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THE CONCEPT OF JUST WAR AND THE LEGALITY OF WAR OF AGGRESSION ARE INEXTRICABLY LINKED WITH INTERNATIONAL HUMANITARIAN LAW

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Abstract

The attacks on New York and Washington on September 11, 2001 and the subsequent "war on terrorism" suddenly brought international humanitarian law into the limelight and once again highlighted the relationship between the causes of conflict on the one hand and respect for rules on hostile behavior and the protection of victims of war on the other. This article traces the history of rules restricting violence and prohibiting recourse to war. Despite the general prohibition of war in the Charter of the United Nations, the application of jus in bello remains independent of the causes of war, even in the fight against aggression, and any discriminatory application of international humanitarian law must be rejected. There are cavalier reasons to defend the principle of warrior arrogance by submitting to the laws of war. Whatever the moral and legal intent, the theory of discriminatory application of the laws and customs of war leads to an unacceptable result, namely unlimited war, because of the conception that war of aggression is not covered by international humanitarian law. State practice and the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002, confirm the strict separation between jus in bello and jus ad bellum.

Keywords: ***War, War of Aggression, International Humanitarian Law.***

1. INTRODUCTION

Historically, States and those who have taken up arms have made it clear that they are doing so for a just cause. They too often use this as an argument to deny sympathy to their opponent and to justify the worst offense. The enemy is accused of serving unjust purposes and is responsible for the shortcomings, suffering, and sorrow that every war leaves behind. Their defeat was enough to prove their guilt, the losers could be slaughtered or enslaved, no matter how many. " Holy war", "holy war", "just war", history shows that often the belligerent parties are the quickest to claim transcendent causes guilty of the worst excesses (Gill et al., 1995).

Thus, chroniclers have told without blinking an eyelid that the massacres that the Crusaders carried out tarnished their victories during the conquest of Jerusalem3. Throughout Europe, the Wars of Religion and then the Thirty Years' War gave rise to the horrific crimes that Jacques Callot's engraving has painted a frightening picture for us, but too many theologians, on both sides, have rushed to justify in the name of the gospel4. However, the horrors of past centuries pale in comparison to the massacres and crimes led

by the ideological crusades of the twentieth century: the Russian Civil War, the Spanish Civil War, and the Second World War (Lord, 2023).

History, however, also teaches us that all civilizations have sought to impose limits on violence, including this violence. The institutionalized form of violence is called war, because the restriction of violence is at the core of civilization. For a long time, these were customary rules, usually of religious inspiration, that were revered between people who came from the same cultural ensemble and who revered the same gods, but which were too often forgotten when it came to fighting against enemies who did not speak the same language or who worshipped other gods (Tomuschat, 2010).

The fathers of international law contributed decisively to the adoption of rules aimed at curbing war-like violence. By anchoring these rules in positive law, that is, in practice and in the will of the ruler and the State, they have paved the way for the recognition of the rules of the universal sphere, capable of transcending the line of cultural and religious errors. Although he remained committed to the scholastic doctrine of just war, Grotius (1583-1645) nevertheless laid the foundations of international law based on positive law, thus laying the first foundations that would lead to the adoption of today's prevailing laws and customs of war; However, it was Vattel (1714-1767) who deserved the benefit of first questioning, if not the doctrine of just war, at least the consequences usually drawn from it: "War cannot be only on both sides. One attributes the right to itself, the other denies it; one complains about humiliation, the other denies having done so. These are two people arguing about the correctness of the proposition. It is impossible for the two conflicting feelings to be true at the same time. However, it is possible that both contents are in good faith. And in dubious cases, it is still uncertain on which side the law belongs. Then that nations are equal and independent, and cannot place themselves as judges of each other, then in whatever cause is prone to doubt, the weapons of both warring parties must pass equally legitimately, at least in terms of external effects and until the cause is decided. "

Vattel therefore did not openly reject the doctrine of just war, because he recognized that war could not be just on both sides, but he rejected it and deprived it of its consequences. Indeed, since States are sou-verains and cannot be tried without their consent, he noted that it is rarely possible to know which of the two belligerent sides defended the just cause. Both can be persuaded in good faith. Thus, both sides may have equal rights to use weapons. More than that and at this point, his teachings stand in stark contrast to the customs of his time these margins of uncertainty and the benefits of the goodwill flowing from them, Vattel acknowledged them to both enemies, even in the event of civil war (Alexander, 2015).

