
Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello

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Abstract

The question whether jus in bello and jus ad bellum should interact, or remain in hermetically sealed spheres, has generated a voluminous and vociferous body of contemporary literature. The goal of this article is to take a step back from the particulars of the arguments and examine the shape and direction of the debate itself. We trace how the debate has evolved in response to political culture and sensibilities, focusing in on paradigmatic points throughout the 20th century. In each era the discussion on how these two areas of law should, or should not, intersect arises. And contrary to what might be implied by the recent debate where both sides often rely on 'fundamental principles', the dialogue regarding the relationship between jus in bello and jus ad bellum is not a static argument. The discourse is dynamic and politically contextualized—impacted by, and impacting upon, the external controversies of the day. Certain consistent threads have guided the debate—first order political interests, institutional considerations, and consequences, and a legal and sociological conservatism run throughout. Distinct visions and assessments of the morality of war and who is to blame for its evils and how best to work towards peace also push and pull the flow of debate. Frequently, the positions on jus in bello and jus ad bellum serve as proxies for deeper or shallower courses of discussion. And although the contemporary discourse is more fractured, these same influences are discernable today.

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There is no longer, if ever there was, any kudos to be had by challenging the distinction between *jus ad bellum* and *jus in bello*. The contours of the arguments have been ably explored. Humanitarian law of armed conflict – *jus in bello* – imposes considerable duties and restrictions regarding the manner in which hostilities may be conducted. Particularly for those forces which are very strong or very weak, these duties and restrictions are paid in the blood of the warring soldiers and may even impact on the outcome of a war. ‘Nuking’ them rather than fighting trench to trench, pillbox to pillbox, hill to hill, would, at least in the short run, save many soldier lives of an army which resorted to such, and would make victory easier. For weak forces, civilian targets may be all that is realistically within reach, as openly carrying arms and meeting on a traditional field of battle would be tantamount to suicide.

For at least 60 years or so, the law of war, *jus ad bellum*, and for a considerably longer period, moral thinking, have distinguished between just wars and unjust wars or, if you wish, between just warriors and unjust warriors. The unjust warrior is an aggressor who elects, immorally and unlawfully, to use force in pursuit of interests. The just warrior is a defender, upon whom war is imposed and whose use of force is both morally justified and legally licit. The murderer and his victim may be locked in a battle to the death, but there is neither moral nor legal equivalence between them.

Is there not, thus, a compelling logic, the argument goes, to link the strictures of *jus in bello* to the determinations of *jus ad bellum*? To obliterate such a distinction violates a lapidary principle of justice to which even God Himself is called upon to respect: ‘[f]ar be it from thee’, says Abraham to the Lord, ‘to do after this manner, to slay the righteous with the wicked, and that the righteous should be as the wicked, that be far from thee: Shall not the Justice of all the earth himself not do justice?’¹

Maybe the civilians on each side are morally equivalent and deserve equal treatment, but what of the warring armies themselves? If the currency of the humanitarian law of armed conflict is paid in the blood of soldiers and the overall strategic and tactical cost of the war, why, it may be asked and has been asked with increasing frequency, would we impose the same cost on the immoral and unlawful warrior as we would on the moral and lawful?

And yet, the mainstream among moral thinkers and legal theorists has held fast to a complete separation between *jus in bello* and *jus ad bellum*. This distinction too, it is argued, is a matter of basic logic and first principles – the two are ‘logically independent’,² a ‘fundamental distinction’³ that is ‘firmly rooted’,⁴ ‘absolute dogma’,⁵ ‘one of the oldest and best established *axiomata* of international law and its predecessor “just war doctrine” ... so self-evident and self-explanatory that [it] hardly require[s] further

¹ Genesis chap. XVIII, verse 25.

² M. Walzer, *Just and Unjust Wars* (1977), at 21.

³ M. Sassoli et al., *How does Law Protect in War?* (3rd edn, 2011), at 14.

⁴ Bouvier, ‘Assessing the Relationship between Jus in Bello and Jus Ad Bellum: An “Orthodox” View’, 100 *Proceedings of the Annual Meeting (ASIL)* (2006) 109, at 110.

⁵ Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’, 37 *Int’l Rev Red Cross* (1997) 35, special issue 116, at 53.

explanation; much less proof'.⁶ Moreover, because the distinction is 'indispensable to the efficacy of the law of war',⁷ conflating the two would lead to the 'complete collapse of the *jus in bello*' and '[m]ankind might simply slide back to the barbaric cruelty of war in the style of Genghis Khan'.⁸

The arguments that support these assertions are also well known, and have two principal strands. One strand, the pragmatic, is the inability – morally, legally, or institutionally, on an individual or societal scale – to know objectively which warring party is the legitimate user of force. Religious philosophers tell us that God's will is unknown. Secular philosophers tell us that at least the ordinary soldier cannot be expected to have the necessary knowledge. Lawyers for their part tell us that until 1945 and the era of the Charter, the law lagged behind moral thinking and simply held that there was no such thing as an illegal war; that, legally speaking, there were no 'wicked' and 'righteous' and hence *jus in bello* applied to all, equally. Since 1945 the lawyer has turned to the known cleavage between legal norms and legal institutions and to the notorious absence of institutions powerful and objective enough reliably to declare illegality and enforce the decision. Under such circumstances, everyone claims – in good or bad faith it matters not – to act justly or legally, and any enforcement relies on reciprocity – which demands equal treatment. To stray from the equal application baseline invites a race to the bottom, with basic humanity, the lives of civilians and soldiers, as the cost.

The second strand, the foundational, acknowledges the moral distinctions between the just and unjust warrior, but asserts that the goals of humanitarian law transcend the distinction, concerned as they are with the very human condition beyond the issue of responsibility for the hostilities. Later in this article we will flesh out these arguments.

The debate has been prolific; this is an area of the law where that self-aggrandizing reference in Article 38 of the Statute of the International Court of Justice to 'teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law' actually has justification. It was primarily the work of publicists which 'made' the distinction fundamental, and it is the work of publicists which is now destabilizing it. In lawfare, unlike warfare, there is neither a *jus ad bellum* nor a *jus in bello*. Maybe there should be. In the battle zone between Separationists and Conflationists – those who would maintain a strict separation between *jus ad bellum* and *jus in bello* and those who would, in this or that circumstance, conflate the two or at least link them – no quarter is given, no prisoners are taken. Much like a battle between two warriors each claiming to be just, both sides claim to be proceeding from first principles, logic, and basic morality.

The goal of this article is not simply to rehearse the arguments on one side or the other, moral and legal, and certainly not to join the war and take a side. We exercise

⁶ Gill, 'The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Jus Ad Bellum* and the *Jus in Bello*', 12 *Leiden J Int'l L* (1999) 613, at 614, 616.

⁷ Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus Ad Bellum* and *Jus in Bello* in the Contemporary Law of War', 34 *Yale J Int'l L* (2009) 47, at 103.

⁸ Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, 2005), at 158.

here the often maligned position of the Neutral. Rather, the goal is to take a step back from the particulars of the arguments and examine the shape and direction of the debate itself. Our interest is not in disentangling abstract moral theory or legal doctrine and trying to adjudicate who is right and wrong in this debate. Our approach is historical and historiographical. We will try to show how the debate has evolved in response to political culture and sensibilities. Contrary to what might be implied by the dual reliance on ‘fundamental principles’, the dialogue regarding the relationship between *jus in bello* and *jus ad bellum* is not a static argument. Both sides of the discourse are dynamic and politically contextualized – impacted by, and impacting upon, the external controversies of the day.

This is a contextualization that runs in two directions: inwards, as the surrounding political and normative discussions impact on the arguments, and outwards, as the arguments influence how we see our surrounding context and the prevailing political claims. It is hoped that by focusing on the historical and contemporary course of the debate itself, we can shed some light on the normative and political assumptions that inform and flow from the discourse.

We will first trace the evolving debate through its principal junctures in the 20th century. Interspersed in this historical narrative will be ‘observations’ which will seek to highlight the conceptual moves implicit in the political positions. In our conclusions we shall offer some unsystematic reflections on the contours of the current debate so contextualized.

