

# THE LAWS OF WAR: PRINCIPLES AND EFFECTIVENESS

## AS LEIS DA GUERRA: PRINCÍPIOS E EFICÁCIA

TÚLIO ENDRES DA SILVA GOMES<sup>1</sup>

### ABSTRACT

Principles of the laws of war were developed for centuries, since the ancient Greece and Rome. After the development of the fundaments of the just war, during the Middle and Modern Ages, and following the intense development of the international humanitarian law, during the 19th century, the laws of war were compiled in many treaties and conventions mostly in the 20th century. Those positive rules actually detailed the centenary principles of the *jus ad bellum* – the lawful use of force – and the *jus in bello* – the lawful conduct during the war. Those principles were also developed in Brazil, integrated to internal law and military doctrine, during the 19th century. Paradoxically, those principles were not able to avoid two world wars, extreme suffering, violations, and millions of casualties, remarkably in Poland. The way to make the laws of war more effective, based on the usage of principles of the laws of war, is the problem that based the effort of the present research. The analysis of those principles, in relation with doctrine, positive conventions, and treaties, led to the conclusion that the principles of the *jus ad bellum* should be considered as the fundaments for planning the use of force, from the strategic point of view; and the principles of the *jus in bello* should compose core values on the rules concerning the conduct of troops and commanders during armed conflicts. Finally, the effectiveness of the laws of war could be also improved by integrating the mentioned principles to the strategic planning directives and military doctrine.

Keywords: Laws of War. International Law of Armed Conflicts. Principles of the Laws of War. *Jus in Bello. Jus ad Bellum.*

### RESUMO

Os princípios das leis da guerra foram desenvolvidos ao longo dos séculos, desde a Grécia antiga e Roma. Após o desenvolvimento dos fundamentos da guerra justa, durante a Idade Média e Contemporânea, e na sequência do intenso desenvolvimento do direito internacional humanitário, durante o século 19, as leis da guerra foram compiladas em diversos tratados e convenções, principalmente no século 20. Essas regras positivas, de fato detalharam os princípios centenários do *jus ad bellum* - o uso legítimo da força - e as *jus in bello* - a conduta legal durante a guerra. Esses princípios também foram desenvolvidos no Brasil, integrados ao direito interno e a doutrina militar, durante o século 19. Paradoxalmente, esses princípios não foram capazes de evitar duas guerras mundiais, sofrimento extremo, as violações, e milhões de vítimas, notavelmente na Polónia. A maneira de fazer as leis de guerra mais eficazes, com base no uso de princípios das leis de guerra, é o problema que fundamenta e estimula a presente pesquisa. A análise desses princípios, em relação a doutrina, convenções positivas, e os tratados, levam à conclusão de que os princípios do *jus ad bellum* devem ser considerados como os fundamentos para o planejamento do uso da força, a partir do ponto de vista estratégico; e os princípios do *jus in bello* devem compor valores fundamentais sobre as regras referentes ao processo de tropas e comandantes durante os conflitos armados. Por fim, a eficácia das leis de guerra também poderia ser melhorada através da integração dos princípios mencionados com as diretivas de planejamento estratégico e doutrina militar.

Palavras-chave: Leis da Guerra. Direito Internacional dos Conflitos Armados. Princípios do Direito da Guerra. *Jus in Bello. Jus ad Bellum.*

<sup>1</sup> Comando da 9ª Região Militar - Campo Grande-MS, Brasil.

E-mail: <tulioendres@gmail.com>

Doutor em Ciências Militares (ECEME).

Bacharel em Direito (Estácio de Sá).

Realizou o Curso Avançado Operacional Estratégico (Academia de Defesa Nacional - Varsóvia - Polónia).

### I INTRODUCTION

It is quite challenging for those who believe in the importance of the laws of war (LOW), and for those who study the secular evolution of their principles, to understand what happened during the World War II (WWII). More than 50 million people died, including more than 6 million Jews, in the most horrible and inhuman conditions. Millions of children and women died in war actions or were harshly executed; prisoners of war were tortured and shot dead without any trial or guarantee. In Oswiecim (Auschwitz), Warsaw, and Katyn, the most unbelievable atrocities were committed against millions of Polish civilians and prisoners of war, only to mention the case of Poland, the from-the-beginning member of the victorious alliance which was the most suffering and damaged country of the war (ZAMOYSKI, 2009).<sup>2</sup>

Brazil, which was dragged to the WWII by the Nazi-German submarine warfare in the Atlantic Sea, fought side by side with the Polish Army in the Gothic Line, Italy, in 1944. As in Europe and in the rest of the world, the right to move the war and the conduct in the war, in Brazil, were also submitted to certain rules, consisting in treaties, principles, laws and regulations.

It is clear, despite some times it was and it is still forgotten, that the laws of war have a moral content. This ethic nature of the laws of war is very related to their principles: rules universally accepted, resulting in centuries of development. More than mere positive rules and detailed regulations, those principles are the core of the laws of war, and their moral and juridical content can be identified in both camps of the laws of war: *jus in bello* and *jus ad bellum*. Michael Walzer (2006, p. 21) illustrated the differences between these two fields of the laws of war and their moral contents:

The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons States have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that the war is being fought justly or unjustly. Medieval writers made the difference a matter of prepositions, distinguishing *jus ad bellum*,

<sup>2</sup> The participation of Poland in WWII and its outcomes are broadly explored in history books. For this essay, Poland: a History, written by Adam Zamoyski, was source and inspiration for the importance of the subject, in order to increase the effectiveness of the laws of war in contemporary warfare, for all the atrocities that were committed against Polish people and country.

the justice of war, from *jus in bello*, the justice in war. These grammatical distinctions point to deep issues. *Jus ad bellum* requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation in customary and positive rules of engagement.

The author also pointed out the independence of the judgments concerning both different fields as well as moral and juridical outcomes:

The two sorts of judgment are logically independent. It is perfect possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules. But this independence, though our views of particular wars often conform to its terms, is nevertheless puzzling. It is a crime to commit aggression, but aggressive war is a rule-governed activity. It is right to resist aggression, but the resistance is subject to moral (and legal) restraint. The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.

But if all those rules failed to prevent wars and violations, such as in WWI, WWII, Vietnam, Guantanamo Bay, and genocides in Rwanda and Darfur, after the development of written conventions and treaties. What was wrong? Is it possible for this body of rules, developed for centuries, to be more effective, in order to avoid unnecessary wars or undesired violations during armed conflicts? That is the problem, which led to the research hereby presented.

