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Jus In Bello, Authored By: Ms. Saloni Bharadwaja (B.A.L.L.B),
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ABSTRACT:

“The research paper has made the sincerest effort to study the force that is used by the nations to cause harm to other states, the paper is written to understand the objectives behind the state's use of force and armed conflicts. The study has dealt with the aspect of customary international law and how the UN Charter and the Geneva Convention deal with force more legally and formally. The research paper has also made the best effort to analyse the world wars and the present wars that are occurring on the international front right now and the damages and losses to the humanitarian population. Through this research paper, the writer has tried her best to explain the use of force by the nations and the impact of that to the international community. Through analysing various literature and relevant case laws the research paper incorporates an understanding of the legal framework governing the use of force”.

Keywords: United Nations Charter, Geneva Convention, World Wars, Jus ab Bello, Jus ab bellum.

LIST OF ABBREVIATIONS:

UN	United Nations
Art.	Article
UNSC	United Nations Security Council
WW1	World War One
WW2	World War Two

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I. INTRODUCTION:

The United Nations Charter mentions under Article 1 to maintain international peace and security between the countries of the world¹, this is the provision under which the countries are expected to maintain friendly relations and achieve international cooperation is the major goal of the UN Charter. Article 2 (4)² of the Charter prohibits the threat or the use of force and expects the nations to respect territorial integrity and maintain steady relations among the world's nations. The international law that is being seen in today's world is one full of prejudices and biases, as the rich nations are overpowering the weak nations, international law came into force as it is a mechanism which protects the rights of humans and fights for the people who live in those nations. Article 55 of the UN Charter³ also states that there should be universal respect for human rights and all the fundamental rights shall be given and respected to all the people. When we articulate human rights, it is inevitable if we don't express the perspective of human rights, as it is an integral part of international law. The people of the land make the nation, therefore if their rights are not protected and promoted the nation will be said to be failing in the growth of the said country. The wars that ensue are the result of the failure to protect human rights, as it is not the nations that are fighting the wars it is the people as well who have to suffer losses, the loss of life, shelter, and food among a few.

II. CHAPTER 1 MEANING OF JUS AD BELLO AND JUS AD BELLUM:

With the onset of the meanings of *jus ad bellum* and *jus ad Bello*, these are Latin terms for Law on going to war and Law in war respectively. these terms together constitute what is called '*Laws of Wars*'. According to the International Committee of the Red Cross, *Jus ad Bellum* refers to the conditions under which states may resort to war or use armed force in general. Jus

¹ UN Charter (1945), Article 1.

² UN Charter (1945), Article 2(4).

³ UN Charter (1945), Article 55.

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ab bello regulates the conduct of the parties engaged in an armed conflict.⁴ *Jus ad bellum* is the term which is used in international law for regulating the resort to force by states, it is this law which establishes whether a law is legal or illegal, it is the part which governs or mentions the reason for a state to engage in war. As mentioned in the introductory part of the paper, this legal maxim is derived from Article 2(4) of the Charter.

As stated, the meaning of *jus ad bellum*, which is the right to war, there are only two exceptions to Article 2 of the United Nations Charter i.e., in self-defence and if the states are authorised by the UN Security Council. ***Proceeding further the definition requires certain factors which need to be taken into consideration. These factors are as follows:***

1. *A just cause behind the war taking place.*
2. *There must be a legitimate authority declaring war.*
3. *There must not be an ill intention.*
4. *The probable chances of achieving victory.*
5. *War should be the last resort.*⁵

The term ***Jus in Bello*** is another branch of the Laws of War, as the literal meaning of the term is Law in War, therefore it means the behavioural principles that govern the states to act in a certain manner in times of warfare. *Jus in Bello* is also called international humanitarian law, as it relates to the humane conditions that should be considered in times of war. This aspect of the theory does not deal with whether the war is legal or illegal whereas there are certain rules in the Geneva Convention which condition the states to follow these rules irrespective of the reason for war and irrespective of the fact whether the war took place domestically or on the international front. They regulate matters ranging from the treatment of the wounded person to the prohibition of attacks on the civilian population. There are three principles of *jus in bello*

