The Legitimate Use of Military Force

The Just War Tradition and the Customary Law of Armed Conflict

Edited by

Howard M. Hensel

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Edited by
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ASHGATE

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Contents

List of Contributors *vii*

Introduction 1
Howard M. Hensel

PART I: PERSPECTIVES ON JUST WAR DOCTRINE, INTERNATIONAL RELATIONS, AND ARMED CONFLICT

1 Theocentric Natural Law and Just War Doctrine 5
Howard M. Hensel

2 Anthropocentric Natural Law and its Implications for International Relations and Armed Conflict 29
Howard M. Hensel

3 The Rejection of Natural Law and its Implications for International Relations and Armed Conflict 63
Howard M. Hensel

PART II: INTERNATIONAL LAW AND THE CUSTOMARY PRINCIPLES UNDERPINNING THE LAW OF ARMED CONFLICT

4 Preemption and Preventive War 99
Gregory A. Raymond and Charles W. Kegley, Jr

5 The Development of International Humanitarian Law and the Continued Relevance of Custom 117
Jean-Marie Henckaerts

6 The Martens Clause and Military Necessity 135
Mika Nishimura Hayashi

7 The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law 161
Jean-François Quéguiner

8 The Principle of Proportionality 189
A.P.V. Rogers

9 *Hors de Combat*: Post-September 11 Challenges to the Rules 219
Avril McDonald

10 Occupation Responsibilities and Constraints 263
Charles Garraway

11 Conclusion 283
Howard M. Hensel

Index *289*

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Introduction

Howard M. Hensel

When is it appropriate to resort to the use of armed force in the resolution of disputes within and between states? If the use of force is, indeed, deemed to be legitimate, what constraints, if any, should govern its actual use? The purpose of this volume is to attempt to provide some perspective as we attempt to address these timeless and vexing questions.[1]

Part I of the volume, entitled "Perspectives on Just War Doctrine, International Relations, and Armed Conflict" examines a variety of Western philosophical perspectives concerning these issues. In Chapter 1, I attempt to lay the foundations for the volume by analyzing and assessing the theocentric approach to natural law and its implications for the concept of just war. Utilizing the framework of analysis developed by proponents of theocentric natural law for evaluating whether to resort to the use of armed force, as well as for determining the factors that should regulate its actual employment, Chapter 1 examines the ways in which the analytical categories embodied within that framework were interpreted and applied, yielding, in turn, the basic criteria for *jus ad bellum* and *jus in bello*. These criteria would thereafter serve as the baseline for just war doctrine. Continuing this analysis in Chapters 2 and 3, I examine the way in which subsequent Western thinkers who rejected theocentric natural law as the basis for their respective philosophical approaches, interpreted and applied the basic analytical framework and its inherent categories of analysis developed by proponents of theocentric natural law, yielding, in turn, respective criteria for the use of armed force that were often quite different in both spirit and specifics from the just war criteria originally delineated by adherents to theocentric natural law.

Part II of the volume, entitled "International Law and the Customary Principles Underpinning the Law of Armed Conflict," examines the contemporary legal constraints governing the use of armed force both within and among states. In Chapter 4, Gregory Raymond and Charles Kegley explore the distinction between preemption and preventive war within the context of anticipatory self-defense, as these concepts have developed throughout history. This analysis is framed within the context of both the *jus ad bellum* criteria developed within the Western just war tradition, as well as within the context of the principles underpinning contemporary international law. Finally, they examine how these concepts have been applied in addressing the national security challenges that we confront at the dawn of the twenty-first century.

Chapter 5, by Jean-Marie Henckaerts, introduces the subsequent five chapters in his overview and assessment of conventional and customary international humanitarian law. Mika Hayashi follows in Chapter 6 with her analysis and assessment of the relationship between humanitarian concerns, as reflected in

the Martens clause, and the principle of military necessity. Chapter 7, by Jean-François Quéguiner, examines the principle of distinction, while, in Chapter 8, A.P.V. Rogers analyzes the principle of proportionality. In Chapter 9, Avril McDonald both analyzes the concept of *hors de combat* and assesses and evaluates its contemporary application. Finally, in Chapter 10, Charles Garraway analyzes the responsibilities and constraints associated with post-conflict occupation.

Following these chapters that concentrate on many of the most fundamental principles underpinning contemporary international law and the customary law of armed conflict, the concluding chapter focuses attention back to some of the basic differences of perspective in Western philosophy concerning man, his relationship to society and the state, and the nature of the international community. The final chapter also serves to reflect on the basic framework of analysis which coalesced at the conclusion of the medieval period designed to assess the conditions under which it was appropriate to resort to the use of armed force in the resolution of conflicts and what constraints should govern its actual employment. It reminds us of the differences in the way proponents of various Western schools of thought have interpreted and applied that framework of analysis, yielding, in turn, different criteria concerning the legitimate use of armed force. The final chapter also reminds us of the foundational role played by the criteria embodied within the Western just war tradition in the development of contemporary international law regarding the use of force, as well as the customary and conventional principles underpinning the contemporary law of armed conflict. Finally, it reminds us of the reality that appeals for adherence to the principles embodied within international law and the law of armed conflict must be made at various levels, utilizing a variety of rationales, designed to resonate for a broad diversity of individuals who adhere to a wide range of intellectual viewpoints concerning the use of armed force within the contemporary international arena.

I would like to express my sincere thanks to Ashgate Publishing Ltd. and the entire editorial team for their assistance in helping to make both this book and this series possible. In addition, I would like to thank both my wife and daughter for their invaluable support and encouragement in the preparation of this volume. It is the hope of all of us associated with this volume that our collective work will make a valuable contribution to understanding the relationship between the concept of just war and contemporary international law, as well as the principles underpinning the customary and conventional law of armed conflict, as it relates to the use of armed force in the twenty-first century.

Note

1 The opinions, conclusions, and/or recommendations expressed or implied within this book are solely those of the authors who are entirely responsible for the contents of their works and do not necessarily represent the views of any academic institution, the Air University, the United States Air Force, the US Department of Defense, any US government agency, any other government, multinational agency, or non-governmental organization.

PART I
Perspectives on Just War Doctrine, International Relations, and Armed Conflict

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Chapter 1

Theocentric Natural Law and Just War Doctrine

Howard M. Hensel[1]

Introduction

Throughout human history, there have been persistent efforts by philosophers, statesmen, and soldiers to place recognized and observable limits on the use of armed force as an instrument of policy. This effort is reflected in Western thought in the development of just war doctrine.[2] Traditionally, mainstream Western thought has analytically divided the concept of just war into two parts. The first component concerns the conditions under which belligerents might justly resort to the use of armed force as a means of conflict resolution, *jus ad bellum*. The second component focuses on the conditions for the just employment of armed force at the strategic, operational, and tactical levels during periods of armed hostilities, *jus in bello*.[3] In an attempt to address these topics, proponents of just war doctrine gradually developed a framework of analysis for each of the component parts of just war doctrine.

There are eight categories within the analytical framework to be applied in determining whether armed force should be used as an instrument in the resolution of a particular conflict. The first analytical category focuses attention on the ultimate goal underpinning any decision to resort to the use of armed force and suggests that the only legitimate purpose of war is the attainment, restoration, preservation, and/or enhancement of true peace. Second, only legitimate authorities can justly authorize the use of armed force as an instrument to resolve conflicts between and within political entities. Third, those authorities that opt for the use of armed force must be motivated by right intentions, taken in the right spirit or disposition. Fourth, there must be a just cause underpinning the decision to resort to armed hostilities. Fifth, this action must be taken as a last resort and only after the exhaustion of all non-violent alternatives. Sixth, the principle of proportionality must be adhered to. The use of armed force is justified only if the costs associated with a decision to opt for a negotiated settlement of a dispute outweigh the anticipated costs associated with the use of armed force, such as: the damage or destruction to civilian objects, the injury to or death of both non-combatants and combatants, the actual and opportunity costs associated with the use of armed force, and the degree of societal dislocation. Similarly, in justifying the decision to resort to armed hostilities, the anticipated positive benefits that

will hopefully result from the establishment of the "true peace" that is sought must outweigh the injury to and death of people, damage and/or destruction of civilian objects, the actual and opportunity costs, and the societal transformation and dislocation that will inevitably accompany the use of armed hostilities. In short, the decision to opt for the use of armed force must yield a greater measure of good than harm. Seventh, except possibly in situations involving self-defense, there must be a reasonable prospect for military success. Eighth, belligerents must declare their intentions prior to initiating armed hostilities. Finally, many proponents of just war doctrine stress that all eight of these analytical categories must be satisfactorily addressed in order for the decision to resort to the use of armed force to be justified.[4]

There are three principal categories of analysis used in assessing the way in which armed force is actually to be employed at the strategic, operational, and tactical levels. First, those planning and executing military operations must be motivated by right intentions or disposition. Second, they must clearly distinguish between combatants and non-combatants, as well as civilian objects and legitimate military targets and objectives. Military planners and those actually responsible for executing military operations must respect the immunity of non-combatants and civilian objects from intentional and unnecessary harm. Third, the principle of proportionality must be applied in the conduct of armed hostilities. This analytical category admonishes military planners and those executing military operations, insofar as possible, to certify that any proposed operation will not cause collateral injury or death to non-combatants and/or damage or destruction to civilian objects that is clearly excessive or disproportionate in relation to the anticipated military gains resulting from the successful completion of those operations. Similarly, even with respect to enemy combatants, the level of violence applied should be limited to only that which is necessary to accomplish the military objectives and, insofar as possible, unnecessary or superfluous death or injury to enemy combatants in the pursuit of military objectives should be avoided. In short, the actual use of armed force must result in greater good than harm.[5]

Western philosophers, statesmen, and soldiers have, however, interpreted these general analytical categories in a variety of ways. The purpose of this chapter is to explore the roots of the Western approach to the concept of just war that originated within the context of theocentric natural law. Toward that end, the chapter will first examine the underpinning assumptions, content, and applications of theocentric natural law. It will then analyze the ways in which the assumptions and propositions that are central to theocentric natural law were applied by its proponents to the various categories contained within the framework of analysis for the possible use of armed force in the resolution of conflict. The result was the criteria used to evaluate the use of armed force known as just war doctrine.

Theocentric Natural Law

In accord with Plato's observation that "God is the measure of all things," the theocentric perspective on natural law ultimately refers to a Divine authority

as the source for all normative standards that shape and serve to evaluate both collective and individual behavior.[6] As A.P. d'Entreves observed, "it is not from the individual that we are asked to start, but from the Cosmos, from the notion of a world well ordered and graded, of which natural law is the expression," – a world "governed by divine Providence."[7]

A series of assumptions underpin the theocentric perspective on natural law. First, a theocentric approach is based upon the conviction that there exists a unified, single, universal, and transcendent Divine Being or hierarchically arranged series of Divine Beings, culminating, in the eyes of some, in a Supreme Divine Being.[8] Second, it assumes that there are permanent, unchanging, and stable, Divinely generated universal truths and that these realities are the true objects of knowledge which human beings can, at least to some degree, comprehend.[9] Third, adherents to a theocentric approach hold that a Divinely generated, naturally harmonious Eternal Order exists for the entire universe which, in turn, is governed by a Divinely established Eternal Law. Eternal Law and, ultimately, the Eternal Order is said to be based upon Divine Reason. It is seen as objective and constant throughout time and it directs the universe toward ends that are good.[10] Fourth, all creatures are created in order to participate in the Eternal Order in accordance with their inherent natures as determined by God. Consequently, proponents of a theocentric perspective hold that all creatures should seek to realize their essential being and, ultimately, achieve goodness appropriate to their essential nature within the larger context of the Eternal Order as determined by the Divine Being. Irrational creatures are driven by instinct and appetites. While to some degree human beings are also motivated by similar instincts and appetites, in addition, unlike other creatures, they are social beings that possess free will, as well as that uniquely human ability to reason and acquire intellectual knowledge and understanding. Moreover, human nature is believed to be the same for all people throughout time.[11] Fifth, whereas the Eternal Order is one of necessity for non-humans, it is predicated on freedom for social, rational human beings.[12] Sixth, human beings have a clear goal in life which is to gain true knowledge and, insofar as humanly possible, achieve harmony and union with the Divine Being.[13] Seventh, the human capacity for rational thought is the vehicle by which human beings can achieve intellectual understanding and, ultimately, approach truth.[14] Finally, eighth, in order to attain their true end and realize their essential selves, theocentrically-oriented natural law thinkers stress that human beings must, through the power and strength of their own will, exercise their freedom, rise above worldly concerns and goals, and focus their efforts upon attaining their ultimate goal in this life, which is to live a virtuous life and, in doing so, fully develop and apply their powers of reason. In that way, they can, insofar as is humanly possible in this life, know truth, know good, and unite spiritually with the Divine Being.[15]

Predicated upon these assumptions, theocentric natural law is defined as "Eternal Law for free, rational, social human beings."[16] It rests upon a series of components. First, it is an unwritten law, based upon reason, and is embedded within man's conscience. Second, natural law is seen as stable, permanent, and unalterable. Third, the whole of mankind is conceived as a community predicated

upon the equality of all human beings. Fourth, reflecting this cosmopolitanism, proponents of a theocentric approach to natural law maintain that it provides standards and guidelines for all human beings and is applicable for all times. Fifth, based upon the universality of natural law and the concepts of justice and morality underpinning it, natural law holds that all people possess basic human rights that all communities must recognize and defend. Sixth, theocentric natural law is viewed as a higher law, above pressures and civil statutes emanating from within the community (*jus civile*), as well as above customs and laws common to all peoples (*jus gentium*). Thus, seventh, all people owe allegiance to this higher law.[17]

Turning specifically to the tenets of theocentric natural law, at its most fundamental, basic level, the primary, central principle of theocentric natural law is the "commandment that 'good is to be pursued, and evil is to be avoided.'" This admonition is based upon the proposition that "all beings seek goodness appropriate to their natures." Given that man is distinguished from other creatures by his social nature and his ability to reason, humans should pursue goodness appropriate to their essential social and rational natures. Therefore, since the admonition that human beings should pursue good and that, for humans, good corresponds to realization of man's rational and social nature, humans pursue goodness by seeking to fully realize their essential social and rational being. Conversely, for human beings, evil is defined as that which clashes with their natural inclinations toward rational thought and participation in society. In short, for human beings, anti-social, irrational behavior and attitudes are evil.[18]

Predicated upon this central tenet of theocentric natural law, human beings have a duty to the Divine, to themselves, and to the other members of their community to give them all their "just due." As such, theocentric natural law delineates three groupings of duties that humans are required to perform in order to realize their essential rational and social being. The first cluster centers upon man's duty to, insofar as is possible in this life, "know and seek spiritual union with the Divine, attain true knowledge through an understanding of the Divine Wisdom, and comprehend the Eternal Order." The second cluster focuses on one's duty to oneself. Certainly, as with all creatures, it is natural for human beings to seek to preserve and maintain the lives of themselves and those they love, as well as to reproduce and care for their offspring. But, in addition, unlike other creatures, human beings should also seek to understand what constitutes their essential being and then to dedicate their lives to the realization of their essential rational and social self. The third cluster focuses on one's duty to one's fellow human beings, both collectively and individually.[19] Theocentric natural law provides a series of general normative standards that serve to govern one's behavior as one seeks to fulfill one's duties to the Divine, to others, and to oneself.[20]

Proponents of theocentric natural law maintain that corollary norms can be reasonably derived from these basic normative standards, although they acknowledge that the level of certainty for these corollary norms diminishes in direct proportion to the degree one descends from the basic theocentric natural law standards governing human behavior.[21] One of the most important corollary norms relates to individual freedom. People must be free in order to fulfill their

duties to themselves, to others, and to God and, in so doing, fully develop their social and rational essential nature, thereby, insofar as possible in this life, allowing them to lead happy and fulfilling lives worthy of human beings. This is seen as a basic and inviolable human right that is preexistent to societal pressures or the laws of the state.[22] Corollary human rights and accompanying responsibilities are, in turn, derived from this fundamental right of individual freedom.[23] Consequently, the family, the various groupings within the community, as well as the community itself, should be designed to promote the common good by facilitating and maintaining an environment in which all members of the community are free to exercise their fundamental right and duty to achieve their full, rational, social being and, thereby, fulfill their responsibilities to themselves, to the community, and to God.[24]

Although recognizing the importance of the rich tapestry of associational groupings within society, adherents to a theocentric approach to natural law generally see the state as the highest expression of the community. They define it as a political entity, "optimally self-sufficient, organized internally on the basis of a division of labor, designed to promote the common good, and, hence, is governed in the common interest." As with the larger community, given man's social nature, it is based upon necessity.[25] In addition to stressing the state's responsibility to maintain the security and peaceful order of the community from external and internal sources of danger, as well as its responsibility to promote the prosperity of the community, one of the most important responsibilities of the state is to promote the common good of all the members of the community so that they all have the freedom and the opportunity to fulfill themselves as human beings. Indeed, this should be the state's ultimate and essential objective. Consequently, proponents of theocentric natural law stress that positive law must build upon the foundation provided by natural law, since the latter is superior to and provides the normative standards for the laws of the state. The state and the community that it governs can take its rightful place within the Eternal Order only by grounding positive law upon the permanent and universally applicable foundation provided by natural law.[26] As A.P. d'Entreves succinctly observed, "all law, eternal and natural, human and divine, is linked together in a complete and coherent system."[27] Similarly, since positive law cannot clash with natural law and remain legitimate, proponents of theocentric natural law contend that illegitimate positive laws should not be viewed as morally binding, although they recognize that the state may exercise its power to coerce individual members of the community into obedience.[28]

Finally, just as the states should govern their respective societies in the common interest, consistent with the basic principles and corollary norms set forth under natural law, similarly, these same normative standards should govern relations between the various states and non-state actors within the international community. Indeed, proponents of theocentric natural law stress the need for global cooperation in an effort to protect and advance the common interests of all peoples of the global community and, thereby, permit all people to have to have the opportunity to fulfill themselves as rational, social human beings who are free to perform their duty to God, themselves, and their fellow human beings.[29]

Theocentric Natural Law and Just War Doctrine

Theocentric natural law theorists applied their convictions to the questions of, under what conditions is it legitimate to resort to the use of armed force in the resolution of conflict and what normative standards should govern the actual conduct of armed hostilities. As James Turner Johnson has convincingly argued, however, the Western just war tradition gradually evolved, not simply from philosophical influences, but also from a variety of other Greco-Roman, Judeo-Christian, and Germanic roots.[30] Thus, the philosophical / theological application of theocentric natural law to the question of just war coincided with complementary efforts by canon lawyers, other legal influences drawing upon the tradition of Roman law, especially the concept of *jus gentium*, as well as secular influences associated with chivalric, knightly traditions and customs. The philosophical and theological influences, as well as the influence of canon law, focused primarily upon the right to resort to the use of armed force, *jus ad bellum*, whereas, secular influences concentrated upon the normative standards governing the legitimate conduct of armed conflict, *jus in bello*. But, as Johnson has argued, while the classical expression of just war doctrine was influenced by both ecclesiastical and secular influences permeating throughout the whole of Christendom, it reflected a conception of justice commonly held throughout Western Europe. Yet, he points out that the tenets of just war doctrine cannot be found in their entirety in any of the various sources prior to the end of the fifteenth century.[31] Indeed,

> It cannot even be found, explicitly, in full form, in the late medieval writers whose work reveals the existence of a general cultural consensus on just war…. Yet such a theory can be read through the ideas of these writers. The weight of evidence, then, shows that by the era of the Hundred Years' War, the late fourteenth and early fifteenth centuries, the core doctrine of just war tradition had coalesced and was functioning as a broad cultural consensus within western European culture on the justification and limitation of war. Major writers on these themes from the sixteenth and seventeenth centuries presupposed this consensus. Yet it was they … and not any medieval theorist, who stitched them together into a systematic whole. Just war tradition coalesced into a cultural consensus during the Middle Ages; this consensus was then expressed in systematic theoretical fashion by writers of the early modern period …[32]

Thus, by the conclusion of the medieval period in Western history, these various streams of thought had come together, resulting in a coherent, theocentric natural law-based classical just war doctrine. That doctrine was erected upon a basic framework of analysis that was then applied in assessing whether armed force should be used in the resolution of specific conflicts and, if it was to be used, how force should actually be employed. Utilizing the analytical categories embodied within this framework of analysis, medieval and early modern thinkers applied the philosophical assumptions and values to which they adhered to the issue of the just use of armed force and, thereby, formulated the various component criteria embodied within what is today recognized as just war doctrine.[33]

Thus, the perspective taken by proponents of a theocentric approach to natural law with respect to *jus ad bellum* and *jus in bello* criteria was consistent with their broader values and perspectives toward man, society, and the Eternal Order. But while theocentric natural law thought coalesced with other Western ecclesiastical and secular influences into a coherent classical just war doctrine at the end of the fifteenth century, the ideas of theocentric natural law proponents regarding just war doctrine continued to evolve. This evolution eventually found expression in a neo-classical interpretation of just war doctrine, the earliest proponent of which was Francisco de Vitoria (1480–1546). Proponents of this neo-classical interpretation of just war doctrine continued to adhere to the theocentric natural law basis of the classical interpretation, as well as the spirit and most of the classical criteria of *jus ad bellum* and *jus in bello*. They did, however, significantly modify certain aspects of the classical interpretation. As such, proponents of theocentric natural law oriented neo-classical just war doctrine built upon the concepts set forth earlier by theocentric natural law, classical just war doctrinal adherents and, together, they established the foundation upon which much of contemporary international law regarding the use of armed force was eventually constructed.[34]

Jus ad Bellum

First, with respect to *jus ad bellum*, proponents of a theocentric natural law perspective adhere to the cosmopolitan, internationalist perspective emphasizing the common good of all mankind. Hence, they stress that the goal of any armed conflict must be a peace that is based, not simply upon a tranquil and just order, but also a concord among the former belligerents in which they can all reside together in a post-conflict environment, based upon neighborly friendship, cooperation, and harmony, predicated upon a sense of shared goals, coordinated activities, justice, and the common good of all peoples. The ultimate goal of peace must be the creation of an environment in which all human beings can fulfill themselves and flourish to the greatest degree possible. But, importantly, while armed conflict, seen as the temporary negation of peace, may be justified by goal of establishing a better, truer peace, war cannot, by itself, achieve that peace.[35]

With respect to the category of analysis to be applied in determining what constitutes legitimate authority to authorize the use of armed force, for several centuries adherents to theocentric natural law debated whether secular or ecclesiastical authorities, or both, each within specifically defined limits, should legitimately perform this function. Eventually, however, classical just war theorists arrived at a consensus that only the highest secular authorities could legitimately fulfill this function. Theocentric natural law, neo-classical just war advocates, such as Francisco de Vitoria, increasingly advocated expanding the number of individuals involved in determinations concerning whether or not to resort to the use of armed force. This, of course, coincided with the increasing acceptance of the concept of popular sovereignty and the growing movement toward greater involvement in formulating all aspects of public policy.[36]

Concerning the analytical category of right intention, theocentric natural law proponents predicated their position upon the assumption that humans are rational beings. Hence, as Isadore of Seville (560?–636) observed, "Unjust war is that which results from passion not from lawful reason."[37] Since justice, known through rational thought, is to be pursued, only reason should serve to impel men to resort to the just use of armed force. Moreover, theocentric natural law proponents draw upon the axiom, "promote good and avoid evil." Hence, just as one should seek to fulfill oneself as a rational, social human being who is both willing and able to fully perform one's duties to God, one's self, and other people, the focus of community action must be to establish, protect, and promote an environment of individual freedom that both permits and encourages the members of the community to fulfill their duties. Any use of armed force must ultimately be directed toward these ends. Furthermore, in opting to resort to the use of armed force, theocentric natural law just war proponents, especially Christian thinkers, emphasize that the qualities of love of one's fellow men, charity, and mercy must also be factors inherent within the criteria of right intention. As St Ambrose and St Augustine stressed, love, mercy, and charity must be extended to one's enemies, as well as to one's friends. Consequently, in assessing intentions, proponents of theocentric natural law cite the "golden rule" and note that, just as one must insist that others respect one's right to perform one's duties as a human being, similarly one must extend that same freedom and respect to others. Hence, one should "do to/for others as you would have them do to/for you" or, stated in the negative, "do not do to others what you would not be willing to have them do to you." In the final analysis, the theocentric natural law interpretation of the category of right intention rejects such self-interest-based, overt, or ulterior motives as the enhancement of one's own power, prestige, or profit, as well as motivations predicated on passion or a desire for revenge. Instead, it maintains that right intention must be based upon one's commitment to the cause of a just, true peace for all the members of the global community.[38]

The theocentric natural law, classical just war theorists emphasized the importance of the application of the analytical category of just cause as one of the most central elements in formulating the criteria inherent within the concept of *jus ad bellum*. They maintained that armed hostilities are reactively initiated in response to an unjust action taken by others in which the adversary is culpable and, therefore, deserving of an armed response. Hence, the resort to armed force is justified by the unjust action taken by another party. It should be pointed out that unjust actions may emanate from either actions initiated by another state or by individuals residing within states that neglect to control their citizens. Moreover, the emphasis by classical just war theorists on culpability eliminated the possibility that both sides may, in some degree, be acting justly. In any case, classical just war theorists placed emphasis on the concept of vindicative justice, although the classical emphasis on vindicative justice was constrained in Christian thought by charity, mercy, and love of one's enemy that are components of the aforementioned category of right intention.[39] Self-defense was, of course, considered a just cause,[40] as were wars of a "retributive nature" that sought to right wrongs committed by others through the restoration of that which had

unjustly been taken, protecting the innocent, enacting compensation, and even taking punitive action against those guilty of wrong doing. This conception of what constitutes just cause implicitly suggests that just wars should be exclusively defensive or retributive in nature.[41] Finally, many classical just war theorists were prepared to justify war in defense of religion as a just cause for the initiation of armed hostilities.[42]

In contrast to the classical emphasis on fault as the root of just cause, however, later, theocentric natural law, neo-classical just war theorists tended to place somewhat less emphasis on the assignment of culpability. They agreed that "there is a single and only cause for commencing a war, namely, a wrong received," and that the standards for evaluating the conduct of states are the tenets of natural law which alone serve to justify resorting to the use of armed force because they are universally binding upon all human beings.[43] But neo-classical thinkers, like Francisco de Vitoria, recognized that culpability is not always clear. Indeed, while acknowledging that God will certainly know which side has a just cause and that, in God's eyes, a war in which both sides have just cause is impossible, from a human perspective, in a great many cases, it is difficult or impossible to ascertain which belligerent has an objectively just cause to resort to the use of armed force. Moreover, even if one side does objectively possess a just cause for hostile action, the other belligerent may sincerely believe that justice is on its side. Hence, Vitoria maintained that, for practical purposes, in many armed conflicts, one must assume that both sides may possess some measure of justice in their cause for taking up arms. Similarly, those thinkers who adopted a neo-classical interpretation of just war doctrine, such as Vitoria, downplayed the corollary classical emphasis within just war doctrine on vindicative justice. Given these qualifications, Vitoria, like other neo-classical just war theorists that followed him, maintained that, since, in many cases, culpability and objective just cause cannot be humanly known, it was the responsibility of both belligerents to scrupulously adhere to the normative standards for *jus in bello*.[44]

With respect to specific causes of war, Vitoria, echoed by later neo-classical just war theorists, emphatically rejected aggressive, offensive wars of expansion or wars for dynastic or personal glory. Furthermore, theocentric natural law, neo-classical just war proponents, such as Vitoria, were united in their rejection of wars for religion. Indeed, Vitoria emphatically maintained that, since no human being can force belief upon another person, it is, therefore, a violation of natural law and, hence, unjust to resort to the use of armed force in an effort to compel others to adhere to a particular religion.[45]

Most theocentric natural law, classical and neo-classical just war proponents, however, echoed St Ambrose in maintaining that humanitarian intervention in states other than one's own could be justified by the admonition to love one's neighbor, which, in this context, implied the obligation to protect one's neighbor from unjustly inflicted harm.[46] Indeed, as James Turner Johnson observed, "It is generally conceded that classic Christian just war doctrine was interventionist in that it gave a ruler authority, acting in the stead of God, to punish wrongdoing even among others not his own subjects."[47]

Similarly, there was a consensus among most theocentric natural law just war theorists that armed defense was a legitimate course of action in response to unjust actions already taken by others. Moreover, there was virtual universal rejection of the concept of preventive war.[48] There was, however, division of opinion concerning whether anticipatory, preemptive self-defense was legitimate. Some analysts rejected any form of anticipatory, preemptive self-defense, stressing that the offending side must be culpable in actually having committed a wrong for there to be just cause for retribution.[49] Other just war theorists were, however, prepared to endorse the concept of an anticipatory, preemptive self-defense prior to actual culpable action taken by the offending party, provided the following criteria was satisfactorily met. First, there must be unambiguous knowledge of the offending party's intention to launch an unjust, offensive attack and, second, the anticipated attack must be imminent.[50]

In any case, irrespective of these differences, all agreed that armed force should only be used as a last resort in the resolution of conflicts and that the analytical category focusing on proportionality must be satisfactorily addressed. Moreover, there was general agreement that there must be a reasonable prospect for victory and that there must be a declaration prior to the actual initiation of hostilities.[51]

Jus in Bello

With respect to the interpretation and application of the categories contained within the framework of analysis designed to assess the proper employment of armed force, theocentric natural law, classical and neo-classical just war theorists placed heavy emphasis on right intention or disposition. As with the category of right intention in the context of the decision as to whether to resort to the use of armed force, theocentric natural law just war proponents, especially Christian thinkers, were emphatic in predicating the category of right intention concerning the actual employment of force upon the qualities of mercy, compassion, and charity to all and the admonition to love one's neighbor, including one's enemy, just as one would hope that the enemy would extend that same charity, mercy, and compassion to one's own combatants and non-combatants. In any case, the category of right intention, especially when punctuated by the qualities of charity, mercy, compassion, and love, served as a limiting constraint upon the way in which hostilities should be conducted.[52] Conversely, as St Augustine observed, it is evil to conduct armed hostilities for "the love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance and the lust of power."[53] Importantly, these admonitions were said to apply, irrespective of reciprocity on the part of the adversary.

While medieval, classical just war thinkers laid the foundations for distinguishing between combatants and non-combatants, this distinction was further developed by early modern, theocentric natural law, neo-classical just war theorists. At its root, theocentric natural law theorists stressed that innocent individuals must not be intentionally killed or injured. Innocence was based upon an individual's function in society and the ability to bear arms. Conversely,

combatants were increasingly defined as individuals whose activities contributed to the prosecution of the armed conflict.[54] Similarly, early modern, theocentric natural law, neo-classical proponents of just war doctrine made significant strides in distinguishing between civilian objects and military objectives.[55] Thus, contemporary, theocentric natural law-based just war thought emphatically holds that there is a clear and functional distinction between combatants and military objectives, on the one hand, and non-combatants and civilian objects, on the other. Indeed, the *jus in bello* principle of discrimination is predicated upon the aforementioned distinctions.[56]

Finally, both theocentric natural law, classical and neo-classical just war theorists were united in their emphasis on the imperative need to formulate proper criteria in interpreting and applying the analytical category focusing on the role of proportionality in the actual employment of armed force. As with the application of the concept of proportionality with respect to the decision to resort to armed force, Christian thinkers especially emphasize the importance of applying the Golden Rule of "do unto others as you would have them do unto you." In other words, theocentric natural law just war thought holds that, consistent with the aforementioned categories of right intent and discrimination, one should apply only that amount of violence upon the enemy that one would consider legitimate for the enemy to apply to oneself or one's allies. Simply put, one should conduct armed hostilities as mildly as possible.[57]

While recognizing that, predicated upon the principle of military necessity, collateral injury to and/or the death of non-combatants, as well as damage to and/or the destruction of civilian objects may be unavoidable, proponents of theocentric natural law-based just war doctrine remain absolutely emphatic that, insofar as possible, non-combatants and civilian objects must be immune from intentional and unnecessary injury, death, damage, and/or destruction during the course of armed hostilities.[58] In this context, it should be noted that various theocentric natural law just war theorists place varying degrees of emphasis on the principle of military necessity. For example, the theocentric natural law, neo-classical just war proponent, Francisco de Vitoria, was prepared to justify unavoidable, collateral death and/or injury to non-combatants when prosecuting a just war. Yet, importantly, he emphasized the imperative of proportionality and stressed that death or injury to non-combatants was permissible only when there was no alternative way to prosecute the war. Similarly, Vitoria echoed St Thomas Aquinas in applying the principle of proportionality to combatants, arguing that only that amount of force that is necessary to halt the evil that the adversary is trying to pursue is justifiable. Death or injury to enemy combatants beyond that which is necessary is unjust and, therefore, illegitimate.[59] Finally, Vitoria maintained that the principle of proportionality extended into the post-conflict period in that the victorious power could legitimately demand reparation for damages only to a degree that is proportionate to the nature of the original offense. Anything beyond that would be disproportionate and unjust.[60] These considerations helped to mitigate pressures to escalate the scope and intensity of hostilities once they were underway.[61]

A particularly illustrative example applying the theocentric natural law perspective concerning the actual conduct of armed conflict is the increasing sensitivity for the protection of cultural properties during periods of hostilities. Proponents of a theocentric natural law perspective on just war doctrine are much more prone to approach the employment of force with an internationalist, cosmopolitan attitude. Consequently, they would tend to argue that moveable and immovable cultural objects and sites are part of a common human culture and, as such, are part of the global heritage of all mankind. As such, they would stress that, during periods of armed hostilities when these cultural objects and properties are especially vulnerable, it is the responsibility of all belligerents to ensure that these objects and properties are not damaged or destroyed, irrespective of what national, ethnic, or cultural group "owns" them. If the cultural objects and properties of all belligerents, including those that are reflections of the enemy's culture or those that are in the possession of the enemy, are perceived to be part of the common cultural heritage of all of mankind, then damage or destruction to any of these objects and/or properties, irrespective of origin or possession, constitutes a loss to all peoples, not just a loss to a particular belligerent. Hence, they would maintain that if all belligerents adopted and adhered to this cosmopolitan, internationalist perspective and perceived all cultural objects and properties to be simply parts of the common cultural heritage of the whole of mankind, then the preservation and protection of these properties and sites would be a norm more readily and universally adhered to, even during periods of armed conflict.[62]

Conclusion

A.P. d'Entreves observed that "natural law is the outcome of man's quest for an absolute standard of justice."[63] By establishing absolute, permanent, and universal principles of justice and morality, theocentric natural law provides an ultimate, authoritative standard for determining right and wrong. As such, it provides a set of criteria to be adhered to in formulating and evaluating the laws and customs enacted and adhered to by society, as well as standards governing the attitudes and conduct of individual human beings as they perform their duties to themselves, to God, and to the members of the community.[64]

Classical and neo-classical just war doctrine represented an attempt by theocentric natural law proponents, reinforced by the ideas of other medieval and early modern Western thinkers and traditions, to delineate guidelines to be employed in determining whether to justly resort to the use of armed force, as well as guidelines for the just application of armed force once the decision to employ armed force had been made. In doing so, they made two interconnected contributions. First, they established a basic framework of analysis, composed of a series of analytical categories, to be used in assessing whether armed force could be legitimately used as an instrument of policy and, if it was to be used, what constraints should govern its actual employment. Second, classical and neo-classical just war proponents then interpreted and applied this framework of

analysis in a manner consistent with theocentric natural law, yielding, in turn, a series of just war criteria that provided an authoritative, moral basis for the use of armed force as an instrument in the resolution of conflicts. Hence, adherence to the principles set forth in classical and neo-classical just war doctrine became a matter of conscience for those responsible for deciding whether to resort to the use of armed force, as well as for those who actually formulated and directed military strategy, operations, and tactical encounters between adversaries. In short, by grounding classical and neo-classical just war doctrine within the context of theocentric natural law, its proponents made adherence to its tenets more than merely a matter of custom, – its tenets were authoritative and its adherence was made mandatory because it traced its legitimacy back to the Eternal Order and, ultimately, to the authority of God. The analytical framework and its component categories established by theocentric natural law classical and neo-classical just war proponents designed to be used to assess whether and how armed force might be employed in the resolution of specific conflicts, as well as the criteria that these theocentric natural law advocates provided in their interpretation and application of these categories of analysis, has, in turn, become the base-line for all subsequent discussions of *jus ad bellum* and *jus in bello* within the context of the Western just war tradition.

Notes

1 The opinions, conclusions, and/or recommendations expressed or implied within this chapter are solely those of the author and do not necessarily represent the views of the Air University, the United States Air Force, the Department of Defense, or any other US government agency.

2 Johnson, 1975, p. 118. Some of the most important contributions to the study of just war doctrine include: Bainton, 1960; Ramsey, 1961; Johnson, 1975; Ramsey, 1983; and Walzer, 1992.

3 Johnson, 1991, p. 5; Williams and Caldwell, 2006, pp. 309–311.

4 Finnes, 1996, pp. 15–26; Johnson, 1991, p. 16; McMahan, 1996, p. 86; Fixdal and Smith, 1998, pp. 285–288, 290–307; Williams and Caldwell, 2006, pp. 309–311. With respect to the criteria of proportionality, however, many analysts have noted that an assessment of proportionality is difficult since one must make an assessment lacking complete information and, further, the assessment must, of necessity, rely more upon speculation than upon calculation. Thus, as Mona Fixdal and Dan Smith observed, "some aspects of the debate about proportionality can be resolved only retrospectively and … others (e.g., how much evil was avoided) cannot be resolved even retrospectively except through the use of counterfactual history." Fixdal and Smith, 1998, p. 305.

5 Finnes, 1996, pp. 26–28, 33–34; Johnson, 1991, p. 16; Fixdal and Smith, 1998, p. 303–305; Williams and Caldwell, 2006, pp. 309–311.

6 Hensel, 2004, p. 1; Germino, 1967, pp. 18, 27; Germino, 1972, p. 15.

7 d'Entreves, 1964, p. 46.

8 While significant differences exist within Western thought concerning the conception of the Divine Being or Beings, Greco-Roman, Jewish, and Christian thinkers generally embrace the propositions that a Divine power exists and it is somehow, directly or indirectly, responsible for the pattern, plan, creation, and direction of the universe

toward ends that are good. Hensel, 2004, pp. 4–9, 11, 23; Armstrong, 1977, pp. 4–5, 36–39, 44, 47, 48–51, 60, 68, 73–75, 77–78, 82–83, 86–90, 97, 97, 122–124, 144, 147, 149–153, 155, 157–159, 161, 178, 180–183, 185–194, 208–211, 223; Maritain, 1943, pp. 5, 20; Rommen, 1948, pp. 6, 12, 14–17, 34, 37, 45, 50, 168, 170, 172–173, 178, 221; d'Entreves, 1964, pp. 21, 28, 34, 52; Copleston, 1951, pp. 96–115, 244–252, 264–265, 287–331, 451–456, 463–475; Copleston, 1954, pp. 410–411; McDonald, 1968, p. 73; Nelson, 1982, p. 74.

9 These universal and permanent truths are often seen as "Divine Wisdom" embodied within the "Mind of God." Hensel, 2004, pp. 4–5, 8–10, 21, 23; Armstrong, 1977, pp. 49, 73, 75, 77–82, 87, 124, 149, 161, 163, 212–215, 218; Rommen, 1948, pp. 6, 12, 14–17, 37, 45, 50, 168, 170, 172–173, 178, 221; Copleston, 1951, pp. 287–319.

10 Eternal Law is seen as the governance of the universe by Divine Will in accord with Divine Reason. Importantly, the stable foundation of Divine Reason is seen as governing Divine Will. Hence, motivated by Divine Will, God is seen as creating and directing the Eternal Order in accord with Divine Reason. Traditional theocentric Western thought maintained that a permanent, universal Eternal Order could be predicated only upon the existence of a stable and unchanging rationally-based Eternal Law. Therefore, since Divine Reason is constant and timeless, it must take precedence over Divine Will to produce the permanent Eternal Order governed by the rationally-based Eternal Law. Hensel, 2004, pp. 10–11, 22–23; Armstrong, 1977, pp. 58, 61, 84, 101, 124, 128–129, 144, 195–196; Rommen, 1948, pp. 6, 15, 19, 22–23, 27, 34–35, 37, 41, 45–46, 50–51, 57–60, 62–65, 71–72, 168, 173, 175, 179–180; Maritain, 1943, pp. 5, 61; d'Entreves, 1964, pp. 35, 39, 52; Copleston, 1954, p. 410; Lamprecht, 1955, p. 190; Sabine, 1961, pp. 149, 252; McDonald, 1968, pp. 73–74, 141–142; Nelson, 1982, pp. 126–127.

11 Hensel, 2004, pp. 11–16. "Humans are capable of reflecting upon alternative goals, evaluating alternative courses of action to attain those goals, projecting consequences of alternative actions, and finally determining a course of action on the basis of sound, rational judgment." Indeed, Greco-Roman and Christian thinkers have traditionally held that reason is the most important component of man's soul and the one that should govern human behavior. Moreover, most Greco-Roman and Christian philosophers believed that the soul was, in some way, itself divine, or an emanation of a Divine Being, or a gift from the Divine Being. Finally, with respect to the conception of man as a social being, traditional Western philosophy held that by his very nature, man must participate in society. As Jacques Maritain observed, "each one of us has need of others for his material, intellectual and moral life, but also because of the radical generosity inscribed within the very being of the person, because of that openness to the communications of intelligence and love which is the nature of the spirit, and which demands an entrance into relationship with other persons." Maritain, 1943, pp. 5–6. Thus, man is compelled by his nature to participate in society in order to realize his essential being. Therefore, Greco-Roman and Christian thinkers believed that the community should serve to establish and maintain an environment in which human beings can realize their essential being as rational, social creatures and thereby fully participate in the Eternal Order. Summarizing man's relationship to society, Jacques Maritain observed, "Man is part of the political community and is inferior to the latter, by reason of the things which, in him and of him, depend as to their very essence on the political community, and which, as a result, can be called upon to serve as means for the temporal good of this community …. On the other hand man transcends the political community by reason of the things which, in him and of him, deriving from the ordering of the personality as such to the absolute, depend as

to their very essence on something higher than the political community and properly have to do with the supra-temporal fulfillment of the person as a person." In short, in Maritain's words, "I am part of the state by reason of certain relationships to common life which call my whole being into play; but by reason of other relationships (with which my whole being is also concerned) to things more important than common life, there are in my gifts, rights and values which exist neither by the State nor for the State and which are outside the sphere of the State." But, in the final analysis, "the taproot of human personality is not society, but God; and because the ultimate end of man is not society, but God; and because the center where the person makes more and more perfect its very life as a person is on the plane of eternal things, whereas the level on which it is made part of the social community is that of temporal intercourse." Hence, while "on the one hand, life in society is natural to the human person, … on the other hand – because the person as such is a root of independence – there will always exist a certain tension between the person and society" that is "both natural and inevitable." Maritain, 1943, pp. 16–19. Hensel, 2004, pp. 12–16, 18, 23; Armstrong, 1977, pp. 40–42, 57–58, 61, 91–93, 97, 99, 101, 107, 109–110, 112, 124–126, 143–144, 154, 188, 215–216, 221–222; Rommen, 1948, pp. 22, 27, 38, 44–46, 77, 94, 161–162, 173, 175, 180, 187, 236, 221, 229–230, 245; Maritain, 1943, pp. 2–3, 5–7, 16–20, 55–56, 60–61; d'Entreves, 1964, pp. 35, 40, 42; Copleston, 1951, pp. 207–215, 251–256, 320–331, 392–393, 395, 399, 413; Copleston, 1954, pp. 74–90, 413–416; Lamprecht, 1955, pp. 89, 178–179, 183, 188–189, 193; Sabine, 1961, pp. 149, 248–249; McDonald, 1968, pp. 73, 75–76, 85, 90, 133; Nelson, 1982, pp. 74, 83, 125–129, 131.

12 "Unlike animals, human beings have the capacity to freely make choices in determining their actions based upon reasoned assessments and do not simply take action based upon blind instinctive compulsion." Hensel, 2004, p. 12; Armstrong, 1977, pp. 92–93; Rommen, 1948, pp. 27, 38, 45, 46, 173, 175, 180; Maritain, 1943, p. 60; Copleston, 1951, p. 395; Lamprecht, 1955, pp. 183, 188–189; Sabine, 1961, pp. 248, 249.

13 Hensel, 2004, pp. 4, 12, 14, 16–22, 24; Rommen, 1948, pp. 6, 17, 22, 32, 161–162, 221, 229–230; Maritain, 1943, pp. 4, 13, 20, 61, 74–75; Armstrong, 1977, pp. 40–42, 91–93, 97, 101, 107, 124–126, 143–144, 154, 188, 192, 215–216; Copleston, 1951, pp. 207–215, 251–256, 320–331, 392–393, 395; Sabine, 1961, p. 146; Copleston, 1954, pp. 74–80; Lamprecht, 1955, pp. 89, 178–179; McDonald, 1968, pp. 73, 75–76, 90; Nelson, 1982, pp. 74, 125–129.

14 Plato, Aristotle, and the Stoics believed that it was possible for humans to acquire true wisdom through their own powers of reason and, thus, achieve complete happiness and fulfillment as human beings. Alternatively, while the Middle Platonists, Plotinus, and the Christian thinkers believed that a limited acquisition of knowledge and, hence, happiness were possible in this life, ultimate fulfillment and happiness through union with the Divine Being was possible only in the afterlife. Hensel, 2004, pp. 4, 14, 16–20, 21, 23–24; Rommen, 1948, pp. 1, 6, 22, 35, 41, 45, 47, 50, 62–63, 158, 164–167, 169, 177–178, 190, 193; Maritain, 1943, p. 4; Armstrong, 1977, pp. 37, 39–43, 46, 53–56, 72, 74, 77, 83–84, 95–97, 100–102, 104, 107–109, 116–118, 121–122, 125–127, 142–145, 151–155, 158, 178–179, 183–185, 188, 192–193, 195–196, 209, 213–221; d'Entreves, 1964, pp. 35–36, 38–41, 45; Copleston, 1951, pp. 142–162, 216–222, 277–286, 332–350, 386–387, 389, 394–398, 421, 430, 432, 434–436 463–475; Sabine, 1961, pp. 146, 149, 153, 175–177, 248; Copleston, 1954, pp. 51–67, 81–86, 398–400, 402–407, 408–409; Lamprecht, 1955, pp. 88–90, 95, 180–181, 190–193, 195; McDonald, 1968, pp. 73, 75, 79–81, 140; Nelson, 1982, pp. 76–77, 129.

15 Hensel, 2004, pp. 12–14, 17–22, 24; Rommen, 1948, pp. 6, 22, 35, 41, 45, 47, 50, 62, 161–162, 177–178, 190, 193, 221, 229–230; Maritain, 1943, pp. 4, 13, 20, 61, 74–75;

Armstrong, 1977, pp. 40–43, 53–56, 83–84, 91–93, 97, 100–102, 104–109, 116–118, 124–127, 142–145, 152–155, 178–179, 183–185, 188, 192–193, 195–196, 209, 213–221; Copleston, 1951, pp. 207–222, 251–256, 320–350, 389, 392–398, 421, 430, 432, 434–436, 463–475; Sabine, 1961, pp. 146, 149, 153, 175–177, 248; Copleston, 1954, pp. 74–86, 398–399, 400, 402–407, 408–409; Lamprecht, 1955, pp. 88–90, 95, 178–179, 190–193; McDonald, 1968, pp. 73, 75–76, 79–81, 90, 140; Nelson, 1982, pp. 74, 76–77, 125–129.

16 Hensel, 2004, pp. 24–25; Rommen, 1948, pp. 37–38, 46, 63, 64, 71–72, 181, 229; d'Entreves, 1964, pp. 21, 28, 34–35, 39–40; Copleston, 1954, p. 409; Lamprecht, 1955, p. 84; McDonald, 1968, p. 142.

17 Hensel, 2004, pp. 25–27; Rommen, 1948, pp. 6, 12, 15–18, 22–24, 26–29, 30, 35–38, 41, 43, 46–48, 50, 53–54, 63–65, 70–71, 76, 86, 175, 179–181, 186, 226–227, 229; Armstrong, 1977, pp. 118, 128–129; Lauterpacht, 1950, pp. 80, 82–83, 89, 94, 98–100, 102, 194; Maritain, 1943, pp. 60–64, 69; d'Entreves, 1964, pp. 8, 17, 19, 21–22, 25–30, 34, 39–40, 42–43; Copleston, 1951, pp. 399–400, 431–432, 434; Sabine, 1961, pp. 149–151, 153–154, 160, 164–166, 253; Copleston, 1954, pp. 408–409, 436; Lamprecht, 1955, pp. 89, 194; McDonald, 1968, pp. 73, 78, 81, 84, 88–89, 141–142, 147; Nelson, 1982, pp. 74–75, 83, 127.

18 Hensel, 2004, pp. 27–28; Rommen, 1948, pp. 17, 33, 36, 46–51, 65, 73, 178, 179, 186, 197–198, 221; Maritain, 1943, pp. 62–64, 69; d'Entreves, 1964, pp. 40–41; Copleston, 1954, pp. 406–407; Sabine, 1961, p. 253; McDonald, 1968, p. 144; George, 1999, pp. 102–103, 231–234.

19 Hensel, 2004, p. 28; Rommen, 1948, pp. 6, 22, 48–49, 51, 56–57, 65, 179, 203–204, 206, 220; d'Entreves, 1964, pp. 40–41; Copleston, 1954, p. 407; Sabine, 1961, p. 253; McDonald, 1968, pp. 51, 147; George, 1999, pp. 102–103, 231–234.

20 Theocentric natural law advocates maintain that these norms are revealed to humans by Divine Revelation, or by rational thought, or by both means. Irrespective, however, they maintain that all societies have similar norms governing man's duty to extend respect for the Divine, as well as duties to himself and those governing his relationship to others, both individually and collectively. Judeo-Christian thought holds that these normative standards are contained within the Decalogue. Irrespective of the source or differences of interpretation in application within specific situational contexts, however, proponents of theocentric natural law hold that these standards are neither arbitrary nor speculative. Hensel, 2004, pp. 28–30; Rommen, 1948, pp. 33, 38, 44, 51–53, 56–57, 65, 73, 96, 221–224, 227, 250, 252; Lauterpacht, 1950, pp. 98, 100; d'Entreves, 1964, pp. 35–41, 45; Copleston, 1954, pp. 409–410, 418; Sabine, 1961, pp. 170–171, 253, McDonald, 1968, pp. 144, 147–148; Nelson, 1982, p. 127. Some natural law scholars identify intermediate moral principles, such as the admonition "'do unto others as you would have them do unto you' and 'evil may not be done that good may come of it,'" that stand "midway in generality" between the first, ultimate, and most basic and fundamental principle that identifies "intrinsic human goods … as ends to be pursued, promoted, and protected, and their opposites … as evils to be avoided or overcome," and "fully specific moral norms which require or forbid (sometimes without exceptions) certain specific possible choices," such as the specific admonition that "'thou shalt not steal,' and 'thou shalt not kill the innocent and just.'" George, 1999, pp. 102, 111, 231, 233; see also: pp. 103–104, 232, 234. Finally, discussing the relationship between human sin and man's ability to comprehend the tenets of natural law, A.P. d'Entreves, summarizing the position held by St Thomas Aquinas, observed that "as he expressly puts it, sin itself has not invalidated 'the essential principles of nature.' Its consequences concern only the possibility of man's fulfilling the dictates

of 'natural reason,' not his capacity to acquire knowledge of them. In other words, they do not impair the existence of a sphere of purely natural – i.e., rational – values." d'Entreves, 1964, p. 41. See also Rommen, 1948, pp. 33, 36, 44.

21 Hensel, 2004, p. 30; Rommen, 1948, pp. 33, 36, 48–49, 51–52, 224, 226, 228, 250–251.

22 Simply put by Jacques Maritain, "Every human person has the right to make its own decision with regard to its personal destiny;" an individual has a "right to personal liberty or the right to conduct one's own life as master of oneself and of one's acts, responsible for them before God and the law of the community." Maritain, 1943, pp. 78, 111. Hensel, 2004, pp. 30–31; Rommen, 1948, pp. 24, 28, 30, 44–45, 207, 208, 210, 222, 225, 231–236, 243, 245; Maritain, 1943, pp. 9, 31, 34–38, 64–68, 77–79, 105; d'Entreves, 1964, pp. 45–46; McDonald, 1968, p. 153.

23 As Jacques Maritain observed, a "person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, and end which must be treated as such …. There are things which are owed to man because of the very fact that he is man …. If man is morally bound to the things which are necessary to the fulfillment of his destiny, obviously, then, he has the right to fulfill his destiny; and if he has the right to fulfill his destiny he has the right to the things necessary for this purpose." Maritain, 1943, p. 65. As Maritain further emphasized, "the first of these rights is that of the human person to make its way toward its eternal destiny along the path which its conscience has recognized as the path indicated by God." Hence, each individual has a "right to the pursuit of the perfection of rational and moral human life. – The right to the pursuit of eternal life along the path which conscience has recognized as the path indicated by God." Therefore, "he is free to choose his religious path at his own risk, his freedom of conscience is a natural, inviolable right." He pointed out, however, that "if this religious path goes so very far afield that it leads to acts repugnant to natural law and the security of the State, the latter has the right to interdict and apply sanctions against these acts. This does not mean that it has authority in the realm of conscience." Maritain, 1943, pp. 81–82, 111–112. In addition, other basic human rights include: the right to life, physical security and, as a last resort, self defense, as well as the right to marriage and family, the right of association, the right to intellectual freedom in the pursuit of truth, the right to freedom of expression, the right to select one's own vocation or profession, the right to property and privacy, the right of people to determine their own governmental form, the right of each citizen to participate equally in the political life of his or her state, the right of every citizen to be treated equally before the law of the state, and the right to be treated with dignity, equality, and respect as an intelligent, responsible, honest, and free human being. Conversely, members of society have corresponding responsibilities to respect these same rights for all other human beings. Hensel, 2004, pp. 30–31; Rommen, 1948, pp. 30, 33, 36, 38–39; 51–52, 65, 68, 77, 81, 89, 94, 191, 202, 206–207, 210, 237–239, 240–241, 243–245; Maritain, 1943, pp. 9, 31, 34–38, 64–68, 79–82, 89–90, 93, 95–96, 105, 111–114; d'Entreves, 1964, pp. 45–46; Copleston, 1954, pp. 415–416; Lamprecht, 1955, p. 194; Nelson, 1982, p. 128.

24 John Finnis has defined the common good as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community." Quoted in George, 1999, p. 235. It should be emphasized that theocentric natural law views neither the component elements composing the community nor the community

itself as being in opposition to the individual. Indeed, theocentric natural law views the individual, the various component elements within the community, as well as the community itself as naturally synergistically intertwined. Moreover, the various institutions, associations and relationships within the community serve to stand between the individual and the state. Hence, given man's essential social nature, the various component elements within the community, as well as the larger community itself, that human beings join of their own volition, are seen as legitimate in their own right and necessary to human fulfillment, independent of the existence of the state. Hensel, 2004, pp. 30–32; Rommen, 1948, pp. 68, 73, 77, 81–82, 220, 238, 241, 243–244; Maritain, 1943, pp. 6–7, 9, 13, 19–22, 24, 39–47, 80, 82, 85, 87.

25 As Jacques Maritain observed, "society is a whole whose parts are themselves wholes." Maritain, 1943, p. 7. Hensel, 2004, pp. 32–33; Rommen, 1948, p. 240; Maritain, 1943, pp. 6–7, 20, 34–35, 79; Lauterpacht, 1950, p. 95; d'Entreves, 1964, p. 42; Copleston, 1954, p. 415; Lamprecht, 1955, pp. 193–194; Sabine, 1961, pp. 125, 165–166, 249; Nelson, 1982, pp. 75, 78, 83, 125–126; George, 1999, pp. 234–236.

26 Consistent with their view that the common interests is more than simply the sum of the individual interests of the individuals who compose that community, similarly, proponents of a theocentric approach to natural law hold that positive laws should be designed to promote this larger common good rather than simply protect and promote the interests of particular individuals or groups within the community. Hensel, 2004, pp. 32–35; Rommen, 1948, pp. 6, 15–17, 24, 30, 38–39, 43, 52, 54–56, 63, 66–68, 73, 86, 95, 146, 150, 192–196, 200–201, 207–211, 219, 227–228, 231, 240–245, 250–255, 264–266, 277; Maritain, 1943, pp. 7–13, 21–22, 24, 27, 39–47, 70–73, 83; Lauterpacht, 1950, pp. 68, 79, 80, 84, 95–96, 99, 100, 123–124; d'Entreves, 1964, pp. 42, 44; Copleston, 1954, pp. 409, 415, 417–419, 421; Lamprecht, 1955, pp. 193–194; Sabine, 1961, pp. 125, 165–166, 249, 254–255; McDonald, 1968, pp. 91, 133–134, 141, 147; Nelson, 1982, pp. 75, 78, 81–84, 89–90, 125–127.

27 d'Entreves, 1964, p. 44.

28 Hensel, 2004, p. 36; Rommen, 1948, pp. 55, 66, 213, 255–256; Maritain, 1943, p. 11; d'Entreves, 1964, pp. 19, 27–30, 34, 42–43; Copleston, 1954, pp. 418–419, 422; Lamprecht, 1955, p. 194; Sabine, 1961, p. 250; McDonald, 1968, pp. 148, 151. As A. p. d'Entreves pointed out, "thus, in certain cases, disobediences may not only be a possibility, but a duty. A theory of resistance can be built up on such premises. The final decision, however, is a matter of complex casuistry. It does not rest solely with the individual. We must be careful not to misconstrue the medieval theory of resistance into a theory of revolution." d'Entreves, 1964, p. 43.

29 Hensel, 2004, pp. 36–43; Wright, 1942, pp. 896–902, 904, 907–909, 911–915, 920–921; Rommen, 1948, pp. 184, 241–242, 150; Lauterpacht, 1950, pp. 3, 6–12, 18, 32–38, 40–41, 43–44, 62, 65, 68, 70, 74, 77, 93–94, 96, 115–116, 118, 121–123; Copleston, 1954, pp. 419–420; Claude and Weston, 1989, pp. 3–5, 8–12, 15; Weston, 1989, pp. 15–20. Some natural law scholars, such as Robert George, are of the opinion that the state is "crucially 'incomplete,' this is to say, incapable of doing all that can and must be done to secure conditions for the all-round flourishing of its citizens." He argues that "the distinctively modern problems of nuclear and other weapons of mass destruction, not to mention global environmental problems such as ozone depletion, oceanic pollution and mass deforestation, simply do not admit of effective solutions without substantial international cooperation. Moreover, international action is necessary to combat mass starvation and other evils, whether they are the intended or unintended consequences of human action or the result of earthquakes, hurricanes or other natural catastrophes, as well as to promote the economic development of poor nations and protect human

rights." Consequently, he argues that "it has become necessary to develop institutions that will enable the international community to function as a complete community and, therefore, as a community whose politics, law and common good are paradigmatic and focal." In making the case for "world government," however, he urges that the natural law "principle of 'subsidiarity'" be closely adhered to. He emphasizes that "world government is, in principle, limited government," and "although such government is envisaged as the central authority of a complete community, it is not meant to displace regional, national or local authorities." Indeed, he stresses that "a world government may legitimately exercise power only where regional, national or local authorities are not competent to solve the problems at hand." George, 1999, pp. 235–236, 239–240.

30 Johnson, 1991, pp. 6–13, 17; Johnson 1975, p. 259; Elbe, 1939, pp. 666–667, 674.

31 Johnson, 1975, pp. 3, 6, 8–13, 15, 21–22, 26, 29, 30–33, 37, 39, 47–48, 56, 59–61, 65, 75, 77, 122, 150, 254, 259 ; Johnson, 1991, pp. 3, 5–6, 9–12, 15–17.

32 Johnson, 1991, p. 16. See also, Johnson , 1975, pp. 22, 75.

33 Johnson, 1975, pp. 3, 6, 8–13, 15, 21–22, 26, 29, 30–33, 37, 39, 47–48, 56, 59–61, 65, 75, 77, 122, 150, 254, 259 ; Johnson, 1991, pp. 3, 5–6, 9–12, 15–17.

34 Elbe, 1939, p. 674; Johnson, 1975, pp. 22–23, 31, 170, 208–209; Johnson, 1991, pp. 16–17.

35 Finnes, 1996, pp. 15–18; Johnson, 1975, pp. 40, 46, 49, 75, 78, 213; ; Johnson, 1991, pp. 8, 15; Elbe, 1939, pp. 666, 668–670, 672–673; Maritain, 1943, pp. 35–38; Boyle, 1996, pp. 40–42; Fixdal and Smith, 1998, pp. 299; Williams and Caldwell, 2006, pp. 311–312.

36 As James Turner Johnson noted, the Decretists and the Decretalists of the twelfth and thirteenth centuries provided "the juridical definition of right authority, and their collective achievement on this issue was to define and restrict religious authority to wage war and ultimately to reserve authority to make war to secular powers." He goes on to observe that "their work on authority to make war was paralleled and reinforced by the work of historians and theorists of Roman law, who sought to make this law the model for a new 'international law' of Christendom, and by the social, economic, and political pressures that led to the establishment of the centralized monarchies as the normative form of government." Johnson, 1991, pp. 14–15. St Thomas Aquinas also maintained that just wars must be authorized by a prince, who, citing Paul, acts as "minister of God to execute his vengeance against the evildoer." Individuals, however, are not authorized to resort to armed force against those culpable of wrongdoing since they may appeal to a tribunal for redress. Elbe, 1939, p. 660; Johnson, 1975, p. 39. Thus, when a higher authority to which one might appeal for redress is absent, the highest authority available has the right to authorize the use of armed force. Elbe, 1939, pp. 671–672. But writing at the outset of the thirteenth century, Raymond of Penaford held that the Church had authority over matters relating to faith, whereas in all other matters, the prince possessed authority to authorize the use of armed force. Raymond also stated that "the case in which war can be fought without a special order from prince or Church; this is when it is a matter of defending one's goods or his country." He went on to note that, "It is a principle of law that one may repulse force by force, on the condition that it be done after [force has been applied] and with moderation." The fourteenth century canonist, John of Legnano, linked the idea that war can be authorized only by authorities lacking any superior with the specific role of religious and secular authority noting that "the Pope, being the 'only Lord of the Earth' may wage war against the infidels, since he has jurisdiction to punish them for sins against the law of nature, and may recover the Holy Land," whereas "the Emperor, who is independent in secular matters, conduct 'public wars' as defined by Roman law against

peoples outside the Empire, against the Kings of France, Spain and England, and against rebellious Italian cities; not, however, against the Pope, who is the Emperor's superior." Elbe, 1939, p. 672. With the defacto demise of the power of the Emperor, the individual princes became the highest authority. In short, de-facto independence from superior authority became a key criteria in determining who could legitimately authorize the use of armed force. Johnson, 1975, pp. 49–50; Elbe, p. 673. As Joachim von Elbe wrote, by the early sixteenth century, theorists such as Francisco de Vitoria, make "the sovereign state the central point of his legal system" and "in the absence of a superior authority, each prince is plaintiff, presecutor and judge at once." Elbe, 1939, pp. 674–675. Johnson, 1975, pp. 37, 39–40, 46–50, 55–59, 61, 73, 75, 76, 171, 174–175; 186, 213; Russell, 1975; Lammers, 1990, p. 62–63; Johnson, 1991, pp. 7–8, 10–11, 15, 14; Elbe, 1939, pp. 666–671–672–675; Fixdal and Smith, 1998, p. 292.

37 Cited in Johnson, 1975, p. 57.

38 Finnes, 1996, pp. 17–20, 26; Eppstein, 1935, p. 67; Johnson, 1975, pp. 30–33, 37–39, 40–41, 46, 49, 57, 75, 78, 101, 122, 160, 171–172, 175, 213; Johnson, 1991, pp. 7–10, 15; Lammers, 1990, p. 59; Elbe, 1939, p. 669; Boyle, 1996, pp. 45–46; Fixdal and Smith, 1998, pp. 299–301; Williams and Caldwell, 2006, pp. 311–313.

39 The act of "vindicative justice" is taken by a legitimate authority, acting as a "minister of God," against those culpable of wrongdoing. This concept was asserted by Paul and reaffirmed by St Thomas Aquinas. Finnes, 1996, pp. 18–24; Johnson, 1975, pp. 30–33, 37–40, 46, 47–48, 73, 75, 122, 171–172, 186, 195, 213; Johnson, 1991, pp. 9–10, 15; Elbe, 1939, pp. 668–669, 673–674.

40 Finnes, 1996, pp. 19–24; Johnson, 1975, pp. 36–38, 39, 46, 49, 56–59, 73, 172, 175; Johnson, 1991, pp. 8, 10–11, 14; Elbe, 1939, p. 673; Boyle, 1996, p. 46; Fixdal and Smith, 1998, p. 295. Many contemporary just war theorists maintain that defense is the only legitimate cause for the use of armed force. Boyle, 199, p. 46; Fixdal and Smith, 1998, p. 295.

41 Finnes, 1996, pp. 20–21; Johnson, 1975, pp. 36–39, 39–40, 46, 49, 56–57, 59, 73, 120, 175; Johnson, 1991, pp. 8, 10–11, 14–15; Elbe, 1939, p. 669; Boyle, 1996, pp. 46–47; Fixdal and Smith, 1998, pp. 295–296, 299. Many contemporary natural law advocates of just war doctrine tend to reject retribution as a just cause for war both because of the destructiveness of modern warfare, as well as the contention that legitimate international authority to authorize retributive action is lacking. Boyle, 1996, p. 46; Finnes, 1996, pp. 20–24. Alternatively, however, other contemporary natural law oriented, just war analysts maintain that retribution remains a useful category for just cause. They argue that "the notions of defense and punishment differ" concerning "the way they are related to past wrongs." Specifically, they recognize that, "a person cannot defend against a wrong already perpetrated, although he or she can defend against its continuing circumstances." But they point out that, "if legitimate grounds for war are limited to defensive considerations, then just to the extent that standing grievances among polities are past wrongs, and not ongoing injustices, they are not legitimate grounds for war." Hence, in such situations, there would be no justification for "defending against them." Boyle, 1996, p. 47.

42 Several theocentric natural law just war thinkers, including St Ambrose and St Augustine, asserted that wars on behalf of and commanded by God were just. Finnes, 1996, pp. 20–24; Johnson, 1975, pp. 6, 8–9, 36–38, 47–53, 57–59, 78, 100–101; 160, 169, 260; Lammers, 1990, p. 62; Johnson, 1991, pp. 7–8; Eppstein, 1935, p. 67; Elbe, 1939, pp. 666–667.

43 Elbe, 1939, pp. 674–675; Johnson, 1991, p. 18. See also Johnson, 1975, pp. 154, 157–158, 166.

44 Johnson, 1975, pp. 18, 20, 23, 31, 82, 93, 154–155, 178–180, 188–189, 194; Elbe, 1939, pp. 674–676; Lammers, 1990, p. 62; Johnson, 1991, pp. 18–19.

45 Johnson, 1975, pp. 6, 8–9, 23, 59, 82, 154–155, 156, 158, 163, 169, 170, 191, -193, 260; Elbe, 1939, p. 674; Lammers, 1990, p. 62; Johnson, 1991, pp. 18–19.

46 Finnes, 1993, p. 22; Johnson, 1975, pp. 9–10, 30, 166, 272; Fixdal and Smith, 1998, pp. 295–301. It should be emphasized that natural law is consistent with the principle of respect for cultural diversity and autonomous development. This position is predicated upon the principle of subsidiarity. Discussing this, Robert George observed, "far from supposing that natural moral law imposes a single cultural norm to which all peoples should aspire, contemporary natural law theorists maintain that respect for the integrity of diverse legitimate cultures is itself a requirement of natural justice." Hence, he suggests that the international community "must, to the extent possible not only permit diverse national and subnational communities to control their own affairs, but also respect (and, if necessary, help to protect) the right of such communities to preserve, by legitimate means, their distinctive languages, customs, traditions and ways of life." But he emphasizes that this does not imply that the international community "acts illegitimately in forbidding and repressing violations of human rights, even when they are sanctions by cultural norms." George, 1999, pp. 242–243.

47 Johnson, 1975, p. 272.

48 Thus, a wrong must be already committed by the offending party; evil intentions or the potential for evil action was seen as an insufficient justification to resort to armed violence. Johnson, 1975, p. 38; Finnes, 1996, pp. 20–24.

49 Johnson, 1975, pp. 36, 38–39, 46; Finnes, 1996, pp. 20–24.

50 Finnes, 1996, pp. 21–24; Johnson, 1975, p. 40.

51 Finnes, 1996, pp. 18, 24–26; Johnson, 1975, pp. 36–38, 46, 49, 75, 175, 213; Johnson, 1991, p. 8; Fixdal and Smith, 1998, pp. 302–303.

52 Finnes, 1996, p. 26; Johnson, 1975, pp. 30–33, 40–41, 47, 67, 78–80, 122, 174–175; Lammers, 1990, p. 68; Johnson, 1991, pp. 9–10, 15; Elbe, 1939, p. 674; Williams and Caldwell, 2006, pp. 311–313.

53 Cited in Johnson, 1991, p. 10. See also Lammers, 1990, p. 59.

54 For example, as pointed out by James Turner Johnson, by the thirteenth century, De Treuga et Pace (Of Truces and Peace) identified "eight classes of persons … are listed as having full security against the ravages of war: clerics (presumably including bishops, though they are not specifically named), monks, friars, other religious, pilgrims, travelers, merchants, and peasants cultivating the soil (as opposed to peasants in the army of their feudal lord, who were combatants)" Assessing the underpinning factors in delineating these classes of non-combatants, Johnson commented, "first, such protection of the innocent obviously embodies the proscription of various kinds of wrong intention defined in the Augustinian tradition, which stand behind all medieval thought on war. Charity demands that the innocent be spared" Second, "business or function" was critical. He noted that "other types of noncombatants – women, the aged, children, the sick and the blind – are omitted in this particular listing" perhaps because "they might have been understood as noncombatants because of 'negative' function – inability to bear arms," but speculated that this omission might also be because "they were protected by the residue of the chivalric code: the traditional ideals of the knightly profession" Johnson, 1975, pp. 44–45. By the sixteenth century the definition of a non-combatant had solidified, as reflected in Vitoria's definition of non-combatants, as including, "all those classes of people who by reasons of inability to bear arms or peaceful social function do not participate in war" and his adamant position regarding the immunity of non-combatants. Johnson, 1991, p. 18.

Finnes, 1996, pp. 18, 26–27; Johnson, 1975, pp. 42, 44–45, 49, 65, 71, 74, 77, 79–80, 172, 195–203, 263; Lammers, 1990, pp. 64–65; Johnson, 1991, pp. 10–11, 14–15, 18.

55 Johnson, 1975, pp. 200, 263.

56 Finnes, 1996, pp. 26–27; Johnson, 1975, pp. 44, 79–80, 172, 195–196, 198–203, 263.

57 Finnes, 1996, pp. 27–28, 33–34; Johnson, 1975, pp. 49, 172, 196–198; Johnson, 1991, pp. 11–12, 15.

58 Finnes, 1996, pp. 26–27, 33–34; Johnson, 1975, pp. 44, 47, 74, 79–80, 172, 195–203, 263; Boyle, 1996, pp. 44–45; George, 1999, p. 111.

59 Johnson, 1975, pp. 172, 196–203; Lammers, 1990, pp. 64–65; Johnson, 1991, p. 19.

60 Elbe, 1939, pp. 675–676; Johnson, 1975, pp. 195, 199–200, 203; Lammers, 1990, p. 65.

61 Johnson, 1975, p. 79.

62 Hensel, 2005, pp. 42–43.

63 d'Entreves, 1964, p. 95.

64 Rommen, 1948, pp. 13, 41, 86, 124–125, 250; d'Entreves, 1964, pp. 7, 28, 41, 80, 82, 84, 86–87, 91, 93, 95 116–117.

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Chapter 2

Anthropocentric Natural Law and its Implications for International Relations and Armed Conflict

Howard M. Hensel[1]

Introduction

In contrast to the theocentric natural law perspective which holds that "God is the measure of all things," the anthropocentric natural law perspective holds that the proper place to focus the study of man is upon man himself; – "Man is the measure of all things."[2] While adherents to an anthropocentric approach to natural law can be found throughout history, this approach gained tremendous popularity during the early modern period of the seventeenth and eighteenth centuries.[3] But, while there are assumptions and perspectives common to all proponents of anthropocentric natural law, during the early modern period, two principal branches of thought, a Hobbesian branch and a Lockean branch, emerged emanating from this common perspective.

The purpose of this chapter is, first, to analyze the common characteristics of the anthropocentric approach to natural law, as well as the variations that characterize the Hobbesian and Lockean branches of anthropocentric thought with respect to their interpretations of man and his characteristics, his relationship to society, the role of the state and its place within the international system, and the general characteristics of the international arena. Second, the chapter will examine the way in which adherents to these two schools of thought have applied their respective bodies of thought in their contrasting interpretations and applications of the various categories of analysis embedded within the analytical framework delineated by theocentric natural law, classical and neo-classical proponents of just war doctrine designed to govern and assess the decision to resort to the use of armed force, as well as the manner in which armed conflicts are to be conducted. In doing so, the chapter will highlight the differences and similarities between the criteria established by proponents of anthropocentric natural law and the classical and neo-classical just war criteria defined by proponents of theocentric natural law.

Anthropocentric Natural Law

An anthropocentric approach to natural law is characterized by its independence from any religious roots or Divine authority. In the early modern period, this perspective was influenced by the "scientific revolution," led by Galileo and others, which was predicated upon an understanding of the earth and, indeed, the entire universe, independent of teleological or theological considerations. For some proponents of an anthropocentric natural law perspective, this merely represented an explicit or implicit analytical separation in the sense that scientific study was seen as being compartmentalized separately from religious convictions. Alternatively, for others, there was a clear and explicit rejection of a Divine Being or a conviction that, if such a Being exists at all, it does not care about individual humans and does not, either positively or negatively, interfere in or influence human affairs. Irrespective, however, proponents of anthropocentric natural law maintain a sharp distinction between theology, on the one hand, and philosophy and science, on the other, that is not present in the theocentric perspective on natural law. For them, natural law was seen as totally secular.[4]

Second, inherent in the anthropocentric natural law perspective is the proposition that all knowledge is based upon human reasoning. Indeed, as Heinrich Rommen observed, "rationalism soon made human reason … the measure of what is." Moreover, since one's individual powers of reason are considered to be sufficient means by which one might obtain knowledge, the social necessity that theocentric natural law proponents assumed was basic to man's nature is denied by proponents of anthropocentric natural law.[5]

Third, but integrally related to these first two characteristics, the anthropocentric perspective is characterized by its commitment to the proposition that natural law must be predicated upon clarity, coherence, and self-evidence. Therefore, proponents of the anthropocentric approach to natural law adopted what they maintained was a rationalist, "scientific," methodological approach. Analogous to the study of mathematics, they began with certain assumptions and then, using these assumptions as a foundation, deductively constructed their philosophical approach by rationally inferring various propositions as axiomatic.[6] Indeed, they asserted that, just as even God, if he does exist, cannot alter the principles of mathematics, similarly, he cannot alter the rationalist-based, scientifically derived principles inherent within natural law.[7] Fourth, the anthropocentric approach to natural law is a mechanistic approach in that human nature and human conduct are seen as being governed by cause and effect, based upon situational and environmental considerations.[8] Similarly, nature is perceived to be amoral and civilization is seen as a human creation conditioned by the environment in which it arises and exists.[9]

Based upon these general assumptions and approaches, proponents of anthropocentric natural law began their analysis by examining what they regarded as the individualist, utilitarian nature of man. In their eyes, human beings are not instinctively social beings. Instead, they maintained that human beings are self-sufficient creatures that best fulfill themselves as solitary individuals operating outside the constraints of society. Hence, man does not have a disposition toward

society; on the contrary, man is characterized as a being disposed to withdraw from society. Therefore, since humans exist prior to society, anthropocentric natural law proponents held that the starting point of analysis should be to examine the nature of man himself, isolated and apart from the constraints and influences of society.[10]

Accordingly, human nature is said to be governed by instinctive aversion and desire, as conditioned by reason. Human beings are said to seek their individual self-interest, satisfaction, and advantage. Anthropocentric analysts held that humans seek self-preservation, freedom from anxiety and pain, and individual pleasure and happiness. Predicated upon this exclusive emphasis on human psychology, good is defined as what advances an individual's quest, evil is what inhibits or prevents that individual from achieving these goals. In short, importantly, proponents of an anthropocentric approach claimed that humans govern their conduct on the basis of egoism.[11] As such, the clear emphasis within anthropocentric natural law is upon the inherent rights of the individual.[12]

Given this individualist conception of man and the absence of any instinctive leaning toward society, proponents of an anthropocentric interpretation of natural law held that the family, the community and all its component parts, as well as the state are artificial products of convention, not natural and necessary creations with separate identities. As seen from the anthropocentric natural law perspective, the human condition is perceived as man versus society and the state, in which man participates only reluctantly.[13]

Hence, based upon their conception of human nature and the factors underpinning human motivation, anthropocentric natural law proponents used the "state of nature" as the starting point for analysis. As conceived by anthropocentric natural law thinkers, the state of nature is seen as an environment in which there is no governing authority or power and, hence, individuals are free to pursue their own self-interest, unconstrained by any laws or rules. While adherents to anthropocentric natural law sharply disagreed as to the characteristics of the state of nature, they all agreed that it reflects human beings as they really are.[14]

Notwithstanding the freedom that characterizes the state of nature, however, anthropocentric natural law thinkers also agreed that people eventually recognize that everyone's pursuit of their individual good is jeopardized if all are perfectly free to pursue their individual self-interest in an unrestrained manner. Thus, they argued that individuals, using their powers of reason, will eventually conclude that some form of mutual restraint is necessary. They will come to recognize that social arrangements can make a useful contribution to individual self-interest by creating a context in which people can live together in peace, while, simultaneously, allowing each individual to pursue his or her particular interests, consistent with the constraints established by society in its effort to keep peace within the community.[15] Therefore, adhering to the utilitarian approach that is characteristic of anthropocentric natural law thought, the common interest of the community is defined as the sum of the interests of the individuals that compose the community. Similarly, the measure of the community's value is determined by the degree to which it facilitates the utilitarian self-interest of the individuals that compose it.[16] But the underpinning perception is that society and the state are

artificial entities and that the individual, motivated by a rational and enlightened sense of self-interest, reluctantly joins society, predicated upon a perception of utilitarian advantage and expediency.[17]

Society is, therefore, said to be formed by means of the "social contract." Anthropocentric natural law oriented philosophers disagreed as to whether there is only one contract concluded between the various individuals to form society, or whether there are two or more contracts, one forming society, possibly joined by others forming the various component associations within society, and finally another forming the state. Moreover, they differed sharply as to the degree of power and authority ceded to state authorities and, conversely, whether, in determining the parameters of state power, the members of the community can or should reserve certain rights unto themselves. Irrespective of these differences, however, there was agreement concerning both the substance and the form of the contract.[18] As A.P. d'Entreves observed,

> "Formally," the contract is a manifestation of individual will with the object of establishing a relationship of mutual obligation which would not otherwise exist by the law of nature. "Substantially," the content of the contract is the "natural right" of the individual, which is exchanged against a counterpart of equal or greater value – the benefits of society and the security of political organization.[19]

Similarly, anthropocentric natural law proponents agreed that the parties to the contract must freely agree to its provisions. The provisions inherent within the contract or contracts are seen as defining the relationship between the individual members of the community, as well as the scope, nature, and prerogatives of the entity that is established. Of course, it assumes that the various contracting parties must adhere to the provisions of the self-imposed contract. Finally, proponents of an anthropocentric approach to natural law viewed the state as the supreme governing authority for the community and, further, they viewed the international arena as composed of the various states interacting in pursuit of their individual national interests. They also agreed that, periodically, conflicts between the states will result in armed violence.[20]

The notion that warfare is subject to universal and timeless principles and rules draws directly upon many of the assumptions underpinning the thought of anthropocentric natural law philosophers. Indeed, adherents to the body of thought that eventually came to be known as military science agree that there are universal laws that govern all aspects of reality, foremost mathematics and the natural sciences, but also human nature and all forms of social interaction. Moreover, they agree that human beings acquire knowledge of these universal principles and rules by systematically, scientifically, and deductively applying their capacity for rational thought in the context of historical experience. While to some degree recognizing the role of social, cultural, environmental, and technological considerations, proponents of scientifically-based military thought believe that the fundamental characteristics of human and natural reality are constant throughout time. In short, they agree with the proponents of anthropocentric natural law

in asserting the existence of a universal body of knowledge and enthusiastically embrace the possibility of rationally acquiring this body of knowledge.[21]

Hence, Renaissance and Enlightenment proponents of military science, subsequently joined by their nineteenth and twentieth century counterparts, maintained that a body of universal principles and rules governing warfare and military organization throughout the whole of human history could be rationally understood through scientific inquiry. Indeed, the systematic precision that purportedly characterizes the field of military science was said to be based upon an understanding of these principles of warfare that transcend the bounds of both time and circumstance.[22] But, as noted by Azar Gat, the military thinkers of the European Enlightenment were also influenced by "legacy of seventeenth-century neo-classicism in the arts," which placed "emphasis on the role of the creative imagination and the free operation of genius." Thus, while the scientific approach to the study of warfare provided fundamental, universal, and timeless rules and principles, the founders of modern military science agreed that "the rules and principles themselves always required circumstantial application by the creative genius of the general." Therefore, the framework for analysis applied by the thinkers of the Enlightenment had two parts: "one is mechanical and susceptible to theoretical study, the other circumstantial and dominated by creative genius and experience." While recognizing their existence, however, proponents of the scientific approach to war tended to downplay the various intangible and unpredictable elements that influence the outcome of wars.[23]

Building upon the assumptions and perspectives common within anthropocentric approach to natural law, early modern anthropocentric thought divided into two schools, best exemplified in the writings of Thomas Hobbes and John Locke.

