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SOFT LAW IN *JUS IN BELLO* AND *JUS AD BELLUM*: WHAT LESSONS FOR BUSINESS AND HUMAN RIGHTS?

*Alonso Gurmendi Dunkelberg**

This contribution, rather than focusing on the debates within the Business and Human Rights (BHR) domain itself, offers a comparison between soft law regulation in the BHR context, on the one hand, and in the *jus in bello* (JIB) and *jus ad bellum* (JAB) contexts, on the other. Specifically, this contribution looks at the recent experience in JIB and JAB wherein states and other actors have tried to address the indeterminacy of treaty law provisions through soft law proposals that advance a disputed interpretation of hard law, producing legal uncertainty and scholarly debate. I use as examples the 2009 Interpretive Guidance on Direct Participation in Hostilities and the 2012 Bethlehem Principles as a way to extract lessons for the codifying momentum underway in BHR.

The Two Cultures Problem

Given the high cost of international regulation, it has usually taken special international crises to move forward with the negotiation and adoption of JIB and JAB treaties. Whether through philanthropic efforts or as a reaction to major wars, JIB and JAB treaty-making has always required *momentum* to move forward and overcome the fundamental disagreements.

The legal approach to war, after all, is commonly experienced through what David Luban has described as two distinct cultures.¹ The so-called military culture gives primacy to the “imperatives of war-making,” whereas the humanitarian one focuses on human dignity and rights.² These different traditions of war-thinking disagree on what JIB and JAB should look like, their purposes, and the lines that can or should be drawn between legal and illegal conduct.

Without *momentum*, states do not usually address these disagreements by adopting new treaties. In fact, while treaty law has made considerable progress in regulating the means of war (i.e., which weapons are allowed on the battlefield), key war-making states (such as the United States) frequently oppose such agreements and refuse to join them. As a result, states rarely seek to address the most contentious issues on JIB and JAB in negotiating conferences; instead, states and other actors have approached these key issues through soft law.

This is not surprising. After all, “soft law has come to fill a void in the absence of treaty law, exerting a degree of normative force notwithstanding its non-binding character,” and “certain soft law regimes end up as the ultimate

* Assistant Professor, Universidad del Pacífico (Lima, Peru).

¹ David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT’L L. 315 (2013).

² *Id.* at 316.

and authoritative determinations of open-ended legal questions.”³ Highly successful examples, like the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Agents or the Draft Articles on State Responsibility, are so often cited by international and domestic courts that it is difficult to say where soft law ends and international custom begins. On some of the more contentious fronts, however, like JIB and JAB, we see a stalemate between the proposed soft law and resistance to it, leading to lack of clarity and stagnation.

The 2009 Interpretive Guidance

International humanitarian law provides that, in an armed conflict, civilians shall enjoy protection against military operations “unless and for such time as they take a direct part in hostilities.”⁴ The meaning of this phrase is subject to an intense debate among states, non-state actors, and scholars.⁵ No treaty gives a clear-cut answer, and states seem unwilling to address the issue through binding law.

In 2009, the International Committee of the Red Cross convened a meeting of experts to produce a non-binding instrument on this subject, the Interpretive Guidance on the Notion of Direct Participation in Hostilities.⁶ Among other issues, the Guidance sought to answer interpretive problems posed by the so-called “revolving door” scenario: whether and when an individual who acted as a farmer-by-day and a rebel-by-night could be the object of an attack. For some, membership in an armed group allows the state to target the individual at all times. For others, the individual is only targetable while specifically engaging in hostile acts, regaining full civilian protections once they stop.