⁴ International Committee of The Red Cross (1863)

⁵ Just war theory, by Alexander Moseley, *The Internet Encyclopaedia of Philosophy*

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necessity, humanity and proportionality.⁶ The principle of necessity junctures the force that is essentially required for a legitimate war to take place and the excessive use of that force must be prohibited, and minimal possible harm should be caused to the civilian population. The second principle of humanity is the condition that even though the states are at war with each other basic human rights shall not be neglected and there should be a sense of humanity among the citizens. The third principle of proportionality mentions that the force used should be proportional to the expected harm by the military. Still, if that force exceeds and the harm is likely to cause suffering to the civilians and civilian property it should not be conducted.

The shift from *jus ad bellum* to *jus in Bello* implies a shift in emphasis from the reason for going to war to the conduct of war once it begins. This trend reflects a growing realisation in international law of the need to reduce the effects of armed conflict while also protecting the rights of those harmed by war.

III. CHAPTER 2: THE USE OF FORCE AND TO WHAT EXTENT

IT CAN BE CALLED AS SELF DEFENCE:

In international law, as we saw under the UN Charter Art. 2 restricts the use of force among the nations, but this also creates an ambiguity in contrast to Art. 51 of the Charter, which articulates the use of force as a pre-requisite to self-defence and another exception to the general rule of Art. 2 of the Charter is that states use force when it is mandated by the UNSC as provided under Art. 42 of the UN Charter. Self-defence is said to be a crucial principle in international law, it is the use of force by states to protect themselves from armed rebellion. Furthermore, customary international law recognised the right of self-defence under specific circumstances, that is even without an armed attack. These include the need for self-defence against impending dangers.

⁶ Ohlin JD. The Basic Structure of Jus in Bello. In: May L, ed. *The Cambridge Handbook of the Just War*. Cambridge Handbooks in Philosophy. Cambridge University Press; 2018:234-254.

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Self-defence was given a much wider and more conventional interpretation in the 19th century in the Caroline case⁷. There are three crucial factors of self-defence which were introduced by Daniel Webster who played a major role in developing the modern meaning of self-defence, he was the one who laid the foundation in his declaration these are necessity, immediacy and proportionality.⁸ The jurisprudence on the use of self-defence as a form of self-preservation was established following the Caroline case debates, but only under extremely restricted conditions. Following the San Francisco Conference, states were guaranteed the right to self-defence against military aggression under Article 51 of the United Nations Charter

The substantial point for a state to legitimately prove the right to self-defence is that the state must establish that the state has been the victim of an armed rebellion, the burden of proof lies with the state seeking to justify the use of force in self-defence, the ICJ in the Nicaragua case⁹ quoted that self-defence would warrant only measures which are proportional to the armed attack and necessary to respond it. The principles of necessity, proportionality and immediacy play a crucial role in the state proving self-defence, necessity would mean the necessary force that is required for a state to thwart the armed attack that took place. Proportionality means that the harm that the state is claiming as self-defence should not be beyond the harm that is caused by the attacking state. Immediacy means that there exists an immediate threat to the state and under that, the state performed their right to self-defence and attacked the country in return. In the *Oil Platforms case (Iran vs. U.S.A.)*¹⁰, Iran claimed that the United States had attacked the oil platforms, and the attacks had been extended to the ships that were present in the Persian Gulfs, the counterclaim that the United States made was that the Oil Platforms were used as concealed mechanisms to perform military activities. The International Court of Justice has

⁷ *United States v. United Kingdom* (1840) 29 BFSP 1137 (*The Caroline Case*).

⁸ Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Lexis Nexis Butterworths, 2nd Edn., 2011).

⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 SCC Online ICJ 3: (1986) 76 ILR 349.