1 Pre-1945

One would have thought that the importance of the distinction between *jus ad bellum* and *jus in bello* would, perforce, be of relatively recent vintage since it would not seriously matter prior to the radical reshaping of the *jus ad bellum* in the Charter era. Indeed, how can there be a discussion regarding the consequences of being the illegal aggressor before aggression is illegal? It is not a coincidence that the very terms *jus ad bellum* and *jus in bello* seem to have been coined in the 1930s, and did not come into common usage until after World War II.⁹ We find, however, that the discussion on the interaction between the two fields becomes pertinent as early as 1916 – quite soon after the 1907 Hague Conventions imposed even the most modest procedural and substantive restrictions on the use of force.

The 1907 Hague Conventions took several small steps towards the regulation of war. Procedurally, the signatories agreed that any hostilities ‘must not commence without previous and explicit warning’.¹⁰ Substantively, Convention I affirmed that war was not to be used to recover contract debts¹¹ and Convention V codified the laws

⁹ Kolb, ‘Origin of the Twin Terms *Jus ad Bellum* and *Jus in Bello*’, 37 *Int’l Rev Red Cross* (1997) 554, special issue 320.

¹⁰ Convention [No. III] Relative to the Opening of Hostilities, 18 Oct. 1907, Art. 1, 36 Stat. 2259, TS No. 538.

¹¹ Convention [No. II] Respecting the Limitation of the Employment of Force for the Recovery of Contracting Debts, 18 Oct. 1907, 36 Stat. 2241, TS No. 537.

of neutrality.¹² The ‘territory of neutral Powers [was] inviolable’ and belligerents were not to move troops or convoys carrying war supplies across neutral territory.¹³ Neutral powers, in turn, ‘must not allow’ the passage of troops or convoys,¹⁴ and ‘[t]he fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act’.¹⁵ What in fact these small steps meant was that *jus ad bellum* already then began to draw the distinction between legitimate and illegitimate armed force.

And, indeed, when these tentative restrictions were tested in World War I vociferous arguments emerged that there should be a distinction drawn between the treatment and the rights of the illegal aggressor and the legitimate defender. When the German government, already at war with France and Russia, invaded Belgium in August 1914, the Belgian Minister of Foreign Affairs cited the Hague Convention and argued that Belgian resistance could not be considered an aggressive act or a forfeiture of neutrality.¹⁶ In 1916, a prominent Belgian scholar, Charles de Visscher, further developed the reasoning, arguing that because Germany had violated the Hague Convention and the rights of a neutral, Germany’s declaration of war against Belgium was inoperative and deprived of all results and legal significance.¹⁷ Belgium, as a victim of unjust aggression, was entitled to a special form of legitimate self-defence, and there could not be equality of rights as between the two adversaries.¹⁸ As a result, ‘the invading troops [could not] invoke the rights of ordinary belligerents’ and the civilian population was entitled to participate in combat, including engaging in conduct that would fall outside the conditions set out in the 1907 Regulations.¹⁹

Legal scholars at the time were accustomed to simply applying the same laws of war to both sides of a conflict, and the claim that Belgium should have differential rights was probably quite novel. In what would become a recurring theme, however, political expediency redirected the focus of the debate. The voices that opposed Belgium’s argument did not focus on the rights of victims of illegal aggression, but rather on whether the German invasion of Belgium was illegal at all. The editorial board of the *American*

¹² Convention [No. V] Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907, 36 Stat. 2310, TS No. 540.

¹³ *Ibid.*, Arts 1, 2.

¹⁴ *Ibid.*, Art. 4.

¹⁵ *Ibid.*, Art. 9.

¹⁶ Davignon, ‘Letter to the head of missions abroad’, 5 Aug. 1914, cited in de Visscher, ‘De la Belligérance dans ses Rapports avec la Violation de la Neutralité’, 2 *Problems of the War* (1916) 93, at 101 (‘Le Gouvernement du Roi est fermement décidé à repousser par tous les moyens en son pouvoir l’atteinte portée à sa neutralité et il rappelle qu’en vertu de la cinquième Convention de La Haye de 1907, ne peut être considéré comme un acte hostile le fait, par une Puissance neutre, de repousser, même par la force, les atteintes à sa neutralité’).

¹⁷ De Visscher, *supra* note 16, at 101.

¹⁸ *Ibid.* (‘L’agression dont il est la victime étant essentiellement *injuste*, contraire au droit, la protection contre cette agression prend la forme spéciale de la *légitime défense*. ... Il en résulte ... qu’il n’y a pas égalité de droits entre les deux adversaires. Cette égalité juridique, qui existe entre belligerents ordinaires dans le cas de guerre régulière, se trouve exclue ici en raison de caractère *injuste* de l’agression’).

¹⁹ *Ibid.*, at 102 (‘la violation de la neutralité justifierait la participation aux combats de la population civile, même en dehors des conditions fixées par le Règlement de 1907, et cela parce que les troupes d’invasion ne peuvent pas invoquer ici les droits des belligerents ordinaires’).

Journal of International Law, for example, had already asserted that Germany's invasion had not violated that Hague Convention.²⁰ There was nothing in international law that generally restricted the right of states to go to war so long as hostilities were commenced with 'previous and explicit warning'. The fifth Hague Convention did nothing to change this basic legal fact, and '[did not] prevent a state from declaring war against a state wishing to remain neutral, which thus becomes a belligerent and loses the benefit of the convention'.²¹ Because Germany had issued Belgium an ultimatum – let our troops pass through your territory or we will enter by force – she had fulfilled the necessary declaratory procedural requirements, and Belgium's status converted from that of a neutral party to a belligerent.²² But note, the Belgian argument was rejected here not because the distinction was to be regarded as *per se* inviolable, but because the Germans were allegedly not unjust warriors. In a sense, the type of 'defence' could even be seen as validating the Belgium argument.

The argument that Germany had not acted illegally when it invaded Belgium does seem, as described by the contemporary British scholars at the Grotius Society, 'a startling one'.²³ The Hague's legal guarantees of the 'inviolability' of neutral territory seemed to be rendered entirely illusory if they could be dismissed with a threat by the invading power that the neutral must break the treaty by allowing troops to pass or have its neutrality rights violated. The inconsistency appears particularly stark if one takes into account a neutral state's legal obligation to prevent, perhaps even by force if necessary, any attempts by belligerents to use neutral territory illegally.²⁴

Nevertheless, the centre of the controversy appears to have remained squarely on whether Germany's invasion of Belgium was illegal, rather than on whether Belgium had a right of 'legitimate defence' that afforded its population different rights during war. The explanation for this focus is in all likelihood political. The initial question whether Germany had violated the laws of neutrality was crucially linked to a highly contentious political issue – the United States' attempts to remain neutral. The United States had ratified the 1907 Hague Conventions, and if it could be shown that Germany had violated its provisions, the question would then become whether the United States, as a signatory to a multilateral treaty that had been violated, would be bound to intervene.²⁵ At a minimum, de Visscher argued, neutral states were not obligated to treat a 'neutral' belligerent as they would an illegal aggressor, a distinction which held potentially significant consequences for the legality of blockades, contraband, and naval passage.²⁶ At the time, the United States was making extraordinary efforts to remain a neutral party, and to avoid being brought into the war – legally or

²⁰ Board of Editors of the *AJIL*, 'Editorial Comment: The Hague Conventions and the Neutrality of Belgium and Luxemburg', 9 *AJIL* (1915) 959; see also Falconbridge, 'The Right of a Belligerent to Make War upon a Neutral', 4 *Transactions of the Grotius Society* (1918) 204.

²¹ Board of Editors, *supra* note 20, at 959.

²² *Ibid.*, at 961.

²³ Comments of the Society reproduced in Falconbridge, *supra* note 20, at 211.

²⁴ Hague Convention IV, Arts. 4, 10.

²⁵ Comments of the Society, *supra* note 23, at 212.

²⁶ De Visscher, *supra* note 16, at 103–104.

politically.²⁷ The *jus in bello* arguments regarding the rights of illegal aggressors within war and the 'legitimate defence' of the neutral state's population were tied to and subsumed by the larger, and much more politically contentious, *jus ad bellum* discussion.