Thus, the present essay<sup>3</sup> seeks to present a brief historical approach of the laws of war, based on their main principles, and how those principles developed in Brazil, mostly during the 19th century. It also aims to describe principles of the *jus in bello* and *jus ad bellum*. It will be demonstrated that this body of international rules, developed for ages, and are not necessarily linked only with the Conventions and Treaties of Geneva, The Hague and New York. Lastly, this essay tries to answer the question formulated in the problem, by pointing out how the laws of war can be more practical and effective, by focusing on their principles, in order to avoid unnecessary wars and violations in the course of the conflicts.

To fulfil this task, the following general objective was designed: analyse the principles of the laws of war and its evolution, highlighting the contributions from Brazil and concluding on how can those principles be used to make the laws of war – *jus in bello* and *jus ad bellum* – more effective.

The analysis is divided in three main topics:

<sup>3</sup> About the methodology adopted in writing the present essay, titles of books and works, literal quotes smaller than three lines, and words written in non-English languages are indicated by italic style. Original titles of the books in Portuguese are kept in their original language. Within those titles, ancient Portuguese words are also indicated by italic style. Quotes larger than three lines are written in normal letters, line space 1, font size 10, indent 4 cm. Translations from Portuguese to English are freely made by the author.

evolutions of the laws of war and related principles; analysis of the principles related to the lawful usage of the resource of the war (*jus ad bellum*); analysis of the principles related to the conduct during the armed conflict (*jus in bello*). In each of them, this paper seeks to highlight contributions from Brazil. As a conclusion, a synthesis will be presented, as well as some points about the usage of the analysed principles, in order to seek the effectiveness of the International Law of Armed Conflicts (ILAC).

## 2 EVOLUTIONS OF THE LAWS OF WAR AND RELATED PRINCIPLES

It can be said that conflict is inherent to any kind of relationship between different groups of human beings, from ancient ages, and the same about war between thereafter-developed countries and nations. As every social relationship and phenomenon, war has been also subject to rules and principles from centuries ago. According to Swinarski (1998, p. 18), the first instruments of the laws of war were present in 1000 B.C. Henckaerts and Doswald-Beck (2009, p. XXXI) pointed out the customary nature of the laws of war:

International humanitarian law has its origins in the customary practices of armies as they developed over the ages and on all continents. The “laws and customs of war”, as this branch of international law has traditionally been called, was not applied by all armies, and not necessarily vis-à-vis all enemies, nor were all the rules the same. However, the pattern that could typically be found was restraint of behaviour vis-à-vis combatants and civilians, primarily based on the concept of the soldier’s honour. The content of the rules generally included the prohibition of behaviour that was considered unnecessarily cruel or dishonourable, and was not only developed by the armies themselves, but was also influenced by the writings of religious leaders.

Clovis Bevilacqua (1911, p. 278) mentioned the customary conduct of Middle Ages Cavalry as the starting point for the rules that would discipline the war. The author also stated that those principles were later incorporated to the customs and to the doctrine of scholars, philosophers, moralists and, eventually, to the rules within international conventions which formed a written body of the laws of war.

But those laws, as a set of principles that justify the employment of armed power, are much older. The conditions that justified the resort to war and the right of self-defence were already presented in the rules made by ancient Egyptians and Sumerians (25th century B.C.); ancient Hittites (16th century B.C.); Greeks, who originated the concept of *jus ad bellum*; and Romans, who formalized laws and procedures concerning the *jus ad bellum* (BOVARNICK et al., 2011, p. 8).

The lawful conduct during the war is much aged as well: in Ancient Babylon (7th century B.C.),

prisoners of war and civilians used to have a special status; in Ancient China (4th century B.C.), Sun Tzu's *The Art of War* established rules about procedures during war, including the treatment and care of captives, and respect for women and children in captured territory; in Ancient India (4th century B.C.), the Book of Manu regulated procedures in warfare.

The *just cause* as a precedent condition for the use of military force is a characteristic feature of the *jus ad bellum* in the *Just War Period*, according to Bovarnick et al. (2010, p. 9). These authors also highlighted the close connection between just war and self-defence, identified by Aristotle in 335 B.C.; the era of Christian influence; and the conditions for the just war, stated by Saint Thomas Aquinas. Those conditions were the authority of the sovereign; a just cause, which could be related to the avenger of a wrong or self-defence; or the seek for the victory of the good over the evil. All those conditions were supposed to aim peace.

The doctrine of international law was, further on, developed in the beginning of the Modern Ages. In the 15th century, according to Fuller (2002, p. 18), several wars were conducted by mercenaries employed by Italian autocrats, to whom war was a profitable business, which was not worth to be shortened or terminated. Notwithstanding, the idea of having a *foreign diplomacy* and *distinction between the power of the soldiers and citizens' rights* was thereby initiated.

By that time, International Law doctrine started to develop, as part of the science of law. Thus, according to Panizza (2006, p. 23), Alberto Gentili initiated the broad doctrinal movement that sought to conceptualize the new doctrine of international law by publishing, in 1598, the book *De Belli Libri Tres Juri*, concerning laws of war: among several issues, he stated about the *just contest of public arms* and referred to the causes of the war, when writing about the *jus ad bellum*, as well as to the means of the just war, within the *jus in bello* (GENTILI, 2006, p. 61).

In the following century, between 1618 and 1648, the Thirty Years War took place in Europe. That was the last of the wars between Protestants and Catholics, which commenced with the protestant movement led by Martin Luther from the year 1519. According to Cinelli (2011, p. 38), this war caused millions of casualties; looting and atrocities were committed by mercenaries. Fuller (2002, p. 17) described some of those atrocities, which reached such serious levels that led to the further deepening on the development of the laws of war:

The Age of Absolute Kings arose from the ashes of the religious wars that culminated in the Thirty Years War (1618-48), which was a outrageous conflict between mercenaries hastily recruited, often accompanied by hordes of hungry people. When, in 1648, the Peace of Westphalia ended the anarchy, Central Europe lay in ruins. It is estimated that more than eight million people perished, not counting about 350 thousand deaths in combat [...]. During the war, cannibalism

was not unknown and the people were steeped in superstition [...].

During the years of the conflict, Hugo Grotius wrote his masterwork of international law, which was published in 1625: *De Belli ac Pacis Juri* (*On the Laws of War and Peace*). He distinguished just and unjust causes and regulated the *rules of what [was] allowed in war*, amongst several other teachings (GROTIUS, 2005, p. 921, 995, 1013).

