Jus in bello revisited*

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Introduction

One of the most crucial issues occupying students of the international law of war has been that of the legitimate means which may be employed in the process of using force to achieve objectives in the international arena. This issue is currently subject to renewed interest in the wake of the proliferation of revolutionary wars and the threat inherent in recourse to nuclear weapons. The purpose of the present article is to examine this in a comprehensive fashion in the light of these new developments with a view to determining whether the *jus in bello* still offers a viable framework for the restraint of conduct by parties engaged in armed conflict. In order to facilitate presentation, an analytical historical summary is provided prior to the discussion of the relevant contemporary legal questions.

ANALYTICAL HISTORICAL SUMMARY

Relationship between *jus in bello* and *jus ad bellum*

Whether the end justifies the means

Before examining the historical background relating to the rules of war themselves we ought to explore the relationship between the *jus in bello* and *jus ad bellum* as traditionally perceived. Specifically, attention should be paid to the relationship, if any, between the laws governing the warfare of belligerent nations and the 'justness' or 'unjustness' of the war which the nations are conducting. Particularly relevant in this respect are the questions whether constraints on means were considered applicable to 'just' wars or did 'the end justify the means', and whether such constraints were seen as equally applicable to the unjustly attacked party and the aggressor side.

Evidently, early and medieval thinkers maintained that a relationship

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between ends and means did exist. Relevant illustrations extend from Plato's endorsement of any atrocities in wars against non-Greeks and barbarians,[1] through Cicero's distinction between wars for survival – in which use of all means was justified – and wars for power and glory – requiring 'comparative clemency',[2] the approval by Aquinas, Ayala and Suarez of certain means to be used in just wars only,[3] to Victoria's insistence on just cause as a prerequisite to and as justifying the use of all means necessary for achieving victory.[4] Basically, the prevailing view was that 'restraints observed in warfare within Christendom did not apply in the "just wars" that Christians fought to defend, to purify or to extend their faith.'[5]

It should be emphasised, however, that the canonists' concept of 'end justifies the means' did not necessarily imply an antagonistic relationship between the *jus in bello* and *jus ad bellum*. Indeed, it has been observed by commentators that the *jus in bello* was regarded by medieval thinkers as the inevitable offshoot of the *jus ad bellum* and that the latter always contained, within its definition of just cause, severe limitations on the means to be adopted in its attainment.[6] This spillover of *jus ad bellum* into the realm of the *jus in bello* was aptly expressed in the following statement:

> The rules – the *jus in bello*, or the laws of war – had not been considered as independent of the principles of the *bellum justum* so long as the doctrine was regarded as potentially viable. Throughout the Middle Ages ... the assumption ... was that the war legitimately declared must be waged in accordance with legitimate means. Not only was it required that the amount of force used be proportional to the extent of injury suffered – Augustine's chief stipulation for limiting war – but the *bellum justum* theory also carried with it requirements as to the rights of combatants and the proper treatment of prisoners.[7]

In the classical era, however, the interest of jurists in the cause of conflicts or the rights and wrongs of any particular war markedly diminished and they concerned themselves primarily with what was and was not permissible in the conduct of war. This approach was reflected in the stand they took on the means-end question, namely that the end did not justify the employment of all means.[8] The focus on the legal permissibility of coercive means and the irrelevance of the rightness of war to the conduct of warfare was later to characterise early twentieth century writings as well.[9]

[1] See Plato *Republic* in Edith Hamilton and Huntington Cain (eds) (Princeton NJ Princeton University Press 1961) Bk V 469B.
[2] See Cicero *De Officiis* (New York The MacMillan Co 1921) Bk 1 Chap XI 38 41.
[3] See St Thomas Aquinas *Summa Theologicae* (New York Benzinger Brothers 1919) II–II Quaest 40 arts 3 and 4; II–II Qu 66 art 8 ad 1; II–II Qu 57 obj 2 and ad 2; Balthazar Ayala *De Iure et Officiis Bellicis et Disciplina Militaria Libri III* (J Westlake ed) (Washington Carnegie Institution 1921) Chap V Para 1 at 35; Francisco Suarez 'De Bello' *De Triplici Virtue Theologica, Fide, Spe et Charitate* in JB Scott ed *Selections from Three Works by Suarez* (Oxford Clarendon Press 1944) Bk I Chap VII Para 22 at 840.
[4] Franciscus de Victoria 'On the Law of War' *De Indis et de Iure Belli Relectiones* (Washington Carnegie Institute 1917) Paras 37, 39 at 179, 180.
[5] Michael Howard 'Temperamenta Bellii: Can War be Controlled?' in Michael Howard ed *Restraints on War* (London Oxford University Press 1979) 5.
[6] See FM Russel *Theories of International Relations* (New York D Appleton-Century 1936) 78.
[7] Lynn H Miller 'The Contemporary Significance of the Doctrine of Just War' (1964) 16 *World Politics* 254 258.

Equality of application of jus in bello

Another aspect of the means-end question, that which relates to the equality of application of relevant rules to both aggressors and their victims, also merits consideration. Early exponents of the laws of war, such as Plato and Cicero, insisted on inapplicability of restrictions in wars against a particular type of enemy.[10] A more explicit distinction between 'just' and 'unjust' belligerents for the purpose of application of the *jus in bello* was expressed in writings in the fifteenth and sixteenth centuries.[11] Indeed, while the horrors of the Thirty Years War induced international legal theorists to search for means which would mitigate military ferocities and give rise to rules of conduct applicable to all combatants, the just/unjust dichotomy continued to filter through representative writings.[12] The distinction lost its force, however, in the nineteenth and early twentieth centuries. The numerous conventions regarding warfare, which were concluded in that period, embodied the principle of equal application,[13] stressing that laws of war were equally binding on a government 'attacked by a wanton and unjust assailant' and on the 'aggressor government.'[14]

To reflect back on the means-end relationship, it appears thus that the

[8] See Alberico Gentili *De Jure Belli Libri Tres* (Oxford Clarendon Press 1933) Bk II Chap XXIII 270–7; Hugo Grotius *De Iure Belli Ac Pacis Libri Tres* (Oxford Clarendon Press 1933) Bk III Chap IV Sec IV 644; Johann Wolfgang Textor *Synopsis Juris Gentium* (Washington Carnegie Institute 1916) Chap XVIII Para 15 at 187. A conflicting view was nonetheless adopted by Cornelius van Bynkershoek *Quaestionum Juris Publici Liberi Duo* (Oxford Clarendon Press 1930) Bk I Chap I Para 4 at 16.
[9] See Oppenheim-Lauterpacht *International Law* 6ed (London Longmans 1944) Vol II 174.
[10] For example, barbarians. See in this connection William Ballis *The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel* (The Hague Martinus Nijhoff 1937) 20; the arrogant, cruel or the perfidous – see Cicero *op cit* Bk I Chap XI 351 at 41).
[11] See for example Ayala *op cit* Chap V Para 7 (at 60); Gentili *op cit* Bk III Chap VII (at 320).
[12] See Grotius *op cit* Bk III Chap X, ss 1–11 at 716–8. It should be pointed out that Grotius vacillated between a position of disregard of the illegality of war on the part of an aggressor (*op cit* Bk III Chap IV sec IV) and attributing important consequences to the just/unjust war distinction (*op cit* Bk II Chap XV Sec XIII 1; Chap XXV Sec IV; Bk III Chap X Sec III 1; Chap I Sec V 3; Bk II Chap II Sec XIII 1 and Sec XIII 4); Christian Wolff *Jus Gentium Methodo Scientifica Pertractatum* (Oxford Clarendon Press 1934) Chap VII Para 778 at 402; but see qualification with respect to the 'voluntary law of nations' which was said by Wolff to apply equally to both belligerents *loc cit* Paras 890–1 455–6); Vattel considered that only the just side was permitted to exercise belligerent rights – see Emmerich de Vattel *Le Droit des Gens ou Principles de la loi Naturelle, Appliques à la Conduite et aux Affaires des Nations et de Soverains* (Washington Carnegie Institution 1916) Bk III Chap VIII Para 136 at 280.
[13] See Oppenheim-Lauterpacht *International Law*, 7 ed (London Longmans 1952) Vol II 217.
[14] See, for example, the well known formulation in General Orders No 100 of 1863, commonly known as Lieber Code art LXVII; reprinted in Leon Friedman ed *The Laws of War: A Documentary History* (New York Random House 1972) 158–86.

jus in bello in later times existed separately from the body of rules governing the right to go to war and indeed operated at different stages and spheres. While the *jus ad bellum* applied as part of the law of peace, the *jus in bello* was brought into operation once a state of war was declared. Arguably, such a separation hinged on a clear distinction between peace and war[15] and was rendered invalid as soon as such distinction became blurred. A tendency then manifested itself of reverting to a just war analysis under which an interaction between the *jus ad bellum* and *jus in bello* was inevitable.[16]

Importance of jus in bello in a just war doctrine

The exact nature of a possible relationship between *jus ad bellum* and *jus in bello* was not easily ascertainable at any juncture. Specifically, no clear guidelines emerge from the historical survey as to whether and to what extent violations of the *jus in bello* would render an otherwise 'just' war 'unjust'. Opinions varied between the perception of serious breaches of the principles and usages of war as constituting a 'just cause'[17] or justifying reprisals,[18] and the view that such infringements did not necessarily vitiate a war properly declared for a just cause.[19]

Some attempt has nonetheless been made to derive from sixteenth century natural law theories a possible classification of violations of *jus in bello* according to their gravity and to examine the circumstances under which they would or would not impugn an otherwise lawful character of war.[20] It is thus maintained, for instance, that occasional atrocities committed by troops against the instructions of their rulers or with the acquiescence of their rules, or incidental war crimes ordered now and then by the rulers would not render unjust a war which was just under other criteria, whereas an established habit of committing war crimes under the instructions of the rulers, a government policy prescribing the systematic commission of war crimes, or government policies constituting a distinct kind of criminal warfare would inevitably invalidate the lawfulness of the war under the *jus ad bellum*.[21]

Yet, modern international law analysts contend that notwithstanding the strong moral reprobation of the use of destructive measures beyond what was necessary to accomplish some legitimate end, such evils were,

[15]See discussion in Ian Brownlie *International Law and the Use of Force by States* (Oxford Clarendon Press 1963) 1–129.

[16]The validity of this proposition will be examined in the light of contemporary international law later in this article.

[17]See Aquinas *op cit* II–II Qu 40 Art 1.

[18]See Henry Wheaton *Elements of International Law* George Grafton Wilson (ed) (Oxford Clarendon Press 1936) Part IV Chap II 470.

[19]See Textor *op cit* Chap XVIII Paras 31, 35 at 190 191; Bynkershoek *op cit* Bk I Chap I Para 5 at 17.

[20]See EBF Midgley *The Natural Law Tradition and the Theory of International Relations* (New York Harper and Row Publishers 1975) 68.

[21]*Loc cit*.

prior to the First World War, not regarded as sufficiently great to make illegal, as a matter of general international law, resort to war or the use of particular weapons (except perhaps poison) or weapons aimed at particular targets.[22] There were, of course, specific commitments incorporated into positive law,[23] in addition to the moral revulsion against excesses, but no international consensus could be established on the legal binding force of rules of warfare so that their violation would result in illegality of the war itself.[24]

Basic principles of *jus in bello*

Three basic principles may nonetheless be discerned from the historical account as underlying traditional theories of restrictions in war. These encompass the principle of discrimination, which prescribes moral immunity of non-combatants from deliberate direct attack; the principle of proportionality which requires that the evil to be prevented be greater than the destruction involved in war; and chivalry which forbade resort to dishonourable or treacherous means, expedience or conduct.

The principle of discrimination

The first elaborate formulation of the principle of discrimination could possibly be traced to the Middle Ages.[25] The canonistic idea of immunity for non-combatants – while emphasising protection as a matter of right – was not, however, a comprehensive one. Immunity was only applied to people whose social function bore no relation to war making, thus excluding obvious groups such as women, children, the infirm and the aged. The latter nonetheless enjoyed full security under the chivalric code which compelled knights by virtue of their professionalism and a sense of *noblesse oblige* to confer protection and immunity on this category. In fact, by the

[22]See discussion in Alfred P Rubin 'Is War Still Illegal?' (1980) 18 *Indian Yearbook of International Affairs* 32 34–42.

[23]For example the 1868 ST Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight; 1899 Hague Declaration II Concerning Asphyxiating Gases; 1899 Hague Declaration III Concerning Expanding Bullets; 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; 1907 Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships; 1907 Hague Convention VIII Relative to the Laying of Submarine Contact Mines; 1907 Convention IX Concerning Bombardment by Naval Forces in Time of War; 1907 Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War – reproduced in Adam Roberts and Richard Guelff *Documents on the Laws of War* (Oxford Clarendon Press 1982).

[24]It is interesting to note in this connection that the various conventions and declarations made it clear that they cease to bind the parties as soon as the hostilities are joined by any non-party.

[25]Through the 'Peace of God' the church extended a mantle of protection from the ravages of war over specific classes of persons such as clerics, monks, friars and other religious workers, pilgrims travellers, merchants and peasants cultivating the soil; see James Turner Johnson *A Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ Princeton University Press 1981) 127.

end of the Middle Ages the two lists of non-combatants coalesced into one which laid the ground for the concept of non-combatant immunity.[26]

While the basic principle of discrimination remained constant throughout the history of the laws of war, different interpretations of the combatants/non-combatants dichotomy were evident. Thus the non-combatant idea was perceived under the chivalric code in terms of class distinction, limiting warfare as between knights and sovereigns. Theological considerations also affected the concept, resulting in a division of the enemy in accordance with their religious affiliations.[27] Reasons of morality prompted a further distinction between 'guilty' and 'innocent'.[28] Yet another, and more popular, definition of non-combatants reflected a 'functional' approach according to which protection was granted to those who were engaged in some occupation other than that of warfare (for instance, merchants, travellers, farmers) or, negatively, were unable to function as soldiers (for instance, women, children, harmless and undefended persons).[29]

The prohibition of harm to non-combatants had its counterpart in the prohibition of needless violence directed against the lands and cities of the enemy. A distinction was drawn between property which could be used by the enemy in its war effort and which was therefore a legitimate target and other property the destruction of which was thus impermissible.[30]

Others insisted that private property, namely that which has been subjected specifically to the service of the state, should be protected.[31] A harder line was taken in the nineteenth century in the interpretation of the 'private' domain of participants in war, including in it *inter alia* their economic activities.[32]

In fact, the combatants/non-combatants distinction was at no time absolute and certain exceptions were generally recognised. Thus under a doctrine of 'indirect intention' (or 'double effect') the unintentional and incidental (or 'collateral') killing of non-combatants was allowed.[33] Considerations of military necessity and 'vindictive justice' also encouraged the relaxation of the seemingly rigid distinction between combatants and non-combatants.[34]

[26]See *Ibid* 131–150.
[27]See for example Victoria *op cit* Para 36 at 79; Ayala *op cit* Chap V 19 at 42.
[28]See Suarez *op cit* Bk I Chap VII Paras 11–12.
[29]See Gentili *op cit* Bk II Chaps XXI and XXII at 251–69; Grotius *op cit* Bk I Chap XI Paras IX–XV at 734–40; Textor *op cit* Chap XVIII Para 17; Wolff *op cit* Chap VII Para 793 at 410–11; Vattel *op cit* Bk III Chap VIII Paras 145–7 at 282–3.
[30]See for example Textor *ibid* Chap XIII Paras 31–33 at 190–1.
[31]See for example Vattel *op cit* Bk III Chap XIII para 200 at 309.
[32]See in this connection Bryan Ranft 'Restraints on War at Sea Before 1945' in Michael Howard (ed) *Restraints on War op cit* 39 48ff.
[33]See Victoria *op cit* Paras 37 52 at 179 184–5; Grotius *op cit* Bk III Chap I Para IV at 600–1.
[34]See Suarez *op cit* Bk I Chap VII Paras 6–7, 11–12, 16–17; Gentili *op cit* Bk III Chap XII Para 575 at 35.

