

Essay

Rethinking the Divide Between *Jus ad Bellum* and *Jus in Bello* in Warfare Against Nonstate Actors

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I. THE CHANGING LEGAL LANDSCAPE

A. *Eschewing Dichotomies*

Not very long ago the regulation of warfare by international law was conveniently organized according to several sets of dichotomies: the right to use force was determined by the presence or absence of an actual armed attack; the type of the military conflict was either international or internal, each with its unique set of norms; the regulation of the hostilities was founded on the dichotomy between combatants (and military targets) and noncombatants (and nonmilitary targets); and the obligations of parties to the conflict and those of neutral third parties were strictly distinguished. But, perhaps due to its counterintuitiveness, the most prominent of all dichotomies has been the sharp distinction between the *jus ad bellum*, the law governing resort to force, and the *jus in bello*, the law governing the conduct of hostilities.

Over time most of these binary choices have evolved into continua, and the sharp distinctions have softened into overlapping sets of norms. Exceptions to the prohibition on the use of force have been recognized in response to new types of challenges ranging from imminent attacks,¹ protracted and low-level attacks by nonstate actors,² and humanitarian catastrophes.³ Some would say, in addition, that the development of weapons of mass destruction capability could also at times legitimate a preemptive strike.⁴ The significance of the distinction between international and

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1. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985).

2. W. Michael Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUS. J. INT'L L. 317 (1989).

3. W. Michael Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, 91 AM. SOC'Y INT'L L. PROC. 431 (1997); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 75; W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000).

4. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999) [hereinafter Reisman, *International Legal Responses to Terrorism*]; W. Michael Reisman & Andrea Armstrong, *Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006); W. Michael Reisman, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 142 (2003).

noninternational armed conflicts has also been muted by the recognition that both humanitarian and human rights obligations are relevant to both types of conflicts. Guerrilla tactics that exploited the law's distinctions between combatants and noncombatants, and between military and nonmilitary targets, required the transformation of these sharp distinctions into a set of points along elaborate continua. Both pragmatic and normative reasons have led to the recognition of *erga omnes* applicability of the obligation to ensure compliance with the laws of war and have therefore obliged neutral states to be vigilant and even to take action.⁵

Curiously, however, the insulation of *in bello* legal assessment from *ad bellum* considerations has resisted this trend almost entirely.⁶ This dichotomy is still in vogue among most international lawyers and philosophers.⁷ Michael Walzer famously referred to these two sets of norms as “logically independent,”⁸ and even those who question the morality of this distinction understand its institutional significance. Yet there appear to be good reasons to question this distinction. In this brief Essay, I undertake to question the logic of the dichotomy by examining the growing influence of *ad bellum* considerations in assessing compliance with *in bello* obligations in the context of asymmetric warfare against nonstate actors.

B. *The Challenge of Asymmetric Conflicts*

This exercise suits a publication that celebrates the jurisprudence of Professor W. Michael Reisman. His close attention to changes in the underlying political, economic, and social factors inspired the recasting of many of these binary dichotomies as continua. Reisman also devoted much attention, as early as the 1980s, to the challenges that asymmetric conflicts pose to the regulation of warfare⁹ due to the demise of the “dynamic of reciprocity and retaliation”¹⁰ when nonstate actors are “neither beneficiaries of nor hostages to the territorial system.”¹¹

Perhaps as a response to the decline of that dyadic dynamic of reciprocity and retaliation, a new, broader dynamic has emerged, one that involves a host of other actors.¹² These actors—governments, international

5. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9).

6. Although the *jus ad bellum* assessment does depend on *jus in bello* considerations, a response to aggression that harms noncombatants excessively would be regarded itself as a *jus ad bellum* violation. Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK Y.B. U.N. L. 99, 124 (2007).

7. See, e.g., Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 723-34 (2008); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

8. MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (4th ed. 2006).

9. Reisman, *International Legal Responses to Terrorism*, *supra* note 4.

10. W. Michael Reisman, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT'L L. 82, 86 (2003).

11. *Id.*

12. See Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQUIRIES L. 97 (2006) (explaining the development of third-party review mechanisms by the erosion of bilateral reciprocity).

organizations, humanitarian nongovernmental organizations, and civil society—have been translating their growing sensitivity to crises and human suffering to the promotion of new types of monitoring and retaliatory mechanisms ranging from divestment to criminal prosecutions of those whom they find to have violated the law.

