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## On a Differential Law of War: A Response

Responding to Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163 (2011).

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### I. INTRODUCTION

A central premise of international humanitarian law (IHL) is that the same rules apply to both parties in an armed conflict "regardless of the type of war they fight, the justness of their respective causes, or the disparities in power and capabilities between them."<sup>1</sup> In her essay, *On a Differential Law of War*, Gabriella Blum questions that premise, asking whether holding powerful parties to higher standards of IHL compliance than weaker parties might better maximize humanitarian welfare in conflict situations.<sup>2</sup> Her answer is that the humanitarian effect of such "common-but-differentiated responsibilities" (CDRs)—a term she borrows from international

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<sup>1</sup> Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 165 (2011).

<sup>2</sup> *Id.* at 166–68.

environmental law (IEL) and international trade law (ITL)—is indeterminate because it depends on the nature of the CDR, the type of conflict, and whether the weaker party is a state or nonstate actor.<sup>3</sup>

Blum's normative analysis of the desirability of CDRs in IHL is exceptionally powerful, and I agree with most of her conclusions. This brief response, therefore, is intended to be more constructive than critical. In particular, I want to raise five issues that I believe warrant further exploration: (1) whether permitting judges to differentially apply IHL standards could be seen as legitimate; (2) whether proportionality is the kind of standard that permits differential application; (3) whether, and to what extent, CDRs would encourage states and nonstate actors to comply with IHL; (4) whether the case for CDRs might be stronger in non-international armed conflict (NIAC) than in international armed conflict (IAC); and (5) whether it is possible to assess the humanitarian effect of CDRs without abandoning the *jus ad bellum*/*jus in bello* distinction. I conclude that, in fact, Blum's own analysis supports recognizing at least one kind of CDR: namely, requiring strong states to spend more money than weak states on procuring and using precision weaponry.

## II. THE LEGITIMACY OF DIFFERENTIAL INTERPRETATION

Blum identifies three ways in which CDRs could be incorporated into IHL. First, states could adopt a "differential legislative scheme" in which different sets of IHL rules would apply to strong parties and to weak parties. Parties to an armed conflict with air forces, for example, could specifically be prohibited from using aerial warfare against parties that either do not have their own air forces or lack the ability to defend against aerial attack.<sup>4</sup> Second, prosecutors could treat members of strong parties more harshly than members of weak parties when deciding whether to pursue charges or particular sentences for criminal violations of IHL.<sup>5</sup> Third, and finally, decision-makers could apply the same rules of IHL to both strong and weak parties but interpret those rules differently depending upon whether a particular party is strong or weak. For example, "richer countries could be held to higher standards of medical evacuation and treatment of wounded combatants, or . . . richer countries could face greater restrictions on destruction of property for operational purposes."<sup>6</sup>

According to Blum, incorporating CDRs into IHL through differential interpretation of standards is "politically far more plausible" than adopting a differential legislative

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<sup>3</sup> *Id.* at 168.

<sup>4</sup> *Id.* at 186.

<sup>5</sup> *Id.* at 186–87.

<sup>6</sup> *Id.* at 187–88.

scheme or a differential scheme of prosecutorial enforcement.<sup>7</sup> I have no doubt that she is correct regarding the former: it is highly unlikely that strong states would ever either ratify a treaty that explicitly held them to higher standards of conduct than weaker states or permit the crystallization of customary rules to that effect. But I question whether differential interpretation of standards is actually more plausible than differential prosecutorial enforcement for one simple reason: discretion. International prosecutors have a great deal of discretion concerning whom to prosecute, what charges to bring, and what sentences to pursue.<sup>8</sup> The exercise of that discretion is typically subject to only minimal judicial review. The International Criminal Court (ICC)'s Pre-Trial Chamber, for example, can prevent the Prosecutor from initiating a formal investigation into a situation only if there is no reasonable basis for that investigation or if the case does not fall within the jurisdiction of the Court.<sup>9</sup> Similarly, it can prevent the Prosecutor from bringing charges against a particular suspect only if the case fails to satisfy the Rome Statute's minimal gravity requirement<sup>10</sup> or there are not "substantial grounds" to believe that the suspect is guilty of the charged crimes.<sup>11</sup> The criteria international prosecutors use to make charging decisions are also anything but transparent, a fact that has been decried by numerous international criminal law (ICL) scholars.<sup>12</sup> As a result, I think it is fair to say that a prosecutor who was committed to using her discretion to "discriminate against stronger parties when prosecuting or sentencing criminals" would have little trouble doing so.<sup>13</sup>