¹⁰ *Oil Platforms (the Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p.161

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held in this case that to resort to force in self-defence, it is a mandate for the state to prove that they have been the victim of an armed rebellion, and the burden of proof is on the state that is claiming this act. It is crucial to portray that the force was caused intentionally, which Iran failed to prove in this case. The contention that follows is that of non-state actors, these include the group of terrorist organisations and rebel groups, there are often cases where it has been seen that these groups also attack states, according to Art. 2(4) of the UN Charter does not allow non-state actors to use force, hence these groups are excluded from the use of force and they can attack states and other such groups. Furthermore, there exists no legal stance where these groups can defend themselves under Art. 51 of the Charter. When attacked by a non-state actor, the member state has two options, the first one being that it should be able to prove that a non-state actor has carried out the armed attack and the second one, that the knowledge was present when such acts were carried out or there was approval by the state.

If we see the initial laws that existed that is customary international laws which are the primary sources of law, there is a clear connotation of self-defence but if we look at Art. 51 there is no mention of anticipatory self-defence, anticipatory self-defence is an integral concept as the attack that took place in the United States of America (9/11 attack) poses a threat among the states, as the 9/11 attack was pre-mediated, the attack could have been tackled if there existed a provision related to anticipatory self-defence. The UNSC is also in support of anticipatory self-defence after the 9/11 attack on the USA. However, in the present scenario, there is no such specific provision for anticipatory self-defence, a large number of states are claiming anticipatory self-defence. Hence, the extent to which the state can use force and claim it as self-defence would depend upon the three key principles and the burden of proof would be on the state that is claiming that such an attack has happened and the necessity for anticipatory self-defence as it plays a key role in preventing or causing less damage to the state.

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IV. CHAPTER III- COMPARATIVE ANALYSIS OF THE TWO WORLD WARS AND THE PRESENT WAR BETWEEN RUSSIA- UKRAINE AND ISRAEL-PALESTINE AND THE AFTERMATH OF THESE WARS:

When we talk about the use of force by states against each other, we refer to the armed attacks that take place from one country to another, in the previous chapter we analysed the concept of the use of force and to what extent it can be termed as self-defence. It is not a recent phenomenon that the states are using force against each other, it dates back to the 1900s when the First World War took place, subsequently after that the Second World War took place, and therein after this was a frequent act as there were some of the other attacks taking place among the countries. This WW1 continued for four years from 1914 to 1918 whereas the WW2 continued for six years from 1939 to 1945. WW1 divided the world between two powers, the Allied Powers (France, Russia, The United Kingdom, Italy and the United States of America) and the Central Powers (Germany, Austria-Hungary, the Ottoman Empire and Bulgaria) whereas WW2 took place between the Axis powers (Italy, Germany and Japan) and the Allied powers (China, France, the United States of America, United Kingdom and Soviet Union). In both wars, Genocide was committed in WW1 genocide happened by Turkey against the Armenians and in WW2, the Nazis committed genocide against the Jews, homosexuals and people with disabilities. WW1 was caused because of the assassination of Archduke Franz Ferdinand whereas the WW2 was caused because of the unsolved disputes of WW1 and the totalitarian regime. The World Wars used new kinds of military technology such as aerial bombing, use of tanks and other military objects. The World Wars that took place changed the perspective of the whole world as both these wars have given inspiration to the creation of weapons and different types of arms and ammunition and that has led to the creation of more advanced technology in the arms and ammunition. If we look at the present scenario the countries are more developed and equipped in their arms and ammunition. Each country has a