The Hobbesian School of Anthropocentric Natural Law

Hobbesian Thought and its Implications for Society and the State

Consistent with the rationalist, naturalistic, and materialist assumptions common to the anthropocentric approach to natural law, Thomas Hobbes (1588–1679) formulated an approach in which he juxtaposed two related themes: his depiction of human nature and the resultant chaos of utilitarian-based, highly competitive human interaction in a state of nature, as diametrically opposed to the order and security of civil authority.[24]

As with other anthropocentric natural law thinkers, Hobbes believed that inquiry should first begin with an analysis of human nature. Adopting a utilitarian approach to human psychology, Hobbes argued that human beings are instinctively driven to incessantly seek to gain happiness or felicity by maximizing pleasure and minimizing pain. Hobbes acknowledged that various individuals will define happiness differently, depending upon a variety of environmental, cultural, and personality-based considerations. But, at its most basic level, all human beings seek self-preservation. In depicting human beings as self-centered

creatures that seek only their own survival and pleasure, Hobbes refused to apply any normative moral standards to this instinctive human behavior. Indeed, he noted that "the desires and other passions of man are in themselves no sin." Moreover, the assignment of blame implies choice and, in Hobbes's eyes, human beings have no choice but to follow what is instinctive to their nature. Therefore, according to Hobbes, human beings equate the terms "evil" and "good" to an individually determined, relative scale on which they evaluate that which they dislike or like, and the degree to which conditions or things contribute to their individual happiness. In short, from Hobbes's perspective, good and evil, right and wrong, justice and injustice are subjective, not absolute terms. Morality is situationally determined, varying by place, time, and context.[25]

Hence, humans, driven by instinct and passion, willfully pursue that which they believe provides maximum pleasure and minimum pain. In doing so, they then employ their powers of reason as a means to achieve the end that they have willed. Therefore, Hobbes maintained that human will is the foremost factor governing human behavior. This view, of course, stands completely opposite to the interpretation adhered to by theocentric natural law proponents who adamantly maintain that human reason, key, in turn, to the acquisition of knowledge, is superior to human will. In contrast to the assumptions underpinning theocentric natural law, however, since Hobbes denied the existence of universals that human reason might know or the existence of any ultimate good that individuals must seek, Hobbes based his approach upon the superiority of the human will over reason, instead of human reason over will.[26]

Constant uncertainty, however, is said to undermine any hope of human happiness. Not only is the quest to attain ultimate happiness unending, individual efforts to attain felicity are threatened by similar efforts by others. Hence, in order to secure one's self-preservation and continue the quest for happiness, individuals are depicted as seeking to maximize their power in relation to other individuals. Therefore, in Hobbes's eyes, since power is the key to survival and securing happiness, irrespective of how happiness may be defined, man is seen not as a seeker of truth in the theocentric natural law sense, but rather is seen as a being endlessly in pursuit of power.[27] In short, Hobbes depicted human beings as self-centered and egoistic, materialistic, greedy, selfish, and insatiably power-hungry.[28]

Hobbes's depiction of the "state of nature" is a projection of his depiction of human nature.[29] Simply put, for Hobbes, the state of nature is total conflict and anarchy. It is the human state when human beings fail to apply reason and are deprived of some form of regulatory authority. As Sterling Lamprecht observed, "in place of law and reason, passions of fear and hate and greed and lust operate without restraint in human lives."[30] Hobbes depicted the state of nature as one in which all human beings possess absolute liberty to pursue their desires unrestrained by laws or norms of conduct. It is a state in which everyone is absolutely equal. But it is also a condition in which all humans, each seeking to satisfy their various desires, are constantly, chaotically conflicting with one another. Hence, in the state of nature, there is perpetual violence, or at least the threat of violence, as each individual seeks to dominate or destroy those who would obstruct his or her efforts to gratify themselves. Rivaling one's sense of

self-centered greed is a constant sense of fear of others, with every human being seen as the actual or potential enemy of every other human. Therefore, in this state of universal competition and struggle, with everyone against everyone else, there is no wrong or right, unjust or just, there is merely amoral competition to survive, as everyone seeks to secure elusive happiness. Hence, in the state of nature, human beings do not gravitate together, instead they move apart from one another. This assertion is, of course, diametrically opposed to the theocentric natural law assertion that all human beings are, by nature, social creatures. In short, Hobbes claimed that the state of nature is one in which human nature is perfectly revealed and the implications of man's instinctive nature are fully realized.[31] Summarizing Hobbes's position, Heinrich Rommen stated, "Man in the depths of his being is what the state of nature shows him to be: a wolf, wicked, devoted to self" and, in the state of nature, "there exists only lawless individuals, in whom is found no natural tendency to live in society; and man's life is 'solitary, poore, nasty, brutish, and short.'"[32] As Hobbes himself summarized, "In the state of nature to have all, and do all, is lawful for all."[33]

Consistent with his interpretation of man's nature and the state of nature, Hobbes radically altered the definition of natural law and natural right from that posited by theocentric natural law proponents. Hobbes defined the right of nature as every individual's liberty to do whatever is necessary for self-preservation. This right is devoid of moral or normative content; it merely stated what Hobbes believed to be the factual condition of human existence.[34] Hobbes defined the "laws of nature" as rationally derived prudent maxims or rules designed to facilitate an individual's drive for self-preservation and self-interest. In short, in contrast to theocentric natural law, Hobbes's laws of nature are not morally-based norms governing human conduct within the larger context of Eternal Law that governs the Eternal Order. Instead, they are simply rules of secular expediency by which man might apply his capacity for rational thought to the problem of how to ensure his instinctive desire for survival and promote his or her own utilitarian self-interests.[35] As John Hallowell observed, "The basis of Hobbes' system is not justice but utility, it is not a question of what we ought to do but of doing that which is to our personal advantage."[36] Thus, morality becomes synonymous with secular, utilitarian self-interest.[37]

While some of Hobbes's laws of nature are more general and others are more specific,[38] his first three laws are especially important within the context of his thought. Hobbes's foremost, most fundamental law of nature is that human beings should seek peace with each other.[39] As Hobbes stated, based upon this "fundamental law of nature, by which men are commanded to endeavor peace, is derived the second law; that a man be willing, when others are so too … to lay down this right to all things and be contented with so much liberty against other men, as he would allow other men against himself."[40] The third law of nature emphasizes "that men perform their covenants made."[41] While Hobbes listed additional laws of nature,[42] he did indicate that, "as it is necessary for all men that seek peace to lay down certain rights of nature; that is to say, not to have liberty to all they list: so it is necessary for man's life, to retain some; as the right to govern their own bodies; enjoy air, water, motion, way to go from place

to place; and all things else, without with a man cannot live, or not live well."[43] An individual may resist any attempt by anyone to deny him life. This suggests that, in Hobbes's view, man may, indeed, retain certain minimal, but inalienable rights that are not abandoned when man enters society.[44]

Hobbes clearly indicated that that the laws of nature are not binding for human beings in a state of nature. Indeed, he noted that, since many of the laws of nature are beyond the control of single individuals, but rather require cooperation and reliable guarantees of reciprocal observance by others, in most cases, the laws of nature are not safe to unilaterally observe.[45] As Sterling Lamprecht observed,

> Reason is able, even in the state of nature and in the midst of war, to perceive the moral desirability of peace and honesty and mutual kindness. But reason itself cannot make conditions prevail in which reasonable men can reasonably perform reasonable acts. The laws of nature do not require a man to expose his innocence to the brutal aggressions of others.[46]

Given the extreme instability and mutual fear of ruin and death pervasive within Hobbes's depiction of the state of nature in which all humans are at liberty to ceaselessly and without any restraint seek to maximize their own power, Hobbes suggested that human beings will eventually, rationally recognize that it is in their common interest to enter society and, consistent with the laws of nature, agree upon a system of mutual restraint, thereby, reducing instability to a level that is tolerable. In short, only by entering into a social contract to emerge from the state of nature and create a community and governing political authority that has the power to control man's anti-social nature can people secure a measure of peace with each other, while, simultaneously, continuing their respective, individual quests for felicity. But again, reflecting Hobbes's exclusive emphasis on utilitarian self-interest, human beings reason that the degree to which they compromise their liberty to pursue power without restraint in a state of nature must be favorably counterbalanced by the greater benefits of mutual security that they will obtain by entering society and yielding to a governing authority. Conversely, societal arrangements are useful to human beings only insofar as they provide a context in which the individual members of society can successfully pursue their self-interests in a more secure environment.[47]

Hobbes stressed that the individuals composing society must mutually agree to respect and yield to the unlimited authority of a sovereign government to regulate social interactions between the various members of society. Conversely, the sovereign authority has ultimate responsibility for order and safety throughout the whole of society and, hence, is exclusively vested with whatever powers are necessary to achieve that end. As such, Hobbes emphasized that there can be no constraints upon the power of the sovereign authority, since, given his conception of human nature, if the individual citizens within society were to retain a measure of power, they would inevitably use it in their own self-interest and attempt to dominate over other individuals and institutions within society, including the government itself. Indeed, Hobbes maintained that effectiveness is the exclusive criteria by which governments are evaluated.[48]

While Hobbes stressed that the sovereign is obligated to obey the laws of nature as Hobbes defined them, consistent with his position that all morality is situational and that there is no absolute good or justice, he held that the state does not possess or manifest any ethical or teleological purpose. Instead, the state is analogous to a machine operated by the absolute sovereign who theoretically possesses unlimited authority. Furthermore, Hobbes adopted a nominalist approach to ethics in that he denied the existence of absolute values. For him, it is the sovereign that defines what is right or wrong, good or evil, just or unjust. Law is, therefore, the product of the will of the sovereign; the sovereign is not bound by the law, instead, the sovereign defines what is the law. The sovereign unilaterally determines how much freedom the citizenry should have and that determination may change depending upon the situational context. As Hobbes pointed out, in many situations, there would probably be no need for the sovereign to intrusively regulate a great many areas of social life or curtail many aspects of individual liberty. Indeed, he believed that the state should contribute to the establishment and maintenance of an environment in which each individual is free to pursue his or her own self-interest with a minimum of restrictions. Therefore, from Hobbes's perspective, individuals within society should be free to pursue their self-interests in whatever manner they deem appropriate, insofar as there is no restriction against exercising their freedom in that manner. But, Hobbes stressed that the degree of liberty granted to the individual members of society would be situationally determined exclusively by the sovereign who could, at will, expand or contract the scope of governmental regulation depending upon that situational context. Thus, for Hobbes and those adhering to his philosophy, the critical question centers, not on the issue of justice or injustice, good or evil, right or wrong as is the case in theocentric natural law thought, but rather focuses on the sovereign's ability to enforce his or her laws and, ultimately, his or her ability to provide order and security for the society that he or she governs.[49]

According to Hobbes, the members of society owe allegiance and complete obedience to the sovereign as the only legitimate governing authority for society. The subjects of the sovereign have no authority to attempt to place restraints upon the unlimited prerogatives of the sovereign or to question or criticize the sovereign's decisions. Indeed, since the sovereign defines what is just, he or she cannot be accused of committing an act of injustice. The members of society obey the will of the sovereign because they are compelled to do so and their corollary recognition that to do otherwise would result in punishment. Hence, from Hobbes's perspective, the law is binding upon the members of society because it is enforced by the sovereign. But in a larger sense, beyond the fear of punishment, the members of society obey the sovereign because they recognize that the alternative to the societal order provided by the sovereign is the anarchy of the state of nature. Therefore, in return for complete obedience to the will of the sovereign, the members of society have a right to expect a secure and tranquil social order in which each individual is able to pursue his or her own self-interest and, thereby, attempt to gain elusive happiness. Although Hobbes was unwilling to recognize as legitimate the right of members of society to rebel against the

sovereign, he seemed to recognize that a government that fails to provide order and security within society will be replaced by one that can.[50]

Hobbesian Realism and International Relations

Hobbes's political thought provides one of the principal foundation blocks for the realist school of international relations.[51] Hobbesian realists argue that the international arena is composed of a number of independent, sovereign states and is analogous to Hobbes's description of the state of nature, in which each state seeks to maximize its power in order to facilitate the promotion of its own self-interest. Since there is no global sovereign to make and enforce an overarching law, there is effectively no law within the international arena and each state is free to pursue its own national interest in any manner that it deems appropriate. Thus, from the Hobbesian realist perspective, the critical question is not whether the statesman's conduct conforms to some ethical standard, but rather whether the statesman has secured the survival of his state, as well as preserved and, if possible, enhanced its power and promoted its national interests. Indeed, many realists maintain that, since the states coexist in a state of nature, their conduct should not be governed by any moral standards. Alternatively, other Hobbesian realists assert that, given the responsibility of statesmen to protect, maintain, and enhance the welfare of the citizens of their state, the security, power, and prosperity of the state is, itself, the "moral" standard that should guide state policy. In short, consistent with Hobbes's depiction of the state of nature, the international system is said to be characterized by constant conflict and rivalry between states or coalitions of states.[52]

In an effort to more effectively maximize their power to pursue their national interests, the individual states often use their diplomatic instruments to join together in coalitions based upon a community of interests. But realists recognize that the configuration of the international system is in constant flux depending upon the circumstances and challenges of the moment. Hence, allies on one set of issues today might be adversaries regarding another set of issues tomorrow. In addition to diplomacy, economic power and armed force are also important policy instruments available to the states as they formulate their grand strategies to advance their interests. Indeed, Hobbesian realists view pressure and coercion as legitimate methods available to the states as they pursue their national interests. Therefore, from the Hobbesian realist perspective, military force is seen as a legitimate instrument of state policy and, consequently, armed conflict is seen as an inevitable aspect of international relations. This is not to say that the states are constantly in a state of open warfare with one another. Peace or, more properly for Hobbesian realists, the absence of open warfare, is, in large measure, said to be the product of a stable balance of power. In such a state of stable equilibrium, at least for the moment, none of the states have an incentive to initiate armed hostilities with any other state or coalition, irrespective of the degree to which their national interests clash, because each recognizes that it will not prevail in an armed struggle. But each state retains the option to employ armed force if

the situation changes and, consequently, it deems it to be in its interest to resort to armed violence in pursuit of its national interests.[53]

Predicated upon these considerations and perspectives, realists view the balance of power system as resting upon a series of assumptions. First, of course, they assume that the sovereign states are the primary actors in the international arena. Second, it is assumed that the international system is characterized by a decentralization of power and authority, but, while consisting of a number of sovereign states, it is usually dominated by two or more interacting great powers that are roughly equivalent in strength. Third, the strength of the various states, including that wielded by the great powers within the international arena, is seen as being measurable by defined standards. Fourth, the international system can be characterized by its homogeneity or its heterogeneity depending upon the degree to which the states, especially the great powers, share a common cultural root, sense of values, and/or conception of justice. Fifth, the fundamental aim of the individual states, as well as the purpose of the international system itself, is to ensure the survival of the sovereign states as independent entities. Sixth, it is believed that the best way to ensure the survival of the states is to perpetuate the international system with its present arrangement of decentralized power and authority. Seventh, it is in the national interest of each of the states that compose the international system to prevent any other individual state from dominating the system and establishing hegemony over its members. Eighth, the responsibility of statesmen is to defend and promote the national interests of their respective states and to maintain or enhance its powers within the international arena. Ninth, consistent with the Hobbesian conception of the responsibilities and unlimited authority of the sovereign, realists are prepared to endorse whatever restrictions to individual liberty that are deemed necessary by the governing authorities in order to protect and promote state interests. Tenth, the use of various instruments of policy, including the use of the armed forces, are seen as part of the overall national security strategy designed to achieve specific political objectives. Hence, since the use of armed force is determined solely by considerations of power and national interest, realists are wary of and resistant to allowing other considerations to intrude in the decision to use armed force or to influence the scope and intensity of violence once armed hostilities are underway. Eleventh, realists believe that when power is balanced among the various states or coalitions of states, not only can no single state establish hegemony over the others, conflict between the states tends to be contained within controllable limits. Twelfth, many Hobbesian realists tend to perceive the balance of power in mechanistic terms and see in it an inherent tendency to gravitate toward a stable state of equilibrium of power between rival sovereign states and coalitions.[54]

Hobbesian Realist Thought and the Use of Armed Force

Hobbesian realist thought can be applied within the context of the analytical categories traditionally delineated and employed by proponents of just war doctrine. In doing so, however, the Hobbesian realist interpretation and application of these categories of analysis is predicated upon and consistent with

the general Hobbesian anthropocentric natural law perceptions of man, society, the state, and the international arena. Consequently, both the spirit and specific application of the Hobbesian realist interpretation of the analytical categories used in determining whether to resort to the use of armed force, as well as the categories utilized in determining the proper employment of armed force, yields a set of criteria that often diverges quite significantly from the just war criteria posited by proponents of theocentric natural law.

The decision to resort to the use of armed force With respect to the analytical category admonishing that peace constitutes the only legitimate goal of war, Hobbesian realists define peace as a state of international affairs in which conflict continues between the individual states for power, as well as for the protection and promotion of their respective national interests, but remains contained short of overt and open armed hostilities.[55] Hence, realists tend to view as utopian the definition of peace posited by proponents of theocentric natural law that emphasizes a tranquil and just order, in which the various actors within the international arena cooperate in harmony and with a sense of shared purpose. Therefore, while broadly agreeing that the restoration of peace or, preferably, a better state of peace should be the goal of any war, realists tend to define peace as an enhanced position of power for the victorious state in which the national interests of the victor have been successfully defended or promoted and in which the victorious power can, in the future, more advantageously press for the attainment of its interests and the expansion of its power vis-à-vis other states. While realists would agree that it is desirable that the victorious power or coalition, as well as the defeated power or powers, at least temporarily accept the post-war status quo and the new balance of power, the key question for realists centers on the post-war balance of power itself. Since realists maintain that national strength is measurable by objective criteria, the new, post-war power configuration is also seen as measurable, both in absolute and relative terms. But Hobbesian realists would emphasize that peace is never permanent, nor is the power configuration ever permanently stable and one should expect new power configurations, predicated upon new rivalries, to emerge during the post-war period, thereby potentially setting the stage for continued conflicts among the members of the international system, – conflicts that could potentially escalate into future wars.

Realists emphasize the analytical category of legitimate authority, asserting that only the lawfully established, secular, governing authorities can legitimately authorize the use of armed force as an instrument of state policy. Moreover, consistent with their Hobbesian anthropocentric natural law assumptions and perspectives, realists maintain that there are objective criteria for determining legitimate authority and sovereignty. As such, Hobbesian realists are wary about recognizing the legitimacy of armed rebel groups within society.

In this context, it should be pointed out that, consistent with the principle of state sovereignty and conditioned by the paramount considerations of national interest, proponents of anthropocentric natural law tend to place at least some emphasis on *jus gentium*, defined as customary norms and patterns of behavior

that are commonly followed by the members of the international community. In addition, bilateral or multilateral informal arrangements and formal agreements between sovereigns are also seen as important considerations influencing the formulation and implementation of state policy. Bilateral or multilateral agreements among sovereigns are seen as carrying additional authority if they are based upon commonly accepted custom. Obviously, both common customs and bilateral/multilateral agreements could be important considerations impacting upon the decisions of governing authorities concerning the use armed force as an instrument for conflict resolution, as well as the way in which military operations are conducted. But it should be emphasized that those realists who recognize the importance of custom and convention usually do so with the critical caveat that reciprocity must be maintained in order for these customs and conventions to remain valid as constraints upon state policy. Moreover, they tend to assert that reciprocity will be maintained only as long as it is in the national interest to do so. In short, as James Turner Johnson observed, this interpretation of custom and bilateral agreements "allowed wrong to be defined not in terms of absolute morality but in terms of violation of customary or mutually agreed upon rights."[56] This interpretation, in turn, stands in contrast to that held by proponents of theocentric natural law who argue that custom and convention are valid only insofar as they conform to the tenets and principles of theocentric natural law. Hence, theocentric natural law advocates maintain that, simply because a pattern of conduct or norm is commonly agreed upon does not necessarily make it right or just. Indeed, they point out that slavery was once commonly accepted, but that did not make it right or just.

Applying the analytical category of right intention, realist thinkers stress that the governing authorities must keep the national interests of their state uppermost in determining any political course of action, especially, the decision to go to war. They would tend to agree, however, that ascertaining the intentions of potential or actual adversaries, as well as friends and allies, is quite difficult at best.[57] Consequently, realists tend to advise that it is generally safest to assume a "worst case" interpretation that relies heavily on an assessment of the adversary's actual capabilities, rather than exclusively depending upon an analysis and assessment of what are thought to be the adversary's intentions.

Concerning the category focusing on the causes of conflict, realists are prepared to sanction the use of armed force to defend the state's national security, to protect and promote the national interests, to maintain or enhance the power of the state within the international arena, and to prevent any other power from establishing hegemony within the international community. While self-defense in response to an actual attack that has already taken place is obviously considered to be a proper cause for war, many realists are also generally prepared to endorse the concept of anticipatory self-defense. Thus, in situations where the governing authorities are presented with unambiguous information indicating that an armed attack by another power is imminent, many realists, like many theocentric natural law, classical, as well as neo-classical just war proponents, maintain that a preemptive strike designed to neutralize the imminent threat is justified. But some realists go even farther and argue that policy-makers cannot be bound by the restrictive

requirements of unambiguity and imminence. Instead, these realists maintain that a preventive attack is justified against a potential, future threat to a state's security or national interests, based on threatening statements by rival leaders and backed by the adversary's actual capabilities to deliver that which is threatened. Similarly, the prospect of the future acquisition of a threatening capability by an unfriendly power is also seen by some realists as sufficient justification for a preventive attack. In addition, policy makers may be confronted with non-military actions by rival powers that are sufficiently threatening to the security and national interests of the state as to justify a military response. Political instability, peaceful encroachments by rival powers, or other similar developments in regions that are critical to a state's vital interests may also be perceived to be sufficiently threatening as to compel a state to justifiably take actions that may be interpreted by others as aggressive. Finally, in addition to arguing that the test of imminence is too restrictive, many realists also argue that the test of unambiguity is too difficult to satisfy. They observe that rarely, if ever, is information about enemy intentions and capabilities so clear, consistent, and devoid of contradictory or ambiguous evidence, as to satisfy decision-makers that a threat of an enemy attack is beyond doubt.[58] Hence, many argue that, if the preponderance of evidence indicates that a state's survival or vital national interests are at risk, the state is justified in taking appropriate military action against that threat.

Realists differ from theocentric natural law, classical and neo-classical just war proponents in their reluctance to resort to the use of armed force in certain situations in which their vital national interests are not at stake. For example, realists recognize that tyrannical and repressive regimes exist within the international arena, but they are extremely reluctant to authorize intervention against these regimes, except for reasons central to the vital national interests of the intervening power or powers. From a realist perspective, however, there could be at least two justifications for intervention. First, intervention could be in response to domestic instability within the state in which the intervention will occur because the maintenance of stability within that state is critical for reasons of national interest to the intervening power or powers. Second, intervention may be justified because of the risk that domestic unrest could spread across borders and escalate into regional instability in an area of interest to the intervening power or coalition. But, from the Hobbesian realist perspective, intervention in the internal affairs of another sovereign state cannot be justified solely because the domestic policies of that state are viewed as unenlightened, repressive, or even tyrannical. In short, state security and national interest must predominate.[59]

In certain circumstances, realists may support wars that are of a punitive, retributive nature, as well as even wars that are aggressive and offensive in nature. But, proponents of an anthropocentric natural law, Hobbesian realist approach to international relations, join with theocentric natural law, neo-classical just war theorists in sharply rejecting religious, ideological, or other morally inspired causes for the use of armed force.[60]

Indeed, realists are generally reluctant to resort to military instruments of power, preferring instead to rely upon non-military instruments, such as diplomacy, economic pressure, etc. But when military instruments are utilized,

realists maintain that there must be a reasonable expectation of victory. Along these lines, realists are often criticized for their willingness to work with any power, irrespective of its ideological orientation or policies, based upon a community of interests and predicated upon the admonition that states have no permanent friends or enemies, just permanent interests.[61] In short, realists tend to place great importance on the criteria that states should resort to armed conflict only as a last resort, but when force is used, there must be a reasonable expectation of victory. With respect to the criteria of declaration, realists admit that there may be situations in which the factor of surprise may counterbalance the *jus ad bellum* requirement for a state to publicly declare its intention to resort to armed violence.

Finally, since realists recognize that wars can, at least theoretically, escalate to become total in scope and reach unlimited levels of intensity, they emphasize the absolute necessity to keep violence within proportionate bounds. Hence, realists tend to place great emphasis on the concept of proportionality and stress the necessity of keeping the means of war proportionate to the political ends that are sought. Indeed, optimally, political considerations centering on the national interest should be the exclusive criteria for authorizing the use of armed force and other considerations impinging upon the decision to go to war should be eliminated from consideration or, at least, minimized. Realists are usually keenly aware of the devastation, societal dislocation, and opportunity costs associated with war. Hence, they emphasize that the gains expected from the anticipated victory must outweigh both the actual and opportunity costs associated with securing military victory. Importantly, however, many realists tend to subjectively assess the cost-benefit calculation, in that they give disproportionate weight to the anticipated costs and benefits to be suffered or accrued by their own side, whereas they tend to depreciate the projected significance of the damage that will likely be accrued by their opponent.[62]

The employment of armed force Concerning the category of right intention as applied within the context of the employment of armed force, realists remind those fighting that the purpose of armed conflict is to support the interests of the state. Therefore, all extraneous considerations should optimally be eliminated as motivating factors. Just as realists see the conflict as one between organized bodies and, therefore, generally tend to recoil from depicting the war as being directed against the entire enemy people, similarly, they tend to avoid demonizing the enemy people, armed forces, or even its often unsavory, governing authorities.[63] While upholding the importance of the analytical categories of distinction and proportionality, however, realists tend to stress that the principles inherent within these categories of analysis must be framed within the context of the principle of military necessity. As a result, military operations must be evaluated based upon the criteria of whether they successfully attain the operational objectives. While they admonish those planning and executing military operations to apply only that degree of force necessary to overcome or neutralize enemy resistance and they agree that collateral injury and/or death to civilians and damage and/or destruction to civilian objects should, optimally, be avoided entirely or, at least,

minimized, they accept the fact that at least some injury, death, damage, and destruction are unavoidable in war. In addition, as with the application of the principle of proportionality, with respect to the decision to resort to the use of armed force, in their calculation of how armed force is to be actually employed, realists tend to be more prone to subjectively weight the proportional assessment of costs and benefits to their own advantage. But, ultimately, realists maintain that operational considerations directed at bringing the armed conflict to a successful conclusion must be uppermost.[64]

While many realists are not opposed to following the laws of nature, even within the state of nature-like international arena, and, therefore, may endorse adherence to specified customary or conventional restraints in their conduct of armed hostilities, realists would insist that endorsement of such restraints must be predicated upon the assumption of reciprocity. When one's adversary abandons the laws of nature or, in this case, abandons the corollary limitations imposed on the conduct of warfare, one is no longer obligated to unilaterally adhere to the laws of nature or, by analogy to adhere to restraints in war. In the final analysis, however, realists emphasize that statesmen and soldiers must always be guided by that which is in their state's self-interest. Thus, realists hold that, at least in situations of extreme necessity, military planners and commanders may be required to authorize the application of force in a manner that is inconsistent with heretofore recognized customs and/or conventions, in order to protect the survival of the state and its vital national interests.[65]

In short, the *jus ad bellum* and *jus in bello* criteria established through the interpretation and application of the analytical framework and component categories of analysis inherent within just war doctrine by classical and neo-classical just war proponents, can be reinterpreted and reapplied by Hobbesian realists to yield a series of criteria and resultant admonitions that are quite different both in spirit, as well as with respect to specific principles. At its root, this clear difference of interpretation and application is the product of the very different assumptions and perspectives inherent within theocentric natural law, as opposed to the assumptions and perspectives inherent within anthropocentric natural law, as interpreted by Thomas Hobbes and the realist school of international relations.

The Lockean School of Anthropocentric Natural Law

Although the term "liberalism" did not come into usage until the nineteenth century, its tenets can be traced back to much earlier times. Furthermore, while there were very significant, subsequent developments in the evolution of liberalism, John Locke (1632–1704) is seen by most scholars as the father of liberal thought.

Lockean Thought and its Implications for Society and the State

John Locke based his thought upon the same general anthropocentric natural law-oriented individualism as did Thomas Hobbes, but Locke portrayed human nature somewhat differently from Hobbes's depiction. In addition, Locke conceived of state authority in very different terms from Hobbes's absolute sovereign.[66]

Locke rested his philosophical approach upon the conviction that there were concepts and rules that were discoverable by human beings.[67] As Dante Germino observed, Locke held that "reason, common sense, and general consent among men combine to render these rules acceptable and indeed 'self-evident.'"[68] As such, Locke asserted that reason is superior to religious revelation and faith and that, in assessing the validity of revelation, one should accept only that which does not contradict reason.[69]

Consistent with other proponents of anthropocentric natural law, Locke posited a "state of nature" in which man was said to have resided prior to entering society. Implicitly agreeing with Hobbes, Locke maintained that in a state of nature, human beings are equal, free, and independent of each other[70] and, therefore, they can do as they see fit "within the bounds of the law of nature," but "without asking leave, or depending upon the will of any other man."[71] While in Locke's eyes, no individual can legitimately be "subjected to the political power of another without his own consent,"[72] the freedom that characterizes the state of nature is conditioned by the law of nature.[73]

Locke saw reason as constituting the defining component of human nature.[74] In the words of Sterling Lamprecht, the law of nature was seen by Locke as "the instruction of reason which requires every man to respect the equal rights of every other man and so to promote peace in the social order."[75] This self-evident law of nature, knowable to human beings through their powers of reason, governs their freedom and, in Locke's words,

> … obliges everyone; and reason which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions …. Everyone, as he is bound to preserve himself, and not to quit his station willfully, so, by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and not, unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or good of another.[76]

Thus, Locke held that all human beings are created equal and enjoy an innate and inalienable right to life, liberty, and property. In addition to the right of self-defense, a corollary to man's right to life, is his right to the things that are needed to preserve life. With respect to liberty, Locke distinguished between natural liberty and civil liberty; the former is the freedom which human beings enjoy in the pre-societal state of nature, the latter is the liberty man possesses vis-à-vis society, subject to the constraints that he directly or indirectly, voluntarily cedes to the civil authority. A human being's innate and inalienable natural right to property implies, not only his or her right to particular things, but also his or

her right to think, act, and speak with freedom. Implicit in Locke's thought is an assumption of equality of opportunity. Thus, contrary to the position taken by Hobbes, from Locke's perspective, man has an absolute claim upon these innate rights that exist prior to the formation of society and these fundamental and inalienable rights cannot be taken away by anyone, by the community, by governmental authority, or by customary or conventional laws. In short, Locke, like others before him, held that individuals have an inherent dignity that must be respected by everyone.[77] As Heinrich Rommen observed, for John Locke, "the function of the state of nature and of the idea of natural law is to establish as inalienable the rights of the individual."[78]

Contrary to the assertions of Thomas Hobbes, Locke believed that human beings could rationally rise above their own selfish interests and cooperate together, even in the state of nature. Indeed, for Locke, the state of nature was characterized by a "state of peace, good will, mutual assistance and preservation," not inevitable and perpetual adversarial conflict, with everyone seeking to assert themselves and/or destroy everyone else, as in Hobbes's depiction. Locke contended that human beings could use their powers of reason to discover and conform to moral norms governing their interaction with others, even prior to the formation of the community. In short, even without societal or governmental regulation, humans are obliged to obey the law of nature and this law is known to be self-evident through their capacity to reason.[79] But, contrary to the views of theocentric natural law thinkers, but consistent with other anthropocentric natural law philosophers, Locke did not view society as natural to human beings. Rather, society was seen as an artificial construct of convention. From the Lockean perspective, man's natural condition was seen in a pre-societal context. Thus, individual human beings enter into a community as a conscious act of will, not an action impelled by the necessity of their human nature.[80]

Notwithstanding the peace and individual freedom that characterizes Locke's depiction of the state of nature, Locke noted that, in the absence of commonly accepted normative rules governing behavior and a legal authority that enforces those rules, there are certain "inconveniences," instabilities, and risks of insecurity in the state of nature, including the possibility that non-rational individuals might ignore the law of nature and violate the peaceful natural state. Thus, with the law of nature open to individual interpretation and with everyone applying the law of nature to their own benefit, with everyone possessing the responsibility to enforce the law in the state of nature, and without a commonly agreed upon authority to adjudicate and punish those who violate the law of nature, human beings are seen as tending to recognize the advantages associated with organized society and civil government.[81] In short, as Sterling Lamprecht observed, as seen from Locke's perspective, "the state of nature, abstractly considered, may be the best condition for men; but the state of political society, practically considered, is the best condition which men can devise for the joint possession of considerable freedom and sufficient security."[82]

It should be pointed out that there is obvious similarity between Locke's discussion of the inconveniences and instability associated with the state of nature and the Hobbesian depiction of the state of nature. Moreover, since the

inconveniences and instability identified by Locke are caused by the actions of individuals, there seems, at least implicitly, to be considerable similarity between Locke's interpretation of human nature and that posited by Thomas Hobbes. Indeed, Brian Nelson observed that, since "pleasure is closely identified with the accumulation of property, pain, with its absence," then "the unlimited desire for pleasure and the avoidance of pain is the determining factor in human behavior, not moral reason or the capacity to know and obey natural law" as originally posited by Locke.[83] Therefore, Locke's interpretation of human nature and behavior is ultimately as utilitarian as that presented by Hobbes.[84]

Given that Locke maintained that human beings are "by nature all free, equal, and independent," and that no individual can be "subjected to the political power of another without his own consent," he stated that "the only way which any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it."[85] Human beings, of their own volition, create communities and governing authorities that will serve their utilitarian, individual interests, while at the same time retaining their fundamental, inalienable human rights that are pre-existent to society. It, of course, assumes that the common good is the sum of the individual interests of the people that compose society.[86]

Most scholars of the works of Locke believe that he saw society and government as having been created by two separate, successive contracts. Individuals unanimously contract to create the community. The majority of the members of the community then form a governing authority as trustee for the community.[87] But, while human beings form communities and establish a governing authority for the sole purpose of securing and promoting their individual interests and, in so doing, surrender their right to interpret the law of nature, Locke emphatically stressed that they retain their basic and inalienable human rights to life, liberty, and property. In short, this is not Hobbes's absolute sovereign, but rather a community and governing authority that is limited by the law of nature, as well as, in scope, by the fundamental, inalienable, indefeasible rights of its citizens. Indeed, respect for the indefeasible and innate human rights of the citizenry constitutes the ultimate standard for evaluating all laws and actions taken by the governing authority. A community or governing authority that expands beyond the limitations established by the members of the community and/or violates the rights of its citizens ceases to be legitimate. As seen by Locke, a tyranny that violates that which Locke delineated as the inalienable human rights of its citizens is worse than there being no governing authority at all.[88]

Predicated upon these considerations, Locke stated that the following conditions must be met for there to exist a commonwealth or civil society. First, there must be a lawfully constituted lawmaker that is recognized by the members of the community as the legitimate source of law. Second, there must be an established body of civil laws designed for the protection and promotion of the self-interests of those individuals that compose the community. Third, there must be an executive authority with the power to enforce the laws. Fourth, there

must be a recognized, impartial, and authoritative judiciary that can adjudicate disputes in accord with the legal code promulgated by the civil government.[89] Locke stressed, however, that the people are sovereign and that the governing authority is responsible to the citizenry.[90]

Whereas Hobbes rejected the notion that the citizens have a right to revolt against the sovereign, Locke's emphasis on popular sovereignty, as well as his proposition that there are two contracts, one to form the community and another to form the government, imply that, under certain circumstances, the people have a right to overthrow the government. Indeed, Locke implicitly rejected the notion that anyone would voluntarily consent to or tolerate a governing authority that violated the law of nature or the human rights of its citizenry. Therefore, he maintained that a governing authority that violates the law of nature and the inalienable rights of the citizenry also violates the terms of the second of his two contracts and, in that case, the government may be overthrown. But, notwithstanding the successful overthrow of the government, however, the community itself, being the product of the first of Locke's two contracts, remains intact.[91]

In short, Locke's thought shared many of the concepts that were central to the thought of Thomas Hobbes, including: (1) their separation of science and philosophy from theology; (2) their anthropocentric emphasis on man as the measure of all things, as well as their anthropocentric perspective on their respective interpretations of natural law; (3) their rejection of any absolute standard of justice, as well as their rejection of any teleological interpretation of the community and the state; (4) their emphasis on human reason as the key to acquiring knowledge; (5) their mechanistic approach to human nature and human conduct; (6) their emphasis on individualism and equality and the accompanying utilitarian stress upon self-interest as the motivating factor in human behavior; (7) their assertion that human beings are self-sufficient and that society is optional, artificial, and conventional, not a necessary product of human nature as maintained in theocentric natural law thought; (8) although they define it somewhat differently, their emphasis on the state of nature as the starting point for analysis and the social contract that establishes the terms by which humans leave the state of nature and form communities; (9) their common atomistic perspective of society that dichotomously juxtaposes the individual and the state and tends to ignore or, at least, deemphasizes the organic, interdependent nature of society with its various institutions and associations that stand between the individual and the state; and (10) their conviction that the common interest is defined as the sum of the interests of the various individuals that compose society. But Locke differed from Hobbes in placing greater emphasis on human rationality and goodness and in emphasizing his conviction that human beings have a capacity for both selflessness, as well as the aggressive self-interest stressed by Hobbes. This, in part, accounts for their somewhat different characterizations of the state of nature. Moreover, in contrast to Hobbes, Locke emphasized that human beings have a dignity that must be respected, as well as inalienable, indefeasible human rights to life, liberty, and property that preexist the formation of society. Locke placed great emphasis on his contention that government exists to protect

these human rights and, therefore, the standard for government is the degree to which it recognizes the dignity of the individual and protects and preserves the basic human rights of the citizenry. Similarly, in contrast to Hobbes, Locke emphasized the need to establish clear, constitutional, legal limitations on the scope of governmental authority and power predicated upon the assumption that individuals should be left as free as possible to pursue their own interests and that the best government is that which governs the least. Locke stressed the principle of separation of powers, instead of unifying them in a single governmental body. In addition, Locke stressed popular sovereignty, consent, and majority rule, as well as emphasized that the people have a legitimate right to overthrow their government if it acts in a tyrannical or arbitrary manner, thus violating the law of nature and the inalienable rights of the citizenry.[92]

Lockean Liberalism and International Relations

Lockean liberals agree with Hobbesian realists in maintaining that the states are the primary actors within the international arena. Furthermore, they agree with Hobbesians in contending that the international arena is analogous to the state of nature. But, as examined earlier, in contrast to Hobbes's depiction, Locke defined the state of nature as a condition characterized by harmony and cooperation. Moreover, in contrast to Hobbesian realists, Lockean liberals emphasize that, just as individuals in the state of nature possess inalienable rights to life, liberty, and property, similarly, the states operating within the international arena possess analogous rights. These rights take the form of each state's rights to secure independence and territorial integrity. Thus, Lockean liberals emphasize coexistence and mutual toleration among the various states, as each seeks to protect and enjoy its rights to independence and security, while, simultaneously, promoting its national interests. Any power or coalition of powers that violates the rights of other states is viewed as an aggressor and is subject to punitive sanctions by the other members of the international community. Beyond mutual tolerance, however, liberals believe that the respective states can and do work together in a spirit of cooperation regarding issues of common interest. This cooperation can be in response to both challenges to the international order or opportunities for enhancing prosperity within the community.[93] In short, as seen from a Lockean perspective, statesmen should be expected to pursue their respective national interests, but, in doing so, remain observant of and consistent with the law of nature.[94]

Finally, in contrast to the pessimism of the Hobbesian realists, Lockean liberals tend to be more optimistic concerning the ability of the states to successfully form international bodies with limited, specified responsibilities for managing relations within designated functional areas of the international order. Similarly, Lockean liberals are also more optimistic concerning the possibility of establishing a body of customary and conventional international law that would govern relations among the states, as well as bodies that would adjudicate disputes among the states. As seen from the Lockean perspective, however, the key to success in establishing such bodies is willingness on the part of the states – they must have

the will to enter into a limited contract with each other for the creation of such laws and international bodies.[95]

Lockean Liberal Thought and the Use of Armed Force

The Lockean liberal interpretation and application of the analytical framework and its component categories of analysis delineated by the proponents of just war doctrine regarding the use of armed force as an instrument of policy, like the interpretation posited by Hobbesian realists, reflects assumptions and perspectives common to all adherents to anthropocentric natural law. But the liberal interpretation and application of these analytical categories and the resultant criteria for the use of armed force contains some significant differences from the criteria provided by the Hobbesian realists.

The decision to resort to the use of armed force With respect to the admonitions that a better peace is the only legitimate purpose of war and that right intentions must underpin any decision to resort to armed force as an instrument of policy, Lockean liberals agree with the realists that the role of the state is to provide an atmosphere of security and stability for the community for which it is responsible and that the national interests of the state should guide state policy. Unlike the realists, however, liberals add that the state is also designed to protect the inalienable rights of its own peoples, as well as those of the other members of the international community.[96] Moreover, as noted earlier, predicated upon the Lockean interpretation of the state of nature as one of peace, harmony, and cooperation, liberals assert that normally relations among the various states should also reflect these same characteristics. Consequently, while recognizing that the national interests of the states will often diverge, liberals believe that differences among the states can be resolved peacefully. Furthermore, they believe that a deterioration of relations among the states to a point where open warfare erupts between members of the international community reflects an abnormal breakdown of the peaceful and cooperative relationship, predicated upon reason, that should normally characterize the state of international affairs. In short, Lockean liberals contend that there is no reason why peace, predicated upon cooperation and harmony among the members of the international community, cannot be permanent. In their eyes, wars are the product of such factors as irrationality, ignorance, prejudice, passion, fear, and/or corruption that overwhelm what Lockeans believe to be man's natural propensity for cooperation and harmony with his fellow men.[97] In this respect, Lockean liberals tend to be closer in their thought to proponents of theocentric natural law than they are to the anthropocentric natural law thought of the Hobbesian school which sees conflict and war as normal and natural aspects of international relations. Therefore, Lockean liberals would contend that considerations of reason, grounded in a commitment to the observance of the law of nature, should serve as the standard governing the intentions of statesmen and, ultimately, condition the goals of the state authorities as they formulate policy, especially with respect to decisions involving the use of armed force within the international arena.

Lockean liberals, however, would agree with their Hobbesian realist counterparts in emphasizing that only the secular governing authority, legitimately established under the terms of the founding contract, can authorize the use of armed force. Locke specifically asserted that the members of the community surrendered their right to individually resort to armed force on the condition that the government would assume this responsibility.[98] Thus, for Locke, only duly constituted state authorities have the legitimate right to authorize the use of armed force. Of course, Lockeans assert that, since sovereignty ultimately rests with the citizenry, the citizens have the right to collectively revolt against a governing authority that has violated the terms of the founding contract and/or has violated the inalienable rights of the people that it has been charged to govern.

Interpreting the analytical category focusing on the causes of the conflict, Locke wrote that "every government is bound, by the law of nature and conditions of the original compact to preserve its subjects and their properties." Conversely, however, no government has "the right arbitrarily to attack its neighbors' lives, liberties, and possessions." According to Locke, "individual men in the state of nature have no power arbitrarily to commit rapine, or attack the life, liberty, health, and possession of others, and they cannot be understood to have transferred any such powers to the government." Therefore, Locke concluded that "rulers can never legitimately use the public force in war against the people of another society for the purpose of subjugating them," nor can they authorize the use of force "to instigate a war on religious grounds, such as in an attempt to stamp out heresy and idolatry."[99] In short, from Locke's perspective, defense is justifiable, but neither individuals in the state of nature, nor states within the international arena have a legitimate right to invade or harm other members of the international community.[100]

With respect to providing assistance to one's friends and allies, as well as, implicitly, with respect to humanitarian intervention, Locke noted that, just as individuals in the state of nature have a responsibility to help others, similarly, the members of the international community have an analogous responsibility to help other members of the community to defend themselves against unjust actions. This can range from defending states that are the victim of aggression, to defending peoples that find themselves living in conditions under which their inalienable rights are egregiously violated. But Lockeans feel that there must be some expression of a desire to obtain assistance emanating from those experiencing aggression or oppression for intervention by other members of the international community to be just.[101] This emphasis on community responsibility, as an integral aspect of the Lockean liberal definition of the national interest, stands in contrast to the narrower interpretation provided by Hobbesian realists, but is more analogous to the position adopted by proponents of theocentric natural law.

As with many proponents of Hobbesian realism, Locke did not rule out anticipatory preemptive or preventive self-defense based upon threats posed by other powers. Thus, from Locke's perspective, a power does not have to wait until a wrong has actually been done for it to respond with a just and legitimate defensive action.[102] While many subsequent thinkers within the Lockean liberal

tradition have retreated from what seems to be Locke's blanket authorization for anticipatory, preventive self-defense, some would continue to authorize preemptive self-defense, predicated upon unambiguity and imminence of the threat, whereas others have adopted a position that rejects anticipatory self-defense entirely.

Certainly, Lockean liberals would agree that force must be applied only as a last resort, but, notwithstanding temporary communities of interest, they are generally more reluctant to work with regimes that violate the basic, inalienable rights of their citizens or disrupt the international order, than are the Hobbesian realists. When they do authorize war, however, they are more prone to delineate political objectives, and, ultimately, define victory as something more than the adjustment in the international power balance often sought by Hobbesian realists. This, of course, impacts upon the principle of proportionality, since, the higher the stakes in war, the greater the amount of force necessary to achieve the war's political goals. Moreover, in contrast to Hobbesian realists, Lockean liberals are more prone to allow such multiplier factors as popular opinion to influence policy decisions. Finally, there is a tendency among liberals to demonize the enemy leadership.

The employment of armed force Regarding limits on the use of armed force, Locke observed that it is both "reasonable and just (that) I should have a right to destroy that which threatens me with destruction; … by the fundamental law of Nature, … one may destroy a man who makes war upon him."[103] Locke went on, however, to define limits qualifying this seemingly all-encompassing authorization to conduct just war in an unlimited manner until victory is attained. In the broadest sense, Locke maintained that belligerents are constrained in their prosecution of armed conflicts by the law of nature. Indeed, from Locke's perspective, it is justice, not appeals to theocentric natural law or a sense of charity to one's fellow man that restricts belligerents in conducting military operations.[104] Hence, Locke's interpretation of the criteria of right intention, as it applied within the context of the conduct of warfare, was conditioned by his admonition that just war should be conducted justly and, therefore, in accord with the law of nature.

With respect to the analytical criteria focusing on distinction, Locke agreed with earlier just war theorists and separated combatants and non-combatants by the degree to which they participate in the war effort, asserting the principle of non-combatant immunity. Similarly, Locke agreed with other proponents of just war doctrine that the principle of proportionality must be adhered to in planning and executing military operations. Consistent with the tenets underpinning his general philosophy, Locke emphasized that all human beings, including the enemy, retain certain inalienable rights and recognition of these rights limits a belligerent's latitude, both in conducting military operations, as well as his prerogatives in victory. For example, Locke argued that belligerents must not destroy the land during armed hostilities so as to render it unusable or uninhabitable. Moreover, he placed restrictions on the latitude of belligerents to destroy crops, barns, etc. for operational reasons. While Locke maintained that a just victor has the right to take action against and exact reparations from those who have engaged in wrongdoing, both as punishment, as well as to deter future transgressions, Locke

placed limits on reprisals against the enemy, as well as limits concerning the rights of the victorious power vis-à-vis the defeated enemy. Locke clearly stated that the victor can take punitive action only against those individuals who are responsible for, involved in, or supported the war. Thus, Locke argued against collective punishment or reprisals. Moreover, he clearly stated that it is wrong for a just defense to transform into a war for unjust territorial conquest. Indeed, he noted that, since human beings have a right to select their own government, if a victorious power forces a political regime upon the defeated people without their consent, they have a legitimate right to rebel against what constitutes an unjust occupation of their country.[105] In short, as James Turner Johnson observed, "nowhere previously in the just war tradition is Locke's argument advanced that the innocent have a strong counterclaim against the just victors regarding what is to be done to punish the guilty and exact repayment for damage done."[106]

Subsequent thinkers, such as Emmerich de Vattel (1714–1767), agreed with the thrust of Locke's interpretation and application of the analytical categories focusing on the actual use of force, but many, like Vattel, developed Locke's criteria even further by placing additional restrictions on belligerents.[107] For example, consistent with the principle of function as the criteria for distinguishing between combatants and non-combatants, Vattel extended wartime protection to civilian cultural properties and objects. Invoking the principle of military necessity, however, Vattel emphasized that, if these cultural properties were used for military purposes, their immunity would be withdrawn. Similarly, Vattel recognized that these sites could sustain collateral damage or destruction due to their proximity to legitimate military objectives.[108]

Indeed, the example of the protection of cultural objects provides a good illustration of the differences in the philosophic assumptions, perspectives, and interpretations between theocentric natural law proponents of just war and those adhering to the anthropocentric approach. Lacking the cosmopolitan, universalist commitment characteristic of proponents of theocentric natural law, advocates of an anthropocentric natural law interpretation would tend to view cultural properties from a national perspective and emphasize the national character of these cultural objects and sites. Indeed,

> While the attribution of national identity to cultural objects certainly does not preclude mutual respect for these objects during hostilities, it does require the various belligerents to project outside their own national cultural bounds and recognize and appreciate the value and immunity of the enemy's cultural objects. Such empathy with the enemy and what is perceived to be his national cultural heritage is often difficult under the best of circumstances. Even in limited wars, situations arise involving close judgment calls in which collateral or incidental damage to enemy cultural objects may occur depending upon a belligerent's course of action. A belligerent may find it easier to justify actions that risk damage to these cultural objects if the belligerent identifies these objects with the enemy, not himself. Obviously, even this degree of restraint is unlikely during … conflicts that are comparatively unlimited in scope and intensity, involving alien peoples, each seeking unlimited political objectives.[109]

In short, although they make significantly different assumptions and perceive man, society, the state, and the international community quite differently, in many respects, the Lockean liberal interpretation and application of the categories of analysis for assessing whether and how to use armed force in conflict resolution, yielding, in turn, a distinctive Lockean liberal criteria, is generally compatible with the interpretation posited by theocentric natural law proponents, especially the neo-classical just war theorists. Indeed, when compared to the interpretation of the criteria for the use of armed force posited by the Hobbesian realists, both in spirit and with respect to specific principles, the Lockean liberal criteria is clearly more compatible with the traditional Western concept of just war.

Conclusion

A.P. d'Entreves observed that "all law must go back to an ultimate power which expresses and sanctions it."[110] Whereas theocentric natural law traces its origin and authority back to Eternal Law and, ultimately, to God, by contrast, the anthropocentric perspective is predicated upon the assertion that natural law is independent of the theological assumptions upon which theocentric natural law is based. Indeed, the anthropocentric version of natural law is entirely secular in nature. For proponents of the anthropocentric perspective, human beings can gain knowledge of universal law through systematic, scientific, deductive, rational analysis. In their eyes, man is, indeed, the measure of all things.

As seen from this anthropocentric perspective, human beings are viewed in essentially individualistic terms, not as inherently part of a larger community within which they would necessarily, by their very nature, fulfill themselves. In essence, man is seen as a solitary creature whose behavior is governed by raw, instinctive, utilitarian self-interest. Indeed, in the "state of nature," human beings are said to be entirely free to pursue their own, self-defined happiness. Thus, proponents of anthropocentric natural law define good and bad, right and wrong, not upon absolute values and normative standards, as do proponents of theocentric natural law, but rather in terms of that which best advances one's individual self-interest. As seen from the perspective of anthropocentric natural law, all morality is subjective and situationally-based. As such, any societal arrangements that come into being are predicated upon the enlightened self-interest of the participants. Indeed, all societal arrangements, agreements, and customs are ultimately based upon the principle of mutual adherence and reciprocity. Therefore, one of the most fundamental principles of anthropocentric natural law is that human beings must honor their commitments.

Hence, the community and, ultimately, the state are designed to better permit its members to pursue their individual self-interest. The common interest is merely the sum of the individual self-interests of those who are members of the community. The community and its governing body, the state, should be evaluated based upon their ability to provide for and maintain societal order. Locke, of course, added the caveat that, in doing so, the state must also respect the dignity of the individual and honor the inalienable rights of the citizenry. But for both

Locke and Hobbes, the will of those who are sovereign delineate the law and, thus, define justice.

While there is a governing authority within the respective states that compose the international community, there is no common global authority governing the international community itself. The states are sovereign entities and function within the international arena in a situation analogous to the respective Hobbesian and Lockean conceptions of the pre-societal state of nature. In both conceptions, however, state policy is shaped by the individual national interests of the respective states. Cooperation, when it occurs between the states, is based upon a community of interests. Indeed, customs within the international community, as well as conventions concluded between the various states are predicated upon self-interest and reciprocity. When necessity clashes with custom or past agreements, the states will follow the course of action that best protects and promotes their respective national interests.

In short, while there are significant differences separating the respective assumptions and perspectives of the Hobbesian and Lockean branches of anthropocentric thought, these two branches share much in common regarding the role of the state within the international arena. These assumptions and perspectives, in turn, condition their respective interpretations and applications of the analytical framework and its component categories of analysis established by proponents of just war doctrine concerning both the decision to resort to armed force and the principles governing its actual employment. Proponents of just war doctrine acknowledge that, in many important respects, Locke's criteria for governing the use of armed force, especially with respect to *jus in bello*, is consistent with the criteria embodied within the just war tradition. Conversely, proponents of just war doctrine tend to agree that the Hobbesian realist interpretation and application of the framework and its component categories of analysis for the use of armed force as an instrument of conflict resolution is essentially inconsistent with both the spirit and specific criteria and principles inherent within the concept of just war as it has evolved within Western thought.

In the final analysis, however, perhaps the most significant difference of perspective separating the theocentric natural law position with respect to just war doctrine from the anthropocentric natural law interpretation and application of the analytical categories embodied within that doctrine is the conviction held by proponents of theocentric natural law that it is inherently good, right, and just to adhere to the criteria and principles embedded within just war doctrine. For them, the principles embodied within *jus ad bellum* and *jus in bello* criteria trace their universal and timeless legitimacy and authority back to God and, hence, adherence to these principles is fundamentally a matter of conscience. By contrast, for anthropocentric natural law proponents, the criteria that they advocate is interpreted through the human lens of self-interest and is, at the most basic level, a matter of individual and societal will, based upon the principle of expediency. As seen from the theocentric natural law perspective, God is the measure of all things, including the criteria inherent within *jus ad bellum* and *jus in bello*, whereas, from the anthropocentric natural law perspective, man is the ultimate measure of all things, including the criteria that are used to decide whether to opt for the

use of armed force, as well as the criteria governing the manner in which force is actually to be employed.

Notes

1 The opinions, conclusions, and/or recommendations expressed or implied within this chapter are solely those of the author and do not necessarily represent the views of the Air University, the United States Air Force, the Department of Defense, or any other US government agency.

2 Sabine, 1961, pp. 27–28; Germino, 1967, pp. 18, 27; Germino, 1972, p. 15; d'Entreves, 1964, p. 54.

3 Rommen, 1948, pp. 5, 8–13, 15, 20, 33,57–60, 70–109, 151; d'Entreves, 1964, pp . 11–12, 68–61.

4 Sabine, 1961, pp. 132, 135, 417, 420, 424; Rommen, 1948, pp. 76, 79, 93; d'Entreves, 1964, pp. 51–53, 70–71; Nelson, 1982, pp. 162, 195–196.

5 Rommen, 1948, pp. 75–76, 82, 87, 93; d'Entreves, 1964, pp. 49–54; Sabine, 1961, p. 425; Nelson, 1982, pp. 196–197.

6 Rommen, 1948, pp. 73–77, 87–88, 90; d'Entreves, 1964, pp. 53–54; Sabine, 1961, pp. 425–427, 458–459; Nelson, 1982, p. 163. Discussing the rationalist approach inherent within the anthropocentric approach to natural law, A.P. d'Entreves observed, "If natural law consists in a set of rules which are absolutely valid, its treatment must be based upon an internal coherence and necessity. In order to be a science, law must not depend on experience, but on definitions, not on facts, but on logical deductions. Hence, only the principles of the law of nature can properly constitute a science. Such a science must be constructed by leaving aside all that undergoes change and varies from place to place." d'Entreves, 1964, p. 53.

7 As Grotius observed, "Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend … Just as even God cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil." Quoted in d'Entreves, 1964, p. 53. This observation represented a complete rejection of a nominalist ethical doctrine which holds that the will of the sovereign, in this case, God, determines the criteria for justice and morality. d'Entreves, 1964, pp. 68–71. See also, Rommen, 1948, pp. 6, 15, 19, 22–23, 27, 34–35, 37, 41, 45–46, 50–51, 57–60, 62–65, 71–73, 168, 173, 175, 179–180.

8 Sabine, 1961, pp. 133, 460; Nelson, 1982, p. 164.

9 Sabine, 1961, pp. 133, 135.

10 Rommen, 1948, pp. 77–78, 80–81, 88–89, 93; d'Entreves, 1964, pp. 54–57; Sabine, 1961, pp. 130, 135, 432–433; Nelson, 1982, p. 217.

11 Rommen, 1948, pp. 76–77, 80–81, 85; d'Entreves, 1964, pp. 56–57; Sabine, 1961, pp. 30–32, 132–133, 135, 152, 422, 461, 463–465, 467, 475, 477, 483–484, 487, 524–526, 528–529, 538; Nelson, 1982, p. 169.

12 d'Entreves, 1964, pp. 57–61.

13 Rommen, 1948, pp. 77, 80–82; Nelson, 1982, p. 195.

14 Rommen, 1948, pp. 10–11, 76–77, 79–81, 93; Nelson, 1982, pp. 173, 206.

15 Sabine, 1961, pp. 32, 133, 465–467, 472, 474, 484, 525, 528–529; Nelson, 1982, p. 195.

16 Rommen, 1948, pp. 89–90; Sabine, 1961, pp. 467, 529.

17 Rommen, 1948, pp. 9–11; Sabine, 1961, pp. 133–134.
18 Rommen, 1948, pp. 77, 81; d'Entreves, 1964, pp. 55–57; Sabine, 1961, pp. 32, 134–135, 420, 423–425, 429–430, 466, 531–534; Nelson, 1982, pp. 172, 195.
19 d'Entreves, 1964, p. 57.
20 Rommen, 1948, pp. 77, 81; d'Entreves, 1964, pp. 55–57; Sabine, 1961, pp. 32, 134–135, 420, 423–425, 429–430, 466, 531–534; Nelson, 1982, pp. 172, 195.
21 Gat, 1989, pp. 1, 8–9, 20–21, 24, 26–29, 71.
22 Among the most important military theorists of the Enlightenment and the period of the French Revolution/Napoleonic Wars are Henry Lloyd (c 1718–1783), Adam von Bulow (1757–1807), Archduke Charles of Austria (1771–1847), and Antoine Henri Jomini (1779–1869). While the theories of all four of these individuals adopted a spatial approach, the ideas of Bulow and, to a lesser extent, Archduke Charles, represent the purest expression of a geometric and mechanistic approach to military science. Gat, 1989, pp. 1, 8–9, 20–21, 24, 26–29, 32, 34–43, 46–48, 54–57, 70–131.
23 Gat, 1989, pp. 29, 34, 36, 38, 40, 42, 58, 70–72, 99, 112, 127–128, 165, 175, 182, 185. Correcting a tendency among historians of Western military thought to stereotype Jomini as exclusively focusing on the rules underpinning military science, Azar Gat observes that, "like all the military thinkers of the Enlightenment, Jomini was always aware of the importance of moral and immeasurable factors but regarded them as belonging to the 'sublime' part of war which was not susceptible to scientific treatment and comprised the 'art' component in the conduct of war." Thus, "on the whole the military thinkers of the Enlightenment saw no use in elaborating upon the moral, incalculable, and unforeseen which could hardly produce practical results." Gat points out, however, that a notable exception to this generalization is Henry Lloyd who "studied the psychological motives of troops with a practical purpose in mind." Gat, 1989, p. 128. Drawing upon Helvetius and consistent with Hobbes's ideas, Lloyd observed that "'Fear of, and an aversion to pain, and the desire for pleasure, are the spring and cause of all actions, both in man and other species of animals … Pain and pleasure arise from interior and mechanical causes.' He discusses at length the emotions motivating generals and troops, listing pride, envy, glory, honour and shame, riches, religion, women, music, and so on. His enquiry into their causes and effects has a clear practical purpose: by using the right approach, the general can control and manipulate the human material at his disposal. By 'offering such motives to the troops as naturally tend to raise their courage when depressed and check it when violent or insolent … he becomes entirely the master of their inclinations and disposes of their forces with unlimited authority.' Echoing de Sax, Lloyd calls this 'the most difficult and sublime part of this, or any other profession.'" Quoted in Gat, 1989, pp. 71, 182.
24 Hallowell, 1950, pp. 72–73; Lamprecht, 1955, p. 276.
25 Hallowell, 1950, pp. 73–74; Sabine, 1961, pp. 133–134, 460, 463–464; Germino, 1972, pp. 96–97; Nelson, 1982, pp. 166, 170–171, 173, 177, 189.
26 Rommen, 1948, p. 81; Germino, 1972, pp. 85, 98; Nelson, 1982, pp. 169–170, 183.
27 Hobbes stated, "So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power, that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more." Quoted in Germino, 1972, p. 98. Sabine, 1961, pp. 173, 183, 463; Germino, 1972, pp. 97–99; Nelson, 1982, pp. 171–172, 183.
28 Sabine, 1961, pp. 461, 463–464, 525; Nelson, 1982, pp. 171, 174–176, 183.

29 Germino, 1972, p. 94.
30 Lamprecht, 1955, p. 278. See also Lamprecht, 1955, p. 277.
31 Rommen, 1948, pp. 82–83; Hallowell, 1950, pp. 74–75; Lamprecht, 1955, pp. 278–279; Germino, 1972, pp. 99–100; Nelson, 1982, pp. 174–175.
32 Rommen, 1948, p. 83.
33 Cited in Lamprecht, 1955, p. 279.
34 Hallowell, 1950, p. 75; Lamprecht, 1955, pp. 278–279; Germino, 1972, p. 101, Nelson, 1982, p. 177.
35 Rommen, 1948, pp. 82, 85; Hallowell, 1950, pp. 75–76; Lamprecht, 1955, p. 279; Germino, 1972, p. 101, Nelson, 1982, pp. 177, 178.
36 Hallowell, 1950, p. 76.
37 Germino, 1972, p. 101; Nelson, 1982, p. 177.
38 Lamprecht, 1955, p. 279; Germino, 1972, p. 101.
39 Hallowell, 1950, p. 75; Germino, 1972, p. 102. See also Lamprecht, 1955, p. 279.
40 Quoted in Germino, 1972, p. 103; Hallowell, 1950, p. 75.
41 Hallowell, 1950, p. 75.
42 Lamprecht, 1955, pp. 279–280; Germino, 1972, pp. 103–104.
43 Quoted in Germino, 1972, p. 104.
44 Germino, 1972, pp. 103–104.
45 Lamprecht, 1955, p. 280; Germino, 1972, p. 105.
46 Lamprecht, 1955, p. 280.
47 Rommen, 1948, p. 83; Lamprecht, 1955, p. 281; Sabine, 1961, pp. 133–135, 467; Hallowell, 1950, p. 75; Germino, 1972, pp. 99–100, 102; Nelson, 1982, pp. 172, 176, 180.
48 Rommen, 1948, pp. 84–85; Lamprecht, 1955, pp. 280–282; Sabine, 1961, pp. 431, 468, 470, 472, 524–525, 533; Hallowell, 1950, p. 77; Germino, 1972, pp. 102, 109; Nelson, 1982, pp. 172, 178–180.
49 Concerning the issued of individual freedom and the authority of the state, Hobbes stated, "In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion." Hobbes went on to note, however, "And therefore such liberty is in some places more, and in some less; and in some times more, and other times less, according as they that have the sovereignty shall think most convenient." But in accord with his conception of natural right, Hobbes recognized that man always retains the right to individual self-preservation. Hallowell, 1950, p. 78. Rommen, 1948, pp. 60, 82, 84–86, 88, 128, 145; d'Entreves, 1964, p. 76; Lamprecht, 1955, pp. 275–276, 282–283; Hallowell, 1950, pp. 77–78, 80–81, 83; Germino, 1972, pp. 102, 111–114; Nelson, 1982, pp. 181–183, 185–186, 189.
50 Lamprecht, 1955, p. 282; Sabine, 1961, pp. 134, 472, 468; Hallowell, 1950, p. 78; Germino, 1972, pp. 102, 105, 113; Nelson, 1982, pp. 177, 181, 187–189.
51 Michael Doyle made the point that realist thought draws upon the ideas of Thucydides, Machiavelli, Hobbes, and Rousseau. Doyle, 1997, pp. 41–201.
52 Dougherty and Pfaltzgraff, 1971, p. 66; Rommen, 1948, p. 128; Germino, 1972, p. 105; Nelson, 1982, pp. 184–185; Mapel, 1996, p. 55; McMahan, 1996, pp.79–83; Doyle, 1997, pp. 111–136.
53 Nelson, 1982, pp. 184–185; Mapel, 1996, pp. 56–58; Doyle, 1997, pp. 111–136.
54 Gulick, 1955, pp. 4, 19, 24, 30–31, 34; Claude, 1962, pp. 11–93; Morgenthau, 1967; Aron, 1967, pp. 21–173; Dougherty and Pfaltzgraff, 1971, p. 66; Mapel, 1996, pp. 55–56, 58–59, 62–63, 65, 68–73; McMahan, 1996, pp. 79–83. Michael Doyle viewed the Hobbesian realist perspective on international relations as resting upon four assumptions: "Assumption 1. The international system is 'anarchic,' a system

of independent states whose security is interdependent (potentially affected by one another) and the lack of world government. Assumption 2. The individual states are coherent units, each seeking at the minimum to survive, at the maximum to expand in capabilities …. States are therefore best conceived of as rational egoists …. Assumption 3. States will rely on self-help for security, and in the absence of any global source of law and order, security and therefore estimation of power will tend to be relative. They will adopt something like Morton Kaplan's first two rules for international behavior: '1. Act to increase capabilities, but negotiate rather than fight. 2. Fight rather than pass up an opportunity to increase capabilities.' Assumption 4. Statesmen can estimate the balance of power rationally, by measuring and comparing capabilities, employing either simple (size of armies or navies) or more complex capability measures …." Doyle suggested that these four Hobbesian realist assumptions "claim that the balance is an 'automatic' result of interstate anarchy." In addition to these four assumptions Doyle went on to list three additional assumptions which he attributed to the influence of Rosseauian realism that "portray the balance as 'semiautomatic' dependent on favorable social conditions in the international system." Finally, Doyle suggested that that there is an eighth assumption underpinning realism that "draws on fundamentalist, Machiavellian, Realism and holds that the balance also requires strategic leadership." Doyle, 1997, pp. 169–71.

55 Mapel, 1996, pp. 56–57.

56 Johnson, 1975, pp. 55, 59, 61–62.

57 Maple, 1996, p. 64.

58 Mapel, 1996, pp. 59–60; McMahan, 1996, pp. 82–86; Fixdal and Smith, 1998, p. 299–300.

59 Maple, 1996, p. 63; McMahan, 1996, p. 84; Fixdal and Smith, 1998, pp. 292–295.

60 Mapel, 1996, pp. 60–61; McMahan, 1996, p. 84.

61 Mapel, 1996, p. 61.

62 Mapel, 1996, p. 65; McMahan, 1996, pp. 86–87.

63 Maple, 1996, p. 61.

64 Mapel, 1996, pp. 65–73; McMahan, 1996, pp. 87, 89.

65 McMahan, 1996, pp. 82–83, 89.

66 Rommen, 1948, p. 88; Hallowell, 1950, p. 110; Germino, 1972, p. 116; Nelson, 1982, pp. 193–194, 217.

67 Hallowell, 1950, pp. 99–100; Germino, 1972, pp. 117, 122, 123–124.

68 Germino, 1972, p. 117.

69 Germino, 1972, pp. 124–125.

70 Hallowell, 1950, pp. 102–103; Lamprecht, 1955, p. 296; Germino, 1972, pp. 126–127, 129; Nelson, 1982, pp. 198–199.

71 Quoted in Hallowell, 1950, p. 103. See also Lamprecht, 1955, p. 296.

72 Hallowell, 1950, p. 102.

73 Hallowell, 1950, p. 103.

74 Germino, 1972, pp. 125, 127.

75 Lamprecht, 1955, pp. 296–297. See also: Germino, 1972, p. 127; Nelson, 1982, p. 199.

76 Quoted in Hallowell, 1950, p. 103.

77 Rommen, 1948, pp. 88–89; Hallowell, 1950, p. 103; Lamprecht, 1955, p. 296; Sabine, 1961, pp. 143–144, 153, 482–483, 487–488, 530, 525–529, 538, 540; Germino, 1972, pp. 129–132; Nelson, 1982, pp. 202–203, 205.

78 Rommen, 1948, p. 88.

79 Rommen, 1948, p. 88; Sabine, 1961, pp. 526, 528, 531; Germino, 1972, p. 127; Nelson, 1982, p. 199.
80 Germino, 1972, pp. 126, 128.
81 Hallowell, 1950, pp. 103–104; Lamprecht, 1955, p. 297; Sabine, 1961, p. 526; Germino, 1972, pp. 127–128; Nelson, 1982, pp. 199, 206. In this context, Locke noted that "there is lacking 'an established, settled, known law, received and allowed by common consent to the standard of right and wrong, and the common measure to decide all controversies between them.'" Locke continued, "For though the law of nature be plain and intelligible to all rational creatures; yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in application of it to their particular case." Quoted in Hallowell, 1950, p. 104.
82 Lamprecht, 1955, p. 297.
83 Nelson, 1982, p. 206.
84 Sabine, 1961, pp. 529, 538, 540; Germino, 1972, p. 128; Nelson, 1982, pp. 206–207, 216–217.
85 Quoted in Hallowell, 1950, p. 102.
86 Rommen, 1948, p. 89; Hallowell, 1950, pp. 102, 104; Sabine, 1961, pp. 484, 528–529, 531; Germino, 1972, pp. 122–123, 126–127, 133; Nelson, 1982, pp. 199–200, 217.
87 Hallowell, 1950, pp. 104–105; Lamprecht, 1955, p. 297; Sabine, 1961, pp. 418, 431, 524–525, 528, 532–533, 538; Germino, 1972, pp. 128–129, 133–134, 136, 139–140; Nelson, 1982, p. 200.
88 Rommen, 1948, pp. 88–89; Hallowell, 1950, pp. 104–105; Lamprecht, 1955, p. 297; Sabine, 1961, pp. 418, 431, 524–528, 532–533, 538; Germino, 1972, pp. 127–129, 132–134, 136, 139–140, 146; Nelson, 1982, pp. 197–198, 200.
89 Lamprecht, 1955, p. 298.
90 Rommen, 1948, p. 89; Lamprecht, 1955, p. 292; Sabine, 1961, pp. 487–488, 534; Germino, 1972, p. 139; Nelson, 1982, p. 201. In an effort to keep the scope of government limited, but at the same time to make it effective, Locke posited a number of methods by which governmental officials could be kept in check. These included: regular election of governing authorities, limitations in the duration of sessions of the legislature, and a separation of powers between the strong executive, the legislature, and judiciary. Lamprecht, 1955, p. 296; Nelson, 1982, pp. 208–212. In his endorsement of rule by the majority, however, Locke apparently failed to recognize the risks associated with the tyranny of the majority for the rights of the minority. Instead, he appeared confident that majority rule will be uncorrupted rule consistent with reason. Germino, 1972, pp. 137, 148; Nelson, 1982, p. 212.
91 Hallowell, 1950, pp. 106–107, 128; Lamprecht, 1955, pp. 297–298; Germino, 1972, pp. 145–147; Nelson, 1982, p. 201. In Locke's words, "Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavor to grasp themselves or put into the hands of any other an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of the new legislative (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society" Quoted in Hallowell, 1950, p. 106.
92 Hallowell, 1950, pp. 110–115; Germino, 1972, pp. 138–139, 148; Nelson, 1982, pp. 194–195.
93 Carr, 1946, pp. 22–23; Doyle, 1997, pp. 219–220.

94 In this context, Michael Doyle observed, "Liberal commonwealths will be governed by prudent strategists pursuing general interests, skillfully engaging in anticipatory games of strategy, for all the 'advantage' of the commonwealth. They differ only in that they remain constrained by the duty not to violate natural law. They are rational legal egoists, bound to abide the law but also bound to exercise prudent advantage when they doubt that others are upholding the law." Doyle, 1997, p. 220.
95 Doyle, 1997, pp. 224–226.
96 Johnson, 1975, pp. 232–233.
97 Doyle, 1997, pp. 223–226.
98 Johnson, 1975, p. 233.
99 Johnson, 1975, p. 233.
100 Quoted in Johnson, 1975, p. 239.
101 Johnson, 1975, p. 239; Doyle, 1997, pp. 221–222; Fixdal and Smith, 1998, pp. 291–307.
102 Johnson, 1975, p. 234.
103 Quoted in Johnson, 1975, p. 234.
104 Johnson, 1975, pp. 233–234, 240.
105 Johnson, 1975, pp. 234–237, 240; Doyle, 1997, pp. 220–222.
106 Johnson, 1975, p. 240.
107 Elbe, 1939, pp. 682–683; Johnson, 1975, pp. 240–252, 263–264. As James Turner Johnson noted, in contrast to Locke who "requires only a 'sedate, settled design' of enmity declared 'by word or action,'" Vattel "requires that an enemy do an unjust act before retaliation is permitted." Thus, "Locke in this matter remains closer to classic just war doctrine; Vattel has moved in the direction of the twentieth-century *jus ad bellum*." Johnson, 1975, p. 250.
108 Williams, 1978, p. 5; Johnson, 1975, p. 263; Hensel, 2005, p. 42.
109 Hensel, 2005, p. 42.
110 d'Entreves, 1964, p. 66.

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Chapter 3

The Rejection of Natural Law and its Implications for International Relations and Armed Conflict

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Introduction

As early as the eighteenth century, but intensifying throughout the nineteenth and early twentieth centuries, Western philosophers moved away from natural law theories, opting instead to predicate their philosophies upon a variety of diverse assumptions and perspectives that were, in many respects, fundamentally antithetical to the convictions of natural law proponents. The purpose of this chapter is to review the basis for this rejection of natural law, as well as to analyze and assess the impact of this rejection upon: the development of liberal thought; the ideas developed by proponents of the Romantic, conservative, counter-Enlightenment; the assumptions and perspectives inherent within legal positivism; and the place of crusading ideologies and religious movements within Western thought. In doing so, the chapter will highlight some of the perspectives of these various schools of thought concerning the international order and the role of armed force in the resolution of conflicts within the international arena.

David Hume and the Critique of Natural Law

Writing in the early and mid-eighteenth century, David Hume (1711–1776) launched a critique of the basic assumptions, thrust, and tenets of natural law. Hume's critique of natural law was based upon his analysis of the nature and limitations of human reason. Hume maintained that, in the process of comparing ideas and propositions, a conclusion is inferred from a premise that is assumed to be valid. But this process cannot establish truth, since it is always possible to assume that a contrary premise is valid.[2] Hume then went on to argue that people equate good and bad to their preferences and sentiments. Hence, that which we call right, just, or good conduct is not based upon "reason but to some human inclination, or desire, or 'propensity.'" Reason itself does not indicate that which is proper or improper.[3] Summarizing this point, George Sabine noted that, in Hume's eyes, "reason is the guide to conduct" only insofar as it shows "what means will

reach a desired end or how a disagreeable result can be avoided; the pleasantness of the result is in itself neither reasonable nor unreasonable."[4]

Hume believed that human conduct is shaped by human passions, not by human reason, noting "reason is and ought to be the slave of the passions and can never pretend to any other office than to serve and obey them." Hume, therefore, denied that humans have the capacity, through reason, to know truth.[5] These assertions had far-reaching implications for both theocentric and anthropocentric natural law. First, with respect to theocentric natural law, Hume argued that it is impossible to establish the validity of the theocentric assertion of the existence of a Divine being or beings. Hence, it is impossible to prove that there is an Eternal Law or a theocentric natural law. Indeed, Hume asserted that religious convictions are based upon human feelings and desires. Second, with respect to theocentric natural law, as well as both the Hobbesian and Lockean branches of anthropocentric natural law, Hume stated that it impossible to prove that such an objective, universal, "immutable moral 'law of nature' discoverable by 'right reason' exists." Instead, in his eyes, irrespective of how it is defined, natural law "is simply a moral sentiment, a utility, that people have mistakenly taken to be an objective moral right." As Hume observed, morality is not objective or intrinsic, but rather, "morality is determined by sentiment." Similarly, Hume dismissed the concept of a priori human rights as products of sentiment and should not be taken as containing moral truth.[6]

Hume stated that human conduct is based upon utility and convention. Hume, however, rejected the Hobbesian interpretation of human conduct as predicated upon what Hobbes maintained was man's selfish, utilitarian, psychological character. Instead, Hume suggested that human nature and motivations are much more complex and many of the considerations that impel humans to act a certain way have little or no direct correlation to pleasure and felicity. Indeed, human concern for other human beings does not easily correlate to the Hobbesian interpretation of human behavior which is based on selfishness. In short, Hume's emphasis on utility did not rest solely on egoism or an inflated emphasis on man's intelligence. Instead, as Brian Nelson observed, "Hume simply wished to emphasize that people's moral sense is based upon sentiment, that people naturally support values that they find agreeable to them." Societal conventions, predicated upon experience, are considered valid and are observed within a particular society "because men habitually use them and they are useful in the sense that by means of them more or less stable rules of action are made." But, while these conventions might seem to be relatively uniform and widely observed over long periods of time, they should not be seen as permanent, universally valid, or reflective of some objective, higher moral law. As Heinrich Rommen observed, for Hume, moral law is "but a sum of societary conventions that are adapted to serve human needs and urges according to our experiences, which, however, may be superseded by different experiences at some future time." In short, as George Sabine noted, for Hume, "since values depend upon human propensities to action, it is impossible that reason by itself should create any obligation." Since "virtue is merely a quality or action of mind that is generally approved," it follows that "moral obligation depends upon the acceptance of the propensities, the wants, the

motives to action that give rise to it."[7] Finally, Hume rejected the anthropocentric natural law doctrine of the contract as neither valid based upon human nature, nor valid based upon historical accuracy. Individuals are loyal to their respective states for many complex reasons, not simply as a result of voluntary adherence to some mythical social contract.[8]

Summarizing the implications of Hume's critique, George Sabine wrote, "if the premises of Hume's argument are granted, it can hardly be denied that he made a clean sweep of the whole rationalist philosophy of natural right, self-evident truths, and of the laws of eternal and immutable morality which were supposed to guarantee the harmony of nature and the order of human society."[9] Although many have rejected Hume's assumptions, his critique has had a profound impact upon subsequent political thought.

