THE COST OF CONFLATION: THE DUALISM OF JUS AD BELLUM AND JUS IN BELLO IN THE CONTEMPORARY LAW OF WAR

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The cost of conflation: The dualism of jus ad bellum and jus in bello in the contemporary law of war

Robert D. Sloane*

The dualism of jus ad bellum and jus in bello is at the heart of all that is most problematic in the moral reality of war.
—Michael Walzer

[It may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of.
—Hugo Grotius

ABSTRACT

Much post-9/11 scholarship asks whether modern terrorism, the increasing availability of catastrophic weapons to non-state actors, and other novel threats require changes to either or both of the traditional branches of the law of war: the jus ad bellum, which governs resort to war, and the jus in bello, which governs the conduct of hostilities. Little if any work focuses on the equally vital question whether the relationship between those branches—and, in particular, the axiom that insists on their analytic independence—can and should be preserved in the twenty-first century. In fact, the issue has been almost entirely neglected since Sir Hersch Lauterpacht, the eminent former judge of the International Court of Justice, published a seminal article on the topic more than fifty years ago. This article revisits the issue in the twenty-first century. The traditional view, which I refer to as the dualistic axiom, holds that the jus in bello applies equally to all combatants—whatever the legality of their justification for resorting to force. Yet subjective conceptions of the justice or legality of conflicts increasingly erode the legal boundary between ad bellum and in bello constraints on war. Conflation of these distinct branches of the law of war also affects international jurisprudence. The cost of ad bellum-in bello conflation is high: conflation of the two threatens


1 MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977); see also BRIAN OREN, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 50 (2000).

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I. INTRODUCTION

Many post-9/11 scholars and statesmen have called for changes in the *jus ad bellum* (the law governing resort to hostilities), the *jus in bello* (the law governing the conduct of hostilities), or both. These invitations to reform, whatever their merit, raise an equally vital but distinct legal issue, which has received far less attention: the relationship between these two branches of the law of war. Since a genuine *jus ad bellum* emerged after World War II with the advent of the U.N. Charter, the reigning dogma has been that the *jus ad bellum* and the *jus in bello* must be kept analytically distinct: *in bello* rules and principles, that is, must be applied equally to all parties to a conflict, whatever each party’s *ad bellum* rationale for resorting to force.

Contemporary international law regards this analytic independence—or “dualism”—as axiomatic. Political philosophers writing in the just war tradition, too, generally insist that “[i]t is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.” In theory, then, a use of armed force may be unlawful in

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one sense—because its author had no right to resort to force under the *jus ad bellum*. But it may be lawful in another—if and insofar as its author observes the *jus in bello*. The latter, also known today as international humanitarian law (IHL), includes both (1) principles of military necessity, proportionality, and distinction in the application of force and (2) absolute constraints on the conduct of hostilities such as the prohibition on torture. I will refer to this rule, which insists on the analytic independence of the two branches of the law of war, as the dualistic axiom.\(^7\)

Despite its general recognition,\(^8\) the axiom is logically questionable,\(^9\) undertheorized, and often honored in the breach. Recent examples, some of which I explore below, abound: the 1991 Gulf War;\(^10\) the North Atlantic Treaty Organization’s (NATO) 1999 air campaign against Serbia;\(^11\) the resurrection of rationalized torture;\(^12\) and the 2006 war between Israel and Hezbollah.\(^13\) The International Court of Justice (ICJ), too, often misapplies the dualistic axiom—for example, in its 1996 *Nuclear Weapons* opinion.\(^14\) But the disconnect between international law’s nominal commitment to the dualistic axiom and its neglect or misconstruction in practice is often not, as might be supposed, a simple product of bad faith or of Cicero’s maxim *inter arma silent leges*. Rather, it often reflects the axiom’s counterintuitive, paradoxical nature and a failure to appreciate its rationales and limits. The

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\(^7\) Writers at times use the phrase “law of war” ambiguously to refer to either or both the *jus ad bellum* and the *jus in bello*. IHL traditionally referred only to that part of the *jus in bello* that protected persons rendered *hors de combat*. For convenience and clarity, I will use the phrases (1) “law of war” to refer to the entire corpus of the international law on the use of force; (2) “*jus in bello*,” “law of armed conflict,” or IHL interchangeably to refer to the law governing the conduct of hostilities; and (3) “law on the use of force” or “*jus ad bellum*” interchangeably to refer to the law governing resort to force.

\(^8\) See, e.g., Brownlie, supra note __, at 406-08; Lauterpacht, supra, note __, at 215-20; Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. — (Dec. 19), Separate Op. of Judge Koojiman ¶ 58 [hereinafter Armed Activities].


\(^14\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter Nuclear Weapons].
end of the Cold War and twenty-first century changes in the nature and legal regulation of war—including the advent of transnational terrorist networks, the proliferation and increasing availability to non-state actors of catastrophic weapons, and the humanization of IHL—invite a reappraisal of the ad bellum-in bello relationship.

This article defends the dualistic axiom against its erosion in theory and practice. But it also tries to refine and clarify the axiom to better serve the values that underwrite it. It argues that two forms of analytic conflation afflict the modern law of war: first, at the macrolevel, conflation of the jus ad bellum and the jus in bello generally, that is, failure to apply the dualistic axiom properly or at all; and second, at the microlevel, conflation of the distinct proportionality components of each. Both forms of conflation compromise the law’s efficacy relative to the evolving nature of twenty-first century hostilities. Properly understood, the dualistic axiom remains indispensable to the modern law of war. But I acknowledge, indeed argue, that the axiom cannot be applied categorically and acontextually—without considering, for example, the relative power of the parties, the technology available to them, and the nature of the conflict.

Conflation may be attributed in part to a failure to appreciate that ad bellum and in bello constraints presuppose distinct units of value: the former operate at the level of collectives or polities (often, but not always today, states); the latter operate at the level of individuals. Polities may have an associative value beyond the aggregative value constituted by the sum of their constituent’s interests. But they should not be romanticized. I take for granted a premise of what may broadly be denominated liberal political theory: only concrete human beings, not abstractions, merit foundational moral weight. That need not preclude the attribution of value to collectives insofar as they serve the interests of their constituents. But “any rights states have must derive from and concern their citizens.”

This moral postulate excludes fascist, Marxist, and other ideologies that ascribe value to collectives qua collectives. I doubt, however, that polities

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17 See David Luban, The Romance of the Nation-State, 9 PHIL. & PUB. AFF. 392 (1980) [hereinafter Romance of the Nation-State].
19 Hurka, supra note __, at 51.
of this sort would in any event have social, political, or moral (as opposed to crude instrumentalist) reasons to conform their initiation and conduct of hostilities to the law of war. Insofar as the dualistic axiom continues to compel our respect, it is because of international law’s postwar solicitude for the individual as the fundamental unit of value—a feature shared by modern IHL and international human rights law. Again, insofar as this is a normative postulate, I take it for granted. It has been defended elsewhere.\textsuperscript{20} Human dignity, not the supposed rights or prerogatives of the abstraction known as the state, underwrites the dualistic axiom.

Given this postulate, I argue that contemporary international law must candidly acknowledge descriptive and normative features of the dualistic axiom that it has tended to elide. Descriptively, it must recognize that, at times, discretionary in bello judgments—in particular, about the principle of proportionality—vary depending on the characterization of the perceived justice or legality of the conflict. That is, they vary, contrary to the dualistic axiom, based on ad bellum judgments. That does not mean that they should. But despite nominal consensus on the dualistic axiom, state practice suggests that international law tolerates more incidental civilian harms (euphemistically, “collateral damage”) if the asserted justification for war is either (1) perceived as legal (e.g., self-defense) or (2) formally illegal but perceived as legitimate insofar as it meets broadly shared international demands to preserve minimum order and forestall serious human rights abuses: hence the general acceptance of NATO’s zero-casualty war against Serbia, which it avowedly fought to prevent ethnic cleansing in Kosovo.

Normatively, the questions “necessary for what?” and “proportional to what?” cannot be answered without acknowledging that such judgments logically depend, at least at the extreme, on ad bellum judgments about the legitimacy of conflicts. They depend, in other words, on the very sort of ad bellum judgment about the justice or legality of a particular conflict that the dualistic axiom tries to exclude. Yet military strategists operationalizing these legal constraints need not, and indeed cannot, therefore revert to the total subjectivity in the jus ad bellum that characterized international law before World War II. That would render the applicability of the law of war subject to the unfettered discretion of the agent of force. It would often eviscerate independent jus in bello constraints on war. One challenge for the twenty-first century law of war—though, historically, it is hardly new—is to accommodate partially subjective ad bellum judgments and aspirationally objective in bello requirements.

But to adapt Justice Holmes’s maxim, the life of the law of war “has not been logic: it has been experience.”\textsuperscript{21} The dualistic axiom, as a fundamental part of that law, is not a principle of rational derivation; it is a convention based on experience and an appreciation of the political and “moral reality of war.”\textsuperscript{22} So while the logical coherence of the dualistic axiom may be philosophically problematic at the extreme, as some theorists forcefully argue, respect for it remains indispensable to IHL’s policy goals: to reduce the suffering and harms of war and ensure respect for certain absolute rights during war. The dualistic axiom almost always serves those goals. But IHL’s goals sometimes prove to be in tension with one another. They cannot be reduced to a simple formula or justified by a univocal moral theory. They instantiate a complex blend of deontology, consequentialism, and virtue ethics. Military strategists and other specialists in armed force will increasingly confront consequent tensions in IHL in the twenty-first century. Those tensions pose challenges that can no longer be neglected, for example, whether torture, currently prohibited in all circumstances by positive law, may ever be authorized by a consequentialist legal analysis.

Part II traces the history and rationales of the dualistic axiom. Part III explains the sources and logic of conflation: how and why the dualistic axiom tends to be neglected, misconstrued, and misapplied. Part IV shows how conflation infects the jurisprudence and practice of war and stresses the cost of conflation for international law’s policy goals. Part V concludes by indicating how geostrategic changes, advances in military technology, and new forms of warfare challenge the continuing vitality of the dualistic axiom in the twenty-first century. It proposes clarifications and refinements of the dualistic axiom that would better serve the values that underwrite the modern law of war. The efficacy of the law of war is commensurate to its correspondence to the nature and felt necessities of warfare. Insofar as participants in modern war see a disconnect between, respectively, the law and political and moral reality of war, the law will cease, to that extent, to operate effectively and serve its policy objectives.

II. THE HISTORY OF AN AXIOM: INDEPENDENCE OR INTERDEPENDENCE?

International lawyers and just war theorists alike use the Latin phrases *jus ad bellum* and *jus in bello* to describe, respectively, the law governing resort to force and the law governing the conduct of hostilities. It would be inaccurate to distinguish sharply between the historical evolution of these two traditions, which overlap and continue to influence each other. But

\textsuperscript{22} Walzer, supra note __, at 21.
they emphatically cannot be equated. Just war theory is much older than international law. It originated and evolved principally in theological and ethical, not legal, terms.\textsuperscript{23} The law of war developed largely in the nineteenth and twentieth centuries. While influenced by just war doctrine, it reflects humanist, positivist, and political realist responses to the trauma of modern war. That is why the U.N. Charter does not speak of just and unjust wars but only of the “scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”\textsuperscript{24} Both mainstream just war theory and international law, however, embrace the dualistic axiom; and in both intellectual traditions, contrary to popular belief, this is a recent innovation.

\textbf{A. Evolution of the Dualistic Axiom in Just War Theory}

\textbf{1. Ancient and Medieval Origins: Interdependence}

The Western concept of \textit{justum bellum} originated in the Roman era,\textsuperscript{25} at which time it had a procedural meaning: a war “preceded by a solemn action taken by the \textit{collegium fetialium}, a corporation of special priests, the \textit{fetiales},” who would certify to the senate under oath that “a foreign nation had violated its duty toward the Romans” and thereby created a just cause for war.\textsuperscript{26} Roman law did not include a \textit{jus in bello}.\textsuperscript{27} Within the limits established by its \textit{jus ad bellum}, “the conduct of war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and non-

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\textsuperscript{24} U.N. CHARTER pmb.
\textsuperscript{25} YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 63 (4th ed. 2005). \textit{Jus ad bellum} antecedents exist in the writings of classical Greece, the Hebrew Bible, and elsewhere, but until ancient Rome, none of these can be described accurately as an ethical concept, still less a legal one, of \textit{justum bellum}. See G.I.A.D. Draper, Grotius’ Place in the Development of Legal Ideas About War, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177, 177 (Benedict Kingsbury et al. eds. 1990) [hereinafter Draper, Grotius’s Place]; BROWNIE, supra note __, at 3-4; ARTHUR NUSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 9-11, 15 (1947); Arthur Nussbaum, Just War – A Legal Concept?, 42 MICH. L. REV. 453, 453-54 (1943).
\textsuperscript{26} Nussbaum, supra note __, at 454; see also BROWNIE, supra note __, at 4; Draper, Grotius’ Place, supra note __, at 178-79; Joachim von Elbe, The Evolution of the Concept of the Just War in International Law, 33 AM. J. INT’L L. 665, 666 (1939).
\end{flushright}
Augustine, the progenitor of theological just war doctrine, likewise said little about *in bello*. He “reconcil[ed] the evangelical precepts of patience and the pacifistic tendencies of the early Church with Roman legal notions,” and this project yielded a substantive conception of just war in contrast to the procedural one of Roman law. But insofar as Augustine spoke to issues we would characterize as *in bello*, his admonitions were not independent of but inextricably intertwined with the *jus ad bellum*. Briefly, because only God’s clear command—as depicted, for example, in the Israelite wars of the Bible—could offer reliable assurance of the just nature of a war, restraints on the conduct of hostilities were simply the “inevitable consequence of lack of absolute certainty such as God alone can give.”

Aquinas, the principal medieval scholastic who systematically codified Augustinian just war doctrine, likewise did not develop a distinct *jus in bello*. He condemned the deliberate slaughter of non-combatants. But this and other scattered antecedents did not add up to a coherent conception of *jus in bello* as a set of legal or ethical injunctions. In fact, “[t]he distinction

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Augustine did, however, preach mercy and recognized that wars fought without it could endanger the stability of any future peace, the ultimate goal of war. See AUGUSTINE, *POLITICAL WRITINGS* 3-12 (Michael W. Tkacz & Douglas Kries, trans., Ernest L. Fortin & Douglas Kries, eds., Hackett Pub. Co. 1994) (410); Nussbaum, supra note __, at 41.

30 RUSSELL, supra note __, at 16; see also Nussbaum, supra note __, at 455; Draper, *Grotius’s Place*, supra note __, at 180.

31 See Joachim von Elbe, *The Evolution of the Just War in International Law*, 33 AM. J. INT’L L. 665, 668 (1939); see also Kunz, supra note __, at 530. Criteria for just war discernable, but never systematically set forth, in Augustine’s writings include “right authority, a just cause, right intent, the prospect of success, proportionality of good to evil done, and that it be a last resort.” JOHNSON, JUST WAR TRADITION, supra note __, at 123; see also FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 16-39 (1975).

32 JOHNSON, JUST WAR TRADITION, supra note __, at xxx.

33 Aquinas distilled from Augustine’s writings three criteria for just war: *auctoritas principis* (right authority), *justa causa* (just cause), and *recta intentio* (right intention). Nussbaum, supra note __, at 457, which corresponded to the “the ends of good politics as conceived in Augustinian political theory: order, justice, and peace.” James Turner Johnson, *The Just War Idea: The State of the Question*, 23 SOC. PHIL. & POL’Y 167, at 177 [hereinafter Just War Idea]. Alexander of Hales, Gratian, and others theologians who contributed to the evolution of Christian just war theory likewise did not develop a distinct *jus in bello*. BROWNLIE, supra note __, at 6 & n.4; von Elbe, supra note __, at 669-70.

34 Finnis, supra note __, at 26; see also Nussbaum, supra note __, at 35; JOHNSON, JUST WAR TRADITION, supra note __, at 199.
between *ius ad bellum* and *ius in bello* is scarcely part of the Catholic natural law tradition.”35 Insofar as a theological analogue to a *jus in bello* existed at all,36 it remained parasitic on, not independent of, the *jus ad bellum*. For theologians, “the justness of the resort to war determined to a large extent the limits on the conduct of war; that is, the *jus ad bellum* and the *jus in bello* were,” contrary to the dualistic axiom, “interdependent.”37 In general, in the theological, as in the Roman, tradition, “once the cause was just, any means to achieve the end was permissible.”38 Conversely, soldiers who fought in unjust wars were, for that reason alone, criminals—even if they refrained from atrocities such as plunder, rape, and massacre.39

The idea of uniform restraints on the conduct of hostilities in the just war tradition evolved chiefly as a part of chivalry, a secular tradition, albeit one tied to medieval Christianity.40 As the means and methods of warfare grew more sophisticated in the Middle Ages, a hierarchical social order developed, “which drew an increasingly sharp division between the armed *nobilis*, noble by virtue of his horses and arms, and the *inerme vulgus*, the unarmed, vulgar herd of common humanity.”41 Medieval war ordinances and customary codes of chivalry evolved, which, though often honored in the breach, presaged the later emergence of a distinct *jus in bello*.42

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35 Finnis, *supra* note __, at 25; *see also* Stacey, *supra* note __, at 30-31; Green, *supra* note __, at 2; Johnson, *Just War Tradition*, *supra* note __, at 124-50; Keen, *supra* note __, at 189-90.

36 Strictly, “it is incorrect to speak of classical just war before 1500. Earlier there exist two doctrines, a religious (i.e., theological and canonical) one largely limited to the right to make war (*jus ad bellum*) and a secular one whose almost total content related to the proper mode of fighting (*Law of Arms, jus in bello*).” James Turner Johnson, *Ideology, Reason, and the Limitation of War* 8 (1975) [hereafter Johnson, *Ideology*].


41 Stacey, *supra* note __, at 29.

42 Stacey, *supra* note __, at 30-38; Draper, *Grotius’ Place*, *supra* note __, at 185; Michael Howard, *Temperamenta Belli: Can War Be Controlled*, in *Restraints on War* 5 (Michael Howard ed., 1979). By the end of the Middle Ages, “[t]he *jus in bello* included two major elements: a listing of classes of persons who normally, by reason of their personal characteristics… or social function, were to be regarded as noncombatants and not to be directly, intentionally attacked during a just war; and some rather moribund efforts to define certain means of war as impermissible because of their inherently indiscriminate or disproportionate effects.” Johnson, *The Just War Idea*, *supra* note __, at 169.
then, however, restraints on war applied only to knights and only relative to Christians; hence the brutality of the Crusades. Furthermore, the just war criterion of right authority determined rights and privileges in war, for example, the right to collect ransom or seize booty. The emerging *jus in bello* remained bound up with particular conceptions about the propriety of both the warrior and the war. The idea that uniform rules on the conduct of hostilities should apply equally to all parties remained foreign to medieval thought. In short, in the formative period of just war doctrine, the *jus ad bellum* largely determined the *jus in bello*, insofar as injunctions of the latter kind existed or applied at all.

2. The Scholastics: Can a War Be Just on Both Sides?

Not coincidentally, the idea of the analytic independence of *jus in bello* and *jus ad bellum* roughly coincided with the emergence of international law in the decades surrounding the Peace of Westphalia. The problem that led to its evolution is a familiar one that persists today: invariably, each party to war claims the mantle of justice for itself and denies it to the other. In the emergent era of decentralized authority, with power dispersed among an increasing number of sovereigns—as opposed to the previous (notionally) uniform authority of the Holy Roman Empire and the Pope—no single sovereign could be the arbiter of the justice of conflicts among them. While Grotius often receives principal credit for "the theory of the equal application of the *jus in bello* irrespective of the justice of a party’s resort to force," recent scholarship emphasizes the antecedent contributions of Francisco de Vitoria, Francisco Suárez, and Alberico Gentili, which merit brief examination here.

