position of those who contend that international legislation should be considered a counterpart of legislation at the national level.

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