The Transformation of Liberalism

Drawing upon Hume's critique, the next phase in the development of liberalism, represented by the pure utilitarianism of Jeremy Bentham (1748–1832) and the corollary democratic principles set forth by James Mill (1773–1836), reflected an abandonment of Locke's commitment to anthropocentric natural law and his accompanying concept of inalienable human rights.

Jeremy Bentham based his philosophy exclusively upon nominalism, individualism, and utility, thereby eliminating the Lockean premises of the state of nature, natural rights, the laws of nature, and the social contract.[10] Bentham defined utility as "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness … or … to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered."[11] Bentham's depiction of human nature is more akin to that of Hobbes than it is to Locke. He states that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do."[12] Thus, individual conduct, as well as the conduct of governments, should be guided by the goal of maximizing pleasure, while, simultaneously, minimizing pain.[13] As summarized by George Sabine, the four quantifiable and measurable "dimensions" included in Bentham's calculation of pleasure were: "its intensity, its duration, its certainty with which it will follow a given kind of action, and the remoteness of the time at which it will occur." In addition, "since one pleasure or pain is likely to induce another, this tendency also must be taken into account …."[14] Bentham defined ethics as "the art of directing man's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view." In doing so, however, Bentham believed that his standard was both absolute and universal.[15]

As with Hobbes and Locke, Bentham believed that society was an artificial creation of human beings designed to satisfy and promote their collective, individual interests. Predicated upon the equality of all, the community's common interest was thus seen as merely the sum of the interests of the individuals that

compose that community. From this follows Bentham's position that the role of government is to provide for "the greatest happiness for the greatest number."[16] It was this principle of rule in the interest of the majority inherent in Bentham's thought that led Bentham's disciple, James Mill to emphasize the importance of the principle of democratic rule and popular opinion.[17] But, true to the concept of freedom for the individual, Bentham, as well as James Mill, believed that government regulations constitute a restriction on individual freedom and, hence, should be kept to a minimum. Within its proper parameters, however, government should be strong and the regulations that are enacted must have the force of law. For Bentham, law enforcement is merely a method to induce desired behavior. Rational individuals recognize that it is less painful to obey the law than to disobey it.[18]

Simultaneously, classical liberal, *laissez faire* economic thought, represented by the eighteenth century physiocrats, but, foremost, by Adam Smith (1723–1790) and his followers, rested its approach on the assertion that each individual within society should pursue his or her own self-interest, predicated upon the principle of comparative advantage, within the context of an unregulated, competitive, free market economy. In such an economic environment, the forces of the free market would serve as a stabilizing, "invisible hand," thereby producing collective prosperity within a harmonious, self-regulating economic order.[19]

Throughout the nineteenth century, however, additional voices within liberal thought were heard, such as that of John Stuart Mill (1806–1873), that implicitly challenged the assumptions underpinning Bentham's utilitarianism. While continuing to profess adherence to utilitarianism and attempting to maintain the equation of good with pleasure, Mill insisted that there is both a qualitative, as well as quantitative dimension to pleasure. By contrast, Bentham, had portrayed all pleasures as equivalent and, hence, quantitatively comparable. John Stuart Mill's introduction of quality into the equation, however, destroyed the ability to arrive at a general calculation of what gives the greatest pleasure, not simply because measuring quality is difficult or impossible, but also because it is impossible to compare quality and quantity. As such, Mill's introduction of quality into the equation implicitly destroyed the entire logic of Bentham's utilitarian philosophy.[20]

John Stuart Mill is justly famous for his defense of individual liberty as one of the "higher qualitative pleasures" that transcends simple, individual utility. Indeed, he maintained that liberty for all is of value to both the individual, as a progressive human being, as well as to the community and mankind as a whole. Hence, Mill argued against government intrusion into the lives of its citizens and maintained that individuals are best able to fulfill themselves in an atmosphere characterized by a maximum of individual freedom. Mill also pointed to another threat, – the risk inherent within democratic systems posed by the "tyranny of the majority." This form of tyranny is characterized by its intolerance of diversity of opinion and minority dissent and the use of its governing power as the majority to repress these divergent opinions. In Mill's eyes, this was an injustice directed against both the individual, as well as society at large.[21]

In short, as Dante Germino suggested, Mill's de-facto rejection of Jeremy Bentham's "utilitarian principle of the 'greatest happiness of the greatest number'" led Mill to argue that "happiness (or 'pleasure,' in the utilitarian vocabulary) is not the highest goal for man." Instead, man's "highest goal" is "the fulfillment of the best that is in man under the conditions of liberty (that is, conditions that are noncoercive and which encourage spontaneity)."[22] Moreover, as George Sabine wrote, Mill's thought helped to stimulate the idea that "the function of a liberal state in a free society is not negative, but positive" in the sense that "it cannot make its citizens free merely by refraining from legislation or assuming that the conditions of freedom exist merely because legal disabilities have been removed." Instead, "legislation may be a means of creating, increasing, and equalizing opportunity, and liberalism can impose no arbitrary limits upon its use."[23]

Liberal thought was further developed by Thomas Hill Green (1836–1882) and the Oxford Idealists who broke with both Bentham's utilitarianism, as well as the earlier Lockean interpretation of anthropocentric natural law and the accompanying doctrine of natural rights. Instead, Green returned to an emphasis on morality and suggested that a complete human being is one who recognizes that individual freedom is predicated upon the subordination of one's will to rules or norms of moral behavior that human beings themselves have created through their powers of reason. Green distinguished between negative and positive freedom; the former being characterized as the absence of constraints, whereas the latter suggests the linkage between freedom and moral purpose and is defined as "a positive power or capacity of doing or enjoying something worth doing or enjoying." Green believed that all individuals should enjoy freedom of thought and the opportunity of sharing in a civilized, moral, socially-based culture.[24]

Turning to Green's ideas concerning the broader "moral culture provided by civilization," as George Sabine stated, "a moral community … is one in which the individual responsibility limits his claims to freedom in the light of general social interests and in which the community itself supports his claims because the general well-being can be realized only through his initiative and freedom." Therefore, there exists "a general social good or welfare which is the criteria of the individual's rights and duties … but it is neither distinct from nor opposed to the happiness of the individual, because it is one in which the individual can share and because the participation is itself a significant part of the individual's happiness." Hence, Green emphasized the synergistic interrelationship between the individual and the community and stressed "the idea of the general good or common human well-being which is capable of being shared by everyone and which provides a standard for legislation." For Green, it was, therefore, of paramount importance that society recognize that all its members possess "the right to moral self-determination and to the moral dignity which is at once the condition and the due of personality," thereby permitting everyone in society an equal opportunity to enjoy freedom and personal fulfillment.[25] In short, Green's linkage of individual positive freedom and moral purpose provided the basis for his assertion that the state has a responsibility to create and maintain an environment in which all individuals have an equal opportunity to enjoy that positive freedom. As such, in the eyes of many commentators, Green provided

the intellectual basis for what has been termed "the modern liberal theory of the state."[26]

This evolution in liberalism had implications for the liberal conception of international relations. First, the utilitarian emphasis on the greatest good for the greatest number and its corollary implications for democratic rule, led liberals to the conclusion that democratic governments which served the interests of their respective communities, would be reasonable in their policies and would resolve differences peacefully, rather than inflict the misery of war upon themselves and their neighbors within the international community. Second, the ideas of classical economists encouraged acceptance of the proposition that free trade, based upon the principle of comparative advantage, would create a truly integrated, interdependent, and prosperous global economy. In addition, economic integration and interdependence would serve to significantly reduce the prospect that international disputes would escalate into armed hostilities.[27] Third, the concept of the positive state encouraged the notion that the states not only had a positive domestic responsibility, but that they also had a positive global responsibility to promote an international order predicated on freedom, dignity, and equality of opportunity for all peoples throughout the global community. In addition, the states were increasingly seen as having a positive responsibility to advance the cause of democracy, free markets, free international trade, as well as for some, global economic development. While non-military instruments, particularly diplomatic and economic instruments, were obviously preferable in fulfilling this responsibility to lead the international community toward the creation of a liberal global order, the use of armed force as an instrument to defend and further promote this positive goal was not precluded. Indeed, liberals held that, if non-violent methods fail, the use of armed force to promote the establishment of a liberal global order may be both legitimate and just.

The Romantic – Counter-Enlightenment – Conservative Reaction

Simultaneously, in the aftermath of the excesses of the French Revolution, many other intellectuals turned to a movement that came to be known as the counter-Enlightenment or Romantic movement. Four overlapping characteristics stand out within this movement. First, thinkers of the counter-Enlightenment rejected as simplistic the approach of the anthropocentric natural law philosophers that had dominated the Enlightenment and which had reduced all experience to a series of knowable, universal, fundamental laws. Instead, while some conceded that certain laws may govern mathematics and parts of the natural sciences, they maintained that the broader, ever-changing world was infinitely diverse and complex, driven by a vast multitude of dynamic forces, and, hence, not reducible to simple laws. Certainly, they emphasized that the rationalist, mechanistic approach advocated by the Enlightenment thinkers did not apply to human affairs. Instead, human relations were said to be influenced by a host of non-rational and emotional impulses, many of which were subconscious and over which human beings had only limited, if any, control.[28]

Second, thinkers of the Romantic, counter-Enlightenment emphasized emotion and sentiment, whereas reason was depreciated. In their eyes, human beings were distinguished by their creativity and active imagination, as well as by their sensitivities and emotional feelings which collectively conditioned both their perception of their past experiences and their responses to current and future challenges and opportunities. This emphasis on human uniqueness, imagination, and creativity, which defied reduction to the mechanical and abstract principles of human behavior propounded by the Enlightenment thinkers, ran parallel to the increasing movement away from neo-classical influences in the arts. Indeed, as Azar Gat summarized, "the deep and multifaceted human experience, as intuitively and intimately known to every individual, was diametrically opposed to the crude, mechanistic, and skeletal system portrayed both by associative psychology and the materialists."[29] Third, but related, adherents to the Romantic movement emphasized societal custom and tradition, as reflected in their enthusiasm within art and literature for myths, as well as folk traditions and stories.[30]

Finally, fourth, there was a new appreciation for history in counter-Enlightenment thought and an accompanying rejection of the penchant of Enlightenment thinkers to perceive the past through their own lens of values and perspectives, under the assumption that the lens, which they had themselves designed, was applicable on a universal, timeless scale.[31] For example, thinkers such as Johann Herder (1744–1803) stressed the uniqueness of every culture and, in the words of Azar Gat, argued "that every culture was a unique historical entity that stemmed from the particular circumstances and experience of its time and place and, in turn, expressed them in the totality of its values, ways of life and thought, institutions, and creative art." Thus, proponents of the counter-Enlightenment perspective argued that a dogmatic approach to history, predicated upon so-called universal standards, precluded any real understanding. Instead, real understanding could only be achieved by sympathetic and imaginative insights into the concrete and individual conditions of the past. Rather than superficial abstractions, a close and detailed study of the diverse forms of specific historical situations was needed.[32] Finally, many adherents came to believe that the development of civilization represented the cosmic design of an underlying Divine spirit and purpose.

Burkean Conservatism

Edmund Burke (1729–1797) played an important part in this general reaction to the anthropocentric natural law-based body of thought that characterized the Enlightenment period in the development of European philosophy.[33] Indeed, many writers regard Burke as "the founder of self-conscious political conservatism."[34] Burke sharply disagreed with both Hobbesian and Lockean anthropocentric natural law proponents regarding man's natural state, arguing that "man's 'natural' habitat is society and not some hypothetical 'state of nature.'" Hence, Burke maintained that the speculation of Enlightenment philosophers that depicted human beings as voluntarily leaving their natural state in order to enter

society and, thereby, better secure their "natural rights," was a fictional distortion of reality. Burke emphasized throughout his writings that man's natural state is as a member of society, not as a solitary individual.[35]

Burke viewed society as not simply a product of human reason. Instead, he argued that societies gradually develop, based upon a variety of instinctive impulses and propensities. Tradition and custom, much more than reason, serve to give society its identity and shape its development. Thus, society is characterized by a unique heritage of traditions, institutionalized relationships between its components, regularized patterns for the resolution of conflict among these diverse societal components, and customary norms for both individual and collective behavior.[36] Furthermore, in Burke's eyes, societies are closely intertwined with the civilizations and national heritages from whence they evolve. Societies and their long-established institutions and customs serve as the repository for culture and the collective wisdom of the ages. Indeed, newly established communities, with a limited heritage and weak or non-existent bodies of customs and traditions, can profitably draw upon the customs, traditions, and insights of other, more established communities within that same civilizational grouping.[37] In addition, Burke viewed society as an organic whole, with diverse classes and socio-occupational groupings within society, welded together in a single, interdependent, socio-economic-political entity, based upon shared traditions and institutions. Hence, change in one aspect of society or its institutions will necessarily impact throughout the entire entity, often in unanticipated ways.[38] Therefore, Burke emphasized that society and its politico-economic structures compose a vast, overlapping, and complex web of traditional rights and customs that have evolved in a continuous manner from the heritage of that society's past experience and have adapted themselves to the challenges and opportunities of the present.[39] But, in the broadest sense, Burke argued that the value of a society's customs and traditions transcends their utility for the pursuit of self-interest by the individuals who compose that society. As George Sabine wrote, for Burke, these traditions constitute "the repository of all civilization, the source of religion and morality, and the arbiter even of reason itself." Thus, following David Hume's critique of natural law and reason, in Burke's thought, "sentiment, tradition and idealized history stepped in to fill the vacancy left by the removal of self-evident rights, and the cult of the community replaced the cult of the individual."[40]

Placing individual human beings within their natural, social context, Burke maintained that humans acquire identity, as well as fulfillment, by participating in the traditions and customary patterns of socio-economic-political interaction. Indeed, Burke perceived society as resting upon the perception held by all its members that they were all part of a larger whole that transcends and endures beyond their own individual existences.[41] He held that the individuals that compose society govern their behavior only in very small measure on superficial, conscious, calculations of personal interest and utility. Instead, Burke asserted that they base their conduct on instinctive, deeply-based feelings of loyalty, duty, and affection to their family, the associations within the community to which they belong, and ultimately to the national state to which they identify.[42] Hence, as George Sabine observed, "Burke not only cleared away, as Hume had done, the

pretense that social institutions depend on reason or nature but far more than Hume he reversed the scheme of values implied by the system of natural law," and asserted that "it is custom, tradition, and membership in society far more than reason that gives moral quality to human nature."[43]

Fundamental to Burke's philosophy was his contention that each society should develop within the context of its own traditions and customs, rather than on the basis of a priori, abstract principles. This contention was the foundation for Burke's assertion that any speculation concerning man's natural rights must be framed within a social context. Hence, he argued that, since man's natural condition is as a member of a community, human rights are necessarily conditioned by the customs and traditions of that community. A right is legitimate because it is recognized and condoned by society, based upon the evolutionary heritage of society's customs and traditions. Thus, while Burke conceded that there were, in theory, certain abstract, universal human rights, he maintained that they "undergo such a variety of refractions and reflections, that it becomes absurd to talk of them as if they continued in the simplicity of their original direction."[44] For example, as Brian Nelson observed, for Burke, the key question was "not whether people have a right to life and property, but how these 'rights' actually exist in society," since these rights "have been utterly modified by society and no longer exist in their theoretically pure form."[45] In short, the rights of an individual within the community should not be exclusively seen in the abstract, but rather, much more importantly, they should be seen in an evolutionary context and, based upon that evolutionary perspective, interpreted and applied by the contemporary community in which the individual is a member.[46]

Similarly, reflecting both Burke's emphasis on the critical importance of understanding the traditions and customs of society, as well as his organic view of society, he believed that the various institutions, classes, and groupings that compose society and the state must be carefully kept in balance for society and the state to remain on a stable footing. Moreover, Burke also believed that the various associations within the community are important, not simply as "a strong barrier against the excesses of despotism," but, if these associations and groupings were to be eliminated, the individuals within the community would stand isolated before the state.[47]

Given all these considerations, Burke maintained that politics is essentially an exercise in prudent practicality, rather than in speculative, theoretical constructs. An understanding of and respect for the customs and traditions of society is critical and, therefore, statesmen should look to history, rather than speculative philosophy, as their guide in formulating policy pertaining to the individual and his or her rights, the role of groups and associations within society, and/or the nature and scope of government.[48] History is seen as not only more rational than the schemes of individual philosophers, but, in a larger sense, Burke believed that the historical evolution of individual societies was part of a larger, Divine order and plan shaping our world.[49]

This, of course, did not mean that, in Burke's eyes, every custom and tradition must be uncritically accepted. Indeed, Burke recognized that adjustments would be necessary where tradition was either absent or defective. Therefore, he

emphasized that adjustments, improvements, and innovations may periodically be necessary in the interest of the good of the whole of society, but only in response to specific problems and grievances.[50] In so arguing, Burke distinguished between the concepts of reform and change. For him, change "alters the substance of the objects themselves, and gets rid of all their essential good as well as of all accidental evil annexed to them." Conversely, reform serves to remedy the specific problem, without changing the socio-economic-political structure of society, thereby remaining consistent with the broader societal customs and traditions.[51] Thus, Burke advocated only carefully measured, limited, gradual reform, but certainly not sudden, comprehensive, social, economic, or political change. Moreover, as statesmen attempt to accommodate to society's contemporary challenges and opportunities, while, simultaneously, preserving the traditional character of society and its institutions, Burke emphasized that these policy-makers must represent and serve the interests of the entire community, not just a particular constituency within that community. Burke's admonition, of course, relates directly back to his organic conception of society.[52]

In sum, Burke recognized and appreciated the tremendous diversity of the numerous components that compose society, as well as the inherently complex, interconnected nature of those components. He articulated with deep conviction that societies are the product of their unique, individual heritage and that everything in society is conditioned by custom and tradition. He believed that it was not only futile, but downright dangerous, for individuals to attempt to displace a stable order, founded upon the heritage of custom and tradition, with a new, revolutionarily transformed order, artificially grafted upon society, based upon concepts that have been speculatively derived, but which ignore the forces of past experience and tradition.

Hegelian Thought

Building upon the thoughts of Edmund Burke and Jean-Jacques Rousseau (1712–1778),[53] the thought of Georg Hegel (1770–1831) represented an attempt to identify an ultimate normative standard, consistent with the Romantic, counter-Enlightenment movement, that would serve as an ethical criteria that could, in turn, be utilized to explain and evaluate human interaction and societal development. Hegel's thought contained two principal components: first, the dialectic and the historical method of analysis and, second, the notions of the "spirit of the nation" and the national state and their relationship to the "World Spirit," the other members of the international community, civil society, and the individual.[54]

Hegel built his dialectical method upon the age-old concept that development is the product of the interaction of opposite forces. He asserted that every force or idea (thesis) eventually produces a counter-force or counter-idea (antithesis). Both possess a measure of truth and when that measure is properly assessed, there results a synthesis of the two, thus yielding a new force or idea that embodies the truth contained in each of the earlier, individual forces or ideas. But, since this new synthesized force or idea (or new thesis) again produces a

new antithesis, the dynamic continues, producing yet another synthesis. This dynamic of contradiction that unfolds in the elusive quest for perfection serves as the driving mechanism for historical development.[55] Thus, as George Sabine observed, "change is at once continuous and discontinuous, carrying forward the past and also breaking with it in order to create something new." Hegel believed that this "law of logical contradiction" served to explain how "society itself and all the principal parts of its structure – its laws, its morals, its religions, and the institutions that embody them – advance under the continual tension of internal forces and their endless readjustment by thought."[56] Hegel generally emphasized gradual, continuous transformation, whereas others, such as the Marxists, tended to emphasize discontinuous, revolutionary change.[57]

Hegel believed that the dialectical method provided a particularly effective way whereby the true, permanent, and significant forces that constitute the core of history could be distinguished from mere transient, historically insignificant developments characteristic of a particular time or place. He maintained that philosophy, religion, morality, art, etc. synergistically reinforced each other, collectively yielding a "spirit" of various peoples, aggregated, in turn, into various nations. Each nation makes its contribution to the development of world civilization through the unfolding of this national spirit. While individuals and groups contribute to this historical progression, they do so largely unconsciously. Indeed, in Hegel's eyes, nations were the significant units in the development of history and his goal was to show, via the dialectical method, how the development of each nation constitutes a part of the development of civilization. He argued that, in this process of identifying the permanent factors underpinning history, one comes to recognize the general and universal laws of historical development and growth. Once identified, these laws can, in turn, be used to evaluate communities, nations, and civilizations.[58] Thus, as George Sabine observed, according to Hegel, "the history of civilization is a succession of national cultures in which each nation brings its peculiar and timely contribution to the whole human achievement."[59]

Hegel further argued that the history of human civilization "is the unfolding of the progressive realization and materialization of the World Spirit in time." Indeed, he believed that the spirit of the nation is a manifestation of the World Spirit at a given time. Thus, each period of history "carries, for the time being, the whole weight and force of the Absolute," and "its duty is to achieve complete self-expression," despite the fact that, in accord with the dialectical process, it will eventually, inevitably give way to an even higher expression of the Absolute.[60] In short, through the instrument of the dialectic, Hegel sought to empirically and scientifically show "the march of God in the world," yielding a "historically objective standard of values," that, in turn, served to replace the old concepts of natural law. For him, the ideal is revealed in history.[61]

Hegel believed that freedom for all people was the ultimate objective of history. While, in many respects, human beings are selfish, capricious, instinctive animals, Hegel believed that humans are also capable of reason and, as a result of experience gained through history, they are able to expand their personality through the possession and exercise of rights, as well as the recognition and

performance of duties. In this way, they gain an understanding that their end is to be fully developed, free human beings that respect the freedom of other human beings. Indeed, notwithstanding their dissimilarity of perspective, like theocentric natural law proponents, Hegel emphasized that rights of individuals are accompanied by duties.[62]

Hegel maintained that human beings are also social creatures and they can enjoy the "good life" only through the family, the various components of civil society, and the state. In principle, Hegel saw no moral conflict between individual and collective goals. In his view, all seek freedom. Hegel distinguished, however, between freedom and the individualism inherent within liberal, utilitarian thought. But, he also argued that the characteristics and normative standards of the family, the various components of civil society, and the state have an impact upon the intellectual and moral perspectives of its members.[63] Hence, consistent with conservative thought, he saw freedom as best understood as a socially-conditioned phenomenon. As George Sabine summarized, for Hegel, freedom is "a property of the social system which arises through the moral development of the community." It is "less an individual endowment than a status which is imparted to the individual through legal and ethical institutions that the community supports." Moreover, freedom is linked to the common interest of all the members of the community in that "even private happiness requires the dignity that attaches to social status and the consciousness of having a share in socially valuable work." In short, freedom is realized through service to the family, the various components of civil society, and, ultimately, the community's highest unit, the state. Indeed, in extreme situations, an individual may be called upon to sacrifice himself or herself for the nation and the state.[64] As George Sabine put it, for Hegel, "the value of a person depends upon the work that he does and the part that he plays in the social drama."[65]

Hegel saw the state, not as a utilitarian body, but rather as the ultimate, all-encompassing expression of power and the embodiment of national unity, the national will, the nation's aspirations, and its destiny. It is the embodiment of the spirit of the nation and the agent through which the nation realizes its role in the march of history. Indeed, Hegel saw the state as an emanation of the World Spirit and, thereby, in a sense, an entity that possesses divine qualities. It subsumes and governs the citizenry, as well as the multitude of families and various components of civil society, without despotic subjugation or suppression. While constitutional in character, the state is seen as possessing absolute, but not arbitrary power. In addition to maintaining the national and municipal security, as well as promoting the common welfare of its citizenry, the goal of the state is to enhance its wealth and power. Finally, in Hegel's eyes, the state is "morally superior to civil society," in that it alone embodies the "ethical values" of the nation and is the sole body that represents the common interest of all the citizenry.[66]

Finally, Hegel viewed war, not only as an inevitable aspect of international relations, but, in some contexts, he appeared to view war, even offensive wars of aggression, as both essentially good and moral. From his perspective, at certain times in history, the historical process is advanced only through armed conflict. Hence, wars and, indeed, any national policies, will ultimately be judged by

the degree to which these actions contribute to the advancement of the World Spirit.[67] As Dante Germino wrote, as seen by Hegel, "the nation-state is only in a provisional sense an end in itself. It is worthy of complete devotion and sacrifice only insofar as it lives up to its potential to be a true state and to serve as a carrier of the World Spirit, which means to promote reason and freedom of all mankind."[68]

Clausewitz and the Counter-Enlightenment

Parallel to and overlapping with the various expressions of the Romantic, counter-Enlightenment was the development of a counter-Enlightenment approach to military thought. One of the first military intellectuals to challenge the scientific school of military thought was the Prussian, Georg von Berenhorst (1733–1814),[69] but, clearly, the most celebrated and influential challenge to the Enlightenment school of military science came from another Prussian, Carl von Clausewitz (1780–1831).

As noted by Azar Gat, Clausewitz drew upon earlier philosophical writings, especially those of Immanuel Kant (1724–1804), to distinguish between "science, whose aim is knowledge through conceptualization, and art, whose essence is the attainment of a certain aim through the creative ability of combining given means." He, of course, recognized that there was an overlap between art and science, since, as Clausewitz wrote, "theory is the representation of art by way of concepts," but he believed that knowledge assists art in only limited ways. Clausewitz asserted that war is more analogous to art than science, reserving the latter term for such fields as the natural sciences and mathematics.[70] Emphasizing the role of individual, creative genius over a priori principles and rules, Clausewitz wrote that "it is simply not possible to construct a model for the art of war that can serve as a scaffolding on which the commander can rely for support at any time … no matter how versatile the code, the situation will always lead to the consequences we have already alluded to: talent and genius operate outside the rules, and theory conflicts with practice."[71] Thus, Clausewitz stressed such unquantifiable factors as the quality, character, and spirit of both the military leadership and the troops, noting that these considerations were essential for an accurate and robust theory of war.[72] But Clausewitz also pointed out that war differed from other creative artistic activities in that, in war, as with any form of social interaction, the object is not passive, but actively reacts.[73] Summarizing Clausewitz's position, Azar Gat wrote,

> The effect of moral forces as well as the bilateral nature of war are among the main factors which turn war into a field saturated with the unknown and unforeseen, and create a gulf between planning and the actual course of war …. the Enlightenment thinkers were quite aware of the factors of uncertainty but focused on what they considered to be suitable for intellectual formulation. Clausewitz regarded their attitude as dogmatic and divorced from reality, and demanded an all-encompassing theory. "They aim at fixed values; but in war everything is uncertain, and calculations have to be made with variable quantities."[74]

Indeed, one of the most characteristic features of war is uncertainty and this notion constitutes one of the foremost themes throughout Clausewitz's writings.

Another dominant theme in Clausewitz's writings was his emphasis on the tremendous diversity of various socio-cultural, political, economic, technological, and individualistic considerations and situational contexts that give each war, as well as each period of warfare, its own unique scope and character. Thus, Clausewitz enthusiastically placed tremendous emphasis on the study of history and stressed that the goal of that study is "to show how every age had its own kind of war, its own limiting conditions and its own peculiar preconceptions," such that each period would tend to be characterized by "its own theory of war." Conversely, he emphatically rejected the approach of the Enlightenment military intellectuals that uncritically imposed universal principles and rules upon past experience and emphasized only those historical facts and events that supported their a priori theories, while ignoring or rationalizing those facts and events that did not neatly coincide with and support their pre-determined ideas and approaches.[75]

Clausewitz asserted that, notwithstanding the diversity of human experience in war, however, it was possible to construct a general theory of war that would capture the "lasting spirit of war" and, thus, transcend the uniqueness of situational contexts and individual circumstances.[76] As Clausewitz observed, "theory cannot equip the mind with formulas for solving problems," as the military scientists of the Enlightenment had maintained, but instead, "it can give the mind insight into the great mass of phenomena and of their relationships, then leave it free to rise into the higher realms of action."[77]

A series of propositions were central to Clausewitz's theory of war. First, Clausewitz agreed with the Hobbesian realists in asserting that power is the dominant consideration in the international arena and war is an inevitable aspect of relations between the various states. The states themselves are seen as guided by their respective national interests and these interests are of foremost importance in the formulation of state policy. Indeed, in his eyes, state policy should be formulated without regard for humanitarian considerations or any other considerations, except those pertaining to the national interest. Hence, like the realists, he viewed the use or threatened use of military force, in conjunction with other instruments of policy, as a legitimate tool available to statesmen.[78] Second, the fundamental aim of war is to compel the adversary to behave in a desired way or to refrain from behaving in a manner that is not desired. Third, war, in its most essential form, is a forceful and violent eruption between belligerents in which the antagonists are impelled by "the impulse to destroy the enemy," an impulse that is "central to the very concept of war." Hence, for Clausewitz, "war is an act of force" and there is, in theory, no "limit to the application of that force." Therefore, in its purest sense, in war, each belligerent seeks the total neutralization of the opponent's capacity to fight. Hence, each side seeks either the surrender of the enemy forces or the destruction of the enemy's ability to continue armed resistance. As the respective belligerents pursue this goal, each side has an incentive to escalate the conflict in order to obtain superiority over the

opponent. Consequently, were this escalation dynamic allowed to occur without the intervention of mitigating factors, the conflict would inevitably assume an unlimited scope and intensity characteristic of a total struggle between adversaries. Clausewitz refers to this extreme, theoretical construct, this "urge for decision" aimed at the "total overthrow of the enemy," as "absolute war."[79]

But actual wars fall short of this absolute construct. This leads to the fourth element of Clausewitz's approach to the study of war. Various factors intervene in war and serve to mitigate this impulse that would drive the antagonists to escalate the conflict to total war for total objectives. Political considerations constitute a major factor that, while external to the war itself, serve to mitigate war's inherent escalation dynamic that gravitates toward a total struggle. Like the realists, Clausewitz emphatically stressed that wars are conducted to secure political objectives. Hence, he maintained that the political objectives of the conflict will impact upon the conduct of the war, since they will determine the war's "course, prescribe the scale of means and effort which is required, and make its influence felt throughout down to the smallest operational detail." Indeed, as Clausewitz noted, while political considerations "are the forces that give rise to war; the same forces circumscribe and moderate it."[80] Therefore, summarizing Clausewitz's position, Azar Gat observed,

> The aims and means of war are no longer dictated by the maximal imperative inherent in the nature of war, but vary according to each particular case. The aim of war is shifted from the total overthrow of the enemy to the aim put forward by politics. Consequently, war is no longer conducted on a total scale but according to the requirements of the political aim.[81]

In addition, other factors internal to war, foremost the notions of chance and friction, also serve to mitigate the scope and intensity of wars.[82] In short, factors both external and internal to war serve to moderate conflict by mitigating its inherent impulse to escalate to extreme levels of violence. Based upon these considerations, Clausewitz suggested that,

> … we can now see that in war many roads lead to success, and that they do not all involve the opponent's outright defeat. They range from the destruction of the enemy's forces, the conquest of his territory, to a temporary occupation or invasion, to projects with an immediate political purpose, and finally to passively awaiting the enemy's attacks.[83]

Throughout his writings, however, Clausewitz emphasized that, in war, combat constitutes the primary means in any effort to secure the conflict's political purposes and he was, therefore, suspicious of any means that sought to avoid such a clash.[84] Along these lines, he wrote that "kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed."[85] In the final analysis, in Clausewitz's eyes, the "destruction of the enemy forces is always the superior,

more effective means, with which others methods cannot compete."[86] Hence, as Clausewitz concludes,

> … our discussion has shown that while in war many different roads can lead to the goal, to the attainment of the political object, fighting is the only possible means. Everything is governed by a supreme law, the decision by force of arms … A commander who prefers another strategy must first be sure that his opponent … will not appeal to that supreme tribunal … If the political aims are small, the motives are slight and tensions low, a prudent general may look for any way to avoid major crises and decisive actions … and finally reach a peaceful settlement. If his assumptions are sound and promise success we are not entitled to criticize him. But he must never forget that he is moving on devious paths where the god of war may catch him unaware.[87]

Finally, Clausewitz appears to have believed that, since the international system lacks an enforcement authority, the option of whether or not to adhere to international law and the normative standards that some writers maintained should govern the behavior of states devolved to the individual states. Indeed, Clausewitz did not attach great importance to the norms governing the conduct of armed conflict. In this context, he noted that there were "certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken," modify, or circumscribe the wartime use of armed force.[88]

Summary: The Romantic/Counter-Enlightenment/Conservative Perspective

In short, the Romantic, counter-Enlightenment, conservative perspective fundamentally challenged some of the most basic assumptions underpinning the schools of thought heretofore surveyed. One of the starkest differences is the rejection of the notion of universality, in favor of emphasis on the uniqueness of custom, tradition, and the social, cultural, economic, and political heritage of every community within the international arena, both presently, as well as throughout history. One corollary of this challenge to universality is the conviction that the customary norms, standards, perspectives, approaches to problem solving, and socio-economic-political culture and institutions of each community are, in turn, the product of their unique and individualistic heritage. Hence, in contrast to the assertion of the universality of human values and perspectives that transcends both time and cultures, upon which much of natural law philosophy is constructed, the Romantic, counter-Enlightenment, conservative perspective denies that contention of universality and stresses that each culture develops its own unique perspective and normative standards of individual morality and community behavior. Indeed, Burke's assertion that human rights are uniquely informed, defined, and conditioned by various individual communities, depending upon their customs, traditions, and patterns of societal development, reflects that rejection of universality.

Proponents of the Romantic, counter-Enlightenment, conservative perspective maintain that adherence to the uniform standards of behavior that underpin

international law, generally, as well as customary and conventional law of armed conflict, specifically, must, therefore, reflect at least some level of normative consensus and commitment to reciprocity among the various adherents if these norms are to survive over time, especially during stressful periods of confrontation. Along these lines, James Turner Johnson has argued that "historical and anthropological evidence suggests that every human culture has generated some analogue of just war tradition: a consensus of beliefs, attitudes, and behavior that defines the terms of justification for resort to violence and the limits, if any, to be set on the use of violence by members of that culture." But Johnson pointed out that, "in practice, cultural restraints on violence are observably difficult to maintain in violent conflicts that cross important cultural boundaries." Furthermore, the incorporation of new military technologies often challenges the commitment of the belligerents to adhere to customs and conventions previously agreed upon. In short, he concluded that "cultural restraints on war are universal but somewhat fragile, and they are difficult to extend across cultural boundaries." Therefore, "cross-cultural conflicts tend to undercut the effect of existing traditions of restraint, and such conflicts may also introduce an element of ideological justification for one's own cause and with it the justification of more ruthless, unrestrained forms of conflict."[89] Illustrating his point, he developed the thesis that the "just war tradition is a major moral tradition of Western culture, shaped by both religious and nonreligious forces and taking shape in both religious and nonreligious forms within that culture." It was a moral tradition encompassing the whole of Christendom and, "so long as Christendom existed the developing just war doctrine did effectively limit conflicts within the community." But the unified Western cultural and moral tradition of Christendom, predicated upon a common sense of justice, was shattered as a result of the Reformation and, thereafter, "European Christianity was no longer single but (at least) dual, and religious values were no longer part of an overall structure of belief but were identified with one or the other of the faiths that comprised western Christianity after the Reformation." This, of course, was said to have produced an accompanying disintegration of the Western consensus concerning the thrust of just war doctrine as it had emerged during the late medieval period.[90] This emphasis on the importance of cultural homogeneity for the establishment and maintenance of an order predicated on shared values and norms of behavior, versus the risks associated with the absence of such shared cross-cultural values is an undercurrent running throughout the recent clash of civilizations discussions initiated by Samuel Huntington.[91]

Another major difference between the Romantic, counter-Enlightenment, conservative perspective and many of the other perspectives thus far surveyed is the former's rejection of reason as the primary factor accounting for human behavior, emphasizing instead individual will, emotions, and instinct. Accompanying this was a rejection of the mechanistic approach to individual and collective behavior that was central to the anthropocentric natural law perspective. Indeed, conservatives argue that individual behavior, as well as collective action, is predicated upon countless, unquantifiable considerations. Similarly, as discussed, the counter-Enlightenment approach to war rejected the penchant

of Enlightenment thinkers to formulate laws and principles that were said to universally apply to armed conflict. Specifically with respect to just war doctrine and customary rules governing the use of armed force, military-intellectuals, such as Clausewitz, tended to depreciate their significance in limiting warfare. Insofar as they marginally influence the conduct of war, counter-Enlightenment thinkers stress that they will only operate on a reciprocal basis and in a manner that is consistent with the national interests of the belligerents.

In short, especially in situations characterized by a divergence of cultures, traditions, and normative standards governing individual and collective behavior among communities, combined with the ever-present impact of non-rational, emotional considerations that are said to condition all warfare, the counter-Enlightenment approach to the study of warfare emphasizes that only conscious, reciprocal efforts by the antagonists to limit conflict in accord with agreed-upon rules governing the conduct of armed conflict might possibly succeed. Even then, mutually agreed-upon customary and conventional rules governing war will often be stressed beyond the breaking point by the impact of new technologies or the perception by one side that total defeat in imminent, leading to a strong incentive to escalate the use of force beyond limits heretofore agreed upon. In this respect, the counter-Enlightenment thinkers tend to be at one with Hobbesian realists.

Legal Positivism

Legal positivism represents another school of thought that gained wide acceptance during the post-Enlightenment period. Legal positivism holds that valid law consists only of binding statutes that have been duly enacted, as well as legal customs that are clearly and consistently recognized as binding by the members of the community.[92] Furthermore, legal positivists hold that the enforcement of obedience is an essential, distinguishing attribute of law.[93] In addition, they emphasize the importance of the formal, systematic codification of the body of law.[94] As Arthur Nussbaum noted,

> By definition a code is an authoritative and exhaustive, or at least comprehensive, fixation of the rules composing the contemplated segment of the law. Positivism favors this kind of undertaking because codification establishes a "positive" source for the codified rules.[95]

Indeed, only codified, positive law can provide the members of the community, as well as those individuals that are responsible for the enactment, enforcement, and adjudication of the law, with the level of certainty that is deemed necessary by proponents of legal positivism.[96] Finally, methodologically, positivism stresses an empirically-oriented, scientific approach to law that draws upon individual and collective experience.[97]

Consistent with the general reaction against natural law characteristic of the period following the French Revolution, positivists tend to dismiss natural law as not possessing the qualities necessary to fulfill the criteria to be termed valid

law. Not only is natural law not enforced, at least not in this life, furthermore, positivists consider it to be unenforceable, since it lacks the necessary definiteness and uniformity that they contend is required of valid law. Indeed, they assert that there is a general lack of consensus as to what precisely constitutes the provisions of natural law. As such, while many positivists acknowledge the general significance of the concepts of justice and ethics, they relegate these concepts to the separate field of moral philosophy.[98] In short, as Heinrich Rommen observed, "in their eyes, law and justice, law and right, are not identical." Hence, for them, "any further criterion as, e.g., the inherent justice or the moral lawfulness of the action commanded by the positive law, is rejected as irrelevant for the sphere of law."[99] Elaborating on the relationship between morality and the law, F.J. Stahl observed, "the highest principles touching the binding force of positive law – that one must obey the public authorities; whether there is a limit to his obedience and what the limit is; whether active resistance is permissible – lie beyond positive law." In his view, questions such as these relate to ethics, "and hence everyone according to his conscience will judge for himself before God what stand he should take on the matter."[100] But, like all legal positivists, he went on to note that, in situations where positive law conflicts with ethics, individuals are not permitted to violate positive law.[101]

Indeed, positivism adopts a nominalist perspective in that it rests upon the assumption that the will has primacy over the intellect, both theologically, as well as with respect to human psychology.[102] Theologically, the notion of the primacy of God's will traces its origin to Duns Scotus (1266–1308) and William of Occam (1300–1349), as well as to the thought of John Calvin (1509–1564) and other Reformation theologians.[103] Summarizing the proposition that God's law is the product of Divine will, rather than the product of Divine reason, Heinrich Rommen observed,

> An action is not good because of its suitableness to the essential nature of man, … but because God so wills. God's will could also have willed and decreed the precise opposite, which would then possess the same binding force as that which is now valid – which, indeed, has validity only as long a God's absolute will so determines. Law is will, pure will without any foundation in reality, without foundation in the essential nature of things. Thus, too, sin no longer contains any intrinsic element of immorality, or what is unjust, any inner element of injustice; it is an external offense against the will of God …. Moral goodness consists in mere external agreement with God's absolute will, which, subject only to His arbitrary decree, can always change.[104]

In short, as seen from this perspective, "there exists no unchangeable … natural law that inwardly governs the positive law."[105] Instead, "the notion of God as an unlimited and arbitrary power implied the reduction of all moral laws to inscrutable manifestations of divine omnipotence."[106] Implicitly drawing upon this theological proposition that God's law is based solely upon God's will, secular thinkers asserted that the law of the community is based solely upon the will of that community.[107]

Building upon the proposition that law represents the will of the community and consistent with the conservative school of thought, proponents of the historical school of law maintain that the origins of all law – customary law, statute law, and the science of law – are to be found in the collective heritages and particular characteristics of groups of peoples. The sources of law for a particular community are to be found in the "spirit of the people" that form that community. Hence, just as language and cultural expressions are different among various groups of people, similarly, the legal systems of various peoples are also distinct and different. Therefore, adherents to the historical school of law argue that the law is not created, rather it is found, formulated, and interpreted by lawmakers and jurists.[108] But, as A.P. d'Entreves pointed out,

> … this does not mean that the followers of the Historical school intended to substitute historical growth and development for the notion of absolute justice. Its greatest representatives, such as Savigny, Puchta and Stahl, remained unshaken in their Christian belief in an order of justice based upon the existence of a transcendent God. They must not be mistaken for Hegelians. Theirs was at bottom a 'dualist' theory: they never accepted the fundamental assumption of Hegel's legal philosophy, that the ideal finds its revelation in history.[109]

As with all legal positivists, however, proponents of the historical school of legal thought held that all law, God's law as well as human law, is based on will, not reason. In addition, like all legal positivists, they argue that when human positive law appears contrary to God's law, human law remains binding.[110]

Alternatively, many other legal positivists do not rest their position upon a historically identifiable "spirit of the people," as the source of law, but rather, consistent with the views of Thomas Hobbes, simply maintain that the law is determined by the will of whoever possesses sovereignty and is not limited by any higher moral law or ethical norms. Simply put, the concept of sovereignty provides many positivists with an "ultimate source" for valid positive law. Moreover, since the capacity to exact obedience is central to the concept of sovereignty, they agree that the principle norm of positivism is that the law, delineated by the lawful authorities of the sovereign entity, must be obeyed.[111] Many of these legal positivists, of course, hold that the law, as determined by the sovereign's will, must be in accordance with the constitution and that the law must be formally enacted in accordance with constitutional procedures.[112] But, since the fundamental law of the sovereign state, its constitution, can be lawfully amended, it too is the product of the will of those who govern.[113] Since sovereignty can reside in an individual, a group or class of individuals, or "the people," it is their will that determines the law.[114] Indeed, those positivists that adopt a materialist orientation are particularly sensitive to the notion that the laws of the state will reflect the interests of those who govern.[115]

While recognizing the value of international law, some positivists, such as John Austin (1790–1859), held that international law could not be properly be classified as law, since the international system lacks a supreme authority that can lawfully and authoritatively formulate positive law and compel the members

of the international community to obey its will. Instead, from their perspective, international law "consists of opinions and sentiments current among nations generally." They, however, adopt a "dualistic" approach, acknowledging that international law does become proper law when it is incorporated into municipal law by the various states.[116] Others, positivists, however, go even farther and emphasize that international law rests upon two foundations: conventional law and customary law. With respect to conventional law, they maintain that adherents to various bilateral and multilateral treaties have agreed to adhere to the terms delineated in these treaties. Indeed, they stress that the sanctity of agreements is a basic principle of law. Most acknowledge, however, that the states, as sovereign entities, may reserve the right to withdraw from particular treaties for reasons of national interest. Customary law draws upon the traditional concept of *jus gentium*[117] and looks to the common will of the international community as its source. Customary law is considered to be valid law insofar as the various members of the international community have, at least tacitly, agreed that it is binding upon all states. As such, they maintain that customary international law cannot be unilaterally altered or abrogated. The problem, of course, for legal positivists is specifically delineating and obtaining universal agreement concerning precisely what principles constitute the body of customary international law.[118]

Throughout the twentieth century, the states within the international community have enacted an ever-expanding series of multilateral agreements that have codified internationally accepted principles of international law. At the center of these efforts have been the Covenant of the League of Nations, the 1928 Pact of Paris, and the United Nations Charter. These agreements established that the international community regards such principles as, state sovereignty, non-interference in the internal affairs of the various states, the peaceful resolution of disputes, the illegitimacy of the use of armed force as an instrument of policy, except as specifically and as a last resort authorized by the UN Security Council, and the right of the states to individual and collective self-defense, as conventional and customarily recognized norms governing relations between the members of the international system. In addition, consistent with the *jus ad bellum* criteria of legitimate authority, these and other international legal documents clarify the principle that only the legally designated authorities responsible for governing the individual states acting in self-defense or a majority of the states (including all the permanent members) represented on the UN Security Council are empowered with the authority to authorize the use of armed force within the international arena. Furthermore, it codifies the *jus ad bellum* requirement that all nonviolent approaches to conflict resolution must be exhausted before the use of armed force can be legitimately authorized. While the principles of peaceful resolution of disputes and the right of self-defense are consistent with the standards embodied within the just war tradition, these positivist customary and conventional international legal provisions regarding the legitimacy of the resort to the use of armed force leave open to interpretation questions regarding the legality of anticipatory, preemptive self-defense. It also raises questions regarding the applicability of such traditional principles contained within the category of cause as retaking that which has been unjustly taken in the past or punitive action

against a power that has in the past acted unjustly toward its fellow members of the international community. Indeed, the positivist international legal ban on any use of armed force except in self-defense or as authorized by the UN Security Council has invited an expansive interpretation of precisely what is defined as "self-defense."[119]

In addition, the states have also codified principles relating to human rights in such international agreements as the 1948 Universal Declaration of Human Rights, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social and Cultural Rights. Indeed, the provisions and underlying principles of these various agreements have now become part of both conventional and customary international law. These positivist contributions are extremely significant, especially when coupled with the post-World War II establishment of the principle that all individuals, irrespective of their official, governmental positions, will be personally held accountable for violations of customary and conventional international law, especially violations of international humanitarian law and human rights law, as well as the principle that the human rights of individuals are considered superior to state sovereignty.[120]

Unfortunately, however, these positivist contributions are often open to interpretation. For example, with respect to questions centering on humanitarian intervention, how significant and of what magnitude do human rights violations have to be in order to allow the UN Security Council to override state sovereignty and the principle of nonintervention in the internal affairs of the states and authorize a humanitarian intervention against the will of a particular state; to what extent and in what form should armed force be used in support of the humanitarian intervention; and what immediate and long-term responsibilities does the international community have to the state and society in which the intervention has taken place following the humanitarian intervention? While the classical and neo-classical interpretation of *jus ad bellum* just war criteria, especially right intention and proportionality, help to provide perspective concerning these questions, these criteria are not formally incorporated into positive conventional or customary international law.[121]

The international community has made tremendous strides over the past century and a half in formulating a body of positive customary and conventional international humanitarian law of armed conflict regulating the conditions under which armed force can be employed. Moreover, the specific terms of the various conventions relating to the law of armed conflict are considered binding for those states that have formally ratified these conventions. In many states, the binding nature of these positive customary principles and specific conventional provisions have combined with the traditional state imperative to maintain military discipline and have been incorporated into various national codes of military conduct. Indeed, not only do these positive customary and conventional legal principles and provisions coincide quite well with the classical and neo-classical *jus in bello* principles of discrimination/distinction and proportionality contained within traditional just war doctrine, the law of armed conflict, as it has developed

during the past century and a half, has played an especially valuable role in elaborating upon and expanding the application of these just war principles.[122] But, simultaneously, the incorporation of such principles as military necessity into positive customary and conventional law contains a measure of risk of abuse, especially when a commitment to the traditional classical and neo-classical just war interpretation of the *jus in bello* criteria of right intention is absent in favor of a more utilitarian interpretation.

In the final analysis, however, legal positivism's exclusive emphasis on defining law as the will of those who possessed proper authority remains unsatisfactory for many scholars and practitioners. Indeed, the logic of positivism assumes the ideal lawmaker and adjudicator. Unfortunately, this is very rarely, if ever, the case. Indeed, as noted earlier, many positivists admit that those who rule often do so in their own self-interest, rather than in the common interest. Consequently, many scholars and practitioners have continued to look toward some ultimate or basic normative standard as the foundation for the legal order, above and beyond the mere will of those who rule and the de-facto reduction of morality to mere categories of positive customary and statute law.[123]

The Crusading Religious/Ideological Perspective and Just War Doctrine

The final cluster of thought to be examined is the Western crusading[124] religious and ideological perspective, as exemplified by such groups as contending, militant, antagonistic religious groups,[125] as well as twentieth century secular, ideological movements, such as National-Socialism[126] and Marxist-Leninist Communism.[127] While these types of diverse groups and movements have existed throughout history and are radically different in the tenets of their respective religious and ideological beliefs, they often share certain common crusading characteristics.[128] They also share certain common perspectives with respect to their interpretation of the criteria utilized in determining whether to resort to the use of armed force, as well as the way in which armed force is to be actually applied.[129]

First, irrespective of whether religiously or ideologically inspired, the crusading perspective is predicated upon a particularist, exclusionary, intolerant worldview. Sometimes this worldview is rationally-based, as with Marxist-Leninism, while, in other cases, it is non-rational, as was the case with National Socialism. Moreover, for some groups and movements, the particularist worldview can be based on what is seen as God's will, which, in turn, is seen as dominant over Divine reason.[130]

Second, both religious and secular, ideological crusading perspectives tend to sharply divide mankind into two antagonistic camps. For the religious crusaders, the two camps are often divided between believers versus non-believers, righteous versus the non-righteous, and Godly versus the ungodly. Similarly, secular ideological crusaders also adhere to this two camp dichotomy. For the Marxist-Leninists, the two camps are divided into exploiters versus the exploited, whereas for National Socialist crusaders, the world was divided into a hierarchically arranged series of racially determined groups of peoples. But, irrespective of the specific criteria used in dividing mankind, for both secular ideologues, as well as

for religious zealots, evil is personified by those who are identified as members of a particular group and who fail to believe in and act in accordance with whatever is defined as appropriate by the tenets of the respective religion or ideology.[131]

Third, adherents to the various secular and religious branches of the crusading perspective perceive themselves as having a responsibility to actively defend and promote the realization of their definition of the just order. That order is, in turn, predicated upon the tenets of their particularist worldview.[132] Finally, fourth, for many, their religiously or ideologically assigned mission is to be accomplished by a conscious, forcible, repressive, militant imposition of the crusader's values and worldview upon others within the global community against the latter's will. Hence, in their eyes, coercion is a legitimate method and armed force is seen as a legitimate coercive instrument.[133]

Thus, advocates of the religious – ideological crusading perspective see themselves as pursuing a just war. Indeed, religious and ideological crusaders hold that war on behalf of the true faith or ideology is the most just form of armed conflict, but they give their own unique interpretation to the categories of analysis that underpin just war doctrine.[134] With respect to the analytical categories governing the decision to resort to the use of armed force, for these crusading religious or ideological groups, the goal of war is to establish a lasting and permanent peace, but one that is consistent with the tenets of their particular religious or ideological worldview.[135] Authority to properly and legitimately authorize the use of armed force will, of course, depend on the secular or religious basis underpinning the particular crusading persuasion. For example, for the religious branch, religious wars are authorized by God, as interpreted through direct revelation from God, one's individual conscience, and/or a spiritual or religiously recognized secular authority. Alternatively, for the secular, ideological branch, the decision to employ armed force is sanctioned only by recognized, ideologically approved, and authorized authorities.[136]

Religious and ideological crusaders usually interpret right intent as requiring the crusaders to correctly orient their attitudes and behavior in such a way as to be in harmony with their respective religious or ideological doctrines. In terms of the decision to initiate hostilities, the motivation for that decision should be consistent with the religious or ideological tenets to which the crusading side subscribes.[137] Some, though not all, proponents of the religious crusading perspective believe that God fights on the side of the righteous and that God will give victory to the side of right.[138] From the secular ideological crusading perspective, there is often a belief that history is on their side and that, ultimately, "right" and "good," as defined by the particular ideology, will triumph.[139]

With respect to the analytical category focusing on the causes of conflict, religious and ideological crusaders emphasize the respective religious or ideological purpose of the armed conflict, – i.e., war for the true faith or ideology. Several types of wars are usually considered legitimate. First, there is general agreement concerning the legitimacy of a war in defense of the true religion or ideology, as well as the institutions that support and sustain the ideology or religion. Second, while most agree on the need for a preemptive defense against challenges that are unambiguous and imminent, there is often division of opinion

concerning preventive war. For some, merely the profession of a different religion or ideology is sufficient justification to initiate armed hostilities. For others, the difference in religion or ideology must be accompanied by a hostile mentality, whereas, others add that a hostile mentality must be backed by a capability that appears threatening or is likely to become threatening to the true faith or ideology and its adherents. Alternatively, other religious or ideological crusading advocates tend to be more cautious and reject the concept of preventive war altogether. Finally, third, there is also often a divergence of opinion concerning the legitimacy of offensive war to spread the order envisaged by the religious or ideological worldview.[140] Opinion concerning this question often can be correlated to convictions concerning the inevitability of the realization of that order, irrespective of whether individuals or groups actively and consciously take action designed to hasten the establishment of that order. For example, for many Marxist-Leninists, the historical process will inevitably culminate in the final stage of historical development due to forces inherent within society and the economy, irrespective of the efforts by individuals or groups to hasten the process.[141]

Once the decision has been made to utilize armed force, however, many religious and ideologically-motivated crusaders advocate war for objectives that tend toward an unlimited character. In extreme cases, some advocate the total eradication of the enemy's socio-political-economic system and accompanying institutions. Furthermore, for some crusaders, it can mean the total eradication of the enemy's religious or value system, as well as the physical manifestations of the adversary's culture. Finally, in the most extreme of cases, it can entail the collective extermination of the enemy people. Examples of such extreme measures would include the Spanish conquest of the New World or Nazi Germany's objectives and policies both before and during World War II.[142]

Turning to the religious and ideological crusading interpretation of the categories of analysis governing the actual employment of armed force, for many advocates of a religious or ideological perspective, there is a strong tendency to demonize the enemy's armed forces and political leadership, as well as the enemy people. Furthermore, many advocate conducting the war in an unlimited manner, devoid of mercy toward the adversary's forces, leadership, or population. This, of course, suggests that all restraints should be removed when fighting such a conflict and that all peoples and groups that are seen as infidels, reactionaries, or inferiors, depending upon the religious or ideological persuasion, deserve to be treated harshly. Indeed, many hold the view that the crueler the war is, the sooner it will be over. This viewpoint, of course, coincides with the position that the war itself is inevitably a conflict for unlimited, kill or be killed, objectives.[143] Obviously, in this context, the fate of cultural objects and properties identified as part of the enemy culture or as "belonging" to the enemy are much more likely to be indiscriminately destroyed or even consciously eradicated.[144]

Alternatively, however, some proponents of the religious or ideological crusading perspective argue for limiting the conduct of war, holding that a just war must be fought justly. Proponents of this view argue that one must be charitable to one's enemies, even one's religious or ideological adversaries. Hence, even in a

crusade, some argue that the crusaders should refrain from needless killing and destruction beyond that which is necessary to achieve victory.[145]

In summary, religious and ideological crusaders see themselves as asserting a set of values and pursuing a course of action that is, in their eyes, a just war. Their definition of morality and justice, however, is very different from the definition adhered to by theocentric natural law, classical and neo-classical just war proponents or, for that matter, any of the other groups heretofore examined. This fundamental difference of belief is, in turn, reflected in the divergence of interpretation and application of the framework of analysis used in governing and assessing the use of armed force as a instrument of policy. The result is a set of criteria that is sharply at variance with the criteria established by the proponents of classical and neo-classical just war doctrine.

Conclusion

Theocentric natural law provided its adherents with an ultimate, authoritative, universal, and timeless source and normative standard to be employed in formulating and evaluating the customs of society and the statute laws of the state. It likewise served as a dependable basis for evaluating the universally applicable customary norms and conventions of all peoples within the global community – *jus gentium*. Finally, it provided a solid foundation upon which just war doctrine was constructed. Consequently, the movement away from theocentric natural law, especially, left a void and, therefore, for many people, a new, authoritative, ultimate source of law had to be found to fill that void.

The utilitarians hoped to fill the void by referring to the individual's quest for happiness and, hence, for them, the greatest good for the greatest number became the universal normative standard. Alternatively, the Romantic, counter-Enlightenment, conservative movement rejected the Enlightenment penchant for universal, timeless laws governing human and societal affairs and, instead, argued that human relations were conditioned by countless, interconnected, rational, emotional, and instinctive conscious and subconscious factors. Moreover, they held that each society was the product of its own unique culture and socio-economic-political heritage. Hence, they stressed that any analysis of human or societal relations must take this synergistic complexity into account. Consequently, for Burkean conservatives, the customs and traditions that were unique to each community provided the standard and guide for both individual and societal conduct. For Hegel, the ideal was revealed in history. But given the uniqueness of each society's culture and values, and the accompanying rejection of the concept of universal norms and values that transcend time, proponents of the Romantic, counter-Enlightenment, conservative school of thought emphasized the difficulty of establishing and maintaining cross-cultural norms and standards, especially with respect to cross-cultural restraints on the use of armed force.

By relegating ethical norms and concepts, such as justice and goodness, to the field of philosophy, the legal positivist movement implicitly suggested that law and justice, law and right, law and goodness were not necessarily equivalent or

even necessarily compatible terms. For most positivists, the highest authority for valid law was the constitution of the sovereign state. When the properly enacted laws of the state conflicted with ethics, one must obey positive law or suffer the consequences. In short, for the legal positivists, right conduct was reduced to mere obedience to the will of those who were legitimately authorized to make the law. Therefore, although many within the legal positivist school of thought recognized as valid, endorsed, more specifically delineated, and even further developed the body of positive domestic and international humanitarian law in a manner that was and is consistent with many of the principles inherent within just war doctrine, for them the ultimate source of law remained the will of those individuals, groups, or peoples who possess sovereign authority, rather than a rationally-based natural law that emanated, in turn, from a higher, ultimate source of all law.

Finally, history has witnessed a variety of crusading ideological and religious movements that have asserted worldviews based upon values unique to their own respective ideological or religious viewpoints. While the doctrines underpinning these religious and ideological movements were diametrically opposite to the philosophical perspectives heretofore reviewed in this and previous chapters, the values inherent within the doctrines of these crusading movements did provide their adherents with what was, in their eyes, an ultimate standard of "goodness." For them, these values would serve as the normative standard by which they would determine and evaluate individual and collective conduct. Their interpretation of the categories of analysis used in the decision to resort to the use of armed force, as well as those governing its actual employment were, in turn, conditioned by these respective perspectives and values. The resulting criteria governing the use of armed force adopted by advocates of these crusading religions and ideologies, however, violated, both the spirit and specific principles embodied within the Western just war tradition.

Notes

1 The opinions, conclusions, and/or recommendations expressed or implied within this chapter are solely those of the author and do not necessarily represent the views of the Air University, the United States Air Force, the Department of Defense, or any other US government agency.
2 Sabine, 1961, pp. 599–600.
3 Sabine, 1961, p. 600; Nelson, 1982, p. 281.
4 Sabine, 1961, p. 600.
5 Rommen, 1948, pp. 110, 112; Sabine, 1961, p. 600.
6 Rommen, 1948, pp. 112–113; Sabine, 1961, p. 601; Germino, 1972, p. 175; Nelson, p. 282.
7 Rommen, 1948, pp. 112–113; Sabine, 1961, pp. 600–602, 604–605; Germino, 1972, p. 176; Nelson, 1982, pp. 281–282, 295.
8 Sabine, 1961, pp. 603–604; Nelson, 1982, p. 282.
9 Sabine, 1961, p. 604.
10 Germino, 1972, p. 237; Nelson, 1982, p. 282.
11 Sabine, 1961, p. 678; Germino, 1972, p. 235; Nelson, 1982, p. 284.

12 Sabine, 1961, p. 677; Nelson, 1982, p. 283.
13 Germino, 1972, p. 236.
14 Sabine, 1961, p. 678. See also Nelson, 1982, pp. 284–285.
15 Carr, 1946, p. 23; Germino, 1972, p. 236.
16 Sabine, 1961, pp. 676–677, 685; Germino, 1972, pp. 234–236; Nelson, pp. 283–284.
17 Carr, 1946, p. 24; Sabine, 1961, p. 696; Nelson, 1982, pp. 284, 286–287.
18 Sabine, 1961, pp. 729, 681–682, 695–696; Nelson, 1982, pp. 285, 287–289.
19 Although the thrust and many of the underpinning assumptions and tenets of classical liberal economic thought were similar to those inherent in utilitarian thought, the former developed independently from the latter. Hallowell, 1950, pp. 138–140; Sabine, 1961, pp. 686–690; Nelson, 1982, pp. 290–292.
20 Sabine, 1961, pp. 707–715; Germino, 1972, pp. 240–244, 251–252; Nelson, 1982, pp. 305–313.
21 Sabine, 1961, pp. 707–715; Germino, 1972, pp. 240–244, 251–252; Nelson, 1982, pp. 305–313.
22 Germino, 1972, p. 251.
23 Sabine, 1961, p. 715.
24 Sabine, 1961, pp. 725–727, 729, 731–732, 734; Nelson, 1982, pp. 313–317.
25 Sabine, 1961, pp. 730–732, 734.
26 Nelson, 1982, pp. 317–318. See also Sabine, 1961, pp. 728, 730, 733, 735.
27 Carr, 1946, pp. 22–36; 43–60; Doyle, 1997, pp. 230–250.
28 Gat, 1989, pp. 139–144, 153, 187.
29 Sabine, 1961, p. 606; Gat, 1989, pp. 144–146.
30 Sabine, 1961, p. 606; Gat, 1989, pp. 146–147.
31 Sabine, 1961, p. 606; Gat, 1989, pp. 147–149.
32 Gat, 1989, pp. 147–148.
33 Sabine, 1961, p. 607.
34 Commenting on Burke's role in the development of conservative thought, George Sabine wrote, "Nearly all its principles are to be found in his speeches and pamphlets: an appreciation of the complexity of the social system and of the massiveness of its customary arrangements, a respect for the wisdom of established institutions, especially religion and property, a strong sense of continuity in its historical changes and a belief in the relative impotence of individual will and reason to deflect it from its course, and a keen moral satisfaction in the loyalty that attaches its members to their stations in its various ranks" He adds, "The point is not, of course, that before Burke there was no conservatism, but it is almost true to say that there was no conservative philosophy" Sabine, 1961, p. 617. See also Nelson, 1982, pp. 261–262.
35 Germino, 1972, p. 218; Nelson, 1982, pp. 262–263.
36 Sabine, 1961, pp. 607, 613–614. In developing this thought, as well as other aspects of his approach, Burke used the terms prescription, presumption, and prejudice. Summarizing Burke's use of these terms, Dante Germino wrote, "'Prescription' had to do with rights – or privileges – which are long-established and recognized by the state." Presumption "referred to the disposition to view any long existing practice or institution as rightful and beneficial to society." Finally, prejudice meant "a settled inclination or habit of mind that prompts the individual to respond in a predictable and salutary manner to a given situation without taking the trouble to inquire into his reasons for doing so." Germino, 1972, pp. 224–225.
37 Sabine, 1961, p. 608; Germino, 1972, p. 226. Burke distinguished between tradition encompassed within a broad civilization and national tradition within the context of the larger civilization. For example, as Dante Germino summarized Burke's position,

"The English national society, then, participated in a common civilizational ethos, or cultural whole, which was the result of the interpenetration of the Judeo-Christian culture with a complex of manners and customs emanating from the Middle Ages, loosely known as 'chivalry.' This ethos of European civilization is absorbed by a kind of cultural osmosis, and becomes so inextricably a part of the minds of the people that they are unable to distinguish between what they learn from others and what they learn from their 'own meditation'" Man's "individual reason develops in the context of a collective reason that has been developed over the centuries and transmitted as a cultural legacy from generation to generation" Indeed, "one of the principle reasons he was so alarmed by the French Revolution was that to him it constituted a direct threat to the basic principles of civilization itself." Thus, "to neglect or destroy" the legacy of European civilization - "as Burke believed the French revolutionaries and Enlightenment or 'Parisian' philosophers in general had set out to do is to destroy the very environment in which the practical reason of individual men takes root and flourishes." Germino, 1972, pp. 223–224. In short, as George Sabine observed, Burke did not clearly delineate between society and the state, regarding the latter as the "guardian of all the higher interests of civilization." He, therefore, "implied that the revolutionary government in France, in overthrowing the monarchy, had become an enemy to French society and was destroying French civilization." This implication, in turn suggested that, from Burke's perspective, the state served as "the bearer of all that has the highest value for civilization." This idealization of the state distinguished Burke from Hobbes, Locke, and Bentham, but is reflected in the writings of Hegel. Sabine, 1961, pp. 607, 615–616, 618.

38 Germino, 1972, pp. 218–219; 223–224; Nelson, 1982, p. 266.

39 Sabine, 1961, p. 608.

40 Sabine, 1961, p. 607. Indeed, there was a close similarity between Rousseau and Burke, as both represented "phases of the new cult of society which was replacing the old cult of the individual." Sabine, 1961, p. 618.

41 Sabine, 1961, pp. 613–614.

42 Sabine, 1961, p. 613.

43 Sabine, 1961, p. 614.

44 Sabine, 1961, pp. 607, 612; Germino, 1972, pp. 216–218; Nelson, 1982, pp. 261–264, 279.

45 Nelson, 1982, p. 263.

46 Sabine, 1961, pp. 607, 612; Germino, 1972, pp. 216–218; Nelson, 1982, pp. 261–264, 279.

47 Sabine, 1961, pp. 608–609, 613; Germino, 1972, pp. 220; Nelson, 1982, pp. 270–271. Ironically, the liberal emphasis on the individual and his or her rights and the accompanying depreciation of associations and groupings within the community, often leads to centralization of state authority and the loss of both the individual's identity and his or her rights. Nelson, 1982, pp. 270–271.

48 Nelson, 1982, p. 265.

49 Sabine, 1961, pp. 616–617; Nelson, 1982, pp. 265–266.

50 Germino, 1972, pp. 222, 226–227; Nelson, 1982, p. 262.

51 Nelson, 1982, pp. 267–268.

52 Sabine, 1961, p. 614. ; Nelson, 1982, p. 262.

53 Sabine, 1961, pp. 607, 617–618, 652, 665; Germino, 1972, p. 227; d'Entreves, 1964, p. 75; Nelson, 1982, pp. 277–278.

54 Sabine, 1961, pp. 620–623.

55 Sabine, 1961, pp. 620–621, 627, 640–641.

56 Sabine, 1961, p. 642.
57 Sabine, 1961, pp. 640–641, 626.
58 Sabine, 1961, pp. 622, 624–629, 639–640.
59 Sabine, 1961, p. 622.
60 Sabine, 1961, pp. 630, 639, 646–647.
61 Sabine, 1961, pp. 622, 625–646, 666; d'Entreves, 1964, pp. 72–74, 100.
62 Germino, 1972, pp. 323–325, 330, 340; Sabine, pp. 632–633, 653; d'Entreves, 1964, pp. 72–73.
63 Sabine, 1961, pp. 635, 639, 646, 649–654; Germino, 1972, pp. 325, 327.
64 Sabine, 1961, pp. 635, 639, 646, 650, 655–657; Germino, 1972, p. 338.
65 Sabine, 1961, p. 639.
66 Sabine, 1961, pp. 633–635, 637, 650–651, 656–662, 665; Germino, 1972, pp. 327–330.
67 Germino, 1972, pp. 338–340.
68 Germino, 1972, p. 340.
69 Throughout his writings, Berenhorst emphasized emotion, human will, and intuition, rather than the so-called laws and principles of military science emphasized in the Enlightenment approach. Indeed, as Azar Gat has noted, Berenhorst argued that the art of war "was not based on immutable laws but was rather associated with the unknown and uncontrollable modifications of the human spirit, and operated in an environment saturated with will-power and emotions." In his view, chance, the sense of fighting spirit within the army, and the moral factors that motivate the individual soldiers were significant, even decisive factors in determining the outcome of wars. Hence, he argued that the factors that underpin war were not subject to a priori scientific formulation, and efforts along that line only tended to yield principles and rules that were artificial in nature and encouraged their indiscriminate and dogmatic application irrespective of the uniqueness of the situational context. Gat, 1989, pp. 150–155.
70 Gat, 1989, pp. 174–178.
71 Quoted in Gat. 1989, p. 178.
72 Gat, 1989, pp. 178–184.
73 Gat, 1989, p. 177.
74 Gat, 1989, p. 185.
75 Gat 1989, pp. 187–189.
76 Gat, 1989, pp. 190–198.
77 Quoted in Gat, 1989, p. 197. See also Gat, 1989, p. 212.
78 Gat, 1989, pp. 239–240, 242, 244.
79 Gat, 1989, pp. 199, 200, 203– 206, 218–219, 222–223.
80 Gat, 1989, pp. 220–221, 224.
81 Gat, 1989, p. 224.
82 Gat, 1989, pp. 219–220, 224.
83 Quoted in Gat, 1989, p. 225.
84 Gat, 1989, pp. 224–225.
85 Quoted in Gat, 1989, p. 225.
86 Quoted in Gat, 1989, p. 225.
87 Quoted in Gat, 1989, p. 225.
88 Quoted in Gat, 1989, p. 242.
89 Johnson, 1991, pp. 3–5.
90 Johnson, 1975, pp. 8–9, 12–13, 15, 21–22, 150, 208, 259; Johnson, 1991, pp. 3–6. Johnson went on to argue that medieval just war doctrine was bifurcated "into two

thematically different theories with radically divergent conceptions of what constitutes a 'just' war." His research led him to conclude that the division revolved around "two divergent reading of the received *jus ad bellum*: one that took war for religion to be the purest, holiest, most just kind of conflict imaginable, and another that consciously and completely ruled out war for religion and emphasized as just causes of war those that could be put in natural-law (mainly political) terms." Johnson, 1975, pp. 8–9, 15, 29, 150, 152, 169, 208, 259.

91 Huntington, 1996; Johnson, 1997.
92 Rommen, 1948, pp. 117, 128–129, 247–248; d'Entreves, 1964, pp. 97, 101–103; Nussbaum, 1954, pp. 101, 135, 235.
93 Rommen, 1948, p. 127; d'Entreves, 1964, p. 233.
94 d'Entreves, 1964, pp. 101, 103; Nussbaum, 1954, pp. 235–236.
95 Nussbaum, 1954, pp. 235–236.
96 Rommen, 1948, pp. 128–129, 247; d'Entreves, 1964, pp. 65, 86, 102–104; Nussbaum, 1954, p. 233.
97 Rommen, 1948, pp. 124–127; d'Entreves, 1964, p. 101.
98 Rommen, 1948, pp. 118–119, 126, 128–130, 247–248; d'Entreves, 1964, pp. 96–97, 102; Nussbaum, 1954, p. 135.
99 Rommen, 1948, pp. 128, 130.
100 Quoted in Rommen, 1948, p. 118.
101 Quoted in Rommen, p. 118.
102 Rommen, 1948, pp. 41, 51, 57–60, 62–65, 71, 82, 85–86, 119, 129; d'Entreves, 1964, pp. 68–69, 71, 76.
103 Rommen, 1948, pp. 57–59, 61, 82, 85, 119; d'Entreves, 1964, pp. 68–71.
104 Rommen, 1948, p. 59.
105 Rommen, 1948, p. 59.
106 d'Entreves, 1964, p. 68.
107 Rommen, 1948, pp. 58, 60; d'Entreves, 1964, pp. 69–71
108 Rommen, 1948, pp. 115–119; d'Entreves, 1964, pp. 98–100.
109 d'Entreves, 1964, p. 100. See also Rommen, 1948, p. 119.
110 Rommen, 1948, p. 119.
111 Rommen, 1948, pp. 60, 85–86, 138, 145, 146, 155–156, 248; d'Entreves, 1964, pp. 66–67, 103–104, 106–107, 117, 11; Nussbaum, 1954, p. 233.
112 Rommen, 1948, pp. 138, 152, 247–248; d'Entreves, 1964, pp. 90, 104.
113 Lauterpacht, 1950, pp. 75–76, 88–89, 91, 93; Hensel, 2004, pp. 35–36.
114 Rommen, 1948, pp. 116, 125, 127–128, 152, 146, 250; d'Entreves, 1964, pp. 65–66, 75, 80; Nussbaum, 1954, p. 234.
115 Rommen, 1948, pp. 125, 127–128, 152, 250; d'Entreves, 1964, pp. 80–81; Nussbaum, 1954, p. 234.
116 Nussbaum, 1954, pp. 232–234; Rommen, 1948, p. 149.
117 Nussbaum, 1954, pp. 13–16, 28, 36, 39, 80–81, 86, 88, 98, 109, 135, 145–146, 148, 165, 168, 172, 302; d'Entreves, 1964, pp. 19, 27–28, 68; Rommen, 1948, pp. 29, 68–69.
118 Nussbaum, 1954, pp. 234–235; Rommen, 1948, p. 149; d'Entreves, 1964, p. 106.
119 Lammers, 1990, p. 60; Johnson, 1991, pp. 21–22.
120 Claude and Weston, 1989, pp. 8–9; Hensel, 2004, pp. 41–43.
121 Fixdal and Smith, 1998, pp. 283–312.
122 Johnson, 1991, pp. 20–24.
123 Rommen, 1948, pp. 131–132, 146–148, 150, 156–158; d'Entreves, 1964, pp. 65, 67–68, 83, 90, 92–93, 95, 102, 104–108, 116, 119; Sabine, 1961, pp. 655–656.

124 See Bainton, 1960; Johnson, 1975. For a very useful, analytical discussion of this complex and controversial category, see Little, 1991.
125 Johnson, 1975, pp. 50–53, 81–149; Johnson, 1991, pp. 7–8; Johnson, 1997.
126 Shirer, 1960; Sabine, 1961, pp. 884–930; Bracher, 1970; Rich, 1973.
127 Hunt 1950; Meyer, 1957; Sabine, 1961, pp. 755–883; Meyer, 1963.
128 Little, 1991, p. 122.
129 Johnson, 1975, pp. 9–11, 51–53, 81–82, 104, 130–132, 150–151, 208, 259. As James Turner Johnson pointed out, however, all of the various identifiable characteristics may not be present in a particular crusading religious or ideologically inspired individual or movement. Johnson, 1975, p. 104.
130 Hunt 1950; Meyer, 1957; Shirer, 1960; Sabine, 1961, pp. 755–930; Meyer, 1963; Bracher, 1970; Rich, 1973; Johnson, 1975, pp. 22, 33, 112, 150–151.
131 Hunt 1950; Meyer, 1957; Shirer, 1960; Sabine, 1961, pp. 755–930; Meyer, 1963; Bracher, 1970; Rich, 1973; Johnson, 1975, pp. 22, 52, 112–113, 115, 132, 134, 137, 140–141.
132 Hunt 1950; Meyer, 1957; Shirer, 1960; Sabine, 1961, pp. 755–930; Meyer, 1963; Bracher, 1970; Rich, 1973; Johnson, 1975, pp. 104, 132, 140.
133 Meyer, 1957; Shirer, 1960; Sabine, 1961, pp. 755–930; Bracher, 1970; Rich, 1973; Johnson, 1975, pp. 104. 132, 140.
134 Rich, 1973; Johnson, 1975, pp. 9–11, 15–16, 22, 33, 139, 150–151, 160, 259.
135 Rich, 1973.
136 Meyer, 1957; Sabine, 1961, pp. 884–930; Johnson, 1975, pp. 53, 81–82, 97–98, 100, 104, 108, 112–113, 115, 117, 119–121, 124–125, 127, 132, 134, 137, 140; Johnson, 1991, pp. 7–8.
137 Meyer, 1957; Sabine, 1961, pp. 755–930; Johnson, 1975, pp. 15–16, 132.
138 Johnson, 1975, pp. 82, 98–99, 104, 108, 134, 137, 140; Johnson, 1991, pp. 7–8.
139 Sabine, 1961, pp. 755–883; Rich, 1973.
140 Rich, 1973; Johnson, 1975, pp. 50–53, 90–95, 101–102, 104, 108, 112, 120, 125–127, 132, 139, 140, 259.
141 Hunt 1950; Meyer, 1957; Sabine, 1961, pp. 755–930; Meyer, 1963.
142 Shirer, 1960; Bracher, 1970; Rich, 1973.
143 Shirer, 1960; Goure 1962; Werth, 1964; Salsbury, 1969; Bracher, 1970; Rich, 1973; Johnson, 1975, pp. 52, 104, 112–113, 115, 122, 128, 132, 134, 137, 140–141, 143, 145–146; Erickson, 1975; Erickson, 1983; Tung, 2001, pp. 77–83.
144 Hensel, 2005, 57–58. For a survey of examples drawn from the "Eastern Front" in World War II, see Goure 1962; Werth, 1964; Salsbury, 1969; Rich, 1973; Erickson, 1975; Erickson, 1983; Tung, 2001, pp. 77–83.
145 Johnson. 1975, pp. 102, 109, 115, 122–123, 126–127, 132–134, 137, 140–141, 143, 145.

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PART II
International Law and the Customary Principles Underpinning the Law of Armed Conflict

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Chapter 4

Preemption and Preventive War

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During the eighth year of the Peloponnesian War (431–404 BCE), an Athenian army entered neighboring Boeotia, fortified the temple of Apollo at Delium, and then returned to Attica. Pagondas of Thebes, commander-in-chief of the Boeotian forces, believed that this brash, illicit act foreshadowed future dangers and called upon his troops attack the Athenians immediately, even though they had withdrawn across the border. Potential aggressors, he argued, "think twice before they grapple with those who meet them outside their frontier and strike the first blow if opportunity offers."[1]

Pagondas' advocacy of a swift, decisive first strike against a budding threat raises timeless strategic and ethical questions about security policies based on appeals to anticipatory self-defense. Since antiquity, many advocates of "power politics" have described such security policies as a prerequisite for survival in the rough and tumble anarchy of international politics. In a classic statement of this view, the sixteenth-century Florentine political philosopher Niccolò Machiavelli insisted that princes must diligently guard against looming dangers: "foreseen they can easily be remedied, but if one waits till they are at hand, the medicine is no longer in time as the malady has become incurable."[2] Similarly, Cardinal Richelieu, the prime minister of France under King Louis XIII, maintained that "it is more important to anticipate the future than to dwell upon the present, since with enemies of the state, as with diseases, it is better to advance to the attack than to wait."[3]

Following Al Qaeda's September 11, 2001 attacks on the World Trade Center and the Pentagon, various members of the Bush administration echoed the recommendations of Pagondas, Machiavelli, Richelieu, and other advocates of *machpolitik*, when they proposed that anticipatory self-defense justified proactive uses of military force against terrorists and the states that harbored them. Old security doctrines emphasizing deterrence and containment, declared Secretary of Defense Donald Rumsfeld, had to be reassessed in the light of the attacks on New York and Washington and the possibility that the next strike might involve weapons of mass destruction (WMD). Anyone who required "perfect evidence" of hostile intent before striking a gathering threat, he asserted, was "back in the twentieth century and still thinking in pre-9/11 terms."[4] "Our approach has to aim at prevention and not merely punishment," added Deputy Defense Secretary Paul Wolfowitz.[5] Taking action after discovering the proverbial "smoking gun" was unrealistic when dealing with elusive enemies like Al Qaeda, explained then-

National Security Advisor Condoleezza Rice. Self-defense against fanatical groups bent on causing wanton destruction required taking the battle to the enemy. "We don't want the smoking gun to be a mushroom cloud."[6]

Self-Defense and the Use of Military Force

Self-defense, observed the seventeenth-century British poet John Dryden, "is Nature's eldest law."[7] Envisioned by the ancients as a natural right of individuals,[8] it has also been recognized by international legal authorities as a right of sovereign territorial states since the Peace of Westphalia (1648) gave rise to modern world system. Although few questioned the legitimacy of states using military force to preserve their national existence, scholarly disagreement remained in the aftermath of the Thirty Years' War over the range of actions that were permissible in the name of self-defense.

