The Dichotomy of *Jus Ad Bellum* and *Jus Ad Bello* in the 21st Century: Its Relevance and Reconstruction

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Abstract

Classical international law recognizes a rigid, autonomous, and independent dichotomy between *jus ad bellum* and *jus in bello*, which can result in the possibility of a just war being carried out illegally or vice versa. The dichotomy is considered a paradox. This study aims to analyze the relevance of the *jus ad bellum* and *jus in bello* dichotomy in the 21st century and to offer a more precise reconstruction of the relationship between the two. The results show that the rigid dichotomy between *jus ad bellum* and *jus in bello* is no longer relevant since the boundaries between war and peace are increasingly blurred. Nowadays, the world has experienced more widespread asymmetric warfare, as well as the use of modern super weapons. The dichotomy is also considered very eurocentrism and creates a paradox in international law. On the other hand, both have disproportionate use of force against the law and are not justified by military necessity. The reconstruction of the relationship between *jus ad bellum* and *jus in bello* must be dynamic, holistic, and harmonious. There should not be a rigid dichotomy, nor a rigid integration, which always places *jus ad bellum* above *jus in bello* or vice versa. Reconstruction of the relationship between the two must be based on the principle that a just war must be carried out in a just manner.

Keywords: *jus ad bellum*, *jus in bello*, 21st century.

A. Introduction

The terms *Jus ad bellum* and *jus in bello* appear, among others, in a book entitled *De Jure Belli Pacis*, by Grotius, who is known as the father of international law (1300-1900). Grotius divides between a state of war (*jus in bello*) and peace (*jus ad bellum*).[1] In addition, Vitoria and Vattel also uses the same terms.[2] Kant, however, was the first to explicitly distinguish between the right to go to war and the right to war.[3] In Indonesia, Haryomataram distinguishes *jus ad bellum,* which regulates the

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1 Spindler Zsolt, "Just War Theories from Jus ad Bellum to Jus Post Bellum, Legal Historical and Legal Philosophycal Perspectives," *Kazan University Law Review* 4, no. 4 (2019): 262, https://doi.org/10.30729/2541-8823-2019-4-4-237-272.

2 Robert Kolb, "Origin of the Twin Terms Jus Ad Bellum and Jus In Bello," *International Review of the Red Cross* 37, no. 320 (1997): 554, 10.1017/S0020860400076877.

3 Spindler Zsolt, 248. See Robert Kolb, 557. See also Jasmine Moussa, "Can Jus Ad Bellum Override Jus In Bello? Reaffirming the Separation of the Two Bodies of Law," *International Review of the Red Cross* 90, no. 872 (2008): 966.

justification of the state using the use of force; and *jus in bello*, which is the law regulates behavior in war. *Jus in bello,* according to Haryomataram, is further divided into the Hague Laws (the conduct of war) and The Geneva Laws (the law on the protection of war victims).[4] This *jus in bello* is currently known as international humanitarian law (IHL).[5]

Jus ad bellum regulates peaceful situations. It assesses the legality of warring states. The use of force is prohibited as affirmed in Article 2(4) of the UN charter.[6] Therefore, only self-defense in Article 51 of the UN Charter and punishment in Chapter VII of the UN Charter that can be the justification for states to use forces against others.[7] These are the setting *jus ad bellum* in the United Nations era,[8] which undermines the principle of sovereign equality.[9] The UN Charter uses the term use of force, which has a broader meaning than war or armed conflict.[10]

Jus in bello literally means the law of war. It governs behavior in war. It regulates the relationship between hosting parties, and the relationship between warring and neutral states, methods and tools of war, protection of war victims, and law enforcement against parties who violate the IHL.[11] *Jus in bello* aims to protect those who have not participated or are no longer participating in armed conflicts and minimize unnecessary suffering in armed conflicts.[12] *Jus in bello* does not pay attention to the reasons of nations to go to war. Despite the reason is legal or illegal, rational, or irrational, international, or non-international armed conflict, *jus in bello* has no business. In other words, it does not judge or decide the right or wrong side,[13] nor does it assess the legitimacy of a war.[14] *Jus in bello* rules from the beginning to the end of a war.[15] When an armed conflict has gone too far, the IHL is applied equally to all conflicting parties because the IHL aims to reduce war

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4 KPHG. Haryomataram, *Pengantar Hukum Humaniter* (Jakarta: Raja Grafindo Persada, 2012), 5.

5 ICRC, "International Humanitarian Law Answers to Your Questions," *ICRC*, March 12, 2022, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf.

6 Article 2(4) of United Nations Charter.

7 Lain Scobbie, *Self-defence as an Exception to the Prohibition on the Use of Force* (Oxford: Oxford University Press, 2020), 156. See also Sefriani, *Hukum Internasional Suatu Pengantar* (Jakarta: Rajagrafindo Perkasa, 2021), 116-117.

8 Lain Scobbie, 157. See Geoffrey S. Corn, "Self-Defense Targeting: Blurring the Line Between the Jus Ad Bellum and the Jus In Bello," *International Law Studies* 88, no. 1 (2012): 58, 10.2139/ssrn.1947838.

9 Matthias Vanhullebusch, "Governing Asymmetries on the Battlefield," *The Chinese Journal of International Politics* 9, no. 3 (2016): 320, https://doi.org/10.1093/cjip/pow011.

10 Geoffrey S. Corn, 58.

11 Antoine Bouvier, "The Relationship between Jus ad Bellum and Jus in Bello: Past, Present, Future," *American Society of International Law Proceedings* 100 (2006): 108, http://www.jstor.org/stable/25660071.

12 Antoine Bouvier, 108.

13 Yustina Trihoni Nalesti Dewi, *Kejahatan Perang Dalam Hukum Internasional dan Hukum Nasional* (Jakarta: Radja Grafindo Persada, 2013), 36.

14 Yustina Trihoni Nalesti Dewi, 37.

15 Yustina Trihoni Nalesti Dewi, 37.

atrocities that cause unnecessary suffering in situations of armed conflict. Atrocities can be committed by anyone from both sides of a conflict.