By contrast, the decision-makers who would be responsible for differentially applying IHL standards—namely, judges of international courts and tribunals—do not enjoy the same kind of discretion. Judges, unlike prosecutors, have to give reasons for their

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<sup>7</sup> *Id.* at 188.

<sup>8</sup> See generally Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162 (2005).

<sup>9</sup> Rome Statute of the International Criminal Court art. 15(4), adopted July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>10</sup> *Id.* art. 17(1)(d).

<sup>11</sup> *Id.* art. 61(7).

<sup>12</sup> See, e.g., Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 541 (2003).

<sup>13</sup> There are, of course, political and reputational constraints on the exercise of prosecutorial discretion, as well. Those constraints, however, should not be overestimated. Given the opacity of the decision-making process, any prosecutor worth her salt could easily justify treating members of strong parties to a conflict more harshly than members of weak parties without having to invoke the language of CDRs. Comparing the gravity of various crimes is a notoriously difficult task. See, e.g., Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 227, 230–32 (Carsten Stahn & Larissa van den Herik eds., 2010).

decisions.<sup>14</sup> That requirement would not prevent an enterprising judge at the International Court of Justice (ICJ) or ICC from applying a rule differently depending on the power of the relevant party, but that judge would either have to pretend that she was not differentially applying the rule or would have to offer some principled rationale for doing so. The former method is at least arguably unethical, and the latter method seems inconsistent with the rule of law, whose basic command to decision-makers is to treat like cases alike.<sup>15</sup> There is nothing illegitimate about *states* legislating CDRs in the IHL context because states make international law.<sup>16</sup> But *courts* are supposed to adjudicate, not legislate—even if we know that, in practice, they often do both.<sup>17</sup>

Blum does not say whether she believes it would be legitimate for judges to differentially apply IHL standards. Indeed, she specifically “bracket[s] out” that issue.<sup>18</sup> Such bracketing, however, seems inconsistent with Blum’s insistence that differential application of IHL standards is the most politically viable method of introducing CDRs into IHL. How could such CDRs be politically viable if they relied on judges openly acknowledging that they hold stronger and weaker participants in armed conflict to different standards of conduct? After all, as Blum notes, the “foundational principle”<sup>19</sup> of IHL is equal application of the rules.

Blum justifies bracketing out the legitimacy issue on the ground that she is interested solely in “the normative question” of whether CDRs are desirable in the IHL context.<sup>20</sup> But the legitimacy of the process used to introduce CDRs into IHL is hardly a non-normative consideration. On the contrary, although instantiated through procedure, the idea that judges should adjudicate instead of legislate—should treat like cases alike—is *itself* normative. The question of whether it is normatively desirable to introduce CDRs into IHL through differential application of generally applicable rules can only be answered, therefore, by taking into account the normative costs of asking judges to assume a role that is fundamentally at odds with their professional function.

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<sup>14</sup> Article 74(5) of the Rome Statute, for example, provides that “[t]he decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” Rome Statute, *supra* note 9, art. 74(5).

<sup>15</sup> See, e.g., H.L.A. HART, THE CONCEPT OF LAW 156–57 (1961) (noting that “to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule”).

<sup>16</sup> See, e.g., Anne-Marie Slaughter, *International Law and International Relations*, 285 RECUEIL DES COURS 9, 34 (2000).

<sup>17</sup> See, e.g., Allison Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Law of War*, 59 VAND. L. REV. 1, 4 (2006).

<sup>18</sup> Blum, *supra* note 1, at 188.

<sup>19</sup> *Id.* at 168.

<sup>20</sup> *Id.* at 188.