Also Emmerich de Vattel, in the 18th century, participated in the doctrinal movement within the *Just War Period*, describing war as *a state in which the right is sought by force*, which also based the principle of the justice of the cause. All those authors stressed the necessity, in a just war, of the actors to be independent States, subjects of international law (VATTEL, 2008, p. 649).

By the beginning of the 18th century, the most fundamental principles of the *jus ad bellum* were thus already settled, and some of them were also related to the use of force during the war; however, according to Bovarnick et al. (2011, p. 11) *jus in bello* received little attention until late in *Just War Period*, at the end of 19th century. Nevertheless, some principles of the *jus in bello*, as the protection and respect for prisoners of war, were already settled by customs and military tradition, as it can be seen depicted in the Raclawice Panorama, in Wrocław, Poland, which contains a scene of a proper imprisonment of Russians by Polish soldiers in 1794.

**Figure 1 - Raclawice Panorama: scene of the imprisonment of Russian soldiers.**



Source: Picture taken from Panorama Raclawicka, Wrocław, Poland, in 31 May 2014.

But the *Just War Period* gave way to the *War as a Fact Period*, in which war was not to be just; instead, according Clausewitz (1984, p. 87), to it was to be a continuation of a State policy, with the usage of some other means, directed to a desired end state. Laws of war, as it was developed for centuries, were not considered by Clausewitzian concept for waging or conducting the war, as it can be seen in his book *On War*, first published

between 1832 and 1835. That was a serious step back in the course of the evolution of the war as a social phenomenon subject to rules - the so developed laws of war, and its consequences were to be faced in armed conflicts during 19th and 20th centuries.

Concerning the *jus in bello*, Clausewitz did not mention the limitations of war as related to those principles; instead, the force could be used in different ways. Still, there are no elements to conclude that Clausewitz considered any limitation or restriction for the use of force during the war:

If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part of warfare and has taught them more effective ways of using force than the crude expression of instinct (CLAUSEWITZ, 1984, p. 76).

Van Creveld (1991) indicated the lack of limitation during the war, according to Clausewitz's view:

Clausewitz used some of the book's most forceful passages to serve emphatic warning against introducing 'moderation' into the 'principle' of war; to him, armed force was subject to no rules except those of its own nature and those of the political purpose for which it was waged. He had no patience with the 'philanthropist' belief that war could (or should) be restrained and waged with a minimum of violence. 'In dangerous things such as war, errors made out of kindness are the worst.' Let us hear no more about generals who conquer without bloodshed.'

Consistent with this view, Clausewitz held that the law of war consisted of 'self-imposed restraints, hardly worth mentioning'.

Further on, during the 19th century, the rise of the State as the principal actor in international relations continued mitigating the concepts of just war. Therefore, those already developed principles were not able to avoid the usage of war as an instrument to achieve national policy objectives. *Realpolitik* replaced justice as the reason to go to war (BOVARNICK et al., 2011, p. 11).

Nevertheless extremist and authoritarian States did not use or recognize proper limitations, the standardization, in written rules, of the laws of war still intensified during the 19th century, mainly those related to the limitations during the war (BEVILAQUA, 1911, p. 278). In the *War as a Fact Period*, war was accepted as a matter of fact, in which the conduct should be disciplined; so the focus changed from *jus ad bellum* to *jus in bello* (BOVARNICK et al., 2010, p. 12).

By that time, the natural law in philosophy and religion often gave guidance to the conduct of combatants in war, particularly in Brazil, which, when becoming independent from Portugal, in 1822, adopted Christianity as the official religion and Roman Apostolic Catholicism as the religion of the State (PENEDO; PEREIRA DE

BARROS, 1855, p. 8).

Far from Europe, when the United States had consolidated its integration and the ideals of their founders, during the Civil War, the most significant document for cataloguing customs and practices of the *jus in bello* was issued, according to Henckaerts and Doswald-Beck (2009, p. XXXI): the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber in 1861 and published in 1863, as the General Order Nr 100, by the President Abraham Lincoln. The document was a broad *drafting of a code of war*<sup>4</sup>.

In some European countries, differently, armies were still reluctant to consider the limitations in war. In 1864, the atrocities committed during the Second Italian War of Independence culminated in the development of the written laws of war – the so-called *international humanitarian law (IHL)*. Henry Dunant, a businessman in Geneva, in a working trip, was impressed with the suffering situation of the French, Italians and Austrians at the Battle of Solferino, and improvised medical care for the wounded. Dissatisfied with the lack of systematization of the medical care in the battlefield, he wrote the book *A Memory of Solferino*<sup>5</sup>. The movement that would take that responsibility was thereafter formalized with the creation of the International Committee of the Red Cross, in 1863.

In South America, the imprisonment of the ship *Marquês de Olinda*, in 12 November 1864, by Paraguayan forces under the dictatorship of Solano Lopez, initiated the war between Paraguay and the Triple Alliance -Brazil, Argentina and Uruguay. The conflict lasted six years and was the longest war in the history of South America. The Treaty of the Triple Alliance, in 1865, in its article 14, mentioned the laws of war and their principles:

Allied nations require [Paraguayan] government to pay the costs of war that they were forced to accept, without express declaration of war, as well as to repair and compensate the damages to their public and private properties and those of their fellow citizens; and damages arose subsequently in breach of the principles governing the law of war (PINTO, 1869, p. 487).

After the invasion of the southern Brazilian province – *Rio Grande do Sul*, in 10 June 1865, the Paraguayan column, under the command of Colonel Antonio Estigarribia, was sieged in Uruguiana, a city placed by the Argentinian-Brazilian border along Uruguay River. After two months of negotiations, watched closely by the Brazilian Emperor Dom Pedro II himself, the Paraguayan forces surrendered under the protection and guarantees from the Allied Forces. A treaty was signed; prisoners of war were removed from the battlefield and

<sup>4</sup> The Code of Lieber was mentioned as such by Henckaerts and Doswald-Beck as well as by Bevilaqua (1911, p. 278).

<sup>5</sup> The Memory of Solferino is available from: <<http://www.icrc.org/eng/assets/files/publications/icrc-002-0361.pdf>>. This file was accessed in 29 May 2014.

could choose a place to live outside Paraguay. Those who were moved to Brazil, including Antonio Estigarribia, were granted salaries.