The treaties signed in Münster and Osnabrück that brought the Thirty Years' War to an end marked the consolidation of a normative order whose rules of behavior had been gradually accumulating since the onset of the Protestant Reformation.[9] Under the Westphalian conception of international society, states no longer were seen as subordinate parts of a vertical system headed by Church authority over both secular and religious affairs. As sovereign political entities, they possessed certain fundamental rights. First, states were independent; they could manage their domestic affairs without external interference, and they could act as free agents in foreign affairs, negotiating commercial treaties, forming military alliances, and entering into other types of agreements without the supervision of another state. Second, states were equal; they all possessed the same privileges and responsibilities, and could expect to have this code of conduct applied impartially whenever they consented to having a third party settle their quarrels. Finally, states had the right of continued existence; they could use military force in self-defense to protect themselves against aggression.

Although sovereign states have a widely recognized right to defend themselves against aggression, legal scholarship has not reached a consensus on when that right may be invoked. Traditionally, the right of self-defense was understood as allowing states recourse to force when repelling an overt armed attack. The victim of aggression could engage in individual self-defense, or it might take concerted military action with other states, regardless of whether one, some, or all of them were attacked. Whether responding individually or collectively, defenders were called upon to follow certain rules of engagement: their military actions were expected to be proportionate to the dangers faced, and they were enjoined not to sacrifice others to minimize their own risks. Self-defense was thus restricted to protection; punitive reprisals aimed at redressing injuries remained illegal.

Under customary international law, states could also take military action in anticipatory self-defense to thwart discernible impending attacks. The British, for example, defended their 1807 bombardment of Copenhagen by claiming that the danger they faced "was certain, urgent and extreme, as to create a case of urgent, paramount necessity, leaving his Majesty's ministeres no choice."[10] As expressed

by U.S. Secretary of State Daniel Webster in the 1837 *Caroline* incident, to exercise this right a state must face an "instant, overwhelming necessity … leaving no choice of means, and no moment for deliberation." Rather than requiring the defender to absorb the first blow before responding, customary law permitted states to intercept approaching attackers as well as to strike those who had taken significant, tangible steps toward launching an armed attack.[11]

Following the promulgation of the United Nations Charter, however, appeals to the Webster criteria for anticipatory self-defense became problematic. The Charter addresses self-defense in two places. First, Article 2(4) stipulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." Second, Article 51 asserts that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." One school of thought about the Charter interprets Articles 2(4) and 51 as superseding customary law, and thus limiting forcible self-defense to cases where the Security Council has not yet responded to an armed attack. A second school of thought disagrees. Highlighting the phrase "inherent right" in Article 51, it argues that pre-Charter, customary rules of self-defense continue in place. Some support for the second school can be found in the *travaux préparatoires* of the Charter,[12] and in the position taken by the International Court of Justice in the *Nicaragua* case. "Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defense and it is hard to see how this can be other than of a customary nature," reasoned the Court. "It cannot, therefore, be held that Article 51 is a provision which 'subsumes and supervenes' customary international law."

The language of the Charter, concludes legal scholar Anthony Clark Arend, "admits to two interpretations" about the permissibility of anticipatory self-defense. International practice, however, is unambiguous: states regularly claim the right to use military force in an anticipatory manner, and their claims tend to be accepted when evidence exists of a looming attack. But what if an attack is foreseeable rather than imminent? In the absence of incontrovertible proof that an armed attack is imminent, can forcible measures be justified legally or morally in order to prevent a potential aggressor from acquiring the means for launching an attack sometime in the more distant future? In order to explore these questions, let us compare the logic of preemptive versus preventive warfare.

Types of Anticipatory Self-Defense

The concept of anticipatory defense is employed in at least two different ways. Some people apply it solely to *preemptive* attacks, those in which military force is used to quell or mitigate an impending strike by an adversary. Others also apply it to *preventive* attacks, those in which military force is used to eliminate any possible

future strike, even when there is no reason to believe that aggression is planned or the capability to launch such a strike is operational. Whereas the grounds for preemption lie in evidence of a credible, imminent threat, the basis for prevention rests on the suspicion of an incipient, contingent threat.

The Logic of Preemptive Uses of Military Force

When clear, convincing evidence exists of an attack being mounted, the international community generally accepts that the victim need not wait until the perpetrators have crossed the border.[13] Not only can attacking forces be interdicted prior to entering the victim's territory, they can be neutralized by a first strike immediately before they are launched.

The Six Day War between Israel and an alliance of Egypt, Syria, Jordan, and Iraq represents a classic case of military preemption. Tensions between Israel and its Arab neighbors had been growing throughout the spring of 1967 and reached their zenith in May, when Egyptian President Gamal Abdel Nasser undertook a series of actions that raised fears in Tel Aviv of an imminent attack. Besides mobilizing his troops and cementing military ties with Syria, Jordan, and Iraq, Nasser ordered the UN Emergency Force to leave the Sinai, where it had been deployed since the 1956 Suez War as a buffer between Egypt and Israel. Furthermore, he announced a blockade of the Straits of Tiran, Israel's vital waterway to the Red Sea and Indian Ocean, and proclaimed that his goal in any future war with Israel would be the destruction of the Jewish state. Assuming that an invasion was forthcoming and survival was doubtful if the other side landed the first blow, the Israelis launched a surprise attack on June 5, which enabled them to win a decisive victory.

Of course, determining when the first use of force is warranted can be difficult. The initiator must consider the certainty of the threat, the magnitude and severity of the harm that will be suffered in the absence of preemption, the probability that preemptive military action will succeed, the costs incurred, and the gravity of the consequences that may result from taking preemptive action.[14] Reasonable people may disagree on how to weigh these factors in any given case, but the difficulty in judging when to use preemption does not mean that it is never justified. Preventive military action, however, is another matter. The question of whether to launch a first strike based on mere conjecture about what might happen someday presents national leaders with a more complex set of strategic, political, and moral challenges.

The Logic of Preventive Uses of Military Force

The temptation to attack an adversary who may present a serious threat sometime in the future can be powerful. According to experimental evidence from the field of political psychology, people appear to be sensitive to losses and gains around a reference point, which they frequently define as the current status quo.[15] Moreover, they generally overvalue losses relative to comparable gains, and seem more willing to take risks to prevent the deterioration of the status quo than

they are to take risks to improved upon the status quo. In other words, people tend to be risk-acceptant in choices regarding losses but risk-averse with respect to gains. Thus when political leaders face a potential threat to the status quo and imagine that inaction will result in a loss, the gamble of taking preventive military action becomes alluring, even though the outcome may prove injurious in the long run.

When potential threats to the status quo are vivid in the minds of national leaders, political psychologists suggest that their likelihood will be exaggerated. If they evoke dread – the fear that something abnormal and menacing will attack indiscriminately and without warning – leaders are prone to respond aggressively to prevent them from occurring.[16] It is "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself," insisted former US Secretary of State Elihu Root.[17] "When you see a rattlesnake poised to strike," counseled President Franklin Roosevelt, "you do not wait until he has struck before you crush him."[18]

Whereas the Israel's surprise attack against Egypt in 1967 was a case of military preemption, its June 1981 raid on the Osiraq nuclear reactor in Iraq illustrates the preventive use of military force. According to Israeli Prime Minister Menachem Begin, the Osiraq reactor was a threat to Israel's survival. The type of reactor Baghdad acquired, its purchase of fuel that could be used in weapons manufacturing, and the termination of inspections by the International Atomic Energy Agency provided strong circumstantial evidence that Iraq was seeking a military nuclear capability. Given the vehement hostility expressed by Iraqi leaders towards Israel, as well as the vulnerability of Israel's population centers and nuclear arsenal to a first strike, the Israelis concluded that Saddam Hussein could not be deterred; Iraq's reactor had to be destroyed before it became operational.

While some observers claim that Israel's preventive use of military force succeeded, others remain skeptical, arguing that it "is hard to determine in fact whether the strike against Osiraq retarded Iraq's nuclear progress or spurred it."[19] Disagreement over the long-term outcome of Israel's actions highlights a larger debate over the preventive uses of military force. Some critics complain that preventive use of force may strengthen the determination of the target state and elicit international condemnation. Others see preventive war as a "bottomless legal pit"[20] and worry that it gives every truculent, egoistic ruler a pretext for launching premeditated, forestalling strikes against prospective adversaries. Still others fear that any doctrine that permits preventive warfare against potential threats would have a high risk of "false positives" (incorrect predictions of future aggression by other states). [21] A major policy dilemma facing political leaders who make preventive decisions concerns the ratio of false positives to false negatives. How can false positives be reduced without increasing false negatives? How can leaders avoid launching preventive wars against states that are wrongly believed to be planning aggression without foregoing action against states that are indeed planning aggression?

The success of a preventive war hinges on the assumption that leaders can foretell what is to come. But predicting another state's future behavior is difficult

because leadership intentions are hard to discern. Information on an adversary's long-range goals may be obscured by its attempts to shroud policy planning in secrecy. Evidence on the options being considered for attaining those goals may be misinterpreted due to a carefully crafted deception campaign. Finally, signals of impending moves may be distorted by background noise.

Acknowledging these difficulties, intelligence agencies often try to predict an adversary's future behavior by evaluating its military capabilities. However, capability estimates can be misleading, especially when made over a long time horizon without reliable data on possible changes in training, command and control, maintenance, and logistics. Another drawback is divining whether projected capability enhancements are earmarked for offensive or defensive purposes. Given that military planners concentrate on their opponent's strengths and their own country's weaknesses, they can easily underestimate the vulnerabilities others feel and fail to recognize how their actions may be interpreted elsewhere. Weapons procurement by one state can provoke alarm in another, triggering round after round of countermeasures by each side, even when both have defensive motives.

In summary, national leaders who embrace security doctrines that countenance preventive warfare may set in motion processes that cause the very thing they hope to forestall. Rather than eliminating serious threats, they may engender cycles of mutual suspicion that trigger conflict escalation. Recognizing this dilemma, Otto von Bismarck is reputed to have said that adopting a preventive war doctrine is like committing suicide out of a fear of death.

Preemption and Preventive War in the Twenty-first Century

Questions regarding the efficacy and legitimacy of preemptive versus preventive military actions arose within the Bush administration shortly after the September 11 terrorist attacks on New York and Washington, DC, when its members began worrying about how to combat low-probability/high-impact threats to American national security. Especially frightening was the possibility that rogue states might help terrorist organizations obtain weapons of mass destruction. Informed by CIA Director George Tenet that Al Qaeda leaders Osama bin Laden and Ayman al-Zawahiri had recently met in Kandahar, Afghanistan with Sultan Bashiruddin Mahmood and Abdul Majid, two high-level Pakistani nuclear scientists, Vice-President Dick Cheney insisted that even if there is just a one percent chance of terrorists getting WMDs, the United States had to act as if it were a certainty. "It's not about … finding a preponderance of evidence," he asserted. "It's about our response."[22] According to Cheney, absolute proof of an adversary's capabilities and intentions should not be a precondition for American military action; it is too high a threshold in a world where warnings of a catastrophic attack would be limited and confirmation of the perpetrator's identity unattainable in operational time. "Absence of evidence," as Secretary of Defense Rumsfeld famously summarized this line of thinking, "is not evidence of absence."[23]

Simply put, Cheney and Rumsfeld were applying the so-called "precautionary principle" from the field of environmental risk analysis to national security policy.[24] Under this principle, if a threat of serious harm exists, uncertainty over the nature of the risks involved should not excuse inaction. Instead of a potential victim needing to demonstrate with absolute certainty that something is harmful, the burden of proof lies with the other side to show that its actions do not constitute a danger. Applying this logic to national security policy, the Bush administration argued that the United States did not need to demonstrate that someone possessed weapons of mass destruction that could be transferred to terrorist organizations; to forestall preventive American action, the accused state must prove that it did not have such weapons.

The Conflation of Preemption and Prevention in the Bush Doctrine

During his first campaign for the presidency, George W. Bush promised that if elected, he would be "very careful" when committing US troops abroad and would avoid using them in nation-building operations. The events of 9/11 radically changed his worldview. Gone were exhortations on the need to be humble with power. Over the next several months, through a series of speeches and interviews, the president and his foreign policy advisors sketched a new national security strategy that has since been called the "Bush Doctrine." As the president told an audience at the Greenwich, Connecticut Hyatt Regency on April 9, 2002: "We've got to secure the world and this civilization from evil people. We just have to do this. And that includes making sure that some of the world's leaders who desire to possess the world's worst weapons don't team up with faceless, Al Qaeda-type killer organizations."[25]

At its core, the Bush Doctrine contains the following propositions: (1) political extremists with potential access to weapons of mass destruction present a unique, ominous, and undeterrable threat to American security; (2) the United States draws no distinction between the extremists who use terrorist tactics and the failing and rogue states that harbor and back them; (3) by changing the regimes in failing and rogue states, the United States can significantly decrease the support given to transnational terrorist networks; (4) the United States has a legal right on the grounds of anticipatory self-defense to take "preemptive" action against these networks and their accomplices; and (5) because the United States may have to act unilaterally when it engages in "preemption," it will keep its military strength beyond challenge.

President Bush's decision to shift the emphasis of US strategy from containment and deterrence to preemption has been called "a remarkably bold departure"[26] that has moved the United States "onto grounds the country had never trod before."[27] His policy shift was formalized in the September 2002 *National Security Strategy of the United States of America*. Building on the assertion that "nations need not suffer an attack before they can lawfully take action to defend themselves,"[28] the report uses the rhetoric of preemption to justify a strategy that is actually grounded in preventive warfare. As expressed in the February 2006 *Quadrennial Defense Review Report*, the Bush administration

believes that it is critically important to take 'early, preventive measures' against irregular and catastrophic security challenges."[29] "We do not rule out the use of force before attacks occur," declares the March 2006 *National Security Strategy of the United States of America*. The country "cannot afford to stand idly by as grave dangers materialize."[30] Because shadowy terrorist networks with no fixed territory or populace to defend could not be dissuaded from using WMDs by retaliatory threats, preventive military action would be used to eliminate the unprecedented danger that they posed, even if Washington had to act unilaterally.

The 2003 Iraq War as Preventive Warfare

The Bush administration's embrace of preventive military action has roots that extend back to the earliest days of the Cold War. For example, during the late 1940s and early 1950s, many voices urged American leaders to attack the fledgling Soviet nuclear arsenal in hopes of destroying it while Washington still held a significant military advantage over Moscow.[31] If American leaders had "reason to believe that a sudden massive armed blow would, … as compared with waiting for such a blow from the enemy, save lives and goods," argued political scientist James Burnham, "then to strike such a blow, far from being morally wrong is morally obligatory."[32] A decade later, similar arguments were made about how to deal with the emerging Chinese nuclear arsenal.[33] Yet the long-term consequences of such a policy were considered so calamitous that most statesmen of that era dismissed security strategies predicated on preventive warfare as nonsense.[34] Indeed, after weighing the costs and benefits of the idea, President Dwight Eisenhower concluded that he "wouldn't even listen to anyone seriously that came in and talked about such a thing."[35]

Interest in preventive warfare reemerged in the wake of the 9/11 tragedy. "This nation will not wait to be attacked again," President Bush promised. "We will take the fight to the enemy," because "if evil is not confronted, it gains strength and audacity, and returns to strike us again."[36] In keeping with Bush's pledge, on February 5, 2003, US Secretary of State Colin L. Powell delivered a lengthy address to the United Nations Security Council, charging Iraq with a material breach of its disarmament obligations under UN Security Council Resolution 1441. American intelligence agencies, Powell claimed, had evidence that Saddam Hussein's regime possessed WMDs. After emphasizing the gravity of the threat these weapons represented, Powell reminded his audience of the Iraqi leader's ruthlessness and warned that he would "stop at nothing until something stops him."[37] If Saddam Hussein wanted to avert an American military attack, he would have to prove to the Bush administration that he did not have WMDs.

Over the next few weeks, President Bush and other members of his administration reiterated Powell's accusations. On March 17, Bush declared that Iraq possessed "some of the most lethal weapons ever devised" and threatened military action if Saddam Hussein did not leave the country within 48 hours. When Hussein failed to comply, the United States and its allies launched a series of precision air strikes and powerful ground attacks that quickly overwhelmed Iraqi defenses. Labeled "preemptive" military action by the White House, the

invasion was in reality a preventive war. Rather than representing an imminent threat, Iraq was seen as a "gathering danger," a rogue state that someday might assist Al Qaeda or other terrorist groups in acquiring WMDs that could be used against the American homeland.

Although the Bush Doctrine could have been applied to other members of the president's "axis of evil," Iraq was a more inviting target than either Iran or North Korea. An outcast state led by a brutal dictator who had violated the human rights of his country's citizens, attacked neighboring countries, and ignored numerous UN resolutions, Iraq had also been weakened by a decade of international sanctions. It presented less of a military challenge than either Iran or North Korea. In the words of Michael Gordon and Bernard Trainor, Iraq was not an imminent threat; it was "a strategic opportunity."[38] If a campaign of shock and awe could quickly oust Saddam Hussein, the United States would benefit from a powerful demonstration effect. As Secretary Powell explained: If you have a security threat "that is undeterrable by the means you have at hand, then you must deal with it. You do not wait for it to strike; you do not allow future attacks to happen before you take action." Waiting for dangers to fully materialize is waiting too long. Vigorous offensive action is necessary because it instills anxiety in one's adversaries and "increases the likelihood that they will cease activity or make mistakes and be caught."[39]

Prior to the war, Central Intelligence Agency Director George Tenet had called the evidence on Iraq's WMDs "a slam dunk case."[40] However, a government investigation headed by Charles Duelfer later discovered that Iraq's WMD capability "was essentially destroyed" during the 1991 Persian Gulf War.[41] In addition, no links between Saddam Hussein and Osama bin Laden were ever discovered.[42] Moreover, instead of being welcomed into Iraq with rice and rose petals, American and allied troops faced a difficult occupation, fighting insurgents who turned various sections of the country into "no-go" zones for those involved in Iraq's post-war reconstruction.[43] These and other problems surrounding the Bush administration's justification for the war in Iraq raise anew important questions about anticipatory self-defense, questions that were introduced centuries ago by just-war theorists. To put our analysis within the context of this tradition of ethical thought, let us consider how just-war theory interprets preemptive and preventive uses of military force.

Anticipatory Self-Defense and Just War Theory

In the years since the new Bush security strategy was unveiled, other countries have toyed with their own versions of national security doctrines that accept preventive military action. Indian External Affairs Minister Yashwant Sinha, Iranian Defense Minister Ali Shamkhani, Israeli Defense Minister Shaul Mofaz, Japanese Prime Minister Junichiro Koizumi, and Russian President Vladimir Putin all have spoken about their right to engage in anticipatory self-defense. Indeed, one observer has predicted that the world is entering an "era of preventive war."[44] Although some students of world politics see this trend as destabilizing,[45]

others expect discretionary uses of preventive military force to become widely practiced and accepted.

What does just-war theory have to say about this possibility? How do classical just-war theorists assess appeals to anticipatory self-defense? Caution should be exercised when responding to these questions because of the variety of just-war theories. The just-war tradition evolved "from interplay among churchly and secular sources of moral and legal norms, not all of which always agree and the result of which does not look exactly the same in all ages."[46] Drawing conclusions from such a diverse body of thought risks misrepresenting the position taken by any given author. Nevertheless, there are sufficient commonalities among most of these theorists to focus on the primary thrust of just-war theorizing with regard to anticipatory self-defense.

Just-war theorists who address questions about anticipatory self-defense tend to distinguish between preemption and preventive warfare. From their perspective, military preemption is legitimate under certain conditions. "It is lawful to kill a person preparing to kill another," wrote the seventeenth-century Dutch legal scholar Hugo Grotius. However, the "danger must be immediate and, as it were, at the point of happening."[47] In succeeding years, other theorists built upon Grotius' argument. James Turner Johnson summarizes the thrust of this body of thought thusly: "preemption is not inherently wrong or right, but it is extremely difficult to justify. For it to be justified, there must be a clear and present danger," not the forecast of a grave and gathering danger. In short, "there is no reason to privilege a second use of force over a first use; indeed, in some circumstances, the first use of force may be the best way to discharge the moral responsibility to protect and preserve order, justice, and peace."[48]

Unlike preemption, which is considered morally acceptable when facing an imminent danger against which defense would be impossible after suffering a first strike, classical just-war theory criticizes preventive warfare on two grounds. First, because it is impossible to see the future, it is condemned as a justification for when states may go to war. According to this *jus ad bellum* critique, misperception, fueled by faulty intelligence, can lead states to attack when their rivals have no malicious plans. It is for this reason that Grotius insisted that "the bare possibility that violence may be some day turned on us gives us the right to inflict violence on others is a doctrine repugnant to every principle of justice." It is "inadmissible," he concluded, "to take up arms in order to weaken a rising power, which if it grew too strong, might do us harm."[49]

In addition to weakening restraints on when states are allowed to use force, classical just war theorists contend that it will also weaken restraints on how they use force. If the objective of a first strike is to prevent the acquisition of WMDs, are pharmaceutical factories, university laboratories, and nuclear power plants located in population centers fair game, even when targeting them is based on suspicion and an attack would cause collateral deaths among civilians? Adhering to the longstanding *jus in bello* principle of discrimination and gauging proportionality are difficult in a preventive war. Any state acting in a discretionary, preventive manner against some hypothetical future threat must make a subjective assessment about where to strike and how much force is needed to ensure a reasonable chance

of success. Faced with uncertainties on both counts, reliance upon a worst-case analysis is likely. "It is better to be safe than sorry," so a popular cliché advises. Preventive military actions are thus subject to pressures that can erode the principle of noncombatant immunity and weaken normative restraints that rule out certain targets on the grounds that the amount of force would be excessive relative to what is known about a latent adversary's capabilities. When the initiator must estimate the magnitude of a threat that has yet to become manifest, it is hard to determine what should be exempt from attack and what qualifies as a legitimate military objective. Further complicating the strategic calculus, the devastation wrought by an unbridled first strike emanating from worst-case assumptions might outweigh whatever benefits the initiator hoped to achieve. The immediate gain from neutralizing a possible threat could be eclipsed by the protracted international rancor resulting from a disproportionate use of military might.

In conclusion, rather than condemning all uses of military force as morally wrong, just-war theorists submit that recourse to war is permissible when certain conditions are met. Just cause and right intention are two of the conditions typically identified by just-war theorists.[50] Wars fought in self-defense meet these criteria by having a morally good objective and by being waged to correct a serious transgression and re-establish peace and justice. What about cases where aggression has not yet occurred? Is anticipatory self-defense justifiable? Whereas just-war theory accepts preemption as warranted under certain circumstances, it denies the legitimacy of preventive military action. By assuming initiators can determine when military force is warranted, preventive war doctrines impugn the legal principle that no party should be the judge of its own cause and obscure the boundary between anticipatory self-defense and aggression. As the eighteenth-century Swiss legal scholar Emmerich de Vattel warned, "A Nation has the right to resist the injury another seeks to inflict upon it …. It may even anticipate the other's design, being careful, however, not to act upon vague suspicions, lest it should run the risk of becoming itself the aggressor."[51]

Notes

1 Strassler, 1996, p. 273. Pagondas won a decisive victory over the Athenians at the Battle of Delium (424 BCE).
2 Machiavelli, 1950, pp. 10–11. For an analysis of the psychological motivations for preventive action, see Renshon 2006.
3 Cardinal Richlieu,1961, p. 80.
4 Cited in Newhouse, 2003, p. 47.
5 Speech delivered in Munich, Germany on February 2, 2002, cited in Smith, 2006, p. 118.
6 Interview of Condaleezza Rice on CNN's "Late Edition with Wolf Blitzer," September 8, 2002. Similar arguments have been made by political conservatives outside of the Bush administration. For example, on July 16, 2006, former Speaker of the House Newt Gingrich told Tim Russert on "Meet the Press" that the time had come for decisive action against North Korea's ballistic missile and nuclear weapons programs. "Can we risk losing San Francisco or Seattle?" he asked. "You don't know where an

ICBM is going when it's sitting on the launchpad, and you don't know what's in that ICBM." Owing to the threat posed by weapons of mass destruction, "Either they dismantle the missile or the United States should dismantle it." Retrieved at http://www.msnbc.msn.com/id/13839698/page/3/.

7 *Absalom and Achitopel* (1681), part 1, line 458. In this regard, see *Exodus* 22:2 and the Talmudic maxim, "If someone comes to kill you, kill him first" (*Sanhedrin* 72a), which appeal to self-defense as a reason for overriding the prohibitions against taking another person's life articulated in *Genesis* 9:5–6, *Exodus* 20:13, and *Deuteronomy* 5:17.

8 Marcus Tullius Cicero, for example, described self-defense as a law "born with us" and derived from "nature herself." In his defense of Titus Annius Milo, he argued that "if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honourable." Retrieved at http://www.perseus.tufts.edu/cache/perscoll_Greco-Roman.html.

9 See Kegley and Raymond, 2002, pp. 12–50.

10 Taoka, 1978, p. 39.

11 In the Nuremberg and Tokyo Trials following World War II, both the International Military Tribunal and the International Tribunal for the Far East referred to the *Caroline* criteria in their descriptions of the customary law of anticipatory self-defense.

12 Brierly, 1963, p. 417.

13 Waldock, 1952, p. 498. As famed seventeenth-century samurai Miyamoto Musashi (1993, p. 35) explains, preemption allows a potential victim to gain victory quickly and at a lower cost than would otherwise have been the case.

14 See Bunn, 2003; Byers, 2003; Greenwood, 2003;Litwak, 2002–2003; Slocombe, 2003; and Steinberg, 2003.

15 Kahneman and Tversky 1979 and 1984. For applications to world politics, see Levy 1992, 1996, and 1997.

16 Slovic, 1987.

17 Cited in Fenwick, 1965, p. 275.

18 Radio address by Franklin Delano Roosevelt delivered on September 11, 1941, retrieved at http://www.usmm.org/fdr/rattlesnake.html. One of the earliest uses of preventive military action by the United States, writes Johnson (2007, p. 7), was President Thomas Jefferson's unsuccessful scheme to overthrow the Bashaw of Tripoli. Also see Carter and Perry, 1999.

19 Betts, 2003, p. 20. Also see McCormack, 1996.

20 Kaplan and Katzenbach, 1961, p. 213. Wood (2005, p. 83) takes a stronger position. Preventive self-defense, he insists, "has no basis in law."

21 Dershowitz, 2006, pp. 228–236. For Gray (2006, p. 601), the accidental shooting of an Iranian civilian aircraft in 1988 by the United States illustrates the hazards of anticipatory self-defense.

22 Cited in Suskind, 2006, p. 62. Also pp, 123, 168, 214.

23 Cited in Albright, 2006, p. 168.

24 See Raffensperger and Tickner, 1999.

25 Albright, 2006, p. 99.

26 Dueck, 2006, p. 159.

27 Joffe, 2006, pp. 43–44.

28 *National Security Strategy of the United States of America*, 2002, p. 15. National Security Adviser Stephen J. Hadley reiterated this theme in March 2006 during a speech at the Mayflower Hotel in Washington, DC. "We must stay on the offense," he

insisted. "Under longstanding principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy attack." Cited in United States Institute of Peace, 2006, p. 6.

29 *Quadrennial Defense Review Report*, 2006, retrieved at http://www.comw.org/qdr/qdr2006.pdf. Also see Wirtz and Russell, 2003.

30 *National Security Strategy of the United States of America*, 2006, p. 23.

31 Senior military figures who echoed these sentiments included Generals Orvil Anderson, Henry Arnold, Ely Culberton, Ira Eaker, Frank Everest, Leslie Groves, and Carl Spaatz. Following the onset of the Korean War, US Secretary of the Navy Francis Matthews suggested that the United States would be "aggressors for peace" in any preventive war against the Soviet Union. Trachenberg, 1991, p. 117.

32 Cited in Buhite and Hamel, 1990, p. 375. Writing during 1957, ten years after Burnham, political scientist Samuel Huntington asked in the *US Naval Institute Proceedings* whether there was a place for preventive war in American foreign policy. See Betts, 1982, p. 146.

33 Burr and Richelson, 2000–2001. Nor was the United States alone in contemplating preventive military actions against the People's Republic of China. According to memoirs and recent testimonies from high-ranking Soviet officials, following clashes with China along the Ussuri River in 1968, Soviet Defense Minister Andrei Grechko advocated an unrestricted first strike against Chinese nuclear facilities. Although the Politburo considered Grechko's proposal and explored several other contingency plans for a preventive war against China, it ultimately chose not to attack. Goldstein, 2006, pp. 80–83.

34 Vagts, 1956, pp. 332–334.

35 Gaddis, 1982, p. 149.

36 Speech by George W. Bush delivered at Fort Bragg, NC on June 28, 2005, retrieved at http://www.whitehouse.gov/news/releases/2005/06/print/20050628–7.html.

37 When the United States was later unable to find WMDs in Iraq, Powell conceded that some of his intelligence sources were weak. In a September 9, 2005 interview with Barbara Walters on the ABC News program "20/20," he called the incident a "blot" on his record.

38 Gordon and Trainor, 2006, p. 64. In the words of journalist Gwynne Dyer (2004, p. 121), "Iraq practically nominated itself" to become the premier target for the Bush Doctrine. Adds Paul Rogers (2006, pp. 85–86), Saddam Hussein's Iraq posed no tangible military treat.

39 Powell, 2004, p. 24. Also see Lieber, 2005, p. 148.

40 Cited in Woodward, 2002, p. 14.

41 *Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD* (September 30, 2005), retrieved at http://www.cia.gov/reports/iraq_wmd_2004.

42 *Final Report of the National Commission on Terrorist Attacks Upon the United States*, 2004, p. 66.

43 The Bush administration's problems in Iraq were complicated by a dearth of strategic thinking. According to Robert D. Blackwill, a former State Department official who became the coordinator for strategic planning on the National Security Council staff in mid-2003, the administration had aspirations but no concrete strategy. Bush's strategy, observed Bob Woodward (2006, pp. 302, 336, 490), was to express public optimism and determination, proclaiming that he would "stay the course" even if only his wife and dog supported him. For an analysis of the long-term implications of the Bush Doctrine, see Kegley and Raymond, 2007.

44 Thomas M. Nichols, remarks on June 1, 2006 in "The Moral Nation?" Forum held at St Bartholemews Church, New York City.
45 See, for example, Chan, 2005, p. 129; Amin, 2006, pp. 10, 124; and Keen, 2006, pp. 21–22.
46 Johnson 1981, p. 199. Following World War I, many analysts sought to replace the notion of *bellum justum* with that of *bellum legale*, which emphasized procedural requirements for acting against threats to international peace rather than the intrinsic justice of the cause. Some of the procedural requirements, however, were inspired by the writings of earlier just-war theorists. Gazzini 2005, p. 19.
47 Grotius, 1949, pp. 73–74.
48 Johnson, 2005, pp. 51, 121.
49 Grotius, 1949, p. 77. Pufendorf (1927), who generally accepts appeals to anticipatory self-defense, also includes fear of neighboring states as an unjust cause of war.
50 Other conditions discussed elsewhere in this volume include last resort, proportionality, legitimate authority, and reasonable chance of success.
51 Vattel, 1916, Book 2, Chapter 4, section 50. More recently, Gazzini (2005, p. 201) has concluded that preventive war "would represent a huge step backwards to the just war doctrine" insofar as this form of anticipatory self-defense "ceases to represent an exception to the general ban on the use of force and becomes the negation of the ban itself."

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Chapter 5

The Development of International Humanitarian Law and the Continued Relevance of Custom

Jean-Marie Henckaerts

Introduction

The sources of international law are set out in Article 38 of the Statute of the International Court of Justice. This provision lists international conventions, international custom and general principles of law as the main sources of international law in accordance with which the Court is to decide disputes submitted to it. It further stipulates that judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law. While international conventions – or treaties – establish rules "expressly recognized by the contesting States;" international custom is defined in Article 38 as "evidence of a general practice accepted as law." Even though Article 38 of the Statute of the International Court of Justice does not provide for a hierarchy among the main sources of international law, there seems to be a common belief that treaties are the most important source of international law. Historically, however, customary international law has often preceded treaty law and has provided a reservoir of principles and concepts on which much of the codification of treaties is based.[1]

The history of the codification of international humanitarian law, resulting in a long series of treaties with a global scope, started in 1864 with the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This is less than 150 years ago and constitutes in the big scheme of human history a rather recent development. During the centuries preceding this first codification, rules regulating warfare did exist but up until then, these rules were based mainly on tradition and custom. It is fair to say, therefore, that humanitarian law started as a body of customary rules and remained so for centuries and that its codification is a much more recent phenomenon.

The main milestones in the codification of humanitarian law include:[2]

- 1864: First Geneva Convention protecting wounded and sick soldiers;
- 1907: Hague Regulations governing the means and methods of hostilities;

- 1925: Geneva Gas Protocol;
- 1929: Two Geneva Conventions updating the protection of wounded and sick and adding rules on the treatment of prisoners of war;
- 1949: Four Geneva Conventions updating the 1929 Conventions and adding rules on the protection of civilians and on armed conflicts "not of an international character" (common Article 3);
- 1954: Hague Convention and Protocols on the protection of cultural property and two Protocols;
- 1972: Biological Weapons Convention;
- 1977: Two Protocols Additional to the 1949 Geneva Conventions updating the rules on the conduct of hostilities and on the protection of war victims and providing the first international convention specifically applicable in non-international armed conflict (Additional Protocol II);
- 1980: Convention on Certain Conventional Weapons and five Protocols dealing with certain conventional weapons (e.g. landmines, booby-traps, incendiary weapons and blinding laser weapons);
- 1993: Chemical Weapons Convention;
- 1997: Ottawa Convention banning anti-personnel landmines;
- 1998: Statute of the International Criminal Court.

Against the background of this wealth of treaty law providing a rather detailed codification of humanitarian law, one may forget that customary law actually lay at the basis of humanitarian law and continues to exist in parallel with these treaties. One of the difficulties with custom, obviously, is its proof. But this difficulty in no way diminishes the continued existence of custom, even in a highly codified field of international law such as international humanitarian law.

Impediments to the Application of International Humanitarian Treaty Law

Notwithstanding the high degree of codification of international humanitarian law, customary humanitarian law continues to be relevant because a number of impediments affect the application of treaty law in practice today. These impediments came to the forefront at the time of the conflicts in the former Yugoslavia and Rwanda in the first half of the 1990s and explain why a study on customary international humanitarian law was commissioned at that time (see *infra*).

The three main impediments to the application of humanitarian treaty law today are that (1) ratification is required for treaties to apply and not all treaties are universally ratified; (2) the characterization of an armed conflict is required prior to determining which treaty law applies, and this is not always easy; and finally but most importantly (3) treaty law governing non-international armed conflicts is still rudimentary.

The Requirement of Ratification

The first impediment, the need for treaty ratification, does not affect the application of the four Geneva Conventions of 1949 since they have been universally ratified today. Nauru was the last state to have ratified the Geneva Conventions and with the entry into force of the Geneva Conventions for Nauru on December 27, 2006, their applicability has truly become universal. The Conventions are binding on all states as a matter of treaty law, regardless of whether they are also part of customary international law.

The impediment of ratification is rather relevant for those treaties that are not universally ratified, such as the 1977 Protocols Additional to the Geneva Convention, the 1954 Hague Convention on the protection of cultural property in time of armed conflicts and its two Protocols and the 1980 Convention on Certain Conventional Weapons and its five Protocols.

For example, at the time of writing (March 1, 2007), the ratification record of some of the principal treaties of international humanitarian law was as follows:[3]

- 1949: Four Geneva Conventions – 194 parties (universal ratification);
- 1954: Hague Convention – 116 parties;
  - 1954: First Protocol – 93 parties;
  - 1999: Second Protocol – 44 parties;
- 1972: Biological Weapons Convention – 155 parties;
- 1977: Additional Protocols;
  - 1977: Additional Protocol I – 167 parties;
  - 1977: Additional Protocol II – 163 parties;
- 1980: Convention on Certain Conventional Weapons – 102 parties;
  - 1980: Protocol I – 100 parties;
  - 1980: Protocol II – 89 parties;
  - 1996: Amended Protocol II – 87 parties;
  - 1980: Protocol III – 94 parties;
  - 1995: Protocol IV – 85 parties;
  - 2003: Protocol V – 31 parties;
- 1993: Chemical Weapons Convention – 181 parties;
- 1997: Ottawa Convention – 153 parties;
- 1998: Statute of the International Criminal Court – 104 parties.

This means, for example, that although the Additional Protocols have been ratified by more than 160 states today – an impressive ratification record by any measure – an important number of states still remain outside the framework of this treaty regime. This also implies that in different conflicts, different treaty regimes apply. This situation is not satisfactory from the perspective of the legal protection of war victims.

This also has an impact on coalition warfare where the different coalition partners have not subscribed to the same treaties. In such cases, only customary humanitarian law provides a common set of rules that is applicable to all coalition

partners. Therefore, even if a state is a party to a particular treaty, it may still be relevant to know to what extent the treaty reflects customary law and is, as such, binding on coalition partners, even those which have not ratified that particular treaty.

The Need for Characterization of Armed Conflicts

The second impediment is that the characterization of an armed conflict is required in order to determine which treaty law applies. Depending on particular circumstances of an armed conflict, its characterization as international or non-international will inform the conclusion whether only common Article 3 or the entire body of Geneva Conventions applies, whether Additional Protocol I or Additional Protocol II applies and whether the grave breaches and serious violations of humanitarian law in Article 8(2)(a) and (b) of the Statute of the International Criminal Court are applicable or whether the serious violations of Article 8(2)(c) and (e) of the Statute are applicable. But the determination as to whether the conflict is international or non-international can be problematic in some cases. For example, the current conflicts going on in and around the Democratic Republic of the Congo or the conflicts in the former Yugoslavia are/were not easy to characterize as international or non-international because in reality they are/were a mix of both. In these situations, the determination of the applicable treaty law may be difficult. To the extent that it is possible to characterize the various aspects of such mixed conflicts, the overlapping application of the treaty regimes applicable to international and to non-international armed conflicts to different parties engaged in the same armed conflict creates complicated legal constructions.

Rudimentary Treaty Law Governing Non-International Armed Conflicts

The third, and by far the most important, impediment to the application of humanitarian treaty law is that it offers only a rudimentary framework for the regulation of non-international armed conflicts, in particular with respect to the conduct of hostilities. Common article 3 of the Geneva Conventions, the only provision of the Geneva Conventions that is formally applicable to non-international armed conflicts, does not as such deal with the conduct of hostilities. In addition, Additional Protocol II, applicable only if the State in question has ratified it, does not deal with the conduct of hostilities and a number of other issues in sufficient detail either. For example, unlike Additional Protocol I, Additional Protocol II does not provide for the obligation to distinguish between military objectives and civilian objects. As a result, it does not contain any protection for civilian objects in general, nor does it define civilian objects and military objectives. This is problematic in practice because even in non-international armed conflicts, armed forces (both state armed forces and armed opposition groups) will actually be required to limit their military operations to military objectives. Additional Protocol II lacks other key provisions on the conduct of hostilities as well, such

as the prohibition and definition of indiscriminate attacks and the obligation to take precautions in attack and against the effects of attack.

Detailed provisions on the conduct of hostilities can be found in Additional Protocol I but not in Additional Protocol II, even though the draft of the Protocol did contain them. In fact, the original drafts of both protocols submitted to the conference by the ICRC were very similar.[4] Even during the diplomatic conference that led to the adoption of the Additional Protocols, Committee III which worked on the draft of Protocol II accepted a substantial number of the draft provisions submitted by the ICRC, often with consensus, sometimes with minor changes. But in the last weeks of a four-year long negotiation process, many parts of the draft Protocol were simply deleted. The main reason for this was that it transpired that consensus could be reached on a simplified text only. This simplification process consisted, in particular, of removing or revising all articles that referred to the "parties to the conflict." A good example of this diplomatic maneuver is the provision on dissemination in the Additional Protocols. Whereas Additional Protocol I imposes an obligation on all "High Contracting Parties" to disseminate the Conventions and the Protocol as widely as possible;[5] Additional Protocol II summarily requires that "[t]his Protocol shall be disseminated as widely as possible" without specifying to whom this obligation is addressed.[6] At the time, States could not accept that "the parties to the conflict," including armed opposition groups, would have specific rights and obligations under international law, e.g. the obligation to disseminate humanitarian law.

This reticence was inspired mainly by the reasoning of then newly independent states that recognition of such rights and obligations and, in general, a detailed regulation of non-international armed conflicts would encourage rebellion and secession threatening their frail sovereignty. However, recognition of rights and obligations of armed opposition groups under international law predated the Protocol by at least 30 years. Indeed, common Article 3 of the Geneva Conventions already imposed obligations on "each Party to the conflict" not of an international character and even encouraged the parties to "further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention" and so went further than Additional Protocol II. Common Article 3 specifies, on the other hand, that its application "shall not affect the legal status of the Parties to the conflict" as do a number of later treaties applicable to non-international armed conflict (see *infra*).

The simplification process of Additional Protocol II has, unfortunately, left the Protocol with an awkward structure. The basic rules on the distinction between military objectives and civilian objects and their definition are missing but detailed rules on specific objects, namely objects indispensable to the survival of the civilian population, works and installations containing dangerous forces and cultural objects and places of worship, were left in the Protocol.[7] These shortcomings in treaty law have somewhat been rectified in subsequent treaties applicable to non-international armed conflicts.

The first treaty to do so was the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on May 3, 1996. Unlike the original Protocol, the amended Protocol was made applicable

to non-international armed conflicts and includes a number of basic rules on the conduct of hostilities which are to be found in Additional Protocol I but which were deleted from the simplified text of Additional Protocol II. These include in particular:

- the prohibition to attack civilian objects;[8]
- the definition of military objectives;[9]
- the definition of civilians objects;[10]
- the prohibition of indiscriminate use of weapons; [11]
- the definition of indiscriminate use of weapons;[12]
- the principle of proportionality;[13]
- the prohibition of so-called “area bombardments”;[14]
- the obligation to take all feasible precautions to protect civilians;[15]
- the obligation to give an effective advance warning, unless circumstances do not permit.[16]

Similar to common Article 3, the amended Protocol provides that its application “to parties to a conflict, which are not High Contracting Parties … shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.”[17]

Although the adoption of the Rome Statute of the International Criminal Court in 1998 constituted a giant step forward in the recognition of individual criminal responsibility for serious violations of international humanitarian law in non-international armed conflicts, it was a rather hesitant step in terms of the substantive law applicable in such conflicts. Indeed, the list of war crimes for non-international armed conflicts is considerably shorter than the list for international armed conflicts and omissions related to the conduct of hostilities include, in particular, attacks against civilian objects and attacks which cause excessive incidental injury, loss of life or damage to civilians and civilian objects.[18] This is all the more surprising since the list of war crimes in non-international armed conflicts considers it a war crime to direct attacks against installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission “as long as they are entitled to the protection given to … civilians objects under the international law of armed conflict” and, thereby, recognizes the protection of civilian objects in such conflicts.[19] It can be argued that the war crime of destruction of the property of an adversary unless such destruction be imperatively demanded by the necessities of the conflict could cover cases of attacks against civilian objects.[20] It is also remarkable that while the advance in the substantive law on non-international armed conflicts was, as explained above, first made in the area of weapons, the Statute of the International Criminal Court does not explicitly criminalize any use of prohibited weapons in non-international armed conflicts.

A year later, in 1999, the second Protocol to the Hague Convention for the protection of cultural property was made applicable to non-international armed conflicts and again contained a number of provisions on the conduct of hostilities. These include:

– the prohibition to attack civilian objects;[21]
– the definition of military objectives;[22]
– the obligation to take all feasible precautions in attack;[23]
– the obligation to give an effective advance warning whenever circumstances permit;[24] and
– the obligation to take all feasible precautions against the effects of hostilities.[25]

Finally, in December 2001, Article 1 of the Convention on Certain Conventional Weapons was modified to extend the scope of application of all then existing Protocols to non-international armed conflicts, as defined in common Article 3. As explained above, until then only Amended Protocol II applied in non-international armed conflicts. Since then, Protocols I–IV have become applicable in non-international armed conflicts for those States having ratified the amendment of Article 1. This means that the provisions in the Protocols related to the conduct of hostilities which were hitherto limited to international armed conflict became applicable in non-international armed conflict as well. These include:

– the prohibition to attack civilian objects;[26]
– the definition of military objectives;[27]
– the definition of civilian objects;[28]
– the prohibition of indiscriminate use of weapons;[29]
– the definition of indiscriminate attacks;[30]
– the principle of proportionality;[31]
– the obligation to take all feasible precautions to protect civilians;[32] and
– the obligation to give effective advance warning.[33]

It seems, therefore, that after the consolidation of many states that were newly independent in the 1970s, it was possible in the 1990s to gradually expand the scope of treaty law to non-international armed conflicts.

One notable exception is the prohibition to attack civilians which has been included *ab initio* in Additional Protocol II and in subsequent treaties.[34] Article 13 of Additional Protocol II provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack … unless and for such time as they take a direct part in hostilities." Under the Statute of the International Criminal Court, "intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part of hostilities" constitutes a war crime in non-international armed conflict.[35] Unlike Additional Protocol I,[36] however, Additional Protocol II does not contain a specific definition of the terms "civilian population" and "civilian." This is due to the fact that legal opinion concerning non-international armed conflicts is ambiguous as to whether, for purposes of the conduct of hostilities, members of armed opposition groups are considered as members of armed forces or as civilians. In particular, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such. This lack of clarity is also

reflected in treaty law. As mentioned, Additional Protocol II does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions.[37] Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.[38]

Need to Clarify the Content of Customary International Humanitarian Law

The brutal wars in the former Yugoslavia and Rwanda constituted moments of deep crisis for the credibility of international humanitarian law. The world witnessed the unfolding horrors in these conflicts but was unable to stop them and to enforce the law. One of the cardinal principles of humanitarian law – the distinction between civilians and combatants and between civilian objects and military objectives – was repeatedly and willfully violated in these conflicts and this with apparent impunity. Something had to be done. To this effect, the Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

> The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[39]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent, at which all states party to the Geneva Convention are present and have a vote, endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[40] Nearly ten years later, in 2005, after extensive research and widespread consultation of experts, this report, now referred to as the ICRC study on customary international humanitarian law, has been published.[41]

The Conference gave this mandate to the ICRC in particular in light of the rudimentary nature of treaty law governing non-international armed conflicts. Indeed, both Yugoslavia and Rwanda had ratified Additional Protocol II when their armed conflicts broke out but, as explained above, the Protocol contains many gaps. Therefore, states wanted to know to what extent these gaps had been filled by customary international law. The mandate was thus a request to the ICRC to assist states in the difficult and time-consuming task of clarifying the content of customary international law.

As requested by the Conference, the ICRC circulated the study to states and competent bodies – each office of the Legal Advisor of Foreign Affairs of all states, all national societies of the Red Cross and Red Crescent, all national humanitarian law committees and numerous international organizations received a copy. The study is meant to be a tool at the disposal of lawyers, judges and academics who in their daily work need to know the content of customary international humanitarian law. Given the difficulty in determining the content of customary international law and the time needed to collect and assess practice and opinio juris, it can be hoped that the study will be used in practice.

Practical Relevance of Customary International Humanitarian Law Today

In light of the impediments to the application of humanitarian treaty law, customary humanitarian law continues to be of practical relevance in various ways. Below are a few examples of recent reliance on customary humanitarian law and of areas of humanitarian law where customary law continues to be relevant.

Military Operations

Customary humanitarian law continues to be an important framework for the conduct of hostilities, including in very recent and current armed conflicts. This was the case, for example, during the US invasion of Afghanistan in 2001 and of Iraq in 2003 as neither Afghanistan, nor Iraq, nor the US are party to Additional Protocol I. A similar situation prevailed during the 2006 conflict between Israel and Lebanon, and particularly against Hezbollah forces, as well as during the intervention in early 2007 of Ethiopian and US forces in Somalia.

With respect to non-international armed conflict, customary humanitarian law provides an important framework in both states party to Additional Protocol II, such as Colombia, and a fortiori in those not party to Additional Protocol II, such as Sri Lanka.

In these conflicts, state armed forces and, where applicable, non-state armed groups, are bound to respect customary humanitarian law. Customary humanitarian law will be an important yardstick to be used by civil society in the states concerned, as well as by third States and international organizations in the exercise of their obligation to ensure respect for humanitarian law.

Finally, in coalition warfare, such as the current military operations of the US and its partners in Iraq and the operations of NATO member states in Afghanistan, as part of the International Security Assistance Force in Afghanistan (ISAF), customary humanitarian law represents common rules applicable to all coalition partners. This stands in contrast to treaty obligations which may vary greatly among coalition partners. Joint operations must therefore comply with those common rules, although individual partners may still have wider obligations under the respective treaties they have ratified.

Fact-Finding

Since customary international law continues to be one of the main legal frameworks in many armed conflicts, it is not surprising that fact-finding missions related thereto also operate within that framework. One example of this was the work of the International Commission of Inquiry on Darfur in 2004–2005.[42] As the Commission reviewed facts related to the conflict in Darfur at a time when Sudan was not yet a party to Additional Protocol II, customary international humanitarian law applicable in non-international armed conflicts was of particular relevance for the work of the Commission. More recent examples include the report of several special Rapporteurs of the UN Human Rights Council and the Representative of the Secretary-General on Internally Displaced Persons on their mission to Lebanon and Israel in the wake of the 2006 conflict.[43]

Judicial and Arbitration Proceedings

National judicial proceedings In many states customary international law may be invoked directly before national courts and tribunals. Such is the case in Israel where the Supreme Court has on several occasions pronounced itself on the customary nature of rules of humanitarian law.[44] More recently, it has done so with reference to the ICRC study on the subject. For example, in a judgment of December 2005 on the so-called neighbor procedure used by the Israel Defence Forces (IDF) to capture persons, the Israeli Supreme Court referred with approval to the study's findings on the customary nature of the precautions to give effective, advance warning (Rule 20) and to remove civilians from the vicinity of military objectives (Rule 24) as well as the prohibition of human shields (Rule 97).[45] Similarly, in its judgment of December 2006 on the policy of targeted killing, the Israeli Supreme Court referred with approval to the study's conclusions concerning the principle of distinction between civilians and combatants and between civilian objects and military objectives (Rules 1 and 7), the principle that civilians are protected against attack, unless and for such time as they take a direct part in hostilities (Rule 6), the prohibition of indiscriminate attacks (Rule 11) and the prohibition to cause excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (Rule 14).[46]

International judicial proceedings At the international level, the International Criminal Tribunal for the former Yugoslavia (ICTY) increasingly operates on the basis of Article 3 of its Statute which gives the Tribunal jurisdiction over "violations of the laws or customs of war." Any conviction based on Article 3 of the Statute requires proof that the crime in question is part of customary international law, lest the principle of legality be violated (*nullum crimen, nulla poena sine lege previa*).[47] For example, in *Prosecutor v. Hadžihasanović*, the Appeals Chamber of the Tribunal concluded that the prohibition of wanton destruction of cities, plunder of public or private property, attacks against cultural property, and more broadly, of attacks on civilian objects were customary norms whose

violation, including in non-international armed conflict, entails individual criminal responsibility under customary international law. In doing so, it cited practice recorded in Volume II of the ICRC study on customary humanitarian law, rather than the black-letter rules in Volume I of the study.[48] Earlier in the same case, the Appeals Chamber had to determine whether it could apply the principles of command responsibility to war crimes committed in a non-international conflict. Since Additional Protocol II is silent on the matter of command responsibility, the Appeals Chamber examined whether command responsibility applied in non-international armed conflict on the basis of customary international law and concluded that it did.[49]

Another example of reliance on customary humanitarian law can be found in the case-law of the Special Court for Sierra Leone which found that the recruitment of child soldiers was a war crime, including in non-international armed conflicts, under customary international law.[50]

International arbitration One notable example of the relevance of customary humanitarian law in arbitration proceedings is the work of the Ethiopia-Eritrea Claims Commission. This Commission was set up after the end of the armed conflict between Ethiopia and Eritrea in 2000 to:

> decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[51]

The relevance of customary humanitarian law for the work of the Commission is self-evident as neither the Geneva Conventions nor Additional Protocol I were applicable as such during the conflict as Eritrea had not ratified any of these treaties at the time. The Commission therefore decided early on that it would work on the assumption that the Geneva Conventions, as well as Additional Protocol I, represented customary international law. However, if either party to the arbitration proceedings wished to challenge these assumptions it would have the burden of proof with respect to the Geneva Conventions, whereas the Commission would have the burden of proof with respect to Additional Protocol I.[52]

Hence, in a Partial Award of December 19, 2005 relating to issues on the conduct of hostilities, the Commission confirmed the customary status of a number of provisions of Additional Protocol I.[53] The Commission concluded, for example, that it could use Article 54(2) of Additional Protocol I (concerning attacks against objects indispensable for the survival of the civilian population) to assess the legality of an aerial bombardment of a water sanitation plant near Asmara by the Ethiopian air force because that provision of Additional Protocol I reflected customary international law.[54]

Review of New Weapons, Means or Methods of Warfare

According to Article 36 of Additional Protocol I:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

This provision implies that states have to verify the legality of new weapons, means or methods of warfare, in accordance with the Protocol and with their other treaty obligations, as well as in accordance with their obligations under customary humanitarian law. That is why the guide to the legal review of new weapons, means and methods of warfare, published by the ICRC in 2006 proposed that the legal framework of rules to be applied to new weapons, means and methods of warfare, include prohibitions or restrictions on specific weapons and general prohibitions or restrictions on weapons, means and methods of warfare under customary international law.[55] In this respect, relevant prohibitions and restrictions can be found in the ICRC's study on customary international humanitarian law.[56]

Notwithstanding that it is only explicitly mentioned in Additional Protocol I, the obligation to submit new weapons, means or methods of warfare to a legal review is not only incumbent upon states party to Additional Protocol I. It seems self-evident that any state wishing to comply with its humanitarian law obligations has to proceed to such a review, for otherwise it cannot ensure respect for humanitarian law by its armed forces. Unfortunately, however, today most states, both states party to Additional Protocol I and states not party, still lack a mechanism for the legal review of new weapons, means or methods of warfare.

National Legislation

Pursuant to customary international law, states have an obligation to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.[57] In order to discharge this obligation, states will need a proper legislative framework concerning war crimes, regardless of whether or not they are party to treaties requiring the adoption of war crimes legislation, such as the Geneva Conventions and Additional Protocol I.[58]

In addition, under customary international law, states may vest universal jurisdiction in their national courts over war crimes.[59] As a result, if states do not wish to see their nationals prosecuted abroad but request their extradition to stand trial at home, they will have to show that they have proper war crimes legislation.

Finally, under the principle of complementarity, the International Criminal Court will only prosecute a suspect if the state concerned is either unable or unwilling to do so.[60] In order for a state to show that it is able to prosecute suspected war criminals, it will be required to have proper war crimes legislation. The fact that the Security Council can refer cases to the Court involving states

which are not party to the Statute of the Court implies that all States are potentially concerned by the jurisdiction of the International Criminal Court. Therefore, all states should adopt national war crimes legislation, regardless of being a party to specific treaties, including the Statute of the International Criminal Court.

Conclusion

The ever increasing codification of humanitarian law, starting in 1864, means that this part of international law is today highly codified. Nevertheless, in the big picture of the history of mankind and of warfare, this codification is still a rather recent phenomenon. Customary rules have regulated warfare for centuries prior to the first codification and continue to do so today. Impediments to the application of the wealth of existing treaty law have contributed to a "revival" of customary humanitarian law. Hence, any description or analysis of humanitarian law that does not include an important section on customary humanitarian law will be considered deficient and, in the end, of limited practical value in today's world.

Notes

1 See, e.g., Weeramantry, 2006, p. 25.
2 For a more complete overview, see http://www.icrc.org/ihl.
3 For a continuous update, see http://www.icrc.org/ihl.
4 ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Geneva, June 1973, published in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*s, Geneva, 1974–1977, Volume I.
5 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, Geneva, June 8, 1977, Article 83(1) [hereinafter Additional Protocol I].
6 See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, June 8, 1977, Article 19 [hereinafter Additional Protocol II].
7 See Additional Protocol II, *supra* note 6, Article 14 (objects indispensable to the survival of the civilian population), Article 15 (works and installations containing dangerous forces) and Article 16 (cultural objects and places of worship).
8 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, Geneva, October 10, 1980 [hereinafter CCW], Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as Amended, Geneva, May 3, 1996, Article 3(7) [hereinafter CCW, Amended Protocol II].
9 CCW, Amended Protocol II, *supra* note 8, Article 2(6).
10 CCW, Amended Protocol II, *supra* note 8, Article 2(7).
11 CCW, Amended Protocol II, *supra* note 8, Article 3(8).
12 CCW, Amended Protocol II, *supra* note 8, Article 3(8).
13 CCW, Amended Protocol II, *supra* note 8, Article 3(8)(c).
14 CCW, Amended Protocol II, *supra* note 8, Article 3(9).

15 CCW, Amended Protocol II, *supra* note 8, Article 3(10).
16 CCW, Amended Protocol II, *supra* note 8, Article 3(11).
17 CCW, Amended Protocol II, *supra* note 8, Article 1(6).
18 These violations are listed as war crimes in international, but not in non-international armed conflicts. See Statute of the International Criminal Court, Rome, July 17, 1998, Article 8(2)(b)(ii) and (iv).
19 Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(iii).
20 Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(xii)
21 Statute of the International Criminal Court, *supra* note 18, Article 6(a)(i) (a contrario).
22 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999, Article 1(f).
23 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 7 (containing a list of detailed precautionary measures very similar to those listed in Article 57(2) of Additional Protocol I).
24 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 6(d).
25 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 8 (containing a list of detailed precautionary measures very similar to those listed in Article 58(a) and (b) of Additional Protocol I).
26 CCW, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, October 10, 1980, Article 2(1) [hereinafter Protocol III].
27 CCW, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Geneva, October 10, 1980, Article 2(4) [hereinafter Protocol II] and Protocol III, *supra* note 26, Article 1(3)
28 CCW, Protocol II, *supra* note 27, Article 2(5) and CCW, Protocol III, *supra* note 26, Article 1(4)
29 CCW, Protocol II, *supra* note 27, Article 3(3).
30 CCW, Protocol II, *supra* note 27, Article 3(3)(a)–(c).
31 CCW, Protocol II, *supra* note 27, Article 3(3)(c).
32 CCW, Protocol II, *supra* note 27, Article 3(4); CCW, Protocol III, *supra* note 26, Article 2(3) and CCW, Protocol on Explosive Remnants of War, Geneva, November 28, 2003, Articles 3–5.
33 CCW, Protocol II, *supra* note 27, Articles 4(2)(b) and 5(2) .
34 Additional Protocol II, *supra* note 6, Article 13; CCW, Protocol II, *supra* note 27, Article 3(2); CCW, Amended Protocol II, *supra* note 8, Article 3(7); CCW Protocol III, *supra* note 26, Article 2(1) and Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i).
35 Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i).
36 See Additional Protocol I, *supra* note 5, Article 50.
37 Additional Protocol II, *supra* note 6, Articles 13–15 and 17–18.
38 See, e.g., CCW, Amended Protocol II, *supra* note 8, Article 3(7)–(11); CCW, Protocol III, *supra* note 26, Article 2; Convention on the Prohibition of Anti-personnel Mines, Ottawa, September 18, 1997, preamble; Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i), (iii) and (viii).
39 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, January 23–27, 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

40 26th International Conference of the Red Cross and Red Crescent, Geneva, December 3–7, 1995, Resolution 1, International Humanitarian Law: From Law to Action; Report on the Follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p. 58.

41 Henckaerts and Doswald-Beck, 2005.

42 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, January 25, 2005.

43 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel (September 7–14, 2006), UN Doc. A/HRC/2/7, October 2, 2006, para. 22 and following.

44 See, e.g., Israel, The Supreme Court Sitting as the High Court of Justice, *Affo and others v. Commander of the IDF in the West Bank*, December 10, 1988, HCJ 785/87, HCJ 845/87, HCJ 27/88, 29 ILM 139 (1990) (concerning the customary nature of Article 49 of the Fourth Geneva Convention).

45 Israel, The Supreme Court Sitting as the High Court of Justice, *Adalah and others v. GOC Central Command, IDF and others*, June 23, 2005, HCJ 3799/02, paras 20, 21 and 24.

46 Israel, The Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel and others v. The Government of Israel and others*, December 13, 2006, HCJ 769/02, paras 23, 29–30 and 41–42; see also references to the commentary of the Study in paras 33–34 and 40 and 46.

47 See Meron, 2005, p. 817.

48 ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, March 11, 2005, paras 29–30, 38 and 45–46.

49 ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanovć and Kubura*, Decision on Command Responsibility, IT-01-47-AR72, July 16, 2003, para. 31.

50 Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), May 31, 2004.

51 Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Algiers, December 12, 2000, Article 5(1).

52 See Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, July 1, 2003, para. 41 and Partial Award, Prisoners of War, Ethiopia's Claim 4, para. 32 (concerning the Geneva Conventions); Eritrea-Ethiopia Claims Commission, Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22, April 28, 2004, para. 23 and Partial Award, Central Front, Ethiopia's Claim 2, para. 17 (concerning Additional Protocol I).

53 Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, December 19, 2005, para. 95 (finding Articles 48, 51(2), 51(4)–(5), 52, 57 and 58 of Additional Protocol I to be customary).

54 Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, December 19, 2005, paras 104–105 (finding Article 54(2) of Additional Protocol I to be customary).

55 See *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, January 2006, Revised November 2006, pp. 13–14 and 16.
56 See Henckaerts and Doswald-Beck, 2005, Rules 12–14, 44–45 and 70–86.
57 See Henckaerts and Doswald-Beck, 2005, Rule 158.
58 See First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; Additional Protocol I, Article 85.
59 See Henckaerts and Doswald-Beck, 2005, Rule 157.
60 Statute of the International Criminal Court, *supra* note 18, Article 17.

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Chapter 6

The Martens Clause and Military Necessity

Mika Nishimura Hayashi

Introduction

International humanitarian law is described as a series of rules and principles to balance the two opposing interests, namely, humanitarian concerns and military considerations. This balancing is often represented by the Martens clause and military necessity, in both practical instruments and academic writings.[1] The historical examination shows that their role and significance have not remained the same over time. Thus, the first purpose of the chapter is to determine the contemporary functions attributed to the Martens clause and military necessity, respectively, and confirm their roles in contemporary international humanitarian law. Both military necessity and the Martens clause, however, also possess highly controversial aspects. It is also a purpose of this chapter to make an enquiry into these controversial aspects and their implications.

In the first part, the period around the 1899 Peace Conference in The Hague is examined. On one hand, the Martens clause was formulated and adopted in this Conference as an integral part of the Hague Convention with Respect to the Laws and Customs of War on Land.[2] Therefore, even though the function of the Martens clause in the preamble of this Convention appeared to have raised little controversy at that point, the choice of this particular historical period for the examination of the Martens clause is justified. On the other hand, the choice of this particular historical period is also convenient for the examination of military necessity for the following reasons. First, in the preamble of the same Convention, the idea of military necessity is spelled out as a reason for this codification of the law of war: "to diminish the evils of war so far as military necessities permit." Second, the academic debate aroused by military necessity expressed in the Hague Convention supplies questions that have bearings on a contemporary examination. Third, most importantly, the highly controversial aspect of military necessity practically as an unlimited justification was a central topic of debate in this period.

In the second part, contemporary jurisprudence concerning military necessity and the Martens clause, respectively, are examined. The controversial aspect of the Martens clause appears in this part. Criticisms are addressed, and how these criticisms or challenges are tackled by international courts are examined.

Since abundant literature exists for jurisprudence of national and international trials immediately after World War II, the examination focuses on more recent jurisprudence – mainly from 1990s onwards – of international courts, mostly of the International Court of Justice (hereinafter the ICJ) and the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ICTY).

1899 Peace Conference

The Modest Origin of the Martens Clause

The historical description of the Martens clause can be brief since it did not raise any immediate problems or debate in the 1899 Peace Conference. The Martens clause in the Hague Convention provided "the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of public conscience." Because of the reference to the idea of military necessity in the same preamble, the protection professed in the Martens clause was seen to offer a counterbalance to the excess of violence to which military necessity might lead. As a result, a number of subsequent authors do describe the preamble of the Hague Convention as an expression, by way of these two terms, of the balancing of the humanitarian ideas and military considerations of the law of war.[3] The modest origin of the Martens clause, however, does not indicate that this clause was supposed to play such a counterbalancing role. Both legal literature and historical writings confirm that the Martens clause was intended to have a limited scope in a particular context,[4] and that it was not created as a carrier of general humanitarian values pitted against general excess of violence.

The clause was inserted to resolve the deadlock in a negotiation during the 1899 Peace Conference. What led to the adoption of the clause was one of the most divisive issues in the codification of the law of war in this Conference. The matter concerned the "combatant status"[5] of the local population which would take arms against invading armies. In the 1899 Peace Conference some delegations thought that such local population should not be criminally punished by the occupying power merely because they were patriotic and behaved accordingly. These were the delegations of small states, which were likely to find themselves occupied rather than in the occupying position. Military powers such as Germany and Russia naturally disagreed. As a result, instead of a clear formulation of the status and protection of such local population, all those concerned were placed under the "protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" by the Martens clause. It was clearly this question of combatant status and the two related articles of the Hague Regulations that constituted the scope of the Martens clause in its origin.[6] De Martens himself – a member of the Russian delegation and an international lawyer after whom the clause is named – does not indicate any further implications of the clause,

either.[7] He is also often portrayed by historians as a practical diplomat serving imperialist Russia rather than as a man of humanitarian vision.[8]

Military Necessity as an Unlimited Justification

In contrast, the references to military necessity in the Hague Convention immediately raised a debate about the nature of these references and the law of war at large. To understand the significance of this debate in relation to military necessity expressed in the Hague Convention, it is necessary to look into what was known as *Kriegsraison*.[9] The idea preceded the Hague Convention. Briefly put, this idea advocated that when certain means were necessary to secure the surrender of the enemy, they were justified. Though the idea nominally required the assessment of necessary means against the end sought, it easily led to the argument that "the end justifies all means." It was as if each state was given license to get rid of the rules and restrictions in the law of war when they were inconvenient in the light of the purposes they pursued. Military necessity in this sense would thus operate effectively as an unlimited justification.

The unconditional acceptance of military necessity in this sense was a plain challenge to this branch of law. Given this challenge, how the Hague Convention – with its explicit references to military necessity – theoretically operated against, or possibly supported, military necessity as an unlimited justification was a considerable concern.[10] In this regard, the Hague Convention adopted two types of explicit reference to military necessity. First, as has previously been mentioned, the preamble declared that the states were inspired by their desire to reduce "the evils of war so far as military necessities permit." Second, there was a provision in the Hague Regulations attached to the Convention[11] that explicitly referred to the idea of military necessity. Article 23(g) of the Hague Regulations stipulated that "in addition to the prohibitions provided by special Conventions, it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Neither reference appears to have been controversial *per se* in the first Peace Conference in 1899. Both were maintained in spite of the amendment of the Convention in the second Conference in 1907.

Some authors of this period saw the codification of the law of war in the Hague Conferences as an important step towards moving away from the logic of military necessity as an unlimited justification.[12] According to them, since the preamble of the Hague Convention explicitly claimed that military necessity had been taken into account in this codification, it could no longer be invoked to justify breaches of the codified rules. On the other hand, there were also authors who continued to emphasize the legitimizing role of military necessity in the Hague Convention: military necessity expressed in the preamble was a clear and general statement that when there was military necessity, violence was permitted.[13] However, from this perspective the second reference to military necessity in Article 23(g) of the Hague Regulations required an explanation. It appeared to restrict the scope of the application of military necessity to this particular provision and to strictly selected circumstances described by the provision. This would not constitute a

logical consequence of what the preamble claimed, according to this view. Thus there was an effort to stress the expression of military necessity in the preamble, which led to a contention that the seemingly restrictive Article 23(g) "would not undermine the freedom of action of belligerents in certain extreme situations."[14] There were also contentions to escape the perceived dilemma of the two types of military necessity by introducing a third type of necessity into the argument, which was to be found outside the Hague Convention. According to these, regardless of the intended effect of the preamble and of the scope and purpose of Article 23(g), necessity argument external to the Convention might still justify a violation of this and other articles.[15]

This academic debate raised by the references to military necessity in the Hague Convention had two bearings on the following examination of contemporary jurisprudence. First, those who saw a limiting effect in military necessity codified in the preamble of the Hague Convention also faced an issue that required an answer. In this vision, too, the second reference in the Hague Convention to military necessity, namely, Article 23(g) of the Hague Regulations, was problematic. It appeared to compromise the effort to exclude military necessity as an unlimited justification and possibly restore a right of completely subjective appreciation in this provision. It totally contradicted the purpose of the Convention, which was supposed to be an effort to restrain this kind of unlimited and subjective right.[16] Therefore, the reference to military necessity in Article 23(g) was criticized as a backward step. This criticism is to be repeated almost word for word by contemporary authors with respect to this type of provisions, found in abundance in subsequent treaties. This will therefore be retained as a point of reference for the examination of "Military Necessity in Treaty Provisions" below.

Second, the practical result of the views that did not see a definite limiting factor in the references to military necessity in the Hague Convention was, if not identical, very close to the argument of military necessity as an unlimited justification.[17] As with military necessity as an unlimited justification, those who subscribed to these views practically admitted that the ends justified all the means.[18] The views effectively meant that the needs of states expressed as military necessity, determined by states themselves, could remove the law of war.[19] States were ultimate masters of the law of war in this vision, in spite of the rules and restrictions imposed by the Hague Convention. The spectre of military necessity as an unlimited justification and the vision of international law in which states are ultimate masters will be revisited in the contemporary debate over the nuclear weapons. This will be discussed in the examination of "Military Necessity as a Principle" below.

Military Necessity in Contemporary Jurisprudence

Military Necessity in Treaty Provisions

Examples and criticisms Article 23(g) of the Hague Regulations, previously reviewed, is not the only example of an explicit reference to military necessity in

treaty provisions. On the contrary, the four Geneva Conventions, their Additional Protocols and other treaties[20] continue to provide military necessity in several formulations. They provide that when there is military necessity, or when there are military considerations, actions not in conformity with the obligations stipulated are nonetheless permitted. The examples are abundant and the short survey below is in no way a comprehensive one.

Concerning provisions for civilian population, a well-known example of military necessity is found in Additional Protocol I.[21] It is prohibited to attack or destroy the objects indispensable to the survival of the civilian population.[22] However, a derogation from these prohibitions is possible for a party to the conflict "in the defence of its national territory against invasion" , when this derogation within such territory under its own control is "required by imperative military necessity."[23] Well-known examples in the Fourth Geneva Convention concern the obligations in occupied territories. The population in occupied territories is not supposed to be transferred or evacuated, but this is nonetheless rendered possible when "imperative military necessity so demands."[24] Extensive destruction and appropriation of property in occupied territories are equally unlawful, except when they are rendered "absolutely necessary by military operations."[25]

Military medical establishments are protected by the First and the Second Geneva Conventions, and the civilian hospitals are protected by the Fourth Geneva Convention. However, all the relevant provisions allow exceptions under military necessity: "urgent military necessity" permits the use of the medical establishment of the armed forces for non-medical purposes;[26] if fighting occurs on board a warship, the sickbays and their equipment are placed under a similar rule of permission by "urgent military necessity;"[27] the medical units and establishments of the armed forces must be indicated by distinctive emblems, but only "in so far as military considerations permit it;"[28] there is also a similar obligation concerning civilian hospitals "in so far as military considerations permit it."[29] Concerning prisoners of war, "imperative military necessity" may be invoked to prohibit the visits carried out by protecting powers.[30] The visits to civilian internees by protecting powers may also be restricted for "reasons of imperative military necessity."[31] In a more general manner, all four Conventions provide that military necessity is a legitimate reason to restrict the activities of protecting powers.[32]

The meaning of different qualifiers included in the description of military necessity, such as "imperative" and "absolute," is not obvious. For some commentators, terms such as "imperative" in treaty provisions are superfluous, in the sense that these are inherent characteristics of military necessity in any case, no matter how it is described by the qualifiers.[33] Yet others maintain that the choice from a variety of terms cannot be completely accidental[34] and has consequences: the "addition of the adverb/adjective indicates that when military necessity is weighed, this has to be done with great care."[35] Where this great care leads to, however, is not clarified.[36] Apart from this uncertainty, most provisions leave the provided military necessity to be assessed by those in need of this justification themselves. In other words, there is no objective scrutiny of this evaluation of necessity when the provisions are implemented.[37] For example, when a state

engaged in an armed conflict decides to restrict activities of the protecting power on the basis of military necessity according to the relevant provisions, inevitably it is this state and not the protecting power who determines military necessity.[38] This is also the case in occupied territories: the occupying power is the sole administrator who is in a position to judge its own military necessity.

Because of these problematical aspects of military necessity in treaty provisions in contemporary international humanitarian law, these provisions are criticized. This criticism is indeed identical to that formulated vis-à-vis Article 23(g) of the Hague Regulations at the time of the 1899 Hague Conference: international humanitarian law tries to limit the violence, but military necessity in specific provisions reintroduces into the operation of the law what it tries to exclude;[39] the practical effect of this kind of military necessity is that the law defers to violence, in spite of the professed purpose of this body of law to do the contrary.[40]

Jurisprudence How these treaty provisions with military necessity are applied to concrete cases by courts today has to be assessed against this background. Three cases related to armed conflict in recent years dealt with one of the provisions of military necessity: Article 53 of the Fourth Geneva Convention. The article reads as follows.

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[41]

The provision was referred to by the Eritrea Ethiopia Claims Commission in one of its awards in 2004.[42] During the armed conflict between Eritrea and Ethiopia, an Ethiopian town called Zalambessa was occupied by Eritrea for approximately two years. The recapturing of this town by the Ethiopian armed forces in May 2000 revealed that "scarcely a single building remained intact."[43] Citing Article 53 of the Fourth Geneva Convention, the Commission ruled that Eritrea was liable for property destruction in this town and gave two reasons why this case could not be justified by military necessity.[44] First, Eritrea itself made no sign that it considered the situation to fall under this article and military necessity. Second, the majority of the destruction took place in the period after Ethiopia's military advances. No evidence was advanced to the effect that military operations against Ethiopia rendered the destruction in the town necessary.

In the *Armed Activities on the Territory of the Congo* case[45] in the ICJ in 2005, a claim concerning the destruction of property by an occupying power was also upheld in the light of Article 53 of the Fourth Geneva Convention. The case concerned a protracted armed conflict in the Democratic Republic of the Congo in 1990s, in which the armed forces of several neighbouring states were involved. Uganda was one of them and was the respondent in this case. The Democratic Republic of the Congo asserted that the Ugandan armed forces had destroyed villages and houses of civilians in the Eastern part of the Congolese territory. The ICJ found that Uganda was indeed an occupying power, at least in a part

of the territory in question, and that it had violated Article 53 of the Fourth Geneva Convention.[46]

In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004,[47] the Court cited Article 53 of the Fourth Geneva Convention and declared that Israel was responsible as an occupying power for its destruction of property under this article. Specifically, the Court was of the view that "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention."[48] Though the Court was well aware of the exception of military necessity that could be invoked under Article 53, it was "not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations."[49]

Assessment of jurisprudence The three cases that applied Article 53 of the Fourth Geneva Convention in recent jurisprudence call for two observations. First, they partly vindicate the criticism that highlights the ambiguity in this provision. Despite the application of Article 53, the cases do not clarify the criteria of military necessity in detail. In particular, the two cases discussed in the ICJ do not offer any clue as to the factors that led the Court to reject the consideration of military necessity of Article 53, or what would have constituted military necessity in the given situations. In neither cases was an examination of concrete property destruction carried out. One can only conjecture the reasons for this omission. In the *Armed Activities on the Territory of the Congo* case there was admittedly a reason not to explore military necessity in any detail: Uganda did not plead military necessity under this particular article, since it did not consider itself as the occupying power of the region in question.[50] In addition, the Court's examination indicated that in some cases civilians also suffered from indiscriminate shelling by the Ugandan forces.[51] Where the destruction of houses and villages was a result of indiscriminate attack, military necessity was irrelevant to the legal assessment: indiscriminate attack is prohibited absolutely.

In comparison to the *Armed Activities on the Territory of the Congo* case, the absence of explanation concerning the criteria of military necessity is more difficult to defend in the *Wall Advisory Opinion.*[52] Israel did advance various kinds of arguments related to military and security considerations. Even though this was not a contentious case brought against Israel and the Court was only responding to a request for an advisory opinion by the General Assembly, the advisory opinions customarily address the points of law raised by states in defence of their actions. This care does not appear to have been sufficiently taken in the *Wall Advisory Opinion*. The Court could have looked, for example, at the actual property destruction that took place, then could have proceeded to examine whether the location and route of the wall that produced such property destruction was absolutely needed by the Israeli army in its military operations under this article.[53] While the conclusion is likely to have been the same, such a care could have provided a better justification of the conclusion. There is also

a visible gap between the Court's laconic treatment of military necessity and its clear statement of a condition concerning state of necessity in the regime of state responsibility. Without a definite confirmation of the applicability of state of necessity to the situation in question, the Court did affirm one of the criteria in invoking state of necessity: the action taken must be "the only way for the State to safeguard an essential interest against a grave and imminent peril."[54] There is no parallel explanation concerning the criteria for military necessity of Article 53 of the Fourth Geneva Convention in the Opinion.

In the *Wall Advisory Opinion* it may also be the very fact of years of occupation by Israel that reduced the urgency of the examination of military necessity. Though the Fourth Geneva Convention ceases to apply one year after the general close of military operations, some of the provisions continue to bind the occupying power beyond that timeframe, for the duration of the occupation.[55] Article 53 is one of these provisions. Nevertheless, invoking military necessity by this provision is likely to become incrementally difficult as the time passes after the general close of military operations.[56] Consequently, this might have been one of the reasons why there was no detailed discussion of military necessity of Article 53 in the *Wall Advisory Opinion*.

The second observation concerning these cases is that the vindication of the criticism of military necessity in a treaty provision is only partial. A concern that treaty provisions with military necessity constitute an open invitation for the subjective appreciation and unlimited justification finds no support in these cases. On the contrary, the cases examined above showed that Article 53 of the Fourth Geneva Convention could hold an occupying power responsible for its violations, in spite of its criticized loophole of military necessity. The explicit possibility of justification by military necessity provided in the article did not, in these cases, mean the unconditional and unlimited acceptance of property destruction that had been carried out. Moreover, the assessment of military necessity is apparently subject to a posterior legal scrutiny, and none of the parties to the above-mentioned cases contested this point. Neither the parties nor the courts adopt the view that military necessity in a treaty provision has to remain a matter of subjective appreciation of those who might invoke it. The alleged destructive power of military necessity over international humanitarian law is not observed in these instances that applied the specific treaty provision with military necessity to concrete cases.

Military Necessity as a Principle

In contrast to the continued acceptance of military necessity provided in treaty provisions and its affirmed role in jurisprudence, military necessity as an unlimited justification is completely rejected in the contemporary literature. It is rejected because of its practical endorsement of the argument that "the end justifies all means," which contradicts the very purpose of this branch of law. Military necessity as a principle continues to be a valid principle, but today it is understood as the idea that renders the military actions legitimate *unless the actions in question are otherwise prohibited by the law of armed conflict*.[57] In

other words, military necessity as a principle of this body of law is understood as a limited justification. Understood this way, military necessity can also be described as a restraining factor of violence and not as an encouraging factor: it prohibits violence which is unnecessary.[58] It is also military necessity in this sense that serves as an underlying criterion of a series of rules and principles in international humanitarian law. It represents the side of military concerns in determining the balance between military considerations and other types of considerations when certain rules and principles are applied to concrete cases. For example, the principle of proportionality is a matter of assessing military necessity in this sense.[59] The principle that prohibits the unnecessary suffering as means and methods of warfare also involves the assessment of military necessity as a balancing factor.[60]

One case that resuscitated the spectre of military necessity as an unlimited justification was the 1996 Advisory Opinion, in which the ICJ tackled the question of the use of nuclear weapons.[61] The Opinion provides no explicit mention, let alone endorsement, of military necessity as an unlimited justification. Nonetheless, because of the notoriously ambiguous conclusion that the Court drew concerning the legality of the use of nuclear weapons, one cannot avoid discussing military necessity in this context.[62] The relevant part of the well-known conclusion of this Advisory Opinion was twofold. First, the use of nuclear weapons would generally be contrary to the principles and laws of humanitarian law. Second, however, "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[63]

Admittedly, the Court could have implied by this twofold conclusion that there may be cases where the use of nuclear weapons does not produce breaches of humanitarian law, even though "generally" it tends to.[64] However, the Court also stated that it is "in view of the current state of international law" that it is unable to decide.[65] This particular formulation leaves room to argue that the Court implied something different. One possible interpretation of this formulation is that the use of nuclear weapons is "generally" unlawful under international humanitarian law unless there is a special justification for this unlawful action. This interpretation inevitably leads to the question: what could this macabre justification be? Given the first half of the formulation of the Court, this argument of exception would have to be a valid exception in this particular branch of law, namely, international humanitarian law.[66]

Along this line, two further possibilities are debated. They both implicitly rely on the argument that "the end justifies the means," a recurrent but problematic theme of military necessity. First, a number of judges of the Court either supported, or pointed out the possibility of, the reading of this conclusion as pointing to the self-defence that would exceptionally justify the breaches of international humanitarian law.[67] If this interpretation were correct, the question would indeed be that of means and end. The correctness of the end, namely, self-defence, is used to mend the breaches of international humanitarian law in this unusual and much criticized blending of *jus ad bellum* and *jus in bello.*[68] Second, one could also argue that the justification does not purely come from the lawfulness

of self-defence, because of the special place given to "the very survival of a State" at stake in the formulation of the Court.[69] But if this were the justification for breaches of international humanitarian law by the use of nuclear weapons, one would still be left with the argument that "the end justifies the means." The end to be weighed would be the survival of the state and the means to be measured against this end would be the use of nuclear weapons. What is problematic in both interpretations is their practical admission that states are given a power to put aside the rules of international humanitarian law when they do not suit their actions with a justified end.