These various new actors and observers, and the institutions they have developed, address a new type of battlefield that challenges the distinctions upon which the law of war is founded. The tactics of nonstate actors exploit, and hence undermine, two basic assumptions that have sustained the *jus in bello* since its inception: first, that it is possible to compartmentalize the battlefield and single out with sufficient clarity military from civilian targets and; second, that there are obvious military goals, such as gaining control over territory, that can reliably tell us whether the collateral civilian damage was or was not excessive relative to the effort made to achieve those goals. The combination of these two assumptions gave rise to the possibility that humanitarian conflict, one in which armies would strive to induce each other into submission without recourse to “total war,” was achievable. War was about inducing concessions from the defeated party by degrading its military capabilities and weakening and disabling its fighters, without necessarily killing them.¹³

Unfortunately, neither assumption typically holds in warfare against nonstate actors. First, there are very few purely military targets. This dramatically limits the ability of a regular army to identify arenas where it can legitimately project its power. In fact, as the 2003 invasion of Iraq showed, the relatively weaker army will try to reduce these arenas by reverting to guerrilla tactics. Moreover, it is no longer clear what can be considered military gain, especially since control over enemy resources and territory often proves to be a liability rather than an asset. Without tangible military goals, commanders are tempted to simply capture or kill as many of their opponents as possible, or to intimidate their opponents’ noncombatant constituency.

Nonstate actors therefore pose a challenge that is fundamental to the vitality and content of the *jus in bello*. Which military objectives could be considered legitimate in an asymmetric warfare against nonstate actors? How should one gauge the legitimacy of collateral civilian damage? In what follows I suggest that bridging the divide between *jus in bello* and *jus ad bellum*, and expanding the *jus in bello* proportionality test to include aspects of the *ad bellum* conditions, offers a possible response to these challenges. *Jus in bello* proportionality analysis can take into account not only the *ad bellum* question of who is to blame for the *commencement* of hostilities, but also incorporate the decision of one of the parties to pursue unrelated goals or to prolong the military confrontation instead of negotiating its end, thereby offering a more comprehensive assessment of the legality of the military

13. As the 1868 St. Petersburg Declaration of the International Military Commission posited: “[t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy [F]or this purpose it is sufficient to disable the greatest possible number of men.” Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [St. Petersburg Declaration], Nov. 29-Dec. 11, 1868, 18 MARTENS NOUVEAU RECUEIL (ser. 1) 474, available at <http://www.icrc.org/ihl.nsf/FULL/130>.

action. Whereas according to the traditional *jus in bello* standard each enemy is entitled to pursue its adversary until its total defeat, it increasingly becomes relevant to inquire—at least in political discourse, if not in positive law—to what extent continuing the fight is necessary.¹⁴ For example, would it have been legitimate, during the 1991 campaign, for the coalition forces not only to drive the Iraqi forces out of Kuwait, but also to invade Iraq and replace the Iraqi regime? Under this framework, the party who had either no legitimate reason to resort to force, or no good reason to pursue it further, would be more limited in its ability to justify the infliction of harm on noncombatants when pursuing its military objectives. If these propositions become part of the law, they would effect a major change: the traditional *in bello* proportionality analysis never required the attacker to explain the necessity of attaining the military objective; the necessity of such action was taken for granted.

II. INTRODUCING *JUS AD BELLUM* CONSIDERATIONS INTO *JUS IN BELLO* ANALYSIS

A. *Observing State Practice*

The reasons for maintaining the “total separation” between *jus ad bellum* and *jus in bello*, which are generally valid, are both moral and pragmatic. Yet they become strained in the context of warfare against nonstate actors. As a result, it is possible to observe a shift in the attitude of different actors, who inject *ad bellum* considerations into their assessment of the legality of certain military measures. In this Part, I first articulate the observation concerning the changing practice and then discuss its normative basis.

Even the adherents of the separation between *ad bellum* and *in bello* admit that “conflicts continue to be viewed in terms of ‘good’ and ‘evil’ . . . [and that] the reality is that such differences, real or perceived, matter.”¹⁵ For example, during the Gulf War of 1991 both the coalition forces and the international community took into consideration the illegality of the Iraqi invasion of Kuwait when assessing the proportionality of the military tactics adopted by the coalition forces. As Gardam noted, “[i]n the assessment of proportionality, civilians, and to a lesser extent combatants, of the aggressor state were accorded less weight in the balancing process than combatants of the ‘just side.’”¹⁶ Reactions during the military conflict in Lebanon in the summer of 2006 conflated *ad bellum* with *in bello* obligations.¹⁷ Similarly, in reaction to the Israeli attack in the Gaza Strip in December 2008 and January

14. While some believe that the *jus ad bellum* assessment is applicable throughout the military conflict, see, e.g., Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT’L STUD. 221 (1983), others maintain that the *ad bellum* proportionality requirement becomes irrelevant once war is raging, see, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 237-42 (4th ed. 2005). But even Greenwood maintains that the *ad bellum* and the *in bello* norms that apply simultaneously should remain insulated from each other.

15. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 41 (2008).

16. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 412 (1993).