Vitoria denied that a war could be objectively just on both sides, where objective means “in the eyes of God.” But he recognized that because of ignorance or mistake, situations would arise in which a “war may be just in

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43 JOHNSON, JUST WAR TRADITION, supra note __, at xxiii, 128-29; see also Stacey, supra note __, at 28, 30, 33; Draper, Grotius’ Place, supra note __, at 184-85.
44 Stacey, supra note __, at 31-32; see also MAURICE H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 137-85 (1965).
45 Cf. Geoffrey Parker, Early Modern Europe, in THE LAWS OF WAR 40, 42 (Michael Howard et al. eds. 1994) (observing that the “powerful combination of natural and divine law, ecclesiastical precept, military law, common custom, and self-interest only coalesced to impart a new and enduring consistency to both the *jus ad bellum* and the *jus in bello* in the period between 1550 and 1700”).
46 See DINSTEIN, supra note __, at 66; BROWNLIE, supra note __, at 11.
47 Gardam, Proportionality and Force, supra note __, at 396 & n.29.
48 E.g., THEODOR MERON, COMMON RIGHTS OF MANKIND IN GENTILI, GROTITUS AND SUÁREZ, IN WAR CRIMES LAW COMES OF AGE, supra note __, at 122.
49 JOHNSON, IDEOLOGY, supra note __, at 194.
itself for the side which has true justice on its side, and also [apparently] just for the other side, because they wage war in good faith and are hence excused from sin.”50 He also explicitly distilled just war theory into the distinct categories of *jus ad bellum* and *jus in bello*, “with the former largely as defined by Augustine and reshaped by Thomas Aquinas and the latter including a well-elaborated doctrine on non-combatant immunity and less developed sections on allowable means of warfare and the rights of victors over vanquished.”51

Suárez similarly rejected the idea that a war could be objectively—in the eyes of God—just on both sides.52 But he also agreed with Vitoria that, given man’s ignorance and uncertainty about God’s will (a problem raised by Augustine a millennium earlier), both sides would often believe, even in good faith, in the justice of their cause for war. Although Suárez rejected Vitoria’s “excusable ignorance” exception,53 he, too, thought that because of man’s ignorance and uncertainty about the divine will, “the limits of the *jus in bello* must be scrupulously followed to avoid damage to either side so far as possible.”54 In short, epistemic uncertainty about God’s will supplied the initial rationale for the dualistic axiom.

3. Natural Law: The Birth of Secular Just War Doctrine

Gentili receives credit for “ridding international law of the shackles of theology.”55 Against the scholastic view, he maintained that a war could be objectively just on both sides, not only apparently so because of one party’s mistake or ignorance,56 and this assertion “paved the way for the uniform applicability of *jus in bello*.57 Gentili also reconceptualized non-combatant immunity. Rather than base it on the innocence of certain non-combatants...

50 FRANCISCO DE VITORIA, POLITICAL WRITINGS 312-13 (Anthony Pagden & Jeremy Lawrance eds., 1991) (emphasis deleted); see also JOHNSON, IDEOLOGY, supra note __, at 155; Nussbaum, *supra* note __, at 460.

51 JOHNSON, JUST WAR TRADITION, supra note __, at 175.


53 See NUSBAUM, *supra* note __, at 69 (emphasis added). Suárez recommended that, where both sides claim justice for their cause, they submit to arbitration. JOHNSON, IDEOLOGY, supra note __, at 194.

54 JOHNSON, IDEOLOGY, supra note __, at 194.

55 NUSBAUM, *supra* note __, at 79; see also BROWNLEE, *supra* note __, at 11; Draper, *Grotius’s Place, supra* note __, at 190.


relative to war’s causes, he stressed humanitarian ideals that more closely approximate modern IHL’s rationale.\textsuperscript{58} Regrettably, however, he presented his views largely in the form of dogmatic assertion rather than rigorous argument.\textsuperscript{59} But insofar as he drew “a clear line of demarcation between the legal aspects of the war problem on the one hand, [and] theology and ethics, on the other,”\textsuperscript{60} his work anticipates contemporary IHL.

Grotius, although credited with developing the dualistic axiom, in fact seems unclear on this issue. His magisterial work \textit{De Jure Belli ac Pacis} distinguished between just causes and just effects. As to the former, he wrote, “War cannot be just on both Sides, nor can any Law Suit be so, because the very nature of the Thing does not permit one to have a moral Power, or true Right, to two contrary Things, as suppose to do a Thing, and to hinder the doing of it.”\textsuperscript{61} As to the latter (just effects), Grotius said that war could be just on both sides.\textsuperscript{62} But it seems unclear what he meant here by “effects”: perhaps that the results of a war could turn out to be just for both sides even if only one initiated it justly. Yet that interpretation would not support the dualistic axiom.

Echoing Vitoria, however, Grotius also argued that “it may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of.”\textsuperscript{63} And, echoing Gentili, he argued from a secular natural law rather than a scholastic perspective that certain restraints should apply equally to all combatants.\textsuperscript{64} These included ethical admonitions that non-combatants (women, children, the elderly, farmers, clergy, merchants, and captives), and combatants who requested quarter, be spared unless found guilty of a crime.\textsuperscript{65} It is in this regard that Grotius’s genuine contribution to modern IHL emerges. He took pains to elaborate the idea of \textit{temperamenta belli}, moderation in war, to which the third book of his treatise is largely devoted. Far more than his predecessors, he emphasized restraint in the conduct of hostilities, albeit in moral, not legal, terms.\textsuperscript{66} Grotius regarded international law, such as existed then, as permissive in this respect.\textsuperscript{67} But

\begin{thebibliography}{99}
\item \textsuperscript{58} See Draper, Grotius’s Place, supra note \__, at 190.
\item \textsuperscript{59} Nussbaum, supra note \__, at 80.
\item \textsuperscript{60} von Elbe, supra note \__, at 677.
\item \textsuperscript{61} \textit{Grotius}, supra note \__, at 1130 (emphasis deleted).
\item \textsuperscript{62} \textit{Id.} at 1132.
\item \textsuperscript{63} \textit{Id.} at 1130-31.
\item \textsuperscript{65} See III Grotius, supra note \__, at 1439-51.
\item \textsuperscript{66} Nussbaum, supra note \__, at 106-07.
\item \textsuperscript{67} See Draper, Grotius’s Place, supra note \__, at 198.
\end{thebibliography}
by looking to state practice for evidence of natural law, which he found in
the social nature of man rather than divine mandate, 68 he facilitated a vital
transition from theological just war theory (expounded by scholastics) to
what would, centuries later, be reformulated as modern IHL (expounded
by lawyers, statesmen, and secular humanists). 69

4. Positivism: Just War as Positive Morality

But if Grotius and Gentili marked the birth of secular just war theory—
and an early entreaty for the dualistic axiom—their work also reflected
the new paradigm of international law that culminated in its demise. Divorced
from religious foundations and transposed to a world of states competing
for power and influence, just war doctrine rapidly degenerated into what
John Austin would describe as “positive morality.” 70 The view of Gentili
and Grotius that a war could be genuinely just for both parties ironically
“brought the just war doctrine in international law to a cul-de-sac.” 71 The
reason is hardly recondite: thereafter, states would inevitably justify their
resort to hostilities in just war terms, but “[i]f that justification need not be
superior to the claims of the enemy, the requirement of just war ceases in
effect to be a hurdle on the path to war.” 72

Positivism, which succeeded natural law as the reigning methodology
of international law in the eighteenth and nineteenth centuries, therefore
relegated just war doctrine to the domain of “the conscience of sovereigns,”
as distinct from positive “law which nations apply in their intercourse with
each other.” 73 Emmerich de Vattel stressed the “necessary law of nature”
and, by reference to it, denounced unjust wars. 74 But after describing

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68 Because Grotius “proceeded on the assumption that the practices of contemporary
states were not improper deviations from a theological norm, but expressions of a natural
order whose principles he could determine,” Leon Friedman, Introduction, Hugo Grotius and
the Law of War, in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 3, 15 (Leon Friedman ed.
1972), he “claimed in earnest that the law of nature and international law derived therefrom
could subsist without a divine foundation.” Nussbaum, supra note __, at 466. Furthermore,
“by taking a pragmatic, positivistic approach, Grotius could reach both the Catholic princes
and the Protestant rulers then engaged in the bitter battles of the Thirty Years War (1618-
1648).” Friedman, supra, at 15; see also Hedley Bull, The Importance of Grotius, in HUGO
GROTUIS AND INTERNATIONAL RELATIONS 65, 78 (Hedley Bull et al. eds., 1990).
69 See Draper, Development of IHL, supra note __, at 67-68.
70 JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 19-20 (Wilfrid E. Rumble,
71 DINSTEIN, supra note __, at 66-67.
72 Id.; see also MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM
WORLD PUBLIC ORDER 134 (1961).
73 von Elbe, supra note __, at 682 (quoting Vattel) (internal quotation marks omitted).
74 See EMMERICH DE VATTEL, THE LAW OF NATIONS 578 (Joseph Chitty trans. & Edward D.
Ingraham ed. 1857) (1758).
natural law as “the inviolable rule that each ought conscientiously to follow,” he explained why, as Nussbaum would later write, just war theory “fades entirely as soon as it is severed from its fostering soil, religion”:75

[I]n the contest of nations and sovereigns who live together in a state of nature, how can this rule [that “[h]e alone whom justice and necessity have armed, has a right to make war”] be enforced? They acknowledge no superior. Who then shall be judge between them, to assign to each his rights and obligations—to say to the one, “You have a right to take up arms, to attack your enemy, and subdue him by force;”—and to the other, “Every act of hostility that you commit will be an act of injustice; your victories will be so many murders, your conquests rapines and robberies?”76

Vattel therefore recommended relegating “the strictness of the necessary law of nature to the conscience of sovereigns” and focusing instead on the positive “voluntary law of nations,” which, in his view, aimed to secure the common advantage of states.77

But positive law contained no injunction against war. Nor, for Vattel, should it. Beyond the problem created by the absence of a neutral and authoritative arbiter, Vattel worried that “warfare which would be illegal on one side and therefore outside the law would create chaotic conditions,” culminating in perpetual war: “there would never be peace, since the results of a war could always be challenged as illegally obtained and therefore not binding upon the other belligerent or third parties.”78 While he embraced the dualistic axiom,79 one may question its meaning or value given the virtual absence of legal restraints on war during this era.80 And in any event, “Vattel was probably the last author of a comprehensive treatise on the law of nations to give the problem of just war serious attention.”81

After World War I, some international lawyers sought to revive just war doctrine as a framework for the law of war, but their efforts failed dismally. By then, Christianity had become an untenable foundation for an aspirationally universal international law, which sought to bind states with very diverse religious mores. Yet except for archaic notions of chivalry that

75 Nussbaum, supra note __, at 475.
76 VATTEL, supra note __, at 380-31.
77 Id. at 381-82.
78 von Elbe, supra note __, at 683.
79 See VATTEL, supra note __, at 382.
80 See id. at 368-69 (recommending restraint in warfare but stressing that, as a matter of positive law, “licentiousness is unavoidably suffered to pass with impunity, and to a certain degree, tolerated, between nation and nation”).
81 Nussbaum, supra note __, at 471.
medieval knights nominally embraced, the just war tradition lacked a non-religious foundation.\textsuperscript{82}

Given this history, it is curious that when the just war idea enjoyed an intellectual revival in the latter half of the twentieth century,\textsuperscript{83} theorists treated the dualistic axiom as an entrenched part of the historical tradition. In fact, the idea that restraints on the conduct of war should apply equally to all belligerents, whatever their \textit{casus belli}, emerged late in the evolution of the just war tradition and never acquired the axiomatic character it now enjoys. Modern legal rationales for the dualistic axiom, too, have at most an attenuated connection to this theological and natural law history.

\textbf{B. Evolution of the Dualistic Axiom in International Law}

1. War as a Metajuristic Phenomenon

Vitoria, Suárez, Gentili, Grotius, and others of lesser repute integrated just war theory into what would become the public law of Europe and, in time, international law.\textsuperscript{84} It would be artificial in this regard to treat the modern law of war as distinct from its theological and natural law roots. Yet the evolution of the dualistic axiom in international law is in a sense the mirror image of its evolution in the just war tradition. Just war theory focused first and foremost on the \textit{jus ad bellum} and only secondarily and latterly on the \textit{jus in bello}. International law, in contrast, largely abandoned any pretense to a \textit{jus ad bellum} until the advent of the U.N. Charter in 1945. It focused on the \textit{jus in bello}—for “[w]ar being legal and inevitable, no other task was to be performed by States than that of making humanitarian rules regarding the conduct of hostilities.”\textsuperscript{85} This process began in earnest in the nineteenth century.\textsuperscript{86} The rise of IHL dates to several milestones in the latter half of that century: when Henri Dunant witnessed the Battle of Solferino (1859) and then founded the International Committee of the Red Cross (ICRC) (1864);\textsuperscript{87} when, during the American Civil War, Francis Leiber wrote and President Abraham Lincoln promulgated the \textit{Instructions}
for the Government of Armies of the United States in the Field (1863);88 and when states drafted the first Geneva Convention (1864) and the St. Petersburg Declaration (1868).89

These and subsequent developments shaped an early jus in bello that viewed war as a “metajuristische phenomenon,” as an inevitable if tragic fact of life, as “extra-legal rather than illegal.”90 The idea of just war—insofar as it had ever been understood in legal rather than religious or ethical terms—virtually vanished with the rise of the modern state. The “liberum jus ad bellum, the right of the absolute sovereign to initiate war for reasons of state,”91 displaced the theological jus ad bellum. States continued to justify wars with just war rhetoric.92 But from roughly the Peace of Westphalia (1658) until the end of World War I (1919),93 international law regarded war as a sovereign right of states—unregulated by positive law.94 States were legally free to resort to war for any reason. And this very liberty, combined with a humanitarian ethos, supplied the core justification for the equal application of the jus in bello to all belligerents.95

The dualistic axiom’s emergence in classical international law therefore differs significantly from its evolution in natural law and theological just war doctrine. In short, because international law imposed no restraint on war as a tool of statecraft, the jus in bello logically could not depend on a jus ad bellum: no such body of law existed. Treaties codifying the jus in bello did

89 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7; St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 1 AM. J. INT’L L. SUPP. 95 (1907).
90 Arnold D. McNair, Collective Security, 17 BRIT. Y.B. INT’L L. 150, 152 (1936); see also id. at 150-51 (citing jurists such as Brierly, Hall, Westlake, and Oppenheim to the same effect).
91 Johnson, supra note __, at 170; see also Gardam, Proportionality and Force, supra note __, at 396; von Elbe, supra note __, at 684.
92 DINSTEIN, supra note __, at 67; BROWNLIE, supra note __, at 14.
93 The Covenant of the League of Nations contained antecedents to the effort to outlaw war, but the principle received its first authoritative enunciation in the Kellog-Briand Pact (General Treaty for Renunciation of War as an Instrument of National Policy), Aug. 27, 1928, 46 Stat. 2343, T.S. No 796, 94 L.N.T.S. 57.
94 DINSTEIN, supra note __, at 67; see also I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 114-15 (Bruno Simma ed., 2002). The Hague Convention (III) of 1907 introduced certain formal requirements—for example, that hostilities be preceded by a declaration of war and neutral powers notified promptly—but did not purport to deny states the absolute right to engage in hostilities as a tool of statecraft. Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538.
95 DINSTEIN, supra note __, at 156; Greenwood, supra note __, at 225.
not refer to the justice or legality of war; only to mitigating its hardships.\textsuperscript{96} The idea that animates the \textit{jus in bello}, embodied in the ICRC’s ethos, is that “human suffering is human suffering, whether incurred in the course of a ‘just war’ or not: Humanity, not Justice, is its \textit{prime} concern.”\textsuperscript{97}

2. From \textit{Bellum Justum} to \textit{Bellum Legale}

As late as 1943, lawyers continued to describe war as “a metajuristic phenomenon, an event outside the range and control of the law.”\textsuperscript{98} Two years later, after the most brutal and destructive war in world history, they sought to subject this metajuristic phenomenon to law—but emphatically not in just war terms. But the advent of Article 2(4) of the U.N. Charter, which prohibits the “threat or use of force against the territorial integrity or political independence of any state,”\textsuperscript{99} rendered the relationship between the new \textit{ad bellum} and the inherited \textit{in bello} unclear.\textsuperscript{100}

Common Articles 1 and 2 of the Geneva Conventions of 1949 affirmed that the \textit{jus in bello} codified in those treaties applied in “all circumstances” and to “all cases of declared war or of any other armed conflict.”\textsuperscript{101} But this did not resolve, for example, the question whether customary principles of necessity and proportionality in the application of force should apply \textit{equally} were one state (illegally) to invade another in breach of Article 2(4), and the invaded state (legally) to respond in self-defense under Article 51. Nor did it resolve whether the \textit{jus in bello} should apply equally to force authorized by the U.N. Security Council. It would be plausible to say that, for an aggressor acting in violation of Article 2(4) of the Charter, \textit{no} amount of force could be necessary or proportional. These principles require some lawful military objective relative to which they can be applied: Necessary \textit{for what}? Proportional \textit{to what}? Because an aggressor lacks any right to use force, no quantum of force, it would seem, could be lawful for such a party.

Additional Protocol I of 1977 also may be thought to supply a textual basis for the dualistic axiom. Unlike the Geneva Conventions, it is clear on


\textsuperscript{97} GEOFFREY BEST, HUMANITY IN WARFARE 4-5 (1980).

\textsuperscript{98} Nussbaum, supra note __, at 477. War simply modified “the status of the belligerents, and, to a certain extent, the status of third powers,” replacing the international law of peace with that of war. Id.; see also von Elbe, supra note __, at 684.

\textsuperscript{99} U.N. CHARTER art. 2(4).

\textsuperscript{100} Greenwood, supra note __, at 225.

\textsuperscript{101} E.g., Convention Relative to the Treatment of Prisoners of War arts. 1-2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
the issue of equal application: “[the Geneva Conventions and] 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 conflicts.” But Article 1(4) confers in bello belligerent rights on some but not all non-state combatants, namely, peoples “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” This strikes many as a backdoor reintroduction of the discredited just war distinction between just and unjust wars. It casts doubt on and tends to undermine the preamble’s categorical affirmation of the dualistic axiom.

Under contemporary IHL, however, the dualistic axiom, as a general principle of law, does not ultimately depend on these textual references; it is rather, or so many claim, customary law. But if it is custom, then, like the prohibition on torture, it is custom despite rather than because of state practice. It is difficult to appraise any modern war honestly without recognizing that international law views the conduct of hostilities differently depending on their ostensible justification. Participants in the international legal process express disparate views on the appropriate application of the jus in bello. Their views often depend on their perceptions of the legality or justice of particular conflicts. Lawful or just belligerents (however defined in context) tend to receive greater deference in their application of in bello proportionality than do unlawful or unjust ones. Can there be any doubt, for example, that the zero-casualty aerial war carried out by NATO against Serbia, which killed hundreds of Serbian non-combatants and devastated Serbia’s infrastructure, would have been viewed as an in bello violation and perhaps even a war crime were its purpose to annex Serbia rather than to halt incipient ethnic cleansing?

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104 See BROWNLIE, supra note __, at 407 (collecting state practice); DINSTEIN, supra note __, at 158-59 (same); Lauterpacht, supra note __, at 215-20 (collecting judicial decisions); Greenwood, supra note __, at 225.

105 See Filartiga v. Peña-Irala, 630 F.2d 876, 884 & n.15 (1980); see also ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 22 (1994).