## III. DIFFERENTIALLY APPLYING THE PRINCIPLE OF PROPORTIONALITY

I also believe that Blum overestimates the ability of judges to differentially apply some of the most important standards in IHL. Consider, for example, one of her two primary examples of a standard that could be applied differentially: the principle of proportionality. That principle prohibits military commanders from intentionally launching an attack "in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."<sup>21</sup> Blum's reliance on proportionality is intuitively attractive. As she points out, because "the application of the principle of proportionality is highly contingent on interpretation, context, and ultimately, the development of a sub-codex of rules for particular circumstances," it is "susceptible to considerations of relative power, capabilities, and resources, all of which potentially affect the application of the standard to differently situated parties."<sup>22</sup>

Unfortunately, the differential application of the proportionality principle is defeated by the same indeterminacy that, in theory, makes such differential application possible. To permit the judicial creation of a CDR, the principle must be flexible enough to be "susceptible to considerations of relative power" yet determinate enough to permit judges to hold stronger and weaker parties to different proportionality standards. Consider Blum's own example of a possible CDR, which she offers in her discussion of compliance with the rules of IHL:

[A]ssume that weaker parties currently do not make any serious effort to minimize civilian casualties in their attacks, and that consequently, on average, attacks result in a 6:1 civilian to military casualty ratio (that is, six civilians killed for every enemy combatant killed). If a CDR gave weaker parties the ability to engage in attacks that yield a 4:1 ratio, even though this ratio would be illegal for stronger parties, the weak might be inclined to make some effort to comply.<sup>23</sup>

The problem is that such fixed combatant/civilian ratios are incompatible with the principle of proportionality, which determines the acceptability of an attack by reference to the relationship between *military advantage* and civilian casualties, not by reference to the relationship between *combatant casualties* and civilian casualties. In

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<sup>21</sup> Rome Statute, *supra* note 9, art. 8(2)(b)(iv). The test is somewhat different in Article 51 of the First Additional Protocol, as Blum notes, but those differences do not affect my argument. Blum, *supra* note 1, at 189–90 n.131.

<sup>22</sup> Blum, *supra* note 1, at 192.

<sup>23</sup> *Id.* at 203.

other words, the acceptable ratio of combatant casualties to civilian casualties *fluctuates* depending on the anticipated military advantage: a ratio that would be acceptable in the context of a critical attack might be criminal in the context of an attack that was less important. A workable proportionality CDR would thus require judges to differentially apply *three different* components of the proportionality standard: (1) the calculation of military advantage (permitting weaker parties to overestimate the anticipated advantage or requiring stronger parties to calculate the anticipated advantage more precisely), (2) the calculation of the incidental damage the attack would cause (permitting weaker parties to underestimate the anticipated damage or requiring stronger parties to estimate the anticipated damage more precisely), and (3) the comparison between the two (giving weaker parties more flexibility than stronger parties to determine when an attack would not be “clearly excessive”).

Could judges fashion a workable CDR out of this multi-faceted proportionality test? I am dubious, given the indeterminacy of all three components—which Blum herself acknowledges. And that skepticism is based on treating the three components as *objective*, determining anticipated military advantage, anticipated incidental damage, and the relationship between the two from the perspective of the “reasonable military commander.”<sup>24</sup> Most proportionality standards, however, determine whether an attack was disproportionate from the military commander’s *subjective* perspective. The Rome Statute, for example, only criminalizes attacks that the commander *knew* were clearly excessive; negligent calculation (of any of the components) is not enough.<sup>25</sup> I fail to see how judges could fashion a workable CDR out of such a subjective proportionality standard, unless they simply decide to adopt a rebuttable presumption that the proportionality claims of weak military commanders are generally more credible than the proportionality claims of strong military commanders.<sup>26</sup> That kind of differential credulity, however, hardly seems legitimate, for all of the reasons discussed in the previous section.

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<sup>24</sup> See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 252 (2007) (noting that even the objective test does “not provide measurable ratios of military advantage and civilian damage that would be considered disproportionate”).