The purpose of the present analysis is not to determine the most satisfactory explanation of the conclusion of the Court concerning the use of nuclear weapons. In fact, all the possible implications explored above are unsatisfactory in one way or the other. The analysis is meant to provide an example where military necessity as an unlimited justification and the archaic vision of international law, in which states are masters of law, are not totally irrelevant in a contemporary context. This vision of international law glimpsed in the *Legality of Nuclear Weapons* case is discussed as that of the *Lotus* principle.[70] Whether it is called the *Lotus* principle or military necessity is not the point. What has to be realized is a tremendous tension this vision creates for international humanitarian law.

Martens Clause in Contemporary Jurisprudence

Doctrinal Background

Despite its modest origin, over time the Martens clause came to represent one of the foundational ideas of international humanitarian law. Today, it is commonly employed for matters other than combatant status, such as the protection of civilian populations or the restriction concerning new technologies, as the following examination of recent jurisprudence shows. The contemporary significance of the functions attributed to the Martens clause in jurisprudence is best understood in the light of the doctrinal debate about customary international law.

The Martens clause has also been taken from the Hague Convention and incorporated into subsequent treaties. The modern version of the Martens clause thus appears in the so-called denunciation clauses of the four Geneva Conventions.[71] It is also found in a number of treaties regulating specific weapons.[72] Additional Protocol I[73] and Additional Protocol II[74] to the Geneva Conventions have also incorporated the Martens clause. However, the formulation adopted in the two Protocols are not identical. This difference in the formulations of the Martens clause adopted in the two instruments offers a convenient introduction to the examination of this clause in recent jurisprudence. The Martens clause of Additional Protocol II omits the reference to "the principles derived from established custom." Thus, unlike the Martens clause in Additional Protocol I or any other instruments mentioned above, it just states that "in cases not covered by the law in force, the human person remains under the protection of the principles

of humanity and the dictates of the public conscience." The omission occurred because "[I]t was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field"[75] in the Diplomatic Conference that adopted the two protocols. This record is indicative of two issues for international humanitarian law arising out of the source doctrine of international law.[76] They are directly related to the ways in which the Martens clause is used by courts today.

The first doctrinal issue concerns the two-element theory of customary international law. According to this orthodox theory of customary international law, *opinio juris* and state practice are needed in its identification.[77] The requirement of state practice is that there is sufficiently constant and widespread practice that conforms to the proposed rule. Identifying customary rules according to this criterion of state practice, however, can be a difficult task in international humanitarian law for the following reasons. For one thing, as the anecdote above suggested, it is only with a very modern perspective that one is able to speak of state practice in non-international armed conflict.[78] Historically, the law of war was the law between states and was not conceived as regulations applicable to fighting between a government and rebels, or a conflict among warring factions within the same state. This is the background of the above anecdote. Moreover, if state practice for the purpose of customary law is narrowly construed as meaning the actual compliance with the proposed rule on a very constant basis, the notorious compliance record of international humanitarian law in armed conflicts in general could be an immense obstacle in the identification of customary rules.[79] For these reasons, the doctrinal requirement of state practice in the identification of customary international humanitarian law is a challenge. It is this challenge against which the Martens clause is called upon by courts.

The second doctrinal issue concerns the place of general principles in the formal sources of international law. In the formulation of the Martens clause in Additional Protocol II, the principles of humanity and the dictates of the public conscience are severed from custom. As it is, there is room to argue that this part of the expressions of the Martens clause is not customary principles. The formal sources of international law as announced by the ICJ Statute do not exclude this possibility, either. "General principles of law" are enumerated as an independent source besides treaties and customary international law.[80] But the classic understanding of this source is restrictive and has little to do with the Martens clause. In a classic doctrine, these are general principles that are shared by a majority of municipal legal systems and are mainly procedural rules of courts in practice.[81] For the purpose of the examination of the Martens clause, the more interesting view is that these general principles could encompass generic principles of law, without a reference to municipal legal systems. To distinguish them from the common rules of municipal legal systems, they can be called either simply general principles or general principles of international law.[82] As it is pointed out by many authors, the alleged general principles are frequently the principles that are in truth found in customary international law.[83] Nevertheless, general principles that derive from neither custom nor common rules of municipal law are

theoretically conceivable. One of the ways in which the Martens clause is called upon by courts today concerns this type of general principles.

The reference to the Martens clause in contemporary jurisprudence is examined below[84] according to the three functions it appears to fulfil: affirmative function; attenuating function; and dislocating function. The affirmative function designates the use of the Martens clause as a reminder of customary international law and its role. The attenuating function designates the instances where the Martens clause is called upon to change the weight attached to state practice in the two-element theory of customary international law. The dislocating function designates the instances where the Martens clause appears to dislocate customary international law as a source of obligations and replace it with general principles.

Affirmative Function: Role of Customary International Law

The first and uncontroversial function of the Martens clause in jurisprudence is an affirmation of customary international law: customary international law is applicable regardless of existence, applicability and contents of treaty instruments.

In the *Legality of Nuclear Weapons* case, the ICJ stated that the Martens clause served "as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons."[85] This was indeed an affirmation of customary international law, and an important affirmation because of the reservations to Additional Protocol I by states such as the United Kingdom and France. Both nuclear powers limit the applicability of Additional Protocol I to conventional warfare and exclude nuclear weapons from its scope by their reservations.[86] Given these known attitudes of a number of nuclear powers, the point made by the ICJ by referring to the Martens clause is clear. Regardless of the validity of these reservations, customary international humanitarian law continues to govern the matter. The Martens clause in this case is used to recall and affirm the role of customary international law, regardless of the status of treaty rules.

The affirmative function of the Martens clause is also observed in the ICTY. The function of the Martens clause in many cases of the ICTY is an affirmation of customary international law in the context of non-international armed conflict, where the defence tries to cast a doubt upon certain rules by highlighting the absence of these rules in Additional Protocol II. The response of the Trial Chamber to the defence in the *Hadžihasanović* case in 2002 is, among others, a typical use of the Martens clause for its affirmative function.[87] One of the charges in the case was that the accused, as superiors, did not punish the commission of offences by their subordinates. The defence argued that international law in 1991, at the time of the alleged omissions they were accused of, did not provide for criminal liability of superiors for omissions in non-international conflict.[88] As it is, Additional Protocol II, which is applicable to non-international armed conflict, has no provisions concerning command responsibility. In contrast, there are rules of command responsibility in Additional Protocol I,[89] which is applicable to international armed conflict. According to the defence, this contrast between the

two Protocols concerning command responsibility was a clear sign that states never intended the application of these rules to non-international conflicts.[90] In response, the Trial Chamber admitted that principles related to command responsibility are not always included in treaties.[91] However, according to the Chamber there were certain fundamental principles, even though they were not included in the treaties.[92] The Chamber went on to stress that, in that regard, the Martens clause was of fundamental importance.[93] The Martens clause served to prevent *a contrario* interpretation of silence in a treaty:[94] silence in the treaty did not result in automatic permission, because rules might exist as customary international law even in such a case. Consequently, the critical importance attached to the difference between the provisions of the two Additional Protocols by the defence, and the alleged importance of the absence of command responsibility in Additional Protocol II in determining the applicable rules, were refuted.[95] The Chamber concluded that the doctrine of command responsibility was applicable in a non-international armed conflict under customary international law in the period in question.[96]

The same affirmative function of the Martens clause was also clear in the later phase of the same *Hadžihasanović* case in 2004.[97] One of the charges was that "wanton destruction of cities, towns or villages not justified by military necessity" took place in some municipalities. The defence again argued that the charge was based on a rule applicable only in an international armed conflict. In its view, consequently, the Prosecution must either show that there was indeed an international armed conflict or that the prohibition of wanton destruction was applicable to non-international conflict, too.[98] In response, the Chamber compared Additional Protocols I and II. As in the case of command responsibility, the Chamber confirmed that only Additional Protocol I provided for a general protection of private property against wanton destruction.[99] It even confirmed that the omission in Additional Protocol II was conscious choice after the explicit discussion whether or not to insert this rule to Additional Protocol II. The reference to the Martens clause appears immediately after these confirmations.[100] Though the reference is brief, the point made by the reference in this particular context is clear: the absence of a written provision, even if a desired one, does not prevent the rule from existing in parallel in the form of customary international law. The Chamber concluded that the wanton destruction of cities during a non-international conflict was prohibited by customary international law.[101]

This affirmative function of the Martens clause is uncontroversial. The only criticism would be a stylistic one concerning the formulations of the courts, that the clause then "states the obvious and therefore pointless."[102] But nothing prevents the courts from formulating the obvious by referring to the Martens clause which has gained the iconic power to highlight the importance of customary international law.

Attenuating Function: Role of State Practice in Customary International Law

A more creative, and accordingly more controversial, function with regard to customary international law is attributed to the Martens clause by the ICTY.

It has resorted to the Martens clause to modify the weight attached to state practice in the two-element theory of customary international law. Concretely, the Martens clause is said to have an attenuating effect on the criterion of state practice, thereby enlarging the possibility of the identification of customary international law even when constant state practice is hard to demonstrate. The clearest articulation of the attenuating function was made by the Trial Chamber in the *Kupreškić* case in 2000.[103]

The Trial Chamber discussed the Martens clause in relation to the prohibition of reprisal against civilian population and objects. The reprisal against civilians is forbidden by Additional Protocol I[104] and one of the tasks of the Trial Chamber was to determine whether this prohibition was also a customary rule. The Chamber admitted that it was unable to support the rule with a widespread and constant state practice. However, it declared that this was "an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause."[105] In this way, the Trial Chamber moved on to the examination of *opinio juris* without a detailed examination of state practice and pronounced that the prohibition of reprisals against civilians was a customary rule. The Martens clause in this case attenuates one of the requirements in the formation of customary international law.[106]

Admittedly, there is no other case that professes the attenuating function of the Martens clause as articulately as the *Kupreškić* case.[107] Nonetheless, there are a number of cases where the ICTY is either unable or unwilling to discuss state practice in detail, in which the Martens clause is referred to as if it compensated for the absence of this discussion.[108] This overall tendency of the ICTY jurisprudence has provoked the criticism that "the Tribunal is painting with a fairly broad brush when it comes to the establishment of customary international law, particularly with regard to non-international conflicts."[109] The underlying difficulty is unmistakably that of the two-element theory of customary international law and its requirement of state practice. The attenuating function of the Martens clause proposed in the *Kupreškić* case is an attempt to find an answer to this difficulty, and to provide a coherent response vis-à-vis the criticism.

On one hand, the attenuating function of the Martens clause is criticized for not being supported by any precedent or confirmed by subsequent decisions. Those who refuse to accept the attenuating function of the Martens clause criticize the *Kupreškić* case that the Chamber should have looked into state practice more thoroughly.[110] On the other hand, the supporters of the attenuating function of the Martens clause highlight the need to address humanitarian needs in this branch of law even before the consideration of such needs crystallizes into custom.[111] It was perhaps unfortunate that the concrete issue dealt with in the *Kupreškić* case was the prohibition of reprisals against civilians. The affirmation of this prohibition as a customary rule proved to be extremely controversial because of the existing contrary practice: certain states explicitly and unequivocally express their position that there is no such customary prohibition.[112] The attenuating function of the Martens clause can also be controversial in the context of international criminal law as it raises the question of the principle of legality.

Dislocating Function: Role of General Principles

With regard to customary international law and the source doctrine, there is another controversial function that is arguably attributed to the Martens clause. While it is also an answer to the difficulty produced by state practice in the two-element theory, it is entirely a different type of answer, in that it proposes a departure from customary international law through the Martens clause. Since customary international law is thus dislocated, such use of the Martens clause can be called a dislocating function.

In the *Military and Paramilitary Activities in and against Nicaragua* case in 1986, common Article 3 of the Geneva Conventions was found by the ICJ to be applicable to the case as "fundamental general principles of humanitarian law."[113] There was no examination of state practice. In place of such an examination, the ICJ offered the Martens clause and "elementary considerations of humanity."[114] Similarly, in the *Legality of Nuclear Weapons* case, in identifying the principle of civilian protection and the prohibition of unnecessary suffering as principles of international humanitarian law, the ICJ omitted the examination of state practice. There was only a generic description of the wide accession to the Hague and Geneva Conventions. In place of the examination of state practice, the ICJ again offered the Martens clause[115] and "elementary considerations of humanity."[116]

Although the Martens clause is cited in place of state practice, unlike the *Kupreškić* case of the ICTY discussed above, nowhere in these cases did the ICJ suggest an attenuating function of the Martens clause. Because of the way and the location in which the Martens clause is referred to in these cases, the Martens clause looks as if it is the direct source of the identified rules. If so, the identified rules are norms that are not based on custom. The paradigm of reasoning in these cases is no longer customary international law. Customary international law as a source of obligations is dislocated by the Martens clause, and possibly by the elementary considerations of humanity, and its place is filled by general principles they themselves embody.

Those who refuse to see the dislocating function in the Martens clause in the *Nicaragua* case and continue to see the case in the paradigm of customary international law assert that "the Court should be reproached for the virtual absence of discussion of the evidence and reasons supporting this conclusion."[117] The missing discussion is that of state practice. Similarly, the way the customary principles were identified in the *Legality of Nuclear Weapons* case is sometimes questioned. What is questioned is again state practice. These views, which refuse to see the dislocating function of the Martens clause and continue to locate the reasoning of the Court in customary international law, cannot be entirely excluded. In fact, in both cases there are references to custom: in the *Nicaragua* case, the result of the discussion in question without a reference to custom did lead to the conclusion that there was a breach of obligation "under customary international law";[118] the identified principles in the *Legality of Nuclear Weapons* case were nominally described as "intransgressible principles of international customary law."[119] Thus, it is not impossible to argue that the paradigm of reasoning continued to be that of customary international law in these cases. It

is also true that the cases do not make any explicit assertion of the dislocating function of the Martens clause.

At the same time, the principles of international humanitarian law identified in these cases with the aid of the Martens clause are given such special treatment, both in terms of the requirement of state practice and the stress of the fundamental value they embody, that there is something artificial about squarely locating the reasoning in the paradigm of customary international law. The possibility that the Martens clause had a function of shifting paradigms from customary international law to that of general principles in these two cases is supported,[120] or at the very least earnestly discussed,[121] by commentators.

The proposition of the dislocating function of the Martens clause and the resulting paradigm shift to general principles is another attempt to answer the challenge resulting from the two-element theory of customary international law, that requires widespread state practice in identifying customary international humanitarian law.[122] While being an answer, the dislocating function of the Martens clause is potentially a source of a different type of tension. Customary international law is supported by consensus, even though its formation does not require unanimous and explicit consent of all states. Consensus is reflected in the custom. General principles – to which the Martens clause calls the attention – are not supported by consensus in the same way. Taken at its face value, the dislocating function of the Martens clause implies a revolutionary vision of international law diametrically opposed to the vision of law discussed under military necessity as an unlimited justification.[123] In the latter vision, states were ultimate masters and they practically had a complete control over international humanitarian law. In the vision implied by the dislocating function of the Martens clause, states lose this control completely.

Conclusion

The Martens clause and military necessity are often described as principles representing the two sides of balancing in international humanitarian law, namely, humanitarian concerns and military considerations. Both of them have valid places in contemporary international humanitarian law, and this is confirmed by contemporary jurisprudence. The valid and uncontroversial use of the Martens clause in contemporary jurisprudence is the affirmation of customary international law by this clause. The Martens clause stresses that a particular wording in treaty provisions or a particular status of the treaty does not diminish or change the applicable rules under customary international law. The valid and uncontroversial place of military necessity was observed in the application of treaty provisions with military necessity. The examined cases showed that such a provision was nonetheless subject to posterior legal scrutiny, and that it did not function as an unlimited justification.

At the same time, both of them also possess highly controversial aspects. The juxtaposition of the Martens clause and military necessity is perhaps most significant when these controversial aspects are juxtaposed, because it showed

two, completely different visions of international humanitarian law. The lingering spectre of military necessity as an unlimited justification can only make sense in a vision of international law in which states are ultimate and sole masters of law: states are not only creators of international humanitarian law but also effectively holders of a power to avoid the rules according to their convenience. Military necessity as an unlimited justification is thus a cloak to place the interests of states above everything. In contrast, the most radical proposition of the Martens clause glimpsed in the dislocating function is that there are norms that bind the states even though these norms are not supported by the consensus of states demonstrated through custom or treaties. The proposition is only possible in a vision in which states are no longer the sole creators and masters of law. The Martens clause, together with the elementary considerations of humanity, advocates that the moral and humane dimension be given a place regardless of interests of states. Neither vision of international humanitarian law has an overwhelming support of the international community today, as it is clear in the conclusion of the *Legality of Nuclear Weapons* case. The technical controversies of military necessity and of the Martens clause described in this chapter are only symptoms of these split visions, and there is no quick remedies to these technical issues without a decision on the fundamental vision.

Notes

1 UK Ministry of Defence, 2004, pp. 21–24; Bothe, 2004, pp. 633–634; Rogers, 2004, pp. 3–7; Pustogarov, 1999, p. 133; Horn, 1990, p. 168; Draper, 1973, pp. 132–133.
2 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, July 29, 1899 (hereinafter referred to as the Hague Convention).
3 Kalshoven, 2005, p. 366; de Visscher, 1917, p. 100.
4 For a concise explanation, see Cassese, 2000, pp. 193–198; Kalshoven, 2005, pp. 58–59.
5 This is not the expression used in the Hague Conference, but is a convenient term to describe the issue. See Neff, 2005, pp. 208–210; Best, 1999, p. 627; Cassese, 2000, pp. 193–198.
6 The clause is in fact immediately followed by the explanation in the same preamble "that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood."
7 de Martens, 1900, pp. 24–29.
8 Nussbaum, 1952, pp. 60–61; Fleck, 2003, pp. 22–23.
9 For the explanation of *Kriegsraison* (or *Kriegsräson*), see Nippold, 1920, pp. 35–69.
10 Strupp, 1914, pp. 3–4; Huber, 1913, pp. 362–363.
11 Regulations concerning the Laws and Customs of War on Land. The Hague, July 29, 1899 (Annex to the Hague Convention (II), hereinafter referred to as the Hague Regulations).
12 Normand and af Jochnick, 1994, pp. 63–65; de Visscher, 1917, p. 101.
13 For a summary of this side of the argument, see v. Knieriem, 1953, pp. 321–322.
14 Meurer, 1907, p. 11.

15 Strupp, 1914, pp. 7–8. Strupp denounces *Kriegsnotwendigkeit*, that more or less corresponds to military necessity as an unlimited justification discussed in this chapter, but moves on to argue that *Notstand*, which is distinguished from *Kriegsnotwendigkeit*, may justify the acts otherwise prohibited by the Hague Convention.
16 de Visscher, 1917, p. 101.
17 de Visscher, 1917, p. 98.
18 Mérignhac, 1903, p. 145.
19 Mérignhac, 1903, p. 145.
20 E.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol.
21 Protocol additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter referred to as Additional Protocol I]. See the ILC Commentary on the Articles on State Responsibility, Article 25 (Necessity), footnote 435, reproduced in Crawford, 2002, p. 186.
22 Additional Protocol I, Art. 54(2).
23 Additional Protocol I, Art. 54(5).
24 Geneva Convention relative to the Protection of Civilian Persons in Time of War [the Fourth Geneva Convention, hereinafter referred to as GCIV], Art. 49.
25 GCIV Art. 53, see *infra*.
26 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [the First Geneva Convention, hereinafter referred to as GCI], Art. 33.
27 Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea [the Second Geneva Convention, hereinafter referred to as GCII], Art. 28.
28 GCI Art. 42.
29 GCIV Art. 18.
30 Geneva Convention relative to the Treatment of Prisoners of War [the Third Geneva Convention, hereinafter referred to as GCIII], Art. 126.
31 GCIV Art. 143.
32 GCI Art. 8; GCII Art. 8; GCIII Art. 8; GCIV Art. 9.
33 Green, 2000, p. 253, footnote 3, in the discussion of Art. 62(1) of Additional Protocol I.
34 Lubell, 2005, pp. 301–302.
35 Dinstein, 2004, pp. 19–20.
36 Dinstein, 2004, p. 20.
37 Bettati, 2000, p. 53.
38 Sandoz, Swinarski and Zimmerman, 1987, p. 101.
39 Klabbers, 2005, p. 12, in the version available in the website of the Erik Castrén Institute of International Law and Human Rights, at http://www.valt.helsinki.fi/blogs/eci/ (last visited on June 19, 2006).
40 Normand and af Jochnick, 1994, p. 93.
41 The main difference between Article 23(g) of the Hague Regulations and this provision is that the relevant section of the Hague Regulations applies in cases of hostilities, whereas Article 53 of the Fourth Geneva Convention is applicable under the occupation.
42 Eritrea Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia's Claim 2 (April 28, 2004).
43 Ibid., para. 71.

44 Ibid., para. 73.
45 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), December 19, 2005, ICJ.
46 Ibid., para. 219.
47 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, July 9, 2004, ICJ [hereinafter referred to as the *Wall Advisory Opinion*].
48 Ibid., para. 132.
49 Ibid., para. 135.
50 *Armed Activities on the Territory of the Congo* case, para. 170.
51 Ibid., para. 208.
52 This omission of the detailed examination of military necessity is criticized by commentators. Kretzmer, 2005, p. 98; Imseis, 2005, pp. 109–114; Lubell, 2005, pp. 299, 304; Gross, 2006, p. 400.
53 See the Separate Opinion of Judge Buergenthal, para. 7. The Israeli High Court of Justice does this in cases such as *Beit Sourik Village Council v. The Government of Israel* (Supreme Court Sitting as the High Court of Justice, HCJ 2056/04, 30 June 2004) and *Mara'abe v. The Prime Minister of Israel* (Supreme Court Sitting as the High Court of Justice, HCJ 7957/04, June 21, 2005). Concerning the treatment of military necessity in these cases, see Orakhelashvili, 2006, pp. 136–137.
54 *Wall Advisory Opinion*, para. 140.
55 GCIV Art. 6.
56 Pictet, 1958, p. 63.
57 Among numerous studies and instruments that articulate this idea, see U.K. Ministry of Defence, 2004, pp. 20–23.
58 Gardam, 2004, p. 8; Ticehurst, 2004, p. 316; David, 2002, pp. 238–239; Bothe, 2004, p. 603. In these writings, military necessity is not juxtaposed to the Martens clause, but is placed together with the Martens clause as principles that restrain military excess in the balancing between humanitarian and military concerns.
59 Green, 2000, pp. 350–352; Jaworski, 2003, pp. 175–206. For the principle of proportionality itself, see Chapter IX.
60 Bettati, 2000, p. 53; Gardam, 2004, pp. 70–73. See also the Dissenting Opinion of Judge Higgins in the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ [hereinafter referred to as the *Legality of Nuclear Weapons* case].
61 *Legality of Nuclear Weapons* case. Though the Court was asked to determine the legality of both the use and the threat of nuclear weapons, the discussion in this chapter will be limited to the former.
62 Kohen, 1999, pp. 310–311; Müllerson, 1999, pp. 271–272; Greenwood, 1999, pp. 263–264.
63 *Legality of Nuclear Weapons* case, para. 151 (*dispositif* (2)E).
64 Greenwood, 1999, p. 264; Condorelli, 1999, p. 242.
65 *Legality of Nuclear Weapons* case, para. 151 (*dispositif* (2)E).
66 Though Kohen also discusses state of necessity and applies its conditions stipulated in the ILC Articles on State Responsibility (Kohen, 1999, pp. 306–308), it is submitted that state of necessity should be considered irrelevant. The commentary to Article 25 of the ILC Articles on State Responsibility makes it clear that state of necessity in this article is not intended to cover discussions of military necessity in humanitarian law. See the commentary to this article, para. 21, reproduced in Crawford, 2002, pp. 185–186.

67 Opinion individuelle de M. Guillaume, paras. 8–9; Dissenting Opinion of Judge Higgins, para. 29; Opinion individuelle de N. Ranjeva.
68 David, 1999, pp. 222–223. See also the explanations in Condorelli, 1999, pp. 242–245, and Greenwood, 1999, pp. 263–264, although these authors conclude that this blending of *jus ad bellum* and *jus in bello* was not intended by the Court.
69 Kohen, 1999, pp. 304–305. See also Condorelli, 1999, p. 242, who articulately rejects this view.
70 See Opinion individuelle de M. Guillaume, para. 10; Dupuy, 1999, p. 461. This is a term taken from the *S.S. Lotus* case of the Permanent Court of International Justice.
71 GCI Art. 63(4); GCII Art. 62(4); GCIII Art. 142(4); GCIV Art. 158(4).
72 See the Preamble of Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as well as the Preamble of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects.
73 Additional Protocol I, Art. 1(2).
74 Protocol additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter referred to as Additional Protocol II], Preamble.
75 Sandoz, Swinarski and Zimmerman, 1987, p. 1341.
76 The present chapter only discusses the implications for international humanitarian law. Both are examined in depth in numerous studies on the sources of international law.
77 The study of customary international humanitarian law by the ICRC also makes evaluations according to the two-element theory. See Henckaerts and Doswald-Beck, 2005, pp. xxxi–xxxix.
78 Moir, 1998, p. 350.
79 The present author examined this issue elsewhere with a focus on the inter-war period, see Hayashi, 2005, pp. 106–114.
80 ICJ Statute, Art. 38(1).
81 Kolb, 2000, pp. 45–47. See also Thirlway, 2006, p. 128.
82 Dupuy, 2006, pp. 346–351; Kolb, 2000, pp. 54–57. As Kolb points out, certain authors prefer to locate these principles outside Article 38 of the ICJ Statute (Kolb, 2000, p. 56). For the purpose of this chapter, this discussion, which is in fact that of the interpretation of Article 38, is not necessary, and therefore not pursued.
83 Thirlway, 2006, p. 128; O'Keefe, 2004, pp. 298–299.
84 Since there are quite a few cases in the ICTY that refer to the Martens clause, the examination below contains only the representative ones.
85 *Legality of Nuclear Weapons* case, para. 84. See Higgins, 2006, p. 253.
86 See the reservation text of the United Kingdom, para. a, as well as the reservation text of France, para. 2, available at http://www.icrc.ch/IHL.nsf (last visited on December 9, 2006). Though the United States is only a signatory, its attitude regarding the question of nuclear weapons and Additional Protocol I is the same as those of the United Kingdom and France.
87 *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01–47–PT (Decision on Joint Challenge to Jurisdiction, November 12, 2002) [hereinafter referred to as the *Hadžihasanović et al.* case].
88 *Hadžihasanović et al.* case, para. 9.
89 Additional Protocol I, Art. 86.
90 *Hadžihasanović et al.* case, para. 18.

91 Ibid., para. 65.
92 Ibid., para. 64.
93 Ibid., para. 64.
94 Ibid., para. 160.
95 Ibid., para. 160.
96 Ibid., para. 179.
97 *Prosecutor v. Hadžihasanović and Amir Kubura*, IT-01–47–T (Decision on Motions for Acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, September 27, 2004) [hereinafter referred to as the *Hadžihasanović and Kubura* case].
98 *Hadžihasanović and Kubura* case, para. 93.
99 Ibid., para. 98.
100 Ibid., para. 98.
101 Ibid., para. 104. See also *Prosecutor v. Hadžihasanović and Kubura*, IT-01–47–AR73.3 (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, March 11, 2005). The Appeals Chamber agreed with this part of the conclusion by the Trial Chamber (para. 30). It noted the way the Martens clause was referred to by the Trial Chamber, too (para. 17).
102 Cassese, 2000, p. 192.
103 *Prosecutor v. Kupreškić*, IT-95–16–T (Judgment, 14 January 2000) [hereinafter referred to as the *Kupreškić* case].
104 Additional Protocol I, Art. 51(6).
105 *Kupreškić* case, para. 527. In this context, *usus*, as opposed to *opinio juris*, is a synonym of state practice.
106 Cassese, 2004, pp. 160–161. The case is also known for attributing a function to the Martens clause with regard to treaty interpretations. For details, see para. 525 of the case and the commentaries on this point by various authors including Cassese, 2000.
107 For its part, the ICRC study of customary international humanitarian law cites the *Martić* case in 1996 and the *Kupreškić* case in 2000 as findings of customary rules "based largely on the imperatives of humanity or public conscience." Henckaerts and Doswald-Beck, 2005, p. 523. For the reference to the Martens clause in the *Martić* case in 1996, see 108 ILM 39–52, at 46 (1998).
108 See for example, *Prosecutor v. Furundžija*, IT-95–17/1–T (Judgment, December 10, 1998) and the way in which the prohibition of torture and the prohibition of rape were identified as customary rules stemming from the relevant rules of the Hague Regulations "read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention" (paras 137, 168).
109 Greenwood, 2004, p. 601.
110 Greenwood, 2001, p. 556.
111 Cassese, 2004, p. 161; Cassese, 2000, pp. 214–215; Meron, 2000, p. 88.
112 Kalshoven, 2003a, pp. 502–503. See also the delicate conclusion concerning the customary status of this prohibition in Henckaerts and Doswald-Beck, 2005, p. 523. The *Martić* case in 1996, *supra* note 107 – another ICTY case which identified the prohibition of reprisals against civilians as a customary rule and included a reference to the Martens clause in its reasoning – also received very vocal criticism. Kalshoven, 2003a, pp. 483–494.
113 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986, ICJ, para. 218 [hereinafter referred to as the *Nicaragua* case].
114 *Nicaragua* case, para. 218. The earlier case in which the expression was used for the first time is Corfu Channel (U.K v. Alb.), Merits, 1949, ICJ, p. 22.

115 *Legality of Nuclear Weapons* case, para. 78.
116 *Legality of Nuclear Weapons* case, para. 79.
117 Meron, 1987, p. 358.
118 *Nicaragua* case, para. 292(8). See also Meron, 2005, p. 819.
119 *Legality of Nuclear Weapons* case, para. 79.
120 Kalshoven, 2003b, articulately supports the view that the dislocating function was at work in the *Nicaragua* case. Verhoeven, 1987, pp. 1207–1208, is also convinced that relevant part of the *Nicaragua* case is about general principles and not customary rules, with an indication of the dislocating function of the Martens clause as a possible technical explanation. See also Verhoeven, 2000, p. 351. Pustogarov, 1999, p. 131, expresses a very articulate support of the dislocating function of the Martens clause in the *Legality of Nuclear Weapons* case.
121 Thirlway, 1990, pp. 9–13, sees it as possibly a reasoning based on general principles and not customary rules, but refrains from a definite conclusion. See also Koskenniemi, 2005, pp. 400–403.
122 See the explanations in Dupuy, 2006, p. 348.
123 The idea of the two visions of law and the tension between them, described in this chapter, mainly comes from Dupuy, 1999.

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Chapter 7

The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law

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> People usually think according to their inclinations, speak according to their learning and ingrained opinions, but generally act according to custom.
>
> Francis Bacon

Introduction

The principle of distinction, codified in Article 48 of Additional Protocol I to the 1949 Geneva Conventions, obliges belligerent parties to distinguish at all times between civilian persons and objects on the one hand, and combatants and military objectives on the other, to ensure that civilian persons and objects will benefit from a general protection against the effects of hostilities. This principle, which is deeply rooted in history, constitutes a fundamental pillar of international humanitarian law (IHL).

Just like any general principle, the principle of distinction is characterized by a high level of abstraction and generalization. In order to ensure the implementation of this principle, it therefore remains critical to determine what its compliance requires in concrete terms. To shed some light on this issue, the drafters of Additional Protocol I sought to codify a detailed legal regime clarifying these concrete requirements. These "rules of application" therefore could be said to simply represent a natural extension and concrete application of the general principle of distinction in particular situations.[2] Given the ontological relationship between these rules of application and the general principle, it is legitimate to consider the former as an integral part of the latter, and therefore to cover both in the present analysis on the customary nature of the principle of distinction.[3]

This study will begin with an overview of the methodological difficulties inherent in establishing the customary nature of the principle of distinction. For instance, if this principle is violated on a daily basis, how can it be said that it qualifies as a "general practice accepted as law" – the standard set out in Article 38 (b) of the Statute of the International Court of Justice for identifying a customary norm? After demonstrating that such methodological difficulties do not negate the customary nature of the principle of distinction or of most of its rules of application, we will examine the legal consequences of this conclusion in

both international and non international armed conflicts. In addition, both the practice and *opinio juris* required to find that this principle constitutes "general practice accepted as law" reveal a clear trend on the part of the international community to elevate the principle to a norm of *jus cogens.* Following a brief summary of the concrete consequences of the imperative nature of the principle, this paper will focus on one that is particularly controversial: the impact of the *jus cogens* nature of the principle of distinction on the rule prohibiting reprisals against civilian persons and objects.

The Principle of Distinction as "General Practice Accepted as Law"

Unlike domestic laws or international treaties, custom does not result from a standardized process of rule-making. Rather, it is derived from a juxtaposition of similar and regular patterns of behaviour that are dictated not only by tradition or ancestral habits, but also by a legal imperative. Therefore, custom can only be deduced from observation and analysis of previous facts (practice), to which a psychological element (*opinio juris*) is added. In short, custom represents the passing from regularity to a rule, from normality to a norm.

Practice and *opinio juris* – the two elements demanded by the traditional theory of custom – already hint, by their very nature, at the difficulty that arises in applying them to the law of armed conflict in general, and to the principle of distinction in particular. Indeed, in a domain in which violations are as frequent as they are flagrant, is there any hope that the conditions of repetition, widespread practice, and consistency – all *sine qua non* conditions for the consolidation of a customary norm – can be fulfilled? The answer to this question lies in the differentiation between two types of complementary practice: the first consists of the actions or abstentions of subjects of law who comply with a general dictate (behavioural practice); the second consists of the reactions elicited by attitudes not consonant with the general rule (diplomatic or verbal practice).[4] In other words, in order to precisely determine the customary nature of the principle of distinction, one's analysis cannot be limited to observing the conduct of the armed forces; it must also cover a broader range of factors, such as civilian, military, national, and international authorities' institutional reactions to all forms of conduct in the area of conflict.[5]

Admittedly, the formation of a customary rule requires, in principle, regularity in both these forms of practice.[6] Yet, in certain specific domains in which the law of armed conflict indisputably applies, emphasis will be placed on diplomatic (reactive) practice rather than on behavioural (creative) practice. Several reasons may be advanced to explain this focus.

- The first reason obviously stems from the profound animosity that exists between belligerents in an armed conflict, which explains (but does not justify) the high frequency and intensity of IHL violations.
- The second reason is based on the fact that information about the actual behaviour of armed forces on the battlefield is usually both difficult to obtain

and relatively unreliable.[7] It must be noted that this argument was recently disputed on the ground that copious reports, issued mainly by state structures, the press, and non-governmental organizations, cast doubt on allegations of total ignorance of military practice.[8] The main objective, however, of these reports is normally to denounce acts perpetrated in violation of legal provisions, not to cover behaviour that is consistent with the law. As a result, it is difficult to consider these reports as objective assessments of the conduct of warring parties.

- The third and final reason is that the psychological element, which must normally accompany both diplomatic and behavioural practice, is rather difficult to assess at the time the act is committed, whereas it usually emerges quite clearly from the words used to retrospectively describe the acts of armed forces in the theatre of war.

This emphasis on diplomatic practice was endorsed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its October 2, 1995 decision in the *Tadic* case:

> In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[9]

In other words, a customary rule could be based on a diplomatic reaction that systematically and unequivocally denounces all contrary practice, rather than on a finding of similar and regular behaviour. The social community's function as a critic amply suffices to counter the argument that atrocities committed (in the more or less distant past as well as in contemporary history) against civilian populations and objects prevent the principle of distinction from becoming customary.[10] In the face of repeated violations of this principle, a considerable body of emerging internal and international diplomatic practice has been unfailingly reiterating this fundamental rule, and confirming its central role in IHL.[11]

Diplomatic practice does not, however, only serve the function of confirming whether or not a customary rule exists; it can also serve to appraise variations in the content of the rule. In other words, diplomatic practice plays a role in assessing the extent to which (repeated) violations of the rule may be considered to constitute "modifying practice," leading, for example, to the emergence of new exceptions. This affirmation stems directly from the reasoning of the International Court of Justice (ICJ) in its judgment of June 27, 1986 in the case of *Military and Paramilitary Activities in and against Nicaragua*. Before applying the prohibitions to resort to force and of non-intervention – two principles that are unanimously reiterated by the international community – the judges considered the legal effect of various violations of these rules since their establishment in conventional and customary law. In this regard, the Court correctly emphasized that if a state invoked exceptions or justifications contained within the rule itself, then this would tend to confirm the existence of the norm rather than weaken it.[12] In the

alternative, the Court raised the possibility that, if a state based its behaviour on exceptions or justifications not contained within the rule at issue, then this position, if shared by other states, could lead to a modification of the rule:

> The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.[13]

Close scrutiny of practice reveals that states or armed groups almost never admit responsibility for a direct attack on the civilian population or civilian objects.[14] On the contrary, they systematically try to justify their acts by claiming that their target was in fact a military objective, or that the loss of civilian life, injury to civilians, or damages to civilian objects was merely incidental, in accordance with the principle of proportionality. These claims thus exclude the possibility of any new exception or, a fortiori, any new rule. Furthermore, in the case of unjustified (or insufficiently justified) violence affecting the civilian population and civilian objects, the diplomatic positions expressed by both belligerents and neutrals unequivocally confirm the continued existence of the principle of distinction.

The Customary Nature of the Principle of Distinction as a Factor for the Extension of Treaty Law

As already mentioned, the principle of distinction and its rules of application were last codified in Article 48 and following of Additional Protocol I. Given that this instrument, to which 167 states are parties,[15] has yet to be ratified by several large military powers,[16] it is essential to analyse the consequences of the customary nature of this norm in the context of international armed conflicts. Likewise, it is also critical to examine the customary nature of this norm in light of the embryonic state of treaty law applicable in non-international armed conflicts.

Customary Nature of the Principle of Distinction in International Armed Conflicts

The customary nature of the principle of distinction is not revolutionary in the context of international armed conflicts. Article 48 of Additional Protocol I was adopted without prompting much debate, and has since been the object of a broad consensus shared even by states that have not ratified the instrument.[17]

Establishing the customary nature of the rules that give concrete and practical expression to the general principle of distinction, however, requires a slightly more complex examination. The ICTY asserted the customary status of some of these rules through two approaches: the classical, two-element approach, combined with logical arguments such as the role of these rules in “specifying and fleshing out” the

principle itself, and states' manifest lack of contestation on the substance of these rules.[18] After carrying out an in-depth analysis of state practice, the ICRC Study on Customary International Humanitarian Law reaches the same conclusion. This Study asserts the customary nature of many derivative obligations, including the prohibition of direct attacks against civilian persons and objects (Rules 1 and 7), the prohibition of acts and threats of violence the primary purpose of which is to spread terror among the civilian population (Rule 2), the definition of military objective and civilian object (Rules 8 to 10), the prohibition of indiscriminate and disproportionate attacks (Rules 11 to 14), and the precautions in and against the effects of attacks (Rules 15 to 24).

The main difficulty encountered relates to the definition of combatants and their duty to distinguish themselves from the civilian population. Conventional rules on the matter include Article 1 of the 1907 Hague Regulations and Article 4(A)(1) to (3) and 4(A)(6) of the third 1949 Geneva Convention, which are supplemented by Articles 43 and 44 of Additional Protocol I. In fact, the adjustment brought by these last two provisions has embodied one of the main points of controversy regarding Additional Protocol I, apparently leading some states to decline ratification of this instrument. The ICRC Study has been criticized for concluding that at least parts of Articles 43 and 44 of Additional Protocol I reflect customary IHL. However, careful analysis reveals that such criticism is unjustified.

A first criticism was raised because Rule 1 of the Study states an obligation to distinguish between *combatants* and civilians, while Rule 5, which defines civilians as any persons who are not *members of the armed forces*, shifts the dichotomy from civilians/combatants to civilians/members of the armed forces.[19] However, there is no logical leap if one accepts the Commentary to Rule 1, which clearly states that "the term "combatant" in this Rule is used in its generic meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status." In other words, Rule 1 only identifies legitimate targets of attack, but it does not envisage any right to directly participate in hostilities or any entitlement to prisoner-of-war status in case of capture. Combatant and prisoner-of-war status, as well as the issue of identifying persons who are entitled to such status, are principally addressed in Part V of the Study under Chapter 33 (Rules 106–108).

Against this background, Rule 3 of the Study specifies that all members of the armed forces of a Party to the conflict (save medical and religious personnel) are combatants, thereby replicating Article 43(2) of Additional Protocol I.[20] Rule 4 then provides a definition of armed forces that is along the lines of Article 43(1) of Additional Protocol I, i.e. "all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates." It is correct that the Study retains a simplified definition of armed forces, omitting some of the criteria found in both the 1907 Hague Regulations and the third 1949 Geneva Convention, namely the obligation of the forces to distinguish themselves from the civilian population by having a fixed distinctive sign recognizable at a distance, and to carry arms openly.[21] But, the Commentary to Rule 4 clearly explains the reason for this omission, stating that "(t)he requirement of visibility

is relevant with respect to a combatant's entitlement to prisoner of war status." The Study therefore lifted this requirement from the definition of armed forces, only to include it under Rule 106, which states that: "Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have a right to prisoner-of-war status."[22] It can therefore be concluded that the Study does not alter the condition for the status of lawful combatant provided for by the 1907 Hague Regulations or the third 1949 Geneva Convention.

In addition, it should be emphasized that Rule 106 reproduces the first sentence of Article 44(3) of Additional Protocol I. It sets aside the contentious second sentence that mitigates the requirement of distinction in specific situations of armed conflict (such as guerrilla warfare) where an armed combatant can hardly distinguish himself due to the nature of the hostilities. If the Commentary leaves uncertain whether or why this exception is not part of customary IHL, the fact that it has not been included in the Rule itself reveals the relatively cautious approach adopted in the Study, on the basis of state practice and *opinio juris.* The comment made by Y. Dinstein that the Study "somehow manages to convey the message that even Article 44 of API (one of the key sources of the "Great Schism" [dividing Contracting and non-Contracting Parties to API]) hardly presents a real problem" misrepresents the more subtle position taken by the authors of the Study.[23]

Finally, Rule 6 repeats Article 51(3) of Additional Protocol I, and labels as customary law the rule that a civilian loses protection against attack for such time as he/she directly participates in hostilities. Some critics argue that by maintaining the civilian character of an individual who directly participates in hostilities, the Study implicitly rejects the concept of "unlawful combatant."[24] It is correct that the Study is limited to an evaluation of the customary nature of concepts that are currently defined under treaty law such as "combatant," "armed forces" and "civilians," and that it does not extend to the relatively controversial notions of "unlawful" or "unprivileged" combatant. In this respect, it should be recalled that the concept of "unlawful combatant," which is not defined under treaty law, is generally understood in legal literature, military manuals, and judicial case law as describing "all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy."[25] So defined, the term "unlawful combatant" would clearly encompass civilians directly participating in hostilities. This expression would also include, for instance, members of militias and other volunteer corps who belong to a party to the conflict but are not integrated in the regular armed forces, where they do not comply with the visibility requirement imposed by Article 4(A)(2) of the third 1949 Geneva Convention.

Under the logic of customary IHL, these persons are either members of the armed forces as defined in Rule 4 (but lose the benefit of prisoner-of-war status if failing to distinguish themselves from the civilian population), or they are civilians who are directly participating in hostilities. The practical consequence of this classification is limited because, in both cases, these persons would be combatants within the generic meaning of Rule 1, i.e. they would be legitimate

targets of attack. The only difference lies in the temporal limitation that is found in Rule 6: as civilians they would regain their protected status as soon as they cease to directly participate in hostilities. What is important is that both state practice and *opinio juris* tend to confirm that there is no gap (at least within the law on the conduct of hostilities) between the all-encompassing concepts of "civilian" and "members of the armed forces."[26]

Customary Nature of the Principle of Distinction in non-International Armed Conflicts

Recognition of the customary nature of the principle of distinction has an indisputably important impact on the law governing non-international armed conflicts. The shortcomings of treaty law in these conflicts are obvious. It is well known that the law applicable in non-international armed conflicts is divided into two legal regimes with two distinct thresholds of applicability. The first regime comprised of a single provision – Article 3 common to the four Geneva Conventions – applies to all armed conflicts. It is generally acknowledged that this provision only covers the treatment of persons who are in the power of the enemy, and not the conduct of hostilities. The article is therefore totally silent on the principle of distinction.[27] The second regime is found in Additional Protocol II to the Geneva Conventions, which relates to the protection of victims of non-international armed conflicts. Additional Protocol II supplements common Article 3 only insofar as its rather stringent *ratione materiae* conditions are met. Although this Protocol does not expressly mention the basic principle of distinction,[28] it may nevertheless be logically deduced from Article 13, which is entitled "Protection of the civilian population."[29] The immunity of civilian objects, however, is not explicitly addressed.[30] Furthermore, Article 13 remains relatively laconic when compared with the detailed rules found in Articles 48 and following of Additional Protocol I.[31]

In short, treaty law suffers from some relatively wide gaps in the protection of civilian persons and objects. These lacunae become apparent when comparing the rules that apply to international versus non-international armed conflicts, but also when comparing the different legal regimes that govern non-international armed conflicts. Establishing, however, the customary nature of essential rules on the application of the principle of distinction in non-international armed conflicts has led to a significant extension of this narrow treaty law.

No real problems have arisen concerning the customary nature of the basic principle of distinction. On the basis of diplomatic practice and *opinio juris* manifested by states, various international bodies such as the International Court of Justice, the United Nations Security Council and General Assembly, the ICTY, and the Inter-American Commission on Human Rights have clearly been in favour of applying this principle in non-international armed conflicts. Relevant references to this practice may be found in the ICRC Study on Customary International Humanitarian Law, which also undertook an evaluation of this principle as a norm of customary law applicable in non-international armed conflicts (Rules 1 and 7).

The thorough analysis of state practice and *opinio juris* carried out in the context of the ICRC Study also demonstrated the customary nature in non-international armed conflict of many derivative rules governing the protection of the civilian population and objects. At the same time, it has shown that the development of these customary rules stems largely from basic principles that govern international armed conflicts: Additional Protocol I has served as a reference for the law governing non-international armed conflicts. There is, of course, a practical reason for the convergence of these two legal regimes. Because the same general principle of distinction is applicable in all cases of armed conflict, it follows that the more detailed system of rules governing international armed conflicts will serve as a model for the development of the law of non-international armed conflicts.[32] Consequently, the ICRC Study softens – at least in the context of the principle of distinction – the ICTY's holding that it is the general essence of principles rather than precise and detailed rules that can be extended to non-international armed conflicts.[33]

Despite this general trend, it is unfortunate that the authors of the Study found Rules 21, 23, and 24[34] to be only "arguably" customary in the context of non-international armed conflicts. They argued that even though elements of practice unquestionably point towards the customary nature of these norms, they nevertheless remain insufficiently developed to meet the conditions of repetition, widespread practice, and consistency.[35] The expression "arguably" is somewhat problematic, as it amounts to admitting (without saying so explicitly) that the norms at issue are not yet customary. Half measures in this area are difficult to envision: either the norm fulfils the conditions and is considered to be customary, or it does not.

It is precisely in these situations – in which a clear practice emerges but doubts remain as to whether the practice is sufficiently dense to mature into a customary norm – that logical arguments, such as those used by the ICTY, could play a key role. Like any other rule of application, these three norms have a role to play in "specifying and fleshing out" the principle of distinction itself. In addition, the evidence of practice collected in Part II of the ICRC Study shows no state opposition on the substance of these rules. Other basic arguments could also justify this merger of legal regimes: for instance, it would be absurd, but for some exceptions, to maintain a distinction between different types of conflict when speaking of the protection of individuals. In view of this, the position adopted by the authors of the Study in assessing the customary nature of these norms could be considered as overly cautious.

The transfer of rules from the international armed conflict regime to that of non-international armed conflicts does, however, have its limits. The main limitation relates to the absence of any combatant or prisoner-of-war status in non-international armed conflicts. Consequently, if the term "combatant" is used in the context of a non-international armed conflict (as illustrated in Rule 1 of the ICRC Study), it is always used in the generic meaning described above in order to indicate a lack of protection against attack, and not a right to directly participate in hostilities or to prisoner-of-war status in case of capture.

The problem then turns on the unclear customary notions of "combatant" and "armed forces" in this context (the ICRC Study stating that Rules 3 and 4 are only customary in international armed conflicts). The Commentary to Rule 3 notes that the concept of "armed forces" used in both Common Article 3 to the Geneva Conventions and in Additional Protocol II, or the notion of "dissident armed forces and other organized armed groups" used only in Additional Protocol II, "are not further defined in the practice pertaining to non-international armed conflicts". This practice leaves no doubt that state armed forces may be understood to be combatants (as opposed to civilians) for the purpose of the principle of distinction. However, no conclusion could be reached concerning members of armed opposition groups, who could either be combatants or civilians who, under Rule 6, lose their protection against attack when directly participating in hostilities.

In summary, the gaps in the treaty law governing the conduct of hostilities in non-international armed conflicts have largely been filled through customary law, which has led to the creation of rules parallel to those in Additional Protocol I. International bodies have even endorsed rules that do not expressly appear in either common Article 3 or Additional Protocol II. This, in turn, has served to significantly attenuate divergences resulting from the qualification of conflicts.[36] Although the gap between the two legal regimes is becoming narrower with respect to the principle of distinction, it is by no means completely closed. The significant contribution brought by customary law does not preclude future developments of the law, particularly on the definition of combatants, armed forces, and civilians in non-international armed conflicts.

A Customary Principle Enjoying Imperative Normativity?

Recognition of the customary nature of the principle of distinction, regardless of how the conflict is qualified, renders the principle mandatory for belligerents. While all rules are compulsory by definition, some rules are even more compulsory than others, in the sense that no derogation is allowed. Today, in light of the fundamental character of the principle of distinction, a clear trend can be observed in favour of recognizing its peremptory (*jus cogens*) nature. A number of practical consequences follow from this elevated status.

*The Peremptory (*Jus Cogens*) Nature of the Basic Principle of Distinction*

The very concept of a peremptory norm might appear inappropriate in an international legal order that is set up by and for states endowed with full sovereignty. It is notable that the term *jus cogens* only formally became part of the public international law lexicon in the early 1960s, following the International Law Commission's (ILC) codification of the law of treaties. The ILC concluded that causes for the invalidity of treaties were not limited to defects or irregularities in the formation or expression of a state's consent to be bound by the instrument. Invalidity can also result if the object of the treaty is illicit. Article 53 of the

Vienna Convention of May 23, 1969 stipulates that a treaty is void if it conflicts with a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In other words, if the entire community of states accepts and recognises the norm's non-derogable character, then it will be endowed with a special effect such that only a new norm with the same peremptory status will be able to modify its content. To date, this is the only definition of *jus cogens* to appear in a treaty.[37]

Seen in this light, the concept of *jus cogens* presupposes recognition of fundamental universal values; the principal difficulty, which explains the most intense opposition to the concept, is in determining the criteria that concretely distinguish the values endowed with peremptory force from other fundamental values. Without going too deeply into this complex issue, a series of arguments have been put forward to demonstrate the non-derogable nature of IHL in general, and the 1949 Geneva Conventions in particular.

- The first is the prohibition of concluding special agreements that are likely to have an adverse effect on the protection of persons benefiting from the Conventions. In other words, while the warring parties are encouraged to conclude special agreements on any matter for which it is deemed appropriate to make separate provision (e.g. evacuation of the wounded and sick), such agreements may not restrict or be detrimental, in legal terms, to the rights of protected persons and objects.[38]
- The second is the fact that the rights contained in the Conventions are inalienable. Protected persons may not waive them, whether in part or in their entirety.[39]
- The third is the fact that the Conventions address the most serious violations of their provisions in distinct articles on "grave breaches." The Conventions prevent any high contracting party from absolving itself or any other party from liability incurred for grave breaches.[40]

Taken together, these factors, which restrict the will of individuals or states to an unusual degree, tend to establish the special nature of IHL as a body of rules that is protected from undergoing certain modifications.

The inalienability invoked under each of these three arguments is, however, limited to the nature of the dispensatory instrument (a "special" agreement in the first case[41]), the subjects covered (for example, "protected persons" in the second case), or the rules concerned ("grave breaches" in the third case). In other words, even though these arguments point strongly to the peremptory nature of IHL, they are not necessarily sufficient to demonstrate that the entire *corpus juris* of IHL constitutes *jus cogens*. The absence, in Additional Protocols I and II, of any explicit reference to the above-mentioned limitations does not preclude their transposition to these two supplementary instruments.[42] Yet, this does not automatically lead to the conclusion that all the provisions contained in these 1977 Additional Protocols are peremptory in nature.

Nevertheless, there is a range of concordant evidence leading to the conclusion that the basic principle of distinction meets the conditions set out in Article 53 of the 1969 Vienna Convention. Indeed, it is generally acknowledged that this principle corresponds to a paramount value of IHL. This status emerges in large part from the title given to Article 48 of Additional Protocol I ("Basic Rule"), as well as from its location in the first Section of Part IV, a chapter devoted to the Section's field of application. This demonstrates that the principle of distinction was intended to permeate the whole body of rules relating to the conduct of hostilities. Finally, the norm's superiority is also derived from the wording of Article 48, which specifies that distinction is required "at all times."[43]

Arguments against the peremptory nature of the principle of distinction have been put forward, but, on analysis, they fail to be persuasive. Setting aside theories aimed at purely negating the concept of *jus cogens*, arguments against the peremptory nature of the principle of distinction are founded on the fact that it is possible to formulate reservations to the provisions that codify the general principle. It is true that, despite the "Basic Rule" status conferred on Article 48, Additional Protocol I does not formally prohibit (either rescinding or modifying) reservations concerning this provision.[44] It is therefore argued that the peremptory nature of the principle is difficult to defend in light of the fact that the Protocol itself allows for the possibility of a unilateral variation of the provision.[45] Nevertheless, the possibility of formulating a reservation in no way prejudges the validity of such reservation, which will depend on its compatibility with the object and purpose of the treaty concerned. The object of Additional Protocol I being the protection of victims of armed conflict, and one of its purposes being to ensure the immunity of civilian populations and objects from the effects of the hostilities, it is difficult to imagine that a reservation that goes against the principle of distinction could pass this validity test.[46] Furthermore, as discussed above, the principle of distinction is not merely a treaty provision: it also stems from a parallel customary rule that is binding on states without any possibility of derogation or modification. Moreover, the customary nature of this rule supports the position that the possibility of denouncing these treaties cannot be used to call into question the peremptory nature of some of the norms that these treaties contain.[47]

While we can assert with confidence that the principle of distinction is peremptory in nature,[48] certain international institutions, including the ICJ, remain reticent to explicitly confirm this, most probably out of a desire to avoid offending certain states who continue to strongly deny the very concept of *jus cogens*. However, by reading between the lines, one can detect an implicit yet clear affirmation of the peremptory nature of the principle of distinction in the ICJ's advisory opinion on the *Legality of the threat or use of nuclear weapons*. In this case, the Court held that the principle of distinction, which it described as "cardinal," was "intransgressible."[49] Although the Court did not specify the meaning intended by "intransgressible" (which is not a technical legal term), it is more than probable that the Court's aim was to indicate the *jus cogens* character of the norm.[50] Moreover, certain judges writing individual opinions showed no

compunction in crossing a boundary that the Court was obviously trying to skirt.[51]

The ICTY, on the other hand, has had much less difficulty advancing along the path already cleared by the praetorian work of the United Nations' main judicial body. In its January 14, 2000 judgment in the *Kupreskic* case, the ICTY clearly asserted that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character."[52] In view of the fact that this case largely concerned accusations of war crimes in the form of deliberate attacks on the civilian population, and that the quote is made in the context of determining the applicable law, there can be no doubt that the Chamber intended to confer peremptory status on the basic principle of distinction.

From Theory to Practice: Consequences of the Peremptory Character of Distinction

Having established the *jus cogens* nature of the principle of distinction, we now turn to its practical legal consequences, which are multifaceted.[53] The first such consequence – stemming directly from Article 53 of the 1969 Vienna Convention on the Law of Treaties – concerns the absolute nullity of any contradicting or "derogatory" agreement. Thus, the *jus cogens* nature of the principle effectively prevents any dilution of the norm. However, while *jus cogens* serves to block any attempt to curtail the conventional or customary guarantees provided by the principle of distinction, it poses no obstacle to the strengthening of such guarantees. The concept of *jus cogens* does not crystallize the content of intangible rights and obligations, but rather ensures that there is a minimum threshold of protection.[54]

The implications of *jus cogens* extend beyond Article 53 of the Vienna Convention and the strict framework of the nullity of a derogatory agreement. A generally accepted second consequence is that violations of a peremptory norm, even when persistent and prolonged, cannot of themselves suffice to cause the norm to fall into abeyance or to become attenuated. In other words, violations will not permit a new, more permissive norm to emerge. That which states cannot do under a treaty cannot, a fortiori, be achieved by unilateral action in violation of a peremptory norm. Put another way, if one wishes to prove that a *jus cogens* norm has fallen into abeyance, then it will not suffice to demonstrate that inconsistent practice casts doubt on the consensus on the norm; it must be proved that a new consensus has emerged on an equal normative level, that is the emergence of a new *jus cogens* norm.[55]

A final, undisputed consequence results from the absolute or non-reciprocal nature of the obligations in question.[56] One party's respect for the principle of distinction shall not depend on mutual respect by the adverse party. There is, however, a lack of consensus on the validity of the logical step that is often made between the exclusion of reciprocity and the inability to justify attacks on civilian

populations and objects by way of reprisals. This point will be further examined below due to the controversy it engenders.

Reprisals Against the Civilian Population and Civilian Objects: A Restriction on the Absolute Character of the Principle of Distinction?

Like the whole of public international law, IHL was initially conceived on the basis of reciprocity, thus authorizing reprisals in response to a belligerent party's violations of conventional or customary provisions belonging to this *corpus juris*.[57] However, the general philosophy of the law of armed conflicts changed radically with the adoption of the four 1949 Geneva Conventions, as clearly evidenced by Article 1 common to the Conventions. This provision places the High Contracting Parties under the obligation to respect and ensure respect for the Conventions "*in all circumstances*," that is over and above any consideration of reciprocity. Rejection of the traditional, synallagmatic approach thus opened the way towards a partial prohibition of reprisals, which, in turn, did not fail to embroil negotiators of the Conventions.

Article 33 of the fourth 1949 Geneva Convention includes a prohibition of reprisals against the civilian population and civilian property. However, this provision which appears in Part III of the Convention, applies only to civilians in the hands of the adverse party, and not to the conduct of hostilities. Articles 51(6) and 52(1) of Additional Protocol I extended the prohibition of reprisals to all civilian persons and objects,[58] although agreement on this extension was reached with some difficulty. The adoption of these two provisions gave rise to a great deal of controversy during negotiations.[59] Many delegations feared that an absolute prohibition of reprisals against civilian populations and objects would be impossible to enforce. Apart from the fact that it would deprive states of a supposedly effective means of ensuring respect for the law of armed conflict, it would place states that had suffered violations in an untenable position vis-à-vis public demands for countermeasures. Formal adoption of these provisions did not put an end to this polemic, which carried over into subsequent practice and doctrine.[60]

This controversy has by no means ended with the ICTY's formal assertions of the customary nature of the prohibition of reprisals against the civilian population and civilian objects in any type of conflict.[61] The Trial Chamber first made a declaration of this nature in the *Martic* case,[62] in which it justified its decision by invoking (in addition to scholarly writings) the obligation to respect and ensure respect for IHL "in all circumstances," interpreted as prohibiting reprisals that would violate norms as fundamental as the prohibition on attacks against civilians. The Chamber also based its findings on Resolution 2675 of the United Nations General Assembly and on Article 51(6) of Additional Protocol I and Article 4 of Additional Protocol II.[63] No state practice, however, was invoked in support of this proposition.

In its detailed judgment of January 14, 2000 in the *Kupreskic* case, the Tribunal reiterated the prohibition of reprisals against the civilian population and

civilian objects.[64] The defence attempted to justify attacks against the Muslim civilian population of the village of Ahmici by referring to previous attacks that Muslims had allegedly launched against the Croat population. The Tribunal's Trial Chamber refuted this argument in scathing terms:

> The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the tu quoque defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.[65]

The Tribunal went on to issue a reminder of the sacrosanct nature of the duty to protect civilians, and affirmed that this duty included the absolute character of the prohibition of reprisals.[66]

According to the Tribunal, IHL was not intended to protect state interests, but was rather designed to benefit individuals *qua* human beings. This body of law therefore does not depend on a synallagmatic paradigm; instead it lays down unconditional obligations that cannot be set aside on the grounds of reciprocity. On this basis, the Tribunal asserted that targeting innocent persons who may not even have had any solidarity with the presumed authors of the initial violation, was a blatant infringement of the most fundamental principles of human rights. The judges considered that a slow but profound transformation of IHL under the pervasive influence of human rights had occurred, the result being a ban on this type of reprisals. This is confirmed, in fact, by Article 51(1)(b) of the ILC articles on the Responsibility of States for Internationally Wrongful Acts, which prohibits countermeasures that derogate from basic human rights.[67] Furthermore, even if in the past it was possible to argue that reprisals constituted the only effective means of compelling the enemy to suspend unlawful acts and to comply with the law, this argument can no longer be justified. Other means of ensuring respect for IHL are now available, such as the prosecution and punishment of war crimes and crimes against humanity by national and international courts.[68]

This set of relatively convincing arguments probably constitutes one of the major contributions of the ICTY to the law of armed conflict. However, as mentioned earlier, there remains some resolute opposition to the prohibition of reprisals. Certain states have clearly formulated reservations to the prohibition of reprisals against the civilian population and civilian objects under Additional Protocol I.[69] Moreover, at least three states disputed the customary nature of this prohibition in their submissions in the *Legality of the threat or use of nuclear weapons* case brought before the ICJ.[70] Other elements of practice – stemming mainly from states not party to Additional Protocol I – also tend to invalidate the ICTY's *dictum*.[71] To these should be added certain doctrinal comments of a sceptical – if not critical – nature.[72]

It must therefore be admitted that current progress[73] towards a total ban on reprisals against the civilian population and civilian objects is currently being

stalled by a small group of dilatory states that are dragging their feet. As a result, there may be a strong temptation to remain cautious and yield to arguments that deny the existence of a customary norm on the subject. It must also be said that the contrary practice of certain states – albeit limited – and the uncertainty as to the *opinio juris* of those states which are not party to Additional Protocol I, may together tip the scale towards concluding that such a customary norm may not have crystallized yet. This, in fact, is the view taken by the authors of the ICRC Study on Customary International Humanitarian Law: the prohibition of reprisals against the civilian population and civilian objects in the conduct of hostilities is not yet elevated to the rank of general international law, although a trend in favour of such a prohibition may be observed in practice.[74]

Such an approach, which is probably wise politically-speaking, is nevertheless open to legal criticism, as it sets aside many probative elements supporting the customary nature of the norm, in order to give way to the radical and systematic opposition of a small (but militarily powerful) minority of states. One possible means of breaking this deadlock is to invoke the "persistent objector" theory. Without hindering the formation of a customary rule, this theory allows certain states to remain outside its field of application if they have continually – and from the start of the formation process – expressed their opposition to its recognition. This theory, which can be inferred from two ICJ decisions,[75] has been treated with caution by many of the doctrinal sources on the topic.[76] It is certainly beyond the scope of the present contribution to provide an in-depth analysis of this complex issue, which goes to the very foundation of the theory on sources of public international law. Suffice it to say that even if the "persistent objector" theory were to be accepted, it could not be applied to a norm recognized as *jus cogens*. Granting members of the international society the right to opt out of a norm would obviously not be compatible with the ultimate purpose of a peremptory norm, which is to protect the international society's fundamental community interests.[77] Since, as we have demonstrated, the principle of distinction enjoys a higher normativity, it would be legally incongruous to admit that it could be subject to derogation by way of reprisals.

Conclusion

The principle of distinction undoubtedly faces increased challenges in contemporary warfare. The expansion of urban warfare, use of asymmetric strategies, and development of new means and methods of combat (such as Computer Network Attacks or electronic warfare) – to mention only a few of these trends – greatly increases the operational difficulty of effectively distinguishing between civilians and combatants and between civilian objects and military objectives. Though such mutations could have entailed a legal erosion of the principle of distinction, analysis of state practice reveals, on the contrary, that each violation of this basic rule has sparked solemn reaffirmations of its being the embodiment of one of the fundamental values of international humanitarian law. These constant and strong reactions not only allow one to easily assert the

customary nature of the principle of distinction in all armed conflicts, but also permits the finding of its imperative (*jus cogens*) character.

Questions therefore do not generally arise concerning the customary nature of the general principle itself, but rather in regards to the various norms of application imparting its concrete and practical expression. In this respect, it should be noted that one of the main conclusions of the ICRC Study on customary international humanitarian law is precisely that it has been able to assert the customary nature of most of these rules and thus their applicability in both international and non international armed conflicts. This conclusion is critical as it significantly attenuates the divergences in treaty law resulting from the qualification of a conflict. The main points of debate remain however the definitions of combatant, armed forces and civilians in non international armed conflicts, leaving ample room for the future development of the law in this regards.

The conclusion that most of these norms of application are in fact customary does not suppress the controversies regarding the interpretation of their content (as for example concerning the definition of "military objectives"). As the objective of the ICRC Study was simply to determine the "customary nature" of these rules, it would be unfair to criticize it for not as well making determinations in this regard. Complementary work clarifying the meaning of certain of the more disputed rules would still of course be useful. The ICRC has already undertaken a significant project in regards to the interpretation of the rules related to direct participation in hostilities, and has made clear its willingness to expand this scope of work to other domains.[78]

Notes

1 Legal Adviser in the Legal Division of the ICRC. This contribution only reflects the views of the author and not those of the ICRC. It is based on an updated and translated chapter in the author's doctoral thesis entitled *Le principe de distinction dans la conduite des hostilités – Un principe traditionnel confronté à des défis actuels*, Thèse n°706, Université de Genève, Institut Universitaire des Hautes Etudes Internationales, Genève, 2006, 493 pp. The author would like to thank Elise Baudot-Quéguiner, IFRC Legal Division, and Nathalie Weizmann, ICRC Legal Division, for revising the text and providing many useful comments.

2 Numerous texts reflect the idea that the norms of application are, by their content, intrinsically linked to the general principle of distinction. For example, the US Department of Defense Report to Congress on the Conduct of the Persian Gulf War (10 April 1992, *ILM*, Vol. 31, 1992 (3), p. 620) stipulates that "(t)he law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination."

3 The ICRC's voluminous six-part study on Customary International Humanitarian Law integrates, in Part I entitled "The Principle of Distinction," six successive chapters relating to both the general principle and its norms of application. See Henckaerts and Doswald-Beck, 2005, Vol. 1, Part 1, pp. 3–76.

4 On the dissociation between these two types of practice, see Barberis, 1990, p. 30. The use of what is sometimes called "verbal practice" to prove the existence of a customary

rule is very frequent, as seen from numerous examples found in the jurisprudence of the International Court of Justice and of the *ad hoc* criminal tribunals. Moreover, it is well known that the Study carried out by the ICRC on customary international humanitarian law grants this type of practice a great deal of importance. Furthermore, some doctrinal authors do not hesitate to make this verbal practice the decisive element in forming customary rules. For example, Baxter, 1965–66, p. 300, states that: "The actual conduct of states in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of states are ascertained. The firm statement by the state of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts." This assertion of the preeminence of verbal practice has, however, been disputed; see Condorelli, 1991, pp. 198–199, and Kwakwa, 1992, p. 31. These authors state that verbal practice might very often correspond to public relations imperatives, without any intention of it being observed on the battlefield.

5 The practice that is examined in order to identify a customary rule is first and foremost the practice of relevant state organs. Such examination cannot, however, be restricted to the attitude of those authorities alone: international organizations, in particular their judicial organs, also play a crucial role in establishing customary rules. Similarly, non-governmental organizations may take positions whose impact could also be taken into consideration (*contra* Dinstein, 2006, p. 5). Finally, the practice developed by organized armed groups could also be a fundamental factor that serves to confirm or invalidate the customary nature of certain norms in the particular context of non-international armed conflicts.

6 Regularity of diplomatic practice is also crucial to establish a customary norm. Where, in a majority of instances of non-compliance, there is no negative reaction, this may lead to the conclusion that the non-compliant behaviour at issue is not or no longer regulated by law, and that, instead, it is a matter of mere usage.

7 This argument was put forward by the ICTY Appeals Chamber in the *Tadic* case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (para. 99).

8 See, in particular, Zegveld, 2002, p. 23.

9 ICTY, Appeals Chamber, *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 (para. 99).

10 Naturally, one might be perplexed to see that the normative nature of a principle is based (essentially) on "diplomatic" exchanges that take place after a violation, without necessarily being followed by an attempt to establish the culprit's responsibility, or, *a fortiori* to impose any sanction. However, the special structure of international law is such that a practice may be "accepted as being the law" even if repressive mechanisms are not systematically triggered whenever a violation occurs. In the words of J.A. Barberis ("Réflexions sur la coutume internationale," *loc. cit.* (note 3), p. 30): "A customary practice acquires the status of legal custom when violation of that practice has effects analogous to violation of a similar legal norm in the context of the coercive structure of the law" (the author's translation).

11 For a relatively exhaustive inventory of these countless references, see Henckaerts and Doswald-Beck, 2005, Vol. II, Part 1, pp. 3–66.

12 "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that the instances of state conduct inconsistent with a given rule should generally have been

treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule;" ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgment, June 27, 1986, *ICJ Reports 1986*, p. 98, para. 186.

13 Ibid., p. 109, para. 207.

14 "No states, and very few armed political groups, admit to deliberately targeting civilians. Direct attacks on civilians are often justified by denying that the victims are actually civilians;" Amnesty International, Israel/Lebanon – Israel and Hizbullah must spare civilians, MDE 15/070/2006, p. 3.

15 A list of the States Parties to Additional Protocol I is available on the Internet site of the Swiss Federal Department of Foreign Affairs (consulted on March 20, 2007) at the following address: <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic.Par.0020.File.tmp/mt_070109_77prot1part_f.pdf>.

16 States not party to Additional Protocol I include, *inter alia*, India, Indonesia, Israel, Iran, Iraq, Pakistan, Turkey, and the United States.

17 For an assessment of practice on this point, see Henckaerts and Doswald-Beck, 2005, Vol. I, pp. 3–5. For doctrinal sources, see, *inter alia*, Roscini, 2005, p. 413. Watkin, 2004, p. 15, considers that "although thirty countries have not ratified Additional Protocol I, the targeting provisions are largely seen as reflective of customary international law."

18 For example, the judges declared in reference to Articles 57 and 58 Additional Protocol I, that "Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol;" *Kupreskic*, judgment, January 14, 2000 (para. 524).

19 Dinstein, 2004, pp. 8–9.

20 In this provision, the term "combatant" is no longer meant in a generic manner.

21 Following Article 43(1) Additional Protocol I, Rule 4 also omits the requirement to respect the laws and customs of war included in the 1907 Hague Convention and third 1949 Geneva Convention. However, the Commentary (at p. 16) indicates that such change does not substantially alter the definition of armed forces for the purpose of determining whether combatants are entitled to prisoner-of-war status. Rule 4 does include a requirement to have an internal disciplinary system to enforce compliance with IHL.

22 If Rule 106 reiterates the general requirement of distinction, it does not precisely indicate how a combatant is supposed to distinguish him or herself from the civilian population. According to one author of the Study, "the conditions contained in Article 4 of the Third Geneva Convention (carrying arms openly and wearing a fixed distinctive sign recognizable at a distance) would be sufficient;" see Henckaerts, (forthcoming 2007).

23 Dinstein, 2004, p. 9.

24 *Ibid.*, p. 9.

25 For this definition, see Dörmann, 2003, pp. 46–47. It should be noted, in passing, that the generally accepted definition seems oriented toward the status of persons in the hands of the enemy and not the conduct of hostilities.

26 There is however one exception – currently of limited application – namely the *levée en masse*.

27 For arguments in support of this view, see in particular David, 1999, p. 367; Kolb, 2003, p. 217; Zegveld, 2002, pp. 82–83. This restriction can be explained first and foremost by the fact that article 3 hinges on the concept of "humane treatment," thus presupposing a degree of control over the persons protected by the provision. There have, however, been some affirmations to the contrary, as it has occasionally been argued that the prohibition of any attack on the civilian population could stem from common Article 3 paragraph 1(a), which proscribes "violence to life and person, in particular murder of all kinds." This reasoning was put forward in particular by the Inter-American Court of Human Rights in its third report on Colombia (p. 83, para. 41). Similarly, the ICTY initially considered, in its March 8, 1996 decision in the *Martic* case (para. 13), that common Article 3 could be interpreted as prohibiting attacks on civilians and other non-combatants. Subsequently, however, the Tribunal adopted a different approach, maintaining that the test for determining whether a person is or is not covered by common Article 3 was "to ask whether, at the time of the alleged offence, the alleged victim of the proscribed act was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3." See the *Tadic* case, Opinion and Judgment of 7 May 1997 (para. 615) and the *Kupreskic* case, Judgment of 14 January 2000 (paras 522–24). For the same approach, see also the American Commission on Human Rights, Report No. 55/97, Case No. 11.137 (Argentina, November 18, 1997 (para. 189).

28 However, it is important to bear in mind that Resolutions 2444 and 2675, adopted by the United Nations General Assembly on December 19, 1968 and December 9, 1970 respectively, and generally accepted as being the relevant customary minimum regardless of how the conflict is qualified, did give precise views on the matter. The first of these resolutions unequivocally sets out the principle of distinction between persons taking part in hostilities and members of the civilian population, with a view to ensuring protection of the latter. The second requires that precautionary measures be taken in attacks in order to avoid injury, loss or damage to the civilian population.

29 Rosenblad, 1979, p. 47. The argument put forward, in particular, by Turns, 2002, pp. 115–116, whereby Additional Protocol II is in no way concerned with methods and means of warfare, appears, quite simply, to be unacceptable. On this point, see the *Commentary* on Article 13 of Additional Protocol II (ICRC/Martinus Nijhoff Publishers, Geneva, 1987, p. 1448, para. 4762), which refers to Article 51 of Additional Protocol I.

30 General Assembly Resolution 2675, however, expressed a specific prohibition on attacking civilian objects. In light of this, doctrinal authors generally consider that the contribution of Additional Protocol II to the principle of distinction and its implementation is very limited; see, *inter alia*, Gardam, 1993, p. 8.

31 It is true that Protocol II (as amended) to the 1980 Convention on Certain Conventional Weapons also applies in non-international armed conflicts, and that Article 3 of this Protocol sets out a series of rules on the protection of the civilian population. This is an indisputably strong indication that it should be possible to transfer these rules into the law of non-international conflict. But, since the Protocol's field of application is limited to mines, booby traps and other devices, no general conclusions can be drawn from this instrument.

32 As pointed out by Zegveld, 2002, p. 77, "International bodies considered the application of Protocol I by analogy to be necessary in order to ensure the effectiveness of Common Article 3 and Protocol II. Part IV of Protocol II provides only the

principles and not the rules of application. … By applying the more specific regulation of Protocol I, international bodies have sought to overcome the lacunae of Protocol II."

33 ICTY, Appeals Chamber, *Tadic* case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 (para. 126).

34 Rule 21 requires that "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Rule 23 demands "Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas" and Rule 24 that "Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives."

35 "… some rules are indicated as being arguably applicable because practice generally pointed in that direction but was less extensive;" Henckaerts, 2005, p. 198.

36 Here, customary law is an absolutely essential source of international humanitarian law. Because there are two treaty-based regimes, customary law appears as the link without which these treaty-based regimes could be disruptive ("seul lien entre une diversité qui, autrement risquerait de devenir disruptive"); Kolb, 2003, p. 53.

37 The 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations repeats *verbatim* the content of Article 53 of the 1969 Convention. It should be pointed out, however, that in both cases the definition is limited "for the purposes of the present Convention." On this last point, however, Nieto-Navia, 2003, p. 610, considers that "since 1969, it is clear that the international community as a whole has continued to accept the existence of these norms from which no derogation is permissible through agreement or unilaterally. As a result, it is possible to state that the definition agreed upon in the Vienna Convention is probably more than simply valid for the purposes of the Convention and is rather valid as a definition of the concept for the general purposes of international law."

38 See Articles 6/6/6/7 respectively of the four Geneva Conventions.

39 See Articles 7/7/7/8 respectively of the four Geneva Conventions.

40 See Articles 51/52/131/148 respectively of the four Geneva Conventions.

41 In this case, the adjective "special" refers less to the substance of the agreement – which concerns one or several specific points of law – than to the limited number of parties to this type of instrument, which is normally concluded only between belligerents.

42 Thus, after mentioning the first two factors found in the text, Abi-Saab, 1984, p. 271, note 16, states: "The 1977 Additional Protocols do not include express provisions to the same effect, but as 'supplements' to the Conventions they are evidently subject to the same general rules."

43 As noted by David, 1999, p. 90, the obligation of respect for the rules of IHL "*in all circumstances*" already appears in Article 1(1) of the Protocol; the superfluous reiteration of this requirement therefore appears to have no purpose other than to stress the absolute nature of the rule, thus facilitating its incorporation into *jus cogens*.

44 According to Article 19 of the 1969 Vienna Convention on the Law of Treaties, which codifies the rules relating to the formulation of reservations, states which sign, ratify, accept, approve or accede to a treaty are free to formulate reservations, except, of course, in case of express prohibition in the treaty concerned. Neither the 1949 Geneva Conventions nor their Additional Protocols contain any provisions prohibiting such reservations.

45 For a better examination of this argument and of the reasoning that may be used to refute it, see Kolb, 2003, pp. 226–227.

46 It is interesting to note that Article 48 has never been the subject of any reservation, despite (or because of) its crucial importance for the whole body of IHL. The requirement of compatibility with the object and purpose of the treaty might, on the other hand, pose a problem for the validity of certain reservations that have been formulated against the rules of application that give the principle practical effect. As far as we know, no objection has ever been raised in that regard.

47 On this point, see David, 1999, p. 89.

48 For a conclusion in support of this view, see Hannikainen, 1988, pp. 685–687. In particular, this author upholds the peremptory nature of the prohibition on direct attacks against civilians, whatever the type of conflict concerned. On the other hand, he expresses doubt as to whether the prohibition of indiscriminate attacks enjoys the same peremptory status. See also the more general references relating to the peremptory nature of IHL cited by Werksman and Khalastchi, 1999, pp. 194–196. For a contrary position, see Nieto-Navia, 2003, pp. 595–640; the conclusions of Nieto-Navia – who limits peremptory norms of the law of armed conflict to common Article 3 and to the first two articles of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – would appear to be much too restrictive.

49 ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of July 8, 1996, *ICJ Reports 1996,* p. 257, para. 79.