As *jus ad bellum* continued to evolve through the 1920s and 1930s the argument that the illegal aggressor should have diminished rights in other areas of the war continued to surface. The communal approach to war in the League of Nations and the renunciation of war as an instrument of policy in the Kellogg–Briand Pact were seen as having fundamentally altered, if not obliterated, the Hague Conventions' laws of neutrality.²⁸ The International Law Association's Budapest Articles of Interpretation, which purported to interpret the Kellogg–Briand Pact, affirmed that signatories could legally discriminate against an illegal aggressor, but that the Pact had no effect on the 'humanitarian obligations' in general treaties such as the Hague and Geneva Conventions.²⁹ Similarly, the Harvard Research in International Law released a Draft Convention on Rights and Duties of States in Case of Aggression suggesting that 'an aggressor does not have any of the rights which it would have if it were a belligerent', including the provisions regarding titles to property and other *jus in bello* regulations.³⁰ Again, there was the caveat that '[n]othing in this Convention shall be deemed to excuse any State for a violation of the humanitarian rules concerning the conduct of hostilities'.³¹ The attached commentary explained that humanitarian provisions were maintained in a large part by the threat of reciprocity, and reflected the common interests of humanity and self-interest.³² For the most part, however, these early forays into *jus in bello* implications were formulated as *de lege ferenda* or criticized as over-reaching interpretations of existing law.³³ The *jus in bello* laws predated the novel restrictions on use of force, and their tradition of equal application drove the continued separation between the two fields. The Kellogg–Briand Pact was simply too sparse and toothless to argue that such far-reaching consequences flowed automatically from its provisions.

The law, including international law, is not simply a disembodied set of rules to which disembodied hermeneutic principles apply. It is also a social institution and a set of human practices. The habit of applying *jus ad bello* to both parties was deeply ingrained as such a social practice and validated by that hallowed principle of mutual consent. Separation was, thus, rooted in sociological practice as much as in logical reasoning. Along with the influence of political pragmatism noted above, we can also

²⁷ J.D. Keene, *World War I: The American Soldier Experience* (2006), at 5–8.

²⁸ Jessup, 'The Birth, Death and Reincarnation of Neutrality', 26 *AJIL* (1932) 790. See also Brierly, 'Some Implications of the Pact of Paris', 10 *British Yrbk Int'l L* (1929) 208; Wright, 'The Meaning of the Pact of Paris', 27 *AJIL* (1933) 39; Wright, 'The Lend-Lease Bill and International Law', 35 *AJIL* (1941) 305.

²⁹ International Law Association, 'Briand–Kellogg Pact of Paris: Budapest Articles of Interpretation', 20 *Transactions of the Grotius Society* (1934) 205, at 206.

³⁰ Harvard Research in International Law, 'Draft Convention on Rights and Duties of States in Case of Aggression', 33 *AJIL Supp.* (1939) 819, at 828.

³¹ *Ibid.*

³² *Ibid.*, at 905.

³³ H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *Transactions of the Grotius Society* (1934) 178; Harvard Research in International Law, *supra* note 30, at 816.

mark the reflex towards legal and sociological conservatism as a theme that we will see arise at various points throughout the history of the *jus in bello*–*jus ad bellum* debate.

2 The UN Charter, the 1949 Geneva Conventions and the Nuremberg and Tokyo Tribunals

The international community did not have to wait long until the UN Charter provided the sound legal footing necessary to argue seriously that *jus in bello* rights and obligations had been fundamentally altered. Indeed, as early as 1946, questions were being raised regarding whether all the Hague rules on occupation should apply when ‘peace-loving nations’ occupied an aggressor’s territory, if insurgents acting in concert with aggressive forces should still be protected by the Fourth Hague Convention, or whether ‘a heroic struggle of millions of people for their country’s ... right to exist’ can be confined ‘within the strict bounds of the Hague rules’.³⁴

What we observe behind the principled language with which the question is framed is the obvious political context and interest barely masked. The ‘peace-loving nations’, the code for the Allies, Stalin included, in World War II, were as much concerned with their regime of occupation in Germany as they were with the principled moral issues of separation and conflation. Both the pre-1945 Belgium debate and the immediate post-Charter debate highlight one central theme in our analysis – obvious but no less true for that: contingent partisan interest is, as expected, often in the driver’s seat when the theoretical discussion spills over into actual political arenas in which IHL plays a role.

Be that as it may, with this background one might have thought that the Charter’s revolutionary legal regulation of warfare would have some impact on the 1949 Geneva Conventions. The text of the Geneva Conventions, however, makes no reference to differential application between legal and illegal wars.³⁵ To the contrary; questioning the relationship between the two legal areas is the exception rather than the rule.

The *travaux préparatoires* show that Denmark’s representative, drawing on his country’s experience as an occupied nation during World War II, was the only delegate seriously to question the impact of the new prohibitions on aggressive war. The Danish delegation repeatedly suggested that ‘[a]ll States agreed that wars of aggression constituted an international crime, and it was therefore obvious that resistance by the civilian population should in such a case be considered as an act of legitimate defence’, and those civilians should be entitled to POW status.³⁶ Although the amendment was initially supported by a number of smaller delegations,³⁷ it faced strong resistance

³⁴ Korovin, ‘The Second World War and International Law’, 40 *AJIL* (1946) 742, at 753.

³⁵ Common Art. I requires that the Conventions be applied ‘in all circumstances’. This language reproduces the text of the 1929 Convention, and the 1952 Commentary does interpret this as applying to both ‘just’ and ‘unjust’ wars, ‘whether it is a war of aggression or of resistance to aggression’. This specific interpretation, however, does not appear to have been discussed during the negotiations of the 1949 Conventions: J.S. Pictet, *The Geneva Conventions of 12 August 1949 Commentary* (1952), at 26–27.

³⁶ Final Record of the Diplomatic Conference of Geneva of 1949, ii Sec. A, at 245–246, 240, 562.

³⁷ *Ibid.*, at 426 (USSR, Finland, Hungary and Israel supporting the first proposed amendment).

from several powerful actors. Canada and Switzerland objected that ‘the criterion of “legitimate defence” was difficult to apply’³⁸ and imprecise.³⁹ A number of delegations stated that because the amendment related to civilians, it should be included in the Civilian convention.⁴⁰ The most strident objections were from the UK, which viewed the proposal as threatening the distinction between combatants and non-combatants, and repeated that ‘[i]t was essential that war, even illegal war, should be governed by those principles’.⁴¹ Denmark’s pleas that the definition of a POW should be decided by reference to national and international norms regarding permissible aggression were ultimately rejected.⁴²

The lack of reference to, or even significant discussion of, the recently enacted prohibition on aggression may appear surprising at first. The political and institutional culture at the time, however, suggests that this was likely to have been a conscious choice rather than mere inertia or inattention. The UK’s position could well be explained by the Colonial context, and Britain’s struggle at that time to preserve chunks of its Empire by force of arms. One can imagine that the Danish position could have been viewed as potentially subversive.

Institutional relationships also probably played a role. In the first Red Cross Conference after the war, where the basis for what would later become the Geneva Conventions was approved, the delegates considered the relationship between the Red Cross and the United Nations. The Red Cross saw the newly-formed UN as a highly political body, antithetical to the ‘non-political character’ of the ICRC, and urged that all national and international ICRC societies ‘exercise the greatest care in regulating their relationship with inter-governmental ... organizations’.⁴³

The delegates adopted a statement regarding the ICRC’s relationship with peace – the goal of the UN – and envisaged their contribution as quite distinct from the recently enacted UN mechanism. A Declaration on Peace, adopted by the Conference, stated that ‘[t]he history of mankind shows that the campaign against the terrible scourge of war cannot achieve success if it is limited to the political sphere’.⁴⁴ The Red Cross was a ‘vital force for the preservation of peace’, which it achieved by engaging in international acts ‘prompted by manifest sympathy, understanding and respect’ so as to create ‘constructive attitudes of friendliness and sympathy among the peoples of the world’.⁴⁵ There is a distinctly religious tone to the declaration, which ends by describing the ICRC’s mission as a ‘sacred duty’ that will draw man ‘nearer ... to that ideal state of real peace which alone will enable him to attain the summit of his creative

³⁸ *Ibid.*, at 434 (objection of Canada).

³⁹ *Ibid.*, at 434 (objection of Switzerland).

⁴⁰ *Ibid.*, at 426, 434 (objection of US, Netherlands, Canada, Italy).

⁴¹ *Ibid.*, at 426; Final Record of the Diplomatic Conference of Geneva of 1949, ii, Sec. B, at 268. Switzerland also objected that including the provisions in the POW convention ‘might have the effect of causing the enemy to take very severe measures against the civilian population’: *ibid.*, Sec. A, at 434.

⁴² Final Record, ii, Sec. B, at 267–268.

⁴³ International Red Cross Conference XVII, Stockholm (1948), at 92, available at: www.loc.gov/rr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf.

⁴⁴ *Ibid.*, at 102.