The scope of the 'military necessity' exception was not, however, clearly defined by the various theorists although the second half of the nineteenth century saw the development of a German interpretation, which in its theoretical essence focused upon the absolute right of the preservation of the demands of the military situation (*Kriegsraison*) over the laws of the customs of war (*Kriegsmanier*).[35] On the other hand, more limited notions of military necessity were reflected in the Hague Conventions of 1899 and 1907 which aimed at eliminating a possible conflict between military necessity and the recognised principles of laws of war.[36]

The principle of proportionality

Some form of allowance in respect of military expedience was invariably also acknowledged in connection with the second fundamental limitation on the conduct of war, namely proportionality.[37] It was clear in any event that while the principle of discrimination incorporated some element of 'absoluteness', at least as a defined goal, proportionality involved a relative calculation of the amount of military force that could be justified by the legitimate military necessity to achieve a specific war objective. No precise guidelines were provided however. Jurists merely reiterated the general principle that there should be a proportion between the amount of evil that was brought and the amount of evil it intended to avert.[38]

The principle of chivalry

More concrete rules were expressed with respect to the third limiting principle of chivalry, although the principle itself was never articulated as such. It has been generally explained as deriving from the sense of fair play and honour in combat and requiring 'a certain amount of fairness in offence and defence and a certain mutual respect between the opposing forces.[39] Falling into this category were restrictions concerning the use of 'dishonourable and treacherous means' such as the hiring of assassins and trait-

[35]See William V O'Brien 'The Meaning of Military Necessity in International Law, (1957) 9 *World Polity* 109 120.
[36]See *Ibid* 128.
[37]A discussion of the principle of proportionality is contained in most writings of the forefathers of international law. See for example Victoria *op cit* Paras 56–60 at 185–7; Suarez *op cit* Bk I Chap VII Paras 11–12; Gentili *op cit* Bk III Chap IV; Samuel von Pufendorf *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo* (New York Oxford University Press 1927) Bk II Chap XVI Para 6 at 139; Textor *op cit* Chap XVIII Para 5 at 185; Vattel *op cit* Bk III Chap VIII Para 137 at 279.
[38]Note that proportionality in this context refers to decisions as to what levels or means of force are proper as distinct from the proportionality which applies to the original decisions whether to use forceful means.
[39]Morris Greenspan *The Modern Law of Warfare* (Berkeley University of California Press 1960) 316.

ors,[40] the use of unscrupulous methods like poison, wild animals[41] and the pollution of drinking water,[42] the maiming of one's enemy[43] and perfidious behaviour towards him.[44]

Underlying rationales

It may thus be concluded that to varying degrees all traditional and classical theories embodied the three limiting principles alluded to above. Different motivations for the restraint of war were nonetheless emphasised. They included religious, moral and natural law sources with their primary concern that lives should be spared where possible and suffering diminished in order to 'humanise' the activitiy of warfare. Such sentiments appear to have dominated relevant thinking under ecclesiastical influence prior to the sixteenth century, aiming to reconcile the necessities of war with the ethical imperatives of the Christian religion.[45] More prudential considerations prevailed during the 'Grotian period' (seventeenth to nineteenth centuries) encompassing appeals to pragmatism and self interest,[46] utility and mutual advantage.[47]

In fact, the main notion highlighted throughout the 'golden age' of the *jus in bello* (from the Peace of Westphalia in 1648 to the Hague Conferences on the eve of the First World War) was that of prevention of 'unnecessary suffering', or a military advantage which was relatively small in comparison with the amount of suffering involved: 'It was less the desire to prevent or mitigate suffering than it was the desire to ensure that some semblence of order would be preserved even in war.'[48] Political factors also played a role in limiting the degree of brutality practiced in war. Thus, for example, the balance of power system of the eighteenth and nineteenth centuries which engendered flexibility in political alignments also had a restraining effect on the conduct of belligerents who envisaged the possibility of their enemies becoming allies at the turn of a war.[49]

[40]See Gentili *op cit* Bk II Chap VIII at 168–9; Pufendorf *ibid* Bk II Chap XVI Para 12 at 140; Vattel *op cit* Bk III Chap X Para 180 at 299–300.

[41]See Gentili *ibid* Chaps VI & VII at 157 159 163; Grotius *op cit* Bk III Chap VI Para XV at 65; Pufendorf *loc cit*.

[42]See Grotius *ibid* Para XVI at 652–3.

[43]See Gentili *op cit* Chap XVIII 295; Vattel *op cit* Bk III Chap VIII Para 156 289.

[44]See Bynkershoek *op cit* Bk I Chap I Para 4 at 16–7; Vattel *ibid* Chap X Paras 174–8 at 296–9; Wheaton *op cit* Part IV Chap II p 470.

[45]See commentary in Howard 'Temperamenta Belli' *op cit* 4.

[46]See for example Grotius's counsel of moderation for the beneficial effect it might have in relation to prospects of success in war; Grotius *op cit* Bk III Chap XII Sec VIII Paras 1 and 2 at 754, 755.

[47]See Vattel's argument against the poisoning of weapons 'in the interest of ... common safety' of 'all nations:' Vattel *op cit* Bk III Chap VIII Para 156 at 289; see also Pufendorf's observation that tempering of methods was desirable because the example set by a party to war might turn against him at a later instance: Pufendorf *op cit* Bk II Chap XVI 199.

[48]Robert E Osgood and Robert W Tucker *Force, Order and Justice* (Baltimore and London The Johns Hopkins Press 1967) 215.

[49]See in this connection Werner Levi *Contemporary International Law* (Boulder Colorado Westview Press 1979) 229.

Restrictions concerning specific means

A similar array of motivations underlied prohibitions of specific means. Essentially, objections were raised against specific means as being 'unfair' by the prevailing criteria of honour, fairness, ethics, morality and so on, or because they were more devastating than need be. Most notable in this respect were prohibitions pertaining to the use of poisoned weapons or the more specific proscription of indiscriminate poisoning of water supplies and foodstuffs.[50]

Examples notwithstanding, efforts to restrict the actual weapons of war were not a common feature of the just war tradition.[51] Restrictions concerning particular weapons became more prevalent at a later period, presumably because science and technology began to make a decisive mark on warfare. These developments led to the adoption of numerous declarations and conventions,[52] reinforcing the customary principle prohibiting the use of means of warfare causing unnecessary suffering.[53] Such rationale was, for instance, behind the prohibition in 1868 of 'projectiles weighing less than 400 grams which are either explosive or charged with fulminating or inflammable substances,' and the prohibitions in 1889 of 'bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions' and asphyxiating gases. Similarly, restrictions with respect to the 'laying of automatic submarine contact mines' provided for in the 1907 Hague Convention reflected the desire 'to safeguard the life and interests of neutrals and non-combatants', while the disapproval of perfidious behaviour seems partly to underly the 1899 and 1907 Hague Declaration on 'discharge of projectiles from balloons' and the prohibition of 'poison and poisoned weapons'.

[50]See for example Grotius *op cit* Bk III Chap VI Secs XV–XVI at 651–53; See also Vattel's opinion that bombardment of cities with red-hot cannon balls was a violation of non-combatant immunity Vattel *op cit* Bk III Chap VIII Para 166 at 292–3.

[51]See however Frederick H Russel *The Just War in the Middle Ages* (Cambridge Cambridge University Press 1975) 156ff for a reference to the canonical attempt, in the late eleventh or early twelfth centuries, to prohibit Christians from fighting one another with bows and arrows, crossbows and siege weapons. Some restrictions on specific weapons could also be found in writings by Vattel (ie with respect to bombardment of cities with red-hot cannon balls having indiscriminate incendiary effect) Vattel *op cit* Bk III Chap IX Para 169 at 294 and Grotius (ie with respect to the use of poison in war) Grotius *op cit* Bk III Chap IV Paras XV–XVI at 651–3.

[52]The 1868 St Petersburg Declaration followed, for example, the development of bullets which exploded upon contact with a hard surface. Other conventions were similarly the product of technological advances (see in this connection the list in n 24 *supra*).

[53]This general principle was later embodied in article 23(e) of the Regulations annexed to the 1899 Hague Convention II and 1907 Hague Convention IV. The following analysis is based on Antonio Cassesse's discussion of 'Means of Warfare: The Traditional and the New Law' in *The New Humanitarian Law of Armed Conflict* (Napoli Editoriale Scientifica Srl 1979) 161 168–170.

CONTEMPORARY APPLICATION OF THE CRITERION

Relationship between *jus in bello* and *jus ad bellum*

As might have been deduced from the preceding historical analysis, the relationship between *jus in bello* and *jus ad bellum* is by no means unequivocal. In fact, a common assumption in this regard is that the idea of restraint on war is totally alien to the very nature of war. Clausewitz's famous opening statement in his *On War* is generally cited to express such a sentiment. 'War,' he stated, 'is an act of force to compel our enemy to do our will ... To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.'[54] A milder form of scepticism was echoed by the International Law Commission in its first session in 1949 when the majority of its members considered that as war had been outlawed the regulation of its conduct ceased to be relevant. Furthermore, it was thought that 'if the Commission, at the very beginning of its work were to undertake [the study of the laws of war] public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for making peace.'[55]

Such arguments have nonetheless been forcefully refuted by a number of writers. In an illuminating discussion of war and its limitations, Clark, for instance, argues convincingly that war is not in essence necessarily limitless or uncontrollable.[56] A leading authority on the history of war has further contended not only that the control of the conduct of war is not inherently impossible but that without control and limitations war cannot be conducted at all.[57] 'Military activity,' says Howard, 'carries an intrinsic imperative towards control, an imperative derived from the need to maintain order and discipline, to conserve both moral and material forces and ensure that these are always responsive to discretion.'[58] It is Howard's conclusion that it is only through the combination and harmonisation of deliberate, controlled and purposeful acts of force that the ultimate political objectives of war can be attained.[59] Indeed, Clausewitz himself recognised elsewhere in his text that in practice restraints are imposed on war by its political objectives.[60] Whether war is a political, legal or moral condition,

[54]Carl von Clausewitz *On War* (M Howard and P Paret eds) (Princeton NJ Princeton University Press 1976) 75.
[55]UN GAOR 4th Sess Suppl 10 Doc A/925 (1949) Para 18.
[56]See Ian Clark *Limited Nuclear War: Political Theory and War Conventions* (Oxford Martin Robertson 1982) esp at 24–38.
[57]See Howard 'Temperamenta Belli' *op cit* 4.
[58]*Ibid* 4–5.
[59]*Ibid* 3.
[60]Clausewitz op cit 81.

as has been suggested by various scholars, some form of restraint – political, legal and moral respectively[61] – is invariably built into it.

The lesser claim that the *jus in bello* is superfluous in view of the rules proscribing war was aptly met by Hersch Lauterpacht when he propounded that '[b]anished as a legal institution, war now remains an *event* calling for legal regulation for the sake of humanity and the dignity of man.'[62] A more vigorous response to the 'over optimistic' argument pertaining to the irrelevance of laws of war in the light of the abolition of war has been provided by Kunz. In a careful analysis of the position of war in treaty law and in the practice of states before and after World War II, he has sought to demonstrate that war has not been 'abolished'.[63] He has additionally claimed the support of leading international lawyers when stating that as a rule of international law, a war, even if illegal under the Pact of Paris, did nonetheless constitute a war or a large-scale fighting and as such was subject to the laws of war.[64]

The relevance and justification of the *jus in bello* is also vindicated by other students of war. Geoffrey Best, for instance, in his thorough review of the development and implementation of the laws of war appears to have successfully rebutted the recurring criticisms that such laws could be discounted as a standing failure and even as positively harmful (by making war more palatable).[65] It may indeed be asserted with some confidence that it is not the existence of the rules for the conduct of war which causes states to resort to force but more fundamental factors in international relations.[66] Nor is there any support for the contention that if there were no restraints on war states would be more likely to avoid it. On the positive side, evidence has been advanced to show that the laws of war have actually influenced the behaviour of persons in time of war and that 'violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them.'[67]

[61]With respect to political constraints see Clausewitz *loc cit*. See Luigi Sturgo *The International Community and the Right of War* (London Allen and Unwin 1929) 89 for the view that 'the concept of war is ... restricted to its function and aspect as a lawful institution.' For the position that war is a moral condition and as such subject to moral restraints see Michael Walzer *Just and Unjust Wars* (New York Basic Books 1977) 36.
[62]Quoted in Lothar Kotsch *The Concept of War in Contemporary History and International Law* (Geneva Librairie E Droz 1956) 294.
[63]Josef L Kunz 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' (1951) 45 *AJIL* 37 46–57.
[64]*Ibid* 55.
[65]See Geoffrey Best *Humanity in Warfare* (London Weidenfeld and Nicolson 1980).
[66]See in this connection Geoffrey Blainey *The Causes of War* (London Macmillan 1973); Martin Nettleship R Dalegivens Anderson Nettleship *War, Its Causes and Correlates* (The Hague Mouton Publishers 1975); Michael Howard *The Causes of War and Other Essays* (London Temple Smith 1983).
[67]Telford Taylor *Nuremburg and Vietnam: An American Tragedy* (New York Time Books 1970) 40.

Yet some commentators maintain that there is an inevitable antagonism between the *jus in bello* and *jus ad bellum* in that an emphasis on one would hamper the development of the other. Such a view has been expressed by a distinguished jurist in the field of the laws of war who asserts that 'the importance attributed to the idea of just war throughout the Middle Ages and well into the seventeenth century undoubtedly delayed the appearance of a body of rules restraining the more barbarous practices of warfare,'[68] and, conversely, a 'very substantial progress towards making the conduct of war less brutal was achieved at a time when the idea of just war had virtually been abandoned.'[69]

Other perspectives may nonetheless be adopted. That the two sets of rules differ in nature, range of application and consequences of violation is evident. The *jus ad bellum* is still composed, for the most part, of broad general principles such as those enunciated in articles 2(4) and 51 of the UN Charter which lend themselves to conflicting interpretations. Attempts to provide a detailed definition of what constitutes aggression and under what circumstances would a use of force amount to aggression, have not been entirely successful. By contrast, the *jus in bello* generally consists of elaborate rules which allow for a comparatively easy application. Moreover, such application is far wider than that of the *jus ad bellum* in that the latter is addressed to the leaders of a state and its policy makers whereas the former imposes obligations on all servicemen, whatever their rank, and, indeed, on the entire civilian population.[70] The extent of criminal liability following a violation also marks a difference between the two sets of rules. As aptly evidenced by the practice of the international military tribunals established in Nuremburg and Tokyo after the Second World War, only a very limited range of people are liable to prosecution on charges of violation of the *jus ad bellum* (crimes against the peace), namely only those who are actually involved in the high level planning or waging of wars of aggression.[71] The *jus in bello*, on the other hand, imposes liability on those who carry out decisions as well as on those who make them, thus allowing conviction for war crimes of both soldiers and generals.

The differences between the *jus ad bellum* and *jus in bello* notwithstanding, the two constitute 'complementary systems of rules which are capable of being studied and applied separately but which must both be considered

[68]Gerald Draper 'The Idea of the Just War' (August 1958) 40 *The Listener* 221 222.
[69]*Ibid* 223.
[70]Note in this connection for example article 127 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War and article 144 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War which impose an obligation on the High Contracting Powers to disseminate the texts of the respective Conventions and incorporate their study in relevant military and civil programmes 'so that the principles thereof may become known to all their armed forces and to the entire population.'
[71]See in this connection Ian Brownlie *International Law and the Use of Force by States op cit* 195 *et seq*.

in evaluating the legality of a state's use of force'.[72] Nonetheless, the nature and extent of this relationship is not conclusively established and conflicting perceptions abound. Indeed, the contemporary debates surrounding the laws of war have triggered anew an old aspect of the relationship, namely whether the *jus in bello* binds the aggressor and defender alike.

One claim advanced in this respect is that which underlay the request by several delegates to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Armed Conflict Applicable in Armed Conflicts (1974–1977) to include in the Additional Protocol on Armed Conflicts ('Protocol I') the definition of aggression as laid down by the General Assembly. According to the Rumanian representative a distinction between an aggressor and its victim was well recognised in international law and should be the starting point in any restatement of international humanitarian law.[73] A firm conviction against any attempt to place both parties to an international armed conflict on an equal footing was clearly expressed by the delegate from the Democratic Republic of Vietnam who considered a distinction in this respect to be grounded in 'logic, intelligence and morality' as well as in 'modern positive law.'[74] The Soviet Union representative echoed earlier communist sentiments when he insisted that a party resisting armed attack should be able to carry out all the military operations required for its defence and to make maximum use of any military advantage it might gain.[75]

The Soviet approach to the problem of the relationship between *jus in bello* and *jus ad bellum* was well exemplified in the rhetorical questions raised in 1946 by a professor of international law at the University of Moscow

> [C]an we demand observance of the Hague rules of military occupation (respect for sovereignty of the local government and so on) in the event of the occupation of the territory of an aggressor state by troops of peace-loving nations? Or can we permit the thought that in such a case the occupation army would provide armed protection for those same reactionary social forms and political institutions which led the country on

[72]Christopher Greenwood 'The Relationship between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 *Review of International Studies* 221, 233.
[73]See Conference Documents CDDH/III/SR 15 10. See also the statement by the Chinese delegate 'Wars were divided into two kinds, just and unjust. Imperialism was at the root of all wars of aggression ... The first step in protecting victims of international armed conflicts was therefore to condemn imperialist policy of aggression and to mobilise the people of the world in a resolute struggle against the policies pursued by the imperialist countries. Moreover, *a distinction between just and unjust wars should be made in the new Protocols* ... [emphasis added]' CDDH/III/SR 12.
[74]See CDDH/III/SR 16 at 9.
[75]See CDDH/III/SR 15 at 8. It should be noted again that according to the orthodox Soviet doctrine the justness of the war is basically determined by its political characteristics, the actors and their aims. Those guided by just aims in turn would inevitably use just methods and their progressive aims would yield just consequences. See Julian Lider *On the Nature of War* (Westmead Farnborough Hants Saxon House 1977) 221. Lider nevertheless suggests that it is more widely accepted now amongst Soviet writers that the character of the means used in war affects the character of the war as a whole.