Throughout the history of classical international law, *jus ad bellum* and *jus in bello* were understood separately, strict, autonomous, or mutually independent. The understanding that the two operate autonomously is firmly rooted in (1) legal literature, (2) state practice, (3) national and international court jurisprudence, and (4) some treaties. The principle of this dichotomy lies in the Statutes of Nuremberg and the Tokyo Trials. Both distinguish violations of *jus ad bellum* (crimes against peace) and *jus in bello* (war crimes) and in no other branch.[16] Crimes against peace are also known as crimes of aggression in the 1998 Rome Statute of the International Criminal Court (ICC).[17]

In addition, the dichotomy is evident in the 1949 Geneva Conventions and the 1977 First Additional Protocol (General Article 1), where states promised to respect and ensure respect for IHL "in all circumstances". The obligation is a reaffirmation of the difference between *jus ad bellum* and *jus in bello*. For Sandoz, the term "under all circumstances" prohibits parties "to present any reason to disrespect (IHL). Whether the war in question is "fair" or "unjust", aggression or self-defense should not affect the application of *jus ad bello*." The preamble to Protocol I of the 1949 Geneva Conventions, section 5 also states that the treaty must enter into force, without prejudice to a distinction based on the nature or origin of the armed conflict or on the causes adopted by or attributed to the Parties to the conflict. For Bugnion, the provision ends all arguments that dispute the dichotomy of the two. Recently, by identifying aggression (the most serious violation of *jus ad bellum*) and war crimes as separate crimes, the Statute of the International Criminal Court reaffirms the principle of autonomy and the distinction between the two.[18]

On the other hand, in its development, the dichotomy between *jus ad bellum* and *jus ad bello* raises many criticisms and challenges. There are at least five conditions where the dichotomy is opposed according to Bouvier. The five conditions referred to are related to aggression, humanitarian intervention, collective security operations, asymmetric conflicts, and war on terror.[19] The aggressor should not be entitled to immunity in *jus in bello*. On the other hand, troops that carry out humanitarian intervention and security operations under the UN Security Council should have more rights in *jus in bello*. In addition, the concept of *jus in bello* also needs to reconstruct asymmetrical wars or wars on terror considering the very unequal position of the hosting parties.[20]

Prominent criticisms were raised by Sir Hartley Shawcross, the prosecutor of the International Military Tribunal at Nuremberg (IMT) after the second world war.

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16 Antoine Bouvier, 109-110.
17 Article 8 of the 1998 Rome Statute on the International Criminal Court.
18 Antoine Bouvier, 109-110.
19 Antoine Bouvier, 109-110.
20 Antoine Bouvier, 109-110.

Shawcross argues that the killing of combatants in war is justifiable, only if the war is lawful. If the war is illegal, and carried out without a clear declaration, then the killings that occur during the war cannot be justified.[21] This opinion considers *jus ad bellum* and *jus in bello* one unit, where *jus ad bellum* will affect *jus in bello*.

Shawcross also considers *jus ad belllum* and *jus in bello* cannot be separated. If *jus ad bellum* is illegitimate, the purpose of war is immoral and illegal, then the *ipso facto* means used to fulfill that immoral goal are also illegitimate.[22] This opinion can be interpreted as testing the *jus in bello* through *jus in bellum*.

Interesting criticism comes from Megret who, although agrees that *jus ad bellum* and *jus in bello* are inseparable, argues that the legitimacy of *jus ad bellum* can be influenced by the poor performance of the state in *jus in bello*.[23] For example, the motivation for humanitarian intervention can be questioned if it is carried out by ignoring *jus in bello* in the intervention.[24] Such neglect can invalidate a good cause, or at least make us think twice about whether it was a good cause in the first place. Mégret further states that the war crimes commission could overturn the right to self-defense or at least seriously question the claim that someone is acting in the context of self-defense if she/he carries out *jus in bello* brutally.[25]

Further, Whitman says that the *jus ad bellum* and *jus in bello* dichotomy is being criticized in the face of 21st century armed conflicts. In the century, technology is being highly developed, and the availability of weapons of mass destruction has increased. The century is also marked by the end of the Cold War, the emergence of modern transnational terrorist networks, as well as the increasing involvement of non-state actors.[26] It can also be added to the use of unconventional tactics in asymmetric warfare, which often intentionally violates the *jus in bello* prohibition against non-combatants, even including the indiscriminate use of weapons of mass destruction,[27] increasing low-intensity conflicts, civil wars, and other organized violence are the factors above which is the background for questioning the relevance of the dichotomy of *jus ad bellum* and *jus in bello* strictly.

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21 Rachel E. VanLandingham, "Criminally Disproportionate Warfare: Aggression As A Contextual War Crime," *Case Western Reserve Journal of International Law* 48, no. 1 & 2 (2016): 234, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2245&context=jil.

22 Rachel E. VanLandingham, 237.

23 Frédéric Mégret, "Jus In Bello and Jus Ad Bellum" (Proceedings of the ASIL Annual Meeting, December 2008): 121-123.

24 Frédéric Mégret, 121-123.

25 Frédéric Mégret.

26 Eyal Benvenisti, "Rethinking The Divide Between Jus Ad Bellum And Jus In Bello In Warfare Against Nonstate Actors," *Yale Journal of International Law* 34, no. 2 (2009): 541, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/6586/22_34YaleJIntlL541_2009_.pdf?sequence=2&isAllowed=y.

27 Jeffrey P. Whitman, *Is Just War Theory Obsolete?* (New York: Routledge, 2013), 25.

Based on the fact that there is strong criticism of the dichotomy of *jus ad bellum* and *jus in bello* to define both as no longer relevant, this study aims to analyze in-depth whether the dichotomy of *jus ad bellum* and *jus in bello* is no longer relevant in the 21st century armed conflict; and is there another alternative legal construction of armed conflict that is better to overcome doubts about the *jus ad bellum* and *jus in bello* dichotomy in 21st century armed conflicts.