⁴⁵ *Ibid.*, at 103.

faculties'.⁴⁶ With this suspicion of political bodies, their ability to achieve peace, and an elevated, quasi-religious view of the ICRC's work, the separationist voice won the day and the Geneva Conventions steered clear of the new UN regime; *jus ad bellum* was kept separate from the classical *jus in bello* which preceded it.⁴⁷

Already, then, at this early stage emerges another general observation concerning the unfolding of the debate: we should not flinch from observing and understanding that the ICRC is a political actor too, which can be empowered or weakened by changes in the material law which is its province. Its mission may be 'sacred' and its motives may be noble. The same could be said of, say, the Vatican. But to accept that the Vatican deals with the sacred and has a noble mission does not mean that it is not empowered or weakened by different constellations of law and politics, and that its positions and actions are not impacted on by such potential empowerment and/or enfeeblement. And the same must be true of the Red Cross. Separationism facilitates its tasks, gives it a passport to all conflicts on equal footing, avoids challenges to its authority, moral and political, which would ensue if the scope of its function were to depend on how it characterized a party to a dispute as just or unjust under a conflationist approach. Institutionally, the ICRC is invested in maintaining the distinction as sacred. No normative judgement is involved in this affirmation but, given its (justly earned) huge authority in any debate concerning *ius in bello*, to exclude interest analysis from its role would be at our peril.

Returning to the immediate post-World War II context, interestingly, just a year or two prior to the 1949 debates concerning the Geneva Conventions, British and American prosecutors at the Nuremberg and Tokyo trials adopted a diametrically opposed stance to the position their delegations took in the Geneva Convention negotiations. At the Nuremberg International Military Tribunal the British Prosecutor, Sir Hartley Shawcross, argued that all those who killed combatants while perpetrating a war of aggression should be viewed as murderers:

⁴⁶ *Ibid.*,

⁴⁷ It is worth noting that this distrust and distance was probably mutual. In the 1920s, it was argued that the League of Nations should not engage with the laws of war: 'the failure of international law to provide solutions to the problems of peace has been at least in part due to the fact that the attention of writers and statesmen has always been diverted from the law of peace to the law of war' and the League of Nations must build a stable international system through 'the development of the law of peace, rather than by renewing the attempts to codify the law of war': Anonymous, 'The League of Nations and the Laws of War', 1 *British Yrbk Int'l L* (1920–1921) 109, at 115, 116. The laws of war were generally disregarded and seen as a 'taboo' subject in the inter-war period: they were generally ignored by the League of Nations, and even teaching the law was 'opposed by many': Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', 45 *AJIL* (1951) 37, at 39. After the creation of the UN it was suggested that the laws of war were obsolete – after all, what need was there, and what message did it send, to provide detailed regulations regarding the conduct of an illegal activity? At its first meeting the UN's International Law Commission 'suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant'. Ultimately the ILC declined to initiate a study of the laws of war, as it considered that studying the law of war and its possible recodification would show a 'lack of confidence' in the UN's ability to maintain peace: International Law Commission, *Report of the International Law Commission on the work of its first Session*, 12 Apr. 1949, UN. Doc. A/CN.4/13, at para. 18.

The killing of combatants in war is justifiable, both in international and in national law, only where the war is legal. But where a war is illegal, as war started not only in breach of the Pact of Paris, but without any sort of warning or declaration clearly is, there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless bands.⁴⁸

Similarly, the Prosecutors before the Tokyo tribunal insisted that, because Japan was the aggressor and had attacked without a declaration of war, Japanese troops did not have the rights of 'lawful belligerents'.⁴⁹ The deaths of soldiers and civilians caused by the surprise attacks on Pearl Harbor and those that started the Pacific War were therefore domestic crimes of murder, and were charged as such.⁵⁰

Ultimately, however, these and other World War II tribunals either reaffirmed the equal application of *jus in bello*⁵¹ or simply avoided the issue.⁵² It is not hard to understand why, legally, the tribunals were uncomfortable affirming these prosecutorial theories. Personal responsibility for the crime of aggression was already quite a leap, based on the existing legal agreements at the time that World War II broke out. There was no precedent in living memory for placing unequal legal or moral blame on the military officers of an aggressive nation. Indeed, for the better part of the last century, moral theory attributed no blame to nations that engaged in aggressive war. Even leaving policy arguments aside, the legal – and moral – leap that would have been entailed was likely to be prohibitive.

3 Korean 'Police Action'

Just one year after the Geneva Conventions had been signed the UN issued its first use of force authorization. Again, the debate regarding the relationship between *jus in*

⁴⁸ Trial of Major War Criminals before the International Military Tribunal: Nuremberg, 14 Nov. 1945 to 1 Oct. 1945, xix: Proceedings 19 July 1946–29 July 1946 (Nuremberg, 1948), at 458, available at: www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf. IMT, xix, at 426.

⁴⁹ Boister, 'The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal', 8 *J Int'l Criminal Justice* (2010) 425, at 439–443; Fujita, 'The Tokyo Trial Revisited' in J. Doria, H.-P. Glasser, and M.C. Basiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009), at 43, 45.

⁵⁰ *Ibid.*

⁵¹ See, e.g., *USA v. List et al.* (Nuremberg, 1948) 11 NMT 1230, 1247 (holding that 'International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.' See also other cases discussed and cited in H. Lauterpacht, 'The Limits of the Operation of the Law of War', 30 *British Yrbk Int'l L* (1953) 206, at 215–220.

⁵² Boister, *supra* note 49 at 441, 444 (noting that the Nuremberg tribunal's only response to Shawcross' argument 'was expression of the view in its judgment that aggression was the supreme international crime which contained the accumulated evil of the whole' and that the Tokyo tribunal, '[a]fter rejecting the conspiracy to murder charges for lack of basis in the Tokyo Charter. ... found that those murder charges relating to initiating attack were already covered in effect by the findings on the charges of crime against peace').

bello and *jus ad bellum* flared: after all, in UN-authorized actions there was by definition no longer any question regarding the legality of the use of force, eliminating one of the main epistemological hurdles to differential application of *jus in bello*. In 1951 the American Society of International Law (ASIL) formed a committee to consider whether the laws of war should apply to UN Enforcement Action. Their report, released in 1952, was highly controversial. The UN, they insisted, did not conduct ‘wars’. Wars were conflicts ‘between states, between units of equal legal status; whereas the United Nations, acting on behalf of the organized community of nations against an offender, has a superior legal and moral position as compared with the other party to the conflict’.⁵³ Recognizing this difference, the UN ‘should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation)’.⁵⁴ Although the UN’s rules would ‘[p]resumably ... be of high humanitarian character and it would respect them carefully’, they would be voluntarily undertaken and might, for example, ‘forbid the use of atomic bombs by a state while reserving the right to use them itself’.⁵⁵

Similar arguments were advanced by other writers. Quincy Wright, one of the editors of the *American Journal of International Law*, argued that the UN and UN-authorized forces had ‘considerable discretion to permit action beyond normal belligerent rights’.⁵⁶ This might include, for example, measures to isolate aggressors beyond those traditionally provided by the laws of war and neutrality that ensured the “‘freedom of the seas,” “freedom of the air,” and “freedom of transit” across neutral territory’. However, because a state could neither deprive nor exempt individuals from rights or responsibilities under international law, this discretion did not extend to authorizing war crimes, or acts that would violate individuals’ human rights as guaranteed by international law or the law of war.⁵⁷ Wright also examined the rights of illegal aggressors, and found that they had reduced rights as regards legal users of force. Aggressors could not retain any of the rights normally conferred on belligerents, including the rights to occupy territory, destroy enemy armed forces, denounce certain treaties, confiscate enemy property, and ‘deter espionage and war treason in occupied territory by punishing individuals who engage in such activities’.⁵⁸ Rules regarding reparations were similarly impacted on, as aggressor states had to make reparations for ‘all losses of life and property resulting from [their] military operations’ while defending states needed only to make reparations for ‘injuries resulting from breaches of the law of war’.⁵⁹ Again, however, all states were required to respect rules regarding the rights of individuals and laws defining war crimes.⁶⁰

⁵³ Report of the Committee on Study of Legal Problems of the UN, ‘Should the Laws of War Apply to United Nations Enforcement Action?’, 46 *ASIL Proceedings* (1952) 216, at 217.

⁵⁴ *Ibid.*, at 220.

⁵⁵ *Ibid.*, at 218.