It is largely on this margin of uncertainty and tolerance that the laws and customs of war will develop. The emergence of nation-states in seventeenth- and eighteenth-century Europe radically changed people's conceptions of war and the fate of its victims. With the establishment of a new European order resulting from the Treaty of Westphalia (1648) that ended the Thirty Years' War, war was no longer considered a means to win dogma, truth or religion, to be recognized only as a means – let alone very imperfect – to settle disputes between two rulers who did not recognize each other as joint judges. The rise of nation-states

also allowed the adoption of rules to stem the specter of war. War is the act of the prince; nations fought each other through their armed forces, easily recognizable by their colorful uniforms; The civilian population, who did not take part in the battle, as well as wounded fighters and those who surrendered at will, had to be rescued. Similarly, States have agreed to abandon unjust practices and have banned the use of certain weapons, such as explosive shells and poisoned weapons, which are likely to cause untold suffering, beyond all proportions to the only legitimate purpose that they can propose themselves in war: the weakening of the enemy's military power (Hashimy, 2023).

These rules were gradually codified, notably in the Geneva Conventions of 1864, 1906, 1929 and 1949, as well as in the St. Petersburg Declaration of 1868 and the Hague Conventions of 1899 and 1907.

In general, there are two main ways to curb war-like violence:

1) rules relating to the conduct of hostilities, which regulate the methods and means of combat and prohibit indiscriminate attacks, attacks directed against non-combatants, weapons likely to cause disproportionate suffering to the aims of war, and dangerous means;
2) Rules protecting non-combatants and people who have been discharged: wounded and sick soldiers, shipwrecked soldiers, prisoners of war, members of the armed forces medical personnel and the civilian population.

It should be noted, however, that these two sets of rules are interdependent and complementary. Some general rules for both. Thus, rules that limit aerial bombardment and prohibit indiscriminate bombing fall within the scope of the law of hostile behavior, when viewed from the point of view of aviators, and rules that protect the civilian population when considering the effects of aerial bombing on the ground. These two sets of rules converged in the Additional Protocol to the Geneva Conventions of 8 June 1977, which updated provisions relating to hostile conduct and those protecting victims of war (Sinha, 2005).

2. IMPLEMENTATION METHOD

This research uses normative legal research methods using qualitative data. The data source used is secondary data derived from premier legal materials obtained from laws and regulations related to personal data protection in Indonesia. Secondary legal materials are mainly journals, guidelines published by international organizations are used to provide an understanding of the concept of privacy as the basis of personal data protection. Tertiary material in the form of an index is used to provide an overview of humanitarian law as one of the reasons for the urgency of the legality of just warfare.

3. RESULTS AND DISCUSSION

3.1 Prohibition of The Use of War and International Humanitarian Law

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Most rules of humanitarian law adopted at a time when the use of war was legal. War is an attribute of sovereignty; It was legal when it was an act of the prince; the country whose undertaking was the sole judge of the motives that made him take up arms. This was the legal conviction of the State and the dominant position of doctrine under the Ancien Régime and in the nineteenth century. The context today is very different: the use of war was banned by the League of Nations Pact , then banned by the Paris Pact (or Kellogg Briand's Pact)10 and by the Charter of the United Nations. Under the Paris Pact, States Parties declared that they condemned "the use of war for the settlement of international disputes" and abandoned it "as an instrument of national policy". The Charter of the United Nations prohibits the use of force in international relations, with the exception of collective coercive measures under Chapter VII and the right to individual or collective self-defense under Article 51. Therefore the question arises: can a belligerent-belligerent relying on the fact that he is a victim of aggression in order to evade his obligations under international humanitarian law and refuse to respect its rules?

This question raises a more general problem: that the autonomy of the norms governing the mutual relations of the belligerents ("jus in bello") with respect to the norms relating to the regulation and prohibition of the use of force (" jus ad bellum"): is the fact that one of the adversaries has launched a war of aggression that is likely to modify the conditions for application juice in bello And, in particular, the conditions for the implementation of humanitarian rules?