50 Admittedly, the judges had previously excluded from their analysis any consideration of the peremptory character of the norms of the law of armed conflict, as made clear in para. 83 of the opinion: "The question whether a norm is part of the jus cogens relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter." Condorelli, 1999, p. 234, deduced from this that the Court wished to bring the basic rules of IHL closer to (but not to say they are a part of) *jus cogens*, and concluded that "in the view of the Court, 'intransgressible' does not mean 'peremptory' but something similar … [dans l'esprit de la Cour, 'intransgressible' ne signifie pas 'impératif' mais quelque chose de voisin]." Yet, a significant part of the doctrine does not hesitate to draw an analogy between the concepts of peremptoriness and intransgressibility. In fact, the ILC says nothing else when it affirms: "In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflicts as 'intransgressible' in character, it would also seem justified to treat these as peremptory" (*Report of the ILC on the Work of its Fifty-third Session*, April 23–June 1 and July 2–August 10 2001, p. 284, para. 5). See also David, 1999, p. 92.

51 The Court's President Bedjaoui stated plainly in his declaration: "I have no doubt that most of the principles and rules of humanitarian law and, in any event, the two principles, one of which prohibits the use of weapons with indiscriminate effects and the other use of arms causing unnecessary suffering, are a part of jus cogens" (para. 21). See also the dissenting opinions of Judge Koroma (pp. 13–14) and Judge Weeramantry (p. 46).

52 ICTY, *Kupreskic* case, Trial Chamber, Judgment of January 14, 2000 (para. 520).

53 Nevertheless, it cannot be deduced from the peremptory character of a humanitarian norm that the norm is applicable without regard to any particular threshold, such as an armed conflict. In other words, the peremptory character of a norm cannot imply

that it may extend beyond its original field of application to cover situations which are extraneous to the *corpus juris* to which it belongs. Any assertion to the contrary could have absurd results in legal terms: the fact that a norm has absolute status in an armed conflict situation obviously does not mean that it is appropriate for governing legal facts or acts, which, if they occur in peacetime or during situations of internal tension or unrest, must be judged against separate standards of conduct.

54 Kolb, 2003, p. 224. This last comment concerning the principle of distinction *stricto sensu* could play an even more important role in the rules of application of the principle.

55 Abi-Saab, 1984, p. 273.

56 The ICTY recently attempted to establish two new consequences of the peremptory character of a norm, but these *obiter dicta* have been the subject of some criticism. First, it was suggested that the concept of *jus cogens* would make it possible to cross the state barrier and deprive of legitimacy (on an international level) any domestic legislative, administrative or judicial act authorizing a contrary practice. This consequence, which was proposed in the context of the prohibition on torture by Trial Chamber II in its Judgment of December 10, 1998 in the *Furundzija* case, was apparently founded on a purely logical argument: "It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a state say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law" (para. 155). Secondly, the *jus cogens* nature of the principle of distinction would trigger the principle of universal jurisdiction: the violation of a *jus cogens* norm would grant any state the right (and even the obligation) to investigate, prosecute, and punish or extradite persons on its territory who are accused of violating such a norm. Indeed, the Tribunal adds (para. 156): "This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes." For a critique of these conclusions of the Tribunal, see Henzelin, 2000, pp. 438–441.

57 Abi-Saab, 1984, p. 273. For a long time, reprisals were viewed as a necessary evil that was used – under strict conditions – to put a stop to wrongful acts committed by enemy combatants. In other words, they seemed to be the only way of preventing war from sliding into barbarity. Doctrinal writings offer some examples of apparently effective applications of this theory (see in particular Walzer, 1999, pp. 288–289). However, apart from the fact that examples of this sort are relatively few and confined to specific situations, no a priori beneficial application of the theory of reprisals has ever been found in the context of the conduct of hostilities. On the contrary, the theory has systematically served – in this domain even more than in others – as a pretext for the worst abuses. In reality, a "correct" use of reprisals necessitates precise information, a period of time in which to establish the facts and communicate with the enemy, and a perception of good faith – all factors that are rarely present in active war conditions. On this last point, see Best, 1997, p. 311.

58 These provisions read as follows: "Attacks against the civilian population or civilians by way of reprisals are prohibited" (Article 51, para. 6); "Civilian objects shall not be the object of attack or of reprisals" (Article 52, para. 1). They indisputably contribute to respect for the principle of distinction, it being too true that reprisals against the civilian population "eradicate the traditional distinction drawn between combatants

and non-combatants in armed conflict – a distinction vital both to civil society and to basic human dignity" (Kwakwa, 1992, p. 140).

59 A clash emerged between two extremely opposed positions at the Diplomatic Conference, some states – following the lead of Poland – advocating a general and absolute ban on reprisals, while others – led by France – wanted to restrict the prohibition to persons in the power of the enemy. Finally, both Poland and France withdrew their extreme positions for the sake of a compromise, and the Protocol ended up with a sectoral prohibition (by category of protected persons) of reprisals.

60 See David, 1999, p. 363 and the bibliographical references cited in the footnotes 2 and 3 for a description of the criticism articulated against the ban on reprisals (which David does not share).

61 This extension of the ban on reprisals in non-international armed conflicts is all the more remarkable in that common Article 3 and Additional Protocol II are completely silent on the matter. During negotiations of Additional Protocol II, some delegations even maintained that armed groups could not be given a right to reprisals because the prerogative was, in legal terms, reserved for states. Only states were endowed with the legal capacity to conduct a war. In other words, even if armed groups could *de facto* engage in acts similar to reprisals, those acts could in no case be considered as a form of implementation of IHL. This reasoning was, however, vigorously contested. As was stressed by Zegveld, 2002, pp. 89–90, given that armed groups have rights and obligations under IHL (particularly pursuant to common Article 3 and Additional Protocol II), there is no principle objection preventing them from enjoying a corresponding right to demand that their adversaries also comply with their legal obligations. Even so, any measures adopted to this end must not be taken to the detriment of the civilian population or civilian objects.

62 ICTY, *Martic* case, Decision of March 8, 1996 taken in accordance with Article 61 of its Statutes; see in particular paragraph 14, which states: "Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflict."

63 The Chamber explained that, even though Article 4 of Additional Protocol II did not explicitly refer to reprisals, the prohibition of reprisals could be implicitly deduced from this provision. Indeed, the Chamber held that the prohibitions enumerated in Article 4, even as countermeasures, were absolute and inalienable, as demonstrated by the obligation to respect them "at any time and in any place whatsoever." Nevertheless, one is forced to admit that this reasoning is perplexing insofar as Article 4, which appears in Part II on humane treatment, has nothing to do with the conduct of hostilities, while this was the central issue in the *Martic* case. It is all the more perplexing given that a strictly analogous reasoning would have been possible based on Article 13 of Additional Protocol II, the first paragraph of which states that the immunity of the civilian population, "shall be observed in all circumstances."

64 ICTY, *Kupreskic* case, Judgment of 14 January 2000 (paras 515 ff.; 527 to 536).

65 Ibid. (para. 511).

66 Ibid. (para. 513).

67 The judgment actually refered to Article 50(d) of a previous version of the ILC Draft Articles on State Responsibility. A further justification may be added in support of this argument, based on the rejection by the ILC Draft Articles of the right to adopt countermeasures if the violated rule meets the definition of a peremptory norm. See Article 51(1)(b) to (d) of the ILC Draft Articles.

68 It should be noted that this last argument had already been used in the *Commentary* on Article 33 of the fourth Geneva Convention (ICRC, Geneva, 1958, p. 228), stating that it was possible for the Convention to prohibit reprisals only "because it substituted for them other means of ensuring respect of the law."

69 In declarations formulated at the time of ratification of Additional Protocol I, Germany, Egypt, France and Italy (more or less clearly) expressed their wish to retain the right to carry out reprisals against the civilian population or civilian objects. The most explicit reservation was submitted by the United Kingdom, which made this reprisals theory dependent on a number of conditions that were apparently even stricter than those laid down by general international law. The compatibility of these reservations with the humanitarian object and purpose of the Protocol was naturally questioned by scholars, although, to our knowledge, no state objection was expressed. See Gaudreau, 2003, p. 170; Laucci, 2001, p. 689.

70 The countries concerned were the United States, the United Kingdom, and the Netherlands. As for the Court, it did not give an opinion on the issue; see ICJ, *Legality of the threat or use of nuclear weapons*, op. cit. (note 36), p. 246, para. 46.

71 For example, the United States has always clearly stated that it could not comply with such a prohibition in the event of a massive attack on its urban areas if reprisals would be the only means of ending the attack.

72 Following a scathing assessment of the two ICTY decisions relating to reprisals, Kalshoven, 2003, p. 505, concluded that: "… none of the arguments advanced by the Trial Chamber have succeeded in convincing me that the prohibition of reprisals against the civilian population has acquired any greater force than as treaty law under Protocol I, or that it extends, whether as conventional or customary law, to internal armed conflict as well." After referring to the *Kupreskic* case, Dinstein, 2004, p. 226, describes as "extravagant" the Tribunal's assertion of the customary character of the prohibition of reprisals against civilians, and notes that "State practice has certainly not yet endorsed the Protocol's provisions." See also Dörmann, 2002, p. 144, who emphasizes that "the view that the prohibition of reprisals against the civilian population is an integral part of customary international law is not uncontested."

73 Indeed, this Pyrrhic assessment is not an obstacle to recognizing the customary character of the prohibition of reprisals against a specific category of civilians, i.e. those who are protected by the fourth Geneva Convention. Nor is it an obstacle to applying the regime laid down in Article 51(6) of Additional Protocol I between States that are bound by this provision.

74 It is under Rule 146, which asserts the customary character – in international armed conflicts only – of the prohibition of reprisals against persons protected by the Geneva Conventions (to the exclusion of the Additional Protocols), that the Study on Customary International Humanitarian Law devotes a section to reprisals against civilians in the conduct of hostilities. The indecisive conclusions of this section are worded as follows: "Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals;" Henckaerts and Doswald-Beck, 2005, Vol. I, p. 523. A similar conclusion is also drawn in relation to the prohibition of reprisals against civilian objects (ibid., p. 525).

75 The two cases in question were the *Asylum* case (*ICJ Reports 1950*, pp. 277–278) and the *Norwegian Fisheries* case (*ICJ Reports 1951*, p. 116).

76 Some authors purely and simply deny the existence of any such theory, regarding it as inconceivable in the international legal order. Others prefer to restrict its scope of application, for example to special customs, and otherwise reject its application to universal treaty rules, a category to which the 1949 Geneva Conventions and their 1977 Additional Protocols indisputably belong. Regarding this last approach, see Abi-Saab, pp. 180–181. As a general rule, doctrinal sources consider that, even if the "persistent objector" theory does exist, it only allows objector States a short period of grace before they too become bound by the norm. See Charney, 1985; Dupuy, 1990.

77 A different approach would lead to absurd results. For example, it would imply accepting that South Africa was free to set up its policy of racial segregation after World War II because it had always firmly opposed the establishment of a norm prohibiting *apartheid* (and was therefore, in legal terms, a persistent objector). See Condorelli, 1991, p. 218.

78 In a document entitled *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, prepared in the context of the 28th International Conference of the Red Cross and Red Crescent (Geneva, December 2003), the ICRC discussed certain ambiguities in the formulation of rules related to the definition of military objective, the principle of proportionality or precautions in and against the effects of hostilities. It concluded that the "current challenge is therefore to assess the practical effect that existing rules have in terms of protection of civilians and civilian objects, improve the implementation of the rules, or clarify the interpretation of specific concepts on which the rules rely without disturbing the framework and legal tenets of the Additional Protocol, the aim of which is to ensure the protection of civilians." It continues indicating that "In the time ahead the ICRC intends, on its own or in collaboration with other organizations, to initiate expert consultations in order to take stock of current doctrine and practice, and to determine whether and how a process of clarification of rules in the above mentioned areas might usefully be undertaken."

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Chapter 8

The Principle of Proportionality

A.P.V. Rogers[1]

The term "proportionality" arises in various areas of international law, including those relating to armed conflict. For example, as this chapter is being written, questions are being asked about the proportionality of Israel's military response against targets in the Lebanon following the capture of two of its soldiers. However, in this essay "proportionality" is used in its law of armed conflict, or *jus in bello*, context, where one tends to speak of the "principle of proportionality." There is a lot of misunderstanding about the principle of proportionality. It has to do with minimizing civilian casualties and damage to civilian property; it has nothing to do with equality of arms, nor with comparing the number of casualties on each side.[2] The principle has been explained, broadly, as "the principle that when attacking military objectives belligerents must make sure that any collateral damage to civilians is not out of proportion to the military advantage anticipated."[3]

The International Committee of the Red Cross (ICRC) have included "proportionality in attack" in their book of rules of customary international humanitarian law, in the following words:[4]

> Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

Here the principle of proportionality is expressed as a rule of prohibition. The principle is also reflected in rules 18 and 19, dealing with precautions in attack, where it is expressed more as an exhortation:

> Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

> Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Although claims are made that proportionality is now a principle of customary international law,[5] it seems not always to have been the case, at least not as evidenced by state practice, or not as currently understood. Here the author has to admit to having written in 1982 that the rule of proportionality was "long regarded as a principle of customary law."[6] Perhaps this was written in the flush of enthusiasm that followed the negotiation of Protocol I. Anyway, it was based on an interpretation of Article 22 of the Lieber Code that now seems hard to follow and on Hall's *Treatise* of 1924, dealt with below.

State practice seems to point in another direction. The disinterested observer of some bombing attacks in World War II might have asked: what was the proportionality of that? An example might be the RAF's attack on Pforzheim on February 23–24, 1945, an attack of which Sir Arthur Harris, head of Bomber Command, seems to have been very proud.[7] This was a small industrial town, known for its jewellery and watches, with a population at the time of about 65,000. The apparent justification for the attack was that the town produced precision instruments for the *Wehrmacht* and that it was a communications centre of some importance for the Western front. About 370 heavy bombers were deployed in the attack, of which 12 were lost. They were able to drop 1551 tons of bombs at low level and create a firestorm. The result of 22 minutes of bombing was that 17,000 to 20,000 people died, about 50,000 were rendered homeless and 90 percent of the town was destroyed.[8] This was death and destruction on a huge scale. To put it into perspective, a similar number of British soldiers lost their lives on the first day of the battle of the Somme on July 1, 1916, probably the bloodiest battle in the history of the British army.[9] To the twenty-first-century mind, the effects of the Pforzheim bombing seem disproportionate by any standard.

Perhaps the principle of proportionality as currently understood did not then exist. After all, if one consults Dr Francis Lieber's famous codification in 1863 of the laws and customs of war, one finds, on the subject of civilian immunity, in Article 22: "… the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[10] No doubt the proponents of area bombing during World War II would have argued that it was justified by the exigencies of war and that Article 22 did not introduce any elements of proportionality, rather it was to do with making room for humanity within the principle of military necessity.

If one looks at the indices of books on the law of armed conflict written before, say, 1977, the word "proportionality" does not appear; yet it does appear with many references in books written after that date. The year 1977 is, of course, significant as the date of the First Additional Protocol to the Geneva Conventions of 1949. It was in that protocol that the principle of proportionality was first codified in a treaty. Surprisingly, the protocol devotes no separate article to such an important principle. The word "proportionality" is not even used. One finds the principle in the wording of Articles 51 and 57. Article 51 deals with the protection of the civilian population and prohibits, among other things, indiscriminate attacks. It gives as one example of indiscriminate attacks, those that are excessive in their effects on the civilian population. The principle of proportionality, as in Rule 14 of the ICRC Rules, is expressed as a rule of prohibition. Article 57 goes

on to require precautions to be taken in attacks to reduce the collateral effect on the civilian population. Those "who plan or decide upon an attack" must "refrain from deciding to launch an attack" that is expected to cause excessive effects on the civilian population. A party to the conflict must also cancel or suspend an attack if it becomes apparent that it is expected to cause such excessive effects. These requirements of Article 57 support the general prohibition in Article 51 by placing obligations on attackers. The way that proportionality is defined in each article is very similar. It may be inferred that an attack is disproportionate if it:

> may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This language, it should be noted, is identical to that of ICRC Rules 14, 18 and 19. In fact those rules are very close to the corresponding rules of Protocol I except that the requirement with regard to cancelling or suspending attacks in the case of the ICRC Rules is to "do everything feasible" to that end and the ICRC Rules do not deal with the position of those who plan or decide upon attacks.

It would be virtually impossible to justify area bombing in populated areas in cases where Protocol I applied. Although the protocol has been ratified by 167 states, it has not been ratified by some important military powers, for example, India, Israel and the United States. It would be easy to say that those states would, therefore, not be bound by the principle of proportionality, but the case is not so clear-cut. States are also bound by customary international law. The authors of the ICRC manual on customary international humanitarian law claim that the principle of proportionality is such a rule of customary law and, furthermore, use language the core of which is identical to that used in Protocol I. If they are right, it would make no difference on the question of proportionality if a state were party to Protocol I or not.

The purpose of this essay, therefore, is to try to trace the development of the principle of proportionality from the inauspicious beginnings of the Lieber Code to discover whether the rule as currently formulated by the ICRC does indeed represent a binding rule of customary international law.

The Law up to 1945

Treaty Law

One can see why the question of proportionality has been addressed only comparatively recently. There was not much need for it when the civilian population was rarely touched by war's death and destruction. There were exceptions, of course, such as naval bombardment or blockade, or the bombardment and siege of defended places on land, and treaties were drawn up to deal with these situations, but, on the whole, the bulk of the civilian population was not near the coast, nor the front line. The advent, about one hundred years

ago, of air power changed everything. The ability to bombard from the air brought questions of civilian immunity and proportionality into focus for the first time. With air power came the means to attack the enemy's populated areas and to cause large-scale casualties among the civilian population and the destruction of civilian property.

International treaties codifying the laws of war were developed from the middle of the nineteenth century when air power was but a dream, so it is not surprising that they concentrated on the conduct of land warfare between armies in the field. It was assumed that the civilian population would not be subjected to the dangers of war except in situations, like sieges, bombardment by artillery or naval guns or naval blockade, where armed forces and civilians were in relatively close proximity. By the end of the nineteenth century the potential threat from the air to civilians in the hinterland had been recognized but attempts to produce treaties dealing with air warfare lagged far behind developments in air force doctrine and technology. Modern treaties specifically cover attacks from the air against targets on land,[11] but even as late as the start of World War II treaty law had little to say about aerial warfare.[12]

So what relevant treaties did exist in then? The Hague Declaration of 1899 prohibited the launching of projectiles and explosives from balloons "and other methods of a similar nature." Those last seven words could be interpreted as prohibiting bombing from aircraft.[13] The declaration, though widely ratified, expired after five years. The prohibition it contained was re-confirmed in the Hague Declaration of 1907. By then the advantages of air power had become evident and the 1907 Declaration, though ratified by the UK, was not ratified by France, Germany, Italy, Japan and Russia, and was renounced by the USA in 1942. It also contained a general participation clause, so was not binding unless all the states in conflict were parties to it.[14] In any event, the Declaration was due to lapse at the time of the third Hague peace conference, scheduled for 1914, which never took place. So, as a matter of law, the Declaration did not apply during World War II.[15]

Of greater relevance were the regulations attached to Hague Convention IV of 1907, known as The Hague Regulations and entitled "Regulations Respecting the Laws and Customs of War on Land." Although not regulating air warfare as such, the regulations could, perhaps, be interpreted as affecting attacks carried out from the air against targets on land. At that stage the full potential of massive air power was probably not appreciated but aircraft could be seen as a form of airborne artillery, ready to strike behind the enemy lines in support of ground forces.

In the context of bombing, Articles 25 to 27 of the regulations are of importance.

> Article 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

This is an absolute prohibition of attacks on undefended places. The reason is that these can be captured without resort to bombardment. The words "by

whatever means" were used to include bombardment from the air.[16] However, the provision is of little relevance to air warfare, except where air forces are acting in close support of troops on the ground, because air forces are unlikely to be in a position to capture places on the ground.[17]

> Article 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

This article, rather obviously, applies only to the bombardment of defended places. It does not apply to bombardments preceding assaults, where the element of surprise would be tactically important. The qualification "do all in his power" seems a bit weak in any event. However, even in respect of defended places, precautions were required by Article 27 to be taken.

> Article 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes …

In the opinion of the International Military Tribunal established at Nuremberg for the trial of the major war criminals of the European Axis, the Hague Regulations were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.[18] However, the omission in Article 27 of the words "by whatever means" may mean that this article is not applicable to air warfare. If it were of general application, there would have been no need for the special convention on naval bombardment. Even if the article does apply to aerial bombardment, it does not prohibit such activity; it merely regulates it by requiring certain precautions to be taken, though the words "as far as possible" allow a lot of room for discretion.

Also worth considering at this point is the Hague Convention IX of 1907, Concerning Bombardment by Naval Forces in Time of War. This contains a similar prohibition of attacking undefended places but makes special allowances for naval warfare, where capture of undefended places may not be feasible. First, a place remains undefended even if automatic submarine contact mines are anchored off the harbour.[19] Secondly, a naval commander is permitted, under certain conditions, to bombard, even in undefended places, "military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbour."

This is of relevance to considerations of air warfare because, like naval forces, air forces are unlikely to be in a position to capture places. Indeed, some experts were of the opinion at the time that the notion of defended and undefended places was obsolete in the context of air warfare and that it would be better to concentrate on the notion of the military objective instead.[20]

After World War I, the full military potential of air power was clearly evident. It would enable a state to get round a stalemate on the front line and defeat the

enemy through the delivery of powerful attacks in its hinterland. At the same time, it was realized that uncontrolled use of air power could have devastating effects on the civilian population of states at war. Various ideas were considered to deal with the phenomenon: a complete ban on bombing, the restriction of bombing to military objectives or the restriction of bombing to the battle zone.[21]

A commission of jurists was appointed by the USA, Great Britain, France, Italy, Japan and The Netherlands to consider rules relating to "new methods of attack or defence" and to report to the governments concerned. The commission drafted the Hague Rules of Aerial Warfare of 1923. The rules embody principles from the Hague Regulations, which are in any event binding on states as customary law. However, they go further and, in language reminiscent of Geneva Protocol I of 1977, state that aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.[22] The rules also provide that aerial bombardment is legitimate only when directed at a military objective.[23] Military objectives are defined as objects of which the destruction or injury would constitute a distinct military advantage to the belligerent. The rules go on to give a narrowly-drawn list of legitimate military objectives.[24]

The rules further prohibit bombardment of cities, towns, villages, dwellings or buildings that are not in the immediate neighbourhood of the operations of land forces. In cases where military objectives are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.[25] In the immediate neighbourhood of land forces operations, however,

> … the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger this caused to the civilian population.[26]

This is an obvious reference to proportionality. It is of interest that proportionality becomes relevant here because, while incidental loss of civilian life is expected to occur during such bombardments, the military requirement for bombardment was considered as of greater significance as it related to the combat zone. Outside the combat zone, it seems that the rules prohibit bombardments having indiscriminate effects, so the principle of proportionality does not arise there.[27]

The Hague Air Warfare Rules did not explicitly mention proportionality, though it is certainly implied in the combat zone cases. Had the rules represented binding law, the area bombing practice of World War II would have been illegal unless the words "in the immediate neighbourhood of the operations of land forces" were given a liberal interpretation. However, these rules were never adopted in treaty form, so had no binding effect on states. At best they can be considered as representing rules that the commission considered ought to be incorporated in a treaty.[28] They were criticized at the time as being unrealistic. One writer suggested that the categories of military objectives should be broadened to

include "factories engaged in the manufacture of materials which may be used in the conduct of war" and all lines of communication or transportation. However he considered that these broadened categories should be attacked only by day to ensure greater accuracy.[29] It is of interest that daylight bombing was, in fact, the practice of the USAAF during the war. Of the other treaty rules, the 1899 and1907 declarations had lapsed, the Naval Bombardment Convention did not apply to bombardment from the air, Article 25 of the Hague Regulations was irrelevant to strategic bombing, and Article 27 of those Regulations probably did not, as a matter of law, apply to aerial bombardment.

Customary Law

So treaty law had, by 1939, made little impact upon the practice of aerial bombardment. It is, of course, insufficient to consider only treaty law.[30] Customary international law is also binding on states and covers air warfare.[31] "A rule of customary law is created by widespread state practice coupled with what is known as *opinio juris*, namely, a belief on the part of the state concerned that international law obliges it, or gives it a right, to act in a particular way."[32] These conditions of widespread practice and binding nature mean that one cannot lightly reach a conclusion that a particular norm has customary law status.

Although customary law principles such as distinction and discrimination and the notion of the military objective can be detected in the language of the early treaties, they were not clearly articulated and defined until Additional Protocol I of 1977; and the principles of military necessity and humanity remain undefined in treaty law today. One has to look to the practice of states, the pronouncements of heads of government and the writings of international lawyers to ascertain whether any relevant binding principles of customary law existed in 1945.

In essence, the law of armed conflict has been an attempt to find ways to make room for humanity even in the extreme case of war. Put another way, it is about the extent to which military necessity should give way to humanity and about striking the right balance between military and humanitarian concerns.

It is as well to consider military necessity and humanity together because they are two sides of the same coin. Customary law tolerates military necessity,[33] that is, the use of force for the purpose of defeating the enemy, but humanity intervenes to prevent the use of force if no military purpose is to be served or if the ensuing human suffering would be out of proportion to the military purpose. Here notions of proportionality act as a balance. Humanity also needs to be taken into account in situations not specifically covered by the law.[34] While it easy enough to formulate these principles in the abstract, it is in their practical application that room for interpretation seems almost endless.[35]

The preamble to the St Petersburg Declaration of 1868 is the starting point for many writers. The commission that drafted it was endeavouring to fix the technical limits at which the necessities of war ought to yield to the requirements of humanity. It considered that the progress of civilization should alleviate as much as possible the calamities of war and that the only legitimate object which

states should endeavour to accomplish during war was to weaken the military forces of the enemy.

At that time, there was no possibility, except by naval bombardment, of striking at targets well behind enemy lines. However, it was recognized then, and remains the case today, that not everything is permissible in war; only that which is necessary to defeat the enemy. Immediately, one runs into difficulties of interpretation. Does enemy mean the enemy armed forces or the enemy state or its people?

It seems that during World War II the principle of humanity retreated before the onslaught of military necessity. Once it had been decided to bomb a target area the practice was to hit it hard and wreak the maximum destruction. The use of incendiary bombs to create a firestorm could achieve that aim best but only at great cost to civilians trapped in the target area. They had poor chances of survival unless there were sufficient, purpose-built shelters. In practice, the principle of humanity did not come to their aid. Military necessity seemed to be regarded as what was thought necessary to win the war; humanity did not come into that equation, so considerations of proportionality did not arise.

As early as 1938, the British Prime Minister, Neville Chamberlain, felt able to enunciate in Parliament three principles of international law applicable to air warfare: (a) that direct attack against the civilian population was unlawful; (b) that targets for air bombardment must be legitimate, identifiable military objectives; and (c) that reasonable care must be taken in attacking military objectives to avoid bombardment of a civilian population in the neighbourhood. These principles were, later in 1938, embodied in a resolution of the League of Nations. It is of note that they did not include any reference, express or implied, to proportionality. The principles, while not going as far as the Hague Draft Rules, are instantly recognizable as part of today's law of armed conflict. The question is whether they were part of the law of armed conflict of 1938 or whether they were more of an expression of hope or, indeed, a political ploy.[36]

The Chamberlain principles will, therefore, be examined below under the following headings: civilian immunity, military objectives and precautions in attack. The last of these is most relevant to the question of proportionality. It should also be noted that the practical application of the Chamberlain principles is hindered by the absence therein of any definition of either "military objective" or "civilian."[37]

Civilian immunity The principle of civilian immunity is a cornerstone of the modern law of armed conflict. It is one of those cases where humanity should outweigh military necessity, the underlying thought being that no military purpose is be served by attacking peaceful civilians.[38] As Garner wrote in 1924:

> The civilized world is in accord that a belligerent ought not to direct his attacks against the civil population who take no part directly or indirectly in the operations of war … There is no reason for admitting a different principle for aerial warfare … the distinction is fundamental and eternal.[39]

At the beginning of World War II, President Roosevelt called on the parties to refrain from aerial bombardment of "civilian populations or unfortified cities." On September 2, 1939 the British and French governments declared, among other things, that they had prohibited their air commanders from "the bombardment, whether from the air or the sea, or by artillery on land, of any except strictly military objectives in the narrowest sense of the word." However, they reserved the right to take appropriate action in the event of the enemy's not observing any of these restrictions. The German chancellor, Adolf Hitler, also responded that the German air force had received the command to confine itself to military objectives on condition that the opposing air forces kept to the same rules.[40] Unfortunately, these declarations, being based on reciprocity, did not survive the bombings of Warsaw and in Norway, Belgium and Holland.[41]

So was the principle of civilian immunity a binding norm of customary law in 1939, binding irrespective of reciprocity? If so, supplementary questions are: what civilians, what immunity?[42] For example, the law has always tolerated civilian casualties that are incidental to attacks on legitimate targets.[43] Customary law had long been based on the understanding that land warfare was a contest between opposing armies and that civilians who went about their normal, peaceable activities had nothing to fear.[44] It was only when civilians got caught up in the fighting, especially as occupants of a defended town subjected to siege and bombardment, that their protection dissolved. The Hague Regulations explicitly recognized the right of bombardment of defended places, subject to precautions being taken, so far as possible, to protect certain categories of property. It follows that in such a scenario civilian casualties were inevitable. In 1907, however, such defended places would, of necessity, be close to the enemy forces and within range of their guns.

The advent of air power meant that the target could be several hundred miles away from places where the opposing forces were in contact. In that situation the concept of the undefended town has no place because such towns cannot be occupied. On the other hand, it would seem extreme to argue that, because enemy territory was protected by troops and naval forces, by fighter aircraft and anti-aircraft guns, every town in the enemy hinterland was a defended town and, therefore, subject to bombardment. It might be better to conclude that the advent of air power was such a fundamental change in the way that war was fought that existing rules on undefended towns, sieges and bombardment simply had no relevance, except when those localities were under immediate threat from ground forces.

That is perhaps why the drafters of the Hague Air Warfare Rules thought it more profitable to try and serve the interests of humanity and the protection of the civilian population by limiting aerial bombardment to cases where some justifiable military need for the bombardment could be advanced. In other words, every town in the enemy hinterland could not be bombed on the basis simply that it was a defended place; there had to be some military purpose for doing so. Indeed, it can be argued that existing customary international law imposed such restrictions in any event. The drafters of the rules tried to achieve limitations by requiring bombardments to be limited to military objectives, defining these, making a

distinction between towns in the immediate neighbourhood of land forces' operations and those at a distance, introducing notions of proportionality,[45] because of the inevitable civilian casualties from attacks on military objectives,[46] and prohibiting indiscriminate bombardment.

Lauterpacht, writing in 1935, considered that the rules of international law were inadequate for the regulation of air warfare. However, he expressed the view that the immunity of non-combatants from direct attack (except in case of reprisals) was one of the fundamental rules of international law, equally applicable, in cases of aerial bombardment. They were not immune from collateral damage but a just balance had to be maintained between the military advantage and the injury to non-combatants. Indiscriminate bombardment from the air would amount to a war crime.[47] His reference to a just balance is clearly a reference to proportionality.

While, as a rule, direct attacks against civilians were contrary to international law, there were some possible exceptions to that general rule, the case of reprisals, considered below, being one of them.

State practice permitted bombardment of besieged towns to pressurize the authorities to surrender and, subject to what follows, this can be extended to bombardment in such situations by aircraft.[48] However, a state of siege can arise only where land forces are in a position to take the town. It cannot arise in the enemy hinterland, so the practice, though relevant to tactical bombing in close support of ground forces, has no place in discussions of strategic bombing.

Although often occurring in cases of siege, the bombardment of defended places was not necessarily limited to sieges and, as in the case of naval bombardment, with the advent of long-range artillery and air power, needs to be considered as a separate issue. Traditionally, and prior to Protocol I, the destruction of private and public buildings by bombardment was considered lawful, as one of the means to impress upon the local authorities the advisability of surrender.[49]

Could one, therefore, argue that morale bombing was also legitimate to send a powerful message to the enemy's population that resistance was useless? Here there seems to be an almost imperceptible dividing line between morale bombing and terror bombing. The latter practice has been castigated.[50] But bombing for the purpose of demoralization seems to have been accepted as legitimate during World War I.[51]

Lauterpacht, writing in 1952, was of the opinion that it was:

> unlawful to resort to bombing of the civilian population for the mere purpose of terrorization. For in this case the civilian population becomes the direct object of attack regardless of any connexion with a military objective.[52]

He did not deal with the question of whether undermining enemy morale is itself a military objective. Nevertheless, he also expressed the view that:

> the aerial bombardment by the Allies did not assume the complexion of bombing for the exclusive purpose of spreading terror and shattering the morale of the population at large – though this was the inevitable concomitant of strategic target-bombing.

He pointed out that, although:

> the charge of indiscriminate bombardment of the civilian population was included in the indictment of the German major war criminals before the International Military Tribunal at Nuremberg, no conviction was recorded on that score.[53]

However, he concluded that

> indiscriminate strategic target-bombing is unlawful when judged by the established standards of the traditional distinction between combatants and non-combatants.[54]

One cannot help feeling that Lauterpacht was uncomfortable in trying to distinguish the allied bombing campaign from the practices he had condemned in 1935, especially as the German propaganda minister, Dr Josef Goebbels, had always referred to the allied bombing as terror bombing. Lauterpacht seems in 1952 to be making a fine distinction between bombing with the intent of terrorizing and bombing without that intent but having that effect;[55] and between indiscriminate strategic target-bombing and strategic target-bombing. However, his view of the principle of distinction does tend to be close to modern thinking: "non-combatants … must not be made the object of attack unrelated to military operations and directed exclusively against them," though that would not protect them from the incidental effects of attacks related to military operations.[56]

A moral case for the allied bombing campaign has been made that it was justifiable to bomb cities at a time of supreme emergency, though not when the emergency was over, a point reached before the campaign reached its climax.[57] This is not, however, a legal argument. There is no exception to the law of armed conflict based on a situation of supreme emergency. References in the International Court of Justice to the legality or illegality of the use of nuclear weapons by a state "in an extreme circumstance of self-defence, in which its very survival would be at stake'[58] are not references to any such exceptional right but to circumstances in which the legitimate use of nuclear weapons might be contemplated.

Military objectives The term "military objective" seems to have been used for the first time in the Hague Air Warfare Rules of 1923 in order to describe targets in the enemy hinterland that might legitimately be attacked from the air.[59] However, the notion of military objective is implied in the Hague Naval Bombardment Convention of 1907, which permitted the bombardment of certain objects even in undefended towns.

In the early years of the twentieth century there seemed to be two schools of thought[60] on the subject of aerial bombardment: the Continental, or tactical, school that thought it should be limited to the immediate area of military operations; and the Anglo-American, or strategic, school that thought it should

be limited to military objectives.[61] One of the leading British writers on aerial warfare, Spaight, writing in 1933, put forward some ideas as to how aerial bombardment could be regulated. While wedded to the idea that attacks should be limited to individual targets of military importance, he considered that greater latitude should be allowed in respect of towns and villages within operational zones, which would take on the character of *places d'armes* to the extent that they were occupied or used for military purposes, though that would not extend to residential areas not in the vicinity of military objectives. Outside operational zones, the right to bomb military objectives would remain but where doing so would result in damage to the civilian population altogether disproportionate to the military results, humanity would demand that the belligerent refrain from attack.[62] On the question of the legitimacy of attacking lines of communication, Spaight wrote:[63]

> The right solution, in the writer's opinion, is to treat as *military objectives* only railways, stations, and docks, which are either in the zone of operations or, if outside it, are used almost exclusively for troop or munition transportation.

He goes on to advance the devastation argument,[64] namely, that the customs of war permitted such bloodless (or at least with minimal casualties) destruction of even non-military property as is necessary for the winning of a war.

Meyer, writing in 1935, considered that objects of a civilian nature could be military objectives if they produced goods of a military nature and that people not belonging to the armed forces could be considered "military objectives" if their work stood in adequate relationship to the success of military operations. That would include persons working in a military objective such as munitions workers.[65] He considered that the principle of customary law that "the right of belligerents to adopt means of injuring the enemy is not unlimited'[66] did not prohibit aerial bombardment so long as its use was vital to the achievement of an object of war.[67]

In the absence of any binding, internationally-agreed definition of military objective, the term tended to be interpreted subjectively, and broadly, by those faced with bombing decisions. Lord Trenchard's definition probably came close to encapsulating the actual practice during World War II "any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight."[68]

Precautions in attack An early reference to proportionality can be found in Hall's Treatise of 1924.[69]

> In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. *Prima facie* therefore all forms of violence are permissible. But the qualification that the violence used shall be necessary violence has a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained.

There was little disagreement among writers that indiscriminate methods of warfare were prohibited but there was no consensus as to what amounted to "indiscriminate attacks." These were not defined until 1977. The present understanding of what is meant by an indiscriminate attack may well differ from that of the 1940s when it did not include elements of proportionality.[70] Some writers have defended area bombing[71] on the basis that it did not fall within the meaning of "indiscriminate."[72] On the other hand, Blix concluded that the legal writers either rejected the practice as illegal or pointed to illegal abuses to which such practice had led or, at the very least, admitted that the practice during World War II was on the border of legality.[73]

Spaight, writing in 1944,[74] mounted a spirited defence of the practice of area bombing.[75] While still approving in principle of the idea that military targets may be bombed if they can be identified and if reasonable care is taken not to bomb civilians in the neighbourhood, he pointed out the immense practical difficulties that had been encountered by bomber crews during the war in achieving this standard. This was due to measures adopted by the enemy of camouflaging installations, setting up dummy installations, lighting diversionary fires, the blinding effect of massed searchlights and the harassment of enemy anti-aircraft artillery and defending fighters. In response to the suggestion that they should, in such circumstances, refrain from attack, he asked the question: who are civilians in war today? He suggested that civilians employed in armament factories, transport workers and even fire fighters[76] should be regarded as quasi-combatants. While regretting that other civilian lives may be lost in the process he did not consider that unlawful, but did not refer, in this context, specifically to the principle of proportionality. His argument was that since the war began, defences had improved. These had to be overwhelmed. Destruction of enemy war production was not the only aim; by tying up defensive forces, the enemy's offensive capability was weakened. He made the comment, with which modern commentators might disagree, that the methods employed by the allies were not so brutal as to be repugnant to humanity.

He went on to say that:

> There is still no warrant whatever for the deliberate bombing of a town which is neither a centre of war industry nor otherwise immediately related to the enemy war effort (e.g., as an important centre of administration or of vital communications), or of those parts of such centres which, being purely residential or given up to retail trade or other non-warlike business, cannot be regarded as an essential part of the enemy's war machine. It is the special, not the general, war potential of the enemy that is still the objective. Bombing for a moral effect only remains unlawful. In that sense, attack on the civilian population is contrary to international law.[77]

Lauterpacht, also writing in 1944, did, however, refer to proportionality in the following passage:

> Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-

> combatants. But … it is of the essence that a just balance must be maintained between the military advantage and the injury to non-combatants.[78]

It seems from the pre-war writings that the legal experts accepted that there were some customary law principles in force that restricted the use of air power. There had to be a military purpose in the bombing. Bombing for the sole purpose of terrorizing the civilian population was prohibited, as were indiscriminate attacks. Attacks had to be delivered at military objectives and some care had to be taken to protect civilians not in the immediate vicinity of the target. Wanton violence or violence grossly disproportionate[79] to the object to be obtained would be prohibited as being unnecessary violence.

Practice of states It is difficult to know what to make of the opinions of the legal writers and how much weight should be attached to them. Spaight, who took part in the discussions that led to The Hague Air Warfare Rules, may, in his inter-war writings, have been advancing ideas on how air warfare could best be regulated rather than trying to set out the actual state of the law. This might explain his evident shift of position when faced with the realities of war.

While pronouncements by heads of state and the opinion of legal writers might have some persuasive value in discerning customary law, the actual practice of states carries more weight. Despite some condemnation by the League of Nations, governments and public opinion, the actual practice of states indicated that they did not accept the existence of any legal restraints on bombing except, possibly (a) attacks that did not serve the purpose of defeating the enemy and (b) attacks for the sole purpose of terrorizing the civilian population.[80] Here reference may be made to the Italian campaign in Abyssinia, the Spanish Civil War, and the Sino-Japanese War.[81] One might add, in this connection, British air operations in Iraq in 1922–1924. After a 48-hour notice delivered by loudspeaker and leaflet, insurgent villages were destroyed from the air.[82] During World War II, restraints based on reciprocity, were gradually eroded during the course of 1940.

It is difficult to find any evidence in state practice of any acceptance of a binding principle of proportionality, not even the "grossly disproportionate" test suggested by Hall and Royse. It seems that the latter were thinking in tactical terms, having regard to their reference to "acts" whereas states were thinking, with regard to what was necessary (and, therefore, implicitly proportionate), in strategic terms, in other words, what was necessary to win the war. For example, when justifying to the American people on August 12, 1945 the use of the atomic bomb against Japan, President Truman said "we have used it in order to shorten the agony of war."[83]

Legal Summary

To summarize the position in 1945, therefore, the undefended town concept had no application in strategic air warfare. There was general acceptance of a legal prohibition of (a) attacks on the civilian population as such (b) of attacks that served no tactical or strategic military purpose and (c) attacks that were only

intended to terrorize the civilian population. However, like the civilian population of a defended town under siege or bombardment in the old land warfare rules, the prohibition in (a) did not extend to civilians who were closely connected to the enemy's war effort, such as workers in the war industries or the residents of towns that became tactical or strategic military objectives. Although not required to do so by law, states were prepared initially, but only on the basis of reciprocity, to take steps to protect such civilians by limiting the zones of air operations or the targets to be attacked. This consensus broke down after a relatively short time leaving the civilian population unprotected if they had the misfortune to be present in areas that it was considered necessary to bomb in the interests of winning the war. Why was proportionality not considered? Proportionality, as we now understand it, helps establish the point at which military necessity should give way to humanity, in other words, when the effect on the civilian population outweighs the military advantage. It seems that little regard was shown for the civilian population, the notion of humanity or the dictates of the public conscience during the titanic struggle of World War II. That being the case, considerations of proportionality simply did not occur.

Legal Developments since 1945

While, prior to 1945, there had been occasional references to proportionality in legal writings, there were none to be found in official publications, nor was the principle evident in state practice during World War II.

Yet the US official manual on the law of land warfare, published in 1956,[84] only 11 years after the Pforzheim attack, included an explicit reference to proportionality. After a passage on objects that may legitimately be attacked even though undefended, paragraph 41 of the manual, goes on to say "… loss of life and damage to property must not be out of proportion to the military advantage to be gained." Where had this come from? It may have been as a result of draft rules that had been prepared by the ICRC, following expert meetings in Geneva in 1954, which, among others, Richard Baxter attended.[85] The draft rules, which are aimed at limiting the risks run by the civilian population in time of war, were published in 1956,[86] presented to the XIXth International Conference of the Red Cross at New Delhi in 1957 and later transmitted to governments. They included the following passage in draft Article 8, dealing with precautions in attack:

> Il est tenu de renoncer à l'attaque s'il resort de cet examen que les pertes et destructions probables seraient hors de proportion avec l'avantage militaire attendu.

In their commentary on the draft rules, the ICRC state that proportionality in attack between the military advantage and the risks for the civilian population was a general doctrinal principle, which the experts at the 1954 meeting had wished to confirm. In earlier drafts, this had been rendered as prohibiting attacks that did not lead to a sufficient advantage.[87]

Greenspan, published in 1959, may not have been aware of military doctrine. He does not mention proportionality as such, though seems to hint at it when he argues that target area bombing would be justified if the area bombed is "so preponderantly used for war industry as to impress that character on the whole neighbourhood, making it essentially an indivisible whole" and "the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable." In such a case, he considers that "the purpose of the bombing is the destruction of a military objective, all other damage being incidental."[88] Nevertheless, his seems a defence of the area bombing methods of World War II.

Since there was no reaction to the New Delhi draft rules, the International Red Cross, with the support of the UN Secretary General,[89] tried again in 1969.[90] Even at that stage, legal writers were not putting forward the principle of proportionality as a cornerstone of the law of armed conflict, though there did seem to be a view that target-area bombing should be prohibited.[91]

But evidence of acceptance of some form of proportionality had become evident in the practice of United States. Parks gives a good example.[92] In its Linebacker I air offensive against North Vietnam in 1972, consideration was given to attacking the Lang Chi hydroelectric plant, which supplied 75 percent of Hanoi's electricity for industrial and defence needs. But it was estimated that 23,000 civilians could perish if the dam were breached. General Vogt, the commander of Seventh Air Force, considered that there was a ninety percent chance of successfully attacking the plant without breaching the dam, by using laser-guided bombs. On that basis, President Nixon authorised the attack.

Eventually, in 1973, the ICRC produced draft protocols to the Geneva Conventions. These included specific references to proportionality. Draft Article 46 prohibited attacks that "may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated." The word "disproportionate" also appeared in draft article 50, dealing with precautions in attack.[93]

At the subsequent diplomatic conference where the draft was debated, it was explained that the intention of the drafters was to avoid, or in any case restrict, the incidental effects of attacks directed against military objectives.[94] Attitudes to the draft rule among delegations at the conference covered a wide spectrum.[95] Some were concerned about the difficulties the rule could present to states conducting legitimate self defence to invasion.[96] Others considered that the subjectivity inherent in the language of the draft would fail to protect civilians.[97] Some considered that the idea of proportionality was unacceptable;[98] while others felt that a reference to proportionality was necessary.[99] There is no indication in the debates that the rule of proportionality, let alone the version drafted, was regarded by delegates as reflective of customary international law.[100] In the end, the word "disproportionate" did disappear from the text, though the final text clearly retains the principle of proportionality, albeit in other words. A vote had to be taken on draft Article 46, resulting in 77 votes in favour, one against and 16 abstentions.[101] In explaining his delegation's vote, Sir John Freeland of the United

Kingdom, stated that the reference "to what had become known as "the rule of proportionality" was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict."[102] So, at least in the mind of one person intimately involved in the negotiations at the Diplomatic Conference, the principle of proportionality was, in 1977, developing law.[103]

The US Air Force manual of 1976, perhaps anticipating developments in treaty law, contains the rule of proportionality in language that is identical to that of Article 57 of Protocol I.[104] The authors explained that, subsequent to World War II, "the practices of parties to conflicts in Korea, Vietnam, the various Middle East conflicts, the India-Pakistan conflict, as well as other conflicts, indicate an increased interest in avoiding civilian casualties from aerial bombardment."[105]

However, this view does not seem to have been shared in all quarters in Washington. Parks comments that in the course of the American military review of Protocol I, it was concluded that the concept of proportionality was not a rule of customary law "as it has been represented."[106] Bearing in mind that, earlier in his article, Parks states that "there is no question that the concept of proportionality is part of the Just War Tradition and the law of war," one concludes that he considers that the Protocol I formulation does not reflect customary international law. He offers a definition, which appears to go back to the "grossly disproportionate" tests suggested by Hall and Royse, in the following terms:

> The occurrence of collateral civilian casualties so excessive in nature when compared to the military advantage to be gained as to be tantamount to the intentional attack of individual civilians, or the civilian population, or to a wanton disregard for the safety of the civilian population.[107]

Parks goes on to suggest that in determining collateral civilian casualties, certain categories of civilians should be excluded, such as those providing support for the military forces, those immediately adjacent to the target, those affected by events beyond the control of the parties and "human shields." He also considers that the customary rule requires the effects to be measured against an overall campaign and not on a target-by-target basis, which would exclude decisions made at a lower level.[108]

Nevertheless, the US Air Force seems to have been at least guided by the principle of proportionality as set out in Protocol I[109] and was at pains to avoid or reduce collateral damage during the Iraq wars of 1991 and 2003 and the Kosovo bombing campaign of 1999.[110]

To include the rule of proportionality is now a matter of routine in military manuals published since 1977, not only among states that have ratified Protocol I,[111] but also among states that have not. The formulation in the handbook produced by the US Army Judge Advocate General's School is "Principle of Proportionality – The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."[112] The US Navy handbook puts it thus:

"incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack."[113] Indeed, the latter states that the rule of proportionality "is inherent in both the principles of humanity and necessity upon which the law of armed conflict is based."[114] It is of interest that, by including the words "concrete and direct," which are not in the naval handbook, the US Army handbook's definition is closer to that of Protocol I and seems to be looking at proportionality as a tactical rather than strategic issue.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has also indicated that the principle of proportionality is one of customary international law:[115]

> In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to have been contested by any State, including those which have not ratified the Protocol.

This passage calls for several comments. The duty of care relates to precautions in attack and is, perhaps, an offshoot of the principle of military necessity, since casualties caused carelessly are not "necessary" to the achievement of any military purpose. The word "always" seems to indicate that the principle of proportionality is one of very long-standing. The formulation of the principle in the second sentence differs in several respects from the formulation in Protocol I, which talks about "excessive" loss and damage, "concrete and direct" military advantage and "anticipated" rather than "gained." It is possible that the tribunal either used a form of shorthand when defining the principle, without taking much care with the precise wording, or considered that theirs was a formulation of the customary law principle. At all events, the tribunal seem to have endorsed the Protocol I formulation as representing customary law.

One might have expected the tribunal to examine the rule of proportionality in the *Strugar* case, which concerned the shelling of the old town of Dubrovnik on December 6, 1991, but the tribunal considered that, since there were no military objectives in the old town, the question of proportionality did not arise.[116]

In the *Galic* case,[117] the trial chamber expressed the view that the "principle of proportionality, inherent to both the principles of humanity and military necessity upon which the law of conduct of hostilities is based, may be inferred, *inter alia*, from Articles 15 and 22 of the Lieber Code and from Article 24 of the Hague

Air Warfare Rules"[118] and, referring to those rules, "although these rules were never adopted in legally binding form, they are considered to be an authoritative interpretation of the law."[119] Unfortunately, the chamber did not cite the extract from Oppenheim's *International Law* on which they based this proposition. The tribunal went on to define the rule of proportionality, in language almost identical to that of Protocol I, in the following terms:

> Once the military character of a target has been ascertained, commanders must consider whether striking this target "is expected to cause incidental loss of life, injury to civilians, damage to civilian objectives [sic][120] or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

The tribunal then expressed the view that if such casualties were expected to result, the attack should not be pursued. Of course, that is not the only option in such cases. Protocol I permits another, namely, that of suspending the attack. Commonsense also dictates that there is a third option: re-planning the attack so that any likely incidental loss and damage is not excessive. As the tribunal noted, the proportionality rule relates to the time that the decision to attack is made, so that there is both a subjective and an objective element:

> In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties[121] to result from the attack.[122]

So a court has to look at the situation as the accused person saw it and on the basis of the information available to him before making an objective finding about the foreseeability of excessive loss or damage. It is of interest that the tribunal talks of "making reasonable use of the information available" rather than "making use of the information reasonably available," which is the formulation made used by several states in their declarations on ratification of Protocol I.[123] Is this an error? If not, what can it mean? The purpose of the declaration by the states was to make it clear that in assessing a commander's responsibilities and the information available to him, which, in this information age, is vast in quantity, one has to bear in mind that the constraints of time and the attention needed for conducting military operations would preclude commanders and their staffs from conducting detailed research before making decisions.

The tribunal's judgement is of interest also for quoting the ICRC Commentary with approval on two points. First, that the expression "concrete and direct" was intended to show that the advantages concerned should be substantial and relatively close, and that advantages which were hardly perceptible or which would only appear in the long term should be disregarded.[124] It did not comment on the author's suggestion made elsewhere that it does not really matter what timescale is applied, provided it is applied to both limbs – military advantage and civilian protection.[125] Secondly, that, in cases of doubt, the interests of the civilian population should prevail.[126]

Turning to the *mens rea*, the tribunal considered that the prosecution must prove that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties."[127]

Finally, on the question of the effect of the activities of the other party to the conflict, the tribunal stated that "the failure of a party to abide by this obligation[128] does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack."[129] The tribunal also did not take advantage of the opportunity to adopt the author's suggestion that the activities of the defenders in such cases should be taken into consideration as part of the proportionality rule.[130]

It is clear that the Yugoslav Tribunal is of the opinion that (a) a rule of proportionality exists in customary international law and (b) that its formulation is in accordance with that proposed in Protocol I.

The advisory opinion of the International Court of Justice with regard to nuclear weapons contains several references to proportionality in the context of the law relating to self-defence but there is no clear statement of the principle of proportionality in the context of the law of armed conflict. Judge Higgins muses on the high level of military necessity that would be needed to justify the high level of civilian casualties that might result from the use of nuclear weapons, but does not offer any view on the existence, or contents, of any principle of proportionality under customary law.[131]

Perhaps the closest one can get to an acceptable formulation of the customary law principle of proportionality is that which is to be found in the Statute of the International Criminal Court (ICC), Article 8 para. 2(b)(iv), which makes the following a war crime:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

According to the Dörmann, the "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack." The word "overall" was intended to cover situations, like feigned attacks to disguise the main attack, where the military advantage was planned to materialize later, but not to go so far as cover long-term political advantages or the winning of the war.[132]

Conclusions

Although proportionality was hinted at by the drafters of the Hague Air Warfare Rules of 1924 and mentioned expressly by legal writers such as Hall (1924), Spaight (1933) and Lauterpacht (1935 and 1944), it does not seem to have been

accepted by states as a binding rule of customary international law until the 1970s. There was a determination to avoid the excesses of World War II, and the principle of proportionality was gradually applied by states in their post-war practice.[133] The 167 states that have ratified Protocol I have accepted the formulation of the rule there set out and it seems reasonable to conclude that the remaining states that have not ratified the protocol accept the principle of proportionality, though they may argue about its precise definition.

It seems to the author that, notwithstanding the views of the ICTY, a formulation based closely on the text of Protocol I, as suggested by the ICRC in their Rules 14, 18 and 19 does not represent customary international law but that the formulation in the ICC Statute, Article 8, paragraph 2(b)(iv) comes closest to doing so, especially as the statute was drafted with states not party to Protocol I very much in mind and involved in the negotiations. It should be noted that, by their use of the words "clearly excessive in relation to the concrete and direct overall military advantage anticipated," the drafters of this article took into account the various statements made on ratification of Protocol I and, by adopting a middle way, have tried to accommodate the requirements of military necessity without abandoning humanity, by allowing one to look at the bigger operational picture.[134]

The principle of proportionality operates at various levels. First, it acts as a factor for decision makers to enable them to take humanity into consideration when doing their military planning. However, commanders are, by the nature of the task they are called upon to perform, likely to put more emphasis on military necessity. Representatives of aid organisations, or indeed journalists, are more likely to put emphasis on humanity. Members of the public of states not involved in the conflict will tend focus on the human story in the aftermath of an attack, like pictures of children killed in an air raid.

In some cases, the collateral damage may appear, even to an impartial observer, to be too high, in which case, secondly, it will be necessary to establish the facts. The mere fact that civilians have been killed and injured or civilian property destroyed or damaged does not necessarily mean that a state has failed to comply with the requirements of international law. It is necessary to inquire into all the surrounding circumstances to ascertain what was attacked and why, what weapons or tactics were used, what was known about likely collateral casualties and damage, what precautions were taken to reduce these, how the collateral loss or damage was caused and what this amounted to. States should have internal procedures for inquiring into these points as a matter of course but sometimes the international community is not satisfied to leave it to national procedures. This may result in inquiries being launched by outside bodies such as the United Nations or by non-governmental organizations such as Human Rights Watch. A much under-used asset in this respect is the International Humanitarian Fact-Finding Commission established under Article 90 of Protocol I. This could be a useful tool for the impartial establishment of facts by a body that would command international respect.

Thirdly, questions of criminal responsibility might arise in the more blatant cases of reckless or irresponsible actions by armed forces. In that respect,

important considerations for any tribunal will include: (a) the overall military advantage must be considered, not merely those advantages flowing directly from the attack (b) commanders must not be judged on the basis of hindsight, or on the basis of what actually happened, but on the basis of the situation as it appeared to the commander at the time he made the decision and on the basis of the information reasonably available to him at the time (c) results flowing from events that are outside the control of the attacker, for example, missiles deflected by enemy counter-measures, should be excluded from consideration and (d) the collateral damage must be "clearly" excessive before criminal liability can be established.

Notes

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2 Non-lawyers tend to compare casualties and then talk about disproportion, but that has nothing to do with the principle of proportionality discussed here. For example, Erlanger, writing of the Israeli attacks in southern Lebanon in July 2006, mentions that comparisons of 230 Lebanese dead with 25 Israeli dead since July 12, 2006, have led to some accusations of disproportionate use of force, but quotes Israeli Brigadier General Ido Nehushtan as saying that "the Israeli military tries our utmost to avoid civilian casualties." That is what the law of war requires them to do. However, the principle of proportionality goes one step further and requires the military to consider the importance of the target to be attacked against the likely civilian casualties and damage to civilian property and then cancel or re-plan the attack if that collateral loss or damage is going to be excessive in relation to the expected military gain.
3 Cassese, 2005, p. 417.
4 Henckaerts and Doswald-Beck, 2005, see rule 14 in vol. I.
5 Henckaerts and Doswald Beck, vol. I, p. 46, which states that "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts." See also Cassese, p. 418.
6 Rogers, Armed forces, 1982, p. 212.
7 Biddle, 2002, p. 257.
8 This information is pieced together from the following authors, who are at variance over the precise details: Grayling, 2006, p. 325; Taylor, 2004, pp. 373–374; Biddle, 2002, pp. 257, 377; Friedrich, 2002, pp. 109–116; Neillands, 2001, pp. 374–375. Neillands does not mention the casualty figures but says that the RAF dropped 1,551 tons of bombs and wrecked 350 acres of the town's built-up area. He quotes a member of a bomber crew being briefed about an attack on "the marshalling yards" and that the town was "a watchmaking centre which was said to be producing V2 warheads."
9 Keegan, 1998, pp. 317–318.
10 Art. 22.
11 E.g., Protocol I, Art 49, para 3.

12 Blix, p. 31, says that "the absence of international rules specifically regulating air warfare may have contributed to the relative absence of restraints which the world has witnessed."
13 According to Lauterpacht, the declaration related to balloons and air-vessels, see Oppenheim, 1935, p. 412. According to Spaight, however, even the later 1907 Declaration was so worded only to include balloons, see Spaight 1933, p. 196.
14 See Roberts and Guelff, 2000, p. 139.
15 Meyer, 1935, pp. 115–116, seems to reach the same conclusion.
16 See Oppenheim, 1935, p. 412; Jennings, 1945, p. 259, quoting Hall; Blix, 1978, p. 41.
17 Blix, 1978, p. 33, regards this as of little practical importance in connection with air warfare.
18 See Roberts and Guelff, 2000, p. 178.
19 Hague Convention IX of 1907, Art 1.
20 Spaight, 1933, p. 197, 214; Jennings, 1945, p. 261.
21 Blix, 1978, p. 35.
22 Hague Air Warfare Rules 1923, Art 22. Spaight, 1933, p. 239, comments that this would not preclude collateral damage.
23 Jennings, 1945, p. 261, pointed out that this means that a town containing no military objectives may not be bombed.
24 Spaight, 1933, pp. 232–235, comments that the rule would exclude many of the industrial targets attacked during World War I.
25 Hague Air Warfare Rules 1923, Art 24, para. 3. The drafting of paragraphs 3 and 4 of Art 24 is somewhat curious, but this is the interpretation Spaight places on it, see Spaight, 1933, pp. 216–217 and Spaight, 1944, p. 161.
26 Art. 24, para. 4.
27 Hanke seems to think that this may have been a drafting error, at least with regard to cases of "conscious negligence" as opposed to deliberately indiscriminate attacks, see Hanke, 1993, p. 26.
28 Or as a convenient starting point for any future attempt at air law codification, Oppenheim, 1952, pp. 519–520.
29 Williams, 1929, pp. 579–581.
30 As Royse commented in 1930 "There are thus no conventional rules in actual force which directly affect aerial bombardment. At the present time the only restrictions bearing on such operations are those general and rather vague limitations known as the customary practices of war" – Royse, 1930, quoted by Parks, 1990, p. 41.
31 Oppenheim, 1952, p. 520.
32 United Kingdom Ministry of Defence, 2004, para 1.12.1.
33 Defined in the Lieber Code, Art. 14, thus: "military necessity … consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war."
34 The so-called "Martens clause" in the preamble to Hague Convention IV of 1907 on the laws and customs of war on land reads as follows: "In cases not included in the regulations … 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 among civilized peoples, from the laws of humanity and the dictates of the public conscience."
35 Royse stated in 1930 that there was "no agreement among jurists as to the extent of violence on a plea of necessity," see Parks, 1990, p. 41.

36 At that stage, Britain would not have been in a position to carry out strategic bombing, see Biddle, 2002, p. 183.
37 Spaight, 1947, p. 258.
38 Historically, the principle was never unconditional as the following extracts from the Lieber Code of 1863 demonstrate: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war" – Art 15; "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit" – Art 22; "the more vigorously wars are pursued the better it is for humanity. Sharp wars are brief" – Art 29.
39 Garner, 1924, pp. 66–67.
40 Spaight 1947, pp. 260–261.
41 Spaight 1947, pp. 264–267.
42 Spaight 1947, p. 43, complains that in the years leading up to World War II "no one stopped to ask who the "civilians" were about whom so much concern was shown. That question was at the root of the whole matter."
43 As Royse commented in 1930 "the rules and practices of warfare do not protect civil populations against incidental bombardment even when such bombardment means wholesale destruction of property and civilian life" – see Parks, 1990, p. 41.
44 This approach, which has found treaty expression in Additional Protocol I of 1977, was the classical continental doctrine, based on the writing of Jean Jacques Rousseau. What has become known as the Anglo-Saxon school of thought placed more emphasis on the enemy's total war effort.
45 Hague Air Warfare Rules, Art. 24(4).
46 See Meyer, 1935, pp. 144–145.
47 Oppenheim, 1935, pp. 414–419.
48 Parks, 1990, p. 4.
49 Oppenheim, 1952, p. 421. However, it does not appear in United Kingdom War Office, 1958, also edited by Lauterpacht, which states, in para 288, that destruction incidental to the bombardment of military objectives is not unlawful but that bombardment directed solely against a non-military objective would be unlawful. In a footnote it is stated that "the bombardment of a workers" housing estate several miles outside the town and separated from it by open country, would be a violation of the law of war. This seems to be an attempt to explain bombing practices of World War II in the light of the rule set out in the manual.
50 Blix, 1978, p. 45, expresses the view that "bombing for the purpose of spreading terror among the civilian population is illegal." See Biddle, 2005, pp. 256–257, about the concern of senior RAF commanders after Dresden to deny that they had adopted a policy of deliberate terror bombing.
51 According to Royse, writing in 1930 – see Parks, 1990, p. 41.
52 Lauterpacht, 1952, p. 368.
53 See also Blix, 1978, p. 37, quoting Telford Taylor, to the effect that since aerial bombardment had been used so extensively on both allied and axis sides it was not made an issue at the Nuremberg or Tokyo trials.
54 Oppenheim 1952, pp. 528; 529–530.
55 This is a distinction that would have been lost on Sir Arthur Harris, a man not given to mincing his words. He said: "what we want to do in addition to the horrors of fire is to bring the masonry crashing down on the Boche, to kill Boche, and to terrify Boche" – see Probert, 2001, p. 223.
56 Lauterpacht 1952, p. 365.

57 Walzer, 2000, pp. 255–263.
58 110 *International Law Reports* 213, 216.
59 See Jennings, 1945, p. 261.
60 This is a thread that runs through Spaight , 1933, or Meyer, 1935.
61 A term, according to Meyer, 1935, pp. 47–48, that stems from the Hague Convention IX on naval bombardment of 1907.
62 Spaight, 1933, pp. 206–210.
63 Spaight, 1933, p. 229.
64 Spaight, 1933, pp. 239–259.
65 Meyer, 1935, pp. 99–100; 104–106.
66 Hague Regulations 1907, Art 22.
67 Meyer, 1935, 116–117.
68 Quoted by Parks, 1990, p. 33.
69 Hall, 1924, p. 635.
70 Additional Protocol I of 1977, Art 51, para 5(b) specifically does so. Royse, writing in 1930, said “to base the legitimacy of a means of warfare upon the extent of its incidental damage to civil populations would be a distinct innovation in the regulations of warfare on land” see Parks, 1990, p. 41. It is to be noted, however, that Spaight, 1933, pp. 206–210, does refer to disproportionate damage.
71 Area bombing refers to the situation where an area containing military objectives is bombed rather than individual targets within that area.
72 See the discussion in Blix, 1978, p. 47.
73 Blix, 1978, p. 58.
74 Spaight, 1944, pp. 161–164. See also Spaight, 1947, pp. 270–274.
75 Bergander, 1998, p. 329, comments that whether area bombardment or point-attack methods were used, civilian casualties were inevitable.
76 He regards it as illogical to drop incendiary bombs on military objectives and then spare those who try to put out the fires or prevent them spreading.
77 Spaight, 1947, p. 277.
78 Oppenheim, 1944, p. 415.
79 See Hall; Royse, 1928, wrote, at p. 137: “If an act is essential, the destruction is effective and not wanton, and if the results to gained by such as act are not grossly disproportionate to the extent of the destruction, then the act can hardly be condemned regardless of the amount of suffering and violence.”
80 Parks, 1990, p. 39, refers to the German *Luftwaffe* directive of 1936, which stated that attacks on cities for the purpose of terrorizing the civilian population were absolutely forbidden, that the single most important task of the *Luftwaffe* was an offensive against (a) the combat strength of the enemy, and (b) its population’s will to resist and that, in order to accomplish this, the *Luftwaffe* should carry out offensive operations against the enemy population and country at its most sensitive points, including economic targets.
81 Blix, 1978, p. 35.
82 Harris, 1998, p. 22.
83 Cited by Walzer, 2000, p. 264.
84 US Department of the Army.
85 Kunz, 1956, p. 324.
86 See 1956 *International Review of the Red Cross*, at pp. 487, 623.
87 Ibid., pp. 700–701.
88 Greenspan, 1959, p. 336.

89 General Assembly Resolution 2444 of December 19, 1968 called for the Secretary-General, in consultation with the International Committee of the Red Cross, to study, among other things, "the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."
90 1969 *International Review of the Red* Cross, pp. 613–619.
91 See Levie, 1971, p. 28.
92 Parks, 1990, pp. 168–169.
93 Swiss Federal Political Department, vol. I.
94 Ibid., vol. XIV, p. 37.
95 Ibid., pp. 48 et seq.
96 See the statement of Mr Paolini (France), Swiss Federal Political Department, vol. VI, p. 161.
97 Mr Fischer of the German Democratic Republic said that it was tantamount to making civilian protection dependent on the subjective decisions of the military commander – Swiss Federal Political Department, vol. XIV, p. 56.
98 For example, Mr Cretu of Romania, Swiss Federal Political Department, vol. xiv, p. 57.
99 For example, Mr Samuels of Canada, who stated that an absolute prohibition would result in a difficult situation when there was a single civilian near a military objective whose presence might deter an attacker – Swiss Federal Political Department, vol. XIV, p. 55.
100 Several delegations wanted the reference to proportionality deleted, for example, Hungary, the German Democratic Republic, Czechoslovakia, Poland, Romania, Albania, Syria, Iraq, Egypt, Indonesia. That did not necessarily mean that they did not accept that the principle existed; they were concerned about the way the principle was drafted. As Mr Herczegh of Hungary explained (Swiss Federal Political Department, vol. xiv, p. 68), "the debate had shown that opinion … was divided on the principle of proportionality set out in sub-paragraph 3(b). His view was that a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it. Sir David Hughes-Morgan, of the United Kingdom, objecting to the deletion of any reference to the principle of proportionality, said that it "ought to form part of international law" – Swiss Federal Political Department, vol. xiv, p. 64. Mr Aldrich of the United States said that the rule of proportionality set out in the amendment in document CDDH/III/27 "was based on existing international law." The formulation in that document was that it was forbidden "… to attack a military objective if the attack may be expected to entail losses among the civilian population, or cause the destruction of civilian objects, in the immediate vicinity of that objective to an extent disproportionate to the military advantage sought" – Swiss Federal Political Department, vol. III, p. 202.
101 Swiss Federal Political Department, vol. VI, p. 163.
102 Swiss Federal Political Department, vol. VI, p. 164.
103 According to Judge George Aldrich, in an email to the author dated July 30, 2006, it was not clear from the debate at the Diplomatic Conference whether the near unanimous support for the rule of proportionality indicated whether it was considered

(a) to be already a customary law rule or (b) a rule considered ready for adoption. "My present view on your question is that John Freeland stated it best."

104 United States Department of the Air Force, p. 5–10c(1)(c).

105 See para. 5.6.

106 Parks, 1990, p. 173. Parks refers, *inter alia*, to the comment by Aldrich, 1981, p. 778, that the protocol included "the first codification of the customary law rule of proportionality."

107 Parks, 1990, p. 174.

108 It is of interest here that many states ratified Protocol I with a statement of understanding similar to that of the United Kingdom that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack," see Roberts and Guelff, 2000, pp. 499–512, where it is also noted that Switzerland declared that the obligations with regard to precautions in attack apply to commanders at battalion or group level and above.

109 See, e.g., Heintzelman and Bloom, 1994, pp. 20–22. See also de Sassure, 1994, pp. 59–60, who, though sharing the views of Parks on the Protocol I treatment of proportionality, accepted the need to avoid disproportionate civilian casualties and property destruction and showed how it was possible to use technologically-advanced weapons to minimize civilian deaths and property damage.

110 See Rogers, 2004, pp. 103–109; Schmitt, 2005, pp. 457–458.

111 See, e.g., German Defence Ministry, 1992, para. 456; Australian Defence Force, 1996, para. 535; United Kingdom Ministry of Defence, 2004, para. 2.6.

112 United States Army, Judge Advocate General's School, 2003, p. 9.

113 US Naval War College, 1997, para. 8.1.2.1.

114 Ibid., p. 8–4.

115 *The Prosecutor* v. *Kupreskic and Others*, Case No. IT-95–16–T, trial chamber judgement of January 14, 2000 at para. 524.

116 *Prosecutor* v. *Strugar*, Case No. IT-01–42–T, trial chamber judgement of January 31, 2005, at para. 295.

117 *Prosecutor* v. *Galic*, Case No. IT-98–29–T, trial chamber judgment of December 5, 2003.

118 Ibid., para. 58, footnote 104.

119 Ibid., para. 57, footnote 103.

120 It should, of course, be "objects." The tribunal almost falls into the trap of adopting the unfortunate media terminology of "civilian target."

121 Presumably, damage to civilian objects would also have to be considered.

122 Para. 58.

123 For example, Canada, Ireland and the United Kingdom, see Roberts and Guellf, 2000, pp. 499–512. Curiously, Australia, Germany, Italy, The Netherlands, New Zealand omitted the word "reasonably" in their equivalent declarations.

124 Sandoz, Swinarski and Zimmermann, 1987, para. 2209; judgement, para. 58, footnote 106.

125 Rogers, Conduct of Combat, 1982, p. 311.

126 Sandoz, Swinarski and Zimmermann, 1987, para. 1979; judgement, para. 58, footnote 108.

127 Judgement, para. 59, citing Art. 85(3)(b) of Protocol I.

128 Namely, the obligations, under Art. 58 of Protocol I, to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas.

129 Judgement, para. 61.
130 See Rogers, 2004, p. 20.
131 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 110 *International Law Reports* 1. For the dissenting opinion of Judge Higgins, see p. 532, at pp. 536–537.
132 See Dörmann, 2003, p. 161 *et seq*.
133 Best, 1994, at p. 323, comments on the principle of proportionality that "only after 1945 did it come out of the closet."
134 See Dinstein, 2004, p. 123.

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Chapter 9

Hors de Combat: Post-September 11 Challenges to the Rules

Avril McDonald

In recent years, the subject of the legal regime applicable to persons *hors de combat* has attracted a great deal of attention as a result of the armed conflicts in Afghanistan and Iraq,[1] as well as in the context of the larger global war on terror, recently renamed "the long war."[2] Given the renewed interest in the subject, the aim of this chapter is to clarify the international legal regime applicable to persons *hors de combat* and explore some of the challenges to it that have arisen post-September 11, 2001.

The chapter first examines the meaning of *hors de combat* and identifies the persons who enjoy protection. It proceeds to trace the customary evolution of the rules and examines the purposes which they have been designed to serve. The chapter then looks at some of the most innovative and significant provisions of the modern conventional legal framework regulating *hors de combat*. Following that, it explores some challenges to the rules that have arisen post-September 11. Some remarks are offered in conclusion.

Becoming *Hors de Combat*

The notion of *hors de combat* constitutes a bulwark of international humanitarian law (IHL) as it underlies, or influences the application of, the fundamental principles of the law, in particular those of distinction, protection, humanity and necessity. In the words of the ICRC's Commentary on Article 41 of Additional Protocol I, "one might argue that the whole secret of the law of war lies in the respect for a disarmed man."[3]

Article 41 of 1977 Additional Protocol I to the 1949 Geneva Conventions is the most contemporary expression of the customary rule regarding *hors de combat*; in fact, it is the first place where the general rule concerning all persons *hors de combat* has been explicitly set out.

> 1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
> 2. A person is *hors de combat* if:
>   (a) he is in the power of an adverse Party;
>   (b) he clearly expresses an intention to surrender; or

> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.
>
> 3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

As the ICRC Commentary to Protocol I notes:

> The safeguard of the enemy *hors de combat* on the battlefield is the logical and natural complement to the preceding provision which prohibits the refusal to give quarter. It is a rule of application which follows from this provision and, like it, is derived from the principles laid down in Article 35 (Basic Rules).[4]

As per Article 49 of the Protocol, attacks should be given the meaning of "acts of violence against the adversary, whether these are in offence or defence."[5]

Article 41 is the first conventional rule to clearly state the conditions for becoming *hors de combat*. Paragraph 2(a) refers to prisoners, whether wounded or sick or well, (b) to persons intending to surrender, and (c) to the sick and injured not in enemy hands. Most persons *hors de combat* are either in or placing themselves in enemy hands. However, as the law has evolved it has developed separate legal regimes for the wounded and sick, shipwrecked persons and prisoners of war (POW) while recognizing that, with some exceptions, POW is the general category, regulating the treatment of all prisoners qua prisoners, and that the sick, wounded and shipwrecked are usually a subcategory of POWs.

If a person has already fallen into enemy hands, it is clear that he is *hors de combat*. Confusion can arise with regard to persons surrendering or the sick, wounded and shipwrecked.

As far as those intending to surrender are concerned, it is clear that the onus is on the individual or the unit to clearly indicate their intention to surrender. "A surrender may be effected by an individual combatant (usually by raising his hands or by hoisting a white flag) or by entire units, sometimes on a massive scale."[6] According to Rogers:

> No procedure is laid down, but normally a soldier surrendering would be expected to put down his weapons and come out into the open with his hands raised above his head. Television footage of United States armoured vehicles moving towards Baghdad during the Iraq war of 2003 included clear instructions from a commander to his soldiers not to open fire on Iraqi soldiers emerging from the undergrowth with their hands up.[7]

However, as Dinstein notes: "A combatant is entitled to continue fighting up to the moment of his surrender without losing the benefits of quarter and his rights as a prisoner of war. No vengeance can be taken since that person has simply done his duty up to the moment of his surrender."[8]

A wounded combatant who continues fighting can still be attacked, but if he is unable to fight through his injuries he is protected. The shooting by a US

marine of injured Iraqi insurgents at a mosque in Fallujah in November 2004[9] provoked international outrage.[10] In this case, the men appeared to be unarmed and not engaged in threatening actions; they were slumped on the ground.[11] However, even armed injured combatants should not be attacked unless they are acting in a hostile way. Common Article 3 distinguishes between persons taking no active part in the hostilities, including members of armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention or any other cause. The former include persons who have surrendered; the latter are persons who are *hors de combat* through sickness but who have not necessarily surrendered through laying down of arms. Indeed, they may be too seriously injured to be capable of doing so. They may therefore continue to be armed, but unless they are engaged in using them or displaying hostile intent, they are protected from attack.

Retreating soldiers are not considered *hors de combat* and may be attacked, unless they surrender.[12]

Article 42 of Additional Protocol I codifies the customary rule[13] concerning the protection enjoyed by persons parachuting from aircraft in distress.[14] According to paragraph 1, such a person should not be attacked during his descent. Under paragraph 2, where such a person is descending into enemy territory, he "shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act."[15] According to paragraph 3 of Article 42: "Airborne troops are not protected by this Article."

Dinstein notes that:

> Excluded from the scope of the protection are (aa) those remaining on board in anticipation of a forced landing; and (bb) those descending by parachute for reasons other than distress (not only airborne troops, but spies too). As indicated, if parachutists from an aircraft in distress alight on water, they come within the definition of "shipwrecked."[16]

The UK Military Manual adds that:

> Parachuting airborne troops are legitimate targets even if descending from aircraft in distress, though in those circumstances it may be difficult to distinguish airborne troops from aircrew. When the identity of parachutists is in doubt, they should not be attacked.[17]

A person who has parachuted from an aircraft in distress into enemy territory may well have suffered injuries either prior to or during his descent. The UK Military Manual observes that:

> Clearly if the "downed" airman is incapacitated he is *hors de combat* and the general rule will apply. The attack may be resumed immediately if he offers violence, attempts to escape, or if, suffering no incapacity, he is in territory controlled by his own forces. The pilot who has crash-landed his aircraft and is attempting to complete its destruction or the destruction of any part of his or its equipment is committing a hostile act and may be attacked immediately.[18]

The UK Manual notes that Article 42 is just a specification of the general rule of *hors de combat*, and that, as with the general rule, it depends on the person refraining from hostile acts, not only once he reaches the ground but also during the descent.[19] This, rather than the fact of being injured per se, is what ensures his protection. While he must be given a chance to surrender, equally he must clearly evince the intention to do so once he has reached the ground.

While the question of whether combatants escaping from disabled land vehicles, such as tanks and armoured personnel carriers, is not dealt with either in Additional Protocol I or elsewhere, the UK Manual notes that, in these cases: "The general rule on the protection of those *hors de combat* … applies."[20]

The Persons Enjoying Protection

Although Article 41 states the conditions for becoming *hors de combat*, neither it nor any other rule specify which persons can become *hors de combat*. However, it is clear that, as a general matter, Article 41 applies to combatants rather than to the general civilian population, which is protected by the Fourth Geneva Convention and other provisions of Additional Protocol I during an international armed conflict.[21] The Article is contained in the part of the Protocol dealing with methods and means of warfare, combatant and prisoner of war status. The term *hors de combat* suggests that the person had previously participated in combat before becoming *hors de combat*. The fact that the rule states that the person *hors de combat* shall not be made the object of attack indicates that it would have been permissible to attack that person before he became *hors de combat*.

Although the rules have been developed to protect combatants and are mainly directed to combatants, this does not mean that only lawful combatants can become *hors de combat*, however. It is clear that any person who has taken a direct part in hostilities during an armed conflict can become *hors de combat* and enjoys protection, even if he will not be entitled to POW status.[22]

Unlike a combatant, who only gains protection from attack by becoming *hors de combat*, there are two possibilities for a civilian taking a direct part in hostilities to regain protection: he can stop taking a direct part in hostilities or he can become *hors de combat*. As the ICRC Commentary on Article 41 states:

> The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions and respect for the rule is also imposed on the civilian population, who should, like the combatants, respect persons *hors de combat*. Finally, this protection also extends, if necessary, beyond the period of combat, and even after the general close of military operations.[23]

This means that civilians who take a direct part in hostilities, like combatants, are obliged to comply with the legal rules regarding persons *hors de combat*, at least as far as refraining from attacking them, even if it would be difficult or even

impossible for a civilian to comply with the detailed rules pertaining to POWs, for example.

In common Article 3 of the Geneva Conventions, protection is extended to persons who become *hors de combat* during a non-international armed conflict. These could be members of armed groups or civilians who take a direct part in hostilities. Given that the combatant's privilege is not recognized in the context of non-international armed conflicts, persons in captivity would not benefit from the extensive regime applicable to prisoners of war, but would be entitled to humane treatment.[24] Additional Protocol II elaborates on the protections enjoyed by those *hors de combat* and the obligations of the parties in this respect, as will be discussed in more detail later on.

There is, thus, not a perfect overlap between the POW population and persons *hors de combat*, as POWs can be persons other than combatants[25] (if not civilians who have taken a direct part in hostilities or members of armed opposition groups during non-international armed conflict) and persons *hors de combat* are not necessarily POWs.