⁵⁶ Wright, ‘The Outlawry of War and the Law of War’, 47 *AJIL* (1953) 365, at 375.

⁵⁷ *Ibid.*, at 373, 375.

⁵⁸ *Ibid.*, at 374.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 375.

These and other revisionist arguments elicited a strong reaction from others in the academic community.⁶¹ Lauterpacht, while accepting that the new prohibition on aggression did have an impact on the laws of war and could be concretely relevant after hostilities had ended,⁶² objected strongly to any differential application of the laws of war while hostilities were ongoing.⁶³ Although there was an undeniable legal logic to the argument that war 'should no longer confer upon the guilty belligerent all the rights to which he was entitled under traditional international law', proposals to excuse UN or other 'legitimate' uses of force suffered from an air of unreality,⁶⁴ reasoning that placed Lauterpacht in the pragmatic strand of separationist arguments rather than the foundational. Most of the time it would not be possible to know who was the aggressor, and the reciprocal nature of the laws of war would in any case necessitate the equal application of the laws of war in any significant conflict.⁶⁵ It was inconceivable for one party to a conflict to be excused from the laws of war without the other following suit. The humanitarian character of most of the law of war meant that '[u]nless hostilities are to degenerate into a savage contest of physical forces freed from all restraints of compassion, chivalry, and respect for the dignity of man, it is essential that the accepted rules of war in that – humanitarian – sphere should continue to be observed'.⁶⁶ Similarly, if illegally occupied populations were given the right to take up arms against illegal occupiers, the occupier would be in effect freed 'from the obligation to treat the population in accordance with international law' as unorganized civilians would now be seen as combatants.⁶⁷ Other academics agreed, with some suggesting that even the limited revisions suggested by Lauterpacht went too far, preferring instead that all aspects of the laws of war remain intact and unaffected by the new illegality of aggression.⁶⁸

Setting aside the substantive merits of either side of this debate, an examination of the prevailing political context again aids in understanding the course of the arguments during this time. The suggestion that 'the forces of the United Nations

⁶¹ Lauterpacht, *supra* note 51; Baldwin, 'A New Look at the Law of War: Limited War and Field Manual 27-10', 4 *Military L Rev* (1959) 1, at 18–19; Baxter, 'The Rôle of Law in Modern War', 47 *ASIL Proceedings* (1953) 90, at 95–98; Kunz, 'The Laws of War', 50 *AJIL* (1956) 313; Huber, 'Quelques Considerations Sur Une Revision Eventuelle Des Conventions De La Haye Relatives a La Guerre', 37 (issue 439) *Revue Internationale De La Croix Rouge* (1955) 417.

⁶² E.g., 'a State waging an unlawful war is not entitled, after the war, to invoke rules of customary international law which disregard the vitiating effect of duress in the conclusion of treaties; which recognize title acquired by conquest; which absolve the belligerent from reparation for damage caused by lawful acts of warfare; which give it the right to regard as dissolved treaties concluded prior to the outbreak of the war; and which render it – and the individuals responsible for its actions – immune from criminal responsibility for the initiation of a war of aggression': Lauterpacht, *supra* note 51, at 239.

⁶³ *Ibid.*, at 212.

⁶⁴ *Ibid.*, at 212, 239.

⁶⁵ *Ibid.*, at 239.

⁶⁶ *Ibid.*, at 212–213.

⁶⁷ *Ibid.*, at 214.

⁶⁸ Kunz, *supra* note 61.

should be entitled to all the rights of war but should not be bound by all of them' was 'frequently made in this connexion in the course of hostilities in Korea'.⁶⁹ Although the UN had authorized the use of force, however, the context surrounding this authorization and the conflict meant that its rights and wrongs were shaped by Western thinking, which was at a minimum contestable. This reality lurks behind, or at times on the surface of, the academic debates. Major Richard Baxter, a Judge Advocate General (JAG) in the US army, opined that '[p]resumably, the [ASIL] committee would have its conclusions apply to the United Nation Command in Korea' and decried that '[e]specially after the Geneva Conventions come into force to the United States ... it would require the most ingenious casuistry to assert that a United Nations action in which the United States forces are participating is not an "armed conflict" at all'.⁷⁰

Similarly, Lauterpacht is careful to note that the Korean action would not have had UN authorization:

but for the fact (which, once more, must be considered exception) that the abstention of Soviet Russia from the deliberations of the Security Council at a crucial juncture made possible decisions of that body taken by all the votes of the permanent members 'present and voting', thus rendering possible action which, in some ways, approximated [a valid UN determination of aggression in breach of the Charter]. ... It is doubtful therefore whether there exists in such cases a fully valid finding of the existence of an 'illegal' war with such, controversial, consequences as may follow there-from.⁷¹

Against this background, the objection that, short of unanimous determination of the permanent members of the Security Council, it is still not possible authoritatively to determine who the aggressor is takes on additional significance.⁷² Although the use of force against North Korea may have obtained legal sanction, it was far from the unquestionably legitimate use of force that some scholars, labelling it a 'police action' and endowing it with a global moral authority, were seeming to suggest.

Be that as it may, a further general observation may now be made on the vicissitudes of the debate. The opposition to conflation tended for the most part to be rooted in the pragmatic branch of the argument. This does not mean that the objection does not rest on moral grounds. But these grounds should be examined carefully. The pragmatist, like Lauterpacht, implicitly concedes the principled logic of the conflationist, but argues that, since there are inbuilt ambiguities in drawing a distinction between the just and unjust warrior, the pernicious moral consequences of that distinction outweigh the principled objection of treating the just and unjust in similar fashion. The foundationalist, the arguments of whom we have not yet explored fully, believes that the importance of separating *jus in bello* from *jus ad bellum* transcends the distinction between the just and unjust.

⁶⁹ Lauterpacht, *supra* note 51, at 242.

⁷⁰ Baxter, *supra* note 61, at 95.

⁷¹ Lauterpacht, *supra* note 51, at 207.

⁷² See, e.g., *ibid.*, at 220.

4 Negotiations on the Additional Protocols

In the 1970s the negotiations on Additional Protocols I and II again returned the structure of the laws of war, or ‘international humanitarian law’ as it was then starting to be called, to the forefront of the debate. While the 1949 Geneva Conventions revealed almost no awareness of the UN Charter’s *jus ad bellum* prohibition, by the 1970s the legitimacy, or illegitimacy, of the use of force had become a central issue. The legacy of colonialism was giving rise to claims for self-determination in a number of ‘third world’ countries, and numerous ‘wars of liberation’ were taking place. While the final text of the Protocols strongly reaffirms the separation of *jus in bello* and *jus ad bellum*, the political context at the time made this a highly contentious point during the negotiations.

David Forsyth, describing the API negotiations, detailed three alleged ‘threats’ to the traditional distinction between *jus ad bellum* and *jus in bello*.⁷³ First, the Democratic Republic of Vietnam (DRV) walked out of the 1974 Diplomatic Conference after circulating a statement that the ‘watertight separation between *jus ad bellum* and *jus in bello* ... has become a flagrant anomaly’ now that wars of aggression were illegal.⁷⁴ The DRV’s argument was two-pronged. First, ‘justice requires that there should be no possibility of equal treatment for war criminals and for their victims’.⁷⁵ It argued that humanitarian law must contribute to the prevention of all war crimes, including the crime of aggression, and that the concept of equal rights and impartiality between parties resulted in ‘gross injustices’ against people fighting against aggression: ‘unjust equality is inequality and unjust impartiality is partiality, and that to the advantage of war criminals, not of their victims’.⁷⁶ Secondly, the changed nature of modern warfare, characterized by a gross asymmetry of power and the impossibility of reciprocity, meant that the existing laws favoured the aggressive imperialist war machine.⁷⁷ IHL should therefore strive ‘effectively [to] protect human beings against the war machine of aggression’ by changing laws requiring guerrilla fighters to wear distinctive emblems and prohibitions on perfidy.⁷⁸ It should also condemn aggression as a crime, and exclude the ‘inadequate and dangerous concepts of “unnecessary injury”, “unnecessary suffering”, “due proportion” and “military necessity”’.⁷⁹ The DRV’s arguments were dismissed at the time as ‘a dead letter’, apparently unable to obtain support from the Third World states, the Soviet-led group, or the People’s Republic of China.⁸⁰ The statement, however, takes on a new resonance due to the similarities it has with recent arguments regarding the separation between *jus ad bellum* and *jus in*

⁷³ Forsythe, ‘Support for a Humanitarian *Jus in Bello*’, 11 *Int’l Lawyer* (1977) 723; Forsythe, ‘The 1974 Diplomatic Conference on Humanitarian Law: Some Observations’, 69 *AJIL* (1975) 77.