In all recent conflicts, one or the other of the belligerent parties and more often both have stated that they are simply exercising their right of self-defense to repel aggression of which they or their allies are victims. Voices were raised to affirm that, as such, they were exempt from obligations under the laws and customs of war and that victims of attacks were not obliged to abide by the rules of aggression vis-à-vis their aggressors. Some authors, especially in the United States and the Soviet Union, have attempted to throw this claim into the mold of legal theory by proposing to subordinate the application of jus in bello to jus ad bellum12. Two solutions can then be considered:

1) Both wars of aggression are regarded as unlawful acts – international crimes par excellence – that fall outside any regulation; in this perspective, it must be recognized that in the event of aggression, the laws and customs of war do not apply to any of the belligerents;
2) The misuse of force is deemed to have the sole effect of depriving the aggressor State of the rights conferred by jus in bello; on the other hand, it remains subject to all obligations arising therefrom. The result is the application of different laws and customs of war, with the aggressor State remaining subject to all obligations inherent in its status as a belligerent, while the victim State of aggression is exempt from all obligations towards its enemy.

3.2 Override International Humanitarian Law in The Event of A War of Aggression

Only the first solution draws all the logical consequences of the possible subordination of jus in bello to jus ad bellum. Nevertheless, it should be rejected without hesitation. Indeed, in both domestic and international settings, law has the task of regulating factual situations resulting from wrongful acts14. Moreover, since there is no war in the Charter system except as a consequence of aggression, it must be recognized that the State has developed norms without scope, which is unreasonable. Finally, this solution leads to the most absolute license and savagery considering the horrors of past wars would seem very harmless. As a consequence of waiver, the first solution leads to an unreasonable and terrible result.

3.3 Different Application of International Humanitarian Law in Case of War of Aggression

The second option requires further examination. Basically, proponents of the application of different laws and customs of war have put forward three arguments:

a. Justice requires an absolute distinction between the aggressor and the vicinity of aggression; it is unlawful for humanitarian law to place the aggressor State on the same level as that which opposes aggression; rather, humanitarian law should help victims of aggression while deterring the actions of the aggressor; finally had to condemn the aggressor firmly.
b. Since aggressive war constitutes the war crime par excellence, involving and encompassing all others, no one is bound to abide by the rules of the laws of war vis-à-vis the belligerents who have violated the first of them by opening the doors of war; in other words, the aggressor State puts itself in the shoes of criminals.
c. Under the saying "ex iniuria jus non oritur", the aggressor State cannot have rights derived from unlawful acts.

What is the relevance of these arguments? It is clear that the prohibition of threats and the use of force in international relations will only have platonic value if it is not accompanied by sanctions, especially in the form of discrimination between the aggressor and the victim of aggression. It is indisputable and indisputable that contemporary international law establishes such discrimination, in particular with regard to the right of individual or collective self-defense, the application of collective coercive measures provided for in Chapter VII of the Charter, relations with third States, the acquisition of territory, treaties imposed by the aggressor on its victims, and reparations at the end of hostilities. In addition, individuals who are personally responsible for preparing, initiating or directing wars of aggression are criminally liable (Lamp, 2011).

Therefore the question arises: can a violation of the law of the use of force also justify the discriminatory application of the rules governing the mutual relations of the belligerents and, in particular, of the rules of humanitarian law? This question should be examined in the legal literature, as well as in the light of positive law.

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In the legal literature, it should first be noted that the saying "ex ini- uria jus non oritur" is subject to serious exceptions, both in domestic law and in international law, so it is not certain that it can be recognized as one of the general principles of law mentioned in Article 38, paragraph 1, letter c, of the Statute of the International Court of Justice. But above all, even assuming that one of the general principles of law is recognized, its application to this case is a double confusion:

the field of formal logic, confusion between cause and accident; From a legal point of view, confusion between the source of a right or obligation and the fact giving rise to the application of that right or obligation. If a house burns down, it is not the fire but the insurance contract that is the origin of the victim's claim vis-à-vis the insurance company; if otherwise, no landlord will bother paying the premium. In the same way, it is not war that is the source of rights and obligations arising from the laws and customs of war, but humanitarian conventions with respect to obligations and rights arising from this treaty, and customary law with respect to rights and obligations arising therefrom; armed conflict – however explainable – is nothing but a fact that requires the application of rules-based these conventions or customs; Otherwise, belligerents would have the same rights and obligations, regardless of whether they are parties to a humanitarian convention or not; this is clearly not the case. Therefore, the saying "ex ini- uria jus non oritur" is irrelevant to the question posed (Schmitt & Watts, 2015).