106 See Gardam, Proportionality and Force, supra note __, at 392-93, 412. For a detailed analysis of how ad bellum perceptions shaped in bello conduct in the 1991 Gulf War, see Gardam, Noncombatant Immunity, supra note __.

107 See infra at [cross-reference].
Nevertheless, no state today expresses the view that the justice of its cause (or the injustice of its opponent’s) relieves it of or relaxes its in bello obligations. Just as the persistence of official torture in state practice does not necessarily defeat the conclusion that torture violates customary international law, so the dualistic axiom may be custom despite frequent instances of inconsistent state practice. The real question is why this custom exists—and how to understand and apply it—in an era in which neither theology nor the absence of a jus ad bellum supplies its rationale.

III. THE SOURCES AND LOGIC OF CONFLATION

_The life of the law has not been logic; it has been experience._
—Oliver Wendell Holmes, Jr. 109

A. The Ad Bellum-In Bello Relationship in the Charter Era

A common but mistaken view of the modern relationship between jus ad bellum and jus in bello is that ad bellum judgments precede and operate in a legal sphere analytically distinct from in bello judgments. According to this view, once hostilities begin, the parties cross a Rubicon separating the spheres of war and peace. Thereafter, “ius ad bellum ceases to be relevant and ius in bello takes control.” 110 And whatever the ad bellum legality of the initial resort to armed force, particular acts must then be judged solely by the jus in bello, a body of law that applies uniformly to all parties to the conflict. Yet this view, which perhaps made sense as long as no real jus ad bellum existed, is anachronistic. 111 State practice now belies the assumption of a “sharp distinction between peace and war,” which classical, prewar international law took for granted. 112 In fact, a sharp distinction probably never existed; only intermittent and fluctuating levels of conflict. Given the rise in low-intensity conflicts, insurgencies, civil wars, and other organized violence perpetrated by non-state combatants, as well as the logically interminable “global war on terror,” this observation applies a fortiori in the twenty-first century.

With the U.N. Charter’s reintroduction of a genuine jus ad bellum, the main consequence of the breakdown between the formerly distinct legal spheres of war and peace is that ad bellum and in bello principles now can

109 HOLMES, supra note ___, at 5.
110 Greenwood, supra note ___, at 221; see also KOTZSCH, supra note ___, at 84.
111 Greenwood, supra note ___, at 221.
112 Id. at 221-22 (citing BROWNLIE, supra note ___, at 1-129, 384-401).
and often will operate concurrently.\textsuperscript{113} Any use of force must be necessary and proportional relative to both the \textit{jus ad bellum} and the \textit{jus in bello}.\textsuperscript{114} The \textit{in bello} concepts of necessity and proportionality have \textit{ad bellum} analogues but, despite their nominal identity, distinct meanings. During the Gulf War in 1991, for example, coalition forces sought to isolate and incapacitate the Iraqi regime. To achieve this aim it was deemed necessary to attack aspects of the Iraqi electricity production facilities and the telecommunications system. The legitimacy of this objective of incapacitating the regime and the targets selected to achieve it is a matter for the proportionality equation in \textit{ius ad bellum}. The detailed conduct of the attacks on these targets is a matter for the proportionality equation in IHL, and in the case of the Persian Gulf conflict, was worked out frequently on a daily basis. The timing and level of command at which the decisions are made in \textit{ius ad bellum} and IHL respectively, therefore, will differ.\textsuperscript{115}

More generally, the \textit{jus ad bellum} now applies not only to the initial decision to resort to armed force but to all conduct “involving the use of force which occurs during the course of hostilities”; that conduct must be “reasonably necessary and proportionate to the danger.”\textsuperscript{116} This proposition need not lead to unduly restrictive constraints, for example, “that a state which has been the object of an illegal attack can never take the initiative or that its forces may only fire if fired upon”\textsuperscript{117}—although this appears to be what the ICJ strangely implied in the \textit{Oil Platforms} case.\textsuperscript{118} Rather, the proper referent of \textit{ad bellum} proportionality changes with the nature and scope of the conflict. Initially, perhaps, force in self-defense must be \textit{ad bellum} proportionate to the injury inflicted. But in any sustained conflict, a state may—and at some stage will—cease to calculate \textit{ad bellum} proportionality by reference to the “specific injury received” and instead consider “the object legitimately to be achieved.”\textsuperscript{119} The general aspiration of \textit{ad bellum} proportionality is to minimize force by

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{113} See Greenwood, supra note __, at 222-25.
\item\textsuperscript{114} See Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103, 122-23 (June 27) [hereinafter Nicaragua]; Oil Platforms (U.S. v. Iran), 2003 I.C.J. 161, 183 (Nov. 6); Nuclear Weapons, 1996 I.C.J. at 245; see also Judith Gardam, \textit{Necessity, Proportionality, and the Use of Force by States} 10-11 (1994); Higgins, supra note __, at 230-34; Greenwood, supra note __, at 223.
\item\textsuperscript{115} Gardam, supra note __, at 21 (footnote omitted).
\item\textsuperscript{116} Greenwood, supra note __, at 223.
\item\textsuperscript{117} Id. at 223.
\item\textsuperscript{118} See infra at [cross-reference].
\item\textsuperscript{119} Higgins, supra note __, at 231 (emphasis deleted).
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The Cost of Conflation

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constraining states to use no more than necessary for self-defense. Yet in sustained conflicts, the relevance of ad bellum proportionality diminishes as the objectives of force multiply and expand.

Furthermore, in the twenty-first century, “sustained” can no longer be understood to refer solely to prolonged international wars. Perhaps the paramount question for the twenty-first century jus ad bellum is under what circumstances an accumulation of discrete attacks by terrorists, insurgents, or other non-state combatants operating from the territory of a host or failed state—where no one of these attacks would justify a full-scale invasion of that state—may in the aggregate be deemed an “armed attack” under Article 51 of the U.N. Charter, which gives rise to a right of self-defense. Suppose, for example, that the United States reacted to the bombing of the U.S.S. Cole by invading Afghanistan. Doubtless that would have been condemned as a clear ad bellum violation—as disproportionate to the injury received. But few would deny that the bombing gave rise to some right to engage in proportionate self-defense. In contrast, the U.S. invasion of Afghanistan and ouster of the Taliban in response to the far more severe and large-scale attacks of 9/11 were overwhelmingly regarded as lawful despite their formal non-compliance with the jus ad bellum. Al-Qaeda’s terrorist attacks could not, after all, be attributed to Afghanistan under the law of state responsibility. Nor did the Taliban exercise effective control over al-Qaeda. Still, the Security Council, NATO, the Organization of American States, and many states supported the U.S. military response explicitly and strongly implied that they regarded it as lawful.

Ad bellum proportionality, today as in the past, must be appraised in its geopolitical context. Yet despite the postwar effort to subject war to law, the jus ad bellum remains, as it has been historically, a malleable and often politicized body of law. In contrast, the jus in bello, particularly in bello proportionality, tries to remain agnostic about the political or architectural goals of war. It insists instead that each discrete application of force be proportional in that it not inflict “excessive” harm relative to the concrete military advantage sought by a particular attack. Of course, this principle is easy to state abstractly but notoriously difficult to apply.

120 GARDAM, supra note __, at 16.
124 See, e.g., Protocol I art. 51(5)(b); see also Rome Statute art. 8(2)(a)(iv) (1998).
125 See William J. Fenwick, Attacking the Enemy Civilian as a Punishable Offense, 7 DUKE J.

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IHL, as explored further below, urgently needs to work out the concrete details of the abstraction that is in bello proportionality.127

B. The Logic of Conflation

The concurrent operation of the jus ad bellum and jus in bello can lead to at least three forms of conflation, which, at first blush, make logical sense: (1) an aggressor-defender model of war, which denies the dualistic axiom by reference to the maxim ex injuria jus non oritur; (2) a failure to appreciate and apply the distinct ad bellum and in bello proportionality requirements; and (3) a collapse of the jus ad bellum and the jus in bello in circumstances of perceived crisis—what the literature refers to as “supreme emergency.”128

Despite modern international law’s ostensible embrace of the dualistic axiom, these forms of conflation challenge its continuing vitality at an abstract level—with concrete consequences for IHL’s practical ability to protect human dignity and rights and reduce superfluous suffering in war.

1. The Aggressor-Defender Model

Recall that before the U.N. Charter regime, the dualistic axiom rested on two rationales, one theological, the other legal. First, anxiety about the opaque will of a Christian God led the scholastics to urge moderation in war by both parties, for it would often be unclear which of them fought on the side of divine justice. Second, as a matter of classical international law, the absence of a genuine jus ad bellum rendered the idea of conditioning the application of the jus in bello on the former’s observance incoherent. In an era when resort to war could not meaningfully be characterized as lawful or unlawful, it made no sense to condition the application of the rules governing the conduct of war on such a characterization. Neither rationale remains viable today.

First, modern just war theorists either (1) repudiate theology altogether as the basis for their views or (2) embrace a more expansive understanding of the jus in bello—for it is surely no longer tenable for Christian just war theorists to argue that just combatants can kill heathens without restraint because the former fight in the service of God.129 That view would be in

127 See infra at [cross-reference].
128 See WALZER, supra note __, at 251-68; see also MICHAEL WALZER, Emergency Ethics, in ARGUING ABOUT WAR 33 (2004).
129 Even contemporary Christian just war theorists tend to conceptualize the doctrine in terms of natural law rather than, strictly, theology. See O’BRIEN, supra note __, at 15. Secular just war theorists tend to argue in terms of normative ethics. Walzer’s Just and Unjust Wars, for example, which many consider the locus classicus of modern just war theory, describes...
principle indistinguishable from the kind of theological justifications for "sacred terrorism" espoused by terrorist networks like al-Qaeda. Second, as a matter of positive law, the postwar introduction of a genuine *jus ad bellum* begged the question why aggressors should continue to benefit from the *jus in bello*: the general principle of law *ex injuria jus non oritur* holds that rights cannot arise from illegal acts. Under the Charter, war ceased to be a sovereign right, a lawful instrument of statecraft. It became, except for defensive force and Chapter VII military actions authorized by the Security Council, illegal. Strictly, then, a war initiated in violation of the Charter’s *ad bellum* should give rise to no *in bello* rights.

A contemporaneous study by the *Institut de Droit International*, which is emblematic of a strain of thought at the time, concluded that “‘there cannot be complete equality in the operation of the rules of warfare when the competent organ of the United Nations determines that one of the belligerents has resorted to armed force unlawfully.” To some, the U.N. Charter had in effect restored the medieval primacy of the *jus ad bellum* and rendered the *jus in bello* dependent on the legality of the resort to force. From this perspective, henceforth “the rules of war [would] operate only at the option of the States resisting aggression; . . . such States may modify them at will; and . . . the aggressor State or States cannot derive from their initial illegality any legal rights, including the rights usually associated with the conduct of war.” Others thought it would be injudicious for international law to continue to focus on the *jus in bello*: its elaboration, they feared, would interfere with the ambition to prohibit war by implicitly legitimizing wars fought in conformity with IHL. These fears yielded an

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131 U.N. CHARTER arts. 51, 42.

132 The Charter itself did not clarify the relationship between the new *jus ad bellum* and the inherited *jus in bello*, except insofar as its preamble and scattered references to human rights or dignity elsewhere in the Charter may be read to reinforce the humanitarian ethos of the existing *jus in bello*—and so to imply, arguably, that IHL should remain applicable equally to all belligerents, whatever their status under the Charter’s new *jus ad bellum*. See, e.g., U.N. CHARTER pmbl., art. 1(3), 55(c).


134 Brownlie, *supra* note __, at 406 & n.1 (collecting sources).

135 Lauterpacht, *supra* note __, at 206; see also id. at 210.

136 See Report of the International Law Commission to the General Assembly, 1949 Y.B. INT’L L. COMM’N 281; see also Kalshoven, *supra* note __, at 18. This is a bad argument, for “[i]t is not the existence of rules for the conduct of war which causes states to resort to force
aggressor-defender model of armed conflict.

This model, which denies the dualistic axiom, is not illogical in view of the Charter; it is, experience attests, simply unrealistic. Lauterpacht argued in an early article, which retains its force today, that despite the Charter’s formal law, “we must visualize at least three sets of situations” involving force: first, where the U.N. Security Council resolves that one state is the aggressor and authorizes collective security measures; second, where the Council does not or, because of paralysis, cannot determine who is the aggressor by a formal resolution but an “overwhelming consensus” among states exists “as to who in fact is the aggressor”; and third,

where there has been no collective determination of aggression in any shape or form, but where there is a conviction on the part of some States that one belligerent party is the aggressor and that it is waging an illegal war. That conviction may be held by both belligerent sides, mutually charging one another with being guilty of aggression. States outside the conflict may be equally so divided in their assessment of the legal merits of the struggle.137

The Charter’s drafters undoubtedly hoped that the first situation would become the norm. As early as 1953, however, it had become clear that the latter two situations had to “be regarded as typical, and that any discussion of the effects of the illegality of the war as it results from the first possibility partakes of a distinct measure of unreality.” 138 Absent an authoritative decision on the legality of a use of force, which an institutionally paralyzed and dysfunctional Security Council could seldom provide, each side to a war would inevitably justify its use of force by reference to the Charter, typically as an act of self-defense under Article 51—just as, in an earlier era, each party to a war would inevitably, if disingenuously, claim the mantle of justice for itself and deny it to the other. Little had changed since the scholastics and early international lawyers struggled with the will-of-God paradox: that although it may be absurd to think that a war can (“really,” “in the eyes of God,” etc.) be just on both sides, it will seldom be possible to ascertain with authority on which side divine justice lies. Therefore, “the plea of self-defence will be invoked alike by the guilty belligerent and by his victim.” 139

In short, the Charter theoretically created a legal regime in which it would be plausible and perhaps logical to distinguish the jus in bello

but more fundamental factors in international relations.” Greenwood, supra note __, at 233.

137 Lauterpacht, supra note __, at 207.
138 Id. at 207.
139 Id. at 220.
applicable to the aggressor from that applicable to the defender. According to this view, an aggressive war initiated in violation of the Charter “should no longer confer upon the guilty belligerent all the rights to which he was entitled under traditional international law.” But because international law is a defective system, especially insofar as it tries to regulate resort to force, in practice,

any application of the principle *ex injuria jus non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character. . . . [T]hey would cease to operate if their operation were made dependent upon the legality of the war on the part of one belligerent or group of belligerents.\textsuperscript{141}

Lauterpacht’s argument became received wisdom.\textsuperscript{142} Today the dualistic axiom finds ample support in modern treaties, military manuals, and judicial decisions applying the law of war.\textsuperscript{143} Yet despite this nominal consensus, the aggressor-defender model persists to a degree not fully appreciated—and, as Lauterpacht and others predicted, in practice it degrades the efficacy of IHL.

2. Proportionality

A second form of conflation consists in confusion of the *ad bellum* and *in bello* principles of proportionality. Suppose that Aggressor (*A*) attacks Victim (*V*). Perhaps *A* claims to be defending himself or another. But suppose further that this claim is objectively wrong and unreasonable—even manifestly pretextual. *A*’s resort to force is objectively illegal. Under the circumstances, no amount of force may legally be used by *A* against *V*. How can some amount of force be proportional? Several contemporary just war theorists offer essentially this syllogism to challenge the dualistic axiom. McMahan, for example, argues that “unjust combatants”—that is, soldiers fighting in unjust wars—cannot comply with the *jus in bello* because “except in the limited range of cases in which unjust combatants act to prevent wrongful acts by just combatants [such as, for example, rape or other serious crimes], their acts of war cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition

\textsuperscript{140} Id. at 212.
\textsuperscript{141} Id.
\textsuperscript{142} See BROWNLIE, supra note __, at 406 n.3 (collecting authorities).
\textsuperscript{143} Id. at 407 & nn.2-7. 

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From a legal perspective, the defect here lies in conflation of the distinct *ad bellum* and *in bello* concepts of proportionality. The assertion that an unjust war cannot be fought justly, that is, without violating *in bello* proportionality, depends on the mistaken view that *in bello* proportionality calls for a utilitarian balance between, on the one hand, the *in bello* harms caused by organized violence and, on the other, the *ultimate ad bellum* “goods” to which that violence purportedly contributes. If those goods, by hypothesis, are objectively *not* good (or unjust), then of course no discrete act of violence perpetrated in an unjust war can be, in this particular sense, proportional: the proportionality dice, so to speak, have been loaded from the outset. Because proportionality is an essential part of “the rules” that comprise the modern *jus in bello*, it is equally clear, from this perspective, that the *jus ad bellum* cannot be analytically independent of the *jus in bello*, as the dualistic axiom insists. Not coincidentally, this secular just war argument is strongly reminiscent of the scholastic opinion that it would be absurd to suppose that a war can be just on both sides in the eyes of God.

But from the perspective of IHL, this syllogism is misguided. Despite the proliferation and general celebration in the post-Cold War era of international criminal law as one technique to enforce or vindicate IHL norms, the principal purpose of the *jus in bello* is not to ascribe moral blame or criminal liability; it is to protect human dignity and rights and to avert needless suffering to the greatest extent practicable in war. By replacing the concept of *bellum justum* with that of *bellum legale*, twentieth-century international lawyers sought to unshackle the *jus in bello* from its historic dependence on the *jus ad bellum*, which had been discredited for centuries before the advent of the U.N. Charter—not least because it had proved so susceptible to abuse.

It is therefore a mistake to understand *in bello* proportionality to require combatants to engage in calculations that weigh *in bello* harms (e.g., death, suffering, property destruction) against ultimate or architectural *ad bellum* goals (e.g., self-defense, humanitarian intervention) advanced to justify

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144 McMahan, supra note __, at 714; see also id. at 708; accord Hurka, supra note __, at 44 ("If *in bello* proportionality looks even partly at the just causes for war, it cannot be assessed independently of *ad bellum* considerations, and especially the moral importance of those causes.").

145 Hurka, supra note __, at 44-45.

146 SUAREZ, supra note __, at 815-16.

147 To his credit, McMahan emphasizes that his arguments about “the deep morality of war” should not be mistaken for “an account of the laws of war.” McMahan, supra note __, at 730. But because the deep morality of war nonetheless affects the contemporary law of war, it is important to clarify why this syllogism is misguided and should be avoided in IHL.