To achieve the objectives, this study explored and found several previous works. The first is Moussa[28] who tested whether the *jus ad bellum* could be positioned higher than the *jus ad bello*. The second is Fogt,[29] who examines the problems of *jus ad bellum* and *jus in bello* dichotomy in hybrid warfare by proposing the idea of *jus ante bellum*. The third is Mégret,[30] who takes the example of the practice of humanitarian intervention to examine the relationship between *jus ad bellum* and *jus in bello*. The fourth is Otieno, Wabuke, and Otieno[31] who found controversy in the ICC decision that merged *jus ad bellum* and *jus in bello*. The fifth is Harris[32] who examined whether the ICC has the power to decide the influences of *jus ad bellum* and *jus in bello*. The sixth is Bouvier,[33] who examines the relationship between *jus ad bellum* and *jus in bello* in the past, the present, and the future. The seventh is Pepperkamp,[34] who proposed the expansion to *jus ante bellum* and *jus post bellum*. Although there are similarities, this study has differences from previous studies because this study aims to examine the relevance of the *jus ad bellum* and *jus in bello* dichotomy in the 21st century armed conflicts and to look for the possibility of alternative legal constructions to be more effective and better that have not been covered in the previous studies. This article consists of three parts: introduction, analysis and discussion, and conclusion. The analysis and discussion section consist of two parts according to the purpose of the study: the dichotomy of *jus ad bellum* and *jus in bello* are rigidly irrelevant in the 21st century; and the reconstruction of the *jus ad bellum-jus in bello* relationship.

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28 Moussa, 967.

29 Morten M. Fogt, "Legal Challenges Or "Gaps" By Countering Hybrid Warfare - Building Resilience In Jus Ante Bellum," *Southwestern Journal Of International Law* 27, no. 1 (2021): 58, https://www.swlaw.edu/sites/default/files/2021-03/2.%20Fogt%20%5B28-100%5D%20V2.pdf.

30 Frédéric Mégret, 121-123.

31 Mbori Otieno, Emmah Wabuke, and Smith Otieno, "The Fission and Fusion in International Use of Force: Relating Unlawful Use of Force and the War Crime of Disproportionate Force Not Justified By Military Necessity," *Case Western Reserve Journal of International Law* 48, no. 1 (2016): 304-326, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2247&context=jil.

32 Thomas S. Harris, "Can The ICC Consider Questions On Jus ad bellum In A War Crimes Trial?", *Case Western Reserve Journal of International Law* 48, no. 1 (2016): 273-302, https://scholarlycommons.law.case.edu/jil/vol48/iss1/14.

33 Antoine Bouvier, 111.

34 Lonneke Peperkamp, "The Blurry Boundaries Between War Andpeace: Do We Need To Extend Just War Theory?," *Archives For Philosophy Of Law and Social Philosophy* 102, no. 3 (2016): 315-332, https://www.jstor.org/stable/45175323.

B. The Dichotomy of *Jus ad bellum* and *Jus in Bello* in the 21st Century

1. The Line Between War and Peace is Getting Blurry During the 21st Century

The 21st century is marked by a significant change in the character of armed conflict. The change did not happen instantly, but it started after the cold war, where the number of wars among states has been decreasing. Conventional war is usually started with a declaration of war, taking place between members of the armed forces, and ending with a peace treaty, as if it has become a thing of the past. In many situations, it is not clear whether an armed conflict qualifies as a war. Is the situation in Afghanistan still at war? What is the operation in Mali? Is a drone attack in Pakistan a war? What is the status of Russian presence in Ukraine?[35]

In today's legal terminology, the term *war* has been abandoned and has been replaced by armed conflict, action, or military action. Wars in the 21st century also take many forms and sizes such as peacekeeping operations, military occupations, war on terror, airstrikes outside the war zone, guerrilla attacks, and targeted killings. The phenomenon makes it difficult to separate war and a peace situation. Most of them are gray.[36] The boundaries between war and peace are increasingly blurred. On the other hand, while *jus ad bellum* and *jus in bello* regulate both, the dichotomy of the two becomes irrelevant.

a. The Rise of Asymmetric War

Another development in 21st-century warfare is the increasing involvement of non-state belligerents, who play different roles and have different interests (e.g., finance, control, or power) such as warlords, modern transnational terrorists, militias, mercenaries, and private military corporations.[37] It results in the emergence of asymmetric warfare, where there is an imbalance of military power between the warring parties. For example, non-state militias wage guerrilla warfare against the national army.[38] In these asymmetrical civil wars, which are increasing in numbers during the 21st century than international wars, rebels are not protected by *jus in bello*. They will still be prosecuted under national law only for participating in combat, even when they refrain from attacking civilians.[39] In civil war, there is no dichotomy of *jus ad bellum* and *jus in bello,* or warring parties' equality.[40]

Another example of asymmetric warfare is when the United States attacked Al Qaeda in Afghanistan. It is not clear whether it falls into the category of peace or

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35 Lonneke Pepperkamp, 317.
36 Lonneke Pepperkamp, 317.
37 Lonneke Pepperkamp, 317.
38 Lonneke Pepperkamp, 317.
39 Tamar Meisels, "Fighting for Independence: What Can Just War Theory Learn from Civil Conflict?," *Social Theory and Practice* 40, no. 2 (2014): 305, https://www.jstor.org/stable/24332353.
40 Tamar Meisels, 305.

war.[41] In an asymmetrical war like that, it is unlikely that the war will start with an official declaration from the representative of a state at any given time.[42] Political decisions in war also tend to develop bottom-up, not top-down as in conventional wars. It makes the situation unclear whether to enter peace or war. Another reality of contemporary asymmetric warfare is that war is increasingly commercialized, making it a potentially lucrative endeavor for the belligerents and other actors. It has an impact on the protracted war either for high or low intensity. It also shows that only a few wars have a clear beginning and end today.[43] The ambiguity of a condition of war or peace results in the irrelevance of the rigid dichotomy of *jus ad bellum* and *jus in bello*.

