RECONCILIATION OF *JUS AD BELLUM* AND *JUS IN BELLO* IN IN LIGHT OF RUSSIA - UKRAINE ARMED CONFLICT CONCERNING ESTABLISHMENT OF JURISDICTION OF ICC IN SCOPE OF INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

International humanitarian law often touted as law of war or armed conflict is certainly in limelight due to the Russia-Ukraine predicament and the troubled waters of East China Sea as the China and Taiwan situation heats up after the media frenzy visit of Nancy pelosi. "Humanitarian Intervention" in the above mentioned armed conflict or possible armed conflict is an evident necessity and pursuant to that necessity a conciliation between its two main components; jus ad bellum and jus in bello is required; often viewed through the lens of distinction; both have much in common. The determination of individual and corporate liability arising out of the violation of these principle also pose a dilemma due to the vague codified law blurring difference between Joint criminal enterprise and command responsibility, which can be solved by ascertaining procedural difference between the two. Continuing development and justified expansion in international legal jurisprudence is the key to solve such conundrum.

Keywords: International Humanitarian Law, jus ad bellum, jus ad bello, individual criminal liability, Joint criminal enterprise, command responsibility.

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INTRODUCTION

Inspired by work of Wolff and Vattel, some lawyers took initiative of demarcating a point of distinction between two essential governing components of armed conflict or war, jus in bello and jus ad bellum from the dawn of nineteenth century[1]. Classical authorities of international law such as the school of Salamanca, Ayala etc. Nor the medieval lawyers of Romania and Scholastic traditions knew of the doctrines of just war[2]. No observed difference between the two doctrines was established in any of the earlier periodical history[3]. The idea of circumscribing war within the legal instrument can be traced to the earliest of western beliefs which sought to establish an affirmative link between use of sein and sollen i.e. power and righteousness by the virtue of making former subordinate to the latter or curbing power with righteousness[4]. This link serves the purpose of establishing validity of war against unjustified use of aggression and as the primary principle to undo the damage caused "(consecutio juris)" or for bringing the aggressor to justice[5]. Four areas defining spheres of causes falling under which an initiation of war could be justified came to be "defence, recuperation of property, recovery of debts and punishment"[6]

It was *Grotius*' *De Jure Belli ac Pacis,* a book written by hugo grotius that is often touted as the foundational authority in context of International law that inferred a distinction between prevalence of conditions under war and peace[7]. Influenced by the volatile state of affairs in his country and constant breaking out of war in Europe generally he published the book in 1625, his other work 'De Jure Praedae' also is the conceptualization of laws governing war[8]. Even though it was the 17th century legal jurisprudence that remarkably laid out the existence of state of war and peace; it remain drastically limited evident by the fact that an analogous

[1] Gregory m. Reichberg, Essays in Political Philosophy 11-29, Cambridge University Press (Larry May ed., 2008)

[2] Robert Kolb, *Origin of the twin terms of jus ad bellum/jus in bello*, ICRC, October 31, 1997, at https://www.icrc.org/en/doc/resources/documents/article/other/57jnuu.htm (Last Visited August 15, 2022)

[3] P. Haggenmacher, Grotius et la doctrine de la guerre juste, 250 – 597, Graduate Institute Publications (1983) and "Mutations du concept de guerre juste de Grotius à Kant", Cahiers de philosophie politique et juridique, No. 10, 1986, pp. 117-122.

[4] Robert Kolb, *Origin of the twin terms of jus ad bellum/jus in bello*, ICRC, October 31, 1997, at https://www.icrc.org/en/doc/resources/documents/article/other/57jnuu.htm (Last Visited August 15, 2022)

[5] Peter Haggenmacher, Grotius et la doctrine de la guerre juste, 457, , Graduate Institute Publications (1983)

[6] Robert Kolb, *Supra* note 2

[7] Carsten Stahn, *'jus ad bellum', 'jus in bello' …'jus post bellum'?- Rethinking the conception of the law of armed force*, European Journal of International Law, Volume 17, Issue 5, November 1, 2006, 921–943,available at https://doi.org/10.1093/ejil/chl037 (Last Visited August 15, 2022)