⁷⁴ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), iv, at 177.

⁷⁵ *Ibid.*, at 178.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, at 179.

⁷⁸ *Ibid.*, at 180.

⁷⁹ *Ibid.*, at 180.

⁸⁰ Forsythe, ‘Support’, *supra* note 73, at 724.

bello and, even more intriguingly, it represents a first swallow of the ‘Asymmetric War’ so à la mode these days, though hailing from the ideologically opposed camp.

Secondly, there was a heated discussion on whether mercenaries should be extended protection that clearly resonates with the language of just and unjust wars. Third World countries and Eastern European states characterized mercenaries as fighting ‘solely for ignoble causes of selfishness and greed’ and not meriting prisoner of war status or any humanitarian protections.⁸¹ Again, Western states objected strongly to the exclusion of mercenaries, eventually negotiating a compromise that withheld POW status but secured them fundamental rights under Article 75.⁸²

The final and most contentious threat to the traditional separation was seen in Third World states’ insistence, supported by socialist countries, that ‘liberation movements’ against colonialist, racist, and oppressive regimes be included as international armed conflicts. Such struggles were ‘just wars’ and the protections offered to combatants should be extended to ‘freedom fighters’. This proposal elicited strong negative reactions from Western countries, which objected in part because it was seen as an impermissible introduction of *jus ad bellum* into *jus in bello* – privileging some conflicts over others because of the ‘just’ nature of their cause.⁸³ Even when the ICRC proposed a compromise that would give individuals fighting for their right to self-determination the equivalent of POW status, it was initially rejected by many Western states.⁸⁴ Several US academics stated that the developing countries’ position constituted ‘a return to the “just war” concept of the eleventh century’⁸⁵ that ‘would significantly set back efforts to create concrete workable rules of war’.⁸⁶ Despite arguments that the final amendment did necessarily have to be interpreted with reference to concepts of ‘just’ or ‘unjust’ wars and explicitly reinforced the equal application of *jus in bello*,⁸⁷ these concerns eventually formed a key rationale in the US’s decision not to ratify the Protocol.⁸⁸

These negotiations were highly politically charged, and it is not surprising that states’ positioning on these matters reflected the parties’ broader political interests. Third World states hoped that including these wars as international conflicts would confer legitimacy on these groups’ causes, restrain governments’ reactions, and provide international legal standards that might push against national laws such as

⁸¹ Representative of the Zimbabwe African People’s Union, CDDH/III/SR.36, at 19.

⁸² Forsythe, ‘Support’, *supra* note 73, at 727.

⁸³ Forsythe, ‘The 1974 Diplomatic Conference’, *supra* note 73, at 82.

⁸⁴ *Ibid.*, at 85–86.

⁸⁵ Graham, ‘The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the “Just War” Concept of the Eleventh Century’, 32 *Washington & Lee L Rev* (1975) 25.

⁸⁶ Roberts, ‘The New Rules of Waging War: The Case Against Ratification of Additional Protocol I’, 26 *Virginia J Int’l L* (1985–1986) 109, at 127.

⁸⁷ See, e.g., Demarest, ‘Updating the Geneva Conventions: The 1977 Protocols Update’, *Army L.* (1983) 18; Armstrong, ‘Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) Articles & Commentary’, 30 *JAG J* (1978) 125; Forsythe, ‘Support’, *supra* note 73.

⁸⁸ Sofaer, ‘The Rationale for the United States Decision’, 82 *AJIL* (1988) 784.

treason.⁸⁹ Essentially, then, these states were hoping to use an expansion of *jus in bello* application to leverage an expansion of *jus ad bellum* – hoping that a change in the law would have an ‘outward’ impact, as we termed it at the outset of this article, on how ongoing conflicts were viewed. Western countries in turn were ‘unwilling to confer indirectly an international right to revolt against certain governments’ and thereby legitimate ‘[i]nternal terrorism’.⁹⁰

Echoing the legal conservatism of earlier eras, here too we see a ‘strong element of legalism’ that permeated Western arguments, with some delegations ‘more concerned with preserving traditional definitions and the traditional structure of the law than in using legal arguments to communicate with other delegations’.⁹¹ Western states had been intimately involved in the ICRC expert drafting process that had preceded the 1974 Conference.⁹² The preparatory work had produced a text that faithfully reflected the traditional ICRC view that ‘the lawful or unlawful nature of the use of force [was not] pertinent’ when it came to the ‘unswerving principle of absolute and unconditional respect for the enemy hors de combat ... who was no longer an enemy, but only a human being’.⁹³ Unquestioned commitment to this principle combined with the view that ‘the traditional law said X and Y and that was the way it had to be’ probably accounts for at least some of the West’s resistance to the Third World proposals.⁹⁴

A fourth observation would be in order here: the ICRC compromise encapsulates two sensibilities which continue to permeate the debate to this day. The first is the singling out of the enemy *hors de combat* as a central artifact in the defence of strict separation. At one level the rationale is compelling – as stated, he or she is not an enemy if *hors de combat*, but a mere bystander, an innocent civilian, a human being. The normative moves made are interesting. First, characterizing the enemy *hors de combat* as no longer an enemy, as an innocent civilian, restores an equivalence to the subjects on both sides of the conflict. There may be an aggressor and a defender, which the principle of moral non-discrimination requires to be treated differently (far be it from thee, etc.), but these innocent civilians are equal and thus should be treated equally. Secondly, there is a move away from the pragmatic and towards the foundational: our ontological identity is not monolithic. An individual may be an enemy, but he or she is also human. And certain ‘rights’ attach to one in the ontological characterization as human which cannot be taken away by the ontological characterization as enemy. There is something seductive in both these moves, and they seem to give an answer to the arguments which were being forcefully made in the debate.

But these moves do not come without a price, even if unappreciated at the time. The ‘innocence’ of the civilian carries by implication the culpability of the combat (and perhaps even supporting non-combat) soldier. If we unpack the view of individual, society, and political organization at time of war implicit in the two moves, we discover

⁸⁹ Forsythe, ‘The 1974 Diplomatic Conference’, *supra* note 73.

⁹⁰ *Ibid.*, at 81.

⁹¹ *Ibid.*

⁹² *Ibid.*, at 84–85.

⁹³ Official Records of the Diplomatic Conference, *supra* note 74, v, CDDH/SR.1 at 11.

⁹⁴ Forsythe, ‘The 1974 Diplomatic Conference’, *supra* note 73, at 81.

that they are medieval. The knight understands himself as a warrior. The warring knight is a moral agent. His bearing of arms is volitional. He would never dream of disowning personal responsibility for his action. By contrast, the medieval individual is indeed ‘innocent’ when it comes to war. He (and certainly she) has no say if and when and where and against whom war is to be waged. It is not simply that he or she has no moral responsibility; the subjects of the King are in fact the objects of the King. In these matters they are not even moral agents – they are no different from the proverbial ‘women and children’. There is a strand of the debate which, at most times unawares, continues to be locked into this implicit worldview. The cost is heavy because it runs in some deep way against our most modern sensibilities. Moral agency is rooted in free choice. On the one hand, in the modern condition of war, even in an army of ‘volunteers’, we would be far more careful in ascribing choice and volition to those serving under arms. This may have important implications for an understanding of the rights and wrongs of some of the most critical *jus in bello* debates. On the other hand, in the modern condition of democracy, we not only insist on civilian control of the military, but we expect in a true republican democracy that citizens take responsibility for the actions of their elected officials, which requires some careful rethinking of how to understand the innocence of civilians. There would be something jarring if the separationist argument generally and, more importantly, the principle of protection of civilians were to depend on a view of polity and politics which was at odds with the worldwide turn to democracy at the turn of the 20th and 21st centuries.

5 Gulf War I and Kosovo

Coming off the heels of the Soviet Union’s dissolution, the 1990s was a time of significantly increased latitude in international geopolitics generally, and within the UN Security Council specifically. The Cold War stalemate, a highly ideological stand-off where both sides uncompromisingly claimed to be on superior moral and political ground, had if anything highlighted the dangers of conflating *jus in bello* and *jus ad bellum*.⁹⁵ With two nuclear super-powers equally convinced of the justness of their causes, and no external institution able to adjudicate on competing claims, maintaining the separation of the justness of a cause from the permissible conduct during the war may have seemed a necessity.