> the path of international crime? And, conversely, can we confine a sacred people's war against an aggressor and enslaver, a heroic struggle of millions of people for their country's independence, for its national culture, for its right to exist, can we confine this war within the strict bounds of the Hague rules, which were concluded for wars of a different type and for a totally different international situation?[76]

Such a line of thought was adopted by several representatives at the Diplomatic Conference who maintained that 'freedom fighters' could not and should not be held to the same standards of international conduct expected of states and their uniformed combatants. This type of reasoning led to vehement discussions over article I of Protocol I which provides for the application of the Protocol in situations

> in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination as enshrined in the Charter of the UN and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN.[77]

As noted above, the perception underpinning this development is that those fighting for just cause must not be fettered by traditional principles that will stand in the way of the achievement of their goals. Article 1 has thus reaffirmed the idea incorporated in the General Assembly Resolution on the Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes[78] that colonialism in all its forms and manifestations is a crime which 'all colonial people have the right' to oppose by 'all necessary means at their disposal.' A further implication of deeming colonialism an international crime and highlighting the just nature of struggles against colonial powers and alien domination is that individual combatants opposing such struggles are liable to be viewed as participants in a criminal war and treated as criminals rather than as prisoners of war if captured.

In fact, a similar notion had lurked behind the Soviet Bloc's reservation to Article 85 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ('POW Convention')[79] to the effect that prisoners of war convicted of war crimes and crimes against humanity under the Nuremberg principles would be treated as common criminals.[80] Coupled with the communist doctrine of war crimes and crimes against humanity –

[76] Eugene A Korovin 'The Second World War and International Law' (1946) 50 *AJIL* 742 753.

[77] The full text of the Protocol is reproduced in (1977) 16 *ILM* 1391–1441 as well as in (1978) 72 *AJIL* 457 502.

[78] UN General Assembly Resolution 3103 (XXVIII) (12 Dec 1973).

[79] Article 85 provides that prisoners of war prosecuted for pre-capture offences retain the applicable benefits accorded to all prisoners under this Convention even if convicted.

[80] Such a reservation also affected the treatment of US prisoners held captive by North Vietnam who were denied POW status on the ground that they were war criminals (in spite of the fact that they were not prosecuted for any war criminals). Indeed, according to a North Vietnamese statement submitted to the Diplomatic Conference in 1974 only the just party – ie the resisters of imperialistic aggression – has any legal rights. See CDDH/41 (12 Mar 1974).

which is sufficiently broad to include persons fighting against socialism and self determination – a denial of prisoner of war status to the latter would be a most likely outcome. At the same time a privileged status is to be accorded to 'combatants struggling against colonial and alien domination and racist regimes' whose treatment, when captured, 'should be in accordance with the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.'[81]

A parallel relationship between *jus in bello* and *jus ad bellum* seems to underly the distinction imposed under Protocol I between mercenaries and foreign volunteers with respect to the conferment of the protected status of combatants and prisoners of war. Evidently, mercenaries are now to be deprived of such protection and downgraded to the status of unlawful combatants[82] because they are motivated to take part in hostilities by the mere 'desire for private gain'[83] whereas other foreign participants who are prompted by their political convictions benefit in full from humanitarian protection. This standpoint had an earlier manifestation in General Assembly Resolution 3103 which stated that

> [t]he use of mercenaries by colonial and racist regimes against national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.[84]

It appears thus that protection under *jus in bello* is made dependent on the *jus ad bellum* of the parties involved in the conflict with the result that individual combatants fighting on the 'wrong' side may be considered as 'war criminals' and treated as such – a position reminiscent of that which existed under the medieval doctrine of just war – whereby those whose cause was deemed unjust could be viewed by their opponents as bandits and lacking any right of fair treatment.

Such a state of affairs is nonetheless unacceptable to a great number of international jurists who point to the dangers inherent in an ideologically biased approach to the law of war. Five reasons have been put forward by Best[85] in formulating his objections and in support of a non-ideological humanitarian standpoint. First, 'conviction of righteousness slides easily into self-righteousness, is not the best state of mind for moderation, objectivity and the practice of human kindness.' Second, history suggests that 'just war' language is generally taken most seriously by 'groups and governments whose acts and policies show them to be the most ruthless.' Third, also supported by history is the fact that belligerent states have occasionally 'been led by overmuch conviction of righteousness into policies most immoderate and inept.' Fourth, the assumption underlying court

[81] Article 4 General Assembly Resolution 3103 (XXVIII) *op cit*.

[82] Article 47 of Protocol I stipulates that '1. A mercenary shall not have the right to be a combatant or a prisoner of war.'

[83] See definition of 'mercenary' in article 47(2) of Protocol I.

[84] Article 5.

[85] See Best *Humanity in Warfare op cit* 7–8.

decisions concerning the law of war and commentators' analysis of it is th
'each party is neither more right nor wrong than the other in having gon
to war in the first place' and that 'all laws of war must assume that bot
parties are equally in the right.' Finally, in practice any decision concernin
the merits of the conflict is meaningless given the fact that the participan
would almost always be convinced of the justness of their cause.

The main objection, however, is for the most part framed in terms o
the humanitarian rationale of the *jus in bello*. It is emphasised that the law
of war are designed primarily to prevent unnecessary suffering and th
they have always been based on the presumption that the individual soldi
would not be held responsible for the decision of his state to wage war.
would, therefore, be unquestionably contrary to the object and spirit of th
laws of war if soldiers and civilians of an alleged aggressor were made t
suffer unnecessarily for acts of leaders over whom they have little or n
control. Moreover, if each side considered the other was in the wrong, an
denied it the benefits of the laws of war, the suffering would be immense.

Reference to the 1949 Conventions, the Hague Rules and other re
evant provisions clearly reveals that the rights and protections accorde
under those instruments apply equally to all combatants and civilians wh
suffer and die in armed conflicts.[86] A fundamental conception is embodie
therein which does not permit legal and humanitarian protection to var
according to the motives of those engaged in a particular armed struggle o
be based on political concepts and expediency or generally determined i
accordance with non objective and non legal criteria.[87]

It is in any event highly questionable whether the motives of a comba
tant for his participation in international armed conflicts could furnish
sound basis for selective and unequal application of the law of war. Th
limited validity of a distrinction grounded on such motives is particularl
apparent with respect to mercenaries vis-à-vis other individuals fighting i
the service of foreign governments. The strong criticism voiced by writer
against the withdrawal of humanitarian protection from mercenaries rest
inter alia on the submission that

> one cannot *ex cathedra* postulate that mercenaries do not have some sort of politic
> convictions in defence of which they are equally fighting or that there is no interna
> ional volunteer who does not make his living from participating in wars of nation
> liberation.'[88]

[86]This principle of equal application is also firmly stated in the Preamble to Protocol I i
which the parties reaffirm 'that the provisions of the Geneva Conventions of 12 Augus
1949 and of this Protocol must be fully applied in all circumstances to all persons who ar
protected by those instruments, without any adverse distinction based on the nature o
origin of the armed conflict or on the causes espoused by or attributed to the parties to th
conflict.'

[87]Arguments reflecting these sentiments were raised in the Diplomatic Conference by th
delegates from the UK (see CDDH/I/SR 2 at 13), France (*ibid* 14), US (*ibid* 15), Canad
(CDDH/I/SR 3 at 6), Spain (*ibid* 6), Switzerland (*ibid* at 5).

[88]Dan Ciobanu 'The Attitude of Socialist Countries' in Cassesse, ed *The New Humanitaria
Law of Armed Conflict op cit* 399 415. See also the critical analysis in HC Brumester 'Th
Recruitment and Use of Mercenaries in Armed Conflict (1978) 72 *AJIL* 37 55–6.

In the final analysis, says Dinstein,

> the contrast between villains (mercenaries) and saints (foreign volunteers like those who shed their blood for liberty and justice, as members of the International Brigades in the Spanish Civil War) is chiefly in the mind of the beholder . . . mercenaries will be placed beyond the pale not because of their frame of mind, but because of that of their judges.'[89]

From a more pragmatic point of view, it is also doubtful whether depriving mercenaries of the protection of the laws of war will deter them from offering their services to foreign governments. The more likely outcome is that once the mercenaries are on the battlefield (for whatever reason) they would not secure to their adversaries greater protection than that which they expect for themselves if captured, and thus the implementation of international humanitarian law would be undermined and armed conflicts rendered even more violent.[90]

Similar fears had also been raised twenty years earlier with regard to the proposition that the laws of war should only apply selectively in the case of enforcement actions undertaken by the UN against an aggressor. Such a conclusion emerged from a report entitled 'Should the Laws of War Apply to UN Enforcement Action?' which was produced in 1952 by the American Society of International Law Committee on Legal Problems of the UN.[91] The Committee stated that

> 'the purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the UN . . . The UN should not feel bound by all the laws of war as may seem to fit its purposes (e.g. prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes.'

The Committee thought it 'beyond doubt that the UN, representing practically all the nations of the earth, has the right to make such decisions.'[92]

The report attracted considerable criticism which focused on the irreconcilable position of the selective and unequal application of the law of war with its humanitarian inspiration. An unequivocal rejection of the idea of discrimination was expressed for example by Judge Max Huber who reasserted the notion that a 'minimum of humanity must be guaranteed even in hostilities contrary to international law.'[93] Specifically, the application of the laws of war to UN forces has been formally reaffirmed by the Institute of International Law in its 1971 'Zagreb Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in

[89]Yoram Dinstein 'The New Geneva Protocols: A Step Forward or Backward?' (1979) 33 *The Yearbook of World Affairs* 265 272–3.

[90]See Ciobanu's critique *op cit* 414.

[91]See *Proc Am Soc Int L* (1951) 216–220.

[92]*Ibid* 220.

[93]Max Huber 'Quelques Considerations sur une Revision Eventuelle des Conventions de la Haye Relatives a la Guerre, (1955) 37 *Revue Internationale de la Croix Rouge* 417 433.

which UN Forces May be Engaged'[94] which provides that such rules 'mus be complied with in all circumstances by UN Forces which are engaged i hostilities' (article 2).

The important determinant of reciprocity in this connection has als been emphasised by several writers, drawing attention to the fact tha states, including those which wage war unlawfully, are induced to compl with the laws of war by the consideration that it had been established prio to hostilities in a form acceptable to both belligerents and applied equally t both of them without conferring any undue military advantage on th other belligerents.[95] Indeed, it is further contended that states have ac cepted laws of war only on the condition of reciprocity: *non facio ne facia* Hence, 'the principle of equality is the basis of the laws of war' and ther 'would be no laws of war without reciprocity.'[96]

With respect to the specific application of the laws of war to UN forces, Baxter has strongly asserted that

> '[i]f the UN armed forces are bound by no law whatsoever, the unlawful belligeren will justifiably conclude that there is absolutely no reason why it should be subject t any of the usual legal restraints. The throwing off of legal obligations will inevitabl be mutual. Those whom the law of war seeks to protect will be the ones first t suffer.[97]

From a realistic perspective it may also be noted that a successfu aggressor cannot be denied the fruits of his aggression and, in the interes of stability, the factual situation would need to be recognised *ex factis ju oritur*.[98] For reasons such as these, jurists have tended to favour the view that 'it is very desirable that the laws of war be observed by and applied t both sides in a conflict as a matter of common sense and humanity.'[99] Ample support for this view is also found in state[100] and judicial[101] practice

[94]Reproduced in (1972) 66 *AJIL* 465–8.

[95]See in this connection Richard R Baxter 'Forces for Compliance with the Law of War' (1964) *Proc Am Soc Int'l Law* 82.

[96]See Denise Bindschedler-Robert *Report of the Conference on Contemporary Problems of th Law of Armed Conflicts*, held in Geneva 15–20 September 1969 (New York 1971) [hereafte Bindschedler Report] at 98.

[97]Richard R Baxter 'The Role of Law in Modern War' 1953 *Proc Am Soc Int'l Law* 90 96; see also Josef L Kunz 'The Laws of War' (1956) 50 *AJIL* 313, 319; and sources cited therein.

[98]See Quincy Wright 'The Strengthening of International Law,' 98 *Hague Recueil* (1959–III) 6, 156.

[99]Brownlie *International Law and the Use of Force op cit* 407.

[100]See for example US Department of the Navy *Law of Naval Warfare* (Washington Dept of the Navy 1955) Sec 200; US Department of the Army *The Law of Land Warfare* FM 27–10 (Washington Dept of the Army 1956) Para 8a; UK War Office *The Law of War on Land Being Part III of the Manual of Military Law* (London War Office 1958) Para 7. See also Jaro Mayda 'The Korean Repatriation Problem and International Law' (1953) 47 *AJIL* 414–38 for a discussion of the application of the rules of warfare by both sides in the hostilities in Korea.

[101]See decisions of military tribunals of the US, UK, France, Belgium, Italy and the Netherlands reported in the *Annual Digest* 1946–9 particularly (1947) No 126, at 288–9; (1948) 215, at 636–7. See also cases considered by Hersch Lauterpacht 'The Limits of the Operation of the Law of War' 30 (1953) *BYIL* 206, 215–220. Neither the judgments of the International Military Tribunal of Nuremberg (1946) nor its counterpart in Tokyo (1948) considered that the armed forces or civilian populations of the aggressor states were automatically beyond the pale of international law or that resort to war without *jus ad bellum* justified the opponents of these aggressors in disregarding the rules of warfare (though it should be added that the question was not before either of these tribunals). See in this connection George Schwarzenberger *Report on Self Defence Under the Charter of the UN and the Use of Prohibited Weapons* (London International Law Association Brussels conference 1962) 14–19.

Some attempt has nonetheless been made to distinguish between rules of warfare applying *durante bello* and those which become applicable upon the cessation of hostilities. Hersch Lauterpacht – wavering between the approval of the principle of different treatment and the observation that the general application of the principle of discrimination between belligerents would render the law of war ineffective and result in a dehumanisation of warfare – advocated a 'compromise' solution whereby at least the 'humanitarian' rules of war should be applied equally during the war while different treatment should be relegated to the *post bellum* period.[102] In a similar vein, Quincy Wright contended that in matters such as the occupation of enemy territory, destruction of its armed forces or the appropriation of its property 'the aggressor enjoys none of these powers but states engaged in defence or enforcement may exercise all of them in so far as military necessities require.'[103] The illegal belligerent must also pay reparations for all damages to life and property which have resulted from his military operations, whereas the legal belligerent owes only reparation for acts done in violation of the laws of war.[104]

The rationale underlying the distinction between *durante* and *post bello* was expertly explicated by Baxter,[105] who emphasised that while hostilities are in progress there is generally no characterisation of the aggressor by either the Security Council or the General Assembly and in the absence of such characterisation, each conflicting state would 'claim a monopoly of virtue and ascribe all vices to the antagonist'. Moreover

> [e]ven if an aggressor could be satisfactorily identified, the effect of being "branded" an unlawful aggressor (resulting in a denial of the privileges of a belligerent) might well have the undesirable effect of making an aggressor cast off legal restraints altogether. Discrimination would push the aggressor one step further down the slippery slope of lawlessness.

On the other hand, when the question of the identity of the aggressor – which is essentially a juridical problem – is resolved by an independent tribunal during the 'sorting out' process following the cessation of hostilities, a clear framework can be imposed and respective rights and duties established. 'Till then the contending parties should remain in a state of equality.'

[102]See Lauterpacht *ibid* 206 *et seq*.

[103]Quincy Wright 'The Outlawry of War and the Law of War' (1953) 47 *AJIL* 371 374.

[104]*Loc cit*.

[105]See Bindschedler Report 93.