<sup>25</sup> See Rome Statute, *supra* note 9, art. 8(2)(b)(iv); Addendum Part II, Finalized Draft Text of the Elements of Crimes, Preparatory Comm’n for the Int’l Crim. Court, Mar. 13–31, June 12–30, 2000, art. 8(2)(b)(iv), element 1, n.37, PCNICC/2000/1/Add.2 (Nov. 2, 2000) (providing that “this knowledge element requires that the perpetrator make the value judgement as described therein”).

<sup>26</sup> This is why Blum’s second example, the duty to take precautions, is a better candidate for a CDR: the extent of the duty is determined objectively, not subjectively. See Blum, *supra* note 1, at 192–93.

There is a reason, in short, that “prosecutors have generally avoided pursuing cases of disproportionate targeting, preferring to focus instead on the deliberate or indiscriminate targeting of civilians”:<sup>27</sup> the proportionality standard is so heavily skewed toward military commanders that only the most blatantly disproportionate attacks will ever run afoul of the prohibition.<sup>28</sup> That fact, I think, dooms any attempt to create a proportionality-based CDR: an attack sufficiently disproportionate to violate the principle of proportionality would be sufficiently disproportionate under *any* interpretation of the proportionality standard. Holding weak and strong military commanders to different standards would thus have no practical effect.

#### IV. OVERESTIMATING AND UNDERESTIMATING COMPLIANCE

Blum argues that “the incentives to defect from humanitarian constraints would be more powerful than in other cooperative regimes,” such as IEL and ITL.<sup>29</sup> She bases that argument on two considerations. First, noncompliance with environmental and trade agreements harms the defecting state because a “critical mass of compliance” is necessary to achieve the agreements’ intended benefits, such as reducing global warming or expanding the global marketplace.<sup>30</sup> Compliance with IHL, by contrast, “does not necessarily contribute to a party’s own welfare,” because violating humanitarian rules can often increase that party’s ability to prevail in an armed conflict.<sup>31</sup> Second, unlike IEL and ITL, which directly regulate only the actions of states, IHL also purports to bind nonstate actors, like rebel groups and terrorists. Such nonstate actors have little interest in complying with IHL, however, because the rules of IHL do not directly benefit them; unlike government forces, they do not possess combatant’s privilege and are not entitled to be treated as prisoners of war (POWs) upon capture. The disappearance of reciprocity from IHL also means that they can violate those rules without thereby permitting their state enemies to do the same.<sup>32</sup>

Although I think Blum’s argument is generally correct, I have questions about both rationales. To begin, I think Blum overestimates the incentive for states to comply with environmental and trade agreements. There is no doubt, for example, that the failure to abide by IEL agreements limits the international community’s ability to slow down global warming. Yet that limitation has not prevented states—both developed

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<sup>27</sup> *Id.* at 190.

<sup>28</sup> See, e.g., Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEO. INT’L ENVTL. L. REV. 61, 83 (2007).

<sup>29</sup> Blum, *supra* note 1, at 199.

<sup>30</sup> See *id.* at 200.

<sup>31</sup> *Id.* at 200–01.

<sup>32</sup> *Id.* at 201–02.

and developing—from routinely violating the agreements or refusing to enter into them in the first place.<sup>33</sup> Their unwillingness is unsurprising: after all, the dangers of global warming are both long-term and highly attenuated, two factors that limit the willingness of states to take those dangers into account when setting economic policy.<sup>34</sup>

Conversely, I think Blum underestimates the incentive for states to comply with IHL agreements. As she acknowledges, a state that violates the rules of IHL is likely to discover that its enemy is willing to do the same.<sup>35</sup> Reciprocity may no longer be required by IHL, but few states will sit idly by while opposing forces indiscriminately attack their civilian population or torture their POWs. Moreover, unlike the dangers of global warming or structurally inefficient global markets, the danger of retaliation for violations of IHL is both direct and immediate—precisely the kind of danger that a rational state *will* take into account when determining military policy.