The Security Council’s resurrection also renewed the *jus ad bellum* and *jus in bello* discussions. The debates through the 1990s display several themes that can be at least partially attributed to the newly emerging possibility of international cohesion and US hegemony. First, the appearance of ‘objectively’ legal or just wars heightened the general awareness and sharpened the debate regarding the possibility that *jus ad bellum* might have an impact on *jus in bello*. The reinvigoration of the Security Council,

⁹⁵ Cian O’Driscoll, e.g., has argued that the insistence on keeping *jus in bello* distinct from *jus ad bellum* during the Cold War era was partly due to a fear that the Cold War would be an ideological, total war: C. O’Driscoll, *Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century* (2008), at 14.

several relatively unambiguous 'just' wars, and the declining possibility of reciprocity seemed to diminish the importance of the traditional arguments supporting separation. Secondly, the shifting geopolitics had an impact on the position of Western states, which seemed to start to reconsider their traditionally absolutist stance in favour of separation. Finally, the emergence of 'humanitarian' wars suddenly placed the humanitarian community in line with the military, or at least one side of a military conflict, creating subtle internal and external tensions within the ICRC community.

The shifting ground can be captured through an examination of two major conflicts of the time – the 1990–1991 Gulf War and the 1999 intervention in Kosovo. Although the Security Council had been operational for over four decades by the time Iraq invaded Kuwait, its 1991 Resolution authorizing the use of international force was only the second such declaration in the institution's history. Moreover, in contrast to the Korean 'police action', there was little doubt that the UN-authorized coalition, led by the US and drawn from the forces of 34 different countries, was truly a legal, and by implication moral, endeavour. The coalition victory was swift and decisive, and a unilateral cease-fire was declared only 100 hours after ground troops were deployed.⁹⁶ As there was never any real contest between the forces, there was also never any real pressure for the international contingent to depart significantly from the traditional *jus in bello* standards. Nevertheless, at the time Judith Gardam noted that there appeared to be a tendency to let the 'legitimate' fighters off the hook, giving them more *jus in bello* latitude because of their undeniably justified *jus ad bellum* claim.⁹⁷ The interpretation of proportionality on the part of the just interveners, she argued, was limited to questions of whether civilians were targeted or attacks were negligent: 'military advantage always outweighed the civilian casualties as long as civilians were not directly targeted and care was taken in assessing the nature of the target and during the attack itself'.⁹⁸ In her analysis, she points to the new-found effectiveness of the Security Council as a decisive shift that allowed for an increased reliance on the concept of a just war.⁹⁹

This is of huge conceptual and theoretical importance. For those separationists, whose argument is mostly rooted in the pragmatic difficulty of authoritatively, and *ex ante*, classifying which of the two parties is a just and an unjust warrior, the Security Council type authorized use of force poses a challenge: for it both clearly and authoritatively makes precisely that distinction. If consistent, the opposition to Conflation, at least in those situations, should drop. The importance of the work of Gardam, careful and insightful, illustrates the pull which the conflationist argument has even when it is not explicitly invoked to explain certain practices.

The subtle tendency towards conflation can also be seen in UN Security Council Resolution 687 setting out the armistice agreement after the end of the war. The Resolution specified that Iraq was 'liable under international law for any direct loss,

⁹⁶ R.S. Lowry, *The Gulf War Chronicles: A Military History of the First War with Iraq* (2003).

⁹⁷ Gardam, 'Noncombatant Immunity and the Gulf Conflict', 32 *Virginia J Int'l L* (1992) 813; Gardam, 'Proportionality and Force in International Law', 87 *AJIL* (1993) 391.

⁹⁸ Gardam, 'Noncombatant Immunity', *supra* note 97, at 834.

⁹⁹ Gardam, 'Proportionality', *supra* note 97.

damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.¹⁰⁰ The complete disregard for any compensation for *jus in bello* violations is notable, and arguably undermines the relative importance of *jus in bello* compliance. Demanding that Iraq compensate all parties for any suffering due to the war without any consideration of whether Iraq's actions had violated *jus in bello* norms effectively subsumes any *jus in bello* reparations to what is presumably seen as the greater evil – starting the war in the first place. While there may be no intention to conflate the two areas here, that demand is driven by a certain legal logic, naturally leading towards this complicated and, in the eyes of some, compromised result.

Similarly, the conduct and analysis of the Kosovo campaign suggest that the justness of NATO's cause – saving a civilian population from systematic ethnic cleansing – tended to affect *jus in bello* expectations. Some suggested that the application of *jus in bello* rules, including targeting decisions, 'cannot be adequately judged without consideration of the underlying causes and reasons for the action'.¹⁰¹ Even more controversial was the decision to have NATO planes execute the bombing campaign from a minimum height of 15,000 feet, an order that was motivated by the desire to make the engagement a 'riskless' war. Of course, the campaign was only riskless on the part of NATO forces, who flew beyond the range of any retaliation from ground forces. The risk to civilians and civilian objects – undoubtedly more difficult to distinguish at such heights – was increased. The apparent tolerance of a 'riskless war' appears acceptable only if the intentions of those unwilling to accept risk are taken into account. It is hard to imagine, for example, that a similar *jus in bello* standard of proportionality would be applied to a powerful aggressor who conducted a war in such a way as to allocate all risk of death and injury to civilians within enemy territory. But here, too, we should not be seduced into thinking that it was just the direct moral paradigm that was at play. The ability to engage in a humanitarian action of the Kosovo type could depend on the ability to reassure the country whose troops are called into action that its soldiers would suffer the least possible risk in engaging in a war which was 'not their own'. Favouring the lives of the intervening soldiers at the expense of innocent civilians (as the 15,000 feet ceiling clearly does) seems at first blush otiose. The moral judgement would be considerably complicated if the failure to allow such conditions meant no intervention at all, potentially threatening a far greater risk to civilians.

Be that as it may, the novel concepts implied by the emergence of 'humanitarian' war also produced alarm and consternation within the Red Cross. Red Cross officials had noted that '[i]n the Bosnia-Herzegovina conflict, the dividing lines between [political or military action to deal with the causes of a conflict and humanitarian action to address the consequences] had become blurred',¹⁰² a trend that became far

¹⁰⁰ UN SC Res 687 (1991), S/Res/687 (1991), 8 Apr. 1991 at para. 16, available at: www.un.org/Depts/unmovic/documents/687.pdf.

¹⁰¹ Burger, 'International humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned', 82 (issue 837) *Int'l Rev Red Cross* (2000) 129, at 130.

¹⁰² Krähenbühl, 'Conflict in the Balkans: Human Tragedies and the Challenge to Independent Humanitarian Action', 837 *Int'l Rev Red Cross* (2000) 11, at 18.

more pronounced in the Kosovo crisis.¹⁰³ The President of the Red Cross repeatedly expressed concern about the militarization of humanitarian aid and the 'lack of distinction between humanitarian and political forms of intervention'.¹⁰⁴ Individual Red Cross officials also expressed alarm at the "'merging" of military and humanitarian operations'.¹⁰⁵ 'Humanitarian' war (itself a 'tragic contradiction in terms'¹⁰⁶) had co-opted and distorted the vision of impartiality and neutrality, the 'two core principles for all types of humanitarian intervention'.¹⁰⁷

The emergence of 'humanitarian' soldiers represented a fundamental challenge to the Red Cross's traditional work and vision:

There is a sign borne by all Red Cross vehicles and premises all over the world: it is a gun with a red X superimposed upon it, and it means that no weapons are allowed in. ... This is a humanitarian space in physical terms. But even more important is the concept of a humanitarian space in moral terms, namely a space that is not delimited, that is made up of tolerance and respect for each and every individual once they are wounded or captive, displaced persons or refugees, no matter to which side they belong. In that humanitarian space, both moral and physical, humanitarian organizations are allowed to intervene according to their principles of neutrality and impartiality, which must be fully recognized and respected by all parties. Then, and only then, the humanitarian gesture becomes not only possible, but effective.