[8] Yasuki Onuma, Hugo Grotius, August 15, 2022 available at https://www.britannica.com/biography/Hugo-Grotius (Last Visited August 15, 2022)

situation that can exist between the two was not conceptualised until 20th century[9]. War and peace are now not viewed as two distinct set existing on the opposite end of spectrum but a flexible framework has been laid out pursuant to United nations charter, Geneva convention and Rome statue that allows "law of war" and "law of peace" to activate and operate at the same time[10]. UN peacekeeping resolution which is primarily result of World Summit Outcome of 2005 and adopted by General assembly highlights three spheres of serious dissension administration namely "preventive action, responsive action, and post-conflict engagement"[11]. These distinct dimensions are inductive of the dismantling of the old rigid doctrine of separation between state of war and peace and rise of novel notion which doesn't categories peace merely as "absence of war"[12]. These changes raises a conundrum regarding contextual application of international law and if it can be supported by traditional interpretation of same inter alia increasing intricacies of International law. This along with other dilemmas impairing international humanitarian law are primarily concerned with 'jus ad bellum' and 'jus in bello'[13] and this research paper suggests how a tridimensional version of the above doctrines by adding 'jus post bellum' can result in pragmatic application as well as understanding of law of armed conflict[14].

Furthermore identification of the above mentioned twin principles as 'jus cognes' will result in impositions of some serious limitations on an aggressive country, hence acting as much needed deterrent as the neo-liberal world becomes too caught in strategic warfare not only on ground but in space, virtual world and cyber space as well.

RESTRUCTURING THE BIDIMENSIONAL VISION OF THE DOCTRINES OF JUST WAR WITH 'JUS COGNES'

The twin principles of *jus ad bellum* and *jus in bello* were first conceptualised as reflection of morality not of legal discourse[15]. The point of distinction between the two was construed in traditional theory as justification of old doctrine of "moral equality of combatants", which

[9] Carsten Stahn, *supra* note 7

[10] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 136, para. 106.

[11] Carsten Stahn, *supra* note 7

[12] GA Res. 60/1, ^138-139 (2005 World Summit Outcome) of 24 Oct. 2005.

[13]See Scelles, 'Jus in Bello, Jus ad Bellum', 6 *Nederlands Tijdschrift voor Internationaal Recht* (1959) 292

[14]see Iasiello, 'Jus Post Bellum. The Moral Responsibilities of Victors in War', 57 *Naval War College Rev* (2004) 33

[15]Jeff McMahan, Morality, Law, And The Relation Between Jus Ad Bellum And Jus In Bello, Cambridge University Press (on behalf of American Society of International law), Vol. 100, April 1, 2006 available at https://www.jstor.org/stable/25660072 (Last Visited on August 15, 2022)

upheld that military combatants whoever they are fighting for enjoy equal protection from liabilities and are entitled to equal rights notwithstanding the morality or legality of the cause they are fighting for.

This orthodox framework dividing abovementioned principles was confronted by new rising doctrine of "human intervention" in 1990s, marking its beginning[16]. United States response to infamous 9/11 attacks is profound illustration of the said doctrine which has starkly mitigated the discussed difference. The warfare Theory propounded by Vitoria distinguishes legal causes of armed conflict and valid limits in war[17], while Vattel[18] and Wolff[19] also follow a long custom of establishing certain differences in the above mentioned principles. But the recognition of this distinction was only encompassed in law in the period of League of Nations, when "Kellogg-Briand Pact" by virtue of Article I and Article II renounced war as an instrument for resolution of interstate conflicts and adopted diplomacy as the legal tool for a valid and harmless solution[20].

Acknowledgement of Jus ad bellum and jus in bello has made 19thcentury international legal jurisprudence undergo metamorphosis to attest the independence of these twin principle regardless of the side warring parties are fighting for[21], this belief of conferring specific rights and liabilities on parties involved without paying due diligence to the side or state in pursuant of which they are contesting for is also reflected in 'Additional Protocol I of Geneva conventions' as it states:

"Reaffirming ' further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"[22].