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powerful military that ensures the security of the states. The development of nuclear weapons and the harm and threat to the civilian population was incomprehensible. If we look at the current situation of the war between Russia and Ukraine, the cause behind the war is that Russia took control of Crimea in 2014 and has since supported separatist movements in eastern Ukraine. It underlines tensions about Ukraine's alliance with the West and Russia's determination to maintain influence in the region, when the war was at the initial stage there were irregular wars but over time the war escalated into far-fetched military operations by Russia. In contrast to WW, the Russia-Ukraine war has used more advanced military equipment such as drones, and cyberwars. If we look at the condition of Russia and Ukraine, the war has led to tensions among other states as well. The treaties are being affected between the states and the world is again under the threat that this would aggravate and lead to a third world war. Another war that began in the year 2023 was between Israel and Palestine, the war preliminary began in the 19th century when there was the rise of Jews and Arabs. In the year 1948, the first Arab-Israeli War took place when the UN presented its partition plan and agreed to divide the British (Resolution 181)¹¹ mandate of Palestine into a Jewish and Arab state. Clashes erupted almost immediately between Jews and Arabs in Palestine, beginning with an Arab ambush of a bus transporting Jewish passengers from Netanya to Jerusalem on November 30. As British troops prepared to evacuate from Palestine, the war escalated, with both Jewish and Arab forces performing hostile acts. This war was over within six days and there were peace processes which were conducted so that the integrity was maintained. The United States has played a major role in the peace process between the countries. At present time the conflict is still unresolved and there is violence, humanitarian crises and loss of life and property still going on total control over the Gaza Strip by the Islamist group has seen a surge. The war has caused a ruckus on the international front as well, as the people and the states are in a dilemma on the wars taking place. This also affects the power and peace relations among the states. After an in-depth study of the two World Wars, the Russia-Ukraine war and the Israel-Palestine war, it

¹¹ Resolution 181, United Nations

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can be noted that there have been major political, social, economic, technological and psychological impacts on the people of these countries, whether it be the two World Wars, the ramifications were severe as there was a *“shortage of food, fuel, and all kinds of consumer products persisted and, in many cases, worsened after peace was declared. War-ravaged Europe and Japan could not produce enough goods for their people, much less for export.”*¹²As quoted by the International Monetary Fund.

The wars have also caused the loss of a lot of lives, billions of people were found dead and abandoned, it was said to be the most expensive wars in history as the countries were in a huge amount of debt, inflation happened, and payment deficits existed. The structure of the cities is being destroyed and the civilian population is facing the threat to their life each day. The common point in all these wars is the force that the states have used on each other and how that force has eradicated the civilians and the city as a whole, as the war takes place it ruins the whole economy of the country and that leads to the people struggling for their lives as there are no funds with the government to meet with the basic needs of the people of their countries. The technology gets affected as the technology which could be used to promote other developments is being used to develop military equipment more specifically nuclear weapons. In today's scenario, nine countries are equipped with nuclear weapons. The wars that take place possess major harm on the international front as well and the treaties are affected by the same. Hence, it can be observed that the use of force at the international level causes a huge amount of loss and damage and the wars that take place add up to the degradation therefore the need for a body like that of the UN was necessary and even though such bodies exist, war still takes place violating the rights and causing damages to the humanitarian population. This shows how force is being used in wars and the repercussions caused by the wars that have taken place in the past and that are still being carried on.

¹² International Monetary Fund Report

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V. CHAPTER IV- LEGALITY OF USE OF FORCE AND VIOLATION OF HUMAN RIGHTS:

In the initial chapters of this research paper, we have seen the use of force by states against each other and how it affects the world population. It is also to be noted that the UN Charter prohibits the use of force by nations but Art. 51 stands as an exception to this rule, as we have also stated that *jus ad bello* is often referred to as international humanitarian law, to lessen the suffering that is caused during wars. The Global Centre for Responsibility to Protect is an organisation which was set up to develop and promote the idea of R2P, (responsibility to protect), R2P is defined as “The Responsibility to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing have emerged as an important global principle since the adoption of the UN World Summit Outcome Document in 2005.”¹³ When we talk about the legality of using armed forces in international law it is simply related to *jus ad bellum* as it means that the circumstances under which the war took place and tries to make an effort to render that war just. Under the purview of international law, the use of force attempts to make the same contention to justify their use of force against another state by naming it as self-defence or putting forth the reasons why the attack happened in the first place.