In fact, in practical terms a proposed discrimination may be considered to have little importance, a point conceded by Wright himself who states that

> the difference between the legal position of the aggressor and that of the defender may often be made effective only in respect of claims for reparations or liabilities for criminal prosecution after hostilities.'[106]

Some serious implications may ensue, however, when enforcement action by the UN results in the final defeat and occupation of the aggressor and the imposition of a regime which may involve basic changes in the structure of government and the political life of the country.[107] It has also been argued, although with little support, that the distinction forced by war crimes trials at the end of the war may have adverse effect on the conduct of hostilities themselves as belligerent commanders are likely to be induced to continue resistance long after its military usefulness, thus transgressing the principles of humanity, proportionality and legitimate military necessity.[108]

The relevance of any distinction drawn between aggressors and defenders has assumed particular importance in recent years with the coming to the fore of the issue of acquisition of territory by the use of force. In this respect, the latest draft of the Revised Restatement of the Foreign Relations Law of the US[109] – which purports to represent current international law applicable in the US – provides that states are required under international law not to recognise a territorial acquisition resulting from the threat or use of force (whether lawful or unlawful).[110]

The provision has been criticised, however, as failing to reflect generally accepted international law.[111] In fact, the Reporters' Notes[112] themselves acknowledge that it has not been generally accepted

> as to territory aquired by use of force which was not unlawful, if a victim of aggression acting in self defence in accordance with Article 51 of the Charter, conquers territory of the aggressor and proceeds to annex it.[113]

[106]Wright 'The Outlawry of War' *op cit* 376.
[107]See Brownlie *op cit* 408 and references therein to measures enforced by the Allied Control Council over Germany.
[108]See Robert Emmet Moffit *Modern War and the Laws of War* (Tucson Ari University of Arizona Institute of Government Research 1973) 31.
[109]See American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised) Tentative Draft No 1 (1980) xii.
[110]The statement does not contain the qualifying phrases 'in violation of international law' or 'in violation of the UN Charter,' thus opening the door to the interpretation that the distinction between lawful and unlawful use of force in this respect is irrelevant.
[111]See Malvina Halberstam 'Recognition, Use of Force, and the Legal Effect of UN Resolutions Under the Revised Restatement of the Foreign Relations Law of the United States' (1984) 19 *Israel Law Review* 495 498–508.
[112]These notes, which follow the 'Black-Letter-Rules' of the Restatement discuss the various issues in greater detail and summarise judicial practice bearing on the question.
[113]Tentative Draft No 2 Sec 202 Reporters' Note 6.

Another ambiguity is added by the reference of the drafters to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN[114] which does not appear to maintain a distinction between lawful and unlawful use of force.[115]

Scholars also emphasise a distinction between 'aggressive conquest' and 'defensive conquest' as well as between 'the taking of territory which the prior holder held lawfully and that which it held unlawfully,'[116] using as a case in point Israel's occupation of territories following the 1967 war with its Arab neighbours.[117]

Critics add that the failure to distinguish between lawful and unlawful use of force is both 'morally and logically untenable.'[118] It is argued that from a moral point of view to equate the victim of aggression with the aggressor is contrary to the most fundamental principle of justice. Logically, there seems to be no convincing answer to the question why should aggressor be protected from losses it may suffer as a result of his aggression. Indeed, equalising the position of aggressor and its victim is likely to remove the important deterrent effect that stems from the possibility of suffering loss as a result of aggression.

Such an argument could also rest on the legal maxim that no man should profit from his own wrong (*ex injuria non oritur jus*); an aggressor should not be allowed to take advantage of the rights of a belligerent occupant. The applicability of the maxim in this context is, however, constrained by other considerations. As contended by one writer,[119] the rules about acquisition of property by a belligerent occupant have an

[114]General Assembly Resolution 2625 (XXV) 25 UN GAOR Supp (No 28) doc A/2028 121 reprinted in (1971) 65 *AJIL* 243.
[115]The Declaration provides that '[t]he territory of a state shall not be the object of military occupation resulting from the threat or use of force *in contravention of the provisions of the Charter* . . .' (emphasis added). On the preservation of the lawful/unlawful distinction in the Declaration see Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore and London: The Johns Hopkins University Press 1981) 52.
[116]See Stephen M Schwebel 'What Weight to Conquest?' (1970) 64 *AJIL* 344 345. See also Stone *Israel and Palestine op cit* 52; Eliahu Lauterpacht *Jerusalem and the Holy Places* (London Anglo-Israel Association 1968) 51–2.
[117]A considerable body of support may be adduced for the proposition that Israel's presence in the territories it occupied in 1967 is lawful. See in this connection Higgins' observation that 'until such time as the Arab nations agree to negotiate a peace treaty, Israel is in legal terms entitled to remain in the territories she now holds.' Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council,' (1970) 64 *AJIL* 1 8. See also Eugene Rostow 'Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate' (1979) 5 *Yale Studies in World Public Order* 161. Some writers moreover have expressed the view that Israel has better title to these territories than Egypt or Jordan given the fact that the latter's use of force in 1948 was unlawful whereas Israel's use of force in 1967 was lawful. See Rostow *loc cit;* Schwebel *op cit* 346; E Lauterpacht *op cit* 47.
[118]See Halberstam *op cit* 503.
[119]See Greenwood *op cit* 229–30.

'important humanitarian function in protecting the livelihood of the inhabitants of occupied territory.' Were an occupier who is guilty of aggression to be denied title even to property taken within the limits prescribed by those rules, he would probably ignore the rules altogether. Secondly, more often than not the innocent purchaser would be the one to be hurt being unaware that he was buying from an aggressor. Given the difficulty of ascertaining which belligerent is violating the *jus ad bellum* as well as the inability or reluctance of the key international institutions to decide which state is an aggressor, imposing such a liability on a private purchaser appears most unjustified.

Nor, it is suggested, is the maxim *ex injuria non oritur jus* applicable in respect of other 'belligerent rights' for the simple reason that these are 'not rights in the true legal sense at all.'[120] Using Hohfeld's celebrated analysis of the concept of 'rights',[121] the more accurate description of entitlements under the *jus in bello* should be in terms of 'liberties' rather than 'rights' since no correlative duties exist. Thus, for example, while a belligerent occupant has a liberty to govern within certain limits without being guilty of a violation of the *jus in bello*, that law also leaves the population free to thwart him.[122]

Indeed, according to Greenwood,

> the notion that *ius in bello* leaves states and individuals free to act in a particular way without giving them a "right" to do so is one aspect of the fundamental principle that war (or armed conflict) is not an institution established by international law but a fact which the law has always recognised and attempted to contain. *Ius in bello* has never sought to regulate the entire relationship between warring states. Instead it has been based on recognition of the fact that the basis of that relationship is not law but the use of power. The rules of *ius in bello* have attempted to prescribed limits to the use of that power, for example, by providing that it is not be used against certain targets, such as prisoners of war, or with certain means, such as dumdum bullets.[123]

Logic and rationality aside, and in spite of legal provisions, juristic pronouncements and judicial practice in support of the 'equal application principle,' claims of subjective justice are likely to continue to affect this area of international law to varying degrees, as long as conflicting ideologies will persist in the international arena.

It should be added, however, that even if it is accepted that the operation of the *jus in bello* does not depend upon the *jus ad bellum*, other forms of interrelationship may nonetheless exist. Indeed, O'Brien in his impressive study of the *Conduct of Just and Limited War*[124] demonstrates the consistent interaction between *jus in bello* and the major criteria of *jus ad bellum* concerning competent authority, just cause and right intention. Using contemporary illustrations, he seeks to substantiate his propositions that

> [c]ompetent authority determines belligerent status under the *jus in bello*. Just cause sets the underlying referent for determinations of the proportionality of the means used under *jus in bello*. Right intention controls the evolution of goals after the war has started and the substance and spirit of its termination, again important to the issue of proportionality of means.[125] The *jus in bello* controls the conduct of the war and should be based on right intention.[126]

In other words, justifications for the *jus in bello* lie in considerations of the *jus ad bellum* and the *jus in bello* gives detail to certain principles of the *jus ad bellum* (thus, for example, an act which contravened the *jus in bello* could not be considered a reasonable and proportionate means of self defence).

The relative position of the *jus in bello* in the final assessment of the justness or legality of war is, however, no more conclusive under contemporary international law than it was according to past provisions. What can be said now with sufficient confidence is that any consideration of the lawfulness of a state's conduct during an international conflict must take account of both *jus ad bellum* and *jus in bello*. Hence, if the use of force is a legitimate act of self defence and the manner of its execution is within the limits of *jus in bello*, there is no breach of international law. It is equally clear that if the belligerents' acts cannot be justified by reference to the *jus ad bellum* and they exceed the limits set by the *jus in bello* they incur a 'double liability.'[127]

Yet, the question remains whether a violation of the laws of war turns an otherwise 'just' or 'legal' use of force into an 'unjust' or 'illegal' one. O'Brien's analysis of the application of the just war criteria to three contemporary wars (World War II, Korea and Vietnam) suggests that this is indeed a relevant issue as compliance with just war prerequisites tends to be rather mixed. Thus while the Allied war effort in World War II was undoubtedly in a just cause, the indiscriminate and disproportionate practices used in its execution infringed basic principles of the *jus in bello*. By the same token, it may be argued that the Americans' conduct of war in Vietnam was in many respects 'superior' to that prevalent in the Second World War whereas the cause claimed for that war was not universally perceived as equally just.

[120] See *Ibid* 228.

[121] See Wesley Newcomb Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed) (New Haven Conn Yale University Press 1919).

[122] See in this connection Richard R Baxter 'The Duty of Obedience to Belligerent Occupant' (1950) 27 *BYIL* 235.

[123] Greenwood *op cit* 228–9.

[124] William V O'Brien *The Conduct of Just and Limited War* (New York Praeger 1981).

[125] For example, means serving the purpose of vengeance are considered violative of proportionate policing.

[126] O'Brien *The Conduct of Just and Limited War op cit* 16. For the importance of 'right intention' in the context of *jus in bello* see Robert L Phillips *War and Justice* (Oklahoma; Oklahoma University Press Norman 1984) 30–47.

[127] See Greenwood *op cit* 229 for an appropriate illustration from the decision of the US Military Tribunal in *US v List* (1948) that the entire German occupation of the Balkans was a violation of the *jus ad bellum*, so that everything which the occupying authorities did was contrary to international law. Greenwood points out that when the occupying authorities, in addition to the initial illegality, also transgressed the limits of occupants' authority under the *jus in bello* they committed a double illegality.

O'Brien's answer to the dilemma posed is that a judgment of the legality or justness of a war be made 'case by case with all the just war conditions being treated very seriously.'[128] Obviously, to ensure a case for legal (and moral) coercion which will withstand challenges of critics, *all* the guidelines of international law and just war should be followed conscientiously. At the same time, given the current emphasis on ideological objectives, additional importance seems to be placed on the 'just cause' element in the just war calculus as the most basic requirement without which other conditions may not be contemplated. In other words, a genuinely just cause such as, for example, an opposition to genocidal tyranny, may entail occasional lapses in the use of means so that the whole war would not consequently be rendered unjust. In a similar vein, it is also reasonable to assume that only indisputable, flagrant and widespread violations of the *jus in bello* which are central to the conduct of war would warrant a finding that an otherwise just war was unjust. Needless to say, however, 'grave breaches' of the rules of war constitute offences under international law[129] for which the delinquent is legally (and morally) responsible.

A still more complex question is whether such breaches give rise to a 'just cause' for a new coercive action. There is no doubt that reprisals have been resorted to by belligerent parties on numerous occasions without engendering a condemnatory response from the international community. The circumscribed use of retaliatory measures has found some recognition in the Draft Additional Protocol I prepared for the second session (1972) of the Geneva Conference of Government Experts on International Humanitarian Law which provided in Article 74(2) that

> [i]n cases where reprisals are not yet prohibited by the law in force, if a belligerent considers that it must resort thereto, it shall observe the following minimal conditions: (a) the resort to reprisals must be officially announced as such; (b) only the qualified authority can decide on resort to reprisals; (c) the reprisals must respond to an imperative necessity; (d) the nature and scope of the reprisals shall never exceed the measure of the infraction which they seek to bring to an end; (e) the belligerent resorting to reprisals must, in all cases, respect the laws of humanity and the dictates of the public conscience; (f) reprisals shall be interrupted as soon as the infraction which gave right to them has come to an end.[130]

At the same time, it is true that international jurists have taken an increasingly critical stance towards belligerent reprisals,[131] stressing the high likelihood of abuse. As asserted in the Oppenheim-Lauterpacht treatise on *International Law*,

> the right to exercise reprisals carries with it great danger of arbitrariness, for often the alleged facts which make belligerent resort to them are not sufficiently verified; sometimes the rules of war which they consider the enemy to have violated are not generally recognised; often the acts of reprisal performed are excessive compared with the precedent of illegitimate warfare.[132]

Other writers have also noted the difficulties inherent in establishing responsibility under the conditions of armed conflict and ascertaining whether the violation of law committed by way of reprisals was really proportionate to the weight of the infraction which it was intended to retaliate against.[133]

International agreement could not, however, be secured for a total prohibition of reprisals, in view of the fact that until other effective safeguards can be instituted which will reliably guarantee respect for the rules to be implemented in armed conflicts, reprisals could not be entirely eliminated from the international system.[134] Firm restrictions have nonetheless been imposed on reprisals against protected persons and objects.[135] Within the set limits, therefore, and subject to 'extreme restraint,' one may be inclined to agree with Johnson that when a fundamental human value, like the rights of non-combatancy, is threatened then action may be taken to preserve that value even if in the short run protecting it may require disregarding it.[136]

The principles of modern *jus in bello*

The principle of discrimination

The principles identified in the analytical historical summary in the beginning of this article have, to a large extent, also underpinned current law of war and practice. Issues of interpretation and the intricacies of modern warfare dominate, however, any effort to apply the just war standards of *jus in bello* to contemporary use of force.

Amongst the most critical issues affecting such application is the distinction between combatants and non-combatants which lies at the heart of the just war 'principle of discrimination.' Debates concerning this distinction have become increasingly complex and important given the changing character of war. Basically, the assumption of separability of military forces and the population they represented found in medieval

[128] O'Brien *The Conduct of Just and Limited War op cit* 348.

[129] It should be noted that under article 85 of Protocol I states are required to make such acts punishable under their domestic criminal law; 'grave breaches' of the Geneva Conventions and Protocol are in any event regarded as war crimes according to article 85 and so regarded may be violation of other treaties and customs of war.

[130] ICRC Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Vol I *Basic Texts* (Geneva 1972) 25. It is interesting to note the extent to which the Article reaffirms traditional criteria of just war.

[131] See Remigiusz Bierzanek 'Reprisals as a Means of Enforcing the Laws of Warfare: the Old and the New Law' in Cassesse (ed.) *The New Humanitarian Law of Armed Conflict op cit* 237.

[132] Oppenheim-Lauterpacht *International Law* vol II 7ed (London Longmans 1955) 563.

[133] See Geza Herczegh *Development of International Humanitarian Law* (Budapest Akademia Kiado 1984) 103.

[134] See in this connection GIAD Draper 'The Implementation of the Modern Law of Armed Conflict' (1973) 8 *Israel Law Review* 1 9.

[135] See 1977 Additional Protocol I Article 20 51(6) 52(1) 53 54(4) 55(2) and 56(4). Other restrictions are specified in the 1949 Geneva Conventions including prohibitions of reprisals against prisoners personnel, and civilians in occupied territory.

[136] James Turner Johnson *Can Modern War Be Just?* (New Haven and London Yale University Press 1984) 57.

theory became in later years much less valid with the total mobilisation of nations and societies against each other. Outlining what was thought at the time to be the main difficulties in distinguishing between combatants and non-combatants, Lauterpacht cited the expansion of the armed forces, the increase in the number of non-combatants engaged in work of direct military importance, the vanishing of the distinction between work which is of direct military importance and that which is not, the growth of offensive and destructive power of aircraft and; the part played in modern war by economic weapons which involve vast segments of belligerent populations.[137]

Further erosion of the distinction between civilians and combatants has clearly taken place with the advent of nuclear capability which renders such a distinction virtually impossible. Nor is the distinction between civilians and combatants feasible in the context of insurgency/counter-insurgency wars. In fact, both sides in these wars tend to deny the existence of any non-combatants.[138] On the revolutionary side, where war is waged on behalf of the 'people', distinctions are drawn between the 'people' and the 'enemies of the people' or between the 'exploiting class' and the 'exploited,' disregarding the traditional combatants/non-combatants distinction. Likewise, the incumbent regimes, faced with popular insurrection, generally apply a classification of 'rebels' which bears little resemblence to the original criterion. The means employed in wars of this type (eg guerrilla) also impede any differentiation between those regarded as classical members of the non-combatant contingent (eg women and children) and clear combatants.

Such trends were nonetheless repudiated in 1969 when the UN General Assembly unanimously adopted Resolution 2444[139] providing that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the

[137]See Hersch Lauterpacht 'The Problem of the Revision of the Law of War' (1952) 29 BYIL 360 364. See also Lester Nurick's argument that the nature of modern 'total war' is such that it is impossible to maintain the distinction between combatants and non-combatants: 'The Distinction between Combatant and Noncombatant in the Law of War' (1945) 39 *AJIL* 680.

[138]Contrast, however, the Chinese wide notion of 'civilians' which embraces 'freedom fighters' when not taking part directly in hostilities. As explained by the Representative of the PRC, '[p]eople's militia and guerrilla fighters in wars of national liberation should be protected, since they are basically civilians who had been forced to take up arms in self defence against imperialist repression in order to win independence and safeguard their right to survival. When not participating directly in military operations, members of people's militia or guerilla movements should have civilian status and benefit from the protection granted to civilians. CDDH/III/SR 7.

