Chapter 6

United Nations operations: does the law of targeting differ?

The generally accepted view is that the legality of the resort to force does not affect the IHL obligations of the parties to the conflict. While I agree with this as a general proposition, it is my view that this is a simplified view and is not a completely accurate statement of the law. In 1971, the ICRC drew a distinction between the humanitarian rules of IHL—which the ICRC considered it be essential that these rules apply equally between parties to a conflict—and some other rules that apply in an armed conflict (on which issue the ICRC did not wish to take a stand but noted that some others had expressed a view that such rules may not apply equally). For example, under customary international law a captured enemy military aircraft is considered war booty and title to the aircraft passes to the capturing State. This makes sense under a traditional view of armed conflict being fought between two or more States. However, when a State’s sole legal authority for engaging in armed conflict is to enforce a UNSCR, does it still make sense that a State can appropriate certain public property for retention after the conclusion of the conflict?

In this chapter, I discuss whether the interpretation of the applicable targeting law is affected by the fact that one party’s legal justification for the armed conflict includes UN authorisation or approval for its actions. I argue that where a State is acting pursuant to a UNSCR, the IHL applicable to target selection, and even more particular still, the lawfulness of particular targets, may vary depending upon the terms of the UNSCR authorising the military action. As UN authorisation for participation in an armed conflict is an aspect of the jus ad bellum, the starting point for this chapter is to discuss the relationship between the jus ad bellum and the jus in bello.

2 For example, the “rules concerning economic war, the law applicable after the end of hostilities, especially in relation to enemy property, as well as the law of neutrality.” (CE/ib, above n 13 (chapter 1), 35)
3 Ibid.
6.1 The *jus in bello* is independent of the *jus ad bellum*

The contemporary legal view is that the *jus in bello* is independent of the *jus ad bellum*. This is shown by such statements as:

(a) ‘The unique aspect of international humanitarian law is that it applies without judgment of the merits of the causes being fought over.’

(b) ‘After much soul-searching in the 1970s, the Institut de Droit International came to the conclusion that the rules of armed conflict—whether within the scope of international humanitarian law or otherwise—must be equally respected by both sides, even in hostilities in which UN forces are engaged.

This is still good law today.

(c) ‘Whatever be the merits or otherwise of resorting to the use of force (the province of the *jus ad bellum*), when once the domain of force is entered, the governing law in that domain is the *jus in bello*. The humanitarian laws of war take over and govern all who participate, assailant and victim alike. … The reality is, of course, that while the *jus ad bellum* only opens the door to the use of force (in self-defence or by the Security Council), whoever enters that door must function subject to the *jus in bello*.

(d) ‘Accordingly, this report does not address who was responsible for the armed conflict between Hezbollah and Israel or which party was justified in waging war—the justness of the cause does not affect the international humanitarian law analysis.’

As an aside, perhaps the one clear exception is that ‘*[a]rticle 47 [API] effectively excludes mercenaries from the protection of the Geneva Conventions as either ‘combatants’ or ‘prisoners of war’.” Essentially, this is a variation of the *jus in bello* based on the individual *jus ad bellum*. As McCoubrey notes, “[t]his is an overtly moral judgment inserted in Protocol I”.

It would appear that a contrary view on the independence of *jus in bello* from the *jus ad bellum* was recently expressed by James Burger, who writes:

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9 *Civilians under Assault: Hezbollah’s Rocket Attacks on Israel in the 2006 War*, above n 91 (chapter 4), 8.

10 McCoubrey, above n 91 (chapter 1), 35.

11 Ibid.