

ABSTRACT: An Argument for Formalizing the Commencement of Hostilities

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Criminal Law and *jus ad bellum* follow a parallel historical development. Both begin with a default that all violence is prohibited, but then grant limited exceptions when it is allowed. Therefore, it seems appropriate for scholars and judges to look to the wealth of criminal law jurisprudence in interpret and develop *jus ad bellum* law. *Jus in bello*, however, developed historically in an almost opposite pattern than criminal law. Historically in the realm of war, all violence was authorized and humanitarian law, first by custom and then as positive norms, developed as limitations to this blanket authorization. Although criminal law and *jus in bello*/humanitarian law use the same or similar terms, the meanings have important differences (e.g. proportionality and self-defense). Therefore, it is problematic to apply the lessons from criminal law jurisprudence to battlefield situations.

To further complicate matters, a single act can be appropriately judged as punishable under a domestic criminal law and authorized and possibly heroic under humanitarian law. Consider the captured soldier. Under humanitarian law this individual is *hors de combat* and not eligible to engage in privileged belligerency for the duration of their capture. If they kill a military prison guard in order to effectuate their escape, they can be prosecuted for murder under the domestic criminal law of the capturing state. However, if they are successful in their escape and return to friendly lines, they are not viewed as a war criminal, or any manner of criminal.

Given these two findings, the analysis of targeted killing should focus on the existence of an armed conflict. If the legal paradigm of war/armed conflict is going to continue, we need to develop a brighter line rule towards determining its existence. Even if this test is met, however, both legal paradigms may apply to the factual situation and yet their respective jurisprudence would not overlap. For example, if a civilian engaged in the targeted killing of an individual and the manner of this targeted killing did not violate *jus in bello* (i.e. engaging a lawful target and lawful method of engagement), that civilian may be punishable under a domestic civilian criminal system (e.g. a intentional killing of another without legal justification or excuse), but not be punishable under the laws of war nor international law. (I do not agree with a concept of “murder in violation to the laws of war” as an international war crime but rather (as my colleague John Dehn has argued) that this domestic law applied extra-territorially).