[139]General Assembly Resolution 2444 (XXIII) 23 UN GAOR Supp No 18 at 50 UN Doc A/7218. Note that the US expressly declared that it regards this resolution as an accurate declaration of existing customary law. See Arthur W Rovine 'Contemporary Practice of US Relating to International Law' (1973) 67 *AJIL* 118 122–5. See also US Field Manual *op cit* Para 25 which states that it is a 'generally recognised rule of international law that civilians must not be made the object of attack directed exclusively against them.'

latter be spared as much as possible. This principle has been recently reaffirmed in the 1977 Geneva Protocol I[140] which distinguishes between combatants – currently defined as those who participate directly in hostilities (article 43) – and civilians who include any person not belonging to the category of combatants as defined in the 1949 Geneva Convention and article 43 of Protocol I (article 50). While it avoids attaching a valuative label (eg legitimate/illegitimate; privileged/unprivileged) the Protocol seems to reflect a further distinction between lawful and unlawful combatants which together with the combatants/non-combatants dichotomy constitutes a basis for the application of the principle of discrimination.

Specifically, a legitimate combatant status is not accorded to combatants who are caught in the act of espionage (article 46), nor to mercenaries (article 47), while being conferred on those who comply with the requirement to distinguish themselves from the civilian population in the course of engaging in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of hostilities, an armed combatant cannot so distinguish himself, article 44(3) stipulates that he shall retain his status as a combatant (and hence qualify for POW privileges) provided that on such occasions he

> carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

The distinction incorporated in article 44 is nonetheless of questionable value given the host of undefined terms (such as 'armed conflict,' 'hostilities,' 'attack,' 'military operation,' 'military engagement,' 'military deployment')[141] used therein. A straightforward interpretation, if at all possible, would also lead to the unacceptable conclusion that lawful combatants are only required to carry arms openly during very limited periods (ie military engagements and while visibly deployed prior to the launching of attacks) and will lose their POW status only if captured by the enemy at the very time that they were failing to meet this requirement. Indeed, even

[140]Article 48 states 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations against military objectives.' See also the informal summary of the 1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts [reproduced in the *International Review of the Red Cross* (September-October 1978) 248–9] which incorporates the provision that '[p]arties to the conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.' (article 7)

[141]For the multiple meanings offered for these terms by the various delegates to the Diplomatic Conference see Fritz Kalshoven 'Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977' (1977) 8 *Netherlands Yearbook of International Law* 128–9.

in these circumstances they are to be provided with 'protections equivalen in all respects to those accorded to prisoners of war by the Third Conven tion and by [the] Protocol' [article 44(4)] and in any event be granted all the fundamental rights guaranteed under article 75 of the Protocol.

The dire results of such construction of article 44 are given a vivid illustration by Dinstein who envisages a *guerrilero* losing himself in a crowd of civilians keeping his weapons concealed until the last conceivable mo ment and then violating with impunity all the rules of warfare and still not forefeiting his right to be a prisoner of war. This, according to Dinstein, is a 'preposterous' and 'dangerous retrogressive step in the evolution of the *jus in bello*.'[142]

Considerable problems, interpretative and otherwise, have also plagued another distinction which constitutes a component of the principle of discrimination, namely that between military and non-military targets. Even before the great increase in the range, areas of impact and destructive effects of modern weaponry, it was difficult, in the face of total mobilisation, clearly to distinguish military targets from those of sufficient military importance to justify a direct attack. Earlier definitions of military objects in terms of 'distinct military advantages' to the belligerent[143] were of limited utility in view of their excessively elastic nature.[144]

Yet, despite the definitional obstacles and negative experiences of recent wars (especially World War II in which entire cities became targets) states have not openly sought to abandon the assumption that there must be some relation between the object attacked and its military value to the enemy.[145] Indeed, Protocol I has reasserted the military/non-military distinction incorporating provisions with respect to the protection of civilian objects [article 52(1)], cultural objects and places of worship (article 53), objects indispensible to the survival of the civilian population (article 54), the natural environment (article 55) as well as works and installations containing dangerous forces (article 56).[146] A more elaborate definition of military objectives is also attempted embracing 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage' (article 52).

[142]See Dinstein 'The Geneva Protocols' *op cit* 272.

[143]See for example the 1923 Rules of Aerial Warfare (Supplement 1923) 17 *AJIL* 245–60.

[144]According to Spaight these rules were based on a test of military objectives which was so widely drawn as to make whole centres of population liable to aerial attack. See James M Spaight 'Legitimate Objectives in Air Warfare' (1944) 21 *BYIL* 158.

[145]See references to state practice and judicial pronouncements in the Bindschedler Report 18–20.

[146]It should be noted that even the special protection of objects indispensible to the survival of the population, works containing dangerous forces and the natural environment, is in fact relative as such objects and works can be attacked, destroyed or damaged to a limited extent with provisional effect, in the light of military considerations.

Doubts nonetheless persist in the absence of a clear-cut list of military targets. While the absence of such a list is evidently explained by the fact that no reasonable definition could be arrived at, given the different strategic conceptions which are extremely diverse and at the same time subject to very rapid changes, from a legal point of view the Protocol's formula is hardly adequate. Phrases such as 'in the circumstances ruling at the time' are particularly vulnerable to abuse, leaving virtually any object open to assessment as offering a 'definite military advantage.' Some commentators also feel that a further qualification should have been added to emphasise that military objectives encompassed only objects whose destruction is sought to achieve a distinct military advantage and not an immediate and predominantly political purpose.[147] Such a proposal, however, besides being unrealistic, would have had the undesirable effect of introducing unnecessary subjective elements into an area of the law which should be primarily guided by humanitarian considerations.

In addition to the definitional controversies regarding its major components, the application of the principle of discrimination in contemporary warfare encounters unavoidable difficulties at all levels of modern war, including nuclear,[148] conventional or unconventional (revolutionary-/counter-revolutionary). As emphasised by O'Brien, even assuming the 'quibbles' about the definition of a non-combatant and a non-military target have been resolved, there remains a considerable number of clear non-combatant and non-military targets that would be 'inevitably attacked routinely as part of the process of carrying the war to the enemy' regardless of whether it involves nuclear strikes, conventional bombing, combat operations on land or typical measures of revolutionary/counter-revolutionary warfare.[149]

An evaluation of the compatibility of the principle of discrimination with the conduct of modern war hinges, however, on the status accorded to the principle within the just war criteria and its comparable standards in contemporary international law. This question has been the subject of numerous philosophical debates and contentions. The traditional assumption in the doctrine of *bellum justum* was that the legal norms and conventions surrounding non-combatancy derive from fundamental moral principles and hence the norm forbidding the direct and intentional attack on non-combatants represented an 'absolute injunction.'[150] Just war theorists,

[147]See Hamilton De Saussure and Robert Glasses 'Air Warfare – Christmas 1972' in Peter D Trooboff ed *Law and Responsibility in Warfare: The Vietnam Experience* (Chapel Hill Carol The University of North Carolina Press 1975) 119–139.

[148]A detailed analysis of the compatability of nuclear means with *jus in bello* is undertaken in the section on 'specific means' *infra*.

[149]O'Brien *The Conduct of Just and Limited War op cit* 137–141; 144–153; 179–181.

[150]Osgood and Tucker *Force, Order and Justice op cit* 306.

notably Paul Ramsey, have strongly maintained that the protection of non-combatant persons and property is absolute and grounded in right.[151]

However, this notion has been challenged in recent years. According to Hartigan, for instance, the immunity granted to non-combatants was merely a phase in the history of warfare reflecting moral and cultural values of earlier societies and not a universal and absolute moral prescription.[152] Ramsey's absolute version of the principle of discrimination has come under attack as lacking persuasive force both as a normative position and a practical guideline.[153] It is argued that such commitment to an absolute principle of discrimination 'leads either to a finding that all war is immoral and the demise of the just war doctrine or to tortured efforts to reconcile the irreconcilable.'[154] Both results seem equally problematic. The first moral posture, namely pacifism has been shown to have little viability in current international politics given the numerous grievances that people seek to redress.[155] The second approach, involving attempts to salvage an absolute principle of discrimination from the eroding pressures of modern warfare, has yielded no solution to the obvious incompatibility of contemporary strategies with a literal application of the principle.[156] In fact, even an 'absolutist' like Thomas Nagel – who insists that deliberate killing of the harmless cannot be justified 'whatever the consequences' – considers in the final analysis that when the refusal to follow a course of action on absolutist grounds leads to disaster, the absolutist 'will find it difficult to feel that a moral dilemma has been satisfactorily resolved' and will therefore be content with a few 'moral blind alleys.'[157]

Alternatively the prohibition against the killing of non-combatants

[151]See Paul Ramsey *War and the Christian Conscience How Shall Modern War be Conducted Justly?* (Durham NC Duke University Press 1961); *idem The Just War: Force and Political Responsibility* (New York Charles Scribner's Sons 1968). See also the attempt to provide a rational basis for an absolute prohibition for killing non-combatants by Jeffrey G Murphy 'The Killing of the Innocent' in *Retribution, Justice and Therapy* (London D Reidel Publishing Co 1979) 3–25.

[152]See Richard Shelly Hartigan 'Non Combatant Immunity: Reflections on its Origins and Present Status' (1966) 29 *Review of Politics* 204 214.

[153]See William V O'Brien 'Morality and War: The Contribution of Paul Ramsey' in James T Johnson and David Smith (eds) *Love and Society: Essays in the Ethics of Paul Ramsey* (Missoula Mont American Academy of Religion/Scholars Press 1974) 163–90. See also James Turner Johnson 'Morality and Force in Statecraft: Paul Ramsey and the Just War Tradition' *ibid* 93–114.

[154]O'Brien *The Conduct of Just and Limited War op cit* 45.

[155]This is discussed further in chapter three of the autor's doctoral thesis.

[156]See discussion in O'Brien *The Conduct of Just and Limited War op cit* 138–40; and critical comments in Osgood and Tucker *Force, Order and Justice op cit* 315–17. See also Walzer's evaluation of nuclear deterrence and to bring the doctrine of deterrence within the permissible scope of just war theory. According to Walzer, there is no escape by the route Ramsey suggests of resolving to engage only in counterforce nuclear retaliation, and relying upon the fear of 'collateral damage' to provide the element of deterrence, thus 'making the just war possible' [Ramsey *The Just War* n5]. Rather, if collateral damage is central to our threats it is not collateral. Walzer *Just and Unjust Wars op cit* 278–83.

[157]Thomas Nagel 'War and Massacre' (1972) 1 *Philosophy and Public Affairs* 123 143.

may be perceived as a *prima facie* rule liable to be overridden by more important moral requirements. In other words, there exists a very strong presumption against the deliberate killing of non-combatants but it is not an irrebuttable one. Situations may be envisaged where one would be justified in breaking this rule. Thus if the Allied's bombing of the cities in World War II had been the only way to win the war and if winning the war was vital to the interests of humanity, then a justification could be found that would be consistent with the principle of discrimination (eg the defence of freedom, the protection of civilisation).[158]

Such a weighing process raises the related issue of the place of military 'necessity' vis-à-vis the principle of discrimination. Can the latter accommodate the former and persist as a moral force? How flexible can the immunity of non-combatants be in the face of demands of necessity without becoming morally redundant? Is it legitimate, for instance, to bomb civilians in order to break down enemy morale and induce surrender; to shorten the war; or to reduce suffering? While the answers to the latter questions are probably in the negative,[159] Tucker believes that

> with a sufficiently elastic definition of what constitutes a legitimate military objective, and a sufficiently broad interpretation of what constitutes permissible 'incidental' injury to the civilian population, there is no need even to deny the continued validity of the principle distinguishing between combatants and non-combatants.[160]

Various formulae have been suggested as representing the utilitarian calculus here. They vary between Brandt's 'orthodox' utilitarianism – which deems military action (eg a bombing raid) permissible

> if the utility ... of victory to all concerned, multiplied by the increase in its probability if the action is executed, on the evidence ... is greater than the possible disutility of the action to both sides multiplied by its probability[161]

– and Walzer's 'moderate' utilitarianism which allows derogation from the principle of non-combatant immunity only in a case of 'supreme emergency.'[162] While the latter version appears to be morally more attractive –combining the best features of both utilitarianism and absolutism – and perhaps affords a better protection to non-combatants, there still remains the difficulty of defining 'supreme emergency.' As Hoffmann has rightly questioned: 'Will not any statesman convinced of the importance of his cause be tempted to plead acute necessity sooner rather than later? How

[158]See discussion in Michael Walzer 'World War II: Why Was this War Different?' (1972) 1 *Philosophy and Public Affairs* 3–21. See also IE Hare and Carey B Joynt *Ethics and International Affairs* (London The Macmillan Press 1982) 87–98.

[159]See Josef Kunz 'The Laws of War (1956) 50 *AJIL* 313 316.

[160]Robert W Tucker *The Just War* (Baltimore John Hopkins University Press 1960) 92–3.

[161]RB Brandt 'Utilitarianism and the Rules of War' (1972) 1 *Philosophy and Public Affairs* 145, 157.

[162]Walzer *Just and Unjust Wars op cit* 231–2, 251–68.

does one know when the supreme emergency has ended?'[163] Nor is it cle whether there are any limits to what may be done in a situation of supren emergency. Furthermore, Walzer's rules are likely to be unacceptable t statesmen who are asked, in order to fight well, to sacrifice the opport nities provided by modern technology and to accept terrible risks for the cause by allowing their adversary (eg in guerrilla war) monopoly on terr and a relative immunity from counter attacks.[164]

Indeed, state practice provides support for the contention that th principle distinguishing between combatants and non-combatants ha never been interpreted as giving the latter complete protection from th hazards of war. According to Osgood and Tucker, this principle ha always had a 'relative and contingent character in state practice as well as the law that emerged from this practice.'[165] As such, the scope of th immunity accorded to the civilian population has been largely depende on the meaning given to the claims of military necessity. Judicial exampl are also available. In the well known case of *Shimoda v Japan* (1963),[166] fo instance, a Japanese civil court characterised the indiscriminate bombing o the undefended cities of Hiroshima and Nagasaki as 'contrary to th fundamental principles of the laws of war' but allowed for the possibilit that there might be, even if there was not in this case, military necessity o sufficient magnitude to justify such action.

At the doctrinal level, some form of the 'double effect' theory has bee resorted to in order to justify attacks on non-combatants without detract ing from the validity of the principle of discrimination. Under a recen formulation of this theory,[167] an act of war that causes injury to civilia

[163]Stanley Hoffmann *Duties Beyond Borders: On the Limits and Possibilities of Ethical Interna tional Politics* (Syracuse NY Syracuse University Press 1981) 78. See also Johnson's obse vation that '[i]t is one thing to argue in the abstract that in particular circumstances militar necessity may require that moral or legal restraints on war be abrogated; it is anothe matter to identify a moment in history in which this justifiable overturning of just limit can take place or has done so.' James Turner Johnson *Just War Tradition and the Restraint o War: A Moral and Historical Inquiry* (Princeton NJ Princeton University Press) 1981 25.

[164]Hoffmann *ibid* 81.

[165]Osgood and Tucker *Force, Order and Justice op cit* 309. See in this connection also statement by representatives of Canada, Netherlands, West Germany, UK, US which lend suppor to the relativity of the principle of discrimination in that they excepted from proscriptio incidental or collateral damage to civilian objects caused by attacks directed against military objectives. Provisional summary Records Fourth Session CDDH/I/SR 41 Annex 2 (Federal Republic of Germany); *ibid* 4 (Canada); *ibid* 6 (US); *ibid* 13 (Netherlands); *ibid* 1 (UK).

[166]Reprinted in [1964] *Japanese Annual of International Law* 212. The case involved a suit b several persons injured in the bombings of Hiroshima and Nagasaki against the govern ment of Japan for failing to assert a claim on their behalf against the US for the 'illega bombing of the two cities. While only a decision of a domestic tribunal, the case ha attracted much attention. See in this connection: the Bindschedler Report 18. See also Marshall Cohen 'War and its Crimes' in Virginia Held, Sidney Morgenbesser and Thoma Nagel eds *Philosophy, Morality and International Affairs* (Oxford Oxford University Press 1974).

[167]See Walzer *Just and Unjust Wars op cit* 151–9.

bystanders is justifiable if this effect is not directly intended although the claim that the evil effect of the act is not an end nor a means to an end is insufficient in itself.[168] Rather, efforts must also be taken to minimise the evil caused even at a cost to the actor himself. The rule of double effect is thus modified to impose an obligation on soldiers to minimise risks to civilians even if to do so they must bear greater risks themselves.