Similarly, the argument that the State responsible for aggression is equated with criminals must also be rejected. Domestic and international law must always be vigilant, especially when it comes to concepts borrowed from criminal law. In this case, the transposition is misleading and misleading. Misleading, because it equates the international responsibility of States with the criminal responsibility of perpetrators. Erroneous, because it supposes that criminals are automatically deprived of any legal protection, which cannot be tolerated by legal orders. In any State governed by law, the offender remains under the authority and protection of criminal law, regardless of the severity of the offense he is accused of. As an unlawful act, a war of aggression entails sanctions, or even a number of sanctions, in particular in the form of individual or collective rights of self-defense, collective coercive measures, non-recognition of territorial acquisitions carried out by force, cancellation of treaties imposed by threat or use of force, discriminatory behavior on the part of third States, reparations imposed on the aggressor at the end of hostilities, .dll. On the other hand, a war of aggression cannot have the effect of throwing the aggressor State outside the confines of the law.

There are still arguments based on the requirements of fairness or equality. This is perhaps the most interesting from a moral point of view. However, this argument completely ignores the purpose of humanitarian law: humanitarian law does not place aggressors and victims of aggression on the same level because it has no jurisdiction to do so; humanitarian law has the sole function of protecting the human person as such, to the exclusion of any considerations of a political, military, ideological, religious, racial nature, economic or otherwise; Humanitarian law establishes only one equality: it is based on the right of all victims of war to be treated in accordance with humanitarian principles. Moreover, no

requirement of fairness or justice can justify the criminalization of all citizens of a State, or even all members of its armed forces, simply because they belong to the State that is considered the aggressor. The international responsibility of the State cannot be concluded that all members of its armed forces or each of its citizens are guilty. As can be seen, the main arguments that have been put forward in favor of the discriminatory application of jus in bello must be rejected. In addition, important considerations determine the maintenance of the principle of equality of belligerents before the laws of war (Rosen, 2007).

3.4 Appointment of The Aggressor

The difficulties inherent in the determination of the aggressor cannot be ignored. Despite more than half a century of deliberation in international forums, there is no general and binding agreement on neither the Kellogg Briand Pact nor the Charter contains such a definition. As for Resolution 3314 (XXIX) adopted on December 14, 1974 by the United Nations General Assembly19, it is far from a real definition; It is practically silent on the indirect forms of aggression that characterize our time, such as subversion, terrorist attacks, foreign intervention in case of civil war, occupation with the consent of puppet governments, etc. In addition, in ordering the case of the war of national liberation, 20 Resolution 3314 considers an essentially subjective element – the motive for the use of weapons – that does not fit into the correct definition, since a definition capable of bringing legal effect must be based on objective and verifiable elements. Finally, this resolution is not binding on the Security Council.

The adoption of the Statute of the International Criminal Court on July 17, 1998 also did not resolve this difficulty. Indeed, States have not been able to agree on the definition of the crime of aggression, nor on modalities for the exercise of the jurisdiction of the Court in this regard. Article 5, paragraph 2, of the Statute of the Court provides: "The Court shall exercise its jurisdiction over the crime of aggression when a provision has been adopted in accordance with Articles 121 and 123, which shall define the offence and determine the conditions for the exercise of the Court's jurisdiction over it. This provision shall be consistent with the relevant provisions of the Charter of the United Nations." The Statute entered into force on 1 July 2002 and 77 States are currently parties to it, but until a compromise is reached on this issue, the Court will have jurisdiction only over the crimes of genocide, crimes against humanity and war crimes. The working group working on the issue of the crime of aggression within the Preparatory Commission for the International Criminal Court has so far had only preliminary discussions on the issue. Is it possible to overcome this difficulty by assigning to the competent body the responsibility for solving it from case to case by appointing the aggressor?

The Security Council shall determine the presence of threats to peace, violations of the peace or acts of aggression. Under Article 25 of the Charter, these findings apply erga omnes, since all Member States of the United Nations are bound to accept them. However, the difficulty has not been resolved: in the absence of legal criteria binding the Security Council, the decision of the latter can only be a political act for which it is not clear how it can have legal effects other than those prescribed by the Charter or other contractual

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provisions. However, there is no provision in the Charter permitting the discriminatory application of jus in bello in the mutual relations of belligerents. In addition, the finding of aggression requires an affirmative vote from the five permanent members of the Security Council; The Council would therefore be paralyzed whenever aggression was carried out by a permanent member, one of its allies or one of its clients; given the current structure of the international system, only very exceptional circumstances, such as in June and July 1950, at the outbreak of the Korean War, and in the summer and autumn of 1990, after the Iraqi occupation of Kuwait, would allow the Council to take such decisions.