148 Kunz, supra note __, at 529-30.
particular uses of force.\textsuperscript{149} In \textit{bello} proportionality rather strives to specify a conception of military necessity that is as removed as possible from \textit{ad bellum} judgments about the legality or justice of the architectural goals of force.\textsuperscript{150} The answer to the question “proportional \textit{to what}?” in the context of \textit{in bello} proportionality therefore need not and should not be, as just war theorists suppose, “the ultimate (just or unjust) cause of the war” or “the end of victory.”\textsuperscript{151} McMahan recognizes this alternative view of \textit{in bello} proportionality but sees it as trivializing the principle’s moral dimension: “so understood,” he writes, “the requirement of proportionality is not a genuine moral requirement but merely a device that serves the moral purpose of limiting the violence of those who ought not to be engaged in warfare at all.”\textsuperscript{152}

I fail to see why, except under a restrictive, \textit{purely} deontological account of what it means for an obligation to be genuinely moral, IHL’s use of this device in an effort to minimize violations of human dignity and rights in war should not be deemed moral. IHL does not adopt one generic moral perspective of the two predominant schools, that is, either deontological or consequentialist. Its rules and principles cannot be reconciled with a single or univoc.al moral theory.\textsuperscript{153} They manifest a moral eclecticism comprised of (both act and rule) utilitarianism;\textsuperscript{154} deontological insistence on the inalienability of some rights;\textsuperscript{155} and a residuum of virtue ethics—especially insofar as enforcement (in the sense of compliance as well as coercion) is understood as a critical part of law itself.\textsuperscript{156} Consider two examples:

(1) Common Article 3 of the Geneva Conventions, which applies in all cases “of armed conflict not of an international character occurring in the

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\item \textsuperscript{149} This is, as McMahan recognizes, the conception of proportionality at work in his argument. McMahan, \textit{supra} note __, at 713.
\item \textsuperscript{150} \textit{WALZER}, \textit{supra} note __, at 129. McMahan argues that “one cannot weigh the bad effects that one would cause against the contribution one’s act would make to the end of victory without having some sense of what the good effects of victory would be”; and “[i]f one’s cause is unjust, [for example, the Nazi desire to create a supreme Aryan nation], the value of the event—victory—would presumably be negative, not positive.” McMahan, \textit{supra} note __, at 715. That is right. But it is not an appropriate characterization of IHL’s \textit{in bello} proportionality calculus (as distinct from that of just war theory).
\item \textsuperscript{151} \textit{WALZER}, \textit{supra} note __, at 129. To concede this is not to retreat to a purely subjective conception of the \textit{jus ad bellum}; it is only to recognize that even in the postwar era, the objective legality of any armed conflict will seldom be entirely free of doubt.
\item \textsuperscript{152} McMahan, \textit{supra} note __, at 716.
\item \textsuperscript{153} See, e.g., \textit{WALZER}, \textit{supra} note __, at 130.
\item \textsuperscript{154} Act utilitarianism fails to account for the rules and principles of \textit{jus in bello} because war is a recurring phenomenon, and the effects of rules adopted must be considered along a broader time horizon. See \textit{WALZER}, \textit{supra} note __, at 131 note.
\item \textsuperscript{155} See W. Michael Reisman, \textit{Holding the Center of the Law of Armed Conflict}, 100 \textit{AM. J. INT’L L.} 852, 852 (2006) [hereinafter \textit{Holding the Center}].
\item \textsuperscript{156} \textit{IGNATIEFF}, \textit{supra} note __, at 109-63 (1998).
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territory of one of the High Contracting Parties,” prohibits, as to “[p]ersons taking no active part in the hostilities,” certain acts, including extrajudicial killing and torture, “at any time and in any place whatsoever.” This rule, which has been recognized as custom, is part of the modern jus in bello. It admits of no exception, even though it is easy to envision circumstances in which utility (however defined) would be better served by its violation. (2) Protocol I prohibits indiscriminate attacks. That prohibition takes an absolute form insofar as civilians may never, whatever the utility, “be the object of attack.” But it otherwise takes a qualified form. It expressly contemplates a flexible calculus by describing as “indiscriminate” those attacks that “may be expected to cause incidental loss of civilian life, injury to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

In IHL, the “concrete and direct military advantage anticipated” should not be conflated with the (just or unjust) cause for war or the ultimate end of victory. By specifying the legitimate end of organized violence at a lower level of abstraction, IHL strives to remove calculations of proportionality from ultimate—frequently controversial—ad bellum judgments. Is that possible? Under certain circumstances and to a certain extent, about which I will say more below, it is—even if it remains theoretically problematic at the more abstract level of strict logic. The point of emphasis is that it is a mistake to regard ultimate ad bellum judgments about the legality of resort to force as necessarily, as opposed to contingently, determinative of in bello proportionality judgments—still less as relevant to in bello duties of an absolute nature, for example, those that prohibit torture, extrajudicial killing, and the denial of quarter. Again, however, this form of conflation infects recent state practice.

3. “Supreme Emergency”: Threshold Deontology in IHL?

The final form of conflation that threatens the dualistic axiom today is the concept of “supreme emergency.” Winston Churchill used this phrase to describe Britain’s predicament in the early years of World War II, when
it seemed that the Nazis would prevail. Walzer then coined it in *Just and Unjust Wars* to refer to a threat to national survival dire enough to warrant overriding *in bello* constraints that would ordinarily apply, including the otherwise absolute prohibition on intentionally targeting civilians—and presumably, therefore, tactics like terrorism and carpet bombing. At first glance, this concept idea seems relatively straightforward: if the *ad bellum* stakes become high enough, *in bello* constraints may be overridden. It thus involves, as theorists recognize, an explicit denial of the dualistic axiom.

The doctrine of supreme emergency bears a family resemblance to the moral theory known as “threshold deontology.” Walzer, at least, seems to understand it this way, although he never explicitly says so. Threshold deontology holds that (1) people have absolute rights, which must be respected regardless of the consequences, but (2) if the bad consequences of respecting those rights become really bad (precisely how bad is unclear), then those otherwise absolute rights may be overridden. Put otherwise, this theory insists on inviolable duties up to a threshold but simultaneously says that it is morally permissible or mandatory to become a utilitarian in dire circumstances. Threshold deontology has been powerfully criticized. Many regard it as incoherent. I tend to agree but cannot claim sufficient familiarity with the philosophical literature to argue the point. For present purposes, however, what matters is whether threshold deontology truly captures the logic of supreme emergency. It does not.

The logic of supreme emergency cannot be understood as a variant of threshold deontology because it relies on an agent-relative preference for the members of the *polity* that asserts the right to engage in otherwise prohibited uses of force, that is, uses that violate the *jus in bello* such as nuclear attacks, carpet bombing, torture, or terrorism. That is why Walzer and other supreme emergency theorists concede that terrorism could be justified or excused in a genuine supreme emergency. But note that the ordinarily prohibited means and methods of war become lawful from the perspective of most supreme emergency theorists only if they will prevent

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162 See Walzer, supra note __, at 251-68; see also Michael Walzer, Emergency Ethics, in *Arguing About War*, supra note __, at 33; Terrorism: A Critique of Excuses, in id. at 51-66.

163 Walzer, supra note __, at 265.


165 He says that “[w]hen our deepest values are radically at risk, the constraints lose their grip, and a certain kind of utilitarianism reimplaces itself.” Walzer, Emergency Ethics, in *Arguing About War*, supra note __, at 40; see also Walzer, supra note __, at 251-55.


a potential catastrophe for a polity or collective entity of some kind.168

To quote the ICJ’s dispositif in the Nuclear Weapons opinion, which de facto embraced the doctrine of supreme emergency, nuclear weapons may perhaps be used by a state “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”169 The doctrine thus tends to assume that states (and perhaps other polities) have an associative value as collective entities that counts for more than the aggregate total of the interests of their individual constituents. Survival of “a State” might therefore take precedence over the catastrophic death and destruction caused by nuclear weapons. The idea “that collectives have a right to kill the innocent if it is the only way to protect themselves from enslavement and massacre” is not a manifestation of utilitarianism, which holds that “individuals or collectives are allowed to give priority to their own lives over the lives of others, only after it has been demonstrated that such preference will lead to better results overall.”170 Whatever we may mean by “better results,” it is surely correct that the doctrine of supreme emergency does not count all human beings equally, as would traditional utilitarians; rather, the doctrine prioritizes the interests of the calculator. To justify that priority requires a further premise that utilitarians typically deny: namely, a justifiable preference for the survival of abstractions like states or other polities over the concrete happiness, preferences, well-being, or other utilitarian unit of value germane to flesh-and-blood human beings.

The doctrine of supreme emergency is therefore not a manifestation of threshold deontology. It is best understood as a particular application of self-defense. Self-defense, however, is an ad bellum, not an in bello, concept. That is why, at bottom, the supreme emergency doctrine conflates ad bellum and in bello law. The danger of this doctrine becomes immediately apparent if one appreciates that it admits of no limit. The ICJ, for example, did not rest its reasoning on anything unique to nuclear weapons. Its logic, which will be examined further below, would equally validate torture, chemical or biological weapons, and terrorism.171 Conceding that these techniques may be lawful under some circumstances is a serious cost of conflation—of collapsing the jus ad bellum and the jus in bello.

IV. THE COST OF CONFLATION

After each of the twentieth-century world wars, postwar architects—with memories of the war fresh in their minds—expected that states would

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169 1996 I.C.J. at 266.
170 Statman, supra note __, at 60.
171 Nuclear Weapons, 1996 I.C.J. at 266. For detailed analysis, see infra at [cross-reference].
be prepared to foreswear or at least dramatically limit resort to war, and in part for that reason, relegated the *jus in bello* to secondary importance. Post-WWI international lawyers sought to revive the “just war” doctrine; post-WWII lawyers worried that elaboration of regulatory strategies such as necessity and proportionality would undermine their efforts to ban war altogether. In part for this reason, our understanding of *ad bellum* and *in bello* proportionality, and their relationship to the Charter’s prohibition on force, is impoverished. The following sections explain why through an analysis of relevant ICJ jurisprudence and some recent state practice.

A. Preliminary Observations

Before examining the relevant ICJ case law, I need to clarify several jurisprudential points that I presuppose below; it would require too much of a digression to defend them here, however. First, it is often misguided to accept what the ICJ says as accurately reflecting the state of contemporary international law. Too many international lawyers treat ICJ decisions as though they were pronouncements from upon high by an international court of last resort like the Supreme Court of the United States. That is false as a matter of positive law, and it needs to be emphasized here: the ICJ’s decisions have no binding force except relative to states parties to particular disputes and no formal precedential value—even if, in practice, the ICJ and other appliers of international law at times treat its decisions as highly persuasive or even precedential.

Second, the ICJ’s Statute textually limits the positive sources the Court may apply to international disputes brought before it by state consent. Yet states are only one of the authors of force that international law strives to regulate today; other participants in modern warfare include insurgents, terrorists, paramilitaries, transnational criminal gangs, militias, and so on. And contrary to the views of some legal positivists, Article 38(1) of the Statute, and the sources of law it enumerates, is more accurately viewed as a choice-of-law clause for the Court than as exhaustive of international law. It is therefore unsurprising that ICJ decisions tend at times to miss or disregard sociopolitical dynamics that affect the *jus ad bellum*, the *jus in bello*, and their relationship.

Finally, international law, particularly insofar as it tries to regulate the initiation and conduct of armed hostilities, is a defective normative system. That is why so many unreflective accusations that international law is not

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173 ICJ Statute art. 59.
174 Id. art. 38(1).
175 I owe this observation to W. Michael Reisman.
really law focus on the law of war. Even in war, however, law is at least a variable in the complex of factors that influences how states and other authors of collective violence behave—although the ICJ’s decisions, as noted, reflect only one variable of that variable. But it would be equally mistaken to trivialize the role of international law—to deny, as some self-described political realists do, that law is at least a variable in the initiation and conduct of war. Even in war, which has been aptly described as the “vanishing point” of international law, which has itself been described as the “vanishing point of law,” international law—because of, among other dynamics, shared perceptions of legitimacy and authority, reputation and reciprocity, habit, and the self-conception of political actors—influences the behavior of states and other participants.

I cannot digress here into the perennial and tangential debate about the nature and efficacy of international law. But I should make clear that for purposes of this analysis, I adopt the policy-oriented view elaborated in the work of what has come to be known as the New Haven School. Briefly, any putative norm of international law consists of three coordinate communications: (1) “policy content,” the mandate communicated, more or less clearly, by the norm; (2) “authority signal,” the extent to which the norm, as an empirical matter, reflects conceptions of legitimacy held by the communities to which it is communicated; and (3) “control intention,” the expectation that sufficient resources will be invested by those with power in the international system to make the norm effective—in common parlance, to “enforce” it. All norms vary in clarity or strength along these three communicative dimensions. The efficacy of any particular norm of international law is a function of that variation. Insofar as international law fails to offer realistic guidance for—or even to recognize—technological, military, and geopolitical changes in modern warfare, its policy content, authority signal, and control intention correspondingly diminish.

B. Conflation in the ICJ’s Jurisprudence of War

1. Corfu Channel

177 Lauterpacht, supra note __, at 381-82.
Perhaps because the Charter’s drafters envisioned self-defense only as a failsafe in the event of an actual armed attack, in circumstances where immediate collective action would not be feasible, the ICJ has repeatedly construed Article 51 restrictively—more so than its ordinary meaning suggests. The ICJ’s consistent policy, despite vast changes in the nature of war since 1945, has been to minimize the contingencies for transborder violence. In *Corfu Channel*, the ICJ’s first judgment—and the first to pronounce (in dictum) on the new *jus ad bellum* of the Charter—the Court held unlawful a U.K. mine-sweeping operation carried out in Albanian territorial waters in the Strait of Corfu. The United Kingdom swept that strait after an incident in which British warships had been disabled and casualties suffered because of mines for which the ICJ simultaneously held Albania liable. While the Court affirmed a customary right of foreign warships to innocent passage through straits, it also denied the U.K.’s assertion of an entitlement to engage in “self-protection or self-help” in the face of Albania’s mining of the Strait and attacks on British vessels traversing it. In well-known dictum, the ICJ said that it could “only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.” *Corfu Channel* has, rightly or not, come to stand for the proposition that Article 2(4)’s prohibition on the unilateral resort to force does not depend on whether or how effectively the Charter’s collective security mechanism functions. This may well be inevitable, for as a creature of the U.N. Charter, it would be remarkable for the Court to declare the Charter a dead letter. Yet the ICJ thus established a disjunction between, on the one hand, the formal law of the Charter (as elaborated by

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180 THOMAS M. FRANCK, RECOURSE TO FORCE 45 (2002); see also U.N. CHARTER art. 51.
181 Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Court has held, for example, as recently as 2004 and 2005, that self-defense may be invoked only against states, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, 194-95 (Jul. 9) [hereinafter The Wall]; Armed Activities ¶ 144-47, even though the plain meaning of Article 51 does not place that limitation on what it describes as an “inherent” right of self defense; the right is simply triggered if “an armed attack occurs.” U.N. CHARTER art. 51. The author of the attack need not be another state.
182 Reisman, Assessing Claims, supra note __, at 83-84.
184 1949 I.C.J. at 35.
185 *Id.*
the ICJ), and on the other, state practice; and this disjuncture has become increasingly broad and problematic over time.

2. Nicaragua

More than thirty-five years later, in the watershed judgment in *Military and Paramilitary Activities in and Against Nicaragua*, the Court not only reinforced the dictum in *Corfu Channel*; it went on to establish, based on little more than a non-binding resolution of the General Assembly defining aggression, a high threshold for the sort of armed attack under Article 51 that would suffice to permit a state lawfully to respond in self-defense. In particular, the Court drew a dubious and vague distinction between “mere frontier incidents” and “armed attacks,” where only the latter give rise to a right of self-defense. In the first place, state practice and *opinio juris*—the textbook components of custom, which the ICJ purported to ascertain independently but conveniently and without much analysis found to supply a customary international law identical to the Charter—indicated a far more complex regime. More significantly, however, as commentators have lamented, the upshot of *Nicaragua*’s distinction is that states which suffer attacks that fall short of the ICJ’s “armed attack” threshold must just endure low-intensity violence—even in the face of a paralyzed Security Council that proves unable to respond as the Charter’s drafters intended.

Relative to the dualistic axiom, *Nicaragua*’s treatment of Articles 2(4) and 51 (or their purported customary analogues) in *Nicaragua* encouraged *in bello-ad bellum* conflation. *Nicaragua* detached the Article 51 right of self-defense from the Article 2(4) framework and created a new *lex specialis* of “armed attack” whereby only some uses of force that violate the Charter, though illegal, may “be resisted by force in self-defense, no matter how

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188 *Nicaragua*, 1986 I.C.J. at 103-104.
189 Id. at 93-94 (citing G.A. Res. 3314 (XXIX) U.N. GAOR, 29th Sess., Supp. No. 31 (Dec. 14, 1974)).
193 E.g., Reisman, *Assessing Claims, supra* note __, at 89; Franck, *supra* note __, at 120. The ICJ said that states victimized by low-intensity armed force may take “proportionate countermeasures,” *Nicaragua*, 1986 I.C.J. at 127, but this part of the judgment is notoriously vague. See Higgins, *supra* note __, at 250-51.
reasonably necessary or proportionate the latter may be, because only some amount to an ‘armed attack.’” Absent the “condition sine qua non required for the exercise of the right of collective self-defence,” the ICJ said, “the appraisal of . . . necessity and proportionality takes on a different significance.”

By redefining armed attack restrictively, and by subordinating ad bellum necessity and proportionality constraints to initial judgments about the legality of resort to force under the Charter, the ICJ established a legal regime that prioritizes the very subjective judgments that international law (and before that, just war doctrine) historically has been unable to regulate effectively. Partially for this reason, the ICJ has since struggled—largely in vain—to cabin allegedly defensive uses of force rather than to confront the difficult but probably more productive questions about ad bellum necessity and proportionality. Greenwood aptly questions why a state that is the victim of one of the lesser forms of force should not resist such force . . . by itself resorting to military means. . . . Of course, one can sympathize with the Court’s evident desire to ensure that a minor use of force does not lead to a wholly excessive response. Any exercise of the right of self-defence is, however, subject to the principle of proportionality. Insistence on compliance with that principle is a more effective and realistic way of seeking to prevent an excessive military response than the creation of an artificial distinction between different degrees of the use of force.

In Nicaragua, as in Corfu Channel, the ICJ’s decision may to some extent be both institutionally understandable and defensible. The ICJ sees itself as the judicial guardian of the Charter’s ad bellum regime, and the Court itself is a creature of the Charter. Yet that does not fully account for the Court’s interpretation of the Charter, which seems to be motivated more by a tacit policy decision than anything in the explicit language of the Charter. The ICJ’s myopic focus on the initial ad bellum legality of a use of force, and in particular, its lex specialis of armed attack, has led it to marginalize those components of the law of war, especially proportionality, that might be more effective in practice. The ICJ’s approach in Nicaragua—to affirm a

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195 Nicaragua, 1986 I.C.J. at 127. In Nicaragua and its progeny, the Court also adopted the textually unfounded view that only states may be the authors of armed attacks giving rise to a right of self-defense. Nicaragua, 1986 I.C.J. at 119. See also The Wall, 2004 I.C.J. at 194-95; Armed Activities, 2005 I.C.J. at ¶¶ 144-47.

196 Greenwood, ICJ and the Use of Force, supra note __, at 379.

197 Id. at 381 (emphasis added).
parsimonious definition of armed attack and focus principally on the initial *ad bellum* legality of resort to force rather than to analyze unconventional conflicts in all their complexity—persists to date.

3. Oil Platforms

Consider *Oil Platforms*.\(^{198}\) Iran sought reparations for two U.S. strikes on Iranian offshore oil complexes. The United States launched those strikes in response to attacks on Kuwaiti vessels during the “Tanker War” between Iran and Iraq.\(^{199}\) On October 16, 1987, a missile hit a Kuwaiti tanker, the *Sea Isle City*, which had been reflagged to the United States for protection. The United States ascribed the attack to Iran and responded three days later by attacking Iranian oil complexes.\(^{200}\) On April 14, 1988, the *Samuel B. Roberts* “struck a mine in international waters near Bahrain while returning from an escort mission”; again, the United States ascribed the attack to Iran and responded by attacking offshore Iranian oil platforms.\(^{201}\)

Applying *Nicaragua*, the ICJ held that neither of these strikes, even in the context of a broader pattern of Iranian attacks,\(^{202}\) qualified as an armed attack sufficient to give rise to the right of self-defense under the Charter.\(^{203}\) It then conflated that initial judgment of *ad bellum* illegality with the question whether the U.S. strikes were proportionate to the incidents:\(^{204}\)

As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither ‘Operation Praying Mantis’ as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.\(^{205}\)

This approach tends to eviscerate *ad bellum* proportionality as a distinct constraint on armed force.