Blum is correct, of course, that nonstate actors have much less incentive to comply with IHL than states. Yet I believe she underestimates that incentive as well, particularly concerning rebel groups. First, rebel violations of IHL are particularly likely to lead to retaliation by the government—and that retaliation is particularly likely to involve significant violence. NIAC rarely attracts the same international scrutiny as IAC,<sup>36</sup> which means that the reputational cost to a state for retaliatory violations of IHL, even particularly violent ones, will normally be much less in NIAC than in IAC. Second, as I have explained elsewhere in the context of the ICC,<sup>37</sup> because of the difficulties involved in investigating war crimes committed by state agents, international criminal tribunals have generally dedicated the lion's share of their (meager) resources to investigating and prosecuting crimes committed by rebel groups. Rebels thus have far more reason than states to fear international prosecution for violations of IHL.

Although Blum does not specifically address these incentives, she suggests that one way to encourage weaker parties in an armed conflict—including rebel groups—to comply with IHL would be to create “a scheme of CDRs that raise the bar for the more powerful but only on the condition that the weaker party complies with its own,

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<sup>33</sup> See, e.g., Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis, in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1, 2–3 (Edith Brown Weiss & Harold K. Jacobsen eds., First MIT Press Paperback ed. 2000).

<sup>34</sup> See generally PAUL EKINS, ECONOMIC GROWTH AND ENVIRONMENTAL SUSTAINABILITY: THE PROSPECTS FOR GREEN GROWTH 242–82 (2000).

<sup>35</sup> See Blum, *supra* note 1, at 200 (noting that constraints on warfare are ultimately bilateral in application).

<sup>36</sup> There are exceptions, of course, such as the conflicts in Darfur and the Congo.

<sup>37</sup> See Heller, *supra* note 13, at 242.

relatively lower obligations.”<sup>38</sup> That is a brilliant insight, even if the likelihood of strong states ever supporting such a scheme is vanishingly small. It is important to note, though, that we would have to push the notion of a CDR to its breaking point in order to provide rebel groups with an incentive to comply with IHL that is greater than the incentive created by the factors discussed above. The problem for rebels is not that the rules of IHL are too difficult for them to satisfy or too easy for the government to satisfy; the problem is that even perfect compliance with IHL does not insulate them from domestic prosecution. Truly incentivizing rebel groups to comply with IHL would thus require granting them belligerent status, which would entitle them to the combatant’s privilege and POW treatment upon capture. Unfortunately, states would be even more unlikely to accept that development than they would be to accept differential application of IHL standards to rebels and terrorists, even if there is precedent for it—the most obvious example being the Union’s willingness to grant *de facto* belligerent status to the Confederacy during the Civil War, an act that was specifically justified by humanitarian concerns.<sup>39</sup>

#### V. CDRs IN NON-INTERNATIONAL ARMED CONFLICT

Although Blum notes that her analysis of CDRs “is intended to be generic for all conflicts,”<sup>40</sup> nearly all of her examples involve IAC. The lack of examples involving NIAC is unfortunate, not only because NIACs are now the rule rather than the exception,<sup>41</sup> but also—and perhaps more importantly—because the various normative rationales for incorporating CDRs into IHL look very different when the weaker party to a conflict is a rebel group instead of another sovereign state.

Consider, for example, the question of whether distributive concerns justify CDRs. Blum rightly emphasizes that CDRs are normatively appealing from the perspective of distributive justice<sup>42</sup> because stronger parties are better able to comply with humanitarian obligations than weaker parties. For example, stronger parties can make use of more technologically advanced weapons whose precision minimizes incidental civilian casualties. Stronger parties also have a greater ability to “shift war onto the enemy’s territory so that the enemy’s civilians face greater perils than the powerful country’s nationals.”<sup>43</sup> Those disparities are only magnified in NIAC: states are always richer and better equipped than rebel groups, and internecine warfare is almost always

<sup>38</sup> Blum, *supra* note 1, at 205.

<sup>39</sup> See JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 68 (1926).

<sup>40</sup> Blum, *supra* note 1, at 195.

<sup>41</sup> See, e.g., J. William Futrell, *Security Forces and International Treaties and Issues*, SG056 ALI-ABA 57, 71 (2002) (reporting that 97 of the 103 armed conflicts that took place between 1989 and 1997 were non-international).