LOGICAL DISJUNCTIONS AND RESULTING ANTINOMIES, ANOMALIES AND LAPSES

[16] Julie Mertus, The Danger of Conflating Jus ad Bellum and Jus in Bello, Cambridge University Press (on behalf of American society of International Law), Vol. 100, April 1, 2006, available at https://www.jstor.org/stable/25660073 (Last Visited August 15, 2022)

[17] See Vitoria, *De iure belli relectiones* (1539), 15-34. For an English translation see E. Nys (ed.), *De iure belli relectiones* (trans. J.B. Pate, 1917).

[18] See E. Vattel, *Law of Nations* (1758), iii, chap. VIII.

[19] See C. Wolff, *Jus gentium methodo scientifica pertractatum* (1749), at ^ 888.

[20] Kellogg-Briand Pact, August 27, 1928, United States Statutes at Large Vol 46 Part 2 Page 23-43

[21] Carsten Stahn, *supra* note 7

[22] Additional Protocol I (international conflicts) of Geneva Conventions, June 8 2022, 75 UNTS 287

Disjunction viewed through the lenses of logic is specifically concerned with two propositions, ideas or values in which only one can be true hence sometimes it is also referred as logical alteration[23], though most ardently the concept of disjunction is more often linked with mathematics or philosophy but its use can felicitate better understanding of the above discussed principles in depth. Traditional theory of just war primarily viewed the above mentioned twin principles in context of their clear cut distinction thus inventing a rigid framework to categorise the causes of a just war and the conduct followed in the same but which with spontaneous events resulting in unexpected innovations in International law governing armed conflict has substantially mitigated this orthodox view and has given rise to certain Antinomies. First, the dissimilitude between the law governing the validity of war and that of conduct of parties involved in violent confrontation is not as strongly perspicuous as often affirmed as[24]. While the independence of one principle from another is generally followed in international law as evident by ICRC's position on the issue under which military combatants are tried and convicted irrespective of any consideration given to legality of the grounds on which war was raised[25] but there have been precedents under which one principle has often shaped another one profound instance of the same is definition of armed conflict incorporated in "Article 1(4) of Additional protocol"[26] which explicitly mentions jurisdiction of the law regulating war up to "armed conflicts which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". The antinomy of these doctrines is also evident by the inferred reasoning that both sometimes act as "sometimes competing, sometimes complimentary"[27].

Secondly, the traditional idea of absolute completion of the twin principles independent of each other is not in consonance with the increasingly conflating International law as its application grows to cover the uncovered grounds. These twin doctrines/ principles are inductive of orthodox disjunction between War and Peace. This comprehensive reasoning however is infected with flaws as it draws and independent legal framework for both of the principles thus highlighting the difference rather than aiming for harmonious construction between the two. This focal point however is not faultless as it excludes from its sphere the

[23]Britannica, Disjunction, March 24, 2009 available at https://www.britannica.com/topic/disjunction-logic (Last Visited August 16, 2022)

[24] Alexander Orakhelashvili, Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello, Journal of Conflict & Security Law , Spring 2007, Vol. 12, No. 2 (Spring 2007), pp. 157-196

[25] see ICRC, *International Humanitarian Law: Answers to your questions* (2002), at 14.

[26] Additional Protocol I, *supra* note at 22

[27] See Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', 43 *Columbia J Transnat'l L* (2004) 6.

ever-growing sphere of international relations between "armed violence and restoration of peace"[28]. A less sophisticated understanding of the discussed principles might not help an easy application of the same. The division between the two, in spite of being precisely drawn as a standard account of rules and regulations concerned with "the sequencing and categorization of human conduct throughout armed hostilities"[29] has cropped out some anomalies as the distinction fails to fulfil the lapses and gaps created by never ending changing circumstances of modern times.

Moreover, the proposition of ideas like Individual Criminal liability or the 'sensitisation' of armed conflict[30] so as to minimise the loss of life and property were not present at the time of inception of these twin doctrines. Hence, the orthodox norms of "jus in bello and jus in bellum" are not fully fit out to deal with the legal, social and political conundrums arising out of continuous addition, subtraction, and innovation in the field of International Law. There are rising lapses in terms of scope and application of international law, the lack of universal jurisdiction and enforcement of same as well as existence of certain mechanism to increase the accountability of the states floundering international norms and also to include within its scope relatively newer cyber warfare. Majority of them in regards of National security thus establishing a direct link between an artificial human designed and planned attack on sovereignty of another nation and this time void of violence but much more dangerous as the hacking can result in breach of highly confidential information putting the whole nation at stake.