The International Court of Justice has given judgments stating the legality of the use of force, these include:

Serbia and Montenegro vs. Spain¹⁴, the case is among the nine cases that were filed by Yugoslavia against various countries including, Belgium, France, United States, United Kingdom, Canada, Germany, Italy, Netherlands, Portugal and Spain for alleged violations of their obligation not to use force against another state. The main contention that Yugoslavia posed against all the states was that the court made these states cease the acts of force and refrain from any act of threat or use of force.

¹³ Global Centre for the Responsibility to Protect, 2008.

¹⁴ *Legality of Use of Force (Serbia and Montenegro v. Canada), Preliminary Objections, Judgment, I.C.J. Reports 2004, p.429*

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The court in two cases i.e., *Yugoslavia vs. Spain*¹⁵ and *Yugoslavia vs. United States of America*¹⁶, The Court rejected the Request for the indication of provisional measures, concluding that it lacked jurisdiction and ordering that the cases be removed from the List. In the eight other instances, the Court declared that it lacked prima facie jurisdiction (*one of the conditions for the indication of interim measures*), and hence could not indicate such measures. The International Court's rulings have led to the conclusion that Serbia and Montenegro should be included in the statute of the Court at the time of the creation of the proceedings is fundamental. It is necessary to meet the conditions under Art. 35 para. 2 of the International Court of Justice Statute, as it lays down "The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."¹⁷

After a thorough analysis of the case laws and the general rule that the states should refrain from the use of force as stated in Art. 2 and protect the integrity of other states as well. The legality of the use of force is still ambiguous as there are no concrete provisions related to the legality of the use of force in international law. The first resort which the states should take into consideration is they use non-violent means to resolve the conflict, and the last resort should be to use force, the pre-condition of it being that it does not pose damage to the property of the civilian population and without any promise of achieving the intended result. The legality aspect of the use of force cannot be stated explicitly but after studying the statutes and taking into purview the concept of *jus ad bellum* and the international humanitarian law it is important to note that these organisations or statutes are made to protect and promote peace among

¹⁵ Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 761

¹⁶ Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 916

¹⁷ International Court of Justice Statute, Art. 35, para.2

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nations not to aggravate the tensions between the states or to violate the rights of the innocent people who do not form part of these armed conflicts. In every instance, the absolution of self-defence cannot be taken, as even to prove self-defence there are requirements which need to be proved to come under the umbrella of self-defence as the states cannot always wage a war or armed rebellion against another state and claim it as self-defence. The cases which have stated this are cited above. The aspect of legality of the use of force in international law needs to be more specific in its approach and should not be in contradiction to its articles of the Charter, as Art. 2 and Art. 52 are in contradiction to each other.

VI. CONCLUSION:

As we reach the end of the research paper, the writer has thoroughly and in an organized manner tried to explain what the use of force means, the statutes that talk about the term *jus ad bello* and *jus ad bellum*, the shift that took place and the reason for same. The research paper is written to provide a detailed study of the topic, the use of force in international law is subject to certain limitations and the main aim is to promote peace, security and human rights. While the *jus ad bellum* governs when force may be used, the *jus in bello* aims to ensure that force is used per humanitarian principles and the rights of all those harmed by armed conflict. The shift is seen because in contemporary times the major aim is to protect the rights of humans and to provide them with a secure environment. The aim of *jus in bello* is the same that is to protect those humans who are harmed by armed conflict and to provide them with the requirements lost by them in wars and armed conflicts. A nation is made by the civilians that make the country, by adding to the resources and working for the betterment of the country. The policymakers must protect the rights of the citizens as these are the people who work for the betterment of the country and make the country economically, culturally and socially better. Therefore, a spike has been seen and a major shift has taken place in contemporary times.