The necessity to regulate the status and living conditions of several Paraguayan prisoners of war in Brazil, who moved before and after the surrender in Uruguaiana, made some regulation necessary. Therefore, the Minister of War, Ângelo Moniz da Silva Ferraz, issued a decree in which many of the principles of the laws of war were present. The so-named *Instructions of 25 December 1865*<sup>6</sup> can be considered a cornerstone within the development of the written regulations concerning laws of war, as well as the *General Orders Nr 100* were, in North America, nevertheless the Brazilian regulation is not well known at all, even in Brazil. According to the Brazilian Former Minister of the Superior Military Justice Court, Mário Tibúrcio Gomes Carneiro:

The Doctrine, fixed in the Angelo Moniz's Instructions, in healthy, just, and humanitarian precepts, which he exhibited in vehement and persuasive language, reflects, as he modestly confessed, the teachings of the early internationalists of the time; but the systematization in which the matter appeared regulated, including all legal and military aspects, showed that the master did his work, and, in technical perfection, completed, in the corresponding chapter, the model that we assume had or has had, in the 1863 American Instructions; and the pair came, proudly, with modern formulas, given the solutions of the problem, the international conventions signed at Geneva in 1929. [...] It seems to us that should be noticed, for the glory of Angelo Moniz's Instructions, that his essay of unilateral coding of one of the chapter of the laws of war was only preceded by the American Instructions, which Bluntschili, unsuspectedly, considered the first attempt at codifying the laws of war in his book *Das Modernes Voelkerecht als der Staten Civilierten Rechtsbuch dargestellt*, published in Germany in 1868, i.e. five years after the Instructions for the Government of Armies of the United States in the Field (CARNEIRO apud PIMENTEL, 1958, p. 21-22).

The *Instructions of 25 December 1865* comprised a series of guarantees and principles, such as:

- reinforced the commitment to the styles of civilized peoples even when the enemy did not follow that customary body of principles;
- mentioned the humanity as duty and right;
- established the general rule to avoid the prisoner to keep offending Brazilian troops instead of punishing or castigating him; that should be done by

<sup>6</sup> The *Instructions (Aviso de 25 de Dezembro de 1865, in BRASIL, 1866, p. 269-283)* were accessed in the Brazilian Army Historical Archive, during our research about the impacts of the laws of war for the Brazilian Campaign in the Triple Alliance War (1864-1870), between 2011 and 2012. The thesis was presented and approved in the Brazilian Staff School (ECEME), in Rio de Janeiro, in 14 October 2013. Most of the Brazilian historical references of this essay were collected as sources during that doctorate research. Complete reference about the thesis is detailed at the end of this essay.

collecting arms as well as sending them apart of the war theatre;

- guaranteed good treatment, means of subsistence, right of life, and respect of religion and customs for the enemies, seeking to ease the rigor of their position;

- guaranteed, for officials, if there were not suspects of misbehaviour, the right to move freely, without escorts, to the designated place, and to live there freely, under the commitment to stay at that place until the peace agreement was signed;

- treatment for the injured in the same way in which Brazilian troops were treated; indeed, Paraguayan injured soldiers were treated accordingly, as it was also demonstrated in our already mentioned research;

- established the distinction between military forces and civilians in the battlefield: priests, women, children, nurses, dealers and all the people who gather the enemy's troops, but were not intended to fight, were to be treated as non-combatants;

- prohibited the enlistment of prisoners of war in Brazilian Armed Forces, even if they were volunteers;

- guaranteed salaries for officers and regular payments for those who worked in public institutions in Brazil; right of private property was also granted.

Moreover, those rules, settled in 25 December 1865, were not the first regulations of Brazilian Armed Forces concerning the limitation of the use of force during the war. Before that, and remarkably before the conventions of Geneva, there were some other internal regulations, present in military compendiums of laws and regulations, such as the *Military Legislation Indicator*, issued in 1863. Those decrees regulated the *jus in bello*, therefore ruling the conduct during the war:

- the conditions for the legitimacy and the procedures for the booty were settled by the Statutes of 29 August 1645 and 9 August 1658, when the booty was accepted only in just wars, as a consequence of the general guidance of the laws of war during that period. The compilation of military legislation made in 1834 made clear the evolution of the concept of the booty, indicating differences between the person and properties of the State, of the soldiers, and those owned by civilians (MATTOS, 1834, p. 206-207).

- the Charter of 7 May 1710 (AMARAL, 1863b, p. 273,294) established the protection of religious temples and sites, priests, and death penalty to be applied to whom, by any arms, offended any person who was not the enemy;

- the protection of women was also established in the Charter of 7 May 1710, with death penalty for those who violated women, even those who belonged to the enemy (BRASIL, 1863, p. 65);

It's remarkable that some of those regulations were issued in Portugal, before the independence of Brazil, which occurred in 22 April 1822. They were still valid during the 19th century, as it can be seen in

the compilations of military laws and regulations of the Ministry of War from those years.

Furthermore, there were some principles of the *ius in bello* present in Brazilian Military doctrine, which demonstrated the so-existing integration between military doctrine and the laws of war: protection to *parlementaires*, to deserters, and, remarkably, the proportionality when fighting against an enemy found in a patrol, which should be preferably imprisoned and treated accordingly, as a prisoner of war, could be found in General Instructions of 1762 (BRASIL, 1865).

The presence of the centenary principles of the laws of war amongst Brazilian directives, during the Triple Alliance War, was subject to publication by The New York Times, in United States of America, in June, 1st, 1866. The proclamation addressed by General Osório to his troops in the very beginning of the Allied Campaign in Paraguay was so published. It contained a very clear recommendation about treatment of non-combatants:

Soldiers! The mission of commanding free men is an easy one; to show them the path of duty is sufficient. Your road lies before you. It is not necessary to tell you that the vanquished enemy and the Paraguayan disarmed or peaceful should be sacred to an army composed of men of honour and heart (OSORIO apud J.M.B, 1866).