Most experts endorsed what seemed like a middle ground: on the one hand, members of a non-state organized armed force lose their civilian protection even if they are not engaging in a specific attack. On the other, however, the Guidance gave membership itself a functional definition, depending on “whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”⁷ Nominal membership, therefore, does not suffice to render someone targetable at all times. The wholesale adoption of the “continuous combat function” concept was controversial for those in the military culture, as it put state and non-state forces on unequal footing: “a cook in the regular armed forces may be lawfully attacked at any time; his or her counterpart in an organized armed group may be attacked only if he or she directly participates and then only for such time as the participation occurs.”⁸

The Guidance went further, however, adding that it would “defy basic notions of humanity” to kill an enemy—even one possessing a continuous combat function—without giving the person an opportunity to surrender “where there manifestly is no necessity for the use of lethal force.”⁹ According to one participant in the meetings, this so-called “duty to capture” was “purely an invention of the Interpretive Guidance.”¹⁰

³ Thomas Gammeltoft-Hansen et al., *Introduction: Tracing the Roles of Soft Law in Human Rights*, in *TRACING THE ROLES OF SOFT LAW IN HUMAN RIGHTS* 3, 8 (Stéphanie Lagoutte et al. eds., 2016).

⁴ Int’l Comm. of the Red Cross [ICRC], *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* art. 53(3), 8 June 1977, 1125 UNTS 3.

⁵ Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, in *ESSAYS ON LAW AND WAR AT THE FAULT LINES* (Michael N. Schmitt ed., 2012).

⁶ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Int’l Comm. of the Red Cross, 2009).

⁷ *Id.* at 33.

⁸ Schmitt, *supra* note 5, at 23.

⁹ Melzer, *supra* note 6, at 82.

¹⁰ Schmitt, *supra* note 5, at 42.

Both the “duty to capture” and the “continuous combat function” concepts remain the object of intense debate. For their opponents, they are at best *de lege ferenda*. For their proponents, they are welcome developments. This uncertainty is already creating real-life problems. As a UN Special Rapporteur concluded in 2013, “[t]hese differences of view have obvious implications for assessing both the legality of individual remotely piloted strikes and the level of ‘civilian’ casualties.”¹¹

The 2012 Bethlehem Principles

The core JAB rule is that war is forbidden, except in self-defense or with Security Council authorization. The meaning of self-defense, however, remains controversial. For some states and scholars, whenever a state is unwilling or unable to address the presence of an armed group within its borders, other states threatened by that group are entitled to use force in the territory of the host state, against the armed group, without violating the UN Charter prohibition on the use of force.¹² This so-called “unwilling or unable” test is hotly disputed.

In 2012, Daniel Bethlehem, a former Legal Adviser to the British Foreign and Commonwealth Office, published a set of principles now known as the Bethlehem Principles.¹³ While non-binding, the Principles were the result of the author’s engagement with like-minded Western powers and were proposed with the normative goal of promoting the views of those powers through soft law. States like the United States and Australia, for instance, have endorsed the “unwilling or unable” test that the Principles articulate.¹⁴ But key states like Mexico and Brazil have continuously defended a strict reading of the UN Charter, opposing the test.¹⁵ Some scholars also argue that the Principles are inconsistent with international law.¹⁶ Opponents note that once a state attacks a non-state actor in the territory of another, the attacked state could claim there has been an unlawful use of force and retaliate in self-defence. This will, in turn, be perceived by the initially attacking state as the first unlawful attack, triggering self-defence against the territorial state itself. The “unwilling or unable” test, therefore, can lead to escalating force. It also creates an unresolvable legal quandary between competing claims of self-defence.¹⁷

Seizing Momentum

Whether regulation of BHR should be accomplished through a soft law or hard law regime is subject to intense discussion. In one view, BHR as a field requires binding laws, given the high risk of non-compliance and severe externalities. On the other, government reluctance to commit to international regulation and the lack of agreement as to what these rules should look like caution that it might be better to proceed through soft law alone.¹⁸ Given that the negotiations for a legally binding instrument (LBI) are moving BHR towards a hardening of the law, what can the BHR community learn from the JIB and JAB experiences described above?

¹¹ [Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism](#), UN Doc. A/68/389, para. 72 (Sept. 18, 2013).