The Purpose of the Rules Regulating *Hors de Combat*

Modern Geneva law is paradoxical because it is, on the one hand, based on the principle of non-reciprocity – each side must apply it regardless of whether the other side does[26] – and, on the other hand, predicated on the assumption of reciprocity.[27] This is because states have developed the rules, first through their customary practices and later by codifying these rules, to serve their mutual self-interest and advantage.[28] While some writers stress one particular purpose of IHL – humanitarian[29] – over another – utilitarian[30] – in principle there is no real conflict between these complementary and mutually reinforcing objectives of the rules that constitute IHL. It is clear that the laws of war, from their earliest beginnings as customary norms to their most comprehensive restatement in the 1977 Additional Protocols, have at their heart a character and a purpose that is both humanitarian and utilitarian.

The early conventional rules concerning what we would today refer to as persons *hors de combat* were based on practices which had evolved and refined themselves over centuries in the customary laws of war. Even if all of the rules are not observed all of the time during armed conflict, the laws of war have been able to accommodate both necessity and humanity because the parties that have traditionally agreed to apply them (namely, states), acting inter each other, have proceeded from common expectations and broadly similar reference points regarding what is humane and honorable and necessary, recognizing that what is inhumane – within the paradigm of war, which assumes that the killing of combatants and sometimes even civilians is not by legal definition inhumane – is generally not necessary and may even be disadvantageous from the military perspective.[31] Not only is it usually not necessary, it is gratuitous and sadistic and a wasteful misapplication of valuable and limited human and material resources; in military terms, it is uneconomic.

Evolution of Customs Pertaining to Hors de Combat

In order to better understand the purposes which the notion of *hors de combat* evolved to serve, it is worth examining, if only in brief, its customary evolution.

In the earliest days of human civilization, to be injured while fighting meant being left to die on the battlefield or finished off. To be captured could mean death and possibly ending up in a pot.[32] Still, customary rules aiming at the regulation of armed conflict can be traced back millennia.[33] The Hammurabic Code (eighteenth century BCE, Babylon) and the Justinian Code (sixth century BCE, Byzantine Empire) addressed humanitarian conduct in war,[34] while the Old Testament contains an early injunction against killing prisoners.[35] The basic principle of economy in warfare, from which the notion of *hors de combat* and the prohibitions of no quarter and of unnecessary suffering are derived, was recognized by Sun Tzu in *The Art of War*, written around 400 BCE.[36] A little later, the law codes of Manu Sriti and Mahabharata also recognized the military advantage of sparing one's enemies, even if only Hindus benefited.[37] Captured fighters who were not killed could more profitably be enslaved and sometimes absorbed into the army,[38] even if for the poor unfortunate slaves or conscripts this might have seemed equivalent to escaping from the pot only to jump into the frying pan!

The practice of slavery was specifically banned by the Third Lateran Council in 1179 but only for Christian prisoners.[39] The Third Lateran Council also contained an injunction concerning shipwrecked persons.[40]

In the Middle Ages, the rise of chivalry meant that captured feudal knights could expect their lives to be spared and to be held until a ransom was paid. For non-Christians or those of lesser status than knights, usually no quarter was given. "They represented no considerable economic value, and the *ad hoc* nature of warfare and armies made it difficult to keep large numbers of soldiers for later exchanges with the enemy."[41]

It was in the seventeenth century, with the increasing consolidation of states and the rise of professional armies, that the concept of a prisoner of war as a representative of a state began to be recognized.

> The centralization and stabilization of society and warfare especially after the Thirty Years' War meant that the principle of reciprocity grew in importance as a de-escalating factor. Thus, the belligerents had an increasing need to restrict the casualties of professional military manpower, which, … represented a considerable investment in time and money. This implied, inter alia, that the killing of combatants (including others than nobleman), who no longer offered resistance, was regarded as unnecessary violence. Gradually this conviction developed into what can be described as a customary rule.[42]

Still, their release continued to depend on the payment of a ransom at the end of the war.[43] Later in the century, however, the practice emerged of releasing all prisoners at the end of the hostilities without ransom, for example in the 1648 Treaty of Westphalia,[44] although ransoms for releases during the hostilities

continued to be demanded for some time. This was because, even after the Treaty of Westphalia, the armed forces of many states continued to consist of mercenaries. But, "[b]y the Seven Years War (1756–1763), this practice that had guided tactics in earlier periods was anathema."[45]

Codification of Customary Rules

Nineteenth Century

The codification of these customs began only in the second half of the nineteenth century with the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of August 22, 1864,[46] the first international legal instrument to provide statutory protection for persons *hors de combat*[47] and those who attend them.

The impetus for that Convention came five years earlier, with Swiss businessman Henri Dunant's fateful encounter with the carnage of the Battle of Solferino. As Dunant described in his seminal memoir *A Memory of Solferino*, chancing in 1859 upon a landscape littered with the broken bodies and stained with the blood of fallen soldiers, his ears ringing with their cries of agony,[48] he deeply felt:

> The moral sense of the importance of human life; the humane desire to lighten a little the torments of all these poor wretches, or restore their shattered courage; the furious and relentless activity which a man summons at such moments: all these combine to create a kind of energy which gives one a positive craving to relieve as many as one can.[49]

True to his word, Dunant's reaction to what he witnessed went beyond sentiment. He was sufficiently stirred to take the initial bold steps that led to the establishment of the first national society of the Red Cross movement in 1863[50] and the adoption of the 1864 Convention.

With nothing to personally gain from these efforts,[51] Dunant can be considered as a humanitarian in the true sense of the word[52] and the father of modern treaty international humanitarian law, as first Geneva law and then all of the rules of war came to be known.[53] But even though his actions were driven by a sense of human decency, Dunant was a practical man and realized the element of self-interest involved in humanitarianism during war, asking: "Is there in the world a prince or a monarch who would decline to support the proposed societies, happy to be able to give full assurance to his soldiers that they will be at once properly cared for if they should be wounded?"[54] It was because the armed forces had been cemented as an institution of the state that states felt obligations vis-à-vis their soldiers. Not least was the fact that states had made big investments in their standing armies, which rules aiming at the protection of troops would safeguard.

The 1864 Geneva Convention set out the basic principle of protection of the sick and injured on land and the neutrality of those who tend them. Wounded

and sick combatants should be evacuated from the battlefield and handed over to the enemy, subject to agreement and when circumstances allowed.[55] It enshrined the principles of neutrality for evacuation personnel,[56] hospitals and ambulances and their personnel.[57] It introduced the Red Cross emblem, an essential element of the *hors de combat* regime. To ensure their protection, hospital, ambulance and evacuation personnel should wear a "distinct and uniform flag," which should be flown alongside the national flag. Personnel enjoying neutrality could, at the discretion of the military authorities, wear an armband. Both flag and "armlet" "shall bear a red cross on a white ground."[58] The Red Cross emblem, which has since been joined by the Red Crescent[59] and most recently the Red Crystal emblems,[60] plays a vital role in ensuring protection of persons *hors de combat* by identifying who is entitled to protection.

Additional Articles relating to the Condition of the Wounded in War, adopted in Geneva on October 20, 1868, extended to naval forces the protections of the 1864 Geneva Convention.

Two scholarly initiatives, the Brussels Project and the Oxford Manual were undertaken in 1874[61] and 1880, respectively.[62] They aimed at offering a statement of the laws and customs of war, in particular as regards POWs.[63]

The first international treaty to address POWs, Convention II with Respect to the Laws and Customs of War on Land and its annexed Regulations, adopted at The Hague on July 29, 1899, incorporated many of the provisions set out in the Brussels Project and Oxford Manual and added some new ones. Article 3 of the Regulations provided: "The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war." Article 4 codified the rule that "[p]risoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers remain their property." Article 5 provided that POWs could be confined only as an indispensable measure of safety.

Twentieth Century

After 1899 a number of developments quickly followed: first, in 1906, the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, whose purpose was to improve and supplement (but not replace) the 1864 Convention. Its Article 25 was an early articulation of the principle of the responsibility of commanders to enforce compliance of their subordinates with the law, while Article 28 was the first ever international treaty rule providing for penal repression of those who break the law. This was followed in 1907 by the Hague Conventions. While Convention IV respecting the Laws and Customs of War on Land and its annexed Regulations are identical to 1899 Convention II and its Regulations, the 1907 Convention was meant to replace the 1899 one as between States Parties to both agreements.[64]

The next major development in the law concerning POWs came in 1929 with the Convention relative to the Treatment of Prisoners of War, adopted in Geneva

on July 27, 1929. An extremely significant aspect of the 1929 Convention was its introduction of the terminology of rights vis-à-vis POWs.[65] As the Commentary to the Third Geneva Convention of 1949 notes:

> At the outset, … the treatment which belligerents were required to accord to persons referred to in the Convention was not presented, nor indeed clearly conceived, as constituting a body of "rights" to which they were automatically entitled. In 1929 the principle was more clearly defined and the word "right" appeared in several provisions of the 1929 Prisoners of War Convention.[66]

On the same day in 1929 a Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was adopted. Its purpose was to "perfect and complete the provisions agreed to at Geneva on 22 August 1864, and 6 July 1906, for the amelioration of the condition of the wounded and sick in armies in the field" (Preamble).

The 1949 Geneva Conventions

The 1949 Geneva Conventions, which revised the 1929 Conventions concerning the sick and wounded on land and POWs, significantly expanded the legal regime governing the condition of becoming or being *hors de combat*. Conventions I through III govern, respectively, those rendered *hors de combat* through sickness or injury on land,[67] through sickness, injury or shipwreck at sea,[68] and the situation of prisoners of war.[69] The Conventions apply not only in all cases of declared war but also during any international armed conflict between two or more states and to all cases of total or partial occupation.[70]

Unlike the Fourth Hague Convention and its annexed regulations, which only apply to a conflict when all warring parties are parties to the Convention,[71] the Geneva Conventions apply even where only some of the warring parties are High Contracting Parties, although only to the states that are.[72] However, given that all four Conventions are considered to be customary,[73] in practice their content applies to all international armed conflicts.

While the basic principle of humane treatment of persons *hors de combat* had long been enshrined in conventional law, the 1949 Conventions put real flesh on the bones of some of the previous rules by specifying how they should be observed in detail.

Given the level of detail concerning persons *hors de combat* in the Geneva Conventions and Additional Protocols, it would be impossible to examine them comprehensively here. Mention will be made only of their most innovative or significant aspects.

Probably the most significant aspect of the Geneva Conventions in relation to persons *hors de combat* is that they introduced a mechanism to enforce the law via the grave breaches provisions in each Convention. The most serious violations of the Conventions are defined as grave breaches in one provision,[74] while another provision provides for states' obligations in relation to these breaches. There are two. First, states must enact legislation to provide effective penal sanctions

for persons committing or ordering grave breaches to be committed. Second, they must search for persons alleged to have committed or ordered such grave breaches and bring them before their courts or alternatively send them to a state that is willing to try them.[75] This legal duty of *aut dedere aut judicare* creates a system of universal jurisdiction.[76] States are prohibited from absolving either their own or any other state from liability with respect to the commission of grave breaches.[77]

As mentioned, the 1929 Conventions recognized that POWs and the sick and wounded and their carers have rights. The 1949 Conventions declared these to be non-derogable. For example, Articles 6 and 7 of the First Convention prevent the wounded and sick, as well as medical personnel and chaplains, from renouncing their rights in whole or in part. Similar provisions are contained in the Second and Third Conventions.

An important feature of the Third Geneva Convention is that it provides the first definition of a prisoner of war in Article 4. The earlier treaties, particularly the Hague Regulations, only defined who was a combatant[78] and recognized that combatants as well as some non-combatants are prisoners of war. However, as we have seen, the categories of combatant and POW are not identical. Geneva III explicitly extends the protection of POW status to a wider range of persons than are recognized as POWs in Hague law.

Also new and highly significant is Article 5, concerning the application of the Convention in cases of doubt as to a person's status. It provides that persons who fall into enemy hands enjoy the benefit of the doubt as to POW status until otherwise determined. It is Articles 4 and 5 of the Third Convention that are at the heart of the current controversy over the status of persons captured in Afghanistan, Iraq and elsewhere.

As already noted, in a breakthrough development, through their common Article 3 the Conventions introduced legal protection for those rendered *hors de combat* in non-international armed conflicts.

The Additional Protocols

Additional Protocol I As noted earlier, Protocol I is the first treaty to articulate the basic rule regarding *hors de combat* in Article 41 and to stipulate its conditionality on refraining from hostile acts or escape attempts. An important provision with respect to ensuring the proper treatment of persons *hors de combat* is Article 5, which specifically allows the ICRC or another suitable organization to be substituted for Protecting Powers, a system which "has not been a success in practice."[79]

Article 8 defines for the first time in IHL who should be considered as the wounded, sick and shipwrecked, as well as who qualifies as medical and religious personnel. It also provides definitions of medical units, medical transportation, medical transports, medical vehicles, medical ships and crafts and aircraft, permanent medical personnel, permanent medical units and permanent medical transports, the distinctive emblem and the distinctive signal.[80]

A significant aspect of Additional Protocol I in relation to *hors de combat* is the fact that it changes the conditions on which the recognition of combatant and POW status depend from those set out in Article 4 of the Third Geneva Convention. A combatant is now a member of the armed forces as defined in Article 43 of the Additional Protocol. Under Article 44, any such person "who falls into the power of an adverse Party shall be a prisoner of war." Paragraph 2 makes it crystal clear that

> [w]hile all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Paragraphs 3 and 4 spell out when a combatant loses his privilege to be considered a POW, basically when he fails to comply with the principle of distinction. But what is required is narrowed from the four conditions of combatancy set out in the Hague Regulations and the Third Geneva Convention. Under paragraph 3, all a person now has to do now in situations where further efforts to distinguish himself would prove his undoing is to carry 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. Once he does this much, his actions shall not be considered perfidious under Article 37(1)(c) of the Additional Protocol. Under paragraph 4 of Article 44, a combatant who does not meet these two requirements of distinction loses his right to be considered as a POW, but, significantly,

> shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

Article 45 updates Article 5 of the Third Convention. A person who takes part in hostilities and falls into enemy hands enjoys the benefit of the doubt concerning his status: he shall be presumed to be a POW

> if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal. (para. 1)

Paragraph 2 gives any person in enemy hands who is not considered a POW the right to assert their entitlement to POW status before a judicial tribunal. Under paragraph 3:

> Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. …

Article 75 sets out a list of fundamental guarantees enjoyed by any person in the power of a party to the conflict who does not benefit from more favourable treatment under the Third or Fourth Convention or Additional Protocol I, including detailed protections for any detained person who is tried for a penal offence. Article 11 adds to the list of grave breaches set out in the Geneva Conventions.

Another innovative part of Additional Protocol I is the section dealing with the missing and the dead. Article 32 sets out the general principle that families have the right to know the fate of their relatives. Article 33 imposes on parties the duty at the end of a conflict to "search for the persons who have been reported missing by an adverse Party …."

Article 34 imposes on parties a specific obligation to respect the remains of persons who have died "for reasons related to occupation or in detention resulting from occupation or hostilities."

Additional Protocol II Additional Protocol II adds a lot of detail to common Article 3 as far as persons *hors de combat* are concerned. Civilians who have taken a direct part in hostilities but who have become *hors de combat* benefit from the fundamental guarantees set out in Article 4 of Additional Protocol II. Persons who are interned or detained for reasons related to the armed conflict also benefit from extra protections pursuant to Article 5. Article 6, concerning the penal prosecution and punishment of persons for criminal offences related to the armed conflict, sets out a series of procedural guarantees enjoyed by such persons, including the right to be tried before a court offering the essential guarantees of independence and impartiality. Pursuant to its paragraph 5:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Articles 7 through 11 elaborate on common Article 3's basic rule concerning the sick and wounded and extend these protections to shipwrecked persons.

Post-September 11 Challenges to the Rules

Violations of the rules protecting persons *hors de combat* by both lawful and unlawful combatants are not uncommon and are seen in every armed conflict, particularly non-international ones. What sets the violations of these rules in the post-September 11 context apart from the run of the mill types of violations is

the fact that they are being committed by the USA, the most militarily powerful state in the world and hitherto one of the greatest champions of the law. Without intending to minimize the fact that the USA is not alone in questioning the relevance of IHL rules regulating *hors de combat* since September 11 – and the relevance of IHL rules in general – or their need for adaptation to meet new security threats,[81] given that where the USA leads others follow, challenges by that state to the rules are particularly worrying and will therefore be the focus of this analysis.

Since September 11, the USA has, at the highest level of government, approached the application of the laws of war as a question of executive policy and discretion rather than legal obligation and has applied the law either incorrectly or selectively. Its approach to detainees has been driven by political rather than military expedients. The law is applied to the extent that it is perceived to give an advantage, but ignored when it acts as a restraining and limiting force. However, the law is not an à la carte menu from which you can pick and choose. To the extent that it applies, it applies in its entirety and detainees must be granted their rights in their entirety.

The next parts will examine some aspects of the US approach to the detainees captured since September 11 and the challenges this poses for observance of the rules concerning persons *hors de combat*. The approach has two particular characteristics: it involves the selective application of IHL to persons and situations to which it is not legally applicable, and at the same time a failure to recognize the applicability of the law in situations where it is applicable or a selectively applicability of the law to persons to whom it does apply.

Given that around 65,000 persons have been reported as having been captured by the US in the wars in Afghanistan and Iraq[82]– and it is impossible to know the true number since records are not kept of all prisoners – and tens of thousands remain in captivity, the problem cannot be said to be a small or insignificant one.

Selective Application of IHL Where it Does Not Apply

The Assimilation of Terrorism and Counter-terrorism with Armed Conflict: Terrorism and the struggle to defeat it have been conflated with armed conflict and there has been an attempt to redefine armed conflict as encompassing both the terrorist attacks of 9/11[83] – and possibly other terrorist attacks as well – and the global war against terrorism.[84] This allows the executive to claim extraordinary war powers under cloak of the "war on terror"[85] which the President has wielded liberally vis-à-vis detainees captured in relation to that "war"[86] and even domestically vis-à-vis its own citizens, particularly in the area of surveillance.[87]

The USA says that its war with Al Qaeda and international terrorists the world over,[88] which the September 11 attacks initiated, is one to which international humanitarian law applies, at least selectively. It applies insofar as the laws of war are invoked as the legal basis for holding detainees who are not captured on a battlefield but in the context of the war on terror, but the detainees are then denied

the rights and protections which the law provides to persons *hors de combat*. In a February 2004 fact sheet the Pentagon stated that:

> The law of armed conflict governs this war between the U.S. and al Qaida and establishes the rules for detention of enemy combatants. These rules permit the U.S. to detain enemy combatants without charges or trial for the duration of hostilities. Detention prevents combatants from continuing to fight against us.[89]

The duration of hostilities refers to the hostilities taking place in the long war – they may not be hostilities in the sense that IHL understands that term – which are ongoing and are envisaged to last at least a generation or more.[90]

Neither the September 11 attacks or the threat from transnational terrorists more generally nor the war on terror or long war can be considered as a real war, however, or at least if they are some new types of war – something which is not impossible to conceive[91] – they are not wars to which IHL applies. If IHL does not apply to the global war on terror, then it cannot provide any legal basis for detaining anyone who has not been captured on the territory of a state where there is an actual armed conflict at the time of capture.

The law recognizes only two types of conflict: international and non-international. The former refers only to armed conflicts between two or more states,[92] and a conflict between one or more states and a transnational terrorist network cannot, therefore, be considered as an international armed conflict. That leaves only non-international armed conflicts, which are conflicts on the territory of a state between it and one or more armed groups, according to common Article 3, the minimum standard that would apply if either the September 11 attacks or the global war on terror can be considered as having initiated a non-international armed conflict. But there are several problems with considering either the September 11 attacks or the declaration by President Bush of a global war on terror as having initiated a non-international armed conflict.

Regarding the September 11 attacks, although they took place on the territory of a single state, the USA, it is difficult to consider Al Qaeda as an armed force within the meaning of common Article 3[93] and the attacks do not have the character of a normal military confrontation.[94] Al Qaeda, at least on that day, looked a lot more like a terrorist group than an armed opposition group, and the September 11 attacks seemed to resemble terrorist attacks far more than military operations within the context of an armed conflict. Even if Al Qaeda has declared war against the West, and particularly the USA,[95] that would not suffice to render the attacks armed attacks carried out during a non-international armed conflict if the basic elements of such a conflict were not met.

Moreover, a non-international armed conflict can occur only on the territory of a single state, so even supposing the September 11 attacks qualified as a non-international armed conflict, that qualification would apply only to those attacks and not transnational terrorism as a wider phenomenon. Common Article 3 makes it clear that its spatial application is limited to a single state by use of the phraseology: “In the case of armed conflicts not of an international armed conflict occurring in the territory *of one* of the High Contracting Parties.”

(emphasis added) It seems that the intention is that it applies therefore only to conflicts involving a single state – meaning a conflict involving a single state and an armed opposition group or groups – rather than to a conflict which occurs on the territory of more than one state, whether simultaneously or consecutively, involving a non-state actor and states which are not at war with each other. This would also exclude the designation of the global war on terror as a non-international armed conflict, given that it is not restricted to a single state. If the September 11 attacks were considered as initiating a non-international armed conflict, it might also introduce something unprecedented into international law: a possible breach of the *jus ad bellum* by non-state actors,[96] in fact, terrorists, as the trigger of a non-international armed conflict.

The Bush administration does not, in any event, consider it to be a non-international armed conflict, and until September 2006 did not believe that the rules providing protection in such conflicts apply to its "war" with Al Qaeda.[97] Since then, it has taken – it has been forced by the Supreme Court to take – the position that all detainees in US custody, including suspected terrorists, are protected by common Article 3. That does not, however, mean that it now considers the war with Al Qaeda to be a non-international armed conflict; only that it is willing to apply common Article 3 as the minimum standard as far as protection goes.[98] There is no legal obstacle to treating the detainees humanely according to the standards set out in common Article 3 even if it is not a non-international armed conflict. Even if the violence in this case does not conform to what is generally considered as an armed conflict, the ICRC Commentary notes that

> the scope of application of the article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party.[99]

The content of the protections granted in common Article 3 could be applied without there being any non-international armed conflict as these fundamental rights are also recognized under the applicable human rights law. But even if the war on terror could somehow be considered as a non-international armed conflict to which common Article 3 applies, it would not provide any legal basis for detention.

According to the Bush administration, the war with Al Qaeda is neither an international nor a non-international armed conflict but a new kind of conflict.

> The war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our Nation recognizes that this new paradigm – ushered in not by us but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with Geneva.[100]

Whether the terrorist threat itself or the war on terror can be seen as a new form of armed conflict, necessitating new thinking regarding the laws of armed conflict, is a serious question deserving of profound consideration. Still, the fact remains that, even if the manifestations of conflict are more complex and variegated than the law currently recognizes, IHL does not apply outside of situations of international and non-international armed conflicts, and would have to be amended to do so. Unless and until any changes to the law are actually made, legally, by a diplomatic conference of States Parties to the Geneva Conventions and Additional Protocols, rather than by fiat of some or other president in office acting extra-legally as far as international law is concerned, it is impossible to consider the war against terror as an armed conflict to which IHL applies, outside of actual situations of armed conflict taking place within the wider campaign against terrorism. That is certainly the position of the ICRC.[101] Since IHL applies only to the conflicts in Afghanistan and Iraq, anyone captured anywhere else as part of the war on terror is not *hors de combat* during an armed conflict: the law does not apply to them at all and should not be applied to them. Their detention is governed by the domestic criminal law of the detaining state, in this case, the USA, subject to international human rights law. Therefore, there is no legal basis under IHL for the detention of a large number of the detainees currently being held in Guantánamo Bay, which hosts persons of 30 nationalities who have been captured all over the world and who are all being held as unlawful enemy combatants.[102] Only those captured on a battlefield are subject to IHL.

The proper question is not or not only whether terrorism or counter terrorism represent new forms of armed conflict but rather whether there is a new form of terrorism – which arguably there may be – and whether our existing criminal and other laws can deal with it. If not, we should consider what actions we can take to improve the legal tools at our disposal for fighting terrorism, and what else we need to do to tackle this problem. The Bush administration has itself recognized that most parts of this war on terror do not involve military operations in the conventional sense and will not be won by military means.[103]

We should not rule out the possibility of revising IHL if in doing so there would be some purpose and material benefit.[104] But it should be recognized that the law of armed conflict is designed to be applied by and to parties who are organized in the sense of being organized armed groups resembling the armed forces of a state, who are able and prepared to observe the rules, not to nebulous, cellular terrorist networks which, even if they are somewhat organized, have a *modus operandi* and a code of conduct that are antithetical to IHL. The questions arise of how the law could be applied in such circumstances but also the futility of making it applicable. Why reinvent the rules to make them applicable to groups and individuals who will never apply them, who cannot by definition apply them?

The Hamdan v. Rumsfeld *case* It is unfortunate that the Supreme Court in the *Hamdan v. Rumsfeld* case did not take the opportunity to address the apparent confusion regarding the law that applies both to persons captured in the context of the war on terror and on an actual battlefield (but in relation to the war on terror). Indeed, it exacerbated it.

Hamdan was a Yemeni national who was captured on the battlefield of Afghanistan by Afghan militia, handed over to the US and ended up in Guantánamo Bay. He had worked as Osama Bin Laden's driver between 1997 and 2001 but denied being a member of Al Qaeda.[105] His case came to the Supreme Court not on appeal of the question of the legality of his detention per se but rather the legality of the military commission before which he was to be tried. While the Supreme Court of course did not need to examine the question of the legality of Hamdan's detention or treatment in detention for the purposes of deciding the case, it missed an opportunity to do so.

The Court of Appeal had found that, alternatively, Hamdan could not invoke the Geneva Conventions at all or the Geneva Conventions did not, in any event, apply to the armed conflict during which Hamdan was captured, that being the war with Al Qaeda, a war, which, the administration asserted and the Court of Appeals accepted, is distinct from the war with the Taleban in Afghanistan.

The Supreme Court disagreed with the Court of Appeals that the Geneva Conventions did not apply at all to this conflict with Al Qaeda because Al Qaeda is not a signatory to the Geneva Conventions. It stated that common Article 3 would apply to this conflict as it applies even where one party to the conflict is not a party to the conventions.

It is true that the Article applies even if one of the parties is not a signatory – by definition it must since non-state actors during non-international armed conflicts cannot ratify international treaties, even if they can apply them[106] – but this does not answer the question as to whether it applies to the war on terror.

As noted, there are certain criteria that should be met in order for an armed conflict to be considered non-international and a group to be considered as an armed group within the meaning of common Article 3. And even if common Article 3 does apply, it would not provide a legal basis for detention, as it only provides protections for persons *hors de combat*; it does not authorize detention. Non-state armed forces to non-international armed conflicts are not authorized by the law to detain enemy fighters, but must just treat them well if they do capture them. States' armed forces are entitled to take prisoners in a non-international armed conflict, but the legal basis is their domestic law, not IHL. So a finding that common Article 3 applies does not settle the question of whether Hamdan's detention is per se lawful.

It is unfortunate that the Court was implicitly prepared to accept the government's argument that the conflict with Al Qaeda is an armed conflict, and one to which IHL applies, without properly examining the nature of that conflict and the qualification of Al Qaeda as an armed group. More troubling is the fact that the Court did not invoke the applicability to Hamdan of Article 75 of Additional Protocol I as customary international law, given that it is the fundamental guarantees recognized therein, rather than common Article 3, which would regulate his treatment in detention. Given that Hamdan was not a member of the Taleban, arguably he would not enjoy the presumption of POW status so would not be covered by the Third Convention. Whether or not he was a member of Al Qaeda, he would normally not be covered by the Fourth Geneva Convention either, for the reason that he has Yemeni, and not Afghan,

nationality. As Yemen was neutral in relation to the war between the USA et al. and Afghanistan, arguably Hamdan was not protected by the Fourth Convention pursuant to its Article 4.

In any event, given that Hamdan was captured in Afghanistan during the international armed conflict, the law applicable in such conflicts, rather than in any so-called conflict with Al Qaeda, would constitute the proper legal basis for his detention under IHL, at least if there was some link between Hamdan and that conflict. Of course, the fact that the international armed conflict in Afghanistan has now ended[107] means that Hamdan should have been repatriated as soon as possible after the cessation of active hostilities if he was captured during the international armed conflict. For him, and for all the persons who have been captured in Afghanistan and Iraq (the latter where the international armed conflict has also ended) during the international armed conflicts, some legal basis other than IHL applicable in international armed conflicts will have to be found for their continued detention if that detention is to be in accordance with international law.

Failure to Recognize the Applicability of the Rules Where they do Apply or Selective Application of the Rules

While applying that part of IHL that gives states extraordinary powers over persons *hors de combat* to whom it does not apply, that is, persons detained only in connection with the war on terror and not any real war, the US government has failed to apply it properly or at all in cases where it is actually applicable.

At first the administration denied that anybody captured during the international armed conflict in Afghanistan had any status or rights under Geneva law. As far as the Taleban is concerned, while the president conceded that the Third Convention applied in principle to the conflict with Taleban soldiers, he said that they were not entitled to be considered prisoners of war as they had not complied with the principle of distinction or other laws of war. They were unlawful combatants.[108]

Regarding Al Qaeda members captured in Afghanistan, the president stated that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva."[109] They were also unlawful combatants,[110] but in relation to the war on terror rather than the war in Afghanistan.

While the determination that members of Al Qaeda captured on the battlefield in Afghanistan are not POWs may or may not be correct, the legal reasoning given by the administration is not.

As noted above, the fact that Al Qaeda is not a High Contracting Party to the Geneva Conventions would not in itself determine their applicability to it.

If Al Qaeda militia belonged to the armed forces of the Taleban, they could be considered as combatants. The Bush administration said that the activities of the Taleban and Al Qaeda were so intertwined as to be virtually indistinguishable.[111] Whether Al Qaeda members acted lawfully or not by distinguishing themselves

and would thus be entitled to be considered as POWs is a separate question requiring a factual determination. But given that Al Qaeda is generally considered to be a nebulous transnational terrorist movement, and not the armed forces of a party to an armed conflict, its associates captured in Afghanistan would probably not be entitled to presumptive POW status under Article 5 of the Third Convention as no doubt would arise as to their status – or at least fewer doubts: they would presumptively be considered as civilians.

Regarding the Taleban, as members of the armed forces of a State Party to an international armed conflict they can be considered as combatants, and are thus presumptively entitled to POW status. In their case, given that they are presumptively entitled to be considered as combatants and thus POWs, the onus would be on the detaining power to determine that they were not, should any doubt arise. In the meantime, they are entitled to enjoy the protection of the Third Geneva Convention.

As noted earlier, the only way that a combatant otherwise entitled to POW status can lose it is to fail to conduct himself as a combatant, that is, by not complying with the principle of distinction, as stipulated in Article 4 of the Third Geneva Convention and Article 44 of Additional Protocol I. The ICRC Customary International Law Study notes that this rule of distinction for combatant, and the loss of POW, status when it is not complied with is a norm of customary international law in international armed conflict.[112] While the term "unlawful combatant" is not used anywhere in the law, it is the term that has customarily been applied to combatants who fail to distinguish themselves as well as to persons who participate in hostilities without being authorized to.[113] But even if a combatant behaves unlawfully, IHL still applies to him and he is still entitled to humane treatment pursuant to Article 44(4) of Additional Protocol I. If he is not covered by the Third Geneva Convention, he will be covered by the Fourth.

The status of a POW being presumptive for combatants as a group, commissions to determine their status would only need to be established where the detaining power has doubt as to whether a person in its hands belongs to one of the categories of persons enumerated in Article 4 of the Third Convention. The US, however, has approached the question of status determination in a way that is precisely the opposite of what Article 5 of the Third Convention requires. The President made a presumptive declaration that all members of the Taleban were unlawful combatants. The administration then refused to convene status determination commissions as it stated that it had no doubt as to their status.[114]

Following the Supreme Court decision in *Rasul*[115] – which gave Guantánamo detainees the right to challenge their detention before US courts – in 2004 the administration created Combatant Status Review Tribunals for the purpose of confirming whether the detainees they were holding had been correctly classified as enemy combatants.[116] Sitting between July 2004 and March 2005, using procedures which were widely criticized,[117] the Tribunals found most of the detainees to have been correctly classified as enemy combatants.[118]

The biggest problem with the procedure was that, instead of enjoying the benefit of the doubt regarding their status as POWs,[119] the burden was put on the detainees to disprove a negative: why they should not be classified as enemy combatants. The detainees were also presented with a procedural handicap: in deciding whether a preponderance of evidence supported a detainee's claim that he was not an enemy combatant, there was a rebuttable presumption in favor of the government's evidence.[120] The detainees were denied legal representation but instead had a "personal representative" – a military officer who was not a lawyer and whose role was to "provide assistance to the detainee and provide an ability for the detainee, through the personal representative and only through the personal representative, to have access to the information in DOD files on the detainee's background."[121]

In 2005 Congress passed the Detainee Treatment Act,[122] which, *inter alia*, set out the procedures for the status review of all detainees being held outside the USA. However, far from providing for any comprehensive, lawful procedure for determining the status of detainees, the Act merely provided for the possibility of review of the current status determination procedures operating with respect to Guantánamo, Iraq and Afghanistan, including the possibility of a review if new evidence came to light.

The Act provided that, in general, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal[123] that an alien is properly detained as an enemy combatant, but only for detainees held at Guantánamo. This would have precluded any other court, including the Supreme Court, from examining the status of any person detained as an unlawful enemy combatant.[124]

In the *Hamdan* case, the Supreme Court rejected the argument that, because of the Detainee Treatment Act, it could no longer review a case such as Hamdan's. Hamdan had raised the issue of the legality of the military commissions before which he was to be tried, not the Combatant Status Review Tribunals, but the attempt to deny the Supreme Court judicial review was the same in both cases. The Supreme Court, referring to *Ex parte Quirin*,[125] noted that, far from abstaining pending the conclusion of ongoing military proceedings, the Court could intervene due to

> (1) the public importance of the questions raised (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them.[126]

Since September 2006, as noted, the Department of Defense is applying common Article 3 to all detainees in its hands, but this does not in any way affect their legal status and is applied without regard to their legal status.[127] Even members of the Taleban remain unlawful enemy combatants in the administration's eyes.

As for prisoners in Iraq, while persons captured during the international armed conflict in 2003 are entitled to POW status, it has been explicitly recognized only for Saddam Hussein (who was hanged on December 30, 2006 following his conviction and death sentence on November 5, 2006 by the Iraqi High Tribunal) and a few high ranking detainees.[128] In many other cases, a status determination has not been made. A large number of detainees are considered as security detainees.[129]

In 2004 it was reported that "[p]resented last fall with a detailed catalog of abuses at Abu Ghraib prison, the American military responded on Dec. 24 with a confidential letter to a Red Cross official asserting that many Iraqi prisoners were not entitled to the full protections of the Geneva Conventions."[130] In 2004 the UN Commission on Human Rights stated that it had "serious concern" over the "uncertain" legal status of many detainees being interrogated in Iraq and asked the Coalition Provisional Authority and the Iraqi Governing Council to clarify the legal status of each person.[131]

In the maelstrom of publicity and debate concerning the status and treatment of persons captured since September 11, 2001 and held at Guantánamo Bay and elsewhere, a crucial fact has sometimes been lost and must again be stressed: that regardless of whether an individual in the hands of the enemy is a lawful or an unlawful combatant or a civilian who has participated in hostilities during an armed conflict, he or she has legal status and rights and is entitled to humane treatment, if not under the Third Geneva Convention then under the Fourth. There is no gap in legal protection for persons *hors de combat* regardless of their status. There is no legal black hole. That unfortunate expression should be binned, as it conveys the wrong impression regarding the problem. There is a political and not a legal black hole or, more precisely, a political Bermuda Triangle.

A Rejection of Fundamental Principles regarding Due Process and Humane Treatment

The US government has not only failed to apply the rules as to status determination correctly and denied thousands of persons the status of POW to which they are presumptively entitled, it has rejected the application of certain fundamental principles, in particular as regards the rights of due process and humane treatment. It has gone so far as to try to redefine the crime of torture in order to permit its officials who mistreat prisoners, mainly as part of interrogation procedures, to avoid legal liability for their acts.[132]

A lack of due process The detainees are being held, mostly without charge, in connection with wars which are either non-existent, i.e., the long war, or over, i.e., the international armed conflicts in Afghanistan[133] and Iraq.[134] In either case, there is no, or is no longer any, legal basis for their detention under IHL. The detainees have been denied their rights of due process which would enable them to challenge their indefinite detention without charge.[135]

A result of the 2006 Military Commissions Act is to deny detainees the possibility of pursuing *habeas* claims in US courts.[136] The ink was barely dry on the Act when President Bush formally notified the US District Court that

it no longer had jurisdiction to consider hundreds of *habeas* petitions filed by Guantánamo detainees and pending before the Court.[137]

Due process rights are being violated not only as a result of the failure to allow detainees to challenge the lawfulness of their detention without charge but also through the procedures that have been created to try the few prisoners whom it is proposed to prosecute before military commissions. The 2006 Military Commissions Act was a response to the US Supreme Court *Hamdan* decision,[138] which found that the military commissions which the President had created by virtue of his Order of November 13, 2001[139] were not lawfully established, as they lacked congressional authorization. However, the main legal challenge to the military commission was as to the lawfulness of its establishment and its jurisdiction over the crime Hamdan was charged with: it was not based on the lawfulness of the procedures of the commission.

While the commission of a crime prior to capture does not disentitle a combatant to POW status it does mean that he can be tried or subjected to other disciplinary measures by the detaining power.[140] The detaining authority should lean towards leniency, and if possible prefer disciplinary over judicial processes.[141] Any POW subjected to judicial process should be tried by a military rather than a civil court.

The Third Geneva Convention and Additional Protocol I set out an elaborate procedure regulating the conduct of any judicial proceedings for crimes committed by the person before he has been captured. If a POW is to be tried, it should be expeditiously.[142] A POW should be subject to the same procedure as would be a member of the detaining power's own armed forces.[143] In particular:

> In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.[144]

As far as due process for detainees during trial proceedings is concerned, the Military Commissions Act hardly represents an improvement on the 2001 Order. Reacting to the Act, Jacob Kellenberger, the ICRC President, said:

> Our preliminary reading of the new legislation raises certain concerns and questions. The very broad definition of who is an "unlawful enemy combatant" and the fact that there is not an explicit prohibition on the admission of evidence attained by coercion are examples.[145]

The persons subject to the military commissions are widely defined as "alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."[146] Significantly, "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." This seems to be an implicit violation of Article 7 of the Third Convention, which provides that POWs may in no circumstances renounce in

part or in entirely the rights secured to them by the Convention, and of Article 6, which provides: "No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them."

A finding by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction.[147] Given the presumption that detainees are unlawful enemy combatants, some detained in connection with the war on terror, it is clear that persons who should not be tried by military commissions, because they have not committed a crime in connection with any armed conflict, may find themselves before this one. As a matter of international law, the military commission has no jurisdiction over at least some of the persons who will come before it.

The provision concerning the exclusion of evidence obtained by torture is most peculiar. It provides: "A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made."[148] What is to be made of this bizarre provision?

Does it mean that statements obtained under torture can be admitted into evidence where the person who appears before the military commission is himself accused of torture, as evidence that he has made a statement, if under torture? Does that mean that all persons appearing before the military commissions who might have been tortured will have to be accused of torture in order for any statements made under torture to be admissible? If so, by opening the door to the admission of statements obtained under torture it would implicitly encourage its use to obtain such statements. Alternatively, it could mean that a statement made by a detainee under torture is only admissible in a military commission against the soldier accused of the torture as evidence that the statement was made. But it would be strange to include such a provision in an Act concerned with the trial before military commissions of detainees captured in the context of the war on terror and not military commissions convened to try the USA's own personnel. The provision is so obtuse that it could be subject to several interpretations, and this may indeed be its very *raison d'être*. What it does not do is clearly exclude the possibility of evidence obtained through torture being admitted. There are other back doors through which statements made under torture could be admitted into evidence in Sec. 948r(c) and (d).

Aside from the provisions of the Military Commissions Act that raise questions as to their compatibility with IHL and international human rights law, in general there can be no possibility of a fair trial before these bodies because the accused is denied the presumption of innocence by having been labeled an unlawful enemy combatant and a terrorist.[149]

Mistreatment The US has not only attempted to deny all detainees their rights of *habeas corpus* and many of the procedural guarantees of due process that are part of any judicial system – so far quite successfully; it has been stymied only by the Supreme Court decisions, which it has by legislation such as the Detention

Treatment Act and Military Commissions Act overridden – it has also coerced and abused some detainees. The attempt to redefine torture to include only acts that result in a prisoner's death or organ failure was the nadir.[150]

There is copious evidence that Abu Ghraib[151] was only the tip of the iceberg and that prisoners held in Afghanistan, Guantánamo Bay, Iraq and an unknown number of secret locations around the world[152] have been subject to coercive and inhumane treatment in a relentless drive to obtain intelligence which could assist in defeating terrorism.[153] It should be noted that the administration's policy towards detainees, including interrogation rules and the recognition of the application of common Article 3, extends only to those detainees in the hands of the Department of Defense.[154] Those who are part of the secret CIA program are detained out of sight and out of reach of the law.[155]

The widespread nature of abuses against detainees in Iraq was noted in a February 2004 Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, which found that:

> … ill treatment during interrogation was not systematic, except with regard to persons arrested in connection with suspected security offences or deemed to have an "intelligence" value. In those cases, persons deprived of their liberty under supervision of the Military Intelligence were at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators.[156]

In November 2004 it was reported in the *New York Times* that, "the International Committee of the Red Cross has charged in confidential reports to the United States government that the American military has intentionally used psychological and sometimes physical coercion "tantamount to torture" on prisoners at Guantánamo Bay, Cuba."[157] A month later, government disclosures forced by a Freedom of Information Act lawsuit indicated that the abuse of detainees in Iraq and at Guantánamo was widespread.[158] Abuses at Bagram airbase in Afghanistan have also been reported[159] and against persons who have been the subject of extraordinary rendition.[160]

Mistreatment of persons *hors de combat* by US agents cannot be regarded as incidental, isolated events, carried out by rogue, sadistic individual soldiers, contractors and military police and intelligence agents.[161] Unlike the problems regarding persons *hors de combat* in many armed conflicts, the problem of US challenges to the rules regarding *hors de combat* is not fundamentally one of enforcement or observance of the rules by troops in the field. It is apparent that the government's policy is to approach the treatment of detainees in an illegal or extra-legal way. In order to influence the behavior of the state's agents, the policy itself will have to change, and a new policy that is in compliance with international humanitarian law will have to be rigorously implemented and enforced.

Concluding Remarks

Given that international humanitarian law is designed to be applied in the extraordinary circumstances of armed conflict, it gives parties to international armed conflicts tremendous liberties – they may kill enemy combatants, they may take prisoners, all of this and more the law allows – but these privileges come with responsibilities. In particular, the States Parties to international armed conflicts and the agents acting on their behalf are entrusted with the humane and proper treatment of persons *hors de combat* in their care. The USA is prepared to recognize the applicability of the law to the extent that it provides it with an advantage: the ability to detain persons, but refuses to recognize its applicability insofar as it gives those detainees rights.

The problem is far more political than legal or military. If the treatment of prisoners came to be seen in legal rather than political terms the rights of persons *hors de combat* might be restored, even if it would call into question the lawfulness of the detention in many cases. Another, alternative, legal basis than humanitarian law would have to be found for the continued detention of many persons.

One can speculate as to the reasons motivating the Bush administration to adopt its (mis)interpretation of the rules protecting persons *hors de combat*. Probably the thirst for intelligence to win a war whose goals have never been completely clear and which can never be won by military means has been one major factor. An element of desperation seems to be another. The lack of expectation of reciprocal treatment might also play a role. In fact, reciprocity has hardly figured as a restraining factor.

Lack of Expectation of Reciprocity

The renaming of the law of armed conflict as international humanitarian law did nothing to change the fact that the *jus in bello* has evolved over the course of centuries to accommodate interests and concerns of states that are as much if not more about advantage and utility than they are about humanity. Insofar as IHL is conceived to and do apply to situations of international armed conflict, as those terms are understood by international humanitarian law, it seems to be and is a question of good sense and self-preservation: do unto others as you would have them do unto you. This system of reciprocity only works, however, where there are two or more enemies who, as much as they might despise one another, are committed to observing the rules out of a sense of prudence, economy, self-preservation and advantage, or a combination of some or all of these and other motivating factors. This system of mutual advantage, which is the main factor promoting compliance with the rules, is not readily adaptable to a type of conflict that is irregular, asymmetrical and unconventional and where one or even both parties are not committed to observing the rules as there is no expectation that the other side will and, in any event, compliance with the law is regarded as disadvantageous.

Mistreatment of persons *hors de combat* is by no means restricted to the USA and its allies. Insurgents in Iraq and Afghanistan engage in practices such

as the beheading and extreme torture of persons *hors de combat*, as well as civilians,[162] and frequently release footage of these abuses over the Internet.[163] This hardly provides any motivation for reciprocal observance of the rules by US troops. Besides this, relatively few US prisoners have fallen into enemy hands, in comparison with the numbers in US hands. There is thus less need to comply with the rules than there would be in a conflict where hundreds or thousands of US troops were in enemy hands. Still, even if there is no realistic expectation of reciprocal behavior by the other side, the US's responsibility to comply with the rules is all the greater because it is a state with an international reputation to uphold that is holding tens of thousands of prisoners.

There is no way of measuring whether proper treatment of prisoners might inspire reciprocal treatment from the other side. Still, it is not only legally required, it cannot hurt, and breaches of the law at the very least provoke tit-for-tat reactions by the opposing party. The mistreatment of Afghan and Iraqi detainees by the US has given rise to concerns that US soldiers who fall into enemy hands will be mistreated.[164]

If an expectation of reciprocity provides the most powerful incentive to comply with the law, a lack of reciprocity does not provide an excuse for breaking it. The rules protecting persons *hors de combat* must be observed because they are based on the principle of non-reciprocity. To the extent that they provide a minimum standard of treatment of persons rendered *hors de combat* they are non-negotiable. The framers of the conventional law were perhaps wise to realize that true humanitarians like Henri Dunant are quite exceptional and that humanitarianism does not always come naturally, especially in war. Dunant, let's not forget, had the luxury of observing rather than participating in the Battle of Solferino. The law of war is called international humanitarian law not because it is obvious that humanity should exist in war but because it is not obvious at all to those who fight these wars, as opposed to those who legislate for them. Because of the natural human tendency to lose all inhibitions when fighting in armed conflict, the need for humanity in war has had to be implanted into the rules regulating this most barbaric of human activities. This has been done for reasons that are not necessarily purely altruistic but because usually it has been considered to be militarily advantageous to do so. Humanity and advantage thus should not be seen as principles of the law that are naturally diametrically opposed and in conflict with one another; in fact, they are closely related and can be mutually reinforcing.

The Advantages of Humanity and Disadvantages of Inhumanity in War

Hors de combat is a state of protection, not a means of repression. Once a state has signed up for the rules, it is obliged to follow them, even if they might appear to inconvenience or limit it. Yet even absent an expectation of reciprocity, there are concrete advantages in applying and observing the rules and disadvantages in not doing so.

It seems that the USA has lost sight of several important advantages that compliance with international humanitarian law brings. It is not only reciprocity

and the expectation that your own soldiers will be treated humanely in return. Even more importantly, compliance with the law promotes discipline and morale in one's own troops. If a state allows its troops to break the law on a widespread and systematic basis, it is not only overseeing and responsible for a policy that is unlawful, it is undermining the very foundation of what constitutes an effective fighting force.

As van Creveld has noted: "Men cannot cooperate, nor can organizations even exist, unless they subject themselves to a common code of behavior."[165] Disregard for the laws of war transforms an organized, disciplined fighting force into an unruly mob. To legislate for or otherwise provide for a policy whereby an armed force that has been trained to believe in honor and respect for the law is ordered or tacitly permitted to carry out actions that are inhumane is destructive of morale and force cohesion. It could even affect recruiting. The prospect that they themselves might be mistreated if captured could also negatively impact on soldiers' morale.

Breaches of the rules serve as a recruiting tool for terrorists. Photos of prisoner abuse, such as those taken in Abu Ghraib, can only be ammunition for terrorist groups such as Al Qaeda in recruiting young Islamist fundamentalists. It will be impossible for the USA to win hearts and minds so long as it is regarded as a ruthless, violent repressor, particularly by those it most seeks to convince otherwise.

Another serious disadvantage that a failure to comply with international legal rules brings is a loss of its legitimacy, as the US has already discovered to its cost. Its policy regarding detainees has proven disastrous for US standing in the world. It not only handicaps it in its international relations, it means a loss of credibility in speaking out on the abuses of international humanitarian law and human rights that continue to be committed around the world and that have been somewhat overshadowed and forgotten since September 11, 2001. The USA used to be a powerful force advocating for respect for international humanitarian law and human rights. Today, because of its policy concerning persons apprehended in relation to the global war on terror, its influence in preventing violations committed on a much greater scale in all of the forgotten non-international armed conflicts around the world has been seriously compromised. This will have repercussions for the treatment of hundreds of thousands of persons who are *hors de combat* in contemporary armed conflicts. It can only open the door to more widespread abuses as other parties to armed conflicts take this as an invitation to follow suit.

Punishment as a Means of Enforcing Compliance

The prospect of punishment for failure to comply with the rules operates as both an incentive to comply (a carrot) and a stick to punish those who fail to do so. But in order for punishment to work as a carrot, that is as a mode of deterrence, there has to be a realistic possibility that the stick will be big and wielded regularly and consistently.

US domestic judicial processes – military, criminal and civil – have a role to play in enforcing compliance with the rules, although the administration has sought to limit its liability, at least under its domestic law. A handful of US soldiers who have carried out abuses have been tried before military courts martial, but these have mainly been lower ranking personnel.[166] Criminal proceedings have been brought against some members of the administration in the domestic courts of other states,[167] but at the time of writing it was far from clear that they would succeed.

Regarding the highly theoretical possibility of any situation concerning the US treatment of detainees coming before the International Criminal Court (ICC), it should be noted that the US is not a party to the ICC. Thus, US citizens who commit crimes against detainees that fall within the Court's jurisdiction on the territory of the US or other non-States Parties would not be subject to the Court's jurisdiction. However, US nationals committing ICC crimes on the territory of States Parties to the Statute could conceivably fall within the Court's jurisdiction.[168]

It would be all to the good if national and international criminal courts were used to better advantage to promote compliance with the rules protecting persons *hors de combat*. In order for juridical processes to play a really significant role in enforcing respect for the law, however, these sticks will have to be wielded more liberally and against not only the agents but also the instigators of prisoner abuse.[169]

Still, as we have stressed, the system of protection for persons *hors de combat* works best when the parties to an armed conflict can see some advantage in complying with the rules and not by the prospect of punishment, which, in any event, is always too little too late. Avoiding breaches of the law is preferable to punishing them. The prospect of punishment therefore has only limited value as a means of enforcing compliance, and it usually does not deter violations of the law by people such as transnational terrorists and certainly not by suicide bombers or even by high level officials in states that are unlikely to ever try them for their actions and who will likely never appear before any international criminal court.

Courts' Role in Ending and Preventing Violations and in Judicial Review

The role of courts in enforcing respect for the rules protecting persons *hors de combat* by means of judicial review of legislation and executive decisions pertaining to detainees and through hearing *habeas* applications should be neither underestimated nor overestimated. It is thanks to the US Supreme Court's refusal to bow to the Bush administration's demand that it yield to executive power and refrain from judicial review of its decisions regarding detainees that their situation has improved somewhat. Detainees are now seen as benefiting at least from the protection of common Article 3 and are therefore no longer regarded as completely outside of international law. The administration's response to these judicial decisions has been to yield a little but not a lot and certainly not on the fundamental questions of the status of the detainees or its resolve to hold some

of them indefinitely. Indeed, the administration has shown scant respect for the Court's authority in denying by legislation some of the rights that the Court has recognized, such as *habeas corpus*.

The courts can be faulted for having bought into the administration's position that the war on terror is an actual war which could provide a legal basis for holding prisoners and trying them before military commissions. Still, if it had not been for the courageous decisions of the Supreme Court, the situation would be worse than it currently is. It is likely that we have not seen the last of Supreme Court intervention vis-à-vis the detainees.

Law in the Service of War or Humanity?

Does it seem too cynical to conclude that the humanitarian aspects of the laws of war have only become part of the statutory law because those that wage war see advantages in being humane? Is humanity in war possible of itself, outside of any military advantage it might bring? While warfare no doubt produces individual acts of gallantry and humanity, absent a code of conduct for warfare and the treatment of prisoners therein, and without observance of the rules regulating war, the result would be even more systematic and widespread abuse of persons *hors de combat* and civilians than there is presently, as the history of warfare demonstrates. The lesson of the mistakes that we seem forever to repeat seems to be that humanity must be legislated for, by cool heads, away from the heat of battle. Whether we call it the law of armed conflict, international humanitarian law, the law of war, or *jus in bello*, observance of the rules regulating armed conflict is what separates the amateur, the sadist, the desperate and the mob from the professional fighter and his commander who, even in the maelstrom and fog of war – the most extreme of emergencies – can retain their basic human decency and morality.

Accepting the fact that it is a body of law that has evolved to accommodate military exigencies, international humanitarian law in general, and its rules protecting individuals *hors de combat* in particular, must, in the final analysis, be adjudged to be law in the service of humanity rather than war. Despite the fact that its customary evolution shows international humanitarian law to be a body of rules that has evolved largely to serve states' interests, the modern body of treaty law is deserving of the title humanitarian. This is because, by recognizing that wars have limits, that persons *hors de combat* and civilians have non-derogable rights, and that parties to armed conflict are absolutely prohibited from carrying out certain acts, even where doing so would provide them with a military advantage, the laws of war draw a line. Some things can never be justified on any account. Without these elements of humanity, and without observance of these rules, the law of war would be law in the service of war. What is absolute in the rules codified in the treaties is as far as we have managed to come so far in terms of the quality of mercy. International humanitarian law, as most particularly shown in its rules protecting persons *hors de combat*, is a statement of the extent, and limits, of our humanity in war. It represents a great success in terms of law making, but in

terms of human evolution it is a very small step. If only for that reason, the line should be held and not breached.

Notes

1 Borelli, 2005, pp. 39 at 42.
2 The term "long war" made its first official appearance in the 2006 Quadrennial Defense Review, 6 February 2006, p. v, <http://www.defenselink.mil/qdr/report/Report20060203.pdf>. Both the terms "the war on terror" and "long war" are used interchangeably herein.
3 ICRC Commentary, 1987, p. 480, para. 1601. The centrality of the notion of *hors de combat* to international humanitarian law is evidenced by the fact that of the seven rules the International Committee of the Red Cross (ICRC) considers to be fundamental and the basis of international humanitarian law, five deal directly with the notion of *hors de combat*. This is not surprising if one considers that "… the law of Geneva developed historically with a focus on the protection of victims of armed conflicts." See also Murphy, 1984, pp. 3 at 11–12.
4 ICRC Commentary, 1987, p. 480, para. 1601.
5 Ibid., p. 482, para. 1606.
6 Dinstein, 2004, p. 145.
7 Rogers, 2004, pp. 48–49.
8 UK Ministry of Defence, 2004, p. 58.
9 The video of the shooting, shot by NBC reporter Kevin Sites, can be viewed at <http://www.ifilm.com/video/2681679?loomia_si=1>.
10 See Katarina Kratovac, "Iraqi PM 'Very Concerned' Over Shooting," The Associated Press, 17 November 2004, <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/42/7377>; John Hendren and Elizabeth Shogren, "Shooting Spurs Iraqi Uproar, US Inquiry," *The Los Angeles Times*, 17 November 2004, <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/42/7377>.
11 See "US investigation of mosque killing is expanded: Was more than one insurgent shot to death?" NBC News and News Services, May 4, 2005, <http://www.msnbc.msn.com/id/6502452/>. The US military's 1st Marine Division investigated the shooting incident. See "U.S. probes shooting at Fallujah mosque," MSNBC News, 16 November 2004, <http://www.msnbc.msn.com/id/6496898/>. The investigation concluded that the Marine's actions were "consistent with the established rules of engagement and the law of armed conflict," Maj. Gen. Richard F. Natonski, commanding general of the 1st Marine Division, said in a statement. The marine was exonerated. See Seth Hettena, "Unidentified Marine in videotaped Iraq mosque shooting won't face court-martial," Associated Press, 4 May 2005. The statement said that the marine "could have reasonably believed that the AIF (anti-Iraq forces) shown in the videotape posed a hostile threat justifying his use of deadly force." "Review exonerates Marine in mosque shooting," Associated Press, May 5, 2005.
12 Dinstein, 2004, p. 94.
13 The opinion that the rule was customary long before 1977 is widely held. For a discussion see Sabel, 2000, p. 440.
14 It should be noted, however, that the rules had already been articulated in Article 20 of the non-statutory 1923 Hague Rules of Air Warfare, which stated: "When an

aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent."

15 See on this distinction Sabel, 2000, pp. 439 at 443.

16 Dinstein, 2004, pp. 144–145.

17 UK Ministry of Defence, 2004, p. 58, § 5.7.1.

18 Ibid., p. 327, § 12.68.

19 Ibid., p. 58, § 5.7.1.

20 Ibid., p. 58, §5.7.2.

21 In particular, Article 51.

22 The ICRC's Commentary on Article 41 refers not only to combatants but "adversaries who benefit only from the safeguard of Article 41 without being recognized as prisoners of war." ICRC Commentary, 1987, p. 485, para. 1613.

23 Ibid., p. 483, paras. 1606, 1607. See also p. 491, para. 1630.

24 The ICRC's Customary International Law study found that the obligation to treat persons *hors de combat* humanely is a customary rule in both international and non-international armed conflicts. Henckaerts and Doswald-Beck, 2005, p. 306 (Rule 87).

25 Namely, pursuant to Article 4(A)(4) of the Third Geneva Convention, "[p]ersons who accompany the armed forces without being members therefore, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany who shall provide them for that purpose with an identity card …', and, pursuant to Article 4(A)(5), '[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law."

26 Article 1 of the Geneva Conventions provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." See Kalshoven and Zegveld, 2001, p. 75.

27 For a discussion see Detter, 2000, pp. 400–404.

28 As Sandoz notes: "[I]nternational humanitarian law is to a great extent based on the conviction that compliance with the law is advantageous for each of the belligerents and does not jeopardise victory for any of them." Sandoz, 2006, p. 8. Fleck states: "For fighters on both sides of armed conflicts, incentives are important to ensure compliance with humanitarian law," Fleck, 2006, p. 65.

29 Lauterpacht, for example, has observed that the laws of war, including Hague law, have a humanitarian character and their purpose is largely humanitarian: "We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation of hostilities, is its essential purpose." "The problem of the revision of the laws of war," Lauterpacht, 2004, pp. 582 at 585, 586.

30 Van Creveld argues that while the laws of war may allow for and even promote humanity in war, they do so for utilitarian reasons, chief of which is to enforce discipline for the sake of ensuring an effective fighting machine. "The purpose of the law of war is not, as Clausewitz and many of his followers seemed to think, simply to appease the conscience of a few tender-hearted people. Its first and foremost function is to protect the armed forces themselves. … If armed conflict is to be carried on with

any prospect of success, then it must involve the trained cooperation of many men working as a team. Men cannot cooperate, nor can organizations even exist, unless they subject themselves to a common code of behavior. The code in question should be in accord with the prevailing cultural climate, clear to all, and capable of being enforced." van Creveld, 1991, p. 89.

31 See Doswald-Beck and Vité, 1993, pp. 95, 99.

32 According to Rosas: "In primitive societies prisoners taken in war were either killed or admitted as full members of the tribe. The latter alternative was often reserved for women and children. Hunger could lead some tribes to cannibalism and to capture prisoners for food. Otherwise the prisoner, if he was not adopted as a member of the tribe, was often tortured to death in a ritualistic fashion." Rosas, 2005, p. 44.

33 Henckaerts and Doswald-Beck, 2005, p. xxv; Green, "What is," 1999, pp. 1 at 5.

34 ICRC, International Humanitarian Law and the Geneva Conventions, 2006 rev., <http://www.redcross.org/museum/images/IHLAct4.pdf>.

35 "Thou shalt not smite them: wouldst thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread before them, that they may eat and drink and go to their master." Proverbs XXV: 21 and 2 Kings VI: 22–23, quoted in Green, "What is," 1999, p. 6.

36 Sun Tzu, 2003, p. 26. See also van Creveld, 2000, p. 38, referring to Sun Tzu's strategy: "Thus the strongest, most successful action is at the same time the most economic one."

37 Rosas, 2005, p. 45; Levie, 2000, p. 339. See also Green, "Cicero," 1999, p. 50.

38 Levie, 2000, p. 339.

39 Third Lateran Council - 1179 A.D, <http://www.dailycatholic.org/history/11ecume1.htm>.

40 Canon 24: "Let those also who in the vilest avarice presume to rob shipwrecked Christians, whom by the rule of faith they are bound to help, know that they are excommunicated unless they return the stolen property." Ibid.

41 Rosas, 2005, p. 47.

42 Ibid., p. 52.

43 Ibid., p. 53.

44 Treaty of Westphalia, 24 October 1648. Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies. Article CX. See also Article CXII.

45 Singer, 2003, p. 31.

46 Reprinted in Dunant, 1986, pp. 137–146. The 1864 Convention may have been the first IHL treaty but it was not the first international legal instrument dealing with the regulation of warfare. The non-binding 1856 Declaration of Paris addressed some issues concerning maritime warfare.

47 The term "hors de combat" does not occur in the 1864 Convention, however, and would have to wait 85 years to make its first appearance, in the 1949 Geneva Conventions. If the 1864 Geneva Convention was the first international humanitarian law treaty, it was not the first attempt at codification of the customary rules. The preceding year, Dr Francis Lieber's Code of Instructions for the Union Forces of the USA during the American Civil War laid out many of the fundamental elements regarding the status and treatment of the sick and injured and POWs which are found in the international treaties that followed it.

48 Dunant described the "groans and heart-rending prayers […] rising from the throats of thousands of wounded men, who were enduring the most fearful agonies, and

suffering from the unthinkable torments of thirst." Dunant, 1986, p. 12. See also pp. 19–20.

49 Ibid., p. 73.

50 See *The Fundamental Principles of the Red Cross and Red Crescent Geneva* (Geneva: ICRC, 1996).

51 Indeed, following his initial efforts to establish the first national society, Dunant was sidelined and quickly faded into obscurity and penury until close to the end of his life, when his enormous contribution finally received the recognition it deserved, culminating in his receipt of the first Nobel Peace Prize in 1901. Dunant, 1986, pp. 7–12.

52 Dunant examined the problem "both from the humane and Christian standpoint." Ibid., p. 116.

53 Even if not everyone approves of the term, considering it somewhat misleading. Dinstein, preferring the term "law of armed conflict" – as do many in the military – notes that: "Despite its popular usage today, and the stamp of approval of the International Court of Justice, 'International Humanitarian Law' as an umbrella designation has a marked disadvantage. This is due to the fact that the coinage IHL is liable to create the false impression that all the rules governing hostilities are – and have to be – truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing considerations of military necessity." Dinstein, 2004, p. 13.

54 Ibid., p. 126.

55 Article 6.

56 Ibid.

57 Articles 1 and 2.

58 Article 7.

59 The Red Crescent Emblem, as well as the Red Sun and Lion (used by Persia), were introduced in the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Article 19 provides: "As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces. Nevertheless, in the case of countries which already use, in place of the red cross, the red crescent or the red lion and sun on a white ground as a distinctive sign, these emblems are also recognized by the terms of the present Convention."

According to Meriboute: "In 1980, Iran renounced the use of the red lion and sun, replacing it with the red crescent, although reserving the right to revive its use if ever new emblems should be recognized. In June 2000, however, the Islamic Republic of Iran announced that it might once again use the red lion and sun as a symbol." Meriboute, 2002, p. 264. The introduction of the Red Crystal emblem in 2005 is supposed to put an end of emblem proliferation. See Pulles, 2007.

60 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, <http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument>.

61 <http://www.icrc.org/ihl.nsf/INTRO/135?OpenDocument>.

62 The Laws of War on Land. Oxford, 9 September 1880 (aka, the Oxford Manual). It was drafted by Gustave Moynier and unanimously adopted by the Institute of International Law in 1880. <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

63 Article 35 of the Brussels Declaration stated: "The obligations of belligerents with respect to the service of the sick and wounded are governed by the Geneva Convention of 22 August 1864, save such modifications as the latter may undergo." The Oxford

Manual included a number of provisions concerning the sick and wounded (Articles 10 to 18) but these merely restated certain provisions of the 1864 Geneva Convention.

64 Roberts and Guelff, 1989, p. 44.
65 In Articles 42, 62 and 64.
66 Commentary Geneva III, p. 91.
67 Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
68 Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, August 12, 1949.
69 Convention III relative to the Treatment of Prisoners of War. Geneva, August 12, 1949.
70 Common Article 2.
71 Article 2 Hague IV provides: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention."
72 Common Article 2.
73 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of July 6, 1996, para. 79, <http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm>.
74 Articles 51 Geneva I and II; Article 130 Geneva III; Article 147 Geneva IV.
75 Articles 50 Geneva I and II; Article 129 Geneva III; Article 146 Geneva IV.
76 According to the ICRC customary IHL study, while States Parties to the Geneva Conventions have an obligation to establish a system of universal jurisdiction, under customary law, the rule is that "[s]tates have the right to vest universal jurisdiction in their national courts over war crimes." Henckaerts and Doswald-Beck, 2005, pp. 606, 604.
77 Articles 52 Geneva I and II; Article 131 Geneva III; Article 148 Geneva IV.
78 Article 1 Hague Regulations.
79 Detter, 2000, p. 370.
80 "[The] 'distinctive signal' means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol." (Article 8(m)).
81 In a speech given in 2006, British Defence Minister John Reid called for international humanitarian law to be redrawn and "demanded sweeping changes to international law yesterday to free British soldiers from the restraints of the Geneva conventions … Mr Reid indicated he believed existing rules, including some of the conventions … were out of date and inadequate to deal with the threat of international terrorists. 'We are finding an enemy which obeys no rules whatsoever,' he said, referring to what he called 'barbaric terrorism.' The conventions, he said, were created more than half century ago 'when the world was almost unrecognizable.' They dealt with how the sick and injured and how prisoners of war were treated, 'and the obligations on states during their military occupation of another state,' … Given the big changes undertaken by the military over the past 50 years, he added, 'serious questions' must be asked about whether 'further changes in international law in this area are necessary.'" Richard Norton-Taylor and Clare Dyer, "Defence Secretary Calls for Geneva Conventions to be Redrawn: International Laws Hinder UK Troops – Reid," *The Guardian*, April 4, 2006, <http://www.guardian.co.uk/frontpage/story/0,,1746324,00.html>.

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84 “2001: US Declares War on Terror,” BBC.co.uk, <http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid_2515000/2515239.stm>; “The Global War on Terrorism – The First 100 Days,” The White House, December 2001, <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html>.

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87 Most notoriously in the US Patriot Act, which introduced sweeping changes in the law to allow for increased surveillance. <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.03162>. In 2005 the Bush administration admitted to wiretapping US citizens. “Bush says he signed NSA wiretap order: Adds he OK’d program more than 30 times, will continue to do so,” CNN.com, December 17, 2005, <http://www.cnn.com/2005/POLITICS/12/17/bush.nsa/>. In 2006, President Bush said that the wiretapping of citizens was a vital part of the war on terror and that it was legal. “Bush Calls Wiretapping a Vital Part of War on Terror,” ABCnews, January 23, 2006, <http://abcnews.go.com/GMA/story?id=1532436>.

88 Addressing a joint session of Congress and the American people following the attacks, President Bush said: “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” Address to a Joint Session of Congress and the American People, US Capitol, Washington DC, The White House, September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010920–8.htm>.

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91 For an interesting analysis see Mohamedou, 2007.

92 Common Article 2, 1949 Geneva Conventions.

93 According to the ICRC Commentary to common Article 3, although not stipulated in the Article itself, delegates to the Diplomatic Conference had in mind an organized military force, with an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. The insurgents should have an organization purporting to have the characteristics

of a state, and they should act under the direction of an organized authority and be prepared to observe the laws of war. ICRC Commentary, 1958, p. 35.

94 According to the ICRC Commentary: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but which take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front." Ibid., p. 36.

95 Al Qaeda released several statements declaring war and justifying its continuation, including August 1996 and February 1998 Declarations of War and November 2002 and October 2004 justifications for its continuation. See Mohamedou, 2007, pp. 70–73.

96 In resolutions adopted following the September 11 attacks, the UN Security Council hinted that Al Qaeda had committed a breach of the *jus in bellum*. In resolutions 1368 of September 12, 1373 of September 28 and 1377 of November 12, 2001, it condemned the attacks as a threat to international peace and security and recognized the right of individual and collective self-defence.

97 "Because of the novel nature of this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply." Memorandum for William J. Haynes II, General Counsel, Department of Defense from John Yoo, Deputy Assistant Attorney General and Robert J. Delabunty, Special Counsel, Re: *Application of Treaties and Laws to al Qaeda and Taleban detainees*, January 9, 2002, reprinted in Greenberg and Dratel, 2005, pp. 38 at 38–39, 43–47. "Neither their detention nor their trial by the US Armed Forces is subject to the Geneva Conventions." Ibid., p. 48.

98 Sec. 4.2 of Department of Defense Directive Number 2310.01E, September 5, 2006.

99 ICRC Commentary, 1958, p. 36.

100 The White House, Memorandum from the President for the Vice-President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taleban Detainees, February 7, 2002, reprinted in Greenberg and Dratel, 2005, pp. 134.

101 "The relevance of IHL in the context of terrorism," ICRC Official Statement, 21 July 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument>.

102 ICRC TV News Footage: "Five Years On, Families of Guantanamo Detainees Desperate for News about the Fate of their Relatives," Geneva, January 11, 2007, transcript online at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/guantanamo-tvnews-110107?opendocument>.

103 See 2006 Quadrennial Defense Review, *supra* n. 2.

104 As Yves Sandoz has written: "It is useful to examine the difficulties and even failures of international humanitarian law encountered in practice. But before beginning work on a renewal or developments of the law, one must be sure that the undertaking can be withstood by the foundations and that it will not call into question the very principles upon which the law is founded. Any examination of international humanitarian law will have to be carried out in a very open-ended manner – one that rules out nothing, not even the possibility of scrapping the law entirely and constructing a new edifice

on different foundations, if one were convinced that it was not possible to incorporate the changes needed into the law as it stands." Sandoz, 2006, p. 4.

105 'Bin Laden's driver to face trial', BBC News, July 15, 2005, <http://news.bbc.co.uk/2/hi/americas/4687279.stm>.

106 Common Article 3 provides that "[t]he parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."

107 Arguably, the international armed conflict in Afghanistan between the USA and the Taleban (assisted by Al Qaeda) which began on October 7, 2001 ended with the cessation of major hostilities and the beginning of the occupation. Alternatively, one could consider that it ended with the December 5, 2002 Bonn Agreement, by which Afghan political leaders formed an interim Transitional Administration and named Hamid Karzai Chairman of a 29-member governing committee, or with the election of Karzai as President of the Afghan Transitional Administration on June 19, 2002, or at the latest, on November 3, 2004, when Karzai was declared the winner of Afghanistan's first-ever presidential election. The occupation, in any event, ended with the handover of power, whenever that is adjudged to have taken place. Article 6 of the Fourth Geneva Convention provides: "In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations." Article 118 of the Third Geneva Convention provides that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." This refers of course to active hostilities within the context of an international armed conflict; a conflict which has now ended. In short, given that the international armed conflict has now ended, the law applicable in such conflicts no longer applies and thus cannot provide any legal basis for holding POWs or civilian detainees. Even if hostilities remained active during the occupation through to the restoration of sovereignty, any continuing hostilities are in the context of a non-international armed conflict. As explained, the law applicable in such conflicts provides no legal basis for detention of prisoners.

108 The White House, Memorandum from the President for the Vice-President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taleban Detainees, February 7, 2002, reprinted in Greenberg and Dratel, 2005, pp. 134.

109 The White House, Memorandum from the President for the Vice-President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taleban Detainees, February 7, 2002, reprinted in Greenberg and Dratel, 2005, pp. 134. See also Memorandum for William J. Haynes II, General Counsel, Department of Defense from John Yoo, Deputy Assistant Attorney General and Robert J. Delabunty, Special Counsel, Re: *Application of Treaties and Laws to al Qaeda and Taleban detainees*, 9 January 2002, reprinted in Greenberg and Dratel, 2005, p. 38. See US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzalez, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense from Jay S. Bybee, Assistant Attorney General, January 22, 2002, reprinted in Greenberg and Dratel, 2005, p. 81.

110 The White House, Memorandum from the President for the Vice-President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to

the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taleban Detainees, February 7, 2002, reprinted in Greenberg and Dratel, 2005, pp. 134.

111 See Memorandum for William J. Haynes II, General Counsel, Department of Defense from John Yoo, Deputy Assistant Attorney General and Robert J. Delabunty, Special Counsel, Re: *Application of Treaties and Laws to al Qaeda and Taleban detainees*, January 9, 2002, reprinted in Greenberg and Dratel, 2005, p. 38.

112 Henckaerts and Doswald-Beck, 2005, p. 384 (Rule 106).

113 See Watkin, 2004, p. 7.

114 "In regard to both the Al Qaeda and Taleban detainees, the United States had asserted that there was no doubt as to their correct status, and that there was therefore no need to resort to tribunal proceedings under Article 5." Carnahan, 2005, pp. 608 at 612.

115 *Rasul et al. v. Bush*, President of the United States, et al., Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 03–334, Supreme Court, 28 June 2004, <http://supct.law.cornell.edu/supct/html/03–334.ZS.html>.

116 By Deputy Secretary of Defense Order of July 7, 2004; Combatant Status Implementation Guidelines, July 30, 2004. See Defense Department Background Briefing on the Combatant Status Review Tribunal, July 7, 2004, <http://www.pentagon.mil/transcripts/2004/tr20040707–0981.html>.

117 See Blocher, 2006, p. 667; Human Rights Watch, "US: Review Panels No Fix for Guantanamo," July 27, 2004, <http://hrw.org/english/docs/2004/07/27/usdom9135.htm>; Amnesty International, *USA: Administration continues to show contempt for Guantánamo detainees' rights*, Al Index: AMR 51/113/2004, 8 July 2004, <http://web.amnesty.org/library/Index/ENGAMR511132004>.

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119 See Naqvi, 2002, p. 571.

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121 Ibid.

122 Detainee Treatment Act of 2005 (H.R. 2863, Title X). Published December 30, 2005. The Detainee Treatment Act of 2005 is part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863).

123 The DC Court would have also have exclusive jurisdiction to rule on the final decisions of military commissions.

124 Sec. 1005(e).

125 *Ex parte Quirin*, 317 U.S.

126 At p. 19 of the judgment.

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129 UN Human Rights Expert Calls on Coalition Authorities to Allow Iraqi Detainees to Challenge Lawfulness of Detention, UN Press Release HR/4742 IK/435, May 5, 2004, <http://www.un.org/News/Press/docs/2004/hr4742.doc.htm>.

130 Douglas Jehl and Neil A. Lewis, "U.S. Disputed Protected Status of Iraq Inmates," *The New York Times*, May 23, 2004, <http://www.nytimes.com/2004/05/23/international/middleeast/23IRAQ.html?ex=1400644800&en=2080d18dc1ef3c01&ei=5007&partner=USERLAND>.

131 "UNCHR 'concerned' over Iraqi prisoners' status," May 6, 2004, Rediff.com, <http://www.rediff.com/news/2004/may/05iraq3.htm>.

132 See Memorandum for Alberto R. Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A, US Department of Justice Office of Legal Counsel, August 1, 2002. Reprinted in Greenberg and Dratel, 2005, p. 172.

133 The international phase of the armed conflict ended in a matter of weeks, although even after the fall of the Taleban and the installation of a new government military operations against Al Qaeda and resurgent Taleban have continued. See Danchin, 2004, p. 12; Cryer, 2002;

134 Major hostilities in the international armed conflict in Iraq ended at the end of April 2004, by which time the US was occupying all Iraqi territory. See Kelly, 2006, p. 130.

135 See Joseph Lelyveld, 'No Exit', *The New York Review of Books*, February 15, 2007, p. 12.

136 Section 7 of the Act provides: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," and "Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

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138 *Hamdan* v. *Rumsfeld*, US Supreme Court, No. 05–184, June 29, 2006, <http://www.supremecourtus.gov/opinions/05pdf/05–184.pdf>.

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140 Article 82.

141 Article 83.

142 Article 103 of the Third Convention provides that: "Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible …."

143 According to Article 102 of Geneva III: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."

144 Article 84.

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147 Sec. 948d, para. (b).

148 Sec. 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements, para. (b).

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153 Some of the reports that followed the worldwide publication of the Abu Ghraib photos in April 2004 noted the role that the pursuit of intelligence had played in the abuses. The Schlesinger report described in detail the DoD's interrogation policy and the sanctioning of more aggressive methods in order to satisfy the pressure to obtain intelligence, admitting that: "The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned." Greenberg and Dratel, 2005, at p. 902.

154 Section SEC. 1002.(a) of the Detainee Treatment Act of 2005 provides: "In General-No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." Section 2 of Department of Defense Directive Number 2310.01E of September 5, 2006, concerning the Department of Defense Detainee Program, and which was the instrument that recognized the applicability to detainees of common Article 3, provides: "2.1. This Directive applies to: 2.1.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter collectively referred to as the "DoD Components").

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Chapter 10

Occupation Responsibilities and Constraints

Charles Garraway[1]

Introduction

"Occupation" is a word that has taken on a new lease of legal life following the invasion of Iraq by the United States led Coalition in 2003. Suddenly, an area of law that had seemed largely of academic relevance only outside the confusing milieu of the Israel/Palestine problem came back into main stream thinking. This is perhaps best illustrated by the concession made by counsel acting for the 14 European members of the North Atlantic Treaty Organisation (NATO) in the Bankovic case[2] before the European Court of Human Rights. This involved the attack on the TV station in Belgrade during the NATO air strikes in the Kosovo campaign. The case was argued on a preliminary point, namely whether the victims were "within the jurisdiction" of any of the respondent States so as to bring the Convention into play. Serbia and Montenegro were not a Party to the Convention and so the question arose of whether the Convention could be applied extraterritorially. The Court held that:

> In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.[3]

The Court, however, went on to say:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[4]

The reference to "military occupation," whilst supported to some extent by the case law, was as a result of a specific concession by counsel. It could hardly have been envisaged in 2001 that within two years, the United Kingdom would itself find itself officially cast as an "occupying power" in a United Nations Security

Council Resolution.[5] The Bankovic Case raises complex issues of the overlap between human rights law and international humanitarian law in situations of occupation but that issue will be returned to at a later stage.

History

The law of occupation has always been something of an anomaly. In earlier times, the idea of occupation as such did not exist. Rulers merely annexed territory as they conquered it and incorporated it within their own boundaries. It was only in the nineteenth century with the growing development of the Westphalian State system that the idea of occupation as a temporary concept began to develop. Chief Justice John Marshall in *American Insurance Company v. Cantor* wrote as early as 1828: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."[6] The wording here is interesting. Where a nation was not "entirely subdued," the territory would be merely "held," pending a final decision on its fate. The end result might well be annexation but there would be an intermediate period when its status was indeterminate. Francis Lieber dealt with this temporary situation in the Lieber Code,[7] concentrating primarily on the relationship between the occupier and the existing civil administration. Whilst Articles 1 and 2 authorised the imposition of Martial Law, Article 6 provided that:

> All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government – legislative executive, or administrative – whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.[8]

Other provisions such as Article 32[9] also emphasized the power of the occupier though it was added that "The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change."

Although specific protections were inserted with regard to the treatment of civilians, it will be seen that it was the occupier who held the upper hand with the functioning of the existing authority and legislative system being at the will of the occupier.