<sup>42</sup> “Distributive justice,” as Blum defines it, “seeks to reallocate resources in an equitable way.” Blum, *supra* note 1, at 181.

<sup>43</sup> *Id.* at 208.

fought in rebel, not government, territory. Moreover, unlike in IAC, the stronger party in NIAC, the government, owes moral obligations to the civilian population of the weaker party, the rebel group. After all, those civilians remain citizens of the state against whom the rebels are fighting. For both of those reasons, the distributive justice case for CDRs will normally be far stronger in NIAC than in IAC.

The corrective justice<sup>44</sup> case may be stronger still. Blum says that, in general, “[a]n argument about corrective justice is not easily transposable to the sphere of war.”<sup>45</sup> But that argument is quite easily transposed to NIAC. Many, if not most, insurrections result from the systematic oppression of minority groups by a government. Rebel activity in Darfur is an example. In such situations, the so-called “Pottery Barn” rule—the idea that the government has to take ownership of a harmful situation that it creates<sup>46</sup>—clearly justifies CDRs designed to “correct...these past injustices” by requiring the government to assume greater responsibility for the humanitarian welfare of the rebels’ threatened civilians.<sup>47</sup>

#### VI. JUS AD BELLUM VS. JUS IN BELLO

Blum states that, “in remaining loyal to the skepticism of IHL with regard to dependence on jus ad bellum,” she “ignore[s] the question of whether the parties are conducting a just or unjust war.”<sup>48</sup> Her essay, however, indicates that her loyalty to that skepticism is divided at best. She openly acknowledges, for example, that there “may not be valid reasons to maintain that distinction” when considering the corrective justice rationale for enhanced obligations because identifying the “causes of suffering” sufficient to trigger the rationale “may be inextricable from the causes of the war and its justification.”<sup>49</sup> Similarly, although the frequency with which states go to war is a jus ad bellum consideration, Blum accepts that incorporating CDRs into IHL will have a powerful effect on the utilitarian calculus that states utilize to determine whether they will use armed force:

If CDRs raise the bar for stronger parties, these states may calculate the costs of war differently and exercise further caution against the use of military force to begin with; correspondingly, if soldiers and citizens of the more powerful party were aware of the increased burdens of war, they would be more hesitant to support their

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<sup>44</sup> Blum defines “corrective justice” as resting on “the idea that those who have contributed to causing harm must make amends to those who have suffered from it.” *Id.* at 183.

<sup>45</sup> *Id.* at 213.

<sup>46</sup> Expressed more colloquially as “you break it, you own it.” *See id.* at 214.

<sup>47</sup> *Id.* at 213.

<sup>48</sup> *Id.* at 197.

<sup>49</sup> *Id.* at 214–15.

government's belligerent policy. At the same time, the greater constraints on stronger parties might encourage weaker parties, believing they stood a greater chance of success, to initiate conflicts, thereby increasing the overall incidence of violence.<sup>50</sup>

To be clear, I come to praise Blum, not to bury her, for failing to consistently maintain the *jus ad bellum*/*jus in bello* distinction. Her essay stands as an eloquent indictment of that distinction because she demonstrates (intentionally or not) that it is impossible to normatively assess the obligations of the parties to an armed conflict without taking into account the comparative justness of their causes. I have already mentioned one example of that impossibility, the corrective justice rationale. Now consider the distributive justice rationale. Blum says—specifically addressing IAC—that “[i]n transposing distributive justice arguments onto war, the question arises whether the general moral obligations that are owed by one society to another endure when the two societies are at war.”<sup>51</sup> How can that question be answered without considering whether one party to the conflict is an aggressor and the other is simply defending itself? As far as I can tell, there is no coherent normative rationale for assuming that the mere act of State A using military force against State B—“mere” in the sense that we do not care why State A is using that force—frees State A of any and all moral obligations toward State B. Blum appears to agree with that conclusion.<sup>52</sup> But if moral obligations survive the use of force, it seems absurd to determine the content of the two states’ IHL obligations without taking into account the fact that State A’s use of force, unlike State B’s, was inconsistent with the *jus ad bellum*.