Asymmetric war not only blurs the line between war and peace but also creates inequality in the legal standing of parties, which is the goal of *jus in bello*. In the US global campaign against terrorism, the NATO war in Afghanistan, the Second Gulf War, as well as Israel's wars in Lebanon (2006) and Gaza (2008-2009),[44] non-state actors do not get combatant immunity as enjoyed by members of the state armed forces. International law is not sufficient to protect non-state actors in asymmetric warfare.[45] The dichotomy of *jus ad bellum* and *jus in bello* is no longer relevant in the symmetrical wars that are rife in the 21st century because only one party receives the status of *jus in bello*.

b. Use of Modern Warfare Technology

In the 21st Century, the development of war technology is extraordinary. The use of modern warfare technologies such as autonomous weapons (AWS), drones, artificial intelligence weapons, nano weapons, as well as robots have also made the dichotomy of *jus ad bellum* and *jus ad bello* irrelevant, especially regarding the start of the war and the conventional evaluation of *jus ad bellum* proportionality. States that use AWS in self-defense will almost never be able to sue for a violation of *jus ad bellum* proportionality because the AWS is considered property. It cannot die like humans. Therefore, its destruction is considered less serious, only as property loss.[46] When it is difficult to determine the proportionality of modern weapons, it will also be difficult to finally judge the legality of *jus ad bellum*.[47] It makes the rigid dichotomy of *jus ad bellum* and *jus in bello* irrelevant.

c. The Dichotomy of *Jus Ad Bellum* - *Jus In Bello* is a Western Cultural Heritage

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41 Ryder Mckeown, "Legal Asymmetries in Asymmetric War," *Review of International Studies* 41, no. 1 (2015): 118, 117-138. 10.1017/S0260210514000096.

42 Muqarrab Akbar and Mahdi Zahraa, "War against Terrorism: Legality of the US Invasion of Afghanistan," *Pakistan Horizon* 68, No. 3/4 (2015): 93, https://www.jstor.org/stable/44988239.

43 Lonneke Pepperkamp, 317

44 Ryder Mckeown, 118.

45 Tamar Meisels, 305.

46 Nathan Leysd, "Autonomous Weapon Systems, International Crises, And Anticipatory Self-Defense," *Yale Journal of International Law* 45, No. 2 (2020): 400-401, http://hdl.handle.net/20.500.13051/6745.

47 Eyal Benvenisti, 541.

The dichotomy of *jus ad bellum-jus in bello* arises due to disappointment with the concept of just war originating from western Christianity, since Roman and medieval times, which only cares about *jus ad bellum*. Saint Augustine states that it is the fault of the opposing side that compels the wise to wage a just war. The real goal of war is peace.[48] Thomas Aquinas, in the Middle Ages, put forward three criteria for a just war: (1) it must be carried out under the authority of a ruler rather than a private individual; (2) must have a just reason, namely in order to avenge the fault; and (3) it must be imbued with the right intention to promote good or avoid evil.[49] Medieval just war concept only focuses on the reasons for war that must be just, no matter how the war is fought, including when it is carried out very brutally.

In the late Middle Ages, the dimensions of *jus in bello* started to be discussed. Francisco de Vitoria claims that war may be fair on both sides when 'there is truth on one side and ignorance on the other'.[50] Hugo Grotius, popularized the issue of *jus in bello* in parallel with *jus ad bellum*. Grotius states that the European just war that prevailed throughout the Christian world was mostly carried out in a barbaric manner. When guns were raised in the name of just war, all respect for divine and human laws was discarded, as if humans were from that moment authorized to commit all crimes without restraint.[51]Grotius argues that moderation in just war is necessary to the laws of nature. To reduce excessive war by rendering equity and non-combatants such as children, women, priests, scholars, and merchants (all potentially innocent parties) should not be attacked, except for some extraordinary reasons and for the safety of many people.[52]

Emmerich de Vattel further developed what his predecessors put forward by putting forward the principle of equality of parties to the conflict to strengthen the idea that war can occur on both sides. De Vattel emphasized the necessity of reducing casualties during war and not inflicting unnecessary damage, as this was immoral and was condemned by the laws of nature. De Vattel was the first to express the idea that the laws of the nation's gave authority to both warring parties regardless of the cause. This is the original prototype of the *ad bellum/in bello* separation, whereby, being considered equal, whatever is permitted to one under the circumstances of war is also permitted to the other.[53]

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48 Lonneke Pepperkamp, 315.

49 Zhuo Liang, "Chinese Perspectives on the Ad Bellum/In Bello Relationship and a Cultural Critique of the Ad Bellum/In Bello Separation in International Humanitarian Law," *Leiden Journal of International Law* 34, no. 2 (2021): 305, 10.1017/S0922156521000054.

50 Zhuo Liang, 305.

51 Zhuo Liang.

52 Zhuo Liang.

53 Zhuo Liang, 306.

In its development, the rise and prevalence of legal positivism in the nineteenth and early twentieth centuries has removed non-legal elements from legal discourse, including the concept of just war from natural law, which is considered pure morality and ethical issues, not a legal problem. At this point, the correlation between just war and international law was ended. From the perspective of legal positivism, the whole system of natural law is nothing more than a moral system that is shaped by ethics.[54]

George Davis states that war is an inherent right of the state, for whatever reason, is at the discretion of the authorities, and international regulation has no right to interfere with it. This opinion makes international regulation fail to produce legal instruments that distinguish between legal and illegal use of force. International regulation has only succeeded in issuing codifications of international laws of war such as the Geneva Conventions of 1864 and the Hague Conventions of 1899 and 1907, which only regulate war behavior, not refer to the justice of war (ethical issues). The legality of waging war is an issue that has not been regulated by international regulation.[55] In the era, there was the opposite of the medieval just war era, which only focused on *jus ad bellum*. The focus is only on *jus ad bello*. The state is free to go to war for any reason as a right attached to it. It shows the great influence of the positivists in creating the dichotomy of *jus in bello* and *jus ad bellum*.