CAN CONTRAVENTION OF *JUS IN BELLO* PROMPT TRIGGER USE OF *JUS AD BELLUM*?

Legal jurisprudence concerning armed conflict has often under its purview argued upon the duties and rights governing the conduct of belligerent state in armed hostilities and it has become pivotal to international law specifically after "Kellogg-Briand Pact" terminated the use of force as relevant means to attain distinct interests[31]. Though in accordance of the traditional theory of dual state of nature- war and peace- the initiation of war within legal framework is not substantial necessity to trigger the rule and obligation under *jus in bello,* but it's often implied that according to principal of natural justice or in connaissance of doctrine

[28] Carsten Stahn, *supra* note 7
[29] Id., 7
[30] see Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 239.
[31] Alexander Orakhelashvili, *supra* note 24

of proportionality, "if the prohibition of the use of force is to be meaningful, the aggressor state shall not be able to claim rights and benefits potentially arising from its commission of the act of aggression"[32].

Whether protective discrimination can be imposed against aggressor state so as to limit its rights under jus in bello and render it legally unequipped against violation of the same by other state? The answer to this question is a convoluted one and has to be drawn out of deepest ravines of age old international legal theory and has to align the same with the contemporary needs of time. The age old doctrine of just war imposes on all of the states party to armed conflict equal rights and liabilities to abide by and invade during the course of armed conflict.The traditional view focuses on the equality of the belligerent nations in terms of their rights and liabilities but in contrast it is provable that protective discrimination against the aggressor state will not result in inequality before law. As it is only by the course of law that an aggressor state losses its rights and privileges conferred on it by International law. "Every state is liable to losing belligerent privileges it it commits the act of aggression"[33] this principle marks equal. it of states; not pursuant to their status or symbol but to their conduct. Even though classical writings are primarily concerned with jus ad bellum; there is evident lack of consensus on the same. Inductive by the writings of some classical writers who while highlighting legal instrumentalities such as treaties has made them subjective to some qualification so that the terms stipulated in such instrument will no longer be operative when ally takes recourse to unjust war[34]. The subsequent periods saw International law adjusting to war as it was regarded to be more expedient to deal with than an unregulated situation of anarchy and chaos[35]. According to W. E. Hall in lack of any alternative available; relation between the concerned states took priority over justification of inception of war hence international law accorded equal legal position to all the parties precluding the legality or morality of the grounds on which an aggressor nation deemed it fit to wage war[36]. The unlawful use of force triggers the application of International law of armed conflict which is predominantly neutral by design[37]. This symbolises a generalisation in doctrination concerning war; reflective of a blanked construed norms through the lens of sustainability of

[32] Id. at 1

[33] Alexander Orakhelashvili, Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello, Journal of Conflict & Security Law , Spring 2007, Vol. 12, No. 2 (Spring 2007), pp. 157-196

[34] H. Lauterpacht, 'The Grotian Tradition in International Law', (1946) 23 AJIL

[35] E. Borchard, 'The Multilateral Treaty for the renunciation of war' (1929) 23 AJIL

[36] W.E Hall, International Law (1904) at 61; see also, The survey of practice, Russian Indemnities arbitraton, International law (vol. 2, 1968) at 37-38

[37] Verzil, Actes juridiques internationaux, (1935) 15 revue de Droit International 289 at 324; C. Visscher, Les Effectivites du droit international Public (1967) at 27-29

relationships rather than Justice. This position of law should be altered so as to make it more expedient for the passive party and deterrent for the aggressor one. Even though legal jurisprudence is severely constrained in development and codification so such approach; still the essence of this position can be felt in numerous initiatives such as "The Budapest Articles of interpretation of the 1928 treaty on the renunciation war". The provision of which leans in favour of discriminative approach penalising the aggressor in exercise of *jus in bello*[38]. The same approach has adopted by "The Harvard Draft Convention on Rights and Duties of states in Case of Aggression"[39] which by the virtue of Article 3 curtails the rights of aggressor states which otherwise it would have been entitled to because of its status as a belligerent nation. Article 4 of the same act render other rights of such state ineffective[40] such as the right to property, visit etc. While the victim was entitled to such rights.