However, Walzer's version of 'double effect,' like comparable attempts by other writers, has not escaped the definitional problems associated with the concept of 'unintended effects' especially when those effects follow 'inescapably' from the projected action.[169] Yet, some light is shed on this quandry by the provisions of Protocol I banning indirect assaults on civilians including warfare intended, or likely to create 'widespread damage to the natural environment' and attacks on dams, dykes, nuclear plants and other facilities whose disruption would inflict harm on civilian populations [articles 35(3) and 55]. Perhaps a more general yardstick is provided in article 51 paragraph 5(a) which classified as 'indiscriminate'

> an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

Thus, as interpreted by one observer,[170]

> if the objectives are sufficiently separated so that they can feasibly be attacked separately with the weapons available and if this degree of separation is evident to the attacker then they must be attacked separately in order to reduce the risks to the civilian population.

Needless to say, however, the application of this rule to nuclear warfare would offer little guidance in view of the broadness and complexity of nuclear objectives which embrace manufacturing, transportation and communication.[171] Indeed, as noted earlier,[172] attempts to reconcile the *bellum justum* principle of discrimination with the requirements of nuclear deterrence – and particularly Ramsey's defence of the latter in terms of 'collateral damage' inflicted by use of nuclear weapons over legitimate targets – have not been entirely successful. A principal line of attack has

[168]Note that according to Osgood and Tucker even an effect only indirectly intended is a means albeit distinguishable from that which is directly intended or positively permitted. *Force, Order and Justice op cit* 312–3.

[169]See doubts expressed by William V O'Brien *Nuclear War Deterrence and Morality* (Westminster Md and NY Newman 1967) 27.

[170]George H Aldrich 'New Life for the Laws of War' (1981) 75 *AJIL* 764 780.

[171]As a matter of fact, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts, from its commencement in 1974 through the final adoption of the Protocol, operated on the understanding that nuclear weapons were excluded from the purview of codification. See in this connection Aldrich *ibid* 781 n48. See also Rupert Granville Glover 'International Humanitarian Law with Reservation' (1984) 2 *Canterbury Law Review* 220 228–9.

[172]*Supra* n156.

been grounded in the contention that Ramsey's use of 'collateral' effects is in fact an abuse of the principle of 'double effect.' As one critic puts it,

> [t]he decisive flaw in Ramsey's position is the dependence of his presupposed 'collateral deterrence' upon effects essential to the purpose of nuclear strategy, directly indispensible, radically wanted – and yet to be sanctioned as 'side effects'.[173]

The principle of proportionality

It is in any event clear that even if we were to accept the view that the indirect effect of modern deterrence or generally of killing non-combatants should not be regarded as indiscriminate, there would still remain the questions of the proportionality of the action – a principle which applies both to the unintended non-combatant deaths and indirect death of combatants. In fact, as pointed out by O'Brien, the main issue in all versions of the theory of double effect is not the intention or preference of the attacking party but the predictable amount of collateral damage to non-combatants and non-military targets,[174] that is, the question of proportion.

Whether the principle of proportionality can offer a better guidance to belligerents is a moot point exemplified in the following question: 'What is more humane and less repulsive a war ended after one week by a nuclear weapon and half a million casualties or a war protracted over ten years without a nuclear weapon and taking five million casualties?'[175] Yet, it is arguable that the principle – now codified for the first time in Protocol I[176] – might, if properly applied and successfully enforced, produce significant limitations on belligerent conduct and thus enhance the *jus in bello*.[177] Indeed, as forcefully contended and elaborated by the author of an article on the subject,[178] proportionality of a military act (ie the weighing of anticipated military benefits against the probable civilian losses) can be calculated with relative ease by the officer in the field,"[179] who is generally well-informed as to the desired military advantage, the means of warfare (eg their controllability and the specific military benefits which they offer) and the military target (eg its vulnerability to destruction, proximity to civilian population, importance to the other side's military capabilities and the dangerous effects of its destruction). Furthermore, placing decision-

[173]Walter Stein 'The Limits of Nuclear War: Is a Just Deterrence Strategy Possible in *Peace, The Churches and the Bomb* (New York Council on Religion and International Affairs 1965) 81.

[174]O'Brien *The Conduct of Just and Limited War op cit* 341.

[175]Wil D Verwey *Riot Control Agents and Hebricides in War* (Leyden AWJ Sijthoff 1977) 291.

[176]Article 51 Para 5(b); article 57 Paras 2(a)(iii) and 2(b).

[177]Ideally, the protection of lives and goods of civilians should not be made dependent on the military advantage anticipated. Reality, however, has rendered reference to military objectives in the Protocol and previous international instruments inevitable and indispensible.

[178]Bernard L Brown 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification' (1976) 10 *Cornell International Law Journal* 134–55.

[179]According to Brown, if proportionality is to be a viable principle of civilian protection it should be applied at the time military decisions are being made rather than as a hindsight principle *ibid* 140.

making with respect to proportionality in the hands of soldiers might increase their sense of personal responsibility which would prompt them to reflection and to a better implementation of the laws of war. At the same time, it can be maintained that soldiers strive, first of all, for military success or gaining military advantages and are consequently

> inclined to attribute greater weight and significance to the advantages anticipated than to the losses caused amongst the civilian population and to the damage done to civilian property, which they often have neither time nor opportunity to consider thoroughly amidst the conditions of armed conflict.[180]

Alternatively, 'the principle of proportion may be rendered more manageable and stable by realistic efforts to formulate material-normative typologies of actions which in specified contexts are prima facie "reasonable" or "unreasonable",'[181] the referent being agreed legitimate military ends *(raison de guerre)* as distinct from political-ideological-strategic ends *(raison d'état)* of the belligerents (although both ends may converge).[182] Whether this is a realistic goal, given the rapid technological change and the dynamic nature of the politico-military environment is, however, potentially subject to contention. Nonetheless, efforts aimed at producing such typologies should be supported provided they are tempered by a realisation that the ultimate goal may not be attainable.

In any event, to be effective, the principle of proportionality must be buttressed with adequate enforcement mechanisms and the relevant rules of criminal responsibility, whereby the officer is held criminally liable for disproportionate acts resulting from his failure to exercise due care or from intentional or reckless conducts.

> If violations of proportionality are treated as war crimes and are actively prosecuted, there will be cause for hope that proportionality can become an integral part of military decision-making rather than an abstract principle of civilian protection.[183]

That the implementation of the principle of proportionality in the context of conventional war is a genuine possibility is amply exemplified in the restraint in conduct manifested by the parties to the Falklands War in 1982.[184] Less practical, however, is the application of the principle in insurgency/counter-insurgency conflicts[185] in view of asymmetry in mili-

[180]Herczegh *Development of International Humanitarian Law op cit* 157.

[181]O'Brien 'Morality and War' *op cit* 176. O'Brien adopts the concept of a 'reasonable colonel' as symbolic of a standard of reasonableness for conduct in war and comparable to the 'reasonable man' standard in domestic criminal and tort law.

[182]*Ibid* 179.

[183]Brown *op cit* 155. Note that under article 85 Para 3 of Protocol I, violation of proportionality 'as defined in article 57, paragraph 2(a)(iii)' is regarded as a 'grave breach' of the Protocol and as such a 'war crime.' See also article 87 which imposes on commanders the duty to prevent and suppress breaches of the Conventions and Protocol I.

[184]Evidently both the UK and Argentina possessed the capability of resorting to more force, bloodier tactics and more destructive weapons than actually used, creating more casualties.

[185]See, for example, the Israeli war with the PLO. For an assessment of the proportionality of the 1982 Israeli incursion into Lebanon see Johnson *Can Modern War be Just? op cit* 58–9.

tary strength between the warring sides, the intensive ideological fervour involved and consequently the difficulty in posing *raison d'état* (needless to say, terrorist tactics invariably employed in this context are inherently incompatible with proportionality[186]). Limitations notwithstanding, the application of the standard of proportion in insurgency wars is not entirely ruled out if the parties restrict themselves to defensive measures rather than punitive actions.

The principle of chivalry

The principle of chivalry, on the other hand, may be expected to apply in all types of war, although no attempt has been made to formulate specific restrictions in this respect for non-international armed conflicts.[187] Inspired by such a principle are the prohibitions of killing, injuring or capturing an adversary by resort to perfidy (ie '[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord protection under the rules of international law applicable in armed conflict, with intent to betray that confidence') [Protocol I, article 37];[188] of making improper use of recognised protective emblems, signs or signals [article 38] or of alien flags, military emblems or uniforms [article 39]; of ordering that there shall be no survivors or threatening an adversary therewith [article 40]; of making enemy *hors de combat* the object of attack [article 41]; and of attacking persons parachuting from an aircraft in distress [article 42].[189]

Underlying rationales

As the preceding analysis reveals, all three principles characterising *jus in bello* in just war theories have been incorporated into the modern laws of war. It is also evident that utilitarian considerations continue to permeate the latter, supporting the notion that 'the rules of war which rational, impartial persons would choose are the rules that would maximise long-range expectable utility for nations at war.'[190] Indeed, as contended and elaborated by Wasserstrom, the doctrine of 'military necessity,' formalising considerations of expediency, is 'firmly and centrally embedded in the conception of the laws of war' both to create explicit exceptions (ruling out gratuitous violence and excessive damage or 'devastations not justified by military necessity') and to function as a general justification for the violations of most prohibitions included therein (as if they all had an implicit clause of exception '... unless military necessity dictates ...').[191] According to Wasserstrom, the laws of war in fact prohibit, with a few minor exceptions, only wrongful practices that also lack significant military value and permit almost any practice, provided that it secures an important military advantage.[192]

More 'palatable' perhaps is a perception of the laws of war as governed by 'utilitarianism of extremity,'[193] namely containing a utilitarian escape clause which allows instrumental or utilitarian calculation in certain extraordinary or extreme situations. Such a theory is defended, for example, by Walzer who argues that 'in certain very special cases, though never as a matter of course even in just wars, the only restraints on military action are those of usefulness and proportionality.'[194] Walzer's approach should, moreover, be seen in conjunction with an increasing emphasis on humanitarian considerations which have characterised contemporary formulations of the laws of war. As observed by a delegate to the 1974–77 Geneva Diplomatic Conference, in many respects (particularly concerning the protection of civilians) Protocol I subordinates military exigencies to humanitarian demands.[195] In this respect, therefore, it markedly departs from the customary law which generally tends to place military necessity on the same footing as humanitarian prescriptions.

It is arguable, however, that even the elevation of humanitarian considerations represents in the final analysis little more than a modification of the weight to be given, in estimating the costs of victory, to the welfare of those affected by the struggle. Basically, 'humanitarianism or a concern with human welfare, always operates within bounds defined by expediency, for the duty to avoid harm is always a duty to avoid unnecessary or disproportionate harm.'[196]

On the other hand, grounding the laws of war in human rights, a view which appears to have gained some acceptance amongst jurists and moral-

[186] A more detailed discussion will follow later under 'specific means.'

[187] The Protocol Additional to the Geneva Conventions of 12 August 1945, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [(1979) 16 *ILM* 1391] as its title suggests is primarily concerned with humanitarian protection of non-combatants and does not provide any definitive codification of laws of war for non-international armed conflicts.

[188] For illustrations of perfidious practices see also the British Military Manual, *The Law of War on Land op cit* Paras 311 n1, 314, 316, 317, 318.

[189] It is perhaps possible to add to the above list the proscription of starvation [Protocol I article 54; Protocol II article 14] but its inclusion under chapters relating to protection of civilians suggests that the underlying reasoning is more congruent with the principle of discrimination. It would, in any event, be examined as a 'specific means' in a later section.

[190] Brandt 'Utilitarianism and the Rules of War' *op cit* 150.

[191] Richard Wasserstrom 'The Laws of War' (1972) 56 *Monist* 1, 4.

[192] See *ibid* 206.

[193] See discussion at 8 *supra*.

[194] Walzer *Just and Unjust Wars op cit* 231.

[195] Konstantin Obradovic 'La Protection de la Population Civile dans les Conflits Armes Internationaux' in Cassesse ed *The New Humanitarian Law of Armed Conflict op cit* 128 152ff.

[196] Terry Nardin *Law, Morality and the Relations of States* (Princeton NJ Princeton University Press 1983) 292.

ists since the Vietnam War,[197] radically changes the perception of restraints in war as subject merely to the requirements of necessity and proportionality. While respect for human rights does not necessarily rule out all utilitarian calculations, it nonetheless imposes limits on military conduct beyond which utilitarian calculations are not permitted to enter. Thus, certain modes of fighting may be proscribed even if to refrain from them is to forego military advantages that may be important or even 'necessary' for achieving one's ends.

In such a vein, for instance, the US Army Field Manual – which incorporates international standards of conduct in war – provides that

> [a] commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is also unlawful for a commander to kill his prisoners on the grounds of self preservation, even in the case of airborne or commando operations, although the circumstances of the operations may make necessary rigorous supervision of and restraint on the movement of prisoners of war.[198]

Reference may also be made to an article in each of the four Geneva conventions[199] which provides that protected persons may not renounce the rights secured to them by the Convention. Moreover, article 3 common to all four Conventions obliges the parties to apply as a minimum certain fundamental standards of humane treatment in an armed conflict not of an international character – a notion which is further developed in Protocol II (articles 4–6).

Such illustrations may nonetheless be insufficient to establish a human rights rationale since they are still explicable in consequential terms. As maintained by Wasserstrom, and echoed in the explanatory statements in the US military manuals, rules of war cannot be overridden by considerations of military necessity because they have already been given their full weight in the decision to promulgate the rules.[200]

Thus, notwithstanding the desirability of a human rights rationale of

[197] See GIAD Draper 'The Ethical and Juridical Status of Constraints in War' (1972) 55 *Military Law Review* 169–186; *Idem* 'Human Rights and the Law of War' (1972) 12 *Virginia Journal of International Law* 326, 326–33. A link between human rights and the international law or armed conflict was officially established at the International Conference on Human Rights convened in 1968 by the UN in Teheran which culminated in Resolution 2444 (XXIII) adopted on 12/5/68 and entitled 'Human Rights in Armed Conflict.' See also UN Secretary-General Report on *Respect for Human Rights in Armed Conflicts* (A/7720) 20 Nov 1969 which states (paragraph 6) that '[t]he Second World War gave conclusive proof of the close relationship which exists between outrageous behaviour of a Government towards its own citizens and aggression against other nations, thus, between respect for human rights and the maintenance of peace.'

[198] *The Law of Land Warfare op cit* 35.

[199] Article 7 of the First, Second and Third Conventions and article 8 of the Fourth.

[200] See Richard Wasserstrom 'The responsibility for War Crimes' in Held, Morgenbesser and Nagel (eds) *Philosophy, Morality and International Affairs op cit* 47, 50–2.

jus in bello, perhaps a more realistic conception of contemporary laws of war reinforces the traditional themes of self interest and reciprocity (unlimited violence invites unlimited retaliation which involves unnecessary suffering and need not result in victory) on the one hand and humanitarian considerations on the other, rather than the assertion that potential victims have 'rights' which must be respected. Indeed, even Walzer, who strongly defends a human rights foundation for the rules of war, is driven to a utilitarian position, albeit a 'minimal' one, whereby such rules may be overridden in the most extreme cases when a nation fighting a just war against aggression is in the position of 'imminent catastrophe' and the 'heavens are about to fall.'[201] Others[202] go as far as to suggest that to speak of 'human rights' in an 'armed conflict' is a contradiction in terms. For one thing, 'human rights have usually been considered by the UN as a peacetime concept.' Secondly,

> human rights represent a relationship between the individual and his own government ... [and not] between an individual and the people most likely to kill or wound him at an armed conflict: foreign governments, foreign non-governmental armed bands or domestic non-governmental armed bands.

Thirdly, it is a fact that existing laws of armed conflict (for example the Geneva and Hague Conventions) are 'not drawn up as codes of human rights.' From a pragmatic point of view, it is also evident that a human rights rationale would engender little support, given the ideological antagonism the subject invariably invokes. The preference of the international community for a separate body of armed conflict rules and standards is clearly reflected in the adoption of the two 1977 Conventions Additional to the Geneva Conventions.

Contemporary restrictions on specific means

Having analysed comtemporary *jus in bello* principles, it remains to determine to what extent certain means of warfare are excluded by the application of these principles or are to be considered *mala per se*. Such an inquiry must take heed of, indeed begin with, additional principles relating specifically to the use of weapons in war, including in particular the so-regarded 'basic principle'[203] that 'in any armed conflict the right of the Parties to choose methods or means of warfare is not unlimited'[204] – commonly interpreted as, and developed into, the principle that it is forbidden 'to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.'[205]

[201] Walzer *Just and Unjust Wars op cit* 231.

[202] Keith Sutter *An International Law of Guerrilla Warfare: The Global Politics of Law Making* (London Frances Pinter (Publishers) 1984) 34–5.

[203] Verwey *Riot Control Agents op cit* p 292.

[204] Article 35 paragraph 1 Protocol I reaffirming the customary rule of international law laid down originally in article 22 of the Hague Regulations.