Back to Europe, the formal conventions and treaties concerning the *ius in bello* continued developing up to the end of the 19th Century and during the 20th Century, formalizing what was to be known as International Humanitarian Law or International Law of Armed Conflicts<sup>7</sup>. The posterior development of the *ius in bello*, during the 20th century, was briefly described by Henckaerts and Doswald-Beck (2009, p. XXXII):

The driving force behind the development of international humanitarian law has been the International Committee of the Red Cross (ICRC), founded in 1863. It initiated the process that led to the conclusion of the Geneva Conventions for the protection of the victims of war of 1864, 1906, 1929 and 1949. It was at the origin of the 1899 Hague Convention (III) and 1907 Hague Convention (X), which adapted, respectively, the 1864 and 1906 Geneva Conventions to maritime warfare and were the precursors of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949. It took the initiative to supplement the Geneva Conventions that led to the adoption in 1977 of two Additional Protocols. The ICRC has both encouraged the development of and been involved in the negotiation of numerous other treaties, such as the 1980 Convention on Certain Conventional Weapons, the 1997 Ottawa Convention banning anti- personnel landmines and the 1998 Statute of the International Criminal Court.

<sup>7</sup> The term *Armed Conflicts* was used in the article 2 common to all 1949 Geneva Conventions, when asserting that the law of war applied in any instance of international armed conflict.

Therefore, the positivism that transformed centenary customs into written rules, initiated with the Code of Lieber, in 1863, developed in the first Geneva Convention, in 1864, and, what not to say, in the Brazilian Instructions of 25 December 1865; they continued developing during the 20th century, in what was known as *War as a Fact Period*, in which war was a recognized and legal reality in the relations between States, [so] a focus on mitigating the impact of war emerged (BOVARNICK et al., 2011, p. 12).

After the World War I, the idea of war as being a part of international law was totally refused; war was considered illegal. That was the *Jus Contra Bellum* period, mostly related to the act of beginning a war as being a violation of the international law (BOVARNICK et al., 2011, p. 13).

Since the procedural requirements of the Hague Conventions and of the League of Nations did not prevent World Wars I and II, United Nations were created, as a world organization with power and mechanisms dedicated to prevent war, and international law was recognized as needed to provide more specific protections for the victims of the war (BOVARNICK et al., 2011, p. 14). War criminals were prosecuted in international courts, after conflicts such as WW II, Yugoslavia and Rwanda, and crimes of war were defined as such in the 1998 Statute of Rome.

The 1945 United Nations Charter continued to enforce the banning of war, extending the concept of violation to the *threat or use of force*. Still, States were permitted to use force if response of an armed attack. The right of self-defence has always been and continue to be a fundamental principle of the contemporary *ius ad bellum*.

After this long period of development, the custom that regulated the conduct during the war (*ius in bello*) was also object of systematization, through the work completed in 2004 by Jean-Marie Henckaerts and Louise Doswald-Beck. These authors illustrated the importance of the principles as a source of international law, mentioning the Martens Clause, inserted in the preamble of the 1899 Hague Convention II:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience (HENCKAERTS; DOSWALD-BECK, 2009, p. XXXI)

Notwithstanding, those principles, rules, and treaties were not effective enough to prevent nor to soften two world wars in the 20th Century, when millions of people died, prisoners of war were tortured

or executed, Jews, Gypsies and other minorities were massacred, churches and historical national-heritage places were destroyed. And what to say about genocides in Africa, atrocities committed by the Soviet Union and its puppet governments, violations against civilians in Vietnam, in Yugoslavia, interventions and war in Middle East? It seems that the lessons from the past were not yet learned. Indeed, the laws of war are not sufficiently effective. Currently, armed interventions are still taking place without being based on self-defence and with no approval from the United Nations, which could legitimate a legal armed intervention. Ukrainian case, with Russian intervention and posterior incorporation of Crimea, is just one example of how ineffective the laws of war are nowadays.

In a discussion about principles of laws of war, their role as a source of *jus ad bellum* and *jus in bello* can be explored. These principles are currently written in uncountable publications, such as the ICRC *Customary International Humanitarian Law*, the USA *Laws of War Deskbook*, the 1863 *Instructions of the Government of the Armies*, and the Brazilian *Employment of International Law of Armed Conflicts in Armed Forces Handbook*.

They are not only juridical rules; much more than this, those rules and principles are very related to deep moral concepts, where right and wrong decisions during armed conflicts are situated. Those principles are discussed in the following topics.

### 3 PRINCIPLES OF *JUS AD BELLUM*

*Jus ad bellum* was defined by Bovarnick et al. (2011, p. 7) as *the law dealing with conflict management, and how States initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified)*. What is seek, by international law, is the *lawful use of force*.

The general principle, established by UN Charter, Chapter VI, is the **pacific settlement of disputes**. This principle can be found in many national constitutions, including the 1988 Brazilian Constitution, which established the pacific settlement of disputes as a fundamental compromise of the Republic (in the preamble), as well as a principle of Brazilian foreign affairs (article 4th, VII).

The pacific settlement of disputes was also established in the first article of The North Atlantic Treaty, signed in 4 April 1949:

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations (NORTH ATLANTIC TREATY ORGANIZATION, 1949).

The right to move armed force to the war is historically based on what is called a just cause, which is characteristic of a just war, as it has been described before. This matter about the lawful use of force is currently regulated by the UN Charter, Chapter VII, which settles the rules for the usage of all the means, including the usage of armed force, in order to prevent or face any threat to the peace, breach of the peace, or act of aggression.

The resource to armed actions against an unjust attack can be primarily justified by the **principle of self-defence**, as stated in Article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security (UNITED NATIONS, 1945, p. 10-11).

The concept of the UN Charter is not new at all. It was already demonstrated that the most important principle of the *jus ad bellum*, the inherent right of self-defence was present during the Just War period, since the beginning of the evolution of the laws of war. By the UN Charter, this concept was extended to collective self-defence, which can be also found in the article 5 of the North Atlantic Treaty, which refers to the article 51 of UN Charter:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area (NORTH ATLANTIC TREATY ORGANIZATION, 1949).

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

*Contrario sensu*, an aggressive war is forbidden, for there is no reason to threat or to use armed force against a country that is not attacking or threatening anyone. Defence of interests and guarantee of strategic resources are definitely out of the scope of the self-defence principle, for there is nothing to do with previous or imminent aggression to be the cause for a just reaction. Moreover, the self-defence measures are to be quit when the UN Security Council takes over the responsibility to

keep international peace and security, recognizing the role of that supranational body as a key-player for the international stability.