Under these conditions, there is great temptation to throw away the Security Council's decision. Therefore, supporters of the discriminatory application of the laws of war have proposed to submit to General Assembly resolutions or refer to public opinion assessments. However, nothing in the Charter confers such competence on the General Assembly. As for the assessment of public opinion, it is enough to ask who will interpret it in order to understand where this slippery slope leads: the recognition of unilateral aggression by individual governments. In the absence of a centralized and mandatory legal procedure that allows aggression to be established in all cases based on appropriate legal criteria and in a way that would be equally binding on all Belgian citizens, the discriminatory theory of the application of jus in bello leads to the non-application of this right on both sides: each belligerent-belligerent is considered a case in the case of the belligerent party concerned in the case deceive his enemy as an aggressor and take advantage of this observation to free himself from the rule of the laws of war. Here, too, it was an open door to an uncontrollable wave of violence. Moreover, even assuming that these difficulties can be overcome and that an extraordinary political constellation allows the Security Council to take decisions in conditions that will leave no room for disputes, other no less serious difficulties will not fail to arise (Zurek et al., 2023).

3.5 Rights to Which No Rights Will Be Attached Obligations and Obligations to Which Any Rights Will Not Be Attached

The discriminatory application theory of the laws of war postulates the possibility of separating rights from obligations arising from them, with all obligations remaining the responsibility of the aggressor State, which has no rights , whereas the victim of aggression will enjoy unlimited rights without being subject to any obligations.

This conception reflects a deep misunderstanding of the laws of war in general, and humanitarian law in particular. The purpose of the laws and customs of war is not to grant to the belligerent rights not attached to obligations, or obligations not attached to rights, but to protect the human person by the establishment of objective laws imposing rights and obligations on both belligerents.

This is the case with the emblem of the red cross and red crescent : sthe emblem protects the sanitary facility to which it is attached, but also protects the opposing Party from the fact that the installation indicated by the emblem should not be used for host actions. Similarly, the distinction between combatants and non-combatants is essentially meant to

protect the civilian population, but also protect the enemy to the extent that civilians know that they will not be able to engage in hostile acts without compromising the immunity that protects them. Similarly, prisoner of war status also protects prisoners and opposing States, as it limits the categories of persons who may engage in hostile acts while being entitled to the protection of that status in the event of capture. The same observations can be made in relation to the prohibition of treason, protection of parliamentarians, respect for truce and armistics, maintenance of order and security. in occupied territories, etc. As we can see, we cannot separate the rights of obligations without destroying both, and without undoing the rules. The laws of war consist of a set of balances between rights and obligations; When this balance is broken, we are no longer faced with the unilateral application of law, but with license and anarchy(Hampson, 2014).

3.5 Retaliation and Reciprocity

The discriminatory application of humanitarian law is also a form of retaliation: if one cannot arrest those personally responsible for having prepared, initiated or directed a war of aggression, one falls back on those held under his hands: the wounded and sick, prisoners of war, civilian internees and the population of the territory. Busy. From this point of view, all provisions of the Geneva Conventions and Additional Protocols prohibiting retaliation against wounded or sick soldiers, army medics, stranded persons, prisoners of war, civilians or civilian objects also preclude the application of different international humanitarian law.

Finally, the application of discriminatory laws and customs of war is practically impossible. Diplomats and jurists sometimes tend to reason as if they themselves are the primary recipients of the norms of the laws of war. With all due respect to these two leading bodies, this is not the case. The main recipients of the rules, those who ultimately depend on obedience or violation of the laws and customs of war, are the fighters. What's their situation? Every nation expects its soldiers to endure suffering and deprivation, to accept the death of their comrades and be ready to sacrifice their own lives. At the same time, they are expected to respect wounded enemies and those who surrender at will. This is not without difficulties! However, military discipline, chivalrous spirit, concern for the fate of comrades killed in the power of the opposing Party, and perhaps the survival of a sense of humanity that the horrors of modern warfare have not yet fully restrained can encourage respect for these rules;

Moreover, every fighter intuitively knows that he may, depending on the evolution of weapons wealth, find himself in the situation of having to rely on the protection of humanitarian law; therefore he will hesitate to break the rules on which his survival, that his relatives or comrades in battle may depend. On the other hand, it is an illusion to expect a soldier to respect the laws and customs of war even though he has been declared a criminal simply because he belongs to a State that qualifies as an aggressor. There is no legal argument that makes it possible to impose on a respectful fighter a protective regime whose protection was denied earlier. It is no less chimerical to expect the State to respect the laws

and customs of war when and its citizens are otherwise deprived of all rights flowing from them.