Indeed, Blum’s own analysis indicates why IHL cannot simply ignore *jus ad bellum* considerations. When discussing the relationship between democracy and “innocence,” for example, she argues that “[p]opular support—whether political, financial, or moral—of the government and armed forces may be enough in such cases to exemplify enmity and, *by way of analogy from self-defense doctrines*, would diminish any moral obligation to positively assist the civilian-attacker.”<sup>53</sup> There is the *jus ad bellum* again—and rightfully so. Why would popular support for a government that is acting in self-defense diminish the obligations of the invading state to provide the invaded state’s civilian population with aid? Similarly, although Blum is no doubt correct that “[a]ny assistance during wartime allows the enemy power to free up resources for the war effort,”<sup>54</sup> do we not care whether those additional resources will be used to resist aggression or to further it? Do we not *want* to limit the military power of aggressors while increasing the military power of the wrongfully invaded?

<sup>50</sup> *Id.* at 204.

<sup>51</sup> *Id.* at 209.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* at 210 (emphasis added).

<sup>54</sup> *Id.*

To be sure, none of these *jus ad bellum* considerations would justify adopting a CDR that held a wrongly attacked state to a *lower* standard of humanitarian protection than the state that wrongly attacked it. After all, the rationale for not requiring reciprocity in IHL is precisely that ordinary civilians and soldiers should not pay the price for their government's misconduct.<sup>55</sup> But Blum's essay brilliantly demonstrates that permitting *jus ad bellum* considerations to affect the interpretation of *jus in bello* obligations does not have to result in the under-protection of civilians and soldiers. There is no reason, for example, why CDRs could not be imposed on a strong aggressive state that would hold it to a *higher* standard of humanitarian protection than IHL normally requires, whether by requiring the aggressive state to take greater precautions before launching attacks, requiring it to launch more precise attacks in general, or requiring it to provide greater humanitarian relief to its civilian victims.<sup>56</sup> Such CDRs would help deter future wrongful attacks and maximize humanitarian welfare in invaded states without penalizing the aggressive state's civilians and combatants for their government's willingness to violate the *jus ad bellum*.

## VII. CONCLUSION

If there is a normative argument against imposing CDRs requiring higher standards of humanitarian protection on strong aggressive states, I cannot find it. Nor can I find any compelling justification for not requiring stronger states in general—aggressive or non-aggressive—“to spend more money on the deployment, procurement, or development of better intelligence and more discriminating munitions.”<sup>57</sup> Indeed, Blum seems to agree with at least the latter requirement: as she herself notes, such CDRs are supported by all four of the rationales discussed in the essay.<sup>58</sup>

Which leads me to the closest thing I have to a genuine criticism of Blum's remarkable essay: namely, that I find it difficult to understand why she is so reluctant to take a firm position on the normative desirability of CDRs. After all, Blum's own analysis indicates that the case for at least one kind of CDR—the obligation of strong states to invest in more precise weaponry—is normatively overwhelming no matter what one's politics. There is nothing even remotely “indeterminate” about the humanitarian impact of *that* CDR. So why not embrace it?

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<sup>55</sup> See, e.g., *United States v. List (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1247–49 (1950).

<sup>56</sup> See Blum, *supra* note 1, at 208–09.

<sup>57</sup> *Id.* at 194.

<sup>58</sup> See *id.* at 179–81 (describing utilitarianism), 181–83 (describing distributive justice), 183–84 (describing corrective justice), 184–85 (describing Samaritanism).

I recognize, of course, that openly advocating a "differential law of war" is fraught with political peril. All too often, such scholarship is used simply as a fancy pretext for either allowing Israel and the United States to launch disproportionate attacks against their enemies or allowing Palestinians and other oppressed groups to attack civilians or use human shields in "self-defense." But that, in the end, is the greatest strength of Blum's essay: she shows us how we can debate the normative desirability of CDRs without lapsing into debased political instrumentalism.