17. E.g., Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779 (2006).

2009, key observers linked *ad bellum* and *in bello* considerations. When asked whether Israel's attacks were disproportionate, the U.S. ambassador to the United Nations responded: "Israel has the right to defend itself against these rocket attacks and we understand also that Israel needs to do all that it can to make sure that the impact of its exercise of right of self defense against rockets is as minimal and no affect [sic] on the civilian population."¹⁸

B. *The Implications of the Shifting Praxis: Reisman's Incident Analysis Approach*

To what extent do such reactions matter in law? In this inquiry, I follow Reisman's theory of the incident as a decisional unit in international law,¹⁹ which takes seriously the task of observing the responses of various actors to assertions of rights and obligations under international law. By observing reactions to incidents, it is possible to "mak[e] inferences about the normative expectations of those who are politically effective in the world community."²⁰ A responsible legal adviser must conclude from such reactions that the perceived justness of one's cause influences third parties' assessment of the proportionality—and hence the legality—of one's military actions. Such an observation is bound to shape the evolution of international practice and hence also the law.

C. *Evaluation*

Thus far I have articulated the proposition that *ad bellum* considerations do matter in *in bello* proportionality analysis, at least in political parlance. The "incident theory" suggests that further support for the proposition is likely to entrench it as the prevailing law. The task is now to reflect on this trend and to ask to what extent the proposition reflects sound policy considerations. Most contemporary scholars oppose the proposition based on two main arguments. First is the argument from dyadic reciprocity. To ensure compliance with *jus in bello*, both sides should enjoy its equal protection. The aggressor will have no incentive to comply with the law if the defender is relieved from the law's constraints. And because each side tends to view itself as just, unless *jus in bello* is insulated from *ad bellum* considerations, the two camps will immediately descend to ruthless brutality.²¹ The argument from reciprocity is convincing, and is even morally compelling,²² when conditions for reciprocity obtain. But warfare between a regular army and nonstate actors is not subject to the dyadic reciprocity rationale. The asymmetric relationship in fact incentivizes *both* sides to eschew reciprocal considerations: the nonstate actor

18. Press Release, U.S. Mission to the U.N., Statement by Ambassador Zalmay Khalilzad, U.S. Permanent Representative, on the Situation in Gaza (Dec. 31, 2008), available at http://www.usun-ny.us/press_releases/20081231_381.html.

19. W. MICHAEL REISMAN, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (1988); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984) [hereinafter Reisman, *International Incidents*].

20. Reisman, *International Incidents*, *supra* note 19, at 2.

21. See Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 889 (2004).

22. Yitzhak Benbaji, *The War Convention and the Moral Division of Labour*, 59 PHIL. Q. (forthcoming 2009) (on file with author).

resorts to terrorism, whereas the stronger regular army is tempted to inflict excessive harm upon noncombatants, to conflate military objectives with killing combatants, and to treat captured combatants as outlaws.

However, as mentioned above, the growing involvement in such conflicts of third parties, with their diverse modalities for reviewing the belligerents' actions, shifts the incentive structure from the traditional dyadic dynamic of reciprocity between the parties to a much broader dynamic.²³ The dueling parties must take the attitude of those third parties into account as the combat is played out not only bilaterally but also concurrently in the global arena. Toleration or condemnation by key international actors, including public and private actors and observers, as well as by foreign and international courts, often proves to be an effective constraint at least on the state party to the conflict. The state party will not descend into barbarism regardless of what the enemy does if it has an incentive to maintain its good reputation globally or to avoid criminal sanctions. Since third-party observers assess both *ad bellum* and *in bello* considerations, the percolation of *ad bellum* considerations into the *jus in bello* proportionality analysis can prove a rather sophisticated and effective constraint on the stronger regular army. The introduction of *ad bellum* considerations into the analysis of *jus in bello*'s vaguer concepts—which often call for balancing of competing considerations, such as the determination of excessive harm to civilians or the targeting of individuals “for such time as they take a direct part in hostilities”²⁴—would not provide either side with more freedom of action or impose greater risks to noncombatants. Quite to the contrary, a state party must convince the international community that its military operations are aimed at just causes to be able to justify the military goals it pursues. This fuller account of the *jus in bello* proportionality analysis²⁵ examines not only the necessity of the collateral harm to noncombatants but also the legitimacy of the pursuit of the military goals. What the traditional law takes for granted—that *in bello* all military goals are equally and always legitimate—can now be questioned by the emerging new assessors and indirect enforcers of the law.