Rather than analyze the necessity and proportionality of the U.S. strikes in the broader context of the Tanker War and the pervasive threat to neutral—including U.S. and U.S.-flagged—vessels in the Persian Gulf, the

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\(^{198}\) 2003 I.C.J. 161.
\(^{199}\) *Id.* at 174-76.
\(^{200}\) *Id.* at 175.
\(^{201}\) *Id.* at 175-76.
\(^{202}\) *Id.* at 191.
\(^{203}\) *Id.* at 192, para. 64; *Id.* at 195-96, para. 72.
\(^{204}\) 2003 I.C.J. at 197-99.
\(^{205}\) *Id.* at 198-99, para. 76.
ICJ disaggregated the conflict at issue into a series of discrete, atomized military incidents. Any defensive strike could be “necessary,” according to its view, only if carried out, first, in immediate response to a particular attack and, second, against the direct source of that attack. In contrast, the Court held (in dicta) that strategic strikes in self-defense carried out in an effort to deter future attacks of the same sort were unlawful per se. Once the initial attack has ended, the ICJ reasoned, so too does any “necessity” for self-defense. Furthermore, because unnecessary uses of force are unlawful, they must also be disproportionate. For in a similar vein, the Court suggested, to be ad bellum proportionate, a strike must be proportional to the particular atomized attack that prompts it rather than to the objective of self-defense in the context of the broader conflict. Consequently, it seems “that a state which has been the object of an illegal attack can never take the initiative or that its forces may only fire if fired upon.” The result of this jurisprudence is that ad bellum necessity and proportionality dissolve as distinct constraints on the use of force; they collapse back into the initial judgment about the legality of resort to self-defense.

206 In appraising ad bellum proportionality in dicta, however, the Court somewhat inconsistently did focus on the broader context of conflict. It said that it could not ignore the fact that the discrete U.S. strikes that formed the basis of Iran’s complaint were part of a broader defensive operation, “Operation Praying Mantis,” and that the mining of a single ship “by an unidentified agency” could not justify such a large-scale military operation. See id. ¶ 77; see also id. ¶ 68. If the ICJ deemed it appropriate to examine the broader operational context in which the U.S. strikes took place, it is unclear why it simultaneously excluded from its analysis the broader operational context of that defensive operation, namely, the Iran-Iraq Tanker War and the consequent threat to neutral vessels in the Persian Gulf.

207 See 2003 I.C.J. at 198, ¶ 76. Because the Court only looked to the jus ad bellum in Oil Platforms in the context of the U.S.-Iran Friendship, Commerce, and Navigation Treaty (FCN), it also failed to distinguish clearly between (1) necessity as a part of the jus ad bellum; and (2) necessity as an interpretation of the FCN’s textual exemption of conduct deemed “necessary” by the states parties to the FCN to protect their security interests. See id. ¶ 41. Judge Higgins pointed out, with considerable force, that it is ill advised for the Court to examine the jus ad bellum “through the eye of a needle that is the freedom of commerce clause of a 1955 FCN Treaty.” Separate Opinion of Judge Higgins, 2003 I.C.J. at 231-32, ¶ 26; see also Separate Opinion of Judge Elaraby, 2003 I.C.J. at 291-93, ¶ 1.1.

208 The Court thus implicitly adopted Iran’s view that “once an attack is over, as was the case here, there is no need to repel it, and any counter-force no longer constitutes self-defense. Instead it is an unlawful armed reprisal or punitive action.” Memorial of the Islamic Republic of Iran, Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6), ¶ 7.13(5).

209 See 2003 I.C.J. at 198-99 ¶ 77; see also 2003 I.C.J. at 333-34, ¶¶ 14-16 (separate op. of Judge Simma). Judge Simma makes this explicit, stressing that, in his view, under the Nicaragua doctrine of “proportionate countermeasures,” it would have been lawful for the United States to counter the Iranian attacks “immediately” with “defensive measures designed to eliminate the specific source of the threat or harm to affect ships in, and at the time of the specific incidents.” Id. ¶ 14. (emphasis added).

210 Greenwood, supra note __, at 223.
Oil Platforms may thus be understood as a variation on the syllogism set out earlier: if no force may lawfully be used against a target, then how can any quantum of force be necessary or proportionate? Again, the defect here is not of logic but of experience. Because the collective security mechanism of the Charter remains largely dysfunctional even in the post-Cold War era, and a fortiori in the post-9/11 era, states invoke and will foreseeably continue to invoke self-defense as a justification for any resort to armed force. Just as the dualistic axiom insists that legal and illegal applications of force alike must comply with the jus in bello, including its proportionality constraint, so too should legal and illegal uses of force alike be required to comply with ad bellum proportionality. Otherwise, in practice, this distinct regulatory constraint on the use of armed force disappears. States may well be influenced to mitigate the amount of or manner of force applied to a target. But seldom if ever will they relinquish the right to resort to force in circumstances of perceived self-defense or national security.

4. Armed Activities on the Territory of the Congo

The ICJ’s most recent foray into the law of war reflects the same view. In Armed Activities, the ICJ declined to decide the contemporary jus ad bellum applicable to a chaotic, multiparty civil war that had spilled over the borders of the Democratic Republic of the Congo (DRC) and threatened the national security interests of adjacent states, including Uganda. Instead, it assimilated the situation to traditional interstate conflicts and applied the anachronistic, incongruous law of Nicaragua. Judge Kooijmans critiqued the Court’s myopic focus on one aspect of the conflict. He stressed that it inadequately reflects the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder and the reprehensible behaviour of all parties involved. A reading of the Judgement cannot fail to leave the impression that the dispute is first and foremost a dispute between two neighboring States about the use of force and the ensuing excesses, perpetrated by one of them. A two-dimensional picture may correctly depict the object shown but it lacks depth and therefore does not reflect reality in full.211

Without disputing the Court’s findings of fact, it suffices to note that Uganda carried out its military activities in the eastern region of the DRC based on the perceived threats to its national security set out in the “Safe

211 Armed Activities, Separate Opinion of Judge Kooijmans ¶ 14.
Haven” document promulgated by the Ugandan High Command. 212
Uganda asserted a need, among other objectives, (1) to “neutralize . . .
Uganda[n] dissident groups which have been receiving assistance from the
Government of the DRC and the Sudan”; and (2) “[t]o prevent the
genocidal elements, namely the Interahamwe, and ex-FAR, which have been
launching attacks on the people of Uganda, from continuing to do so.” 213
Just as the United States did not, despite Nicaragua and its progeny, refrain
from attacking the Taliban’s Afghanistan given that the regime hosted non-
state actors that had attacked the United States repeatedly, neither could
Uganda reasonably be expected to allow hostile non-state actors to operate
against it from within chaotic regions of the eastern DRC, which Kabila’s
(at best dysfunctional) government proved either unable or unwilling to
control.

Still, citing Nicaragua, the ICJ insisted that Uganda could not act in self-
defense. 214 It took cognizance in this regard only of “one of the five listed
objectives” of Operation Safe Haven because only one, in its view, referred
to “a response to acts had already taken place.” 215 In part, it seems likely
that the ICJ did not want to opine on, still less be perceived to validate,
either anticipatory or preventive self-defense in light of the U.S. assertion
of the latter right in its 2002 National Security Strategy. 216 But it thereby,
as Judge Kooijmans observed, elided the real issue and absolved itself of its
paramount obligation as the judicial organ of the United Nations: to
answer questions of international law raised by disputes submitted to it by
states—in this case, questions about how the jus ad bellum of the Charter
applies to “large-scale attacks by irregular forces”; 217

[T]he Court refrains from taking a position with regard to the
question whether the threshold set out in the Nicaragua Judgment is
still in conformity with contemporary international law in spite of
the fact that that threshold has been subject to increasingly severe
criticism ever since it was established in 1986. The Court thus has
missed a chance to fine-tune the position it took 20 years ago in
spite of the explicit invitation by one of the Parties to do so. 218

212 Armed Activities ¶ 109.
213 Id.
214 See id. ¶¶ 142-147
215 Id. ¶ 142.
216 THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), at
217 Armed Activities ¶ 147.
218 Id., Separate Opinion of Judge Kooijmans ¶ 25
Judge Simma, too, lamented this missed opportunity. He observed that “a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law of self-defence for a long time,” but “in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered.” Nor, as in Oil Platforms, did the Court consider how ad bellum proportionality applied once it had held Uganda’s initial resort to force illegal. At least tacitly, the Court appears to have reasoned that its initial finding of ad bellum illegality obviated the need to examine issues of ad bellum proportionality: again, no amount of force, according to this logic, can be proportional if force may not be deployed in the first place. The Court did, appropriately, consider the DRC’s allegations of in bello violations by Ugandan forces. But it nonetheless failed to apply the dualistic axiom correctly because it (1) did not consider in bello proportionality and (2) intimated that the legality of Uganda’s “belligerent occupation” of part of the DRC changed the applicable jus in bello. The Court’s approach in Armed Activities again seems short-sighted: a state like Uganda might be influenced to mitigate the manner or quantum of force it applies, but it is highly unlikely to relinquish its right to self-defense where it sees a threat to its vital national security interests.

5. The Wall

The ICJ’s advisory opinion in The Wall illustrates the point. I strongly suspect that the ICJ’s bottom line—that the wall built by Israel in part in the Occupied Territories violates its international obligations under both IHL and international human rights law—is accurate. Israeli settlements in the West Bank violate, among other applicable law, Article 49(6) of the Fourth Geneva Convention. But Judge Buergenthal argued forcefully in dissent that because of Israel’s decision not to participate in the advisory proceedings, and because of the Court’s failure to conduct an independent, impartial investigation for itself (or even to solicit additional evidence), the majority lacked “the requisite factual bases for its sweeping findings.”

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219 See Armed Activities, Separate Opinion of Judge Simma ¶¶ 8-15.
220 See id. ¶ 11 (emphasis added).
221 See id., Separate Opinion of Judge Kooijmans ¶¶ 31-33 (critiquing the Court for its failure to examine necessity and proportionality in this regard and concluding that some Ugandan military action should be deemed both necessary and proportionate, even though Uganda subsequently violated these ad bellum conditions).
222 See id. ¶¶ 60-61.
224 Id. at 201.
225 Id. at 182-84 ¶¶ 117-20.
226 Id. at 240, ¶ 1, Declaration of Judge Buergenthal. To decide the validity of Israel’s
Consequently, it would have been advisable for the ICJ not to hear the case as a matter of its discretion, not only because of the evidentiary worries set forth in *Western Sahara*, but because of broader considerations of judicial propriety articulated by the Permanent Court of International Justice in *Eastern Carelia*, which have regrettably fallen into desuetude. More critical to the thesis here, however, is a distinct (though related) point made by Judge Buergenthal:

> It may be, and I am prepared to assume it, that on a thorough examination of all the relevant facts, a finding could well be made that some or even all segments of the wall . . . violate international law. . . . But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on Israel’s legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. . . . In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would give the Opinion the credibility I believe it lacks.

I stress the words “as a matter of law” because the ICJ’s opinion lacks not only credibility (part of the authority signal that is an element of law), but also analytic clarity (part of the law’s policy content) relative to the proper analysis of the law of war—including the dualistic axiom. The result is, as Judge Buergenthal says, a disservice to the very humanitarian objectives that the majority purported to vindicate.

Assume that the Court correctly found that Israel cannot assert a right security claims, the Court relied on little more than a report by the Secretary-General of the United Nations and a statement Israel submitted “limited to issues of jurisdiction and judicial propriety,” although the Court said it included “observations on other matters,” including Israel’s security concerns. 2004 I.C.J. at 162 ¶ 57; see also id. at 243 ¶ 7, Declaration of Judge Buergenthal (noting that the Court “fails to address any facts or evidence specifically rebutting Israel’s claim of military exigencies or requirements of national security” and “barely addresses the summaries of Israel’s position on this subject that are attached to the Secretary-General’s report and which contradict or cast doubt on the material the Court claims to rely on’’); id. at 244 ¶ 8.


229 2004 I.C.J. at 240-41, ¶ 3 (emphasis added).

230 Id. at 241 ¶ 3.
of self-defense in this context.\textsuperscript{231} Israel’s wall, that is, violates the \textit{jus ad bellum} of the Charter. The dualistic axiom should be understood to insist that this conclusion is irrelevant to Israel’s duty to respect (1) the necessity and proportionality components of the \textit{jus ad bellum}; and (2) the \textit{jus in bello} in its entirety, including the principle of \textit{in bello} proportionality. The ICJ failed to examine either issue. Instead, its analysis essentially ceased after its initial condemnation of the wall as unlawful force. It thereafter supplied little more than a conclusory litany of various IHL and international human rights law treaty provisions that it said the wall violated.

It is not that the ICJ necessarily erred in finding the wall unlawful (or a violation of the cited treaties); I would assume with Judge Buergenthal that these conclusions are accurate. Rather, it is that, even so, the dualistic axiom should have led the Court to offer guidance on proportionality. Instead, it effectively viewed its finding that Israel lacked a right of self-defense as legally sufficient to obviate the need for proportionality analysis. Whatever the initial \textit{ad bellum} legality of the construction of the wall as a measure of self-defense, the dualistic axiom, broadly understood, requires the Court to engage in an independent \textit{in bello} proportionality analysis—that is, to analyze the extent to which the wall could be “expected to cause incidental loss of civilian life, injury to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\textsuperscript{232} It did not. In fact, \textit{The Wall} may be viewed as an extreme version of denying the analytic independence of \textit{ad bellum} and \textit{in bello} judgments: it suggests that the former not only affects but may wholly determine the latter. On \textit{in bello} proportionality, the Court, without analysis, simply remarked that it was

\textsuperscript{231} I seriously doubt this conclusion. The wall, like the U.S. naval blockade of Cuba during the Cuban Missile Crisis, is a weapon—a defensive weapon, to be sure, but a weapon. Its lawfulness as self-defense depends on whether Israel has been the victim of an “armed attack.” U.N. \textsc{Ch}arter art. 51. Cf. Oscar Schachter, \textit{In Defense of International Rules on the Use of Force}, 53 \textsc{U. Chi. L. Rev.} 113, 134 (1986). The Court cursorily dismisses this possibility in a single paragraph, unsupported by authority, in which it claims (1) that Article 51 only permits self-defense in response to the “armed attack by one State against another State,” 2004 I.C.J. at 194 ¶ 139; and (2) that the right of self-defense does not apply against threats that originate from within a state’s territory. Id. The first proposition is doubtful: the text of Article 51 contains no such limitation, and its imposition is in tension with recent resolutions of the Security Council. See Declaration of Judge Buergenthal, 2004 I.C.J. at 242 ¶ 6; id. at 215 ¶ 33, Separate Opinion of Judge Higgins; id. at 230 ¶ 35, Separate Opinion of Judge Kooijmans. The second proposition is equally doubtful: states retain the right to respond in self-defense to insurgencies within their own territory, provided their response is necessary and proportionate and otherwise complies with international law. Id. at 215 ¶ 34, Separate Opinion of Judge Higgins. The Court also ignores the essential and accurate premise of the remainder of its opinion: that the Occupied Territories do not constitute Israeli territory under international law. See id.

\textsuperscript{232} Protocol I art. 51(5)(b).
not convinced that the specific course Israel has chosen for the wall was necessary to obtain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order.233

But absent a bona fide appraisal of Israel’s claims of military exigency, this conclusion rings hollow: “the Court says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”234 The appropriate course would have been to consider the facts bearing on alleged military exigency carefully and, even assuming the wall were unlawful as a whole,235 to offer guidance on in bello proportionality relative to “individual segments of the route.”236 The Court did not, of course, say so. But its tacit justification for disregarding the dualistic axiom in The Wall seems to be the view criticized by Lauterpacht more than fifty years ago: that any effort to offer guidance on the conduct of hostilities in the context of unlawful force would risk conferring a veneer of legitimacy on that particular use of force. This view is misguided and likely counterproductive. Israel will—unsurprisingly and as experience since The Wall judgment attests—surely not accept the ICJ’s categorical judgment dismissing its self-defense rationale for the wall or obey the Court’s demand that Israel dismantle it forthwith. Yet it is not unreasonable to think that, had the ICJ made its views available, Israel would have considered them; for example, with respect to the correct way to calculate proportionality as between Israel’s asserted security needs and the harms caused to civilians by the wall.

This is not speculation: Israeli judicial decisions suggest the same. In Beit Sourik Village Council v. Israel,237 and then in Mara’abe v. Prime Minister of Israel,238 the Israeli Supreme Court, unlike the ICJ, considered these complex, fact-intensive judgments about proportionality. It ordered parts
of the wall dismantled, parts modified to take less injurious route, and other changes to the domestic law governing the wall. These orders, backed by effective domestic institutions of enforcement, did more in practice to ameliorate the concrete injuries to Palestinian civilians than did the ICJ’s categorical pronouncement of illegality and failure to consider, even arguendo, how Israel’s asserted military necessity should be balanced against the acknowledged harm to Palestinian civilians caused by the wall. A brief look at these decisions is instructive.

a. Beit Sourik Village Council

In Beit Sourik, the Israeli Supreme Court first distinguished between authority to construct the wall and more specific questions about its route. It stressed that a “military commander is not at liberty to pursue . . . every activity which is primarily motivated by security considerations.”239 Because of its distinct institutional role within the domestic legal system of Israel, the Israeli Supreme Court, unlike the ICJ, could not dismiss Israel’s assertion of military necessity in a conclusory fashion; it accepted the executive’s representations. Yet it also complied with the principle that IHL does not give Israel absolute discretion as to the means and methods adopted to pursue military goals or exigencies and that proportionality, among other rules and principles, must be applied to ascertain the wall’s legality. Military commanders must balance the asserted necessity for the wall against the local population’s humanitarian rights and needs.240 The Court therefore emphasized the “central role [of proportionality] in the law regarding armed conflict.”241

Rather than define proportionality only in the abstract, the Court proposed a specific “relationship between the objective whose achievement is being attempted, and the means used to achieve it.”242 This relationship, it reasoned, may be conceptualized in terms of three subtests: “rational means,” “least injurious means,” and cost-benefit proportionality—or proportionality “in the narrow sense.”243 The Court distinguished between “absolute values,” which may be compared by weighing costs and benefits,
and applying the test in a “relative manner” where states must weigh the costs and benefits of one act against those of a second, alternative act. As a practical matter, the third subtest therefore breaks down further into two further subtests: absolute and relative proportionality. The latter says that an “act is disproportionate . . . if a certain reduction in the advantage gained by the original act—by employing alternate means, for example—ensures a substantial reduction in the injury caused by the administrative act.” All three subtests “must be satisfied,” but the Court recognized a “zone of proportionality,” which seems similar in concept to the margin-of-appreciation doctrine in European Court of Human Rights case law.

Actions within this zone could satisfy all three subtests.

In contrast to the categorical judgment of the ICJ, Beit Sourik analyzed the competing military and humanitarian values of each particular seizure order. It considered issues of topographical control, the security of the patrol forces, the ability of terrorists to fire into adjacent Israeli towns, and engineering difficulties presented by building on steep ridges. Against these military concerns, it set the concrete harms to Palestinian farmers and residents such as the loss of or separation from their land, restrictive licensing policies and gate access systems that produced long lines, the virtual enclosure of some villages, and the difficulty for residents seeking to reach nearby cities.

But the Court did not concern itself with inconvenience so much as it did with the livelihood of residents who depended on their farmland for subsistence: “Their way of life is completely undermined.” The Court also expressed concern about Israel’s compensation system. It seemed to be influenced by the military’s failure to “seek out and provide [Palestinian farmers] with substitute land, despite [its] oft repeated proposals on that matter.” While accepting that “[t]here will inevitably be areas where the security fence will have to separate the local inhabitants from their lands,” the Court stressed that when the military must seize land, it is obliged to compensate the owner but that “compensation may only be offered if there are no substitute lands.”