The same position is recognised by Institute of International Law; evident by its resolution stating that the laws of armed conflict "shall be without prejudice to the effects which an illegal use of armed force may have in general international law upon the principle of non-discrimination in the application of non- humanitarian rules of armed conflict"[41]. It is pivotal to note that the aggressor discrimination is not insinuating of irrelevance of International Humanitarian Law. This doctrine focused on aggressor discrimination was framed to the aggressor to take advantage of its own wrong. As is elucidated by Sir Elihu Lauterpacht:

"if carried out to full logical extent, would call for a denial to the unlawful belligerent of any right under the rules of warfare. Considerations of humanity and appreciation of the function of the bulk of the rules of warfare excludes the adoption of so extreme a position. But if the logical application of principles is to be bent to the dictates of humanity, nothing compels the abandonment of points of principle for other than humane reasons. If those are absent, as they are in cases where the unlawful belligerent claims the right to take measures affecting third parties, then principle must reassert itself to the full."[42]

Chapter VII of United Nation chapter also legalises the exercise of protective discrimination against the state which has violated the general principles of threat to peace, unlawful use of

[38] H. Lauterpacht, 'The pact of Paris and the Budapest Articles of Interpretation'. (1935) 33 AJIL supplement 819 at 824, 828.
[39]Harvard Draft Convention on Rights and Duties of states in Case of Aggression (1939) 33 AJIL Supplement 819 at 824, 828
[40] Id.
[41] Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May br Engaged, Session of Wiesbaden (1975) Article 3.
[42] E. Lauterpacht, *'the legal irrelevance of the state of war',* AJIL (1968)

force or crime of aggression[43]. According to the charter the Security council at its discretion can may order special measures affecting the right of aggressor nation if it deems it fit to do so. Such powers of council's are not specifically defined and only limitation is to act in consonance with the charter. The council's authority is inductive of its bigger purpose i.e. to curb certain conflicts by use of sanctions such as imposing limits on arms, strategic weapons or anything deemed danger to world peace and security. It seems that international jurisprudence concerning acts of war will be better equipped if it disposes of blanket genaralisation of placing legally unequal nation on equal playing field in regards of the rights and liabilities associated with belligerent status of such nations.

RUSSIA-UKRAINE ANALOGY: WAR VOID OF LAW

The culmination of Russia – Ukraine confrontation into a full fledged war in February 2022 raised many questions concerning potency and pragmatism of twin doctrines of armed conflict in the post industrial, multipower neo-liberal world. Jus ad bellum concerning the above conflict is predominantly concerned with the Russia' claim of 'self- defence 'to justify its act of aggression[44]. This discourse viewed through the lens of traditional; just war doctrine' is usually concerned with the issues of legitimate authority, bonafide intention, lack of any other plausible redressal mechanism and the doctrine of proportionality[45]. All of which leans heavily against the state of Russia. Jus ad bellum emphasises on military leaders and political figures associated to certain war to hold accountability; and the lack of such action despite being evident that it is perpetrator of various provisions of International law diminishes the belief in international law instrument and institutions. With such omission of strong action from world stage depicts International law in the light of ceremonial law void of binding authority and at deposition of powerful nation to construe and mold the same to bring it in congruence of their narrative.

DISSECTING SELF–DEFENCE AND PROPORTIONALITY IN LIGHT OF RUSSIA'S CLAIM

[43] The United Nations Charter, Art. 51

[44] Rob Mclaughlin, Keeping the Ukraine-Russsia jus ad bellum and jus in Bello issues seperate, March 7, 2022 available at https://lieber.westpoint.edu/keeping-ukraine-russia-jus-ad-bellum-jus-in-bello-issues-separate/ (Last Visited September 3, 2022)

[45]See Judith Gail Gardam, Proportionality and Force in International Law, The American Journal Of Internatioal Law Vol. 87, No. 3 (jul., 1993), pp. 391-413 (23 pages)