¹² Ashley Deeks, [“Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense](#), 52 VIRGINIA J. INT’L L. 483 (2012).

¹³ Daniel Bethlehem, [Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors](#), 106 AJIL 769, 780 (2012).

¹⁴ See The White House, [Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations](#) (2016).

¹⁵ See Patrick Luna, [Remarks](#), 112 ASIL PROC. 50 (2018).

¹⁶ Elizabeth Wilmshurst & Michael Wood, [Self-Defense Against Nonstate Actors: Reflections on the “Bethlehem Principles”](#), 107 AJIL 390 (2013).

¹⁷ Adil Haque, [Self-Defense Against Self-Defense, in Syria and Abroad](#), JUST SECURITY (May 31, 2018).

¹⁸ For a full discussion, see Barnali Choudhury, [Balancing Soft and Hard Law for Business and Human Rights](#), 67 INT’L & COMP. L.Q. 972 (2018).

At its core, the history of BHR shows the same kind of heated controversies as in JIB and JAB. From the beginning, a bloc of developed nations (the United States and the European Union) has resisted what they consider excessive regulation, while a bloc of developing ones (led by Ecuador and South Africa) consider the lack of tougher business regulation unacceptable. These two blocs resemble the same “two cultures” prevalent in JIB and JAB. This controversy is further reflected in the submissions by the international business community, represented by organizations such as the International Organization of Employers (IOE), the International Chamber of Commerce (ICC), and the Business & Industry Advisory Committee at the Organisation for Economic Co-Operation and Development. These submissions contrast with those of civil society organizations, such as Human Rights Watch and the so-called Treaty Alliance, which includes the International Federation for Human Rights and the International Commission of Jurists. Put simply, the former culture sees transnational corporations as part of the solution to human rights violations, while the latter sees them as part of that problem.

In the early days of the BHR project, these two cultures clashed openly. The international business community sharply resisted the UN Human Rights Sub-Commission’s Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (TNCs) with Regard to Human Rights (the UN Norms). The UN Norms asserted that TNCs had the *obligation* to respect, protect, and secure the fulfillment of human rights.¹⁹ For the ICC and the IOE, this was a “step in the wrong direction,” and they urged the Human Rights Commission to “set the record straight” by stating unambiguously that “the duty-bearers of human rights obligations are States [,] not private persons” and that the proposed norms were “neither UN Norms nor authoritative” but rather “a draft with no legal significance.”²⁰

When John Ruggie established the process that produced the UN Guiding Principles (UNGPs), he purposefully sought to present them as a way to defuse the friction between the cultures through a consensus-based approach, thus winning the support of the international business community.²¹ The widespread support the UNGPs enjoy from both civil society and the international business community—as well as states—is therefore a highly positive asset that helped BHR avoid the troubles and uncertainty other fields have experienced.

This aspect of the UNGPs inevitably creates room for questioning the prudence of an LBI. Are supporters of the Revised Draft LBI destroying from within BHR’s most precious asset? There is no question, after all, that the Revised Draft LBI is the brainchild of one specific side of the debate—a direct response from developing nations to what they see as a lack of significant follow-up measures at the UN after the adoption of the UNGPs.²² Is the Revised Draft LBI’s content, therefore, the BHR version of a “duty to capture” or an “unwilling or unable” test—a position likely to perpetuate division rather than consensus among stakeholders?

I do not think so. At this point, BHR finds itself in the exact opposite situation of JIB and JAB. JIB and JAB have a solid base of binding and uniform rules (the UN Charter, the Geneva Conventions, and the 1977 Additional Protocols), but states and scholars disagree on the use and validity of ambitious and individualized soft-law projects as a means to interpret and develop that law. New treaty-based solutions are not coming about because there is no momentum to pursue them. BHR, on the other hand, lacks binding international rules but already has some

¹⁹ Human Rights Comm’n, [Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises \(TNCs\) with Regard to Human Rights](#), UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

²⁰ Bischöfliches Hilfswerk Misereor e.V. et al., [Corporate Influence on the Business and Human Rights Agenda of the United Nations](#) 11 (2014).