By the UN Charter, collective response is recommended over unilateral actions of self-defence. That is what can be deduced from the Chapter VII of UN Charter,<sup>8</sup> which establishes that UN Security Council is entitled of determining

*the existence of any threat to the peace, breach of the peace, or act of aggression; to make recommendations [and] decide what measures shall be taken, [seeking for the peaceful solution of the controversy]; decide what measures not involving the use of armed force are to be employed to give effect to its decisions, [calling] upon the Members of the United Nations to apply such measures, [still trying to reach a peaceful solution; finally], take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations (UNITED NATIONS, 1945).*

Therefore, the UN Charter establishes a mechanism of gradual increase of the use of power, first the currently named *soft power*, and, if not effective, an increasingly *hard power*, counting on a collective action by the UN members.

According to Bovarnick (2011, p. 31-32), individual self-defence, by United States doctrine, has three main expressions: *protection of territorial integrity; protection of political independence; and protection of nationals*. These expressions of the use of force, based on the right of self-defence, enlarge the concept of the contemporary *jus ad bellum* and can be subject to discussions, particularly the last one.

Furthermore, the USA enlarges the concepts of self-defence by considering lawful the anticipatory self-defence and the pre-emptive use of force, which is present in USA 2002 and 2006 National Security Strategy. Those concepts are not clearly present in multilateral charters such as UN Charter or North Atlantic Treaty, and are subject to endless discussions, not suitable to the objective of the present essay. Neither is present the concept of self-defence against non-state actors, which is also considered by some American scholars, in a quite challenging approach for the contemporary *jus ad bellum*. According to this concept, it can be lawful to attack non-state actors within *host States that are unwilling or unable to deal with the non-state actors who are launching armed attacks from within its territory* (BOVARNICK et al., 2011, p. 35). The use of this concept can be identified in the war against terrorists in Afghanistan and in the action that culminated with the death of Osama bin Laden, in Pakistan, in 2 May 2011.

<sup>8</sup> So it was by Bovarnick et al. (2011, p. 28), who stated mentioned the Charter's strong preference for collective responses to the illegal use of force over unilateral actions of self-defence.

There are two principles of the *jus ad bellum* that should base any use of force, in the cases of self-defence: **necessity** and **proportionality**. They emerged from the concept of just war in centuries of the development of the *jus ad bellum*, since just war should be a *reasonable* and *necessary* reaction against an *unjust attack*, in which the sovereignty or rights of the country was seriously threatened. It can also be said that

It is well-accepted that the UN Charter provides the essential framework of authority for the use of force, effectively defining the foundations for a modern *jus ad bellum*. Inherent in modern *jus ad bellum* is the customary requirement that all uses of force be both necessary and proportional (BOVARNICK et al., 2010, p. 30).

States must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention. In other words, force should be viewed as a "last resort" (BOVARNICK et al., 2010, p. 31).

Indeed, the concept of **necessity** can be seen in aged vestiges of the laws of war. Gentili (2006, p. 120, 148), in 1598, and Paiva (1850, p. 25), in 1850, stated about the necessity, say, the usage of all possible means to repair the offense, as a condition for a just war. Also, the *unquestionable right to protect the subjects, by the depletion of diplomatic means to avoid the offenses to the right of Brazilians in Uruguay* was evoked by the Duke Caxias, in 1851.<sup>9</sup>

The principle of necessity was also mentioned in the North Atlantic Treaty, in article 5, which authorizes the use of *such actions as deems necessary* (NORTH ATLANTIC TREATY ORGANIZATION, 1949).

It is important to remark that necessity, as the principle of the just cause is related to the indispensability of military measures to safeguard the inherent rights of a given nation; the concept differs the necessity of the *jus in bello*, related to necessary means of combat, as it will be analysed during the next section of this essay.

**Proportionality**, in turn, is related to the dimension of the reaction: a proportional reaction or exercise of self-defence comprises the reasonable use of force, in order to prevent or to stop an unjust aggression. Both concepts, proportionality and necessity, are inherent of the principle of self-defence, and can also be found in the doctrine of domestic criminal law acts or systems, as conditions for the lawful exercise of self-defence.<sup>10</sup>

Besides, the lawful use of force includes actions

<sup>9</sup> The Proclamation of Duke of Caxias, the patron of Brazilian Army, can be found in the sequence of orders issued by him as Commander-in-Chief of Brazilian Armed Forces during the Campaign in Uruguay, in 1851. It is accessible in the National Archive, Rio de Janeiro (Collection Caxias, fund code OP, box 811, package 2).

<sup>10</sup> The article 25 of the Brazilian Penal Code states that: "It is understood in self-defence who, moderately using the necessary means, repels unjust aggression, actual or imminent, against himself, herself or other people (BRASIL, [20--?])."



authorized by the UN Security Council under the Chapter VII of San Francisco Charter. This is the case of UN peace enforcement actions, initiated by the existence of a *threat of peace, a breach of the peace, or an act of aggression*, described in the article 39 of the Charter. It is indeed a contemporary mechanism of collective defence based on the role of the United Nations as a guarantee of world peace. UN peacekeeping<sup>11</sup> and peace enforcement missions are covered by Chapter VII when the force is used, also under proportional and necessary conditions, to recover, establish or keep peace and security in a given country or region.

**Legitimacy** can be also considered another principle, developed for the centuries of evolution of the *jus ad bellum*. In the past, as it can be learned by the teachings of many scholars, including Alves Junior (1866, p. 92)<sup>12</sup>, only sovereign States could wage war. Nowadays, UN Charter preconizes that the unjustly violated State in self-defence or the States authorized by UN Security Council can lawfully launch armed force against an aggressor. The principle of legitimacy, which is not clearly explored by current doctrine, is an important issue when discussing the legality of non-governmental actors or States, which are not authorized by UN Security Council to launch an attack as legitimate parties of the *jus ad bellum*. It is important to highlight that legitimacy does not exclude the principles of necessity and proportionality, for the armed action or campaign to be lawful.

The NATO Comprehensive Operational Planning Directive (COPD INTERIM V2.0, issued in 04 October 2013), in Chapter 3 – Strategic Level – establishes the analysis of legal aspects (in general) of the problem in the initial crisis estimation, as well as the analysis of international law as one of the steps of the strategic assessment<sup>13</sup>. During the phase of military considerations – use of NATO military instrument – there are no specific mentions about the *jus ad bellum*. In the development of the Military Response Option (MRO), legal requirements are to be determined; international law and moral constraints, each one a separated item, are used as criteria for the analysis of the MRO, if acceptable or not. During the development of the Strategic Concept of the Operation (CONOPS), legal basis and mandate for the operation are to be given after NATO end state, mission, role, and strategic objectives and Political limitations and assumptions.