[205] Article 35 paragraph 2 reiterating existing general prohibition stated first in the Preamble of the 1868 St Petersburg Declaration and in article 23 of the Hague Regulations.

These principles should be further supplemented by rules stemming from the disapproval of means of war whose effects are indiscriminate, uncontrollable and lasting. Thus, from the fundamental distinction between combatants and non-combatants, discussed earlier, flows the prohibition of developing weapons or tactics that cause indiscriminate harm as between combatant and; non-combatant military and civilian personnel. It is similarly prohibited to use weapons and tactics that violate the neutral jurisdiction of non-participating states.[206] In addition, the enjoinment of uncontrollable means of war, aptly demonstrated in the Geneva Gas Protocol,[207] may be reformulated as a rule proscribing the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices, including bacteriological methods of warfare. Finally, under a provision introduced in 1977 into the laws of war by Protocol I, 'methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment' are banned.[208]

Generally, two[209] distinctive approaches to the regulation of use of weapons may be discerned: the intrinsic and extrinsic or contextual.[210] Whereas the former focuses on the abstract 'nature' of the weapon to

[206]See 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers in Case of War on land articles 1 2 3 4 and 10 reprinted in (1908) Supplement 2 *AJIL* 117–27; and the 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval Wars articles 1 and 2 reprinted in (1908) Supplement 2 *AJIL*.

[207]1925 Protocol for the Prohibition of the Use of War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare reprinted in (1975) 14 *ILM* 49.

[208]Article 35(3). Note that while the Protocol's status is somewhat questionable due to the failure of certain major powers to ratify it, evidence may be adduced in support of the contention that this rule has acquired the force of 'instant' customary law (including the multi-national expression of 'common concern' for the environment as reflected in the Stockholm Declaration of the UN Conference on the Human Environment in the Report of the UN Conference on Human Environment, UN Doc A/CONF 48/14 and Corr 1 reprinted in (1972) 11 *ILM* 1415. See in particular Principle 16 which provides that '[m]an and his environment must be spared the effects of nuclear weapons and all other means of mass destruction ...' Ecological awareness was also the basis for General Assembly Resolutions 3154 (XXVIII) of 1973 [UN GAOR 28th Sess Supp No 30], which denounced 'environmental pollution by ionising radiation from testing of nuclear weapons,' and 3246 (XXIX) of 1974 [UN GAOR 29th Sess Supp No 30], which deplored efforts to influence the environment and climate for military purposes because such efforts were 'incompatible with the maintenance of international security, human well-being and health.' For the proposition that article 35(3) of Additional Protocol I may be viewed as declaratory of emerging customary law see Burns H Weston 'Nuclear Weapons Versus International Law: A Contextual Reassessment' (1983) 28 *McGill Law Journal* 542 567.

[209]There is a third, more extreme, approach which has attracted, however, little adherence as yet. It is not directed to specific weapons but to the 'missions' or 'functions' for which military capabilities can be employed, with a view to banning weapons capable of performing functions that are forbidden by international law (eg offensive and destabilising armaments). See Christopher Bertram *Arms Control and Technological Change: Elements of a New Approach* (London Adelphi Paper No 46 1978) 19. See also Richard A Falk 'On the Further Decline of International Law,' in AR Blackshield ed *Legal Change: Essays in Honour of Julius Stone* (Sydney Butterworths 1983) 290–1.

[210]This distinction was drawn by Richard A Falk in 'The Shimoda Case: A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki' (1965) 59 *AJIL* 759.

govern the issue of its lawfulness, the latter measures the legality of a weapon in the context in which it is used, that is, by the relation existing between the military advantage procured by the weapon and the sufferings inflicted on the civilian population.[211] In such a vein, 'unnecessary suffering' has been interpreted to mean suffering that is not reasonably related to any military advantage to be derived from its infliction.[212]

The contextual approach, which was favoured by a number of delegates to the 1969 Conference on Contemporary Problems of the Law of Armed Conflict,[213] has also been reflected more recently in the reluctance of state Representatives to the 1974–77 Diplomatic Conference on Humanitarian Law to impose specific bans on weapons.[214] Indeed, international law has not registered many successful efforts to declare weapons or means of warfare *mala per se*. Exceptions nonetheless exist, the most conspicuous being the prohibition of genocide. Employment of genocidal policies as a means of war is unequivocally prohibited under the 1948 Genocide Convention which followed a unanimous adoption of a 1948 General Assembly resolution affirming that 'genocide is a crime under international law.'[215] Agreement has also been reached on the absolute prohibition of bacteriological (biological) warfare, including the use of biological weapons as a reprisal in kind.[216]

On the other hand, efforts[217] to declare chemical weapons *mala per se* have not resulted, as intended, in the conclusion of an international convention on the prohibition of the development, production and stockpiling of all chemical weapons and on their destruction. In fact, even the prohibition under the 1925 Geneva Gas Protocol relating to the use of chemical weapons, is said to be basically a no-first-use proscription which might not survive use by an ally of a party to a conflict, much less an immediate

[211]Relevant 'contextual' questions include, for example, whether the weapon can be delivered accurately to its target? Would its use necessarily result in excessive injury to civilians or damage to civil objects so as to qualify as an 'indiscriminate weapon'? Would its effects be uncontrollable in space or time so as to cause disproportionate injury to civilians or damage to civilian objects? Would its use necessarily cause suffering excessive in relation to the military purpose which the weapon serves?

[212]See Wasserstrom 'The Laws of War' *op cit* 199.

[213]See Lucius Caflisch *Summary Record of the Conference* (New York 1971) 74–7.

[214]See analysis in Cassesse 'Means of Warfare' *op cit* 179–86.

[215]Resolution No 260 (III) A, UN GAOR 3rd Sess (I) Resolutions 174; UN Doc No A/810; *AJIL* Supplement (1951) 7–9. Following the Nuremberg precedent, genocide is also treated as a crime for which individuals may be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contradicting parties that have accepted its jurisdiction.

[216]See 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction ('Biological Weapons Convention') reprinted in (1972) 11 *ILM* 310.

[217]See for example: Report of the Committee on Disarmament (which includes, *inter alia*, a report of its *Ad Hoc* Working Group on Chemical Weapons) GAOR 38th Sess Supp 27, UN Doc A/38/27, para 79.

opponent.[218] Furthermore, distinctions are also drawn between the various chemical substances and agents by reference to the degree of harm caused and the particular mode of use,[219] thus re-emphasising their 'contextual,' as distinct from 'intrinsic,' illegality.

At the same time, some progress in the quest to 'humanise'[220] warfare has been registered in the adoption on 10 October 1980 of a Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and three Protocols on Non-Detectable Fragments (Protocol I), on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) and on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).[221] Other major attempts to proscribe

[218]O'Brien *The Conduct of Just and Limited War, op cit* 345–6. In a resolution adopted by the British Branch of the International Law Association on 7/12/61 it was considered that '[i]n the absence of specific undertakings, it appears impossible to deny the right to use such weapons, biological, chemical and nuclear, by way of reprisals to a belligerent whose opponent has broken treaty obligations not to resort to force or to war.' Cited in George Schwarzenberger, *Report on Self Defence Under the Charter of the UN and the Use of Prohibited Weapons* (International Law Association, Brussels Conference, 1962) 43. See also: Ann van Wynnen and AJ Thomas jr *Legal Limits on the Use of Chemical and Biological Weapons* (Dallas Southern Methodist University Press 1970). Indeed, certain states have accompanied their instruments of ratification or accession by a reservation asserting the right to use these weapons against such states which themselves would use them. For a discussion of these reservations and interpretation see: Henri Meyrowitz *Les Armes Biologiques et le Droit International* (Paris Editions A Pedone 1968) 62ff. Meyrowitz adds that even without such a reservation the use of biological (and chemical) weapons in reprisals is not necessarily prohibited – *ibid* 78ff.

[219]See: Meyrowitz *ibid* 28–29. See also: Bindschedler Report 35–7.

[220]It should be noted that the specific prohibition of certain weapons belongs to two branches of international law: disarmament law and international humanitarian law applicable in armed conflicts. While in matters of disarmament, emphasis is laid on problems of security, security considerations are subsidiary in the context of international humanitarian law. This is not to suggest however that there is no interrelationship between humanitarian norms and disarmament efforts. Such interconnection has been recognised in General Assembly Resolution 3076, UN GAOR 28th Sess Sup 30 15 UN Doc A/9030 (1973) which stated that 'the widespread use of many weapons and the emergence of new methods of warfare that may cause unnecessary suffering or are indiscriminate call urgently for efforts by Governments to seek through possible legal means the prohibition or restriction of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measure of disarmament, the elimination of specific weapons that are especially cruel or indiscriminate.' See also BG Ramcharan 'Human Rights, Humanitarian Law and Disarmament – Recent Trends in UN Human Rights Organs,' paper presented at the Fifth Round Table on Current Problems of International Humanitarian Law San Remo Italy (6–9 September 1978).

[221]UN Doc A/CONF 95/18 (1980) reprinted in (1980) 19 *ILM* 1523. It is important to note that Protocol I outlaws specific weapon systems entirely, prohibiting the 'use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.' On the other hand, although Protocol III reaffirms the general principle of civilian protection by declaring that '[i]t is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons,' such weapons may be used, when necessary for legitimate military purposes, against combatants or; military targets.' See in this connection Jordan Paust "Remarks" (1973) 67 *Proc Am Soc Int'l Law* 162–3; Fritz Kalshoven "Remarks" *ibid* 157, 160; John Matheson "Remarks", (1979) 73 *Proc Am Soc Int'l Law* 156, 157–8.

the use of specific means of war pertain to saturation bombardment of cities regardless of whether they contain military targets,[222] attacks designed to spread terror amongst civilians,[223] and deliberate starvation of civilians.[224]

The *mala per se/mala prohibita* dichotomy assumes particular importance with respect to nuclear weapons. Specifically, considerable attention is accorded to the issue whether nuclear weapons are inherently wrong or merely illegal in distinct contexts. Support for the latter contention rests largely on the absence of any conventional rule explicitly outlawing nuclear weapons in general,[225] coupled with the traditional theory of obligation in international law which provides that states are free to do whatever they are not strictly forbidden from doing.[226] Such reasoning has for

[222]See Article 51 paragraph 5 of (Additional) Protocol I.

[223]See Article 51 paragraph 2 of (Additional) Protocol I (replicated in Article 13 of Protocol II) which provides: 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror amongst the civilian population are prohibited.' The lack of a definition of 'terrorism,' however, as well as the prerequisite factors of intent, effect and the relative absence of proportionate military necessity for the measures taken, tend to detract from the 'absoluteness' of this prohibition.

[224]Article 54 of Protocol I (as well as article 14 of Protocol II) prohibits 'starvation of civilians as a method of warfare.' The prohibition does not apply, however, when objects such as foodstuff, crops, livestock, etc are used as sustenance solely for the members of the armed forces of the adversary and when a party to the conflict implements a 'scorched earth' policy while defending its national territory from invasion. See also O'Brien's questioning analysis of the interpretation and application of this rule in the light of long established and conflicting belligerent practices. (*The Conduct of Just and Limited War op cit* 108–9; 197–8) O'Brien further subjects the curtailment of food denial and/or destruction to a 'contextual' examination and concludes that such strategies are not self evidently disproportionate nor indiscriminate. (*Ibid* 109) For a thought provoking general discussion of this issue see: Walzer *Just and Unjust Wars op cit* 160–75.

[225]There are, however, important treaties which prohibit nuclear weapons in Antarctica, Latin America, Outer Space, and on the Seabed beyond the limit of the national territorial seas. See Antartic Treaty 402 *UNTS* 71, Articles I and V (signed 1 December 1959; entered into force 23 June 1961); Treaty for the Prohibition of Nuclear Weapons in Latin America, 634 *UNTS* 281 (signed 14 February 1967; entered into force for 24 states on 31 December 1982); Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water 480 *UNTS* 43 (signed 5 August 1963; entered into force 10 October 1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 610 *UNTS* 205, Article IV (signed 27 January 1967; entered into force 10 October 1967); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, reprinted in 10 *ILM* (1971) 146 (signed 11 February 1971; entered into force for 70 states on 31 December 1982).

[226]A classic statement of this version of the international normative process is contained in the *SS Lotus* holding that 'rules of law binding on states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.' (*Frances v Turkey*) (1927) *PCIJ* Ser A No 10 18. See also *Fisheries Case* [1951] ICJ Reports 116.

instance underpinned the American position as reflected in article 613 of the US Naval Instructions of 1955, stipulating that

> [t]here is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.[227]

By the same token, '[t]he law of war, like the whole of international law is composed of more than treaty rules, explicit and otherwise.'[228] As proclaimed in the 'Martens Clause' in the Preamble to the Fourth Hague Convention 1907:

> Until a more complete code of laws has been issued, ... in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established amongst civilised peoples, from the laws of humanity, and the dictates of public conscience.[229]

Such a broad conception of the laws of war was further reaffirmed by the International Military Tribunal at Nuremberg in 1946, declaring that

> [t]he law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.[230]

Particularly relevant in the discussion of the intrinsic illegality or otherwise of nuclear weapons is the Tokyo District Court's judgment in the *Shimoda Case* that the nuclear bombings of Hiroshima and Nagasaki were in violation of international law. Addressing the specific point of the lack of explicit proscription of nuclear weapons, the court concluded

> [I]t is right that use of a new weapon is legal, as long as international law does not prohibit it. However, the prohibition in this case is understood to include not only the case where there is an express provision of direct prohibition but also the case where it is necessarily regarded that the use of a new weapon is prohibited, from the interpretation and analogical application of existing international laws and regulations. Further, we must understand the prohibition includes also the case where, in light of principles of international law which are the basis of the above-mentioned positive international law and regulations, the use of a new weapon is admitted to be contrary to the principles. For there is no reason why the interpretation of international law must be limited to grammatical interpretation any more than in the interpretation of domestic law.[231]

[227] See also US Army Field Manual *op cit* ss 35, 18; Robert W Tucker *Law of War and Neutrality at Sea* (Newport RI US Naval War College 1956) 54–5.

[228] Burns H Weston 'Nuclear Weapons and International Law: Illegality in Context,' (1983) 13 *Denver Journal International Law and Policy* 1 3. A similar conclusion has been reached by EL Meyrowitz, 'The Laws of War and Nuclear Weapons' (1983) 9 *Brooklyn Journal of International Law* 227.

[229] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land 18 October 1907, reprinted in (1908) 2 *AJIL* supp 90–117.

[230] *Trial of Major War Criminals Before the International Military Tribunal* Col XXII (IMT Secretariat Nuremberg 1948) 464.

[231] *The Shimoda case op cit* 235. Note, however, that the court did not hold the atomic bombing unlawful *per se*. Rather, it held that in certain circumstances the use of such means was questionable.

The illegality of nuclear weapons must therefore be assessed in the light of 'sources' of the laws of war other than international conventions. Most significant in this connection is the General Assembly Resolution of 24 November 1961[232] stating that

> [t]he use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations, and, as such, a direct violation of the Charter of the United Nations

and that

> [a]ny state using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws and humanity and as committing a crime against mankind and civilisation.

The evidentiary authority of the Resolution has, however, been impaired by the refusal of some of the Great Powers (whose attitude is decisive in this case) to declare or admit the illegality of nuclear weapons as such,[233] thus rendering impossible the inference of the existence of an *opinio juris* necessary for the formation of a specific rule of prohibition.

Yet certain rules might be extended by analogy to proscribe the use of nuclear weapons. Arguably applicable, by virtue of the resemblance between the injurious effects caused by nuclear fall-out and the deliberate emission of poison into the environment, are article 23(a) of the Hague Regulations 1907 which declares that it is forbidden 'to employ poison or poisoned weapons' and the Geneva Gas Protocol 1925 which prohibits 'the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.' Such an analogy may nonetheless not be sufficiently close to be compelling; fall-out is only a *side-effect* of nuclear weapons, whereas poisoning is the *main* (if not the sole) effect of using poisonous gas. Nor do nuclear explosions directly produce bacteria, fungi or living organisms so as to uphold an analogy with bacteriological weapons, in spite of the similarity in scale and scope of destruction.

The analogy to genocide and crimes against humanity[234] also seems questionable as a basis for an absolute proscription of nuclear weapons since the use of such weapons need not be directed at or result in the

[232] Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, UN General Assembly Resolution 1653 UN GAOR 16th Sess Supp (No 17) 4 UN Doc A/5100 (1961).

[233] Fifty five states (consisting mainly of communist and Afro-Asian countries) voted in favour of the resolution, twenty states (consisting mainly of Western countries) voted against and twenty six states (consisting mainly of Latin American countries) abstained. The resolution was reaffirmed by wider margins in 1978 and 1980 but still falls short of providing evidence of a generally accepted custom. (The Western powers, at any rate, are probably entitled to claim that the resolution has no legal effect on them, since they have consistently repudiated the ideas stated in it.) See UN General Assembly Resolution 22/71–B UN GAOR 33rd Sess Supp No 45 48 UN Doc 2/33/45 Supp No 48 69 UN Doc A/35/48 (1980).