In the era of the League of Nations, where Western-dominated international regulation began to limit the use of force with substantial limitations, *jus ad bellum* re-emerged in international regulation discourse, although no longer in the context of war, just ethics.[56] This restriction culminated in the UN Charter that affirms *jus ad bellum* in article 51.

The core instruments of International Humanitarian Law (IHL) developed since de Hague and Geneva codifications focused on equal application to both parties of a conflict regardless of their reasons to have a war. General Article 1 of the 1949 Geneva Conventions affirms that the convention applies in 'all circumstances'.[57] Obviously this is the dichotomy of *jus ad bellum* and *jus in bello*. The ICRC categorically denies the relevance of the just war argument in the application of IHL. Whether a war is "fair" or "unfair" and aggression or self-defense, it does not affect the equality of the warring parties to abide by *jus in bello*.[58] This is also reaffirmed in Additional Protocol I to the Geneva Conventions.[59] Protocol I does not distinguish between the parties to the conflict based on the cause of the armed

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54 Zhuo Liang.

55 Zhuo Liang, 307.

56 Robert Kolb, 558.

57 Article 1 of Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949.

58 ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2016), 61, para. 186.

59 ICRC, para. 186.

conflict.[60] This provision clearly prohibits *jus ad bellum* to thwart the application of *jus in bello*.[61]

It is no coincidence that all the signatories to the Geneva Conventions of 1864 were western and Christian states, such as France, Belgium, Denmark, Hesse, Italy, the Netherlands, Prussia, Portugal, Switzerland, Spain, and Württemberg.[62] Non-Western participation was far from sufficient, even until the 1949 convention.[63] The IHL legal regime was heavily influenced by Western culture and European powers until the 1970s.[64] It is a fact that the ICRC, which functions as 'the custodian of *jus in bello* around the world', is an organization originating in a western state, Switzerland, whose membership is open exclusively to Swiss citizens.[65] It is not surprising that Western culture and values dominate its formation.[66]

On the other hand, other traditions, or cultures, such as Islam, China, India, and Africa, have developed their own approaches to the laws of war.[67] This tradition does not create a rigid dichotomy between *jus ad bellum* and *jus in bello*. Islam allows war only in the context of self-defense known as *daf'u as-shail*. It is defined as an effort to defend oneself from unjust attacks on life and property. It is explained in the Quran, Chapter Al-Hajj verse 39. The verse confirms that those who are persecuted and oppressed (battled) are allowed to fight back. It is also added that if war is unavoidable, then Islam forbids doing it by exceeding the limits as stipulated in Chapter Al Baqarah 190: *"And fight in the way of Allah, to defend yourself and the honor of your religion, those who fight you, but do not transgress and do not kill women, children, the elderly, the blind, the lame, and the people who have nothing to do with war. Indeed, Allah does not like those who transgress the limits by violating ethics."*

The ethics of war in Islam very clearly upholds the ethics of war which is exemplified by the Prophet who never attacked the enemy without giving a fair warning beforehand.[68] War in Islam is an alternative when all peace efforts fail. War is not a goal in Islam, but it is a medium for preaching as well as an effort to gain peace. Islamic troops are not allowed to kill non-combatants nor damage the environment by destroying trees or killing livestock. They are also not allowed to

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60 Preamble of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 1977.

61 Zhuo Liang.

62 Zhuo Liang, 292.

63 F. Mégret, *The Universality of the Geneva Conventions* (Oxford: Oxford University Press, 2015), 679.

64 Zhuo Liang, 307.

65 Article 2(1) and Article 7(1) of the ICRC Statutes.

66 Zhuo Liang, 292.

67 Zhuo Liang, 293. See also Zulfikri Sidik, Dian Santoso and Diah Widhi Annisa, "Tinjauan Fiqh Jinayat dan Hukum Pidana terhadap Pembelaan Terpaksa yang Melampaui Batas dalam Tindak Kejahatan," *Journal of Indonesian Comparative Syaria'h Law* 3, no. 2 (2020): 207, http://dx.doi.org/10.21111/jicl.v3i2.5386.

68 Mohammad Farid Fad, "Reformulasi Ius Ad Bellum dan Ius Ad Bello dalam Perspektif Hukum Islam dan Hukum Humaniter", *Al Ahkam* 16, no. 1 (2020): 46, http://dx.doi.org/10.37035/ajh.v16i1.2688.

commit atrocities against prisoners of war.[69] The Messenger of Allah forbade the killing of women, children, the elderly, *usafa* (laborers), and religious leaders. They are the principle of protection in Islam.[70]

In the Chinese paradigm, the relationship between *jus ad bellum* and *jus in bello* is very harmonious: *Jus ad bellum* assimilate *jus in bello* but does not destroy it; and *jus in bello* tames *jus ad bellum* but does not degrade it. They are like the *yin* and *yang* of just war, inseparable, interconnected, and interdependent, forming a unified whole to serve world peace.[71] The practice in China does not divide *jus ad bellum* and *jus in bello* rigidly. The application of human values was entrusted to the belligerents to conduct the war justly so that the Chinese could hardly realize the moral need for *ad bellum/in bello* segregation.[72]

Thus, cultural diversity in understanding, interpreting, and applying concrete norms of the IHL should not be ignored because international law does not only originate from the West.

d. The Dichotomy of *Jus ad Bellum* and *Jus in Bello* is a Paradox of International Law