<sup>11</sup> UN Peacekeeping missions here considered are those in which the use of force is authorized, e.g. current missions in Haiti and Democratic Republic of Congo. In turn, peacekeeping missions can be also used as a step to be taken before the use of force under Chapter VI of the UN Charter.

<sup>12</sup> This book was reference for the teaching of law, laws of war included, in the Brazilian Military School, in the second half of the 19th century.

<sup>13</sup> COPD describes this step as follows: “3-13. Appreciate International Interests and Engagement in the Crisis. a. Determine International Legal Aspects. Throughout the process the legal aspects of the crisis based on international law, treaties and agreements, as well as relevant UN resolutions, will be reviewed for understanding and applicability (NORTH ATLANTIC TREATY ORGANIZATION, 2013, p. 3-27).”

Considering the ethical content of the *jus ad bellum*, moral and legal constraints are very related, but this does not seem to be the focus of NATO Directive. In short, the process emphasises much more the achievement of strategic objectives and end states, than the legal implications and restraints for the use of force, which can easily recall the realistic, Clausewitzian approach of 19th century *realpolitik*.

For what has been analysed during this essay, it seems to be necessary to consider the implications of the laws of war, here referring to the legitimate use of force, from the beginning of the strategic process and during all the phases of the strategic assessment and planning. This is not a task for lawyers, it concerns the very fundamental issues about the use of force, with military, legal, and moral aspects involved. Hence, it would be appropriate to adjust the focus of the planning process in order to synchronize more effectively the *jus ad bellum* to the assessment concerning the use of military force.

It could be also valuable to mention which principles or rules, in general, should be considered. In this case, it would be much more practical if the principles of the *jus ad bellum* were indicated, with main concepts, it would be much more synthetic and simple than to describe all the written rules and compiled customs about the lawful use of force. Therefore, the use of the principles of the *jus ad bellum* in the strategic planning process can result in more effective results about the compliance of the laws of war when armed force is to be used.

I. In brief, the main principles, universally accepted, as a result of the development of the *jus ad bellum*, are the peaceful settlement of disputes, the right of self-defence, necessity, and proportionality. To these principles, the use of force under a UN mandate, as a guarantee of peace and security, was added by UN Charter, in 1945. They should be primarily considered in any strategic assessment concerning the possibility of the use of military force. The enlargement of the centenary principles of the *jus ad bellum* comprises the most challenging moral, political, and juridical arguments about the laws and the justice of war: was Bin Laden lawfully eliminated or murdered? Were the actions in Afghanistan and Iraq lawful or not, from the perspective of legitimacy, necessity, proportionality? Does Russia have the right to enter in Ukraine to protect the rights of Russians within that country? These challenges are not supposed to be easily solved, notwithstanding the centenary development of the customary, doctrinal and positive principles of the *jus ad bellum* can indicate some just and universally acceptable solutions.

## 4 PRINCIPLES OF JUS IN BELLO

The *jus in bello*, or the lawful conduct of combatants during armed conflicts, is mostly known as the International Humanitarian Law, for the influence

and major role played by the International Red Cross / Red Crescent Committee, since the effort for the systematization of the humanitarian constraints and restraints during the war, by Henry Dunant, and the First Geneva Convention, in 1864.

It was already mentioned that the conventions and treaties concerning the conduct in combat were a result of customary rules and principles, developed after centuries of wars and suffering. It was also explored that *realpolitik* and the prevalence of States as the most important actors in international law, in 19th and 20th centuries, caused a series of massacres and violations of the so-developed customary *jus in bello*. In turn, the WWII and the atrocities thereby committed provided the basis for the conception of United Nations as a world promoter of peace and security and for the rising of ICRC, non-governmental and international organizations in charge of promoting humanitarian aid and relief during armed conflicts.

Nowadays, the *jus in bello* is mostly based in treaties and conventions, mainly connected to the Geneva Conventions (1949), their Additional Protocols (1977), and The Hague Conventions (1899, revised in 1907). Protective rules to non-combatants were established in Geneva, and limitations, means, and methods were subject of The Hague Conventions. Crimes of war were defined, by the Statute of Rome, only in 1998. Additionally, there are plenty of conventions and treaties, not always signed by all the UN nations, what makes it difficult to understand and memorize of all legal aspects of the conduct of the war.

Rules of engagement (RoE) are usually provided to the troops, since the *jus in bello* deals with the day-by-day conduct during the war and armed conflicts in general. However, these rules of engagement, if likely to cover all the rules of the *jus in bello*, can be too long and detailed for a simple soldier to understand, memorize and mostly use them during the extreme stress caused by the war. In a multinational force, this challenge is even bigger, there are different political positions, laws and regulations from different countries involved<sup>14</sup>.

Publications and rules of engagement usually refer to the main conventions and treaties of the *jus in bello*, which were listed by Bovarnick et al. (2011, p. 17-19):

- 1949 Geneva Convention I: protects wounded and sick in the field;
- 1949 Geneva Convention II: protects wounded, sick, and shipwrecked at sea;
- 1949 Geneva Convention III: protects prisoners of war;

<sup>14</sup> The difficulties related to different national patterns for the establishment of rules of engagement, when planning and conducting military actions during the war within a multi-national contingent, was one of the most emphatic remarks made by the Polish Major-General (retired) Andrzej Tyszkiewicz, the first commander of the Multinational Division Central-South, in Iraq 2003-2004, during the RING Exercise, in the National Defence University, Warsaw, in June 2014.

- 1949 Geneva Convention IV: protects civilians;
- The Hague 1899 Convention, revised in 1907: focuses on regulating the means and methods of warfare, e.g. tactics, weapons, and targeting decisions;
- 1977 Geneva Additional Protocols: supplemented de 1949 conventions, taking into account the existing gaps in those rules and in those of The Hague Conventions;
- 1925 Geneva Protocol: prohibits the use chemical and biological weapons;
- 1954 The Hague Cultural Property Convention;
- 1972 Biological Weapons Convention;
- 1980 Certain Conventional Weapons Convention;
- 1993 Chemical Weapons Convention.

Additionally, the Resolution XXIII, signed during the UN Human Rights International Conference, in Iran, called upon all States, the assistance for both civilians and soldiers to be protected by an International Law in all armed conflicts, mentioning **principles** such as **limitation, protection of civilians populations and distinction**, which is remarkable, from the perspective of this essay.