[234] See Richard Falk Lee Meyrowitz Jack Sanderson 'Nuclear Weapons and International Law' (1980) 20 *Indian Journal of International Law* 541 568–9.

destruction of people of a particular race, religion and nationality in the extermination of a civilian population.[235] Alternatively, nuclear weapons could be compared with the mass bombing raids of the Second World War. The persuasive power of this analogy is, however, also in doubt, given the absence of a treaty prohibiting those raids and the difficulty of arguing that they were contrary to customary law in the face of the extensive utilisation of this mode of warfare by both sides in the Second World War.[236]

Perhaps a more direct inference of illegality of nuclear weapons may be drawn from the principles of *jus in bello* discussed earlier. Especially pertinent in this context is the rule prohibiting the use of weapons or tactics that cause mass destruction and indiscriminate harm as well as the somewhat related proscription in respect of weapons or tactics that violate the neutral jurisdiction of non-participant states.[237] Indeed, a large body of support[238] can be adduced in favour of the contention that nuclear weapons, at least of the type exceeding a certain size, are necessarily indiscriminate in their effects for the following reasons. First, their explosive force is such that they cannot be limited to military objectives; they destroy both lawful and unlawful objectives in an indiscriminate fashion, so that even if they were directed against lawful objectives, the destruction of unlawful objectives would not be purely accidental. Secondly, since fallout is uncontrollable, nuclear bombs are 'blind' weapons and hence indiscriminate ones, and at any rate could not be confined to any precise territorial boundaries.

Some difficulty nonetheless remains in deriving from the *jus in bello* principle of discrimination an absolute prohibiton of nuclear weapons (as distinct from illegality in context) in circumstances where no indiscriminate effects are produced. In other words, nuclear weapons destined to be utilised under precisely determined conditions (for instance, at great heights) or whose explosive force is sufficiently small to avoid any unlawful effects (eg neutron bombs) may be considered as not affected by the prohibition against indiscriminate warfare.[239]

[235]The essence of the concept of 'genocide' is expressed in the 1948 Genocide Convention which defines it as the commission of specified acts 'with intent to destroy, in whole or in part, a national, ethical, racial, or religious group, as such.' In other words, the acts are carried out not in virtue of any legitimate public requirements of war (or peace) but purely for the sake of exterminating or degrading the target group.

[236]If Articles 48–60 of Protocol I had been in force during the Second World War, they would have proscribed many of the bombing raids which occurred during that war. It should be noted, however, that the US, when signing the 1977 Protocol, placed on record its 'understanding ... that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. See (1978) *AJIL* 407. Similar statements were made by the British and French governments, in fact by all nuclear weapon states (with the exception of China) as well as by other states and non-governmental organisations. See in this connection Elliot L Meyrowitz 'Remarks' (1981) 75 *Proc Am Soc Int'l Law* 214.

[237]Another rule which may be classified under the broader 'principle of discrimination' is that which prohibits the use of weapons or tactics that cause widespread, long term and severe damage to the natural environment. As indicated above (n 208), however, it is contained in the yet unratified Protocol I which is, moreover, understood not to extend to nuclear weapons (see n 236).

[238]See The Bindschedler Report 31 and authorities cited therein (n 17 18). See also Falk, Meyrowitz, Sanderson, 'Nuclear Weapons and International Law' *op cit* 564–7.

Similar arguments questioning the illegality *per se* of nuclear weapons pervade attempts to ground such illegality in the violation of the fundamental principle of *jus in bello* that acts of war should not cause unnecessary suffering, that is suffering out of all proportions to the military advantage to be gained from those acts. It is contended, for instance, that while nuclear weapons cause enormous suffering, they can also produce an enormous military advantage such as in the case of deployment against Japan which resulted in considerable shortening of the Second World War.[240] Hence, the use of nuclear weapons cannot be considered unlawful in all circumstances but needs to be appraised in specific wartime contexts.

This is not to suggest, however, that such a contextual evaluation would not result in the conclusion that the use of nuclear weapons is invariably illegal. Nor does it necessarily follow that peacetime possession and threatened use are unconditionally legal. Indeed, summing up an in-depth analysis into whether resort to nuclear weapons is proportional to a legitimate military end,[241] Weston asserts that

> [w]hile no treaty or treaty provisions specifically forbids nuclear warfare *per se* except in certain essentially isolated whereabouts,[242] almost every use to which nuclear weapons might be put, most notably the standard strategic and theater-level options which dominate United States and Soviet nuclear policy, appear to violate one or more of the laws of war that serve to make up the contemporary humanitarian law of armed conflict, in particular the cardinal principle of proportionality.[243]

A more far reaching conclusion is the product of another extensive study into the legal consequences of the use of nuclear weapons in the light

[239]See Robert W Tucker 'The Law of War and Neutrality at Sea' in Naval War College *International Law Studies* Vol I (Washington DC Government Printing Office 1957) 55; Erik Castren *The Present Law of War and Neutrality* (Helsinki Suomalaisen Tiedekatemian Toimituksia 1954) 206–7.

[240]Michael Akehurst *A Modern Introduction to International Law* 4ed (London Allen and Unwin 1982) 233.

[241]Appraising 'strategic' and 'tactical' nuclear exchanges (Weston further distinguishes in both cases between 'countervalue' and 'counterforce' targeting) in the contexts of first and second defensive use of nuclear weapons. An even more comprehensive assessment is provided by Weston in 'Nuclear Weapons Versus International Law' *op cit* 542.

[242]Such as the 'essentially cautious, long-term preparations for preventing or deterring nuclear war, short of provocative "sabre-rattling" activities; very limited tactical – mainly battlefield – warfare utilising low-yield, "clean" and reasonably accurate nuclear weapons for second use retaliatory purposes only; and possibly *but not unambiguously* (until as yet undeveloped technological refinements are achieved), an extremely limited counterforce strike in strategic and theater-level settings for second use retaliatory purposes only.' Weston 'Nuclear Weapons and International Law' *op cit* 14.

[243]*Loc cit*.

of a wider range of scenarios for use contemplated by existing strategies and weapons capabilities –

> [A]lthough nuclear weapons are not illegal *per se*, their likely effects and the absence of any mechanism to control the escalatory spiral once the firebreak is crossed render virtually any use inconsistent with the fundamental objectives and principles of war. The use of nuclear weapons would therefore be unlawful, even during a war of legitimate self defence.[244]

Having addressed the issue of the threatened use of nuclear weapons, and specifically the 'paradox of deterrence,' the author further contends that deterrence structures which rest on the manufacture, possession and threats to use such weapons are also unlawful.[245]

A conception of relative legality or illegality of nuclear weapons[246] seems, however, to be more commensurate with political reality. One is nonetheless inclined to concur with Weston's assertion that in the light of existing humanitarian rules of armed conflict, at the minimum a presumption of illegality is established, imposing a heavy burden of proof on those contemplating the use of nuclear weapons on any extended or large scale basis.[247]

In any event, it is clear that rules and principles of *jus in bello* are as applicable to nuclear as they are to conventional weapons and warfare.[248] An intention on the part of the world community to subject the use of

[244]Daniel J Arbess 'The International Law of Armed conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?' (1984) 30 *McGill Law Journal* 89 121.

[245]*Op cit* 121–30.

[246]See, for example, proposals for 'no-first-defensive use' of nuclear weapons discussed in Richard L Falk 'The Claimants of Hiroshima' in Richard L Falk and Saul H Mendlovitz (eds.) *The Strategy of World Order* Vol 1: *Toward A Therory of War Prevention* (New York World Law Fund 1966) 309 'A tradition of no first use, if seriously supported by the official proclamations of principal governments, would considerably improve the prospects for avoiding nuclear war.' For a comprehensive account of arguments for and against 'no-first-use' as well as a summary of views by state representatives to the UN see Frank Blackaby, Jozef Goldblat, Sverre Lodgaard (eds) *No-First-Use* (London and Philadelhia Taylor and Francis 1984). On 'limited nuclear war' see Laurence Martin 'Limited Nuclear War' in Michael Howard *Restraints on War op cit* 103–21. On the 'morality' of deterrence see Joseph S Nye, Jr 'Regan, the Bishops and the Bomb' *The Boston Globe* 31 January 1983 2 'Even if one believes that nothing is woth nuclear war, it does not follow that nothing is worth the *risk* of nuclear war. Imagine a tiny risk of neclear war and imagine the threat of that risk helped prevent a large-scale conventional war? Many people think not – so long as efforts are made to keep the risks as low as possible, and so long as one realises that this is only an interim solution.'

[247]Weston 'Nuclear Weapons and International Law' *op cit* 15.

[248]See Weston 'Nuclear Weapons versus International Law' *op cit* 575–89 for a demonstration, utilising the 'co-ordinate communication flaw' theory of norm prescription, that the laws of war, including their humanitarian components, do apply to nuclear weapons and warfare.

nuclear weapons to such laws may also be discerned.[249] While some uncertainty exists with respect to the extent to which such control intentions could be realised in practice, it does not negate the conclusion that nuclear weapons and warfare are placed 'under the legal scrutiny of the humanitarian rules of armed conflict.'[250] This conclusion is also dictated by policy exigencies in view of the 'horrifying and potentially irreversible devastation of which nuclear weapons are capable, not to mention the very little time their delivery systems allow for rational thought.'[251] Normative restrictions, of course, may not necessarily culminate in a permanent nuclear peace, at least not within the present statist world order but may provide governments with an opportunity and scope for meshing their security policies with an emerging consensus that would preclude any reliance upon nuclear weapons.[252]

Generally, and as a summary, it may be concluded that apart from the principle prohibiting the use of weapons that render death inevitable – which 'was buried with the first blast of a grenade'[253] – humanitarian rules of armed conflict 'though somewhat eroded over the years and obviously susceptible of evasive interpretation continue as a vital civilising influence on the world community's warring propensities.'[254]

> [T]here remains even in this nuclear age an inherited commitment to standards of humane conduct within which the reasonable belligerent can operate, a commitment to the fundamental principle from which all the laws of war derive, namely that the right of belligerents to adopt means and methods of warfare is *not unlimited*.[255]

While the problem of abuse of *jus in bello* is likely to persist, the fault does not lie with the principles themselves but with the 'dishonest and hypocritical individuals or nations that misuse these principles.'[256]

To be sure, upholding just war standards in nuclear as well as conventional war is extremely difficult and the problem of applying the law of war in revolutionary/insurgency warfare is generally acknowledged.[257] However, the value of the principles is not thereby reduced. Indeed, it may be contended that a just war analysis is particularly applicable to questions of arms control given the grounding of related principles in a 'wide-spread

[249]The desire to limit the use of nuclear weapons and warfare is evidenced for example by the conventions and resolutions referred to above (nn 225 232 233). See also the SALT agreements (signed on 26 May 1972 and 18 June 1979 respectively) reprinted in (1972) 11 *ILM* 784 (SALT I) and (1979) 18 *ILM* 1112 (SALT II). Additionally see Weston's studied discussion *ibid* 568–73; and Falk's suggestions for a contemporary 'Magna Carta for the nuclear age' and his outline of a legal regime governing nuclear weapons. Richard A Falk 'Toward a Legal Regime for Nuclear Weapons' (1982–3) 28 *McGill Law Journal* 519.

[250]Weston 'Nuclear Weapons and International Law' *op cit* 4.

[251]*Loc cit*.

[252]See Falk 'Toward a Legal Regime' *op cit* 540–1.

[253]Verwey *Riot Control Agents op cit* 294.

[254]Weston 'Nuclear Weapons versus International Law' *op cit* 573.

[255]Weston 'Nuclear Weapons and International Law *op cit* 4 [emphasis added].

[256]O'Brien *The Conduct of Just and Limited War op cit* 340.

[257]See discussion in O'Brien *ibid* 175–203.

cultural consensus on the appropriate uses and limits of violence.'[258] By the same token, proposed alternatives appear to offer limited usefulness. As maintained by Johnson, utilitarianism[259] for instance 'appears at its best to represent a kind of attempt to reinvent the wheel.'[260] Another alternative, the 'unfocused appeal to humanity' is 'too blurry in its meaning to be useful' and itself rests on basic moral principles that are left unacknowledged and unexamined.[261] Finally, pacifism, with its emphasis on the absolute banning of all weapons, 'appears better suited to an analysis of the eschatological era than of sinful human history, where war and weapons of war remain a fact of life.'[262]

The dearth of specific prohibitions within the just war framework is not in itself a critical shortcoming of the *jus in bello*. In fact, compelling reasons may be adduced for the view that 'general principles, coupled with effective implementation efforts, will often serve better than specific prohibition to control the development and use of weapons.'[263] 'Effective implementation,' in turn, while not easily accomplished, may be enhanced through various methods,[264] including further agreements on general criteria concerning the use and effects of prohibited weapons, educational efforts directed at both the general populace and potential military combatants, domestic criminal restraints and, at a more general level, departure from an inhibiting state-oriented approach and its substitution by a value-based attitude.

The effectiveness of *jus in bello* restraints should also be viewed in the light of their relationship with the *jus ad bellum*. As illustrated by Johnson for instance, while

> [f]rom the standpoint of the just war tradition's *jus in bello* the dilemma of strategic nuclear weapons – which is the dilemma of their use, or threat of use, in counterpopulation warfare – remains in all its force – from the *jus ad bellum* perspective it is possible to see that moral and practical considerations point the same way – towards an effective deterrent to war.[265]

The combined effect of macro- and micro-restraints on the conduct of nuclear war is also emphasised by Clark, who considers that

> [u]ntil such time as a persuasive account is offered of the relationship between war's political ends and its nuclear means, the conclusion that must inescapably be drawn is that, as a matter of political theory, the macro-limitations inherent in war itself must serve as a prohibition on resort to this particular means.[266]

Seen in the context of its interrelationships with other components of the just war concept, *jus in bello* appears thus to offer an adequate body of prescriptions governing the conduct of armed combat. Needless to say, however, further efforts to give it concrete expression would increase the utility of this set of principles and rules. Emphasis on values, hitherto not expressly recognised, such as the survival of mankind, the protection of human environment and the 'principle of threshold'[267] should also render the existing framework more effective in dealing with the development of weapons of mass destruction.

[258] Johnson *Can Modern War be Just? op cit* 88.
[259] As represented for example by Nagel, Brandt and Hare in Marshall Cohen (ed) *War and Moral Responsibility* (Princeton Princeton University Press 1974) 3–61.
[260] Johnson *Can Modern War be Just? op cit* 88.
[261] Johnson *loc cit*.
[262] Johnson *loc cit*.
[263] Joradn J Paust 'Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons' (1983) 28 *McGill Law Journal* 608 623 and references therein (n 79).
[264] See *ibid* 623–7.
[265] Johnson *Can Modern War be Just? op cit* 103.
[266] Ian Clark *Limited Nuclear War: Political Theory and War Conventions* (Oxford Martin Robertson 1982) 240.
[267] Under this principle certain types of weapons may be prohibited totally, although a specific kind in specific circumstances would not violate the principles of the laws of war, because any use of this type of weapons would pass a threshold between this type and other types of weapons, and thereby create the danger, through escalation of the general use of these weapons (eg napalm). See SIPRI (Stockholm International Peace Research Institute) *The Law of War and Dubious Weapons* (Stockholm Almqvist and Wiksell International 1976) 43–4.

Human rights and environmental law: the case for a conservation bill of rights

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Introduction

The time appears to have arrived in South Africa when we can say, as was said in 1970 about perceptions in the State of California in the United States of America (USA), perhaps somewhat irreverently, that "(e)nvironment has gained a place next to God, nation, motherhood and apple pie in our national pantheon of political idols."[1] Consider the following statements published in the *Government Gazette* of 29 May 1987 in a Draft Bill on Environment Conservation.[2] The draft provides, *inter alia,* for the determination by the Minister of Environment Affairs and of Water Affairs of a national policy in respect of-

> the establishment and maintenance of living environments which contribute to a high quality of life for the inhabitants of the Republic of South Africa.[3]

The formulation of that policy is required to take place within the framework of specified principles, one of which is that-

> Every inhabitant of the Republic of South Africa is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment.[4]

Another stated principle required to be observed in the formulation of such policy is that-

> The preservation of productive systems and unimpeded natural processes is essential for the meaningful survival of all life on earth.[5]

The Draft Bill proposes that all ministers of state departments, provincial administrators and executive officers of local authorities are required to execute that policy to the extent that it is within their competence to do

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[1] T C Lynch and J S Stevens "Environmental Law – The Uncertain Trumpet" 1971 *Environment LR* 24 (reprinted from 1970 (5) *University of San Francisco LR* 10).
[2] GG 10752, Notice 353 of 1987.
[3] S 2(1)(d).
[4] S 2(2)(a).
[5] S 2(2)(d).