Russia in an attempt to justify its unlawful use of force in its notification advanced to security council cites 'Self- defence'[46] as valid ground so as to exempt it from jus ad bellum violations and confer a legal status on the war. Such argument can be easily dismantled solely by the virtue of Prerequisites required to constitute a just exercise of 'self defence' which are (a) Armed attack of sufficient gravity[47], (b) the said attack should be perpetrated by state other than the one claiming 'self defence'[48] and (c) the exercise of proclaimed 'self – defence' must be in conformity of the peremptory norms of proportionality[49]. There was no form of recognised 'armed attack' initiated by Ukraine; the mere presupposition by Russia of threat which might possibly arise out of Ukraine's NATO membership can't be qualified as grave or imminent threat as such act if recognised will set a dangerous precedent giving validation to war waged on just an assumption; preponderance of probability can be used to determine the fault of a party in civil cases not as a ground to justify an act of armed conflict. Ukraine's willingness to join NATO is a diplomatic choice valid by its virtue of sovereignty and even if an armed attack existed; which in present case didn't Russia's act will still be not in consonance with customary provisions of International Law as Russia's invasion of Ukraine (as the attack initiated didn't constitute self defence) was violative of doctrine of necessity and proportionality rendering it unlawful one way or other.

Proportionality as a doctrine of armed conflict is associated with jus ad bellum and jus in bello as it governs the justification of inception of armed offensive and in latter the balance between causalities and aim of war[50]. In its rudimentary sense it can be defined as equilibrium weighing the pros and cons of war and ensuring that the latter doesn't outweigh the former[51]. The resort to war in contemporary times is mostly exercised only under the heads of Self- Defence and Necessity and in such cases customary law (due to Geneva Conventions[52] now it is conventional as well) imposes on belligerent nation to be proportionate in their use of force. While legitimacy of war is an old concept conceptualised in terms of morality and immorality; doctrine of proportionality is a modern concept. Some of its trace can be found in the medieval just war theories of Grotius and Vattel who

[46]The United Nation Charter, Art. 51
[47]U.N. Charter, art. 51; Military and Paramilitary Activities in and Against Nicaragua) (Nicar. v. U.S.) (Merits), 1986 I.C.J., ¶ 195(June 27).
[48]Id.
[49]C. Gray, International Law and the Use of Force, 150 (3rd edn, 2008).
[50] Adam Roberts & Richard Guelff, Documents on the laws of war (1989)
[51] James Turner Jhonson, *Just war tradition and the Restraint of war* 203 (1981)
[52] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3

elucidated the said concept in the circumscribed horizon of jus ad bellum[53]. The writings of Grotius are also symbolic of neutrality in context of *jus in bello* irrespective of the legal status of war[54]. The distinction between the pragmatism and morality of war highlighted by Grotius fails to draw upon a considerable restraint on conduct of belligerent parties[55]. Vattel was more explicit in defining moderation as pivotal element of war as he declares any act aimed at harming the enemy conducted in due course of war unjustifiable unless it is desired by elements of necessity[56]. With the emergence of nation- states the idea of war came to defines and applied within the domestic territorial limits of the nation causing fragmentation of 'just war theory' and decline of "*jus ad bellum"*. This historical period witnessed the severance of "*jus in bello"* from *"jus ad bellum"*[57] and its development as independent set of principles. This chasm created a space for the formulation of modern international law of armed conflict; codified by Hague conventions. "St. Petersburg Declaration of 1868" was the first of its kind in establishing the foundation of doctrine of proportionality in modern world view with limitations imposed on use of weapons inflicting unwarranted suffering[58]. The growth of proportionality as a doctrine of armed conflict was in its nascent stages was predominantly concerned with combatants, as the involvement of civilians was largely limited[59]. As the international stage stood witnessed to increasing incidence of war and civilian causalities it necessitated a need for law providing immunity to the civil population from ramifications of war[60]. With the incoming of aerial weapons civil population of country was significantly exposed to huge risk rendering them indefensible in front of inevitable fate[61]. This led to

[53] Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, bk. II, (Carnegie ed., Francis W.Kelsey trans, 1925)