This psychological impossibility is a consequence of a fundamental contradiction at the level of formal logic: a contradiction that consists of considering as unlawful all acts of war committed by the party considered the aggressor, while requiring the party to observe the difference between legitimate acts of war according to the laws and customs of war and acts of war that are intrinsically unlawful because they are committed in violation of the laws and customs of war. An enemy cannot be expected to respect the laws and customs of war while declaring that any of his actions will be treated as war crimes simply because they were committed in an aggressive war(ROSEN, 2007). As can be seen, whatever moral or legal intentions may have inspired it, the theory of the application of discriminatory laws and customs of war in practice leads to the same result as the conception according to which aggressive war escapes all rules, that is, unbridled war.

3.6 The Principle of Equality of Belligerents Before the Laws of War

Therefore, the principle of equality of belligerents before the laws of war must be preserved. Its application responds to humanitarian requirements since humanitarian principles command respect for the victims of war in all circumstances and for whatever side they belong to. It responds to the requirements of public order insofar as only the application of this principle allows us to avoid an indefinite wave of violence. Finally, it satisfies the requirements of civilization because, as Bluntschli points out, “The laws of war cultivate just war and unjust war". This conclusion fully corresponds to the positive law. Indeed, neither the League of Nations Pact nor the Paris Pact violated the principle of equality of belligerents before the laws of war. The "Committee of Eleven", established in 1930 by the Council of the League of Nations (LN) to consider amendments to the League of Nations Treaty to be in line with the Kellogg Briand Pact, expressly recognized that jus in bello remained valid and retained its full value in case of resistance to aggression or during international police actions. regardless of the classification of the operation. Similarly, the Charter of the United Nations does not contain provisions that change the conditions for the application of the laws of war in the mutual relations of belligerents. On the other hand, the Charter reaffirms without limitation the principle of equality of sovereignty of States, to which the principle of equality of belligerents before the laws of war is its application.

The Statute of the International Military Tribunal (International Nuremberg Tribunal), attached to the Treaty on the Prosecution and Punishment of Major War Criminals of the European Axis Powers, signed in London on August 8, 1945, is undoubtedly the instrument of international law that has gone the most way in condemning aggressive war, which is not only characterized as unlawful acts involving the international responsibilities of States, but also as an international offense involving the criminal responsibility of individuals responsible for the preparation and initiation of wars of aggression, but nevertheless maintaining in a very clear and clear way the distinction between crimes against peace, that is, "the direction, preparation, initiation or continuation of wars of aggression or wars in violation of international treaties, guarantees or treaties " on the one hand, and war

crimes, that is, "violations of the laws and customs of war", on the other hand, which means that actions in accordance with the laws and customs of war will not be punished, even if they have been committed in the context of a war of aggression.

The court has carefully respected the distinction between crimes against peace and war crimes. It is considered a war crime only an act committed in violation of the laws and customs of war, the illegality of which has been demonstrated by reference to the Geneva Conventions or The Hague. On the other hand, the Court accepted that the accused could take advantage of the exercise of the rights provided by jus in bello, even though they had taken part in wars of aggression. In this way, the Court affirmed the principle of equality of belligerents before the laws of war and autonomy jus in bello with respect to jus ad bellum. Most national courts dealing with war crimes committed during the Second World War have applied the same principle, thus affirming the autonomy of jus in bello from jus ad bellum.

The Geneva Convention of 12 August 1949 affirmed in two respects the principle of equality of belligerents with respect to the application of humanitarian law; through the prohibition of retaliation against persons and objects protected by this Convention38, but primarily through the provisions of Article I, which is common to the four Conventions: "The Supreme Parties undertake to respect and ensure respect for this Convention in all circumstances." This provision underlines the binding force of the Geneva Conventions, the application of which cannot be exercised subject to an assessment of the legality or illegality of the use of force, whether such assessment is made by the Parties to the conflict or by an international body.39 General Article 2 further provides that the Convention shall apply "in the event of war or other armed conflict arising between two or more Supreme Parties". This interpretation is confirmed by the Commentary on the Geneva Conventions published by the International Committee of the Red Cross: "The implementation of the Convention does not depend on the nature of the conflict. Whether it is a 'just' or 'unjust' war, aggression or resistance to aggression, this in no way can affect the protection and care for the wounded and sick."