Although the Court analyzed each order separately and described the specific concerns (both military and humanitarian) of each segment of the

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244 Id.
246 Beit Sourik ¶ 42.
247 Id. ¶ 49.
248 Id. ¶¶ 51, 55, 65, 78
249 Id. ¶¶ 60, 68, 75.
250 Id. ¶ 70.
251 Id. ¶ 60.
252 Id. ¶ 82-83.
route, with few exceptions, it nullified the seizure orders because it found them disproportionate.\textsuperscript{253} The Court held, based on its scrutiny of the facts, that “[t]he gap between the security provided by the military commander’s approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not.”\textsuperscript{254} The Court also indicated that a gate checkpoint system in the route between Har Adar and Katane would not sufficiently ameliorate the harms caused to farmers. Yet it accepted that “some level of injury to the inhabitants” would occur and enjoined the parties to “continue to discuss” ways to “fulfill the demands of proportionality.”\textsuperscript{255} Perhaps most disturbing to the Court was the “veritable chokehold” surrounding the village of Beit Sourik because, there, the wall not only implicated the livelihood of Palestinian farmers but “severely stifle[d] daily life.”\textsuperscript{256} Rather than merely order the parties to work out a compromise, or direct the military commander to “consider alternatives,” the Court specified in this case that “the location of the route [must] free the village . . . from the current chokehold.”\textsuperscript{257}

After addressing the orders individually, the Court declared that it should “lift [its] gaze and look out over the proportionality of the entire route.”\textsuperscript{258} Despite legitimate military concerns,\textsuperscript{259} it recognized that the injury caused by the wall “strikes across the fabric of life of the entire population.”\textsuperscript{260} It found the harms to the local population so extreme as to be disproportionate relative to the security gains of Israel’s chosen route compared to alternative but viable routes. The Court ordered a “renewed examination of the route [as a whole] according the standards of proportionality that [it] set out.”\textsuperscript{261}

b. Mara’abe

In \textit{Mara’abe}, which arose after \textit{Beit Sourik} and \textit{The Wall}, the Court sat in an expanded panel to consider “the Advisory Opinion . . . and its effect upon the normative outline as set out in \textit{The Beit Sourik Case}.”\textsuperscript{262} Unlike the petitioners in \textit{Beit Sourik}, the wall in \textit{Mara’abe} enclosed Palestinian villagers

\begin{footnotes}
\item [253] Id. ¶ 86.
\item [254] Id. ¶ 61.
\item [255] Id. ¶ 67.
\item [256] Id. ¶ 68.
\item [257] Id. ¶¶ 76, 71.
\item [258] Id. ¶ 82.
\item [259] Id. ¶ 85.
\item [260] Id. ¶ 84.
\item [261] Id. ¶ 85.
\item [262] Mara’abe, supra note _, ¶ 36.
\end{footnotes}
The Cost of Conflation

on the Israeli side, where it had been designed to incorporate the Israeli town of Alfei Menashe. This cut them off from aspects of their life beyond the economic (agricultural) concerns at stake in Beit Sourik. Among other things, the Court summarized the decision of the ICJ and highlighted the differences between that opinion and Beit Sourik.263

The Court found a “basic normative foundation” common to both.265 While the Mara’abe Court said that it would give “full appropriate weight” to the ICJ’s views, its reasoning and holding, unsurprisingly, more closely parallel Beit Sourik.266 The ICJ’s opinion, after all, would require that the wall be dismantled immediately and compensation paid for injuries suffered as a consequence of its prior existence. The Mara’abe Court said that the differences between The Wall and Beit Sourik could be explained primarily by the “difference in the factual basis laid before the court[s].”267 It described this difference accurately as “deep and great,” and like Judge Buergenthal, criticized the ICJ for the “minimal factual” attention given to the military necessity created by terrorist attacks on Israel.268 The Court also criticized the ICJ’s consideration of the wall “as a totality, without examining its various segments.”269 Because IHL requires a proportionality calculus between military necessity and human rights considerations, it faulted the ICJ for placing “full weight . . . on the rights-infringement side” and said that the difference in the facts before the two courts had proved to be “of decisive significance.”270

As in Beit Sourik, the Mara’abe Court expressed concern over the severe hardships faced by Palestinians because of the “chokehold” around their village.271 In Mara’abe, however, the Court declined to defer as substantially to executive assertions of military necessity. It said that “the existing route of the fence seem[ed] strange” and that the executive had failed to persuade it of the route’s military necessity.272 The Court acknowledged that removing the more northern villages from the enclave might make defending the road to Israel more difficult but determined that a new road likely could be built. The Court also noted that changing the route would “reduce the injury to . . . a large extent”273 and that it did not appear that

263 See, e.g., ¶¶ 72, 75.
264 Id. ¶¶ 37-74.
265 Id. ¶ 57.
266 Id. ¶ 56.
267 Id. ¶ 60 (emphasis added).
268 Id. ¶¶ 61-64.
269 Id. ¶ 65.
270 Id. ¶ 68.
271 Id. ¶ 113.
272 Id.
273 Id.
“the required effort [had] been made” to procure an alternate route.274 It therefore directed Israel to reconsider the route, “examine the possibility of removing the villages” from the enclave, and establish a timetable for making changes.275

c. Appraisal

The point of canvassing the Israeli Supreme Court’s approach to these issues is not to suggest that it necessarily reached the right results in each case or appropriately analyzed proportionality. The substantive merits of the Court’s views may be open to question. But its willingness to try to work out a concrete theory of proportionality and apply it to the factually complex and politically sensitive circumstances of the Israeli-Palestinian conflict contributed far more to the policy objectives of IHL than the ICJ’s categorical pronouncement of illegality and neglect of the dualistic axiom. Of course, the ICJ has a limited capacity for fact-finding and a distinct institutional role within the international system; I do not mean to suggest that it could (or should) have undertaken an analysis comparable in specificity or approach to that contained in the Israeli decisions. But had it offered at least some guidance or rigorous legal analysis of proportionality, the Israeli decisions suggest that the ICJ’s judgment would have been taken seriously by the Israeli Supreme Court. By declining to engage the difficult questions, the ICJ failed to offer guidance to a domestic judicial system that has historically taken international law seriously. And because domestic incorporation and internalization is one effective means by which international law is enforced,276 the ICJ’s approach to the law of war in The Wall seems at best misguided and likely counterproductive. It did little but weaken the ICJ’s credibility and authority. The Court’s decision lacks a clear policy content, and its failure to analyze the facts rigorously or consider Israel’s claims of military necessity diminishes the decision’s authority signal. States will be unlikely to pay much attention to judgments that trivialize what they perceive to be essential national security interests.

The Wall also took the misguided logic of Oil Platforms one step further: in Oil Platforms, the Court found the U.S. attacks unjustified under the Charter and then collapsed ad bellum necessity and proportionality into its initial black-and-white judgment that the U.S. strikes violated the jus ad bellum of Article 51. In The Wall, the Court collapsed both ad bellum and in bello proportionality into its dubious conclusion about the scope of Article 114.

274 Id. ¶¶ 113-114.
275 Id. ¶ 114.
51: that self-defense may only be invoked against states). Despite its importance, this issue occupied a single paragraph in the opinion.\textsuperscript{277} By blurring the distinction between \textit{jus ad bellum} and \textit{jus in bello}, the Court forewent an opportunity to shape international law to influence state behavior and reduce the harms of war—the paramount objective of IHL.

6. Nuclear Weapons

In its opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons}, the consequences of the ICJ’s myopic focus on regulating the contingencies for resort to self-defense in the first instance rather than on the more difficult issues of \textit{ad bellum} and \textit{in bello} law led to a holding that most regard as, at best, confused. The General Assembly asked the ICJ to advise it whether “the threat or use of nuclear weapons [is] in any circumstances permitted by international law.”\textsuperscript{278} After dismissing certain non-dispositive alternative arguments, the ICJ turned to “the most directly relevant applicable law”: the law “relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities.”\textsuperscript{279} It thus suggested that both \textit{ad bellum} and \textit{in bello} law bear on the legality of the threat or use of nuclear weapons.

The ICJ opined that although the unique features of nuclear weapons, including their awesome destructiveness and inherent inability to respect the principle of distinction, “seem[ ] scarcely reconcilable with” the \textit{jus in bello}, it lacked “sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”\textsuperscript{280} In part, the Court may have had in mind the hypothetical circumstances posed by Judge Schwebel in dissent, for example, the tactical use of a nuclear depth-charge to disable a nuclear armed submarine known to be planning a direct attack on a city in the target state.\textsuperscript{281} Yet the ICJ’s Delphic and controversial 7-7 holding, broken by its President, suggests another possibility. The Court notoriously held that while

the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; . . . [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance.

\textsuperscript{277} 2004 I.C.J. at 194 ¶ 139.
\textsuperscript{278} G.A. Res. 49/75K (Dec. 15, 1994).
\textsuperscript{279} Nuclear Weapons, 1996 I.C.J. at 243.
\textsuperscript{280} Id. at 262-63.
\textsuperscript{281} Id. at 320-21 (dissenting opinion of Judge Schwebel).
of self-defence, in which the very survival of a State would be at stake.\textsuperscript{282} The former sentence, it seems, declares nuclear weapons “generally” illegal under the \textit{jus in bello} (except, perhaps, in unlikely scenarios such as those suggested by Judge Schwebel).\textsuperscript{283} The latter proposes that nuclear weapons might still be lawful given high enough stakes. As both Judge Higgins and Judge Schwebel said, this de facto \textit{non liquet} holding is breathtaking:\textsuperscript{284} no state had even argued that a use of nuclear weapons that violates the \textit{jus in bello} may still be lawful if it satisfies the \textit{jus ad bellum}.	extsuperscript{285} That is one plausible reading of the ICJ’s holding, and it clearly violates the dualistic axiom. The \textit{jus in bello} does not, according to this view, apply uniformly to all parties. A state acting “in an extreme circumstance of self-defence . . . in which [its] very survival . . . would be at stake” apparently may use weapons that would be legally prohibited if deployed by its adversary.\textsuperscript{286}

Yet another plausible reading is that the ICJ rejected the dualistic axiom in an even deeper sense. \textit{Ad bellum} proportionality typically does—and should—analyze an armed conflict architecturally, that is, from the perspective of the asserted military necessity of those polities implicated (typically, but certainly not invariably, states). \textit{Ad bellum} proportionality says that any use of force, including defensive uses, must not be excessive relative to the asserted need to resort to force. In contrast, \textit{in bello} proportionality says that any use of force must not inflict collateral damage that is excessive relative to the concrete military advantage anticipated in \textit{discrete} instances—for each particular strike. That is why, during the 1991 Gulf War, coalition forces calculated \textit{ad bellum} and \textit{in bellum} proportionality separately.\textsuperscript{287}

The modern law of war requires that both judgments be made, at times concurrently. But in the \textit{Nuclear Weapons} advisory opinion, the ICJ related Article 51 to “the fundamental right of every State to survival, and thus its right to resort to self-defence . . . when its survival is at stake.”\textsuperscript{288} This suggests that the Court may not have intended to imply, as Judge Higgins supposed, that force that violates the \textit{jus in bello} might still be legal as a matter of the \textit{jus ad bellum}. Rather, the Court may have had in mind the sort of scenario described by political theorists as supreme emergency. Perhaps

\textsuperscript{282} 1996 I.C.J. at 266 (emphasis added).
\textsuperscript{283} \textit{But see id.} at 589 (finding the use of the word “generally” ambiguous).
\textsuperscript{284} \textit{See id.} at 322 (dissenting opinion of Judge Schwebel); \textit{id.} at 590-91 (dissenting opinion of Judge Higgins).
\textsuperscript{285} 1996 I.C.J. at 590.
\textsuperscript{286} DINSTEIN, \textit{supra} note __, at 161.
\textsuperscript{287} GARDAM, \textit{supra} note __, at 21 (footnote omitted).
\textsuperscript{288} 1996 I.C.J. at 263.
the ICJ meant that in such circumstances—that is, where “the very survival of a state would be at stake”—nuclear weapons would not violate in bello proportionality because of the logic of supreme emergency. The jus in bello, that is, ceases to be relevant where “the fundamental right of every State to survival” is at stake. Such a right is found nowhere in the Charter or any other positive law. Consistent with the logic of supreme emergency, it is really an assertion about an allegedly inherent right of a polity qua polity. The ICJ seems to suggest that states, like individuals in Hobbes’s state of nature, have a natural right to self-defense and survival that cannot be relinquished. If this reading is correct, the Court made the common error of applying the domestic law analogy to the abstract entity of the state.

On either view, the ICJ’s opinion has disquieting implications beyond the unique horror of nuclear weapons. There is no principled reason to limit the logic of conflation in supreme emergencies to particular weapons or methods of warfare. Chemical or biological weapons, too, would be justified to ensure the survival of a state. In fact, this logic admits of no limit. It does not stop at the flexible aspects of IHL, such as proportionality. It would equally authorize torture, summary execution, terrorism, denial of quarter, and other violations of absolute restraints on the conduct of hostilities—provided that the cost of military defeat in ad bellum terms reaches a sufficient level: namely, the destruction of a state or perhaps a cognate non-state polity. A paramount purpose of the dualistic axiom is to avoid precisely this kind of misguided logic. Taken to its extreme, it leads inexorably to the destruction of independent constraints on the use of organized violence by collective entities. Such entities, whether states or other forms of political association, arrogate to themselves an associative value that exceeds the aggregate interests and values of their constituents. In the context of war, one problem with this presumption is that it cannot be limited in principle to the survival of “desirable” polities—say, to liberal democratic states. Rogue states like North Korea, too, may equally invoke this logic to justify IHL violations and disregard of the dualistic axiom—as may non-state collectives espousing some collective value higher than the individual (such as al-Qaeda).

To summarize, the ICJ has from its inception demonstrated an ill conceived predisposition to collapse, misconstrue, or simply neglect the dualistic axiom. In particular, it has paid little attention to working out the contours of the distinct demands of ad bellum and in bello proportionality. It has effectively reasoned, in the spirit of McMahan’s just war syllogism, that where a state, in its view, violates Article 51 of the Charter because the “armed attack” threshold set out in Nicaragua has not been met, no amount of force can be ad bellum proportional. Nor, according to The Wall, is it necessary to inquire into in bello proportionality, as the dualistic axiom insists. In practice, the ICJ’s jurisprudence therefore tends to eviscerate...
both *ad bellum* and *in bello* proportionality as independent constraints on force. It treats judgments that particular uses of force violate Article 51 as legally sufficient to obviate the need for proportionality analyses. Most disturbing, according to the apparent logic of the *Nuclear Weapons* opinion, *ad bellum* objectives that presuppose the value of polities qua polities, like the “very survival of a state,” may supersede *in bello* requirements even of an absolute nature, authorizing means methods of war that IHL forbids.

C. Conflation in State Practice

The ICJ’s failure to draw and apply analytic distinctions contextually is not, as emphasized at the outset, necessarily the best indicium of modern international law. But recent state practice, too, suggests that the failure to clarify or correctly apply the dualistic axiom affects how states conduct hostilities. Below, I briefly examine three examples: first, NATO’s 1999 air campaign against Serbia in an avowed effort to prevent ethnic cleansing in Kosovo; second, the brief but tragic conflict between Israel and Hezbollah in Lebanon in the summer of 2006, which for lack of common name I refer to as the “Thirty-Four Day War”; and finally, the resurrection of candidly justified torture as a method of war.  

1. Kosovo

In March 1999, after the failed negotiations at Rambouillet about the future status of Kosovo, Serbian forces launched attacks on the Kosovo Liberation Army (KLA) and targeted ethnic Albanian civilians. In response, NATO organized air strikes against targets in Serbia, flying more than 38,000 sorties over the course of the conflict. A ground invasion would have been more effective and efficient—and, as relevant here, also better enabled NATO to discriminate between civilians and combatants. NATO chose to carry out the war solely by air because its political elites believed their constituents would not tolerate casualties. The aerial war, according to most analysts, took more time than a ground war would have,
killed or injured more civilians, and caused more damage to Serbia’s civilian infrastructure—not to mention accidents like the bombing of the Chinese Embassy.

To minimize the risk to pilots from anti-aircraft defenses, NATO planes flew at a minimum height of 15,000 feet. After some strikes mistakenly killed civilians, including refugees, NATO’s actions came under intensified scrutiny. Critics argued that NATO could have averted these mistakes with better target sighting techniques: visual confirmation either by pilots flying at lower altitudes or by ground troops confirming target selection. Criticism intensified when the war did not end as quickly as NATO anticipated. As its success seemed less certain and Milosevic refused to relent promptly, the issue of potential ground troop deployment gained greater attention. NATO never sent troops into Kosovo because of the difficulty of achieving supranational consensus, as well as the allegedly inevitable domestic political opposition to a war involving casualties. In fact, the polls were less conclusive on this point than commonly thought. But officials at the Pentagon and the White House remained convinced that any military conduct that threatened casualties would not be politically viable.

On June 10, 1999, nearly four months later, the conflict ended. Total civilian casualties reportedly numbered around 500, and Serbia had sustained severe damage to its civilian infrastructure. Criticism of these facts affected both domestic and international public support for the NATO campaign. It also motivated human rights organizations and others to

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293 Id. at 1108-1110.
295 ICTY Report, supra note __, at 1257-1258.
296 See, e.g., Medenica, supra note __, at 406-09.
298 See Jane Perez, Crisis in the Balkans: War Options: Clinton and the Joint Chiefs to Discuss Ground Invasion, N.Y. Times, June 2, 1999, at A14.
appraise the lawfulness of NATO’s air campaign tactics _ex post_. Multiple parties requested that ICTY Prosecutor Carla Del Ponte investigate NATO for war crimes. She ultimately found that unnecessary based on a report compiled by a committee established to review NATO’s actions.

The Report purported to embrace the dualistic axiom. It rejected any notion “that the ‘bad’ side had to comply with the law while the ‘good’ side could violate it at will,” and it based this view on the traditional rationale that an asymmetry in the law “would be most unlikely to reduce human suffering in conflict.” In practice, however, it is unclear that the Report actually applied the axiom. The Report acknowledges that military commanders have an obligation:

a) to do everything practicable to verify that the objectives to be attacked are military objectives,

b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and

c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

Of course, “everything practicable” does not mean “everything.” Yet the Report’s analysis of _in bello_ proportionality raises more questions than it answers. It elides the question whether NATO acted lawfully by focusing on an alleged lack of clarity in IHL. Even though, it says, “NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilian or civilian objectives,” and even though they deliberately avoided _any_ risk to NATO combatants by flying at an altitude that “meant the target could not be verified with the naked eye,” still, “it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during

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304 ICTY Report, _supra_ note __, at 1257-1258.

305 Voon, _supra_ note __, at 1086-87.

306 ICTY Report, _supra_ note __, at 1266.

307 _Id_. at 1265.

the bombing campaign.” Furthermore, relative to in belli proportionality, the Report concludes that “there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses.”

Now, the Report’s conclusions may have been accurate, though several commentators conclude otherwise. Also, even if NATO violated IHL at the margins, it is surely a distinct question whether it would have been appropriate to prosecute NATO combatants for war crimes given the nature of the alleged violations. Arguable violations of proportionality by NATO do not compare to the deliberate targeting of civilians or to the kind of serious war crimes on which the Tribunal has properly focused—summary execution, rape, torture, arbitrary detention and the like. But an impartial review of the Report’s somewhat superficial analysis would at the least leave some doubt in the reviewer’s mind as to whether NATO’s ad bellum justification for the air strikes did not affect the Report’s conclusions about the legality of NATO’s in belli conduct. NATO engaged in a four-month campaign of brutal air strikes against Serbia, deploying fighter planes at heights that reduced the risk to its own combatants to zero at the cost of a substantial increase in the risk to Serbian civilians. Beyond more than 500 civilian casualties, Serbia sustained severe damage to its civilian infrastructure and economy from which it still has not fully recovered. Suppose the avowed goal of the air strikes had been to annex Kosovo—a clear violation of the modern jus ad bellum—rather than to halt an incipient campaign of ethnic cleansing against ethnic Albanian Kosovars. It is difficult to believe that the Report would have been quite so quick to dismiss critics’ allegations that NATO failed to comply with the jus in belli, or that the Report’s conclusions would have been substantially identical.