This dichotomy is said to be paradoxical at least for several reasons. First, it separates war and peace, while nowadays it is increasingly difficult to separate war and peace. The effect of this division makes not all acts of death and destruction committed in illegal wars illegal, let alone crimes.[73] The state may violate *jus ad bellum* but at the same time act in full accordance with *jus in bello*, or vice versa. Second, on the one hand, international law prohibits or limits war with jus ad before but, on the other hand, *jus in bello* does not prohibit war nor does it question the motivation of states to go to war.[74] Third, based on the rule of law *ex injuria non-oritur jus*, a person is prohibited from profiting from the crime he/she has committed.[75] However, this does not apply when there is a rigid *jus ad bellum-jus in bello* dichotomy, where a head of state who orders troops to carry out aggression, and attacks other states illegally, benefits from the introduction of the *jus in bello* regime even though the war ultimately kills hundreds or even thousands of soldiers from victim states, also incur collateral damages such as incidental deaths of civilians and destruction of civilian property.[76] Based on *jus in bello*, soldiers from the aggressor state are still entitled to benefits such as the immunity

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69 M. Hamdan Basyar, "Etika Perang dalam Islam dan Teori Just War," *Jurnal Penelitian Politik* 17, no. 1 (2020): 24, https://doi.org/10.14203/jpp.v17i1.854.

70 Abdul Basith Junaidy, "Perang Yang Benar Dalam Islam," *Al-Daulah: Jurnal Hukum dan Perundangan Islam* 8, No. 2 (2018): 498–500, https://doi.org/10.15642/ad.2018.8.2.486-512.

71 Zhuo Liang, 315.

72 Zhuo Liang, 315.

73 Van Landingham, 216-217.

74 Sefriani, "Perang dalam Hukum Internasional: Suatu Perbandingan antara Piagam PBB dan Hukum Humaniter Internasional," *Mimbar Hukum* 6, no. 44 (2003): 73.

75 Moussa, 966.

76 Van Landingham, 215.

of a combatant in *jus in bello*. On the other hand, soldiers who are defending themselves have the potential to be hit by a *jus in bello* violation which should never have happened if they had not been attacked by the aggressor first. It is paradoxical, therefore, how can the soldiers of the aggressor state have the same benefits or rights as the soldiers of the state that was forced to defend against the aggression?[77] Although this dichotomy is based on practical humanitarian reasons, it becomes a paradox, questioning the justice side of the victim being attacked, the logical and moral side,[78] keeping in mind that no one will be liable for death and collateral damages caused by military operations carried out in accordance with the aggressor state if they do so in accordance with *jus in bello*.[79]

2. Reconstruction of the Relationship *Jus ad Bellum - Jus in Bello*

It is not a simple thing to reconstruct the relationship between *jus ad bellum* and *jus in bello*, considering that their relationship is the focus of all problems in the moral of war.[80] Theoretically, *jus ad bellum* and *jus in bello* look different; but, practically, both have similar points, especially regarding the interpretation of the principles of proportionality and necessity.[81] Thus, the two can actually be fused.[82] One example of evidence of the urgency of the fusion is related to the use of disproportionate force that is not justified by military necessity in an act of self-defense or aggression. Beforehand, it must be understood that both *jus ad bellum* and *jus in bello* both apply the principles of proportionality and necessity.

The unlawful use of force by a state or non-state entity is a violation of the United Nations Charter. It is recognized as *jus cogens* in the ICJ decision on the case of Military and Paramilitary Activities (Nicaragua v. US), Judgment, 1986.[83] The use of legitimate use of force according to the UN charter is when a state conducts self-defense as regulated by Article 51 of the UN Charter or in the context of punishment regulated by Chapter VII of the charter.

In *jus ad bellum* the use of force for self-defense must be strictly limited to defensive purposes.[84] Legitimate acts of self-defense can become unlawful when they violate the principle of proportionality required by *jus ad bellum*, namely that the use of force must be proportionate to the aggressor's initial attack. On the

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77 Nancy Amoury Comb, "Unequal Enforcement of the Law: Targeting Aggressors for Mass Atrocity Prosecutions," *Arizona Law Review* 61, no. 1 (2019): 158, https://scholarship.law.wm.edu/facpubs/1926.

78 Moussa, 966.

79 Van Landingham, 231.

80 Nancy Amoury Comb, 156,

81 Otieno, 313. See also Enzo Canizzaro, "Contextualising Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War," *International Review of Red Cross* 88, no. 864 (2006): 781, 10.1017/S1816383107000896.

82 Otieno, 303.

83 *Military and Paramilitary Activities, Nicaragua vs United States, Judgment, I.C.J. Rep. 14, 100 (1986*), paragraph 190.

84 Otieno, 309.

other hand, the disproportionate use of force will also violate *jus ad bello* when the attack causes excessive losses to civilians and civilian objects compared to the military gains gained.[85]

Thus, it can be concluded that the principle of proportionality is a similar point of *jus ad bellum* and *jus in bello*. In *jus ad bellum*, this principle measures the legitimacy of strategic objectives in the use of force for self-defense. In *jus in bello*, this principle measures the legitimacy of any armed attack that causes civilian casualties. The proportionality requirement in *jus ad bellum* is based on the superior right of the attacked state over the aggressor. The *jus in bello* regulates the methods and warfare. The principles of equality of the belligerents to prioritize human values is the main consideration.[86] *Jus ad bellum* aims to state officials, policymakers, and decision-makers to go to war; *jus in bello* aims to members of the armed forces who are directly involved in combat on the ground. A similar point tries to act as a restraint on activities that would be considered legally unjustifiable. *Jus in bello* has well established that the means and methods of warfare are not limitless.[87] *Jus ad bellum* limits the self-defense state to consider factors such as the damage caused to the aggressor state by its defense action, the means used by the state acting in self-defense, and the duration of the entire military operation.[88] It is not clear how far the two concepts can operate separately. If the use of force is not required, then the action is disproportionate. If it is disproportionate, it is difficult then to see the necessity.[89]

The next melting point is related to the principle of necessity, where both *jus ad bellum* and *jus in bello* relate action to its goal. The damage is required not to exceed what is necessary to achieve the intended purpose.[90]

The fusion of *jus ad bellum* and *jus in bello* is necessary to face some situations. For instance, the use of violence that is not in accordance with the UN charter has been known as a crime of aggression. The facts show that it is very difficult to prosecute state officials for violations of *jus ad bellum* (crimes of aggression) in the ICC forum. It is no exaggeration to say that it is almost impossible to prosecute the individual leader of the aggressor state who orders the disproportionate use of unlawful force and is not justified by military necessity.[91] A leader of a state who orders the start of a war of aggression has actually committed the highest international crime that is different from other war crimes because the crimes contain the accumulation of other crimes as a whole, considering that everything that happens on the battlefield begins with his order to wage war.[92] The

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85 Otieno, 311.
86 Enzo Canizzaro, 782.
87 Article 35 of Additional Protocol l Geneva Conventions of 12 August 1949.
88 Military and Paramilitary Activities, para.237.
89 Muqarrab Akbar, 93.
90. Otieno, 312.
91 Otieno, 315.
92 Otieno, 316.

