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# Human Rights and Resort to Force: Introduction to the Symposium

Dapo Akande\* and Katie A. Johnston\*\*

## Abstract

*While the relationship between the jus in bello and international human rights law has been the subject of considerable debate, less attention has been paid to the relationship between the jus ad bellum and human rights. The United Nations Human Rights Committee's General Comment 36 on the right to life, adopted on 30 October 2018, brought these questions to the fore with the Committee's pronouncement that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'. The contributions in this Symposium assess three ways of viewing the relationship between the protection of human rights and resort to force. First, the suggestion that resort to force in violation of the jus ad bellum will amount to a violation of the right to life is explored. Second, some contributions examine different arguments as to whether international law permits, justifies or excuses resort to force to protect human rights, and indeed whether it can change to permit such. Third, one contribution examines whether the crime of aggression, as defined in the ICC Statute, covers resort to force to protect human rights.*

While the relationship between the *jus in bello* and international human rights law has been the subject of considerable debate,<sup>1</sup> less attention has been paid to the

\* Professor of Public International Law and Co-Director, Oxford Institute for Ethics, Law and Armed Conflict, Blavatnik School of Government, University of Oxford & Fellow, Exeter College, Oxford, UK. Email: [dapo.akande@bsg.ox.ac.uk](mailto:dapo.akande@bsg.ox.ac.uk).

\*\* DPhil Candidate, University of Oxford, UK. Email: [katie.johnston@law.ox.ac.uk](mailto:katie.johnston@law.ox.ac.uk). This author's research is funded by a UK Arts and Humanities Research Council studentship and a St Edmund Hall postgraduate scholarship.

<sup>1</sup> Some examples include: Tomuschat, 'Human Rights and International Humanitarian Law', 21 *European Journal of International Law* (Eur. J. Int'l L.) (2010) 15; Hathaway *et al.*, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law', 96 *Minnesota Law Review* (2012) 1883; Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict', 64(2) *International and Comparative Law Quarterly* (ICLQ) (2015) 293; Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' 38 *International Review of the Red Cross* (1998) 409.

relationship between the *jus ad bellum* and human rights. The United Nations Human Rights Committee's General Comment 36 on the right to life,<sup>2</sup> adopted on 30 October 2018, brought these questions centre stage. Replacing earlier General Comments 6 and 14, General Comment 36 addressed a wide range of aspects of the right to life, from the ability of women and girls to seek abortions, to environmental degradation and climate change. However, it is the Committee's brief pronouncement that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant'<sup>3</sup> that has generated new questions about the connection between the law of the use of force and international human rights law.

As the comment is drafted, it is unclear what should be understood by the 'acts of aggression as defined in international law' that trigger this automatic violation of the right to life. Although it is clear that an 'act of aggression' must refer to a use of force that is unlawful, that term is used to refer to concepts in both the law of state responsibility and individual criminal responsibility.<sup>4</sup> Even if it was clear to which concept of 'act of aggression' the Committee wished to refer, the meaning of aggression in each of these contexts, as well as the relationship between them, if any, is itself fluid and the subject of uncertainty. There are also questions as to the legal status of the Committee's views, at least until the reactions of states, in particular states parties to the International Covenant on Civil and Political Rights (ICCPR), clarify their position in relation to what is, for now, a non-binding interpretation by a treaty body. All this is in addition to the overarching questions of whether it is correct in principle, and advisable as a matter of policy, to link *jus ad bellum* lawfulness and international human rights law in this way.

It is in this context that, in November 2019, the Oxford Institute for Ethics, Law and Armed Conflict convened a workshop to examine the interactions between the rules of the *jus ad bellum* and international human rights law. Three contributions to the present symposium originated as papers presented at the workshop and each addresses a different point of interaction between the *jus ad bellum* and human rights. Eliav Lieblich's contribution directly addresses the implications of the Committee's view in General Comment 36 that the conformity of a resort to force with the *jus ad bellum* should impact the assessment of whether human rights have been violated.<sup>5</sup> Kevin Jon Heller analyses the impact of the criminalization of aggression on the possibility of resort to force to protect human rights.<sup>6</sup> Proceeding from the position that the primary rules of international law relating to the use of force do not permit humanitarian intervention, Federica Paddeu examines arguments based on the law of

<sup>2</sup> United Nations Human Rights Committee (HRC), General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36, 30 October 2018 (GC 36).

<sup>3</sup> *Ibid.*, para 70.

<sup>4</sup> Akande and Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2017).

<sup>5</sup> Lieblich, 'The Humanization of Jus ad Bellum: Prospects and Perils', 32 *Eur. J. Int'l L.* (2021) 579.