²¹ Jens Martens & Karolin Seitz, [The Struggle for a UN Treaty: Towards Global Regulation on Human Rights and Business](#) 11 (Global Policy Forum & Rosa Luxemburg Stiftung, 2016).

²² *Id.* at 15.

eighty-plus nations interested in treaty-based solutions building upon widely accepted soft law.²³ Instead of disagreement over soft law solutions, BHR is rather experiencing a codifying momentum, with even the IOE and the ICC taking part (if strategically) in the negotiations. The history of JIB and JAB shows us that these moments should be seized.

Take, for instance, the ratification history of Additional Protocol I. Today, save for a few objecting states, the protocol inspires broad consensus. With 174 state parties, many of its provisions have acquired customary status. In fact, except for the United States and Turkey, all NATO member states are parties to it. This was not always the case. A negotiation process full of hotly contested debates meant that in its first ten years, only six of the fifteen NATO members at the time signed it, not including key members like the United States, the United Kingdom, France, and Germany. In 1987, the treaty's membership was dominated by Global South states. In fact, only ten of sixty-four member states were European (including the Holy See). Today, more than forty European states—the entire continent except for Andorra and Turkey—are parties.

The Revised Draft LBI could follow a similar pattern, achieving sufficient consensus with business stakeholders so that its positions on intensely argued issues become accepted over time and the benefits of membership come to outweigh the cost of specific controversial provisions. The main key difference, of course, is the regrettable (and, one hopes, temporary) absence of developed states from the negotiating table. To address this, it is important that codification efforts pursue mutually acceptable solutions that do not water down the benefits of hardening the law, but that take advantage of the participation of the business community. The ideal outcome is a situation where hard and soft law move forward together, mutually reinforcing each other, instead of replacing, contradicting, or even obfuscating one another in the name of faster normative advancement.²⁴ For example, the Revised Draft LBI should continue to favor corporate liability through domestic law rather than through direct corporate human rights obligations.

Unlike what critics of an LBI maintain, it is rather the potential loss of this codifying momentum that risks perpetuating division. Relying on unilateral domestic implementation of the UNGPs—with developing and developed states potentially adopting differentiated solutions to similar problem—is a recipe for fragmentation. In fact, faced with a dead end, developing nations might try to develop their own worldview through entirely separate, even regional or sub-regional, rules and processes. This result would depart from the consensual basis of the UNGPs entirely and prompt a response from the rival culture through conflicting hard and soft law. Having separate BHR soft law norms clash in the same way as they did in the JIB and JAB contexts, but here without the grounding baseline of binding law like the Geneva Conventions, is potentially disastrous. Indeed, although military and humanitarian stakeholders in JIB and JAB disagree on the margins, they agree on the core rules. In the case of BHR, developed and developing nations would be battling for the heart of BHR entirely, potentially rendering the resulting hodgepodge of conflicting laws useless. A nuanced LBI that takes into account the concerns of the business community might help avoid this.

In conclusion, BHR is in a unique, even enviable, position. It is building upon solid soft law groundwork, while negotiating its potential transition to binding rules in an inclusive forum. Whether this favorable tide can lead to a successful and widely accepted treaty is still, of course, uncertain. Much will depend on whether developed states can learn to accept a developing-nation-led process. From the perspective of JIB and JAB, however, at least one thing is clear: this codifying momentum should be seized.

²³ In this regard, see [the letter by the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador at the 24th Session of the Human Rights Council](#) (noting “the necessity of moving forward towards a legally binding framework”).

²⁴ See Claire Methven O'Brien, *Transcending the Binary: Linking Hard and Soft Law Through a UNGPs-Based Framework Convention*, 114 AJIL UNBOUND 186 (2020) (proposing a “constructive dialectic” between the two).