Nuremberg and Tokyo international tribunals (IMT) that tried Nazi and Japanese architects in World War II have formulated crimes against peace, crimes that give individuals responsibility for illegal wars. The IMT found twelve defendants guilty of crimes against peace at the time. But after the IMT Nuremberg and Tokyo, other international courts have never dealt with crimes of peace or aggression again. The 1998 Rome Statute has defined aggression as one of the four most serious crimes of concern to the international community but has left it undefined and subject to future jurisdictional requirements.[93] It must be admitted that these crimes against peace or aggression are the most political of international crimes.[94] It is necessary for the role of the security council to determine if a situation of aggression has occurred so that it is considered impossible to become the jurisdiction of the ICC.[95]

Amendment to the Rome Statute through the 2010 Kampala Agreements added article 8bis to define the crime of aggression. This article reads as follows.

> *"1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*
>
> *2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war."*

The article refers to Security Council resolution 3314[96] even though this amendment is still not as expected, it is still difficult to bring the state leaders to the offense of the crime of aggression in the ICC forum.

Considering that ordering the crime of aggression is a crime with the greatest impact on humanity, it is ironic that the state leaders are acquitted of punishment for what they have done. It is true that theoretically a national leader can be held responsible for *jus in bello* violations by the troops through the theory of command

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93 Van Landingham, 239.

94 Beth van Schaack, "U.S. Policy on the ICC Crime of Aggression Announced," *Just Security*, March 12, 2022. http://justsecurity.org/22248/u-s-policy-icc-crime-aggression/.

95 Zachary D. Nichols, "The International Criminal Court's Proposed Jurisdiction Over The Crime Of Aggression: Inapplicable In Ukraine And Beyond," *Transnational Law & Contemporary Problems* 25, no. 1 (2015): 184, https://www.proquest.com/scholarly-journals/international-criminal-courts-proposed/docview/1789775048/se-2.

96 Zachary D. Nichols, 184.

responsibility, but it is quite difficult to prove since *jus ad bellum* decision makers usually do not carry out military operations governed by *jus in bello*.[97]

Therefore, one solution that can be proposed is to merge *jus ad bellum* and *jus in bello* so that it can include the use of unlawful force as a war crime, as regulated in Article 8 (b)(iv) of the 1998 Rome Statute on the ICC.[98] Attacks carried out by states as part of a war of aggression or in self-defense must be analyzed under the strict requirements of the Rome Statute on individual criminal responsibility. However, since the origin of the crime is clear from *jus in bello*, a clear combination emerges with *jus ad bellum*. This is where that fusion can be built to prevent impunity as well as deter people who try to use the gaping hole in the crime of aggression as an advantage to commit war crimes.[99]

Even though the integration is required, the *jus ad bellum* and *jus in bellu*m dichotomy does not have to be completely canceled. Many parties claim to have just wared refuse to admit that they also have equal rights and obligations as their enemies, which they consider unfair. In the name of the legal *jus ad bellum*, the softening of the *jus in bello* is demanded.[100] The so-called concept of aggressor discrimination is proposed, which gives a wider *jus in bello* discretionary margin to the legally belligerent party. Conversely, it provides a more limited *jus in bello* discretionary margin to the illegal party.[101] Cases of humanitarian intervention and the global war against terrorism are exemplified as 21st century armed conflicts that allow expanding the boundaries of *jus ad bellum* and sacrificing *jus in bello*.[102] The concept has the potential to invite debate on the kind of discretion given and the party with the right to give discretion. Other questions that may arise include the authority to decide whether discretion is exercised legally and the potential to be a *jus in bello* offense in the future. For instance, there are many criticisms of the attacks by the US-led coalition in Afghanistan and Pakistan, which are alleged to have violated *jus in bello*. In fact, the aggressors can justify the use of force under *jus ad bellum*.[103] It can also be added that it is assumed that if this concept is accepted, each state tends to think the cause of the war it is doing is just and uses every ambiguity to its advantage.[104] States that are attacked will retaliate with

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97 Van Landingham, 233.

98 Article 8(b)(iv) of the Rome Statute uses language similar to AP 1 to discuss war crimes: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

99 Otieno, 318.

100 Harris, 273.

101 Harris, 275.

102 Van hullebusch, 310.

103 Muqarrab Akbar and Mahdi Zahraa, 99. Violations of jus in bello committed by coalition forces include US airstrikes on October 3, 2015 that destroyed the MSF (Médecins Sans Frontières) hospital in Afghanistan's northern Kunduz province. The attack killed 22 people.

104 Shai Dothan, "When Immediate Responses Fail," *Vanderbilt Journal of Transnational Law* 51, no. 4 (2018): 109, https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1113&context=vjtl.

harsh measures that violate the limits of *jus in bello*[105] because they also feel the need for fairness. Finally, the concept can plunge both sides into horrific war crimes.[106] No state, especially the aggressor will comply with *jus in bello* if it knows it will not benefit from it.[107] Subordinating *jus in bello* to *jus ad bellum* without strict provisions regarding discretion in the concept of discrimination against aggressors is not a good alternative because it can return to the medieval just war concept which ignored behavior on the battlefield if their reasons for fighting were considered fair by church leaders so that there was brutality on the battlefield.[108]

On the other hand, subordinating *jus ad bellum* to *jus in bello* is also inappropriate because of the potential to increase the use of armed violence, when attention only focuses on war behavior without strictly limiting the reasons or motivations for war. Experience shows that when international law does not limit warring states, considering war as an inherent right of the state. States, especially the major states, will very easily commit violence against others, even to the point of colonization of western nations in Asia and Africa.