[54] Gerald Draper, *The Development of International Humanitarian Law*, International Dimensions of Humanitarian Law 67 (1988); see also Geoffrey Best, *The Place of Grotius in the Development of International Humanitarian Law* , Grotius et L'ordre Juridique International 101, 105 (Alfred Dufour, Peter Haggenmacher & Jiri Toman eds., 1985);and Bendict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, Hugo Grotius and international Relations 1, 20-21 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990)

[55] Frits Kalshoven, Grotius'jus in bello with special reference to ruses of war and perfidy, Grotius et L'ordre Juridique International, 89-90

[56] Emmerich De Vattel, Droit Des Gens (Carnegie ed., Charles G. Fenwick trans., 1916) (1758). See also Geoffrey Best, Humanity in Warfare 54-55 (1980).

[57] See generally Draper, *supra* not 54 and Hugo Grotius And International Relations, *supra* note 54

[58]St. Petersburg Declaration renouncing the use, in time of War, of Explosive Projectiles Under 400 grammes Weight, Dec. 11, 188, 138 Consol. TS 297 (1868-69)

[59]Alexander Pearce Higgins, Non- Combatants And the War 15 (1914). See also Geoffrey Best, *Restraints on War on Land Before* 1945, Restraints on War: Studies in the Limitations of Armed Conflicts 17, 27 (Michael Howard ed., 1979).

[60] Frits Kalshoven, The Law of Warfare 27 (1973): John Basset Moore, International Law and Some Current Illusions and other Essays 5 (1924); Esbjorn Rosenblad, International Humanitarian Law of Armed Conflict : Some Aspects Of The Principle od Distinction And Related Problems53 (1979); and Richard R. Baxter, *the Duties of Combatants and the conduct of Hostilities*, International Dimensions Of International Humanitarian Law 93, 103 (1988)

[61]J. M. Spaight, Air Power and War rights 225 (1947)

considerable development in pursuance of necessary laws to diminishing the impact of such new evolving techniques of Warfare[62]. The main structure of this doctrine was established by drawing a line distinction between Military objectives and Civilian populace evident by 'Hague Rules of Air Warfare'[63].

The Russian conduct in the war is violation of the same distinction. Putin's speech highlights the purpose behind his action as to counter the brewing threats towards the Russian soil by eastward expansion of NATO; to substantiate his reasoning he cites the examples of Yugoslavia, Iraq, Libya etc. which were areas of many of US military operations. The Use of force by US has been part of many legal debates one such example of the same is the Persian Gulf conflict where validity of the 'self-defence' contention was questioned[64]. Another such point concerning the issue of proportionality arises in the Iraq's initiation of arm offensive against Kuwait; and whether the high scale use of military enforcement was required to attain Iraq's withdrawal of the same. All the cited examples are often cited as violations of International law precluding unjustifiable use of force by a state; hence there is an inherent irony in Mr. Putin's statement to use the contentions which are more inclined to invalidate rather than substantiate his statement.

Russia's action has been in pursuance of its scalding objective purporting to establishment of old USSR regime and is more of a political act instead of defensive one; but the conundrum is the inaction at world stage perilous inductive of justice as a dispensable tool. International law should be manifested in the form of Universal Jurisdiction rather than that of selective one; if anything the present scenario is an act of prophecy or indication of other to follow with china not much behind; that in lack of requisite institution imposing the liabilities of *jus ad bellum and jus in bello on* deferring state; the rules are not more than mere statements of ideal set of norms.

ICC'S LACK OF PROPRIO MOTU: A CHASM IN APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

The lack of universal jurisdiction even in the cases of severe violations *of jus cognes* norms of International law render courts such as International Criminal Court stripped off of its role as well as independence to enforce justice. ICC often has to tumble and navigate the world of