2. The Thirty-Four Day War

On July 12, 2006, a Hezbollah attack on the Israeli Defense Forces (IDF) rapidly escalated into a thirty-four day conflict, which eventually ended

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309 ICTY Report, supra note __, at 1273.
310 See id. at 1273. But see Colangelo, supra note __, at 1424.
311 See Medenica, supra note __, at 393, 408; Voon, supra note __.
312 See Colangelo, supra note __, at 1436; see also Human Rights Watch, Civilian Deaths in the NATO Air Campaign (Feb. 2000) (concluding that even though certain incidents in the NATO campaign “violated the laws of war,” they “did not . . . rise to the more serious level of ‘grave breaches’ or war crimes that the tribunal is empowered to prosecute”).
314 On NATO’s avowed objectives, see Christine Chinkin, NATO’s Kosovo Intervention: Kosovo: A “Good” War or a “Bad” War?, 93 AM. J. INT’L L. 841, 845-46 (1999).
315 See Colangelo, supra note __, at 1424.
316 The conflict began around 8 A.M. local time on July 12, 2006, and ended in a cease-
in a U.N.-brokered ceasefire. During the conflict, both Israel and Hezbollah attacked dual-use targets and civilian areas, killing, injuring, and displacing civilians. Israel attacked, for example, the Beirut Airport, media transmission stations, and transportation routes, and its widely condemned attack on the city of Qana killed scores of civilians, including children. In its defense, Israel argued that Hezbollah intentionally used civilian areas for its military operations and civilians as “human shields.” Both sides engaged in retaliatory rhetoric and seemed to suggest that in bello violations perpetrated by their forces could be justified as reprisals. Sheik Nasrallah, Hezbollah’s leader, said that “as long as the enemy acts without limitations or red lines, it’s our right to continue the confrontation without limits.” The Israeli U.N. Ambassador Gillerman, in response to allegations that Israel was using disproportionate force, replied, “You’re damn right we are.”

Yet Israel suggested that it occupied the moral high ground because it never intentionally targeted civilians. It appealed to the nature of Hezbollah to justify strikes in civilian areas. It appealed, that is, to an ad bellum consideration (the nature of the enemy) to justify a prima facie in bello violation. Israeli Foreign Minister Livni argued that “[p]roportionality is not compared to the event, but to the threat, and the threat is bigger and wider than the captured soldiers. Unfortunately, civilians sometimes pay the price of giving shelter to terrorists.” In a Security Council meeting, Ambassador Gillerman apologized for the civilian deaths but emphasized the “huge moral disequivalence between the two sides,” stressing that “[w]hile our enemies . . . specifically target women and children . . . , we are

fire at 8 A.M. on August 14, 2006. In terms of twenty-four-hour periods, the conflict therefore continued for thirty-three days, but it encompassed thirty-four calendar days.

318 See, e.g., Human Rights Watch, Why They Died, Civilian Casualties in Lebanon during the 2006 War, September 2007, Volume 19, No. 5(E) at 4. Both parties also at times used indiscriminate weapons such as cluster munitions. Id. at 12.
324 Id.
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325 Israel’s arguments in support of its actions also reflected the rhetoric of preventive self-defense: that its goal was to deprive Hezbollah of its ability to conduct future strikes. Both the IDF and Hezbollah were criticized for IHL violations.

For purposes of the present analysis, the principal analytic issue raised by this tragic conflict, however, lies less in the IHL violations perpetrated by both sides and more in the failure to distinguish between ad bellum and in bello law. Critics referred to the “disproportionate character of Israel’s response” without clarifying “which kind of proportionality was being referred to. Quite often the[] statements contain[ed] elements of both jus ad bellum and jus in bello arguments.” The war in fact raised distinct issues for each of these bodies of law. One distinct question, for example, is the legality of Israel’s decision to engage in a transborder use of force in the first instance. This question must be answered by reference to the jus ad bellum, including ad bellum proportionality.

The immediate casus belli for Israel’s incursion into Lebanon consisted in Hezbollah’s attack with Katyusha rockets and mortars launched from Lebanese territory at IDF bases near the Israeli border town of Zarit. Hezbollah used those attacks as a diversion. During them, it crossed the border into Israel, attacked an IDF patrol, kidnapped two Israeli soldiers, killed three, and wounded two. Israel responded with a rescue mission. An attack by Hezbollah then claimed the lives of four of the Israeli soldiers engaged in “hot pursuit.” Israel argued that Hezbollah’s attacks, in the aggregate, constituted an act of war. Though an early (July 12) Israeli Cabinet communique asserted that Israel would “respond aggressively and

326 See, e.g., Seymour M. Hersh, Watching Lebanon: Washington’s Interests in Israel’s War, NEW YORKER, August 21, 2006 (“[A] national-security adviser to the Knesset … told me, …. ‘Hezbollah is armed to the teeth and trained in the most advanced technology of guerilla warfare. It was just a matter of time. We had to address it.’”).
328 Enzo Cannizzaro, Contextualizing Proportionality: Jus Ad Bellum and Jus In Bello in the Lebanese War, 88 INT’L REV. RED CROSS 779, 780 (2006). Conflation of ad bellum and in bello proportionality is not an uncommon feature of international legal and political discourse. Id.
331 Greg Myre & Steven Erlanger, Israeli Forces Enter Lebanon After 2 Soldiers Are Seized, N.Y. TIMES, July 12, 2006.
harshly to those who carried out, and are responsible for today's action,” and that Israel would hold the "Lebanese Government . . . responsible for the action that originated on its soil.” Israel quickly modified its asserted casus belli. A July 16 statement stressed that “Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian—and Iranian—sponsored terrorist enclaves of murder.”

Israel’s casus belli, in short, drew upon the U.S. precedent of attacking Afghanistan for harboring al-Qaeda during and after the attacks of 9/11, except that scant evidence suggested that the Lebanese government, unlike the Taliban vis-a-vis al-Qaeda, actively supported Hezbollah. The situation bore more resemblance to Uganda’s justification for its military incursion into the DRC based on the inability of Kabila’s government to control rebel forces hostile to Uganda in the eastern region of that vast and chaotic state, which, like Afghanistan, had been in the midst of a civil war. The ICJ, as noted, has offered no guidance on the jus ad bellum applicable to this kind of increasingly common situation. Furthermore, if we leave aside, for the moment, the question whether Israel’s initial resort to force may be deemed lawful and focus on ad bellum necessity and proportionality, the issues become even more complex. Launching a full transborder war in response to what seems to be a comparatively trivial attack by Hezbollah initially looks disproportionate. Certainly, that would be the likely conclusion based on Nicaragua and its progeny. Yet is that a plausible or realistic way to analyze the situation?

In Israel’s view, the kidnapping represented the culmination of a series of similar attacks that must be considered, not in isolation, but in the aggregate. Israeli Foreign Minister Tzipi Livni stressed at the time that proportionality must be judged in terms of the overall threat posed by Hezbollah and not “as an answer to a single incident.” John Bolton, then the U.S. Ambassador to the United Nations, offered a comparable defense of Israel’s resort to force. Responding to allegations that Israel acted disproportionately, he remarked:

What Hezbollah has done is kidnap Israeli soldiers and rain rockets and mortar shells on innocent Israeli civilians. What Israel has done

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in response is an act of self-defense. And I don’t quite understand what the argument about proportionate force means here. Is Israel entitled only to kidnap two Hezbollah operatives and fire a couple of rockets aimlessly at Lebanon?336

Bolton’s remark, despite the rhetorical sarcasm, reflects a very real and troubling gap in contemporary international law. Proportionality, in both its in bello and ad bellum manifestations, is not, as E.U. Foreign Policy Chief Javier Solana said in reference to the in bello law governing the Thirty-Four Day War, “a mathematical concept.”337 Proportionality is clearly not a lex talionis calculation. But few seem to know how it should be understood.

Returning to the ad bellum context, recall that in view of Nicaragua and its progeny, a minor cross-border incursion does not qualify as an armed attack authorizing self-defense under Article 51 of the U.N. Charter. Yet in an era characterized by internal conflicts between non-state actors, terrorist strikes emanating from sovereign states that may be unable or unwilling to control their borders, and asymmetrical wars of attrition, is it realistic to suppose that states will tolerate repeated “minor” attacks (“death by a thousand pinpricks”)?338 At some point, a state may deem those attacks, in the aggregate, an armed attack that justifies self-defense every bit as much as “conventional” attacks by one state on another—the paradigm in the minds of the drafters of the U.N. Charter. Indeed, several commentators argue that Israel’s resort to self-defense in the Thirty-Four Day War may already have been justified given recent state practice,339 even if ad bellum proportionality did not justify its strikes in Lebanon “beyond the territory controlled by Hezbollah.”340

Not coincidentally, Israel’s defense of its military response is redolent of the U.S. view of ad bellum proportionality rejected by the ICJ in Oil Platforms: that it is ad bellum proportionate, not only to respond in self-defense to the direct, immediate source of an attack during the duration of that attack, but to use defensive force in response to one attack as a means to deter others of the same sort. In an interview one year after the Thirty-Four Day War, Israeli Prime Minister Ehud Olmert invoked the “need to

337 Herb Keinon, Israel Dismisses Assad Cease-Fire Call as ‘Bizarre’, JERUSALEM POST, July 20, 2006. Israeli Foreign Minister Livni expressed this view in the ad bellum context, while E.U. Foreign Policy Chief Solana expressed a comparable view relative to in bello law. Yet neither these speakers nor the article reporting their comments distinguishes the two.
339 See, e.g., id.
340 Id. at 292; Cannizzaro, supra note __, at 780.
restore deterrence” to justify Israel’s resort to self-defense and asserted that it had succeeded.\textsuperscript{341} Olmert referred in this regard to Nasrallah’s widely reported view that had he known what would happen because of his decision to order the kidnappings, “he wouldn’t have started the war.”\textsuperscript{342}

Again, the point of emphasis is not whether the parties acted lawfully relative to the \textit{jus ad bellum} or the \textit{jus in bello}—although it seems clear that Israel and Hezbollah alike violated both. Whatever conclusions one reaches on these issues, the Thirty-Four Day War shows the logic of \textit{ad bellum-in bello} conflation in action and, in particular, confusion about the meaning of each law’s proportionality component. Given geopolitical, military, and technological changes since 1945, the law of war can no longer afford, as in the \textit{Armed Activities} judgment handed down one year before the tragic Thirty-Four Day War, to elide issues about how \textit{jus ad bellum} applies to “unconventional” scenarios, which have in fact become more common than “conventional” ones. By neglecting them, international law not only fails to offer guidance or influence the conduct of participants in modern war; it facilitates abuse by those participants—state and non-state alike.

3. The Resurrection of Rationalized Torture

\begin{quote}
The legality of waterboarding] depends on how it’s done. It depends on the circumstances. It depends on who does it.

—Rudy Giuliani\textsuperscript{343}
\end{quote}

In February 2008, Director General Michael Hayden acknowledged that the CIA had subjected three al-Qaeda detainees to waterboarding in 2002 and 2003,\textsuperscript{344} though he said that the CIA has not used waterboarding since then.\textsuperscript{345} Nonetheless, the U.S. executive branch has refused to acknowledge that waterboarding is illegal or a form of torture. U.S. Attorney General Michael B. Mukasey, in a letter to the Senate Judiciary Committee, wrote that waterboarding might be authorized in the future, but first

the CIA director would have to . . . ask [the Attorney General] . . . if

its use would be lawful – taking into account the particular facts and circumstances at issue, including how and why it is to be used, the limits of its use, and the safeguards that are in place for its use.346

He added, “There are some circumstances where current law would appear clearly to prohibit waterboarding’s use. But other circumstances would present a far closer question.”347 When Senator Edward M. Kennedy asked directly whether waterboarding constitutes torture, Mukasey replied that were it “done to [him],” he “would feel that it was.”348 He refused, however, to characterize it legally as torture and therefore as absolutely prohibited.

Multiple officials have now invoked a consequentialist defense of “enhanced interrogation techniques,” which is often a euphemism for torture. Vice President Cheney, for example, has stated that CIA interrogations overseas must be understood as “a tougher program, for tougher customers” and asserted that “the program has uncovered a wealth of information that has foiled attacks against the United States.”349 Justice Scalia, too, has echoed these positions, remarking that an imminent threat could justify coercive techniques such as “smacking someone in the face,”350 which leads, as he acknowledged, to a slippery slope to torture. These views contrast starkly with past U.S. treatment of waterboarding, which the United States had previously called torture and prosecuted as a capital crime.351 As of this writing, however, Congress’s efforts to limit CIA interrogation techniques to those listed in the Army Field Manual, which prohibits waterboarding, have met with repeated opposition from the executive branch.352

It would be a needless digression to revisit contemporary debates over the “ticking time-bomb” scenario, about which much has been written

347 Id.
recently. For present purposes, I want to consider what these debates indicate about the viability of the dualistic axiom. In the first place, there can be no question that waterboarding qualifies as a form of torture under international law. The Convention Against Torture defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention, which the United States has ratified, also states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” It is perfectly plausible and, in my view, politically desirable to debate openly whether the Convention’s absolute prohibition on torture—and the customary international law rule to the same effect—continues to reflects the right policy given new threats to world public order; or whether, in contrast, we should modify the law so that torture will henceforth be subject to some form of consequentialist analysis. But there can be no real legal question that this would be a change to—not a plausible interpretation of—current law. Given the ordinary meaning of the terms of the Convention, it is not only wrong but disingenuous to suggest otherwise.

Were such a change effected, it would be emblematic of a trend noted by Michael Reisman: on the one hand, since WWII, there has been a vast

354 Convention Against Torture art. 1(1).
355 Id. art. 2(2).
356 Without attempting to defend my views on this issue here, such a change would, in my judgment, be disastrous, even for U.S. interests narrowly conceived. I substantially agree with the positions on this issue articulated by David Luban and Jeremy Waldron. See Luban, supra note __, at 1440-52; Waldron, supra note __, at 1682-1717.
357 Vienna Convention art. 31.
proliferation of IHL rules; on the other, there has been a disturbing trend toward transforming IHL rules of a deontological, absolute character into the kind of flexible, consequentialist constraints represented by principles of military necessity, proportionality, and distinction. 358 In part, I believe, this phenomenon involves a tacit regression to the discredited just war idea that, contrary to the dualistic axiom, the *jus in bello* may differ based on the nature of the conflict or the enemy—that is, based on the *jus ad bellum*, which in application remains, as it has been historically, inflected by the subjective views of parties to the conflict. So for Rudy Giuliani, the legality of waterboarding depends on “who does it” 359; and for Vice-President Cheney, the manifestly euphemistic “tougher program[s]” applied by the CIA to detainees held overseas may be justified as appropriate to “tougher customers.”360 This is not necessarily a partisan issue, however. The Reagan administration opposed, and liberals generally favored, a change in the law of war reflected in Additional Protocol I’s effort to modify the legal rights of non-state combatants depending on their subjective characterization as “peoples . . . fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . .”361 A serious problem with this kind of de facto denial of the dualistic axiom is that putative changes to the law of war cannot be limited to some participants in warfare but not others; they cannot be limited to the “good” side. If the international law against torture depends on “who does it,” there is no law against torture.

IV. CONCLUSION: THE DUALISTIC AXIOM IN THE TWENTY-FIRST CENTURY

At an abstract level, law can control undesirable conduct by, among other strategies, prohibition and regulation. The law of war, including the Charter’s *jus ad bellum* and the postwar *jus in bello*, uses both strategies. The *jus ad bellum* tries to minimize resort to armed force in the first instance by prohibiting “the threat or use of force against the territorial integrity or political independence of any state.” 362 It also tries to regulate and thereby limit the scope and intensity of force by means of the customary principles of *ad bellum* necessity and proportionality. 363 Yet international law also

358 See Reisman, *Holding the Center*, supra note __, at 854-55.
361 Additional Protocol I art. 1(4); see Sloane, supra note __ at 461-67.
362 U.N. CHARTER art. 2(4).
363 The Charter says nothing about necessity and proportionality, but Nicaragua, which
recognizes that, historically, prohibition has been—at best and charitably—only partially successful at preventing war. Since the nineteenth century, it has focused increasingly on regulation, both by elaborating principles of in bello military necessity, proportionality, and distinction and by determining that, whatever the consequentialist calculi, certain modes of warfare, such as torture or the denial of quarter, should be absolutely prohibited.

The dualistic axiom is indispensable to the efficacy of the law of war, such as it may be, because it theoretically ensures that relatively common (arguable) violations of the initial prohibition on force do not obviate or modify the regulatory strategies reflected in both ad bellum necessity and proportionality constraints and the full corpus of the jus in bello, which includes its own proportionality constraint. Both the ICJ’s jurisprudence and recent state practice suggest an erosion of the dualistic axiom. In part, this reflects the practical pressure brought to bear on the law of war by modern changes in geopolitics, technology, and the nature of war itself. If it is to retain any relevance or potential efficacy, international law must candidly recognize and adapt to these changes, not elide them, as did the Armed Activities judgment. It must also clarify vague regulatory constraints, especially proportionality.

I do not suggest abandonment of the prohibition strategy. I agree with Louis Henkin’s appropriately qualified view that, for all its failings, Article 2(4) affects how states behave to some extent and in some circumstances. But it would be advisable for the diversity of participants involved in shaping and applying the law of war to focus as well, and more rigorously, on refining the ad bellum and in bello regulatory strategies to meet new and evolving factual contexts—geostrategic, military, technologic, and so on—that hostilities today increasingly manifest. To conclude, I therefore want to propose four clarifications or refinements of the dualistic axiom.

First, as the dualistic axiom traditionally insists, conclusions about the jus ad bellum should neither obviate nor modify the obligation of both

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participants in and appraisers of modern war to apply the *jus in bello* in full, always mindful of the factual context of the particular armed conflict. This means, on the one hand, that constraints of a deontological or absolute nature should not be transformed *sub silentio* into contingent rules that may—in conditions of supreme emergency or otherwise—be subjected to consequentialist calculi. This change, as noted, is not properly understood as an application of threshold deontology. It reflects the *ad bellum* logic of self-defense that ascribes value to collectives qua collectives. It involves a subjective judgment about the value of polities that, if allowed, effectively eviscerates the content of *in bello* prohibitions. Nor can such a change be limited in practice to some polities but not others: again, if the law against torture, for example, depends on “who does it,” then, given how international law operates, there is no law against torture. Those who favor modifying absolute *in bello* constraints of this sort must consider the aggregate and long-term consequences of the change. Its effects cannot be limited—for example, in the case of torture—to extreme circumstances like ticking time-bomb scenarios: empirically, torture has a well-documented metastatic tendency, as the Abu Ghraib scandal illustrates.365

On the other hand, *in bello* constraints of a consequentialist nature—those that explicitly contemplate balancing military advantage and civilian harms—should be applied and worked out on a case-by-case basis. There has been a regrettable tendency to conflate the distinct *ad bellum* and *in bello* concepts of proportionality, about which I will say more below. But it is an error to understand “military advantage” in the *in bello* sense *architecturally*, that is, as a concept that leads inexorably to the ultimate objective of the conflict—victory. If we view military advantage this way, then it is difficult to argue with just war theorists like McMahan who argue that the dualistic axiom is a fiction, for then *ad bellum* conceptions of which party constitutes the “good” side inevitably affect, at a minimum, *in bello* proportionality. That is precisely why Protocol I’s formulation of this principle does not frame the law in architectural terms. It instead forbids attacks “which may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the *concrete and direct* military advantage anticipated.”366 By articulating a conception of military necessity tied to the facts on the ground rather than to the ultimate justice or legality of the conflict, IHL strives to remove *in bello* proportionality calculi to the greatest

365 See, e.g., Waldron, *supra* note __, at 1716-17 (citing, inter alia, Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 143 (1978)); see also Reisman, *Holding the Center, supra* note __, at 855-56.