Hague Regulations

Change began to come at The Hague Peace Conferences of 1899 and 1907. In the Regulations attached to the Fourth Convention of 1907,[10] occupation was defined as follows:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[11]

Furthermore, in a distinct change of policy, the Regulations went on to state that:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[12]

Whilst this recognized the transfer of "power," it restricted the ability of the occupant to change the legal regime in force in the country. Whilst previously, under Lieber, the occupant had had effectively *carte blanche* to make such amendments to the administrative, governmental and legal structures of the territory as he saw fit, now, whilst he held the responsibility "to restore, and ensure, as far as possible, public order and safety," he could only change the laws if absolutely necessary. The occupier was seen, not so much as a conqueror, but as an "administrator," acting on behalf of the legitimate sovereign. Indeed, the word "administrator" was used in Article 55 which stated that:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.[13]

However, the Hague Regulations did not comment on the end of occupation which remained a matter for any subsequent peace treaty. The aim of the Regulations was to preserve the *status quo* in so far as possible until any final settlement. It thus adopted a "conservationist" approach.[14] The 14 articles prevent forced informants (Article 44), oaths of allegiance to the Occupying Power (Article 45) and pillage (Article 47), whilst requiring respect for "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice" (Article 46). The right of the Occupying Power to levy taxes is restricted to that required for the "needs of the army or of the administration of the territory in question" (Article 49) and the collection and disbursement of general tax revenues shall be "as far as is possible" in accordance with the rules of assessment and incidence already in force within the territory (Article 48) with receipts tendered (Article 51). Collective punishments are prohibited (Article 50) and requisitions limited (Article 52). Moveable State property may be seized and some private property linked to the war effort but, in the latter case, restoration and compensation must be made "when peace is made" (Article 53). In addition, there are special provisions governing certain submarine cables (Article 54) and some cultural property (Article 56) as well as the important Article 55 which has already been mentioned.

The first real test of this new paradigm came during and at the end of World War II – and it came under severe strain. During the war, both in Europe and the Far East, the tendency was to adopt the more lenient Lieber approach – where the law of occupation was even acknowledged as applicable. More often than not, the territory was effectively annexed, for example Luxemburg and parts of Poland, Belgium and France. However, it should be pointed out that war crimes trials after the war certainly sought to apply the Hague standards.[15]

Even more complex was the situation at the time of the surrender of German and Japanese forces. Here, the complete State had been subjugated. This was not the temporary occupation of a portion of territory pending a peace settlement with the sovereign authorities but an unconditional surrender. Indeed, the Berlin Declaration of June 5, 1945 stated that there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers."[16] How could this situation be incorporated within the strict limitations of the Hague Regulations? This problem was recognized at the time and as eminent an authority as Robert Jennings had commented that "to attempt to apply [the law of occupation] would be a manifest anachronism."[17] Certainly new challenges presented themselves. The requirement here was not for a "conservationist" approach but for a "transformative" one. If the entire political structure was seen as "evil," as was the case with Nazi Germany, then to suggest that the existing structures should continue to exist except where "absolutely necessary" was indeed a "manifest anachronism" and utterly unacceptable. As a result, the process adopted was again more akin to that of the Lieber Code where the existing structures only survived at the will of the occupier. The intention, after all, was to reconstruct the administrative structures in a transformative way, not, as might have happened in years past, to annex the territory. The 1958 *United Kingdom Manual on the Law of War on Land*, citing Jennings and Oppenheim,[18] freely recognized this conundrum and stated: "The position in Germany after the unconditional surrender has given rise to much controversy. It was probably not governed by the Hague Rules 42–56."[19]

Geneva Conventions

But if it was not so governed what laws did govern it? This question was never really decided and it is interesting that the Fourth Geneva Convention of 1949,[20] in its treatment of occupied territory, reverts back to the "conservationist" approach of the Hague Regulations. This is, however, not surprising when it is recalled that the Geneva Conventions were less concerned with the conduct of hostilities than with the protection of victims. Thus the conduct of occupation was inevitably viewed from the need to protect the persons and property of the inhabitants of the territory. Furthermore, the intention was to build upon the provisions of the Hague Regulations, not to replace them. During the negotiations, the United States delegation did raise the issue by essentially suggesting that the text should revert back to the Lieber enunciation which effectively provided the occupier

with an absolute right to change legislation. However, they could not find any support for this proposal.[21] Again the 1958 *Manual* saw a possible lacuna here and stated: "It is equally doubtful whether the Civilian Convention applies to situations – such as that of Germany after 1945 – in which the government of the defeated State ceases to exist and the Occupants assume supreme authority."[22] Such a statement is not contained in the successor version, published in 2004, *The Manual of the Law of Armed Conflict*.[23] However, its very existence in 1958 shows the tension that was already apparent between the "conservationist" and "transformative" approaches to occupation.

The Fourth Geneva Convention, in accordance with its "conservationist" approach sought to build on the Hague principles. It laid down detailed provisions on the administration of the occupied territory, including the position of local officials, especially judges. It was recognized, however, that the Occupying Power is entitled to take measures to protect its own security and thus permitted certain restrictions on civilians within the territory, including restrictions of movement, assigned residence and internment (Articles 42, 43 and 78). However, the latter two measures are seen as exceptional and may only be adopted subject to a regime similar to that applicable to prisoners of war under the Third Convention.[24] Other specific areas dealt with are schools (Article 50), medical care (Article 56) and protection of civilian medical facilities (Article 57). In addition, there are articles dealing with relief supplies, both in relation to the provision of such supplies (Article 59), their protection (Article 60) and arrangements for their distribution (Article 61).

In keeping with the protective aim, there are also specific provisions dealing with labour (Articles 51 and 52) and protection of property (Article 53). Linked to the provisions dealing with criminal justice and internment, there is in place a reasonably comprehensive system of protection for all those who find themselves within the designation of "protected person" under Article 4 of the Convention.

The drafting of the 1949 Geneva Conventions should be put in context. At around the same time, two other seismic changes were going on in the area of international law. The first was the development of the United Nations and in particular the restrictions on the use of force contained in the Charter. The second change, which has already been alluded to, was occasioned by the beginnings of the development of human rights law as a separate legal regime. The impetus for this came in large part from the treatment meted out to civilian populations by dictatorial regimes during World War II.

United Nations Charter

The United Nations Charter sought to restrict the use of force to situations of self-defense and where the Security Council had itself decided to take action as an enforcement measure. This meant that the use of force to accomplish territorial expansion was now effectively prohibited, limiting the scope of occupation law. Indeed, in the two leading examples of where the law of occupation has been

held to be relevant, Northern Cyprus and the West Bank and Gaza, both arose from actions where the "occupier" claimed to be acting in some form of self-defense. In the case of Israel, it was to the Arab attacks that led to the 6 Day War in 1967 and in the case of Northern Cyprus, to the Greek inspired coup in Cyprus which overthrew the government of Archbishop Makarios and put at risk the constitutional settlement between Greeks and Turks living on the island. In both those cases, the applicability of the law of occupation was challenged for diverse reasons. Indeed, for a long period, it seemed that the law of occupation was losing relevance. This was because of the new nature of conflict. Examples of what would have amounted to "occupation" were being conducted under United Nations auspices where any use of the term was discouraged. Thus, in Kosovo and East Timor, territories were administered under United Nations mandates.[25] This did not prevent the law of occupation being used as a guideline for conduct but its *de iure* application was not considered appropriate. It is interesting to note that, in Somalia, it was argued by some lawyers that United Nations forces were in "occupation" of parts of that "failed state" and that the law of occupation applied.[26] However, generally, there was a growing tendency to prefer the use of United Nations mandates and Security Council resolutions to deal with the problems of governance.

Human Rights Law

A similar reluctance to recognize the applicability of provisions of international humanitarian law can be found in the development of human rights law. The young United Nations was reluctant to be involved in any further development of international humanitarian law, seeing this in some ways as contrary to their object, namely to prevent war. There was a certain illogicality in seeking to abolish war but, at the same time, seeking to regulate it when it did occur. As a result, the updating of the Geneva Conventions was left to the International Committee of the Red Cross and human rights law developed separately. Indeed, in the early days of human rights law there seemed to be almost a tacit acceptance that the two regimes were separate and that in times of armed conflict it was international humanitarian law that applied with human rights law taking a back seat. However, that is no longer the case today if it ever was and it is now accepted that the two regimes sit side by side, even if the relationship has yet to be fully spelt out. The interrelationship was exemplified in the drafting of the two Additional Protocols to the Geneva Conventions in 1977 where there are several examples of human rights terminology appearing and indeed reference to "fundamental human rights."[27] This will be discussed further later.

Iraq

Occupation law came back into sharp focus with the invasion of Iraq in 2003. It is beyond the purpose of this article to discuss the legality or otherwise of that

invasion though much has been written and said on that matter. What is beyond dispute is that the law of occupation was accepted as applicable. However, the decision to apply that law was not without some controversy. The reason for this was, to a large extent, political. The decision of the United States and their allies to "go it alone" without the sought-after "Second Resolution" from the United Nations Security Council[28] meant that the Council itself was split with Permanent Members lined up on both sides. There was therefore no question of a subsequent Security Council resolution "legitimizing" the invasion and establishing a United Nations administration to oversee the return to local government. Indeed, such a course of action would probably have been unacceptable to the United States Administration itself, which considered that it was acting in self-defense under Article 51 of the Charter[29] and was not prepared to leave what it saw as its own security in the hands of others. The apparent belief within the Pentagon that the invasion would be greeted with open arms by the Iraqis[30] and that an indigenous administration would soon be ready to take over the reins of government was quickly squashed as it became apparent that the machinery of government itself had collapsed. The Coalition Forces would have to take over responsibility for the running of the country themselves – at least in the short term. But on what basis? Initially, certainly in the United States, there was grave reluctance to accept the idea of "occupation."[31] However, there was little doubt but that the situation fell squarely within the definition contained in Common Article 2[32] and that therefore the Fourth Geneva Convention applied in full. This was recognised by the United Kingdom very early on[33] and also – though in slightly convoluted language – in United Nations Security Council Resolution 1483.[34]

With the acceptance that this was an "occupation," a number of problems immediately presented themselves. Some were political such as the reluctance of some Coalition partners, particularly European states to be considered "occupiers;" others were legal. However, two stood out. For the first time since the Fourth Geneva Convention was drafted, the applicability of a "conservationist" law in a "transformative" situation was brought into sharp relief. Also, with the growing influence of human rights law, the relationship between human rights law and international humanitarian law was also questioned – with different answers being produced.

Certainly so far as the United States was concerned, one of the primary purposes of the invasion of Iraq was "regime change" and, even for states like the United Kingdom who did not accept that regime change, in itself, was an acceptable aim, there was a tacit acceptance that there would have to be regime change if the campaign was to succeed. It was hardly feasible for the Coalition forces to invade Iraq, take over the governance of the country for whatever period and then hand back to the Baath Party and Saddam Hussein. The "aim" had to be to produce an Iraq that was able and willing to take its place at the table of nations as a responsible member of the international community. However, this would require a "transformation" of Iraq, going well beyond anything permitted by the law of Hague and Geneva. Furthermore, the idea of occupation being a temporary state of affairs until such time as there could be a permanent peace agreement between the occupiers and the sovereign state was clearly impractical

in that there was no sovereign state remaining. In the words of the 1958 *United Kingdom Manual*, we were in a situation "in which the government of the defeated State ceases to exist and the Occupants assume supreme authority."[35] Coalition Provision Authority Regulation No. 1[36] of 16 May 2003 stated in Section 1(1):

> The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

But what was the authority for this sweeping transformational agenda? The Regulation began:

> *Pursuant* to my authority as the Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, ….

Leaving aside the interesting fact that this Regulation is dated May 16, 2003 and Resolution 1483 was not adopted until May 22, 2003, we see here the blending of international humanitarian law and United Nations law. Whilst "occupation law" would remain the underpinning to the structure, the detail would be provided by United Nations Security Council resolutions in which the Security Council retained the right to authorize activities beyond those permitted under international humanitarian law. This somewhat schizophrenic approach to existing law is perhaps exemplified in the Preamble to Resolution 1483, which states:

> *Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),
>
> *Noting further* that other States that are not occupying powers are working now or in the future may work under the Authority, ….[37]

Under this provision, the political dilemma of those Coalition members reluctant to be defined as "occupiers" was resolved. Only the United States and the United Kingdom were "occupiers" with other States merely "working … under" them. However, whilst this might provide a political fig leaf, what was its effect on the ground? Were Polish troops operating under the law of occupation? Could such troops be prosecuted for violations of the Fourth Convention if they were not "occupiers" themselves but merely "working … under" the occupiers? Would it be the United States and the United Kingdom who took the ultimate responsibility under the law of occupation for all troops operating in Iraq, regardless of nationality? Whilst many of these questions might be only of academic interest,

they illustrate that such a political compromise over legal issues is fraught with danger.

Of greater interest though is an examination of Resolution 1483 itself. What was envisaged was a partnership between the Coalition Provisional Authority and the United Nations. The 27 operative paragraphs of the Resolution go into considerable detail on the reconstruction of Iraq. In the Preamble, the Security Council "resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance."[38] This was to be done through the appointment of a Special Representative who was given a specific remit "in coordination with the [Coalition Provisional Authority]." The Special Representative was required, *inter alia*, to carry out his duties:

> (c) working intensively with the [Coalition Provisional Authority], the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;
> (e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions; …
> (h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force;
> (i) encouraging international efforts to promote legal and judicial reform.[39]

Unfortunately, this dual approach collapsed with the murder of the Special Representative, Sergio Vierra de Mello, in a bomb attack on the United Nations Headquarters in Baghdad on August 19, 2003. The United Nations were forced effectively to withdraw from the ground in Iraq and the Coalition Provisional Authority found itself acting alone. From then on, Ambassador Bremer, the Administrator of the Coalition Provisional Authority, was careful to cite United Nations Security Council resolutions, particularly Resolution 1483, as authority for his various Regulations and Orders. However, the degree of direct consultation with the United Nations authorities is not clear.

The first difficulty that faced Ambassador Bremer was that of governance. Whilst the Coalition Provisional Authority had indeed taken over the powers of government, there was a recognized need to establish an indigenous political structure to whom power could be handed back as soon as possible. However, this was simply not possible under the traditional law of armed conflict, which foresaw the return of power to the previous rulers. Resolution 1483, apart from paragraph 8(c) cited above, in its Preamble, had referred to:

> *Encouraging* efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion or gender.[40]

But how was this to be done? There is no need here to examine in depth the various twists and turns that led eventually to the establishment of an Interim

Iraqi Government in accordance with United Nations Security Council Resolution 1546.[41] What is clear is that occupation law, in itself, was insufficient to justify the steps that required to be taken. Whilst it could be argued that some form of de-Baathification programme could be justified on security grounds, the root and branch clearance and the introduction of what is sometimes described as "regime change" required additional authority. That authority could only be found in Security Council resolutions.

Similar concerns arise in relation to the various economic reforms that were introduced by the Coalition Provisional Authority. Even on security issues, where occupation law does seem to provide more latitude, the disbandment of the Iraqi security forces and the attempted construction of a New Iraqi Army might be considered problematic in the light of the prohibition contained in occupation law against compelling "nationals of the hostile party to take part in the operations of war directed against their own country."[42] Did this include the raising of indigenous forces, under Coalition command, to fight against insurgents and those resisting the occupation? If yes, and that would appear to be a logical position, then such forces would be illegal under the law of armed conflict. On the other hand, if there was to be an eventual handover to an independent indigenous authority, it was vital that that authority had the wherewithal to control the country – and that inevitably means the establishment of security forces. The rebuilding of the Iraqi police force was expressly recognized in Security Council Resolution 1483 but it was not until the passing of Resolution 1511 on October 16, 2003 that this was extended to "police and security forces."[43]

It has to be accepted that attempts to change the fundamental structure of Iraqi society and their economic basics are hard to justify under any theory of law. However, the nature of the Baath regime – and its longevity – inevitably required some radical surgery. In some cases, the enthusiasm of Coalition personnel for free market economics and Western-style democracy may have led them to exceed their mandate. However, with the *status quo ante* not being an option, the restrictions imposed by the "conservationist" approach of occupation law as found in the law of armed conflict were unrealistic. Some legal compromise had to be found.

The Relationship Between United Nations Law and the Law of Armed Conflict

The relationship between United Nations law and the law of armed conflict is one that leads to much discussion. Can the United Nations override provisions of the law of armed conflict? Certainly, under Article 103 of the United Nations Charter,[44] it can be argued that obligations under the Charter override "obligations under any other international agreement." But what of the situation where that "agreement" may represent customary law or *ius cogens*? This is not the place to enter into the debate on whether or not there is a normative hierarchy in international law.[45] However, the European Court of Justice in *Kadi v. Council*,[46] when faced with an argument that compliance with a Security Council resolution would involve the abrogation of fundamental rights, stated:

> None the less, the Court is empowered to check indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[47]

The *Kadi* Case involved the freezing of the funds and assets of individuals listed by the United Nations Sanctions Committee as sponsors of terrorist operations. The Court upheld the validity of the actions taken by European Union institutions to enforce the Security Council resolution in relation to Yassin Abdullah Kadi but the method by which the Court reached its conclusion does seem to pave the way for possible challenges to the legality of Security Council resolutions.

The Geneva Conventions are now universally ratified. It has been argued that the Security Council does not have the right to abrogate from fundamental principles of humanitarian law as contained in those Conventions but such arguments may fail to distinguish between the principles and the detail. Not all the detail contained in the Conventions can be said to amount to fundamental principles and it is sometimes necessary to return to those principles in order to ascertain the exact intent of the drafters. To take a simple example, in the Third Geneva Convention, there is a requirement for "capture cards" to be completed, "similar, if possible, to the model annexed to the present Convention," and "forwarded as rapidly as possible" to the Central Prisoners of War Agency.[48] The purpose of this provision is to ensure that the existence of the prisoner, and the fact that he is alive, is relayed to those who need to know as soon as possible. Much of this is now done electronically to ensure the fastest possible response. The principle has overtaken the detail!

In the case of occupation, as has been seen, there is a natural tension between the "conservationist" and "transformative" approaches. The law adopts the "conservationist" approach – and rightly so as it is designed to protect those who are most vulnerable. However, there will be times when the "conservationist" approach simply does not match the reality on the ground. This is particularly so in situations where the intervention is specifically for the purpose of "regime change" or where "regime change" is an inevitable consequence of the intervention. In some such cases, the "conservationist" approach is still appropriate, where there remains an authority to whom sovereign power can be returned. An example of this is the occupation of Kuwait in 1990. Although the whole country was occupied, there was a "Government in Exile" and the international community had no intention of allowing Iraq to annex the country as they purported to do. In that case, it was wholly appropriate to insist on a strict application of the "conservationist" approach.

On the other hand, in the case of the invasion of Iraq in 2003, whilst many considered that the use of force that led to the occupation was illegal, nobody took the view that the occupation should end with the transfer of power back to the Baath Party or to Saddam Hussein. It was recognized that it was in the interests of the Iraqi people themselves that they should be able to develop fresh

institutions, free from the taint of the Saddam regime. However, this could not be done within the strict limits of the "conservationist" approach.

A slightly similar situation arises in relation to long-term occupations. A freeze on institutional development will inevitably lead to stagnation and may not be in the interests of the indigenous inhabitants. On the other hand, to allow the occupier a free hand to introduce such reforms as he sees fit will undermine the whole nature of occupation law.

Occupation law is part of the law of armed conflict. That law is exactly what its name implies, the law **of** armed conflict. It recognizes the reality of the battlefield and seeks to provide practical solutions to practical problems. The *ius in bello* is different from the *ius ad bellum*. It does not seek to look at the origins of the conflict but to lay down rules with which all sides, both aggressor and victim, need to comply. Similarly in the law of occupation, the rights or wrongs of the occupation itself do not enter into the equation. However, one of the purposes of the law of occupation is to ensure that nobody gets an unfair advantage whilst negotiations continue on a long-term solution to the problem that caused the occupation in the first place. It follows that the "conservationist" approach is that which in most cases is most likely to suit the circumstances but there are occasions when such an approach may be counter-productive and not fit with the reality on the ground. Are the interests of the people affected, usually the indigenous population, to be subservient to the purity of the law?

A law that works to the disadvantage of those it is designed to assist will soon be ignored and fall into desuetude. On the other hand, it is clearly wrong to give to the occupier *carte blanche* to decide what is in the interests of the inhabitants and thus the ability to set aside unilaterally that part of the law that he may find inconvenient for his own purposes. The answer that seems to be developing to this conundrum is that the bottom line in relation to occupation is the "conservationist" approach. However, in cases where such an approach is inappropriate for whatever reason, exemptions may be approved under strictly limited circumstances by the Security Council. In some cases, as we have seen with Kosovo,[49] the Security Council may effectively take over the role of "occupier," laying down its own rules so that the real "occupier" is acting under the direction, authority and control of the Security Council. In others, such as Iraq, the occupiers are identified and remain bound by the law of occupation, subject only to those areas of exemption granted to them by the Security Council.

In the case of Iraq, the Security Council tried to set up a partnership between the United Nations and the Occupying Powers. However, this was effectively stymied by the bomb blast that took the life of the Special Representative and forced the United Nations out of Baghdad. This left the occupiers, in the form of the Coalition Provisional Authority, to interpret the Security Council mandate for themselves. Technically, of course, the Security Council could have intervened at any time to overturn any such interpretation with which they disagreed but with the two Occupying Powers that made up the Coalition Provisional Authority, the United States and the United Kingdom, both holding vetoes within the Council, that was unlikely. Arguments will therefore remain as to the legality of some of the actions taken by the Coalition Provisional Authority, purporting to act under

Security Council authority. We will never know how the partnership would have worked out had Sergio Vierra de Mello lived.

The Relationship Between the Law of Armed Conflict and Human Rights Law

A further issue that increasingly arises in occupation is the overlap between the law of armed conflict and human rights law. Occupation normally arises out of conflict and the law governing it, particularly the Hague Regulations and the Fourth Geneva Convention, are an integral part of the law of armed conflict. However, there is an increasing tendency to look to human rights law as an important adjunct to the law of armed conflict in occupation situations. This is not without controversy.

The wording of the 1966 International Covenant on Civil and Political Rights (ICCPR) requires States to grant rights to "all individuals within its territory and subject to its jurisdiction."[50] This appears to lay down a two part test with the conjunctive use of the word "and." However, the European Convention requires Parties to "secure to everyone within their jurisdiction the rights and freedoms" contained in the Convention (Article 1).[51] Here, the territorial requirement is missing. Jurisdiction has been interpreted widely and, as has been stated earlier, it has been ruled by the European Court of Human Rights that although the application of the Convention is primarily territorial, extraterritorial jurisdiction is not ruled out, *inter alia*, "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[52] The exact effect of this is being tested in the United Kingdom courts at the moment in a number of cases arising out of Iraq.[53] The United Nations Human Rights Committee has looked at the narrower text of the International Covenant and has effectively sought to adopt the European standard. In General Comment 31, adopted on March 29, 2004, the Committee stated:

> A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[54]

The United States, however, has not accepted this interpretation and continues to support the literal reading of the text and limit the application of the Covenant to United States territory. This position is to be found, for example, in the Working Group Report on Detainee Interrogations in the Global War on Terrorism which stated:

> The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.[55]

It is interesting to note that the 1969 American Convention on Human Rights,[56] signed but not ratified by the United States, in Article 1, also refers to the obligation to ensure rights "to all persons subject to their jurisdiction," thus equating to the language of the European Convention.

A further issue is raised as to the "hierarchy" of human rights and law of armed conflict norms. Again, the United States tends to adopt the line that in time of international armed conflict, human rights law is inapplicable and is replaced by the law of armed conflict. However, it is doubtful if this "purist" view, which was once commonly held, can any longer be sustained in the light of the texts of the treaties themselves, in particular the derogation clauses. Article 4 of the International Covenant on Civil and Political Rights, which covers derogations, provides for such "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."[57] Even then, there are certain rights that are non-derogable. The European Convention is even more specific referring in Article 15 to "in time of war or other public emergency threatening the life of the nation." In Article 15(2), it specifically states: "No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war … shall be made under this provision."[58]

It is clearly therefore not open to the European states to argue that the Convention does not apply in time of war as it specifically caters for that eventuality. It is therefore necessary to examine how the two bodies of law mesh together in time of conflict. The International Court of Justice has addressed this issue in a number of cases including the *Nuclear Weapons* case[59] and, most recently, the *Barrier* case involving the so-called "Wall in the Occupied Palestinian Territory."[60] In the *Nuclear Weapons* case, the Court observed that:

> … the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[61]

In the *Barrier* case, the Court quoted from the *Nuclear Weapons* case and continued:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian

> law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[62]

All of this is fine on a theoretical level but applying it in practice is much more difficult. If one takes occupation law as the base plate, then it is possible to argue that human rights law applies the embellishments. In many areas this may work. For example, in relation to the provisions in the Fourth Geneva Convention on internment, it is possible to blend in further human rights law protections.[63] What is more difficult is where occupation law is silent. This could apply particularly to the use of force. Under the law of armed conflict, the use of force is governed by the nature of the target – military objectives, including combatants and civilians taking a direct part in hostilities. In the case of combatants, it is their status that is important. They can be attacked at any time and in any place.

On the other hand, human rights law is threat based. The force used, particularly lethal force, must be shown to be absolutely necessary in the light of the threat posed. Under the law of armed conflict, a sleeping combatant is a lawful target and can be killed. The situation might be different under human rights law where the first question asked might be whether some lesser use of force, even capture, might be appropriate.

Occupation law is seen as part of the law of armed conflict but it is silent on the use of force. If a member of a resistance movement is involved in an operation against the occupying forces and is captured, he may be entitled to the status of a prisoner of war. However, what are the criteria for the occupying forces in considering what force may be used against that person? If combatant rules apply, then he may be targeted simply because of who he is and what he is doing. On the other hand, if human rights rules apply, lethal force may only be used as a last resort in response to a specific threat. For the soldier on the ground, the matter will usually be governed by his Rules of Engagement, his orders on opening fire, but Rules of Engagement are not in themselves law. They should be based upon law and in order that there are so based, it is necessary for the law to be clear. This confusion is perhaps apparent in some of the cases arising out of the Iraq occupation in 2003–2004. The United States certainly appear to have taken the view that combat rules applied and where Rules of Engagement were more restrictive, that was a matter of policy rather than law.[64] The situation was less clear with the United Kingdom forces, even prior to the occupation phase.[65] There is a clear divide between the two legal regimes in their position on the use of force and this is an issue that is not just limited to occupation law. It applies also in non-international armed conflict where there is no "combatant status" and hence no "combatant immunity" from the usual domestic law restraints on the use of force. Any relaxation of those rules would need to be contained in domestic law, which would in turn need to be compatible with the human rights obligations of the state concerned.

Conclusion

It follows that the law of occupation may be at a turning point. Whilst the traditional "conservationist" approach adopted in both the Hague Regulations and the Fourth Geneva Convention has stood the test of time as a foundation for governing occupation regimes, it has failed to provide a full solution in some cases, particularly those where it is recognized that regime change is the only way forward for the occupied territory or, perhaps, in long term occupations where the "conservationist" approach can lead to stagnation.

Some will argue that the law of occupation is now outdated and needs to be revised. However, a better approach may be to accept the "conservationist" approach as the foundation but to also permit "derogations" from the strict requirements of that law in certain specific cases. The difficulty that arises then is deciding on who should be in a position to authorize such derogations. At present, that role seems to have fallen on the Security Council and this may be appropriate in the light of the Security Council's primary responsibility for the "maintenance of international peace and security."[66] The need is to ensure flexibility in the system without losing the fundamental protections for which the law was designed.

In addition, the increasing overlap between the law of armed conflict and human rights law becomes particularly apparent in situations of occupation where occasionally the two systems of law sit uneasily together, particularly in relation to the use of force. Conflict in this area needs to be resolved. Clarity in the law is essential and is in the interests both of the occupying forces themselves and those inhabitants of the occupied territory. Conflicting legal rationales are unhelpful. This is particularly so in relation to the entitlement to use force in situations of occupation.

To conclude, the law of occupation seeks to strike a balance between the needs of the occupier to protect his own security and the rights of the inhabitants of the occupied territory – and indeed the ousted sovereign. As the nature of conflict – and hence of the background of modern occupation – changes, so that balance may change. However, if it tilts too far in either direction, the system will break down and everybody will lose out. The current balance is maintained by an application of a mixture of the law of armed conflict, human rights law and United Nations law. There are inevitable tensions within the three regimes and care needs to be taken to ensure that the relationship is one of cooperation and not confrontation. There needs to be a holistic approach so that all actors know their rights and responsibilities. Confusion is a recipe for disaster. If there is no agreement on the law applicable to any given situation, then all parties will be tempted to choose that part of the law that is most suitable for their purposes. This will lead to a breakup in the universality of the law and thus in the ability to enforce the law. Law without enforcement may be seen as nothing more than worthless platitudes.

Notes

1 Charles Garraway is Visiting Professor of Law, King's College London, an Associate Fellow of Chatham House and a Visiting Fellow of the Human Rights Centre, University of Essex.
2 *Banković and Ors. v. Belgium and Ors*, Case No. 552207/99, 123 International Law Reports 94.
3 Ibid., para. 67, p. 111.
4 Ibid., para. 71, p. 113.
5 United Nations Security Council Resolution 1483 (2003) of May 22, 2003.
6 *American Insurance Company v. Cantor*, 26 US (1 Pet.) 511, p. 542.
7 1863 General Order No. 100, US Department of Army, Instructions for the Government of Armies of the United States in the Field (Lieber Code), reprinted in Schindler and Toman, 2004, p. 3.
8 Ibid., p. 5.
9 Ibid., p. 8. Art. 32 states "A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another."
10 1907 Regulations Respecting the Laws and Customs of War on Land Annexed to 1907 Convention IV Respecting the Laws and Customs of War on Land, reprinted in Roberts and Guelff, 2003, p. 73.
11 Ibid., Art. 42, p. 80.
12 Ibid., Art. 43, p. 80.
13 Ibid., Art. 55, p. 82.
14 See Fox, 2005, p. 236.
15 See, for example, the Trial of Wagner and others, 3 WCR p. 28.
16 Berlin Declaration, June 5, 1945, reprinted in Jennings, 1946, pp. 113–114.
17 Jennings, 1946, p. 136.
18 Oppenheim, 1955, p. 603, n. 2.
19 War Office, 1958, p. 140, para. 499, fn. 2.
20 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, reprinted in Roberts and Guelff, 2003, p. 299, fn. 9.
21 See Roberts, 2006, p. 588.
22 MML Part III, op. cit., fn. 19, fn. 2 to para. 499 on p. 140.
23 The Manual of the Law of Armed Conflict, UK Ministry of Defence, OUP, 2004.
24 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), reprinted in Roberts and Guelff, 2003, p. 327.
25 See respectively United Nations Security Council Resolutions 1244 (1999) of June 10, 1999 and 1272 (1999) of October 22, 1999.
26 See Kelly, 1999, p. 31.
27 Art. 72, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, reprinted in Roberts and Guelff, 2003, p. 463.
28 Following up on United Nations Security Council Resolution 1441(2002) of November 8, 2002.
29 See letter dated March 20, 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351, which, whilst primarily relying on previous Security Council resolutions, also states that the actions of the Coalition forces were "necessary

steps to defend the United States and the international community from the threat posed by Iraq ….”

30 In an interview with NBC's *Meet the Press*, Vice President Cheney, on March 16, 2003, stated: “I think things have gotten so bad inside Iraq from the standpoint of the Iraqi people, my belief is we will, in fact, be greeted as liberators.” Accessed at http://www.mtholyoke.edu/acad/intrel/bush/cheneymeetthepress.htm.

31 Marc Grossman, Under-Secretary of State for Political Affairs in the State Department, speaking on Al-Arabiyya TV on 25 April 2003 said: “Obviously we consider ourselves to be liberators of Iraq, not the occupiers of Iraq.” Accessed at http://www.state.gov/p/us/rm/20058.htm.

32 See Common Article 2 to the four Geneva Conventions of 12 August 1949, reprinted in Roberts and Guelff, 2003, pp. 198, 222, 244 and 301.

33 See statement by British Prime Minister Tony Blair on April 14, 2003, Hansard, Column 616.

34 See fn. 5.

35 See fn. 19.

36 See Coalition Provisional Authority Regulation 1, The Coalition Provisional Authority, dated May 16, 2003, accessed at http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

37 Preamble to United Nations Security Council Resolution 1483 (2003), op. cit., fn. 5.

38 Ibid.

39 See paragraph 8, United Nations Security Council Resolution 1483 (2003), op. cit., fn. 5.

40 Preamble to United Nations Security Council Resolution 1483 (2003), op. cit., fn. 5.

41 United Nations Security Council Resolution 1546 (2004), of June 8, 2004.

42 Art. 23, Hague Regulations, op. cit., fn. 10, p. 77.

43 Para. 16, United Nations Security Council Resolution 1511 (2003) of October 16, 2003.

44 Art.103, Charter of the United Nations, reprinted in Brownlie, 2002, p. 24.

45 See Shelton, 2006, p. 291.

46 *Kadi v. Council* (Case T-315/01), European Court of Justice, September 21, 2005.

47 Ibid., para. 226.

48 Art. 70, Third Geneva Convention, p. 270, fn. 25.

49 See fn. 25.

50 Art. 2(1), International Covenant on Civil and Political Rights, 1966, reprinted in Brownlie, 2002, p. 206, fn. 44.

51 Ibid., p. 245.

52 See fn. 4.

53 *R. (Al-Skeini and others) v. Secretary of State for Defence*, Divisional Court, [2005] 2 W.L.R. 1401 (and later in the Appeal Court, [2005] All E.R. (D) 337 (Dec)).

54 Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, March 29, 2004, UN Doc. CCPR/C/21/Rev. 1/Add. 13 (2004).

55 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, March 6, 2003, reprinted in Greenberg and Dratel, 2005, p. 241.

56 American Convention on Human Rights, 1969, reprinted in Henkin et al., 2001, p. 374.

57 See fn. 50, at p. 207.

58 Art. 15(2), European Convention for the Protection of Human Rights, reprinted in Brownlie, 2002, p. 249, fn. 44.
59 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996, 110 International Law Reports 163.
60 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, accessed at: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.
61 Nuclear Weapons case, op. cit., para. 25, p. 190, fn. note 58.
62 Wall case, fn. 60, para. 106.
63 See Pejic, 2005, p. 375.
64 Exemplified, perhaps, by the Fallujah operation after the November 2004 US Presidential election which had the effect of driving 300,000 Sunnis from their homes and devastating the city. See Hendrickson and Tucker, 2005, p. 18.
65 See Garraway, 2006.
66 Art. 24, United Nations Charter, fn. 44, p. 8.

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Conclusion

Howard M. Hensel[1]

This volume began by examining a variety of Western schools of thought regarding the nature of man, his relationship to society and the state, and the nature of the international system. In addition, it examined the various ways in which proponents of these respective schools of thought have interpreted and applied the analytical framework, originally developed and employed by just war proponents, as they delineated their respective criteria for determining when and how armed force should be utilized as an instrument of policy. Based upon this overview, it seems clear that there are a number of areas in which there are fundamental divergences of belief.

For example, some Western philosophical schools of thought are predicated upon the existence of absolute normative standards and values, whereas others argue that all values are relative and situationally determined, based upon pragmatic considerations. Among those that believe that there are absolute, universally applicable, permanent, and unalterable norms and values that should govern individual and collective behavior, as well as serve as the standard with which to evaluate that behavior, some thinkers adopt a teleological perspective and look to a Divine authority as the ultimate source for all law. Alternatively, others see norms and standards as based on generally accepted customs within the global community – *jus gentium*. Finally, there are those who adopt a particularist religious or ideological perspective and maintain that their respective religious or ideologically-based assumptions and beliefs should govern individual, group, and state behavior. For them, the religious or ideological values inherent within their belief system provide the ultimate source and standard for what they see as "good," "right," and "just."

Conversely, among those who deny the existence of absolute values and norms and adopt the position that all values are relative and situationally determined, many thinkers maintain that both individuals and groups are motivated by an overpowering desire to advance their individual, community, national, and/or cultural, utilitarian self-interest. Others, however, do not see human motivation as predicated simply upon the calculation of self-interest alone, but instead argue that human beings are motivated by a variety of complex, interconnected, emotional, instinctive, and rational conscious and subconscious considerations. Nevertheless, like the proponents of utilitarianism, they too reject the concept of absolute values and norms that transcend time.

Some schools of thought emphasize the universality of mankind, whereas others stress the importance of distinct cultural or national heritages that are unique to each society. Some Western philosophical approaches emphasize the dominance of reason over will, whereas others stress the opposite. Indeed,

among those who perceive the will as dominant over reason, some look to no higher authority than the self-interest-based will of those individuals or groups who possess sovereign authority to delineate and adjudicate the positive laws of the community. Others look to mankind's collective will, as expressed through the customary norms accepted throughout the global community. In both cases, however, by grounding law upon will rather than reason, positive statute law or custom becomes subject to change by those individuals or groups of individuals empowered to make and/or adjudicate the law.

The criteria and principles inherent within just war doctrine's interpretation and application of its underpinning analytical framework that coalesced during the late medieval and early modern period, was largely based upon a theocentric conception of natural law, as well as thoughts and traditions that developed and evolved during the medieval period in Europe. During the early modern period, however, new schools of thought emerged that implicitly or explicitly rejected a belief in theocentric natural law. The anthropocentric school of natural law was the first expression of this rejection of theocentric natural law, but eventually, it too was discarded by many, as modern Western philosophy turned to such schools of thought as the utilitarianism of Jeremy Bentham and James Mill, the neo-liberalism of Thomas Hill Green and the Oxford Idealists, and the Romantic, counter-Enlightenment, conservative movement as expressed by Edmund Burke, as well as the concepts embodied within the thought of Georg Hegel. In addition, legal positivism emerged as a prominent school of thought during the modern era. Finally, extremist religious and ideological crusading movements, reflecting tendencies that were perhaps always present throughout history, rose to prominence in the wake of the demise of theocentric natural law during the modern period, as most recently reflected in the twentieth century expressions of National Socialist and Marxist-Leninist ideological extremism. Each of these schools of philosophical thought, as well as the religious and ideological movements, interpreted the categories embedded within the framework of analysis established by the original proponents of the concept of just war through the lens of their own respective beliefs and perspectives.

Turning specifically to the respective interpretations and applications of the analytical categories inherent within the framework of analysis used to assess the decision to resort to armed force as an instrument of conflict resolution, the first category, the goal of peace, was originally defined by proponents of just war doctrine in a manner that emphasized mutual harmony, shared purpose, and concord within the community, based upon a sense of selfless cosmopolitan identity with the whole of the global community. Many proponents of subsequent viewpoints, however, especially the Hobbesian realists, tended to view peace in a zero-sum context that emphasized national interest as the governing criteria. Second, the analytical category of intent, as originally interpreted by just war advocates, was also based upon a sense of selflessness. Many proponents of later schools of thought, however, placed the emphasis upon national interests and/or ideological or religious tenets. Regarding the category of proper authority, some argued that only secular authorities had the power to authorize the use of armed force, whereas, for others, the use of armed force could be authorized

by secular, religious, and/or ideological authorities. With respect to the category focusing on the causes of conflict, self-defense was generally acknowledged as legitimate by proponents of the various schools of thought examined, but there was controversy as to whether anticipatory self-defense was legitimate. While generally acknowledging that preemptive self-defense, predicated upon unambiguous information concerning the imminence of an impending military attack, was legitimate, theocentric natural law, just war thinkers tended to reject the legitimacy of preventive self-defense. In determining the legitimacy of defensive wars, however, there was a division of opinion between theocentric natural law, classical and neo-classical advocates of the concept of just war as to whether it was necessary to establish clear culpability before the use of armed force could be justified. Despite their rejection of theocentric natural law, proponents of subsequent schools of thought remained divided as to whether anticipatory self-defense was a legitimate response to an actual or perceived military threat. Moreover, for some, only secular reasons of state constituted just cause for the use of armed force as an instrument for conflict resolution, whereas, for others, religious and/or ideological causes were also legitimate. Some viewed humanitarian intervention as legitimate, basing their position upon the principle that all people have a responsibility to protect their fellow members within the global community. Others, expressed their support for the concept of humanitarian intervention solely for reasons of national interest. Finally, there were still others who blended these motivations and who believed that individuals and groups within the various states, as well as the states and cultural groupings within the international community have a responsibility to that community to help and protect others. They held this position predicated upon self-interest, but also predicated on motives that incorporate a broader, more selfless conception that included a sense of duty, loyalty and responsibility to other peoples. Finally, while just war doctrine, as it originally coalesced around the end of the fifteenth century, rejected the concept of offensive war, proponents of subsequent viewpoints that were predicated upon different assumptions and values were often sharply divided as to its legitimacy.

As with the interpretation and application of the categories contained within the framework of analysis to be applied in assessing whether to resort to the use of armed force, the assumptions, beliefs, and values of proponents of theocentric natural law were reflected in their interpretation and application of the analytical categories relating to the actual employment of armed force. Later thinkers who rejected the theocentric natural law basis of just war doctrine, however, interpreted and applied the categories of analysis concerning the actual use of armed force consistent with the assumptions, values, and beliefs that underpinned their respective philosophies, religious convictions, and ideological tenets. Hence, there were often clear divergences of opinion between the criteria established by the original theocentric natural law advocates of just war doctrine and the criteria provided by the various other perspectives that gained currency during the modern period. In addition to clear divergences of opinion concerning what constituted right intention, there were divisions of opinion concerning what factors, if any, should limit the scope and intensity of armed conflict once it

had been initiated. Moreover, there were also differences concerning the proper definition and application of the principle of military necessity. There was controversy as to whether constraints on the strategic, operational, and tactical employment of armed force were mandatory, especially in situations of extreme emergency or where there was an absence of reciprocity. Finally, controversy existed concerning the rights of victorious powers vis-à-vis defeated peoples and their governments.

In short, there were, and remain, significant areas of disagreement within Western philosophy generally, as well as, specifically, with respect to the ways in which these philosophical perspectives were applied in addressing the question of whether and how armed force should be used to resolve conflicts. Clearly, in interpreting and applying the various analytical categories embedded within the framework of analysis designed to help answer these questions, a great many schools of thought widely diverged from the principles and criteria advocated by the original theocratic natural law proponents of just war doctrine. This observation would be a source of considerable despair were it not for the fact that, notwithstanding the often widely divergent criteria that resulted from the various interpretations and applications of the analytical categories embedded within the framework for analysis underpinning just war doctrine, proponents of most of schools of thought that rejected theocentric natural law implicitly agreed that the categories embedded within that framework of analysis were useful, appropriate, and applicable in shaping and evaluating policy formulation and implementation with respect to the use of armed force.

Building upon that theoretical agreement concerning the usefulness of the basic categories defined within the analytical framework underpinning just war doctrine, as well as drawing upon those areas in which there was, at least, a measure of agreement concerning the criteria developed within the context of that framework, the international community has made enormous and commendable strides during the past century and a half in delineating a body of positive international law governing the specific conditions under which the states, individually, or the international community, collectively, could legitimately resort to the use of armed force. Similarly, tremendous advances have been made in delineating an extensive and growing body of specific conventional and customary law regulating the actual employment of armed force. Indeed, although there are several areas of divergence between modern international law dealing with the use of armed force within and between the states of the international system and the tenets of just war doctrine, in many respects, modern international law involving the use of armed force traces its origins to the Western just war tradition. But, just as there is a tension within just war doctrine concerning the proper balance between military necessity and humanitarian limitations concerning the employment of armed force, that tension remains inherent within the principles that underpin the contemporary, customary and conventional international law and the law of armed conflict. Indeed, the chapters contained within Part II of this volume have focused in considerable detail on both the positive achievements in delineating the provisions and underpinning principles embodied within contemporary international law and the law of armed

conflict, as well as the continued, inherent tension between military necessity and humanitarian limitations on the contemporary use of armed force and the considerable challenges that confront our efforts to apply these provisions and principles within the context of twenty-first century conflicts.

In the final analysis, however, as with all positive law, the question that arises in the minds of many as to why one should adhere to this increasingly well-defined body of positive conventional and customary international law governing the use of armed force, especially during periods of extreme emergency? That question must be addressed on a variety of levels. For those individuals who tend to assume that human beings are rational, social creatures and that cooperation and a teleological focus is inherent in the human spirit, appeals that emphasize the universality of norms of behavior, a spirit of individual, group, and international cooperation, and a sense of cosmopolitan responsibility to all peoples within the global community will resonate and influence their attitudes and behavior. Since these individuals often believe that the roots and legitimacy of all law must be traced back to theocentric natural law and, ultimately, to God, for them, the validity and, hence, adherence to these positive expressions of law is a matter of conscience. Their commitment to voluntarily obeying the laws of the state and the international community, however, extends only insofar as the provisions of these laws are compatible with the tenets of theocentric natural law. For others, arguments predicated upon custom and the concept of *jus gentium* will tend to have a greater degree of appeal. For still others, appeals that are framed within the context of a mutually cooperative sense of duty, loyalty, responsibility, and affection for others will tend to have a greater degree of resonance. Alternatively, for many people, an emphasis on utilitarian self-interest, pragmatism, and the promise of mutual benefits associated with reciprocal restraints concerning the use of armed force will have compelling appeal. For some, the powerful specter of the rule of positive law as the foundation for societal order, in itself, compels obedience, whereas, for others, the threat of punishment of those who violate that law, provides the compelling incentive to obey. For some, divergence from the law would serve to degrade their individual and collective sense of honor and jeopardize the legitimacy of their cause. Recognition of the propaganda advantage provided to one's adversary by failure to observe the tenets of customary and conventional law can also be an incentive to conform to its provisions. Finally, even for some ideological and religious crusaders, appeals for limitations on the use of armed force can be framed within the context of the tenets of their respective crusading-oriented religious and ideological belief systems.

In short, the argument for adherence to the specific provisions and principles underpinning customary and conventional international law and the law of armed conflict, as well as the argument for adhering to the more general spirit of these laws, must be made using various rationales, so as to resonate with a wide variety of individuals who subscribe to a broad range of philosophical beliefs and who approach the subject from a number of different perspectives. Only in this way can a consensus be built and maintained that will place effective limits on the use and threatened use of armed force within the global community. As the means of war become increasingly lethal and the potential for their indiscriminate

and disproportionate use similarly increases, such appeals are both urgent and imperative as mankind confronts the serious security challenges of the twenty-first century.

Note

1 The opinions, conclusions, and/or recommendations expressed or implied within this chapter are solely those of the author and do not necessarily represent the views of the Air University, the United States Air Force, the Department of Defense, or any other US government agency.

Index

9/11, *see* September 11, 2001 attacks

Abdul Majid 104
Abu Ghraib 239, 242, 245
Abyssinia
  Italian campaign in 202
Additional Protocols to Geneva Conventions, *see under* Geneva Conventions
Afghanistan 125
  US-led invasion/occupation of (2001) 125, 219, 228, 231–44 *passim*, 254–5 n. 107
Al Qaeda 99–100, 107, 254 n. 107
  and 9/11 attacks 99, 104–5
  and US application of *hors de combat* rules 231–7 *passim*, 245
al-Zawahiri, Ayman, *see* Ayman al-Zawahiri
Ali Shamkhani 107
American Civil War 250 n. 47
American Convention on Human Rights (1969) 276
anthropocentric natural law 29
  characteristics of 30, 56 n. 6
  compared to theocentric natural law 30, 54
  Counter-Enlightenment's rejection of 68
  Hume's rejection of 64–5
  and international relations 55
  and just war doctrine 55–6, 88
  and principles of warfare 32–3, 55–6
  and society 30–32
  and the state 31–2, 54–5
  see also Hobbesian school of anthropocentric natural law, Lockean school of anthropocentric natural law
  anticipatory self-defence 99–100
  and customary international law 100–101, 110 n. 11
  and just war doctrine 107–9, 112 n. 51
  see also preemption, preemptive war, preventive war
Arend, Anthony Clark 101
Art of War, *The*, *see* Sun Tzu
Austin, John 82
authority, *see* legitimate authority
Ayman al-Zawahiri 104

Baath Party/Baathists 267, 272, 273
Babylon 224
Baghdad 271
Bagram airbase 242
Battle of Solferino 225
Baxter, Richard 203
Begin, Menachem 103
Belgrade 263
Bentham, Jeremy 65–7
Berenhorst, Georg von 75, 92 n. 69
Berlin Declaration (1945) 266
bin Laden, Osama, *see* Osama bin Laden
Biological Weapons Convention (1972) 118, 119
Bismarck, Otto von 104
Blix, Hans 201
Bremer, Paul 271
Britain, *see* Great Britain
Brussels Project (1874) 226
Burke, Edmund 69
  see also Burkean conservatism
Burkean conservatism
  and society and the state 69–72, 78, 88, 90 n. 34, 90–91 nn. 36–7
Burnham, James 106
Bush, George W. 105, 106, 231, 232, 236, 237, 239, 240
  administration of 99, 104–7, 231–47 *passim*
Bush Doctrine 105–6, 107
Byzantine Empire 224

Calvin, John 81
Caroline incident (1837) 101, 110 n. 11

Central Intelligence Agency (CIA) (US) 104, 107, 242
Central Prisoners of War Agency 273
Chamberlain, Neville 196
Chemical Weapons Convention (1993) 118, 119
Cheney, Dick 104–5
China 106, 111 n. 33
  Sino-Japanese War 202
Christians 224
CIA, *see* Central Intelligence Agency
Cicero, Marcus Tullius 110 n. 8
Clausewitz, Carl von
  and use of armed force 75–8, 80
Coalition Provisional Authority (in Iraq) 239, 270–72, 274–5
Cold War 106
Colombia 125
Congo, *see* Democratic Republic of the Congo
Convention on Certain Conventional Weapons (1980) 118, 119, 123, 179 n. 30, 190
Convention on the Prevention and Punishment of the Crime of Genocide (1948) 84
Copenhagen,
  British bombardment of (1807) 100–101
Counter-Enlightenment
  characteristics of 38–9
  and just war doctrine 79–80, 88
  rejection of natural law 68, 78–80
  and use of armed force 75, 78–80
  see also Burke, Hegel, Clausewitz
crusading perspective
  characteristics of 85–6, 89, 94 n. 129
  and just war doctrine 86–8, 89
cultural properties, protection of 16, 53, 87
customary and conventional international law
  and anticipatory self-defense 100–101, 110 n. 11
  of armed conflict
    and Counter-Enlightenment 78–80
    and human rights law 275–7, 278
    and legal positivism 83–5
    and UN law 272–5, 278
  and legal positivism 83–5
  and Lockean liberalism 49
  and Martens clause 144–50
  two-element theory 145, 148, 150
  see also positive customary and conventional international law, *and under* international humanitarian law
Cyprus 268

Darfur 126
d'Entreves, A.P. 7, 9, 16, 20 n. 20, 32, 54, 56 n. 6, 82
de Martens, Frederic Frommhold 136
de Vattel, Emmerich 53, 109
de Victoria, Franciscus 11, 13, 15, 24 n. 36, 25 n. 54
decision to use armed force
  analytical framework for 5–6, 11–14, 16–17
  and anthropocentric natural law
    Hobbesian realism 40–43
    Lockean liberalism 50–52
  and anticipatory self-defense 107–9
  and Clausewitz 75–8, 80
  and crusading perspective 86
  and Hegelian thought 74–5
  and legal positivism 83–4
  and liberalism 68
  and theocentric natural law 11–14
  see also declaration, intention, just cause, last resort, legitimate authority, proportionality, prospect of success, ultimate goal of peace
declaration (of intention to armed force) 6
  and anthropocentric natural law
    Hobbesian realism 43
  and theocentric natural law 14
defense, *see* self-defense
Democratic Republic of the Congo 120, 140–41
detainees
  and due process 239–41
  torture of 241–2
  and US application of *hors de combat* rules 231–47 *passim*, 275
Dinstein, Y. 166, 220, 221
disposition (in use of armed force), *see* intention

distinction (in employment of armed force) 6
and anthropocentric natural law
Hobbesian realism 43
Lockean liberalism 52–3
and crusading perspective 87
customary nature of 169, 175–6
in international armed conflicts 164–7, 176
in non-international armed conflicts 167–9, 176, 179 nn. 27–8, 179 nn. 30–31, 183 nn. 61–3
as general practice 162–4
and international humanitarian law 161–4, 164–9, 175–6, 237
treaties 121–4, 164–9, 171–3, 175–6
and legal positivism 84
peremptory nature of 169–73, 176, 181 n. 50, 182 n. 56
and preventive war 108
and reprisals 173–5, 182 n. 57, 183 nn. 61–3
and theocentric natural law 14–15, 25 n. 54
Divine authority/order/will 6–7, 17, 17 n. 8, 18 n. 10, 30, 55, 56 n. 7, 69, 71, 73, 81, 85
Dörmann, Knut 208
Doyle, Michael 58–9 n. 54
Dryden, John 100
Dubrovnik 206
Duelfer, Charles 107
Dunant, Henri 225, 244, 250–51 n. 51
A Memory of Solferino 225
Duns Scotus 81

East Timor 268
Egypt
and Six Day War 102, 103
Eisenhower, Dwight 106
employment of armed force
and anthropocentric natural law
Hobbesian realism 43–4
Lockean liberalism 52–4
and anticipatory self-defense 108–9
and Clausewitz 75–8, 80
and crusading perspective 87–8
and legal positivism 84–5
principles for 6, 14–15, 16–17
and theocentric natural law 14–16
see also distinction, intention, proportionality
Eritrea
conflict with Ethiopia (2000) 127, 140
Ethiopia
conflict with Eritrea (2000) 127, 140
intervention in Somalia (2007) 125
Ethiopia-Eritrea Claims Commission 127, 140
European Court of Human Rights 275
Bankovic case 263, 264
European Court of Justice
Kadi v. Council 272–3

Fallujah 221
First World War 198
France
and bombardment in Second World War 197
and nuclear weapons 146
Freeland, Sir John 204–5

Galileo 30
Garner, James W. 196
Gat, Azar 33, 69, 75, 77, 92 n. 69
Gaza 268
Geneva Conventions 120–28 *passim*, 139–42 *passim*, 144, 149, 167, 169, 173, 204, 223, 225–30, 235–42 *passim*, 255 n. 107, 266–7, 268, 273
First (1864) 117, 120, 225–6, 250 n. 47
Second (1906) 139, 226, 228
Third (1929) 118, 120, 226–7, 228, 235, 267, 273
Fourth (1949) 118, 119, 120, 165, 166, 170, 173, 227–8, 235–42 *passim*, 250 n. 47, 266–7, 269, 275, 277, 278
Additional Protocols to (1977) 118, 119, 120–24, 125–8 *passim*, 139, 144–8 *passim*, 161, 164–9 *passim*, 170–71, 173–5 *passim*, 179 n. 30, 183 n. 61, 183 n. 63, 190–91, 194, 195, 205–8 *passim*, 209, 219–23 *passim*, 228–30, 235–42 *passim*, 268
Geneva Gas Protocol (1925) 118
George, Robert 22–3 n. 29
Germany
and bombardment in Second World War 197
post-Second World War 266, 267

Germino, Dante 45, 67, 75, 90–91 nn. 36–7
Gingrich, Newt 109 n. 6
global war on terror 219, 231–42 *passim*, 243, 245, 247, 275
Goebbels, Dr Josef 199
Gordon, Michael 107
Grachko, Andrei 111 n. 33
Great Britain
  bombardment of Copenhagen (1807) 100–101
  and bombardment in Second World War 190, 197
  bombing of Iraq (1922–24) 202
  bombing of Pforzheim (1945) 190, 203
  UK Military Manual 221–2, 266–7, 270
  and nuclear weapons 146
  occupation of Iraq by 268–72, 274, 275, 277
  and proportionality 204–5
Greece 268
Green, Thomas Hill 67
Greenspan, Morris 204
Grotius, Hugo 56 n. 7, 108
Guantànamo Bay 234, 235, 237, 238, 239, 240, 242
Gulf War (1991) 107, 205

Hague Air Warfare Rules, *see* Hague Rules of Aerial Warfare
Hague Convention and Protocols (1954) 118, 119, 122–3, 149
Hague Convention Concerning Bombardment by Naval Forces in Time of War (1907) 193, 195, 199
Hague Convention with Respect to the Laws and Customs of War on Land (1907) 135, 136–8, 144, 192, 193, 226, 264–6
Hague Declaration (1899) 192, 195, 226
Hague Declaration (1907) 192, 195
Hague Peace Conference (1899) 135, 136–8, 226, 264
Hague Peace Conference (1907) 137, 264
Hague Regulations (1907) 117, 141, 165, 166, 192, 193, 194, 195, 197, 226, 228, 229, 264–6, 275, 278
Hague Rules of Aerial Warfare (1923) 194, 197, 199, 202, 206–7, 208
Hall, William 202, 205, 208
  Treatise on International Law (1924) 190, 200
Hallowell, John 35
Hamdan, Salim Ahmad, *see* Salim Ahmad Hamden
Hamden, Salim Ahmad, *see* Salim Ahmad Hamden
Hamden v. Rumsfeld case 234–6, 238, 240
Hammurabic Code 224
Hanoi 204
Harris, Sir Arthur 190
Hegel, Georg 72
  see also Hegelian thought
Hegelian thought 82, 88
  and international community 72, 73–5
  and society and the state 72–5
  and use of armed force 74–5
Herder, Johann 69
Hezbollah 125
Hindus 224
Hitler, Adolf 197
Hobbes, Thomas 33
  see also Hobbesian school of anthropocentric natural law
Hobbesian realism, *see* Hobbesian school of anthropocentric natural law
Hobbesian school of anthropocentric natural law 29, 33–6
  and armed force 39–40, 55
    actual employment of 43–4
    the decision to use 40–43
  compared to theocentric natural law 34, 35, 37, 40, 41, 42
  Hume's rejection of 64
  and international relations 38–9, 55, 58–9 n. 54
  laws of nature 35–6
  and society and the state 36–8, 54–5, 58 n. 49
hors de combat 219–23, 247
  defining 219–23
  in non-international armed conflicts 228, 249 n. 24
  rules governing
    codification of 225–30, 247, 250 n. 47
    customary 223, 224–5, 247, 249 n. 24
    post 9/11-challenges to 230–42
    punishing violation of 245–6

purpose of 223, 247
and reciprocity 243–4
and US 230–47
human rights 9, 21 n. 23, 31, 35–6, 45–9, 50–53 *passim*, 71, 78
and legal positivism 84
human rights law 84, 267, 268
and international humanitarian law 264, 268
and law of armed conflict 275–7, 278
Human Rights Watch 209
humanitarian intervention, as just cause
and anthropocentric natural law
Hobbesian realism 42
Lockean liberalism 51
and legal positivism 84
and theocentric natural law 13
humanitarian law, *see* international humanitarian law
Hume, David 63
rejection of natural law 63–5
Huntington, Samuel 111 n. 32
Hussein, Saddam 103, 106–7, 239, 269, 273, 274

ICRC 121, 126, 225–6, 268
and clarification of customary international humanitarian law 124–5
Commentary on Additional Protocols 207, 219, 220, 222, 233
draft protocols to the Geneva Conventions (1973) 204
draft rules (New Delhi, 1956) 203, 204
draft rules (1969) 204
and new weapons, means and methods of warfare 128
Report on the Treatment of Coalition Forces of POWs and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation 242
study on customary international humanitarian law 124–5, 127, 128, 155 n. 107, 165–9 *passim*, 175, 176, 177 n. 4, 189, 190, 191, 209, 237, 249 n. 24
ideological crusade, *see* crusading perspective
India
and anticipatory self-defense 107
individual freedom 8–9, 21 n. 23, 58 n. 49, 65–8, 73–4
see also human rights
intention (in deciding to use armed force) 5
and anthropocentric natural law
Hobbesian realism 41
Lockean liberalism 50
and anticipatory self-defense 109
and crusading perspective 86
and legal positivism 84
and theocentric natural law 12
intention (in employment of armed force) 6
and anthropocentric natural law
Hobbesian realism 43
Lockean liberalism 52
and crusading perspective 87
and legal positivism 84
and theocentric natural law 14
Inter-American Commission on Human Rights 167
Inter-American Court of Human Rights 179 n. 27
Intergovernmental Group of Experts for the Protection of War Victims 124
International Atomic Energy Agency 103
International Commission of Inquiry on Darfur (2004–2005) 126
International Committee of the Red Cross and Red Crescent, *see* ICRC
international community
and anthropocentric natural law 32
and Hegelian thought 72, 73–5
and legal positivism 83–5
and theocentric natural law 9, 22–3 n. 29
see also international law, international relations
International Court of Justice (ICJ) 136, 167, 175, 177 n. 4
cases
Congo 140–41
Legality of Nuclear Weapons 143–4, 146, 149–50, 151, 153 n. 61, 171–2, 174, 181 n. 50, 199, 208, 276
Nicaragua 101, 149, 163–4
Wall in Occupied Palestinian Territory 141–2, 276–7

see also Statute of the International Court of Justice
International Covenant on Civil and Political Rights (1966) 84, 275, 276
International Covenant on Economic, Social and Cultural Rights (1966) 84
International Criminal Court 128–9, 246
see also Statute of the International Criminal of Justice
International Criminal Tribunal for the former Yugoslavia (ICTY) 126, 136, 164, 167, 168, 182 n. 56, 206–8, 209
cases
Galić 206
Hadžihasanović 146–7
Kupreškić 148, 149, 172, 174
Martić 173, 179 n. 27, 183 nn. 62–3
Strugar 206
Tadić 163
and Martens clause 146–8, 149
and reprisals 173–5
International Humanitarian Fact-Finding Commission 209
international humanitarian law
customary 117–24 *passim*, 177 nn. 4–6
and arbitration proceedings 127
clarifying the content of 124–5
and distinction 164–9, 175–6, 179 nn. 27–8, 179 nn. 30–31, 237
and fact-finding 126
and *hors de combat* 224–30, 247, 249 n. 24
and ICRC 124–5, 127, 128, 155 n. 107, 165–9 *passim*, 177 n. 4
and judicial proceedings 126–7
and Martens clause 144–51
and military operations 125
and national legislation 128–9
and new weapons, means or methods of warfare 128
and proportionality 189–91, 195–210
and reprisals 173–5
development of 117–18
general principles of 149–50
and *hors de combat* 219–23, 247
codification of 225–30, 250 n. 47
defining 219–23
post-9/11 challenges 230–42
punishing violations of 245–6
and reciprocity 243–4
and US 230–47
and human rights law 264, 268
and legal positivism 84–5, 89
and Martens clause 144–51
and military necessity 140, 142–4, 150–51, 195–6
and occupation 263–8, 272–8
of Iraq 268–72
peremptory nature of 170–71
and reprisals 173–5, 183 nn. 61–3
treaty law 117–18, 135–51 *passim*
characterization of armed conflicts under 120
and distinction 164–9, 171–3, 175–6
and *hors de combat* 225–30, 247, 250 n. 47
and non-international armed conflicts 120–24, 146–7, 148, 167–9, 176, 179 nn. 27–8, 179 n. 30–31, 183 nn. 61–3, 228
and occupation 263–8, 272–8
and proportionality 189–91, 191–5, 202–10
ratification of 119–20
and reprisals 173–5
international law
and general principles 145, 149–50
and *jus cogens* 169–70
and legal positivism 82–5
see also customary and conventional international law
International Law Commission 169, 174, 181 n. 50
International Military Tribunal, Nuremburg 193, 199
international relations
and anthropocentric natural law
and Hobbesian realism 38–9, 55, 58–9 n. 54
and Lockean liberalism 49–50, 55
and liberalism 68
and theocentric natural law 9
International Security Assistance Force (ISAF)
in Afghanistan 125
intervention, *see* humanitarian intervention
Iran 107, 110 n. 21
and anticipatory self-defense 107
Iraq 125
British bombing of (1922–24) 202

Governing Council 239
High Tribunal 239
occupation of Kuwait 273
and Osiraq attack (1981) 103
and Six Day War 102
US-led war on (1991) 107, 205
US-led war on/occupation of (2003) 106–7, 125, 205, 219, 220, 221, 228, 231–44 *passim*, 263, 268–72, 273–5, 277
and WMDs 106–7, 111 n. 37
Isadore of Seville 12
Israel
and anticipatory self-defense 102, 103, 107
conflict with Lebanon (2006) 125, 126, 189, 210 n. 2
Defence Forces (IDF) 126
and Occupied Palestinian Territory 141–2, 263, 268, 276–7
and Osiraq attack (1981) 103
and Six Day War 102, 103, 268
Supreme Court of 126
Italy
campaign in Abyssinia 202

Japan
and anticipatory self-defense 107
post-Second World War 266
Sino-Japanese War 202
US use of atomic bomb on 202
Jefferson, Thomas 110 n. 18
Jennings, Robert 266
John of Legnano 23 n. 36
Johnson, James Turner 10, 13, 23 n. 36, 25 n. 54, 41, 53, 79, 92–3 n. 90, 94 n. 129, 108
Jordan
and Six Day War 102
jus ad bellum 5, 10, 11–14, 17, 55, 83–4, 92–3 n. 90
see also decision to use armed force
jus civile 8
jus cogens
and principle of distinction 169–73, 182 n. 56
jus gentium 8, 10, 40, 83, 88
jus in bello 5, 10, 11, 13, 14–16, 17, 55, 84–5
see also employment of armed force
just cause (in deciding to use armed force) 5
and anthropocentric natural law
Hobbesian realism 41–2
Lockean liberalism 51
and anticipatory self-defense 109
and crusading perspective 86
and legal positivism 83–4
and theocentric natural law 12, 24 nn. 40–42
see also humanitarian intervention, military necessity, preemption, preemptive war, preventive war, self-defense
just war doctrine 5
analytical framework for deciding to use armed force 5–6, 16–17, 92–3 n. 90
and anthropocentric natural law 55–6, 88
and Counter-Enlightenment 79–80, 88
and crusading perspective 86–8, 89
and cultural differences 79, 88
evolution of 10–16
and legal positivism 83–5, 88–9
principles for actual employment of armed force 6, 16–17
and theocentric natural law 10–17, 55–6, 88
see also decision to use armed force, employment of armed force
Justinian Code 224

Kadi, Yassin Abdullah, *see* Yassin Abdullah Kadi
Kant, Immanuel 75
Kellenberger, Jacob 240
Koizumi, Junchiro 107
Korean War 111 n. 31
Kosovo 205, 263, 268, 274
Kriegsraison 137
Kuwait 273

Lamprecht, Sterling 34, 36, 45, 46
last resort (deciding to use armed force as) 5
and anthropocentric natural law
Hobbesian realism 43
Lockean liberalism 52
and legal positivism 83
and theocentric natural law 14

Lauterpacht, Hersch 198–9, 201–2, 208
law of armed conflict
  and human rights law 275–7, 278
  and UN law 272–5, 278
  see also international humanitarian law
League of Nations 196, 202
  Covenant of 83
Lebanon
  conflict with Israel (2006) 125, 126, 189, 210 n. 2
legal positivism 80
  and authority 85, 89
  and international law 82–5, 89
  and just war doctrine 83–5, 89
  and natural law 80–81, 88–9
  and society and the state 82, 88–9
  and use of armed force 83–5
  see also positive customary and conventional international law
legitimate authority (for deciding to use armed force) 5
  and anthropocentric natural law
    Hobbesian realism 40–41
    Lockean liberalism 51
  and crusading perspective 86
  and legal positivism 83
  and theocentric natural law 11, 23–4 n. 36
liberalism
  and individual freedom 65–8, 91 n. 47
  and international relations 68
  and society and the state 65–8, 91 n. 47
  transformation of 65–8
  and use of armed force 68
  see also Lockean school of anthropocentric natural law
Lieber, Dr Francis 190, 250 n. 47, 264
Lieber Code (1863) 190, 191, 206, 250 n. 47, 264–6 *passim*
Locke, John 44
  see also Lockean school of anthropocentric natural law
Lockean liberalism, *see* Lockean school of anthropocentric natural law
Lockean school of anthropocentric natural law 29
  and armed force 50, 55
    actual employment of 52–4
    the decision to use 50–52
  compared to Hobbesian realism 45–54 *passim*
  compared to theocentric natural law 46, 50, 51, 52, 53, 54
  Hume's rejection of 64
  and international relations 49–50, 55
  law of nature 45, 46, 60 n. 81
  and society and the state 45–9, 54–5, 60 nn. 90–91
long war, *see* global war on terror
Lotus principle 144

Machiavelli, Niccolò 99
Mahabharata 224
Makarios, Archbishop 268
Manu Sriti 224
Maritain, Jacques 21 n. 23
Marshall, Chief Justice John 264
Martens, Fyodor Fyodorovich, *see* de Martens
Martens clause 135–6, 150–51
  affirmative function of 146–7
  attenuating function of 147–8
  in contemporary jurisprudence 144–50
  dislocating function of 149–50, 151
  origin of 136–7
Marxism/Marxists 73
Marxist-Leninist Communism 85, 87
Matthews, Francis 111 n. 31
Meyer, Alex 200
military necessity 135–6, 150–51
  in contemporary jurisprudence 138–44
  in Hague Convention with Respect to the Laws and Customs of War on Land 137–8
  and proportionality 195–6, 208, 209
  as unlimited justification 137–8, 142–4, 150–51
Mill, James 65–6
Mill, John Stuart 66–7
Mofaz, Shaul 107
Münster, Treaty of 100

Nasser, Gamel Abdel 102
National Socialism (Germany) 85, 87
NATO
  and Afghanistan 125
  and Kosovo 263
natural law, *see* anthropocentric natural law, theocentric natural law

natural law, rejection of 63
see also Counter-Enlightenment, Hume, legal positivism, liberalism
Nauru 119
Nelson, Brian 47, 64, 71
new weapons, means and methods of warfare
and customary international humanitarian law 128
Nicaragua 101, 149, 163–4
Nixon, Richard 204
North Atlantic Treaty Organization, *see* NATO
North Korea 107, 109 n. 6
North Vietnam
US Linebacker I offensive (1972) 204
Northern Cyprus 268
nuclear weapons/warfare
and international humanitarian law 143–4, 149–50, 151, 181 n. 50, 199, 208
and Martens clause 146, 149–50
and military necessity 143–4, 208
and reprisals 174
Nuremburg Trials, *see* International Military Tribunal, Nuremburg
Nussbaum, Arthur 80

occupation
law 263–4, 273–5, 275–7, 278
Geneva Conventions 266–7, 278
Hague Regulations 264–6, 278
history of 264
and human rights law 268, 275–7, 278
and Iraq 268–72, 273–5, 277
United Nations Charter 267–8
and Lockean liberalism 53
and Martens clause 136
and military necessity 139–42
see also under Iraq, Palestine
Old Testament 224
Oppenheim, Lassa F.L. 266
International Law 207
Osama bin Laden 104, 107, 235
Osiraq nuclear reactor, Israeli attack on (1981) 103
Osnabrück, Treaty of 100
Ottawa Convention (1997) 118, 119
Oxford Idealists 67
Oxford Manual (1880) 226

Pact of Paris (1928) 83
Pagondas of Thebes 99
Pakistan 104
Palestine/Occupied Palestinian Territories 141–2, 276–7
Israeli occupation of 263, 268
Parks, W. Hays 204, 205
peace, as ultimate goal of use of armed force, *see* ultimate goal of peace
Peloponnesian War (431–404 BCE) 99
Pentagon attack, *see* September 11, 2001 attacks
Pforzheim 190, 203
Plato 6
positive customary and conventional international law 83
and just war doctrine 83–5
and the use of armed force 83–5
positivists,
see also legal positivism
post-conflict occupation, *see* occupation
POWs, *see* prisoners of war
Powell, Colin L. 106, 107, 111 n. 37
precautionary principle 105
preemption, as just cause 101–2, 107–9
and anthropocentric natural law
Hobbesian realism 41–2
Lockean liberalism 51–2
and crusading perspective 86–7
and legal positivism 83
and theocentric natural law 14
preemptive war 101
logic of 102
post-9/11 100–101, 104–7
see also preemption, as just cause
preventive war 101
Iraq war (2003) as 106–7
logic of 102–4
post-9/11 100–101, 104–7
see also preventive war, as just cause
preventive war, as just cause 102–4, 107–9, 112 n. 51
and anthropocentric natural law
Hobbesian realism 42
Lockean liberalism 51–2
and crusading perspective 87
and theocentric natural law 14
prisoners of war (POWs) 118, 139, 165–6, 168, 220, 222–3, 226–30 *passim*, 235–42 *passim*, 255 n. 107, 273, 277

proportionality (in deciding to use armed force) 5–6, 17 n. 4
and anthropocentric natural law
Hobbesian realism 43
Lockean liberalism 52
and crusading perspective 87
and legal positivism 84
and military necessity 143
and theocentric natural law 14
proportionality (in employment of armed force) 6, 189–91
and anthropocentric natural law
Hobbesian realism 43–4
Lockean liberalism 52–3
and crusading perspective 87
and international humanitarian law 189–91, 202–3, 203–10
customary 195–202, 203–10
treaties 123, 143, 189–91, 203–10
and legal positivism 84
and military necessity 143, 208, 209
and preventive war 108
and state practice 190, 202
and theocentric natural law 15
prospect of success (in decision to use armed force) 6
and anthropocentric natural law
Hobbesian realism 43
Lockean liberalism 52
and preventive war 108–9
and theocentric natural law 14
protection of cultural properties, *see* cultural properties
Putin, Vladimir 107

Raymond of Penaford 23 n. 36
Red Crescent 226
see also ICRC
Red Cross 226
see also ICRC
Red Crystal 226
see also ICRC
religious crusade, *see* crusading perspective
reprisals 53, 100, 198
and distinction 173–5, 182 n. 57, 183 nn. 61–3
and Martens clause 148
Rice, Condoleezza 100
Richelieu, Cardinal 99
rights *see* human rights, individual freedom
Rogers, A.P.V. 220
Roman law 10, 23 n. 36
Romantic movement, *see* Counter-Enlightenment
Rommen, Heinrich 30, 35, 46, 64, 81
Roosevelt, Franklin D. 103, 197
Root, Elihu 103
Rousseau, Jean-Jacques 72
Royse, M.W. 202, 205
Rumsfeld, Donald 99, 104–5
Russia
and anticipatory self-defense 107
see also Soviet Union
Rwanda 118, 124

Sabine, George 63, 64, 65, 67, 70, 73, 74, 90 n. 34, 91 n. 37
Salim Ahmad Hamden 234–6, 238
Second World War 87, 190, 192–203 *passim*, 204, 209, 266, 267
self-defense, as just cause 110 n. 8
and anthropocentric natural law
Hobbesian realism 41–2
anticipatory 14, 41–2, 107–9, 110 n. 11, 112 n. 51
and crusading perspective 86–7
and legal positivism 83, 84
and military necessity 143–4, 208
and nuclear weapons 143–4, 199, 208
and theocentric natural law 12, 14, 24 nn. 40–41
and UN Charter 101
see also preemption, preemptive war, preventive war
September 11, 2001 attacks 99, 104, 231, 232, 233
effect on George W. Bush administration 99, 104–6, 107, 231–43 *passim*
Serbia and Montenegro 263
Seven Years War 225
Sierra Leone 127
Sinha, Yashwant 107
Sino-Japanese War 202
Six Day War 102, 268
Smith, Adam 66

social contract 32
  and Hobbesian realism 36–8
  and Hume 65
  and Lockean liberalism 48, 51
Solferino, Battle of 225, 244
Somalia 125, 268
Soviet Union 106, 111 n. 31, 111 n. 33
Spaight, James M. 200, 201, 202, 208
Spanish Civil War 202, 206
Special Court for Sierra Leone 127
Sri Lanka 125
St Ambrose 12, 13, 24 n. 42
St Augustine 12, 14, 24 n. 42
St Petersburg Declaration (1868) 195
St Thomas Aquinas 15, 20 n. 20, 23 n. 36
Stahl, F.J. 81, 82
state, the
  and anthropocentric natural law 31–2
    Hobbesian school of 36–8
    Lockean school of 45–9
  and Burkean conservatism 69–72
  and Hegelian thought 72–5
  and legal positivism 82
  and liberalism 65–8
  and military necessity 137, 138, 142–4, 151
  and theocentric natural law 9, 21–2 n. 24, 22 n. 26, 22–3 n. 29
  Westphalian conception of 100, 264
Statute of the International Court of Justice 117, 118, 119, 120, 122, 123, 145, 161
Statute of the International Criminal Court 122, 129, 208, 209, 246
Sudan 126
Sultan Bashiruddin Mahmood 104
Sun Tzu
  The Art of War 224
Syria
  and Six Day War 102

Taleban 235–8 *passim*, 254 n. 107
Tenet, George 104, 107
terrorism and terrorists
  and US application of *hors de combat* rules 231–42 *passim*, 245
  see also global war on terror, terrorist organizations
terrorist organizations
  and US application of *hors de combat* rules 231–42 *passim*, 245
  and WMDs 104–6, 107
theocentric natural law 6–9
  assumptions underpinning 7
  components of 7–8
  defined 7
  duties arising from 8
  Hume's rejection of 64
  and international community 9, 22–3 n. 29
  and just war doctrine 10–17, 55–6, 88
  norms arising from 8–9, 20 n. 20
    individual freedom 8–9, 21 n. 23
  and the state 9, 21–2 n. 24, 22 n. 26, 22–3 n. 29, 54–5
  tenets of 8
Third Lateran Council 224
Thirty Years' War 100, 224
torture 182 n. 56, 241–2, 244
Trainor, Bernard 107
Treaty of Westphalia 224–5
Trenchard, Lord 200
Truman, Harry S. 202
Turkey 268

Uganda 140–41
ultimate goal of peace (as decision to use armed force) 5
  and anthropocentric natural law
    Hobbesian realism 40
    Lockean liberalism 50
  and crusading perspective 86
  and legal positivism 83
  and theocentric natural law 11
UN, *see* United Nations
United Kingdom, *see* Great Britain
United Nations 209
  Charter 83, 267–8, 272
    and self-defense 101, 267–8
  Commission on Human Rights 239
  General Assembly 167, 173, 179 n. 28, 179 n. 30
  Human Rights Committee 275
  Human Rights Council 126
  and human rights law 268, 278
  and law of armed conflict 272–5, 278
  Representative of the Secretary General on Internally Displaced Persons 126

Sanctions Committee 273
Security Council 83, 84, 101, 106, 128, 167, 267, 274–5, 278
Resolutions 106, 107, 263–4, 268–72 *passim*, 272–3
Secretary General 204
and US-led war on/occupation of Iraq 268–72
United States of America
and Afghanistan war/occupation (2001) 125, 219, 228, 231–44 *passim*, 254–5 n. 107
Air Force (USAAF) 195, 205
manual 205
and anticipatory self-defense 100–101, 103, 104–7, 109 n. 6, 110 n. 11, 110 n. 18, 110 n. 21, 111 nn. 31–2
Army handbook 205–6
and Bashaw of Tripoli 110 n. 18
bombing of Kosovo (1999) 205
and *Caroline* incident (1837) 101, 110 n. 11
Central Intelligence Agency (CIA) 104, 107, 242
Combatant Status Review Tribunals 237–8, 241
Congress 238
Court of Appeal 235, 238
Department of Defense 238, 242
Detainee Treatment Act (2005) 238, 241–2
District Court 239
effect of 9/11 attacks on 99–100, 104–6, 231–42 *passim*
and *hors de combat* rules, post-9/11, 230–42, 243–7
intervention in Somalia (2007) 125
and Iraq war (1991) 107, 205
and Iraq war/occupation (2003) 106–7, 125, 205, 219, 220, 221, 228, 231–44 *passim*, 263, 268–72, 273–5, 277
manual on the law of land warfare (1956) 203
Military Commissions Act (2006) 239–40, 241, 242
Navy handbook 205–6
and nuclear weapons 154 n. 86
and proportionality 195, 202, 203–6 *passim*
Supreme Court 233, 238, 241, 246–7
Hamden v. Rumsfeld case 234–6, 238, 240
Rasul et al. v. Bush case 237
use of atomic bomb on Japan 202
Vietnam War 204
Universal Declaration of Human Rights (1948) 84
USA, *see* United States of America

van Creveld, Martin 245
Vieira de Mello, Sergio 271, 275
Vienna Convention on Law of Treaties (1969) 170, 171, 172
Vietnam War
US Linebacker I offensive (1972) 204
Vogt, General 204

war on terror, *see* global war on terror
weapons of mass destruction (WMDs) 99, 108
and Iraq 106–7, 111 n. 37
and terrorist organizations 104–6, 107
Webster, Daniel 101
West Bank 268
Westphalia, Peace of (1648) 100
see also Treaty of Westphalia
William of Occam 81
WMD, *see* weapons of mass destruction
Wolfowitz, Paul 99
World Trade Center attacks, *see* September 11, 2001 attacks
World War I, *see* First World War
World War II, *see* Second World War

Yassin Abdullah Kadi 273
Yemen 236
Yugoslavia 118, 120, 124

Zalambessa
occupation of 140