<sup>6</sup> Heller, 'The Illegality of Genuine Unilateral Humanitarian Intervention', 32 *Eur. J. Int'l L.* (2021) 613.

state responsibility that might be deployed in support of using force to protect human rights.<sup>7</sup>

All three contributions demonstrate the complexity of the legal and ethical issues raised by the interactions between human rights and resort to force. Lieblich analyses General Comment 36 in the context of the ongoing discourse around the individualization of war and the humanization of international humanitarian law. His contribution uses the opportunity presented by the adoption of the General Comment to discuss normative aspects of these debates. Lieblich concludes that ‘threshold arguments’, which would exclude the application of international human rights law from questions of the use of force altogether, are not convincing.<sup>8</sup> Yet his contribution also highlights how using *jus ad bellum* concepts to determine whether the right to life has been violated can lead to undesirable – or at least unexpected – moral outcomes. Lieblich points out that if killings pursuant to an act of aggression are *ipso facto* violations of the right to life because this involves non-defensive killing, it is unclear why the same conclusion should not be drawn with regard to non-defensive killings pursuant to other unlawful uses of force, such as an initially lawful use of force in self-defence that exceeds the conditions of necessity or proportionality.<sup>9</sup> Despite the apparent automaticity of an ‘*ipso facto*’ violation, Lieblich concludes that in this and other choices the General Comment leaves room for politics to influence the human rights discourse.

In arguing that even ‘genuine’ humanitarian interventions may qualify as the crime of aggression for the purposes of the Rome Statute of the International Criminal Court, Kevin Jon Heller’s contribution highlights the difficulties faced by legal arguments that such acts do not violate the prohibition of the use of force.<sup>10</sup> Given the *jus cogens* status of that prohibition, Heller argues that it is not sufficient merely to show sufficient state practice and *opinio juris* to establish new customary law, and practice must also be sufficient to modify that *jus cogens* norm. Given this high threshold and the paucity of relevant practice, Heller concludes that it is ‘impossible’ to argue that customary international law currently permits unilateral humanitarian intervention. The second half of the article considers whether humanitarian intervention is effective in addressing mass atrocity, usefully highlighting that, aside from the debate as to legality, there remain significant policy arguments against the use of force for humanitarian purposes. Heller concludes by cautioning that arguments for the legality of unilateral humanitarian intervention risk weakening the prohibition on force with little corresponding benefit for the protection of human rights.

Federica Paddeu’s contribution picks up on Heller’s conclusion and considers whether, if the primary rules of international law do not permit resort to force for humanitarian purposes, the secondary rules of state responsibility might provide a legal basis for humanitarian intervention.<sup>11</sup> However, the *jus cogens* status of the prohibition

<sup>7</sup> Paddeu, ‘Humanitarian Intervention and the Law of State Responsibility’, 32 *Eur. J. Int’l L.* (2021) 649.

<sup>8</sup> Lieblich, *supra* note 5, at 590–595.

<sup>9</sup> *Ibid.*, at 601–602.

<sup>10</sup> Heller, *supra* note 6.

<sup>11</sup> Paddeu, *supra* note 7.

on force creates significant obstacles to the justification, excuse or mitigation of acts of humanitarian intervention on the ground of necessity. Similarly, the structure of the Charter system itself appears to exclude any possible justification based on secondary rules of necessity as, Paddeu argues, its comprehensive prohibition on force with two exceptions of self-defence and collective security already accounts for situations of necessity.<sup>12</sup> Paddeu's analysis shows that arguments for the legality of humanitarian intervention based on the law of state responsibility face similar structural obstacles to those arguments based on the primary rules of the *jus ad bellum*.

The structure of the *jus ad bellum*, and how it affects the development of rules permitting the use of force to protect human rights, emerges as a fundamental issue that underlies much of the analysis in the preceding contributions. Heller and Paddeu both highlight obstacles to arguments for the legality of resort to force for humanitarian purposes that are created by the structure of the *jus ad bellum* itself, whether those arguments favour the emergence of a new exception to the prohibition on force, as considered (and rejected) by Heller,<sup>13</sup> or are based on the law of state responsibility, as analysed by Paddeu. The multiplicity of the norms regulating the use of force, drawn from different sources of international law and some with characteristics specific to the UN Charter or *jus cogens* norms, poses serious problems for those arguing that a new right of humanitarian intervention has come into existence.

The Epilogue to the symposium, by the present authors, therefore takes this opportunity to reflect on these structural conditions within the *jus ad bellum*.<sup>14</sup> In particular, it examines how the diversity of the rules that form the law relating to the use of force affects whether and how that law evolves. It is argued that the correct methodology for evaluating whether the law on the use of force has changed will depend on the area of the *jus ad bellum* being considered. For example, while arguments based on state practice and *opinio juris* alone may be relevant to the evolution of the law of self-defence, the creation of a new rule permitting humanitarian intervention would also require change to existing interpretations of the UN Charter in accordance with the requirements imposed by treaty law, as well as modification of a *jus cogens* norm. This is not to say that the *jus ad bellum* is impossible to change, and the contribution also explores the possibility that the law could evolve so that the UN General Assembly may approve the use of force for humanitarian purposes without Security Council authorization. However, arguments that the law on the use of force has evolved must take account of the complexity of its structure, the diversity of the rules that form the *jus ad bellum* and the respective requirements for their modification.

<sup>12</sup> *Ibid.*, at 660.

<sup>13</sup> Heller, *supra* note 6, at 618–628.

<sup>14</sup> Akande and Johnston, 'Implications of the Diversity of the Rules on the Use of Force for Change in the Law', 32 *Eur. J. Int'l L.* (2021) 679.