This is not to suggest that whatever the aggressor does would be tainted as a *jus in bello* violation, nor that its population would thereby become fair game. The basic rules of the *jus in bello* need not change; the prohibitions on intentionally killing noncombatants, on denying quarter, etc., must remain insulated from *ad bellum* considerations. Once thrown into combat, combatants belonging to the aggressor would still be entitled to protect themselves and their population from attacks by their enemies, and their defensive military goals would be regarded as legitimate. Moreover, the party that initially defended itself against aggression may subsequently overreact or

23. See Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 482 (2007).

24. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), adopted June 8, 1977, 1125 U.N.T.S. 3.

25. On the difference between “thin” and “thick” meanings of *jus in bellum* proportionality, see Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law* (Jan. 3, 2009) (unpublished manuscript, on file with author).

decline opportunities to settle the conflict, at which stage its margin of discretion will be reduced.

Besides the argument from reciprocity, the other possible argument against this suggested linkage between *in bello* and *ad bellum* is a moral one. This argument sets out from the assumption that the insulation of *jus in bello* from *ad bellum* considerations is moral because of the equal protection *jus in bello* accords to combatants and noncombatants regardless of their affiliation. Walzer calls it “[t]he moral equality of soldiers,” who “have an equal right to kill.”²⁶ Unequal application of the law is problematic because it divests combatants and noncombatants of protection despite their lack of responsibility for their leaders’ aggression.²⁷

There are two moral objections to this argument for *jus in bello* equality, which also support the injection of *ad bellum* considerations. The first objection is that we should not accord morally equal weight to the pursuit of unjust aggression.²⁸ Yet even those who raise this objection nevertheless accept that the laws of war—as distinguished from the morality of the war—must treat both goals as equal, because of the dyadic reciprocity between armies and their respective beliefs in the justness of their causes.²⁹ However, as argued above, this moral concession to practical constraints is not imperative under conditions of asymmetric warfare, where dyadic reciprocity is nonexistent and alternative mechanisms to assess justness exist. The availability of third-party institutions that enforce compliance with the law, and identify where justice lies, relieves the moral assessment from the shackles of pragmatic reasoning.

The second moral objection to the argument in support of the insulation of *jus in bello* from *ad bellum* considerations challenges the depiction of the *jus in bello* as evenly balanced. The focus on the law’s impartiality between the different combatants is misleading when one takes into account the *communities* that fight each other. The laws of war are inherently biased in favor of the stronger armies that can translate their relative economic power into military gains. The weaker party that fights for a just cause must nevertheless play by the rules that portend its defeat. The burden of obeying the law—and indeed the burden of the insulation of *jus in bello* from *ad bellum* considerations—therefore rests on the shoulders of the weaker side. Small wonder that the constituency of the weak finds the insulated *jus in bello* morally corrupt. Weaker communities might be more inclined to subscribe to a law that also takes into account the justness of the cause.

III. CONCLUSION OF AN OVERTURE

This short Essay can only outline the need to rethink the dichotomy between *jus ad bellum* and *jus in bello*, and hint at the potential for more

26. WALZER, *supra* note 8, at 34, 41.

27. *But see* Benbaji, *supra* note 22 (manuscript at 2, 14-17) (offering an alternative explanation).

28. Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 708-09 (2004); *see also* Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 44 (2005).

29. Hurka, *supra* note 28, at 45; McMahan, *supra* note 28, at 729-30.

nuanced law. Obviously, one can anticipate several refinements that may lie on the horizon, for example, in the context of individual criminal responsibility or the authority of an occupying power. One major concern is the precariousness of a system that relies on third parties, whose impartiality and skillfulness in assessing the actions and motivations of parties to a conflict may be called into question. Yet this is the very same system that we use to assess *ad bellum* lawfulness. Far from perfect, it is the best available system to measure compliance in asymmetric warfare against nonstate actors, and this system already shapes the behavior and expectations of the various nonlegal actors, including the parties to the conflict themselves. It is time for lawyers to digest and expound the meaning of this new practice.

Michael Reisman was able to anticipate the evolution of the law by constantly questioning time-honored postulates in light of “the common interests of the aggregate of actors.”³⁰ In his view, it is “the responsibility of the international lawyer . . . to assess innovative claims carefully for their contribution, in present and projected contexts, to the essential goals of law.”³¹ This short Essay seeks to apply Reisman’s insights and methodology to the study of the impact of *ad bellum* considerations on *in bello* proportionality. In an era when armed conflict was the business of professional armies detached from population centers and governed by reciprocity, dichotomies made eminent sense. They enabled enemies to communicate their mutual expectations. Binary messages—“yes” or “no” to the disproportionate killing of noncombatants—were feasible and effective. But most contemporary conflicts are different. Under such conditions, the insulation of *jus in bello* proportionality analysis from *ad bellum* considerations may prove at times to be more of a detriment than a contribution to the essential goals of the law. It is therefore the responsibility of the international lawyer to reassess what is perhaps the last remaining dichotomy in the laws of war.

30. Reisman, *supra* note 10, at 89.

31. *Id.*