366 Protocol I art. 57(2)(a)(iii); see also Public Comm. Against Torture v. Israel, Judgment, Dec. 14, 2006 ¶ 46 (stressing that military advantage must not be speculative but rather direct and anticipated).
extent possible from often subjective and political *ad bellum* judgments.\textsuperscript{367}

Realistically, it is doubtful that states and other participants in modern war will always (or even often) be able to divorce such calculations from their views about the legality or justice of the war. But in some cases, IHL may be expected to realize this aspiration more than in others. In conflicts between parties of rough parity, for example, traditional dynamics of enforcement such as reciprocity encourage compliance with IHL, including the dualistic axiom. Also, in conflicts in which one party enjoys a strong military advantage, such as the First Gulf War of 1991, that party often can “afford” (and has reputational if not humanitarian incentives) to adhere to IHL. Technological advances may enable it to avoid significant (or perhaps, as in the Kosovo conflict, any) risk to its combatants, though the legality of this zero-casualty strategy remains an open question.

But the twenty-first century has witnessed the advent of a particular kind of asymmetrical warfare, namely, where one party is an elusive non-state actor such as al-Qaeda or a cognate “network of networks.”\textsuperscript{368} That party’s goals may be either unclear or contrary to a world public order of human dignity and international human rights standards.\textsuperscript{369} Furthermore, a superior military force in conventional terms and advanced military technology does not offer the same sort of advantages—and, incidentally, incentives to abide by the *jus in bello*—as existed, for example, in the 1991 Gulf War. It is here, as we have seen in the struggle against al-Qaeda and other forms of “sacred terrorism,” that the temptation to violate the dualistic axiom and apply a different standard (justified, perhaps, by the different nature of the enemy or the war) becomes strong. The problem, again, is that putative changes to the law, once initiated, cannot easily be controlled—for example, by characterizing those changes as applicable to some parties but not others. They spread rapidly, permeate international law and the perspectives of its participants, and influence the conduct of hostilities generally. Proposed modifications, as I have argued in earlier work, should therefore ideally be the product of multilateral, transparent deliberations rather than of unilateral, opaque decisions.\textsuperscript{370}

Exigencies perceived as supreme emergencies will inevitably arise. It is unrealistic to suppose that political elites charged with responsibility for protecting their polities will obey the law in all circumstances. But that does not necessarily counsel changing the law. Law is one normative system that influences conduct; it is not everything. Sometimes it will (and perhaps should) be disobeyed in the service of other values and policies that inform

\textsuperscript{367} See Hurka, *supra* note __, at 35.
\textsuperscript{368} Sloane, *supra* note __, at 473-78.
\textsuperscript{369} *Id.* at 467-73.
\textsuperscript{370} *Id.* at 478-85.
But in a liberal democratic polity governed by the rule of law, political elites who arrogate to themselves the power to act extralegally must, as Jack Goldsmith has argued, “do so publicly” and transparently, subjecting themselves to “after-the-fact political scrutiny”; and in Thomas Jefferson’s words, “throw [themselves] on the justice of [their] country and the rectitude of [their] motives.” Political exigencies need not and should not necessarily change the law of war. They should rather be recognized, in most cases, as violations. Otherwise, the law of war will cease to exert the minimal influence on the conduct of hostilities that even IHL critics and self-described realists will generally concede, let alone to offer guidance to combatants operating under favorable circumstances in which the jus in bello may be applied rigorously and in good faith.

Second, the contemporary dualistic axiom requires both ad bellum and in bello necessity and proportionality judgments. Ad bellum law, such as the law of self-defense, operates at the level of polities. What value, if any, should the collective nature of these entities receive in the determination of necessity and proportionality? In an ideal world, the answer, I think, is that it would depend on the nature of the entity, and in this regard the dualistic axiom is in a descriptive and logical sense false. States, in the international system, enjoy privileges that other polities do not. One rationale for this is that states possess an associative value beyond the aggregative value of their constituents. Yet the associative value that states may possess surely depends on the nature of the state, as well as on the right of the state’s peoples to self-determination under contemporary international law. What rationale justifies treating a liberal democratic polity that respects the human rights of its constituents as equally entitled to the privileges of the abstraction we call a state as an autocratic regime like North Korea that starves its own people? Sovereignty resides in human beings, not in territory, divine right, or other anachronistic grounds.

Yet it is a distinct question whether this judgment should affect the law on resort to force under the Charter framework. Again, historically as well

372 Id. at 80-81 (internal quotation marks omitted).
373 See ROUSSEAU, supra note __, at 147-49. For a defense of this conception of the nation-state, see WALZER, supra note __, at 54. For an enlightening exchange on it, see Luban, Just War and Human Rights, supra note __; Michael Walzer, The Moral Standing of States: A Response to Four Critics, in INTERNATIONAL ETHICS, supra note __, at 217; and Luban, Romance of the Nation-State, in id. at 238.
375 See W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT’L L. 866 (1990); see also Luban, Just War and Human Rights, supra note __, at 195; Romance of the Nation-State, supra note __, at 238.
as logically, judgments of this sort will often reflect political judgments. Each state (or other collective, including terrorists, gangs, and insurgents) will inevitably claim the mantle of justice or self-defense for itself and deny it to its opponent—even though, increasingly, regional or supranational entities, such as the United Nations, the European Union, and the Organization of American States, may lend an air of objectivity to some of these judgments. For the law of war, however, the real question is whether drawing these distinctions based on the nature of the parties or of the war will further the policies of international law.

Two of the most fundamental policies of international law are to minimize organized, especially transborder, violence and to reduce superfluous suffering in war. Polities will continue to make subjective ad bellum judgments about which side is the aggressor and which the defender. But in the application of ad bellum proportionality, the law of war must continue to hold all parties to the same standards, or it will lose whatever shared perceptions of authority and legitimacy it currently has. Just as the dualistic axiom insists that the jus in bello applies equally to all parties to a conflict, so it should insist that ad bellum proportionality—the regulatory component of ad bellum law—applies equally.

The ICJ’s jurisprudence of war ill serves the law’s effort to minimize and regulate the use and application of force. Because judgments about the initial resort to armed force often prove insusceptible to prohibition, the law should focus more attention on force’s regulation. Rather than content itself with condemning states for violation of Articles 2(4) or 51 under the anachronistic and incongruous standard of Nicaragua and its progeny, the ICJ—and other jurisgenerative entities and appliers of law—should work out a more coherent, detailed conception of ad bellum proportionality. Regulation of the application of putatively defensive force by this doctrine is more likely to affect how states behave than categorical pronouncements that particular resorts to force violate the law of the U.N. Charter.

Third, the war in Kosovo begs the question whether international law should ever countenance exceptions to the dualistic axiom. Suppose that a zero-casualty air war of the sort carried out against Serbia were the sole way to halt a genocide or comparably serious widespread and systematic human rights crisis, such as the current situation in Darfur; that the Security Council, as usual, is paralyzed by a veto threat from one or more permanent members; that diplomacy and economic sanctions or indulgences either have failed or would manifestly fail; and that no state or coalition is able or willing to undertake a ground war necessary to stop the atrocities. Suppose further that, as in Kosovo, a coalition were able and willing to carry out an air campaign with a high likelihood of success. But it is clear that such a zero-casualty humanitarian intervention would violate in bello proportionality and cause significant “collateral damage.”
Innocent people will die, lose their homes, and suffer horrible injuries because technology, despite advances, has not yet created a bomb smart enough to discriminate between combatants and non-combatants if the coalition’s air force flies at the height required to avoid anti-aircraft fire and reduce its risk of casualties to zero.

This scenario poses an acute conflict of values. The dualistic axiom and IHL generally seek to limit superfluous suffering in war. International human rights law, including the *jus cogens* prohibition on genocide and the tragically hypocritical “never again” declarations that postdate virtually every genocide, counsel prompt intervention to halt the “crime of crimes.” As just war theorists rightly point out, in the “deep morality of war,” the dualistic axiom is hard to square with logic, even if, as I have argued, it should be understood legally as a principle based more on experience than strict logic. But IHL’s goals, as noted earlier, may at times prove to be in tension with one another. They cannot be reduced to a simple formula or justified by a univocal moral theory because their rules and principles reflect a complex blend of deontology, consequentialism, and virtue ethics.

Contrary to the dualistic axiom, it may therefore be possible that in certain cases—in particular, where armed intervention in arguable violation of the dualistic axiom is the sole way to stop a genocide or comparably serious human rights crisis—the same moral values that underwrite that axiom may countenance limited exceptions to it.

I say “may” because the answer, I believe, depends on fact- and value-intensive judgments. I simply want to note the potential tension or conflict here between, on the one hand, a traditional axiom of IHL, which on the whole this paper has sought to defend against its tacit erosion, and on the other, certain *jus cogens* norms to which contemporary international law is equally committed. It is logically correct that, as a moral proposition of just war theory, the dualistic axiom cannot be sustained in its pure form. Hurka puts the point well:

[Intuitively,] [t]he level of destruction permitted in a war against a genocidal enemy such as Nazi Germany is surely greater than in the Falklands War. But this claim contradicts the dominant view in the just war tradition, which treats the *jus in bello* as entirely independent of the *jus ad bellum*, so the same rules apply to both sides of a conflict whatever the justice of their aims. . . . [Yet] [i]f “military advantage” justifies killing civilians, it does so only because of the further goods such an advantage will lead to, and

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377 See Hurka, *supra* note __, at 52.

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how much it justifies depends on what those goods are.\textsuperscript{378}

As both Hurka and McMahan acknowledge, arguments about what may be called “the deep morality of war” should not be mistaken for “an account of the laws of war.”\textsuperscript{379} But sometimes the two collide.

Finally, international law must avoid the conflation of \textit{ad bellum} and \textit{in bello} proportionality, a characteristic mistake made, for example, by critics of both sides in the Thirty-Four Day War.\textsuperscript{380} The problem largely reflects the failure of international law to explain proportionality except in terms so abstract as to border on the tautological.\textsuperscript{381} Exploring proportionality in all its complexity would require a separate paper. But I want to draw a few distinctions between \textit{ad bellum} and \textit{in bello} proportionality here in an effort to clarify their proper application.

\textit{Ad bellum} proportionality seeks to limit the quantum of force used by states in self-defense. On one side of the consequentialist “scales” is the attack or attacks (or perhaps the threat or threats) to which one party purports to respond in self-defense. On the other side is \textit{not}, however, as would be the case for \textit{in bello} proportionality, collateral damage. Rather, proportionality in its \textit{ad bellum} sense is parasitic on \textit{ad bellum} necessity. It is the imperative to use, to quote Daniel Webster’s famous words in the \textit{Caroline} incident, no more force that necessary under the circumstances: “the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”\textsuperscript{382} Furthermore, an act will be disproportionate if the same \textit{ad bellum} “good” sought by force could have been achieved by diplomacy or another non-violent strategy at a roughly comparable cost.\textsuperscript{383}

One plausible (but hardly compelled) reading of Webster’s statement, which the ICJ adopted in \textit{Oil Platforms}, is that defensive force must be limited to what is immediately necessary to respond to the relevant attack and to the direct source of the attack. \textit{Ad bellum} proportionality, according to this view, means “that the intensity of self-defense must be about the same as the intensity defended against.”\textsuperscript{384} Such a parsimonious, \textit{lex talionis}

\begin{itemize}
\item \textsuperscript{378} Hurka, \textit{supra} note __, at 45.
\item \textsuperscript{379} McMahan, \textit{supra} note __, at 730; see also Hurka, \textit{supra} note __, at 45.
\item \textsuperscript{380} See, e.g., \textit{Mind Those Proportions}, \textit{The Economist}, July 29, 2006, at 43-44.
\item \textsuperscript{381} See, e.g., \textit{Gardam}, \textit{supra} note __, at 24.
\item \textsuperscript{382} Jennings, \textit{supra}, note __, at 89 (quoting Daniel Webster’s correspondence with Great Britain).
\item \textsuperscript{383} Webster wrote that “[i]t must be shown,” among other things, “that admonition or remonstrance to the persons on board the \textit{Caroline},” which British forces destroyed, would have been unavailing.” Jennings, \textit{supra} note __, at 89 (internal quotation marks omitted). See also Hurka, \textit{supra} note __, at 37.
\item \textsuperscript{384} Frederic L. Kirgis, \textit{Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon}, \textit{ASIL Insight}, Aug. 17, 2006.
\end{itemize}
interpretation of ad bellum proportionality leads to absurd results. In Oil Platforms, for example, it meant that once the attack on the Sea Isle City ended, so too did any “necessity” for self-defense. Any response at that point would be disproportionate, a fortiori if directed against an Iranian target other than the source of the missile. No state, in practice, would accept this conception of ad bellum proportionality.

An alternative conception is the aggregative or cumulative view: that states may respond in self-defense that is ad bellum proportionate to the aggregate attacks on it rather than only to the specific attack that prompted the defensive response. Put otherwise, ad bellum proportionality “could mean that the force, even if it is more intensive than [the attack to which it responds] is permissible so long as it is not designed to do anything more than protect the territorial integrity or other vital interests of the defending party.” 385 When the United States responded to the attacks of 9/11 by not only targeting al-Qaeda but invading Afghanistan and overthrowing the Taliban regime that it held guilty of harboring that terrorist network, few condemned that response as disproportionate even though it violated the jus ad bellum elaborated by the ICJ. In part, that is surely because of the unprecedented scale of the attack on U.S. soil. But the U.S. attack may also be deemed ad bellum proportionate because it responded not to a single attack, but to a series of attacks by al-Qaeda, including the 1998 embassy bombings and the 2000 bombing of the U.S.S. Cole. Israel’s decision to initiate a transborder war against Hezbollah also reflects this aggregative theory of ad bellum proportionality. In terms of proportionality, the immediate impetus for Israel’s initiation of armed hostilities did not justify a full-scale war, but perhaps Hezbollah’s attacks, in the aggregate, did. 386 That does not, of course, imply that Israel made a prudent or advisable decision, nor that it complied with IHL once it resorted to war. But its

385 Id. (emphasis added). The limitation here to “vital interests” is crucial. It would be untenable to count, among the relevant “goods” on the ad bellum scale, the fact that, for example, fighting the war will “lift [the] state and the world’s economies out of [a] recession, as World War II ended the depression of the 1930s”; or that war “may boost scientific research and thereby speed the development of technologies such as nuclear power.” Hurka, supra note __, at 40.

386 Hurka, though speaking in terms of just war theory rather than international law, draws an important distinction in this regard between “sufficient” and “contributing” just causes that applies equally to the law. Some “goods,” such as deterring an enemy may not be sufficient to authorize the initial resort to armed force, and yet once a state responds in self-defense, those goods may legitimately be counted as aims of defensive force. Id. at 41. In Oil Platforms, for example, it would have been unlawful for the United States to attack the Iranian offshore oil platforms to deter Iranian attacks on neutral vessels preemptively. But once the Sea Isle City had been struck by a missile and the Samuel B. Roberts mined, it became legitimate for the United States to consider, as a matter of ad bellum proportionality, that attacks on the Iranian offshore oil platforms would deter comparable attacks threatening vital U.S. interests in the future.
initial decision may have been lawful from an *ad bellum* perspective.

This approach, I think, is inevitable in view of the nature of modern war. In situations of asymmetrical power, non-state participants—whether insurgents, terrorist networks, militias, or guerillas—characteristically and understandably elect to use force as an intermittent tactic. This means, typically, a series of discrete strikes, which, considered in isolation, would not suffice as an armed attack under *Nicaragua* and its progeny. Yet today such small-scale, irregular attacks or military incursions have become more the rule than the exception. The question can no longer be, as *Nicaragua* put it, whether a small-scale transborder armed incursion crosses the line between a “mere frontier incident” and an “armed attack” giving rise to a right of proportionate self-defense.387 States, driven by, among other forces, domestic constituencies, will at some point decide that a series of discrete, “trivial” attacks by non-state actors operating from the territory of a host or failed state, no one of which would justify a full-scale invasion of that state’s territory, nonetheless justify self-defense in the aggregate. If we insist on the parsimonious interpretation of *ad bellum* proportionality embraced by the ICJ in *Oil Platforms*, it will in practice cease to operate as a distinct constraint on force.

While *ad bellum* proportionality often involves an at least partially subjective appraisal of the legality of one side’s reason for resort to force, *in bello* proportionality, in contrast, strives to remain agnostic and objective. Each discrete application of armed force must be proportional in that it not inflict harm that is “excessive” relative to the particular, concrete military advantage sought in particular instances.388 International lawyers and just war theorists err by supposing that *in bello* proportionality involves the weighing of *in bello* harms (that is, concrete harms to human beings such as death, suffering, and property destruction) against architectural *ad bellum* justifications for force such as the asserted necessity of self-defense. *In bello* proportionality rather seeks to specify a conception of military necessity that is as close as possible to the judgments made by military strategists based on the facts on the ground in particular, concrete circumstances. So for *in bello* proportionality the answer to the question “proportional to what?” is not, as for *ad bellum* proportionality, the military necessity or vital state interest that occasioned the use of force. Rather, it is the “incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof,” and the question is whether those harms “would be excessive in relation to the concrete and direct military advantage

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387 Greenwood, supra note __, at 381.
The details of this principle urgently need to be worked out at a less abstract level and operationalized by military lawyers. As the ICTY Report on Kosovo notes, in bello proportionality demands answers to, among other questions, the following:

a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects?
b) What do you include or exclude in totaling your sums?
c) What is the standard of measurement in time or space? and
d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The problem is not that contemporary international law provides incorrect answers to these questions; it is that, frequently, it offers no answer. Given the emerging geopolitical, strategic, and technological trends in the twenty-first century, whether the dualistic axiom can be preserved in the twenty-first century depends in part on whether in bello proportionality can be coherently operationalized without reference to ad bellum goals.

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The ICJ’s pathological dispositif in Nuclear Weapons is emblematic of the true cost of conflation: that is, of disregard or failure to apply the dualistic axiom with analytic rigor. The decision shows why the post-World War II “humanized” law of war tries, at least, not to conflate values that attaches to polities qua polities with the interests and values of human beings as the fundamental unit of value and concern in contemporary international law. Because of this conflation, the ICJ’s Nuclear Weapons opinion oddly seems to contemplate “extreme circumstances” in which nuclear weapons would be simultaneously prohibited and permitted. The dualistic axiom will continue to come under pressure in the twenty-first century. But as I have sought to show, it remains indispensable to IHL in practice, based on our historical experience with the moral and political reality of war. The law of

389 Protocol I art. 57(2)(a)(iii) (emphasis added); see also Public Comm. Against Torture v. Israel, Judgment, Dec. 14, 2006, ¶ 46 (stressing that military advantage must not be speculative but rather direct and anticipated).
390 Fenwick, supra note __, at 545-46.
391 ICTY Report, supra note __, at 1271, ¶ 49 (2000); see also Amichai Cohen & Yuval Shany, A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case, 5 J. INT’L CRIM. JUST. 310, 316 (2007); Michael Walzer, Two Concept of Military Responsibility, in ARGUING ABOUT WAR 23 (2004); Hurka, supra note __.
war should therefore strive, despite new challenges, to preserve the dualistic axiom and maintain a rigorous distinction between, respectively, the lawfulness of the initiation of and conduct of hostilities—even if, inevitably, it does not always or often manage to realize this aspiration.