Therefore, the reconstruction of the relationship that the study proposes is a dynamic, holistic, and harmonious relationship. The relationship between the two depends on the situation that occurs is a rigid dichotomy, nor is it a rigid integration. It should always place *jus ad bellum* above *jus in bello* or vice versa. For example, the need for accommodation to the principle *ex injury non oritur jus,* where some *jus in bello* provisions should apply to all hosting parties. However, some *jus in bello* benefits should be rejected for aggressors, especially for state leaders who order attacks that cannot be accepted based on *jus ad bellum* because their orders resulted in many casualties. On the other hand, it is necessary to doubt the motivation of warring states when they claim what they are doing is just war, not violating *jus ad bellum* but carrying out the war brutally, violating *jus in bello*. At this point, international law can invalidate the justification of the enemy's *jus ad bellum*. The study is of the position to agree with Megret that it is possible for the legality of war to be canceled when the war is carried out without heeding *jus in bello*.[109] The conditions in this exposure indicate the need for flexibility in the relationship of *jus ad bellum* and *jus in bello*. Changes in the rigid dichotomy to flexible ones according to the facts on the ground can be made by ICC judges or other court judges if there is no amendment to the existing humanitarian rule. Courts can apply sociological jurisprudence theory, where court decisions can function as a tool as engineering, can change the behavior of the warring parties

105 Shai Dothan, 1092.
106 Shai Dothan.
107 Nancy Amoury Combs, 159.
108 Nancy Amoury Combs, 158.
109 Frédéric Mégret, 121-123.

not to carry out brutal acts that violated *jus in bello* even though the reason for starting the war initially obtained legality from *jus ad bellum* because its legality could be canceled due to such brutal acts.

Regarding the reconstruction of this rigid dichotomy, there are quite several suggestions, including changing the dichotomy to a trichotomy consisting of *jus ad bellum*, *jus in bello,* and *jus post bellum*.[110] There are also discussion on the legal tetrachotomy: *jus ante bellum, jus ad bellum, jus in bello,* and *jus post bellum.*[111] *Just ante bellum* is applied just before the war, while *jus post bellum* begins right after the war ends and peacetime begins. Both are often referred to as a transitional period between peace and crisis, which is very risky for human rights violations to arise.[112] *Jus ante bellum* will seek to provide a legal framework to avoid crises and wars and to prepare for armed conflict. *Jus post bellum* seeks to restore peace and stability by creating a "just peace" or at least peace that is accepted and/or persists without returning to crisis or war.[113] Of course, it requires further study and in-depth analysis since it is not included in the scope of this study.

Apart from the emergence of the new discourse, the most important thing is that the reconstruction of the relationship between *jus ad bellum* and *jus in bello* in the future does not have to be rigid as is currently happening. It must be dynamic, holistic, harmonious, and based on the moral principle that war must be fought justly and in a fair manner. A just war gives no leeway for his side to violate *jus in bello*. On the other hand, an unjust war should not result in immunity, especially for the leaders of states who ordered the unfair war to be carried out. Troops who are victims of an unfair war, however, must not overstep their bounds in self-defense or anticipate the attacks of the aggressor. A just war that is carried out brutally against *jus in bello* can question the motivation or legality of *jus ad bellum*. Considering that the current rules of humanitarian law still apply a rigid dichotomy and changes can take a long process and a lot of energy, the courts can make innovations. The role of the ICC or other court judges in settling cases of violations of humanitarian law is very necessary in terms of the implementation of the reconstruction of the relationship *jus ad bellum* and *jus in bello* in a flexible, harmonious, dynamic, and holistic manner. The judge can provide substantive justice. Judges are not confined to a legalistic positivist mindset but look at the facts on the ground based on the moral principle that war must be fought fairly and in a just manner. At this point, judges can become agents of change through their decisions; and make law as a tool of social engineering, changing the behavior of parties who are to carry out a just war fairly.

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110 Van hullebusch, 311.
111 Morten M. Fog, 58.
112 Morten M. Fog, 58-59.
113 Morten M. Fog, 72.

C. Conclusion

The rigid dichotomy of *jus ad bellum* and *jus in bello* in the 21st century is no longer relevant due to some arguments. Firstly, there is an increasingly blurred line between war and peace, which is the basis for the existence of *jus ad bellum* and *jus in bello*. Secondly, the number of asymmetrical wars is increasing. Thirdly, the current war has used super modern war technology. Fourthly, the dichotomy is very eurocentrism because it is a western cultural heritage and does not accommodate other cultures and the application of the dichotomy rigidly creates a paradox in international law.

The relationship of *jus ad bellum* and *jus in bello* must be reconstructed in a more flexible direction, in terms of a dynamic, holistic, and harmonious relationship. The dichotomy is not completely abolished. It may even be extended to trichotomy or tetrasomy. The relationship allows for fusion considering that both have a melting point regarding the principles of proportionality and necessity which are very much needed to carry out law enforcement against the leader of the aggressor state who orders disproportionate use of force against the law and not justified by military necessity. Although integration is possible, the expected is not a rigid integration that always places *jus ad bellum* over *jus in bello* or vice versa. Reconstruction of the relationship between *jus ad bellum* and *jus in bello* must be based on the moral principle that war must be fair and must be carried out in a just manner. If the rigid rules of the *jus ad bellum* and *jus in bello* dichotomy have not been changed, the role of the ICC judges or other courts dealing with cases related to this dichotomy is very important to make the law to change the behavior of the warring parties and to conduct a just war fairly.

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