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# *A Non-Response to Weiler and Deshman*

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## Abstract

*This short article comments on Joseph Weiler and Abby Deshman's article on the debate whether there should be a wall of separation between the* jus in bello *and the* jus ad bellum. *Agreeing with Weiler and Deshman that the debate is quite polarized and at times coloured by a quasi-religious tone, this article reflects on some of the reasons for this intensity, including the fear among many international humanitarian lawyers that both the law and the profession are under near-existential threat.*

In their article in this symposium Joseph Weiler and Abby Deshman avowedly adopt the position of the Neutral, that they themselves describe as often maligned.[1] Rather than take a side in the debate on whether there should be a wall of separation between the *jus in bello* and the *jus ad bellum*, they are interested in painting a historical picture of that debate, with the goal of showing that the debate is not static but is immersed in the political context and evolves in response to the controversies of the day.

This declared neutrality at once makes their piece both refreshing and frustrating. It is refreshing simply because it is different. This debate has been rehashed so much that it has become exceedingly difficult to say something truly new – except, well, when somebody does say something new.[2] Even supposedly objective historiographical recapitulations of the debate are most frequently used to advance a particular side in that debate. This is not to say that Weiler and Deshman necessarily do not have an agenda – they do, and they declare it at the outset; if they have another beyond this it is difficult to discern.

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1 Weiler and Deshman, 'Far be it from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between *Jus ad Bellum* and *Jus in Bello*', this issue, at 3.

2 For notable recent examples in the legal literature see Blum, 'On a Differential Law of War', 52 *Harvard J Int'l L* (2011) 164; Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', 34 *Yale J Int'l L* (2009) 48.

This brings me to why I found the article frustrating, and doubly so. First, because as I read it I felt an increasing need to pin the authors down and expose them as either closeted Separationists or (more likely) Conflationists. On self-reflection, this defensive urge only serves to demonstrate my own successful, willing, and happy IHL indoctrination. The second reason for my frustration is that the article's position of neutrality makes it hard to respond to – hence this non-response. Weiler and Deshman's article is, to my eyes at least, essentially correct in its historical description of the evolution of the separation/conflation debate and its wider context. It is most definitely correct in arguing that this is a debate in which quarter is rarely given and is pervaded by an almost religious tone – just note the various descriptions of separation as 'absolute dogma' or 'self-evident and self-explanatory'.[3]

This quasi-religiosity of the debate in part makes Weiler and Deshman's use of a biblical *leitmotif* so apt. When Abraham questions God whether destroying Sodom would entail slaying the righteous with the wicked, he is invoking the idea of equality: that the like should be treated alike, and the different differently. The parallel to the separation of the two *jus*-es is clear: why should the unjust warrior be treated equally as the just? Yet equality is by itself an empty idea, since it requires prior judgements as to what similarities or differences are to be considered relevant.[4] These judgements, in turn, depend on deep ideological priors and various competing conceptions of morality, be they deontological, consequentialist, aretaic, or something else entirely. Incidentally, the same Abrahamic quotation can be used to defend, rather than assail, other IHL '*axiomata*', such as distinction, proportionality, and the prohibition of collective punishment.[5]

That said, even if the need for total or near-total separation is accepted, as it so widely is, and if the Separationists are so consistently out-arguing the Conflationists, why is this need so often justified in quasi-religious terms? Nor is such language limited to defending the *jus in bello* from that other *jus*; I have personally attended a number of conferences or symposia where there was repeated reference to the need to maintain IHL's 'purity' (that was indeed the word used) from outside influences, but today most acutely from human rights.

I would venture that such language is a consequence of IHL's own perceived fragility, a fragility which is deep-seated and fundamental, to which any outside influence poses or is seen as posing a near-existential threat. Despite its comparative antiquity, the law of war has always suffered from severe defects of compliance (viz. Lauterpacht's 'if international law is at the vanishing point of law, the law of war is at the vanishing point of international law') and internal moral incoherence (being a

[3] See Weiler and Deshman, *supra* note 1, at 1–2, and the references therein.

[4] Cf. Westen, 'The Empty Idea of Equality', 95 *Harvard L Rev* (1982) 537.

[5] Essentially by equating the righteous to civilians and the wicked to combatants. Note also how Abraham attempts to temper God's decision to annihilate the whole of Sodom by asking him whether he would do so if he could find 50, or 45, or at least 10 righteous among the wicked, to all of which God responds by saying that he would spare the city: Genesis, 18: 22–33. See for more Ben-Naftali, 'Human, All Too Human Rights: Humanitarian Ethics and the Annihilation of Sodom and Gomorrah', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 419, 424 ff.

body of law that legitimizes the routine killing of people, albeit in a nice way). There is, in other words, no other part of international law that is so openly exposed to the apology/utopia dynamic,[6] that is so existentially concerned with the need to reconcile normativity with practicality, that is so obsessed with appearing objective and apolitical when trying to regulate war, that most political of human endeavours.