[62] Protocol on Prohibitions or Restrictions on the use of Incendiary Weapons, UN Doc. A/CONF 95/15. Ann. I, at 20 (1980)
[63] Hague Rules of Air Warfare, Art. XXIV, 1922
[64] Judith Gail Gardam, Proportionality and Force in International Law, 391-413, 87 AJIL 1993

sovereign states precluding its jurisdiction and diplomacy of cooperation necessary to carry out a verdict. ICC was an outcome of long debates and deliberations[65] formulated amidst scepticism and affirmations motivated by political and individual interests. But it becomes necessary in present state of affairs to draft a plausible solution to the evasion of liability solely on the virtue of sovereignty; if this impediment in way of effective justice is to be removed. The jurisdiction of ICC suffers from disability of sorts due to its failure to impart and execute its verdict or practice its jurisdiction concerning Non- State actors[66]. Non state party are not obliged to abide by the stipulated norms of Rome statue and the most the court can do against such perpetrators is to issue an indictment charging them for their act purporting to violation of Customary International law which at its best can impair Foreign policy of such nations or state[67]. One such example is the aerial bombings by US causing damage to pharmaceutical plant in Sudan citing the plant as base for terrorist; which it was not; ICC issued indictment charges despite US claiming the defence of Non state party[68].

Jurisdiction is lawful exercise of authority in pursuant to certain objectives. It involves the power to apply laws to certain people, circumstances; to subject them to judicial procedure or enforce rule of law[69]. Adjudicatory jurisdiction of ICC under Article 12 of Rome Statue is often under the sight of criticism and contending for its universal jurisdiction in such state appears utopian but ironically necessary. To uphold the contention of universal jurisdiction; it is necessary to dismantle the arguments against it. US criticism in reference to Rome statue was primarily centred on the premise of dangerous of arming the court with statutory authority to try the individuals of non- state; which it argued would constitute transgression of law of treaties[70]. Amidst the plethora of the arguments after US contention; a fundamental issue regarding the position of ICC as an institution of international importance is often lost in spiral of obscurity and misconception often perpetuated by the political powers trying to cover their own hides. The framework conceptualising the Jurisdiction of ICC is promulgated considering its inclination as that of tout court (criminal court). In furtherance of this view its job is characterised as to adjudicate the liability of individuals guilty of cognizable international crimes. Hence; a logical doctrinal approach would lean in favour of expansion

[65]Philip Allot, The health of Nations, 62-9, (2003)

[67] S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J.

[68] United States v. ALCOA, 148 F. 2d 41t6, 443 (2d Cir. 1945), also see David J. Scheffer, The United States and the International Criminal Court, 93 AM. J. IN'TL L 12, 19 (1999).

[69] Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 786(1988)

[70] David Scheffer, U. S. Ambassador at Large for War crimes Issues, *The International Criminal Court: The Challenge of Jurisdiction*, (Mar. 26, 1999

of its jurisdiction lest the concerned state wants the perpetrators of such serious international crime to evade liability.

The drafters of Rome statue were confronted with precarious need to design a jurisdictional mechanism which would be propulsive to its objective of prosecuting criminals at the same time to balance the delicate conflict it might face with sovereignty of a nation. In the contemporary scenario of Multi-polar and highly digitalised world a state of perplexity due to subliminal influx of jurisdictional flaws insinuating of ineffectiveness of ICC poses a genuine perturbation in the minds of concerned.

A jurisdictional approach rooted in need to enforce efficacy of ICC in its status as criminal court while being cautious of fine line of areas of interstate dispute settlement should be devised to redress the violation of peremptory norms of customary International law. May be viewing rule of law concerning ICC's jurisdictional approach in the forms of a regulative ideal rather than a transcendent principle or objective fact will help in bridging the chasm created by the antinomies of political ideology standing as roadblock in its true application. A further creation of consensual regime by Non-sum zero game can successfully circumvent the void of any enforceable International instrument. While the debate around the flaws and fallacies, pros and cons will continue; it is evident and somewhat prophetic in light of recent circumstances that it would be perilous to international jurisprudence to maintain the current status quo of inaction where justice can be afforded and accorded solely on the basis of goodwill.

Jus ad bellum and *jus in bello* as the *jus cognes* doctrines of armed conflict in absence of supranational authority to enforce; would be mitigated to selective tools wielded in consonance with ideologies rather than justice by non-state parties. The erosion of legitimacy of such doctrines should be curbed by devising a plausible solution by virtue of accountability imposed on aggressors inductive of efficacy of such principles not as mythical principles but as pragmatic and justiciable doctrines of International.