The principles of the *jus in bello* are few, and they summarize the detailed rules of conventions, treaties and protocols. Basically, those principles were already present in compilations of the customary *jus in bello*, existing even before the conventions of Geneva, The Hague and New York (UN), such as the General Order Nr 100 (USA, 1863) and the Brazilian Instructions of 25 December 1865. The Brazilian Ministry of Defence International Armed Conflicts Handbook (BRASIL, 2011) mentions the following principles, aimed to discipline the conduct of combatants during the war:

- **Distinction**, as the general rule to differ combatants and non-combatants, which includes prisoners of war, medicals, religious personnel, and private property; cultural heritage, temples, hospitals, schools, women and children are also included;
- **Humanity** imposes the avoidance of unnecessary suffering, mostly amongst civilians, and the respect for the human rights; collateral damage is to be strongly avoided;
- **Limitation**, which is related to choses about means and methods of combat; the principle emphasizes the avoidance of unnecessary damage and suffering;
- **Proportionality** in the use of force: the military goal must be proportional to the employed means and methods, which include attacks to military targets;
- **Military Necessity** relates the use of force to the aimed military goal; targeting, apart of the respecting the principle of limitation, must be aimed to a specific military purpose.

The ICRC Customary International Law Publication, written by Henckaerts and Doswald-Beck (2009), recognizes and provides details and rules about the same mentioned principles, as a result of an

uncontroverted centenary construction of the *jus in bello*, and extend the subject to contemporary concerns, such as peacekeeping missions, dangerous forces and natural environment. Some of those rules, or principles, are summarized below:

- distinction between civilian and combatants;
- distinction between civilian objects and military objectives;
- protection of medical, religious, humanitarian relief, peacekeeping missions personnel and objects, connected to distinction;
- proportionality in attack;
- prohibition of indiscriminate attacks, related to distinction, proportionality, limitation;
- protection of cultural property, related with distinction;
- precautions in attack and against the effects of attack, very related to limitation, distinction, and avoidance of incidental damages and civilian casualties; precautions must include particular care with works and installations containing dangerous forces;
- special care with natural environment, also related to limitation;
- inviolability of *parlementaires*, a very aged customary principle of the *jus in bello*, existing since the Middle Ages, much earlier than the principles codified in the 19th and 20th centuries;
- principles concerning the usage of weapons: prohibition of unnecessary suffering or superfluous injury; prohibition of weapons which are by nature indiscriminate; prohibition of poisoning, nuclear, chemical, and biological weapons, expanding and exploding bullets etc. – all those principles are particular aspects of the principles of humanity, distinction, and limitation.

By what was exposed during this section, it is clearly noticeable the existence of several conventions, treaties, resolutions, and other written rules detailing the *jus in bello*. It was already mentioned that, even addressing those rules to the troops by rules of engagement, they are too detailed, sometimes not standardized, and those rules usually specify many other details, complemented by commanders' guidance in some other aspects not related to the laws of war. It is indeed confusing and challenging to reach full effectiveness concerning the laws of war only using those rules when engaged in battles under intense pressure.

Therefore, the understanding and application of the few existing principles of the *jus in bello* – **humanity, distinction, limitation, proportionality and military necessity** – can be one of the most valuable tools for the proper use of means and methods of combat and for the protection of the vulnerable during the war. These principles were developed for centuries, they are part of the military tradition, comprise a moral content, and should not be confused or turned ineffective by the positivism tradition of the international law. Soldiers are in the battlefield, not lawyers. As it was mentioned by

Walzer (2006, p. XX):

[UN] decrees do not command intellectual or moral respect – except among the positivist lawyers whose business is to interpret them. The lawyers have constructed a paper world, which fails at crucial points to the world the rest of us still live in.

## 5 CONCLUSIONS

The principles of the laws of war, which can be found in current conventions, treaties, internal laws, publications, and military doctrine result from centuries of years of evolution. They are an inherent part of the art of war and cannot be disregarded when any of the subjects of the armed conflicts is discussed.

In short, *jus ad bellum* should be considered as the basis for the strategic and operational planning before moving forces to the theatre, and *jus in bello* should give mandatory guidance for the tactical actions and daily procedures in combat. Therefore, both aspects of the laws of war should be on the fundamentals of planning and conduct, and not as something to be checked or to be used to justify an action already planned or executed, as it can still be seen in contemporary crisis and conflicts. This is a matter of changing definitely the perspective of the laws of war, for which should be already the current pattern of their usage as a military science.

The perspective of considering the laws of war the core for any planning or action during armed conflicts directly influences the effectiveness of those rules. Moreover, the integration between the International Law of Armed Conflicts and the military doctrine is necessary for the full implementation of those centenary principles. This integration could be already seen in Brazil in 1865, as it was demonstrated during this essay. Currently, there is such an effort in Brazilian Armed Forces, concerning both aspects of the laws of war, from the strategic to the tactical level:

Therefore, it will be necessary to permeate the doctrine fundamental aspects related to the International Law of Armed Conflicts (ILAC), from the strategic to the tactical level, compromising planners from the highest level of decision to the executors. Tactics, techniques and procedures, individual and collective, should be grounded in aspects of ILAC, ensuring their implementation in military operations (BRASIL, 2011, p. 36).

Moreover, the principles hereby analysed could be used for the effectiveness of the laws of war, with some advantages pointed out during this essay: they are few; easily understandable; traditional, for centuries of evolution; generally part of the military culture and values; and, remarkably, they consist in the fundamentals of the main conventions and treaties of the laws of Geneva, The Hague and New York, those rules were based on these

principles.

Therefore, the principles of pacific settlement of disputes, self-defence, necessity, proportionality, and the hereby proposed legitimacy and can give general guidance and fundaments, from the perspective of the *jus ad bellum*, for strategic and operational planning processes.

In turn, the principles related to the conduct during armed conflicts – distinction, limitation, military necessity, proportionality, and humanity – could be fully integrated to handbooks, military doctrine, orders, plans and rules of engagement, in order to facilitate the understanding, reinforce the ethic tradition of the armed forces and make more effective the *jus in bello* as a moral restraint for troops in combat.

Finally, the usage of those principles and its integration to military doctrine and strategic planning directives could lead to fairer wars, with just conceptions and less violations. More than to answer questions about the justice of armed interventions in Ukraine or Middle East, it could help to avoid unjust wars and irregular procedures. Armed conflicts are always pitiful and terrible, but centuries of just war tradition must have positive and effective outcomes in the battlefield and for the humankind.

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