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, held in Geneva from 1974 to 1977 to update international humanitarian law and adapt it to new forms of conflict since 1949, ended any controversy by introducing the following provision into the Preamble to the First Additional Protocol to the Geneva Conventions (Protocol I): " The Parties High Participants [...] Reaffirms that the provisions of the Geneva Convention of 12 August 1949 and this Protocol shall be fully applied in all circumstances to all persons protected by such instruments, without prejudice by virtue of the nature or origin of armed conflict or to causes supported by the Parties to the conflict, or attributed to them". This provision, adopted by consensus, without discussion or opposition, in the Diplomatic Conference, shall be considered as an authentic interpretation of the Geneva Conventions. It is therefore binding on all States Parties to these Conventions, whether they are bound by Protocol I or not.

This provision affirms the autonomy of humanitarian law with respect to jus ad bellum. Consequently, a State cannot invoke the fact that it is a victim of aggression or other

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considerations stemming from the origin or nature of the conflict in order to circumvent its obligations under international humanitarian law and refuse to apply its rules. Such an attitude would be contrary to the spirit and letter of the Geneva Conventions and the First Additional Protocol.

The statute of the International Criminal Court affirms the autonomy of jus in bello with respect to jus ad bellum. Indeed, while it is true that the Court has jurisdiction to punish crimes of genocide, crimes against humanity, war crimes and crimes of aggression, each crime must be sanctified in its own interest, even if several of them may have been committedsimultaneously. More importantly, the fact that the Court can decide on crimes of genocide, crimes against humanity and war crimes before agreement is reached on the definition of the crime of aggression and the exercise of jurisdiction of the Court to punish these crimes. It strongly asserts that war crimes do not depend on crimes against peace.

3.7 State Practice

Most countries that have been involved in armed conflict since 1945 have claimed to exercise the right of individual or collective self-defense to fight wars of aggression of which they or one of their allies claims to be a victim. However, only one, to our knowledge, has drawn concrete conclusions in terms of the application of humanitarian law and the activities of the International Committee of the Red Cross (ICRC). Indeed, until the January 1973 Paris Agreement, which was supposed to end the war in Vietnam, and until the repatriation of American prisoners of war, the Democratic Republic of Vietnam rejected all ICRC offers of service, alleging, among other things, that Vietnam was a victim of a war of aggression on the part of the United States and that it was not, therefore, obliged to implement the Third Geneva Conventions to American prisoners of war, or to authorize the ICRC to carry out activities set forth in those Conventions for the benefit of such prisoners. All measures are taken by the ICRC to help these prisoners.

The government of the Socialist Republic of Vietnam relied on the same argument during the Sino-Vietnamese conflict in February 1979. However, after protracted discussions, this government finally allowed the ICRC delegation to visit Chinese prisoners of war captured during the conflict, despite claiming to have been victims of a war of aggression by the Chinese Republic of China. Finally, in ratifying Protocol I, the Government of Hanoi made no reservation for paragraph 5 of the Preamble.47 It is therefore reasonable to believe that this Government has changed its position on the conditions of application of the Geneva Conventions and that it has supported the unanimous opinion of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law that no consideration based on the nature or origin of the conflict or causes is supported by The Parties may obstruct the application of humanitarian law.

Since the adoption of the Charter of the United Nations, only three major military operations have been conducted under Chapter VII of the Charter and the mandate given by the Security Council:

1. Actions of the United States and its allies in Korea, based on Security Council Resolution 83 (1950) of June 27, 1950;
2. The actions of the anti-Iraqi coalition for the liberation of Kuwait, based on Resolution 678 (1990) adopted on November 29, 1990;
3. The intervention of NATO forces in Bosnia and Herzegovina, which was based on Resolutions 816 (1993) and 836 (1993) adopted on 31 March and 4 June 1993 and various subsequent resolutions.

States acting on orders or with Security Council authorization claim to use this as an argument to abdicate themselves from their obligations under international humanitarian law. Therefore, state practice is consistent with the conclusions of doctrinal analysis: a belligerent cannot count on the fact that he is a victim of aggression or on the fact that he defends just grounds to free himself from his obligations under the laws and customs of war and, in particular, from the requirements of humanitarian law. This is not surprising. Indeed, this conclusion reflects the will of the international community to set limits on the execution of violence and to ensure the protection of the human person in all circumstances, whatever the motives that led the belligerents to take up arms. Moreover, just excuses cannot allow belligerents to trample on basic humanitarian demands, nor can they provide a pretext for an uncontrollable wave of violence. Even just war has its limits (Schmitt, 2005).