During the Kosovo conflict there was little, if any, humanitarian space left. The extremely politicized international context in which the war was prepared, decided and conducted left almost no room for it. Impartiality and neutrality became terms heard with increasing suspicion, taken instead to mean that the ICRC was 'on the other side', whoever it was talking to.¹⁰⁸

Making military action itself a humanitarian good implied that the militantly impartial and neutral space maintained by the Red Cross and traditional IHL in general was seen in a suspicious light. The fusion of 'humanitarian' and legitimate, morally just war by its nature implies a fusion between the goals and actions taken under *jus ad bellum* and *jus in bello*.

6 Nuclear Weapons

Some of the strongest language reinforcing the separation between *jus ad bellum* and *jus in bello* emerged as a reaction to the ICJ's advisory opinion on the legality of nuclear weapons.¹⁰⁹ It is here that we first see the terms 'dogma'¹¹⁰ and 'axiomata'¹¹¹ emerge to describe the principle of separation. In setting up the analysis of the opinion's

¹⁰³ *Ibid.*, at 19.

¹⁰⁴ *Ibid.*

¹⁰⁵ Roggo, 'After the Kosovo Conflict, A Genuine Humanitarian Space: A Utopian Concept or an Essential Requirement?', 837 *Int'l Rev Red Cross* (2000) 31, at 41.

¹⁰⁶ *Ibid.*, at 40.

¹⁰⁷ *Ibid.*, at 41.

¹⁰⁸ *Ibid.*, at 41–42.

¹⁰⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

¹¹⁰ Doswald-Beck, *supra* note 5, at 53.

¹¹¹ Gill, *supra* note 6, at 614, 616. See also Sloane, *supra* note 7 (referring to the separation of the fields as the 'dualistic axiom').

paragraph 2(e), Terry Gill, for example, states that the absolute distinction between *jus ad bellum* and *jus in bello* is ‘one of the oldest and best established *axiomata* of international law and its predecessor “just war doctrine”... so self-evident and self-explanatory that [it] hardly require[s] further explanation; much less proof’.¹¹² He goes on to write that the Court ‘fundamentally misconstrued this relationship’¹¹³ and ‘potentially weakened any restraining influence *jus in bello* might have upon the use of nuclear weapons’.¹¹⁴ He concludes that, as a result, ‘the Advisory Opinion ... should be written off as a judicial error and relegated to the status of one of those cases which we would sooner forget than look to for guidance’.¹¹⁵ Louise Doswald-Beck, who posited the separation between the fields as ‘absolute dogma’ for at least two centuries, was similarly dismissive of this portion of the opinion, stating that ‘for the purposes of evaluating the relationship between the law of self-defence and humanitarian law, it would be more meaningful to rely on [other statements in] the Opinion, rather than the confusing and rather artificial ... paragraph 2E’.¹¹⁶

Paragraph 2(e), the source of scholars’ concerned reactions, famously stated that while ‘the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’, the Court could not ‘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’.¹¹⁷ Many understood this statement as a conflation of *jus in bello* and *jus ad bellum*. According to one interpretation, the paragraph states that while nuclear weapons generally violate *jus in bello*, such violations may be justified or excused by extreme *jus ad bellum* necessity – the very survival of the state.¹¹⁸ A second reading that has also been suggested is that ‘recourse to nuclear weapons is not incompatible with *jus in bello*, but it is solely reserved to a State in perilous conditions of self-defence’.¹¹⁹ Rein Müllerson, for example, has suggested that the ‘right to survival’, possessed only by a defending state, may inform the distinct proportionality calculations under *jus ad bellum* and *jus*

¹¹² Gill, *supra* note 6, at 616.

¹¹³ *Ibid.*, at 614.

¹¹⁴ *Ibid.*, at 623.

¹¹⁵ *Ibid.*

¹¹⁶ Doswald-Beck, *supra* note 5, at 53.

¹¹⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, supra* note 109, at para. 2(e).

¹¹⁸ Doswald-Beck, *supra* note 5, at 53; Sassöli, ‘Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’, in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (2007), at 241, 250–251; Gill, *supra* note 6; Warner, ‘The Nuclear Weapons Decision by the International Court of Justice: Locating the *raison* behind *raison d’état*’, 27 *Millennium – J Int’l Stud* (1998) 299. This interpretation appears to have been supported by the separate opinion of Judge Fleischhauer, who argued that ‘although recourse to nuclear weapons is scarcely reconcilable with humanitarian law applicable in armed conflict as well as the principle of neutrality, recourse to such weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State’: *Legality of the Threat or Use of Nuclear Weapons, supra* note 109, at 308.

¹¹⁹ Dinstein, *supra* note 8, at 162.

in bello, influencing the right to self-defence in the former and military necessity in the later.¹²⁰ These interpretations, which seem to subsume *jus in bello* to *jus ad bellum* or modulate the former with reference to the later, were bolstered by the Dissenting Opinion of Judge Higgins, who understood that the Court ‘necessarily leaves open the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful’.¹²¹

It was this apparent reference to the justness of the cause, and the apparent ability of just cause to trump or otherwise influence restrictions on conduct within war, that elicited the strong reactions from certain parts of the academic community. It is not immediately evident, however, that this interpretation of paragraph 2(e) is correct. The wording of the Court’s majority ‘decision’ is notoriously vague, capable of multiple distinct interpretations. The ratios were extremely fragmented, with four judges appending declarations to the advisory opinion, three appending separate opinions, and six judges writing dissents. Because each operative paragraph was voted on separately, with different judges voting for and against different clauses (paragraph 2(e) got seven votes for, seven against, with the President casting the approving tie-breaking vote) there is not likely to be any ‘authoritative reading’.

Several alternative understandings are possible. As posited by Christopher Greenwood,¹²² it is also possible to understand the Court’s statement that, although use of nuclear weapons will generally violate IHL, under certain conditions and situations – say the use of tactical nuclear weapons, or a complete absence of civilian objects – they may be permissible under *jus in bello*. The subsequent reference to nuclear weapons being legal under ‘extreme situations of self-defence’ might then refer to the proportionality calculation under *jus ad bellum*, a matter that is completely distinct from the *jus in bello* calculations. Moreover, other parts of the majority joint statement and the accompanying opinion do seem strongly to reaffirm that the use of nuclear weapons must comply with both IHL and *jus ad bellum*.¹²³ Why, then, was there such a decisively excited reaction to the Court’s possible conflation of the two areas of law?

At least part of the reason for the level of emotion and strident language may have to do with the number of broad stroke ideologies that were at play here. Layered on top of the ICJ’s nuclear weapons decision are several philosophical positions on war, peace, and humanity, all of which become bound up into the question of the relationship between *jus in bello* and *jus ad bellum*. The first narrative that the nuclear weapons case invokes is pacifism. The philosophical side of just war theory has also had an uneasy relationship with nuclear weapons. During the Cold War, when any overt recourse to war seemed necessarily to imply nuclear annihilation, many scholars

¹²⁰ Müllerson, ‘The Relationship between *jus ad bellum* and *jus in bello*’, in L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999), at 267, 271–272.

¹²¹ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 109, at 590.

¹²² Greenwood, ‘*Jus ad bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion’, in Boisson de Chazournes and Sands (eds), *supra* note 120, at 247, 264.

¹²³ *Ibid.*, at 263.

suggested that just war theory – which presumes by definition that some wars may be just – was no longer applicable. These arguments often emerged out of the Christian theological community, and were in large part bolstered by statements from the Catholic Church.¹²⁴ Thomas Merton, for example, forcefully asserted that, in view of the emergence of nuclear weapons, ‘we must take into account a totally new situation in which the danger of any war escalating to all-out proportions makes it imperative to find other ways of resolving international conflicts. In practice the just war theory has become irrelevant.’¹²⁵ Eventually such thinking made its way into just war theory as well, resulting in a strain of reasoning – labelled *jus contra bellum justum* by some – which used the just war principles to argue for a total rejection of war.¹²⁶ In short, the argument is that because the means of war are so destructive, no just cause will suffice and *jus ad bellum* becomes irrelevant.¹²⁷ The ICJ’s refusal to give humanitarian considerations priority over the *jus ad bello* rights of states effectively eliminates this possibility.

Whereas the *jus contra bellum justum* has never emerged as *lex lata*, certainly not in any non-weapons of mass destruction (WMD) context, it has in our view left a strong trace on the debate. A variant of the argument that the consequences of war in these times are so catastrophic as to render ‘just war’ meaningless is that the going to war is in and of itself a moral failure the responsibility for which will always fall on both parties. When such a position informs, even if subconsciously, the sensibilities of the debate, it is another reason why the separationist argument retains such a hold