Add to this the double fragmentation that IHL is experiencing as a profession, and the urge to entrench dogmas or axioms becomes even clearer. Externally, IHL specialists are trying (or see themselves as trying) to fend off all sorts of bumbling amateurs and dilettantes, especially from the human rights crowd, who are not only meddling in things they do not fully understand, but are employing misplaced, impractical, utopian arguments which risk compromising both IHL and human rights.[7] Internally, IHL as profession has always been fragmented, shared between the humanitarian-minded, mostly academic bunch on one end, and the more hard-nosed, realist, mostly military one on the other.[8] The separation 'dogma' is the one thing virtually all of these people can agree on, and it is no wonder that it needs to be defended so emphatically.

What Weiler and Deshman's broader narrative shows, I think, is that while the separation principle has in legal scholarship always been the mainstream view, it has also never been without significant challenge. Indeed, it is somehow perched so impossibly that it is surrounded on all sides by slippery slopes. It can be challenged, as it often has been, on grounds of principle.[9] It can also be challenged carelessly, on grounds of transitory political expediency – the most painful current examples being the never completely articulated legal rationales of the Bush and Obama administrations in justifying their extraterritorial use of force against non-state actors, in which conflation between the *ad bellum* and the *in bello* is almost obligatory.[10] In other words, separation is under constant threat from conflation, sometimes acutely, sometimes less so.

[6] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).

[7] For a sophisticated critique in this direction see Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict', 86 *US Naval War College International Law Studies (Blue Book) Series* (2010) 349.

[8] This is obviously a gross over-generalization – but one still largely true.

[9] In that regard, one set of issues that is currently of great importance and also threatens the wall of separation between the *in bello* and the *ad bellum* consists of processes that can end a belligerent occupation or transform an international armed conflict into a non-international armed conflict through the toppling of an old government through a foreign intervention and the creation of a new government which then provides consent to the presence of the interveners (e.g., Afghanistan, Iraq, Libya). See for more Milanovic and Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013), pre-print draft available at: http://ssrn.com/abstract=1988915, at 23–24.

[10] E.g., John Brennan, President Obama's chief advisor on terrorism stated in a recent speech that 'we are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. *Our ongoing armed conflict with al-Qa'ida stems from our right – recognized under international law – to self defense*': Remarks of John O. Brennan – As Prepared for Delivery, Assistant to the President for Homeland Security and Counterterrorism, Program on Law and Security, Harvard Law School, 16 Sept. 2011 (emphasis added), quoted in full in Lederman, 'John Brennan Speech on Obama Administration Antiterrorism Policies and Practices', *Opinio Juris*, 16 Sept. 2011, available at: http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/.

Ultimately, the separation principle can only be justified externally, outside the law, through moral reasoning that is always coloured by personal experience and ideology. I can freely confess that my own devotion to the principle, such as it is, is the product of my observing first-hand what the cost of conflation was in the conflicts in the former Yugoslavia, in which mass atrocities orchestrated by state or para-state entities have been and are to this day rationalized and minimized by reference to the supposed general justness of each party's cause (e.g., in the case of the Serbs the alleged preservation of Yugoslavia/preventing the recurrence of World War II crimes against the Serbs, or in the case of the Bosniaks or Croats defence against Serbian aggression). I can think of no example more depressing than that of the Mothers of Srebrenica, a Bosnian organization comprised mainly of the survivors of the 1995 Srebrenica genocide, congratulating Croatian generals Gotovina and Markač on their acquittal for ethnic cleansing of the Serbs from Croatia by a divided ICTY Appeals Chamber, overturning by three votes to two (and on the facts) a unanimous Trial Chamber which had previously found the generals guilty.[11] The chairwoman of the society explained her support by saying that the two generals were innocent for the simple reason that they were defending their homeland.[12] What, I wonder, would Abraham say to that?

And so I say – and I hope Weiler and Deshman would join me in this despite their professed neutrality – that while the wall of separation is not an absolute dogma, it still stands. It will never stand without challenge, nor should it. But it must stand, even if we may need occasionally – but ever so carefully – to drill a hole or two through it.

[11] See Milanovic, 'The Gotovina Omnishambles', *EJIL: Talk!*, 18 Nov. 2012, available at: www.ejiltalk.org/the-gotovina-omnishambles/.

[12] See 'Majke Srebrenice čestitale Hrvatskoj [The Mothers of Srebrenica Congratulate Croatia]', available at: www.tportal.hr/vijesti/svijet/226651/Majke-Srebrenice-cestitale-Hrvatskoj.html (in Croatian).