4. CONCLUSION

It is in moments of crisis or extreme tension that the law finds its full value, since it is in these moments that the temptation to justify the use of means that are otherwise rejected is the most dangerous. The law of armed conflict was adopted precisely to limit violence in war and, however serious the aggression suffered, whatever the causes defended by the parties to the conflict and the reasons for using weapons, it cannot be used as an argument against them. From this perspective, no State or party can declare itself above the law, whatever the reasons it claims to serve. On the contrary, no one can be expelled from the empire and the protection of the law. Whether it is a matter of the "war on terror" or any other form of conflict, care must be taken not to destroy by force of arms the values that weapons claim to protect."Who would believe in the justice of your war if it was done indefinitely," wrote François de La Noue, who was one of Henry of Navarre's best captains, the future Henry IV. As Albert Camus' Algerian Chronicles echoed: "If it is true that in history, at least, values, whether those of nations or humanity, do not survive without being fought for them, the struggle (or strength) is not enough to justify them. It is also necessary that he himself be justified, and enlightened, by these values. To fight for one's own truth and be careful not to kill him with the very weapon from which he is defended, on these words of double price take on the meaning of their life ". Whatever means are available and whatever the virulence of the attack for which it is responsible, no terrorist movement can destroy with its own power a modern society or a democratic State based on respect for the law, the support of citizens and respect for fundamental human rights. There are many indications that the leaders of terrorist organizations are aware of this and that they rely on the emotions triggered by their successful attacks to encourage the victimized State to self-destruct the bases on which it

was established. It is these values that must be protected. Since terrorist networks transcend borders and have international consequences, only joint action at the international level will allow to overcome them. Such measures cannot be established in the long term, except with respect to the international legal order, in which international humanitarian law is in some way the last bastion.

REFERENCES

Alexander, A. (2015). A short history of international humanitarian law. European Journal of International Law, 26(1), 109–138. https://doi.org/10.1093/ejil/chv002

Gill, T. D., Fleck, D., Hosang, H. F. R. B., Cammaert, P. C., Cathcart, B., Ducheine, P. A. L., Fenrick, W., Garraway, C. H. B., Heinegg, W. Von, Klappe, B., Kleffner, J. K., Kondoch, B., Lietzau, W. K., Melzer, N., Myjer, E. P. J., Oswald, B. M., Rogers, A. P. V, Rutigliano, J. A., Schmitt, M. N., … White, N. D. (1995). The Handbook of the International Law of Military Operations Edited by In collaboration with. 124.

Hampson, F. J. (2014). The relationship between international humanitarian law and international human rights law. Routledge Handbook of International Human Rights Law, 86(December), 185–213. https://doi.org/10.4324/9780203481417.ch12

Hashimy, S. Q. (2023). The Agonising Narrative of Environmental Dilapidation in the tussle of Armed Conflict; From the Lens of International Humanitarian Laws. Journal of Global Ecology and Environment, 45–59. https://doi.org/10.56557/jogee/2023/v17i28145

Lamp, N. (2011). Conceptions of war and paradigms of compliance: The "new war" challenge to international humanitarian law. Journal of Conflict and Security Law, 16(2), 225–262. https://doi.org/10.1093/jcsl/krr005

Lord, J. E. (2023). Accounting for disability in international humanitarian law. International Review of the Red Cross, 105(922), 60–98. https://doi.org/10.1017/S1816383122001072

Rosen, D. M. (2007). Child Soldiers, International Humanitarian Law, and the Globalization of Childhood. American Anthropologist, 109(2), 296–306. https://doi.org/10.1525/aa.2007.109.2.296

Schmitt, M. N. (2005). Precision attack and international humanitarian law. International Review of the Red Cross, 87(859), 445–466. https://doi.org/10.1017/S1816383100184334

Schmitt, M. N., & Watts, S. (2015). The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare. Texas International Law Journal, 50(2), 189–231.

Sinha, M. K. (2005). Hinduism and international humanitarian law. International Review of the Red Cross, 87(858), 285–294. https://doi.org/10.1017/S1816383100181342

Tomuschat, C. (2010). Human rights and international humanitarian law. European Journal of International Law, 21(1), 15–23. https://doi.org/10.1093/ejil/chq003

Zurek, T., Kwik, J., & van Engers, T. (2023). Model of a military autonomous device following International Humanitarian Law. Ethics and Information Technology, 25(1), 1–12. https://doi.org/10.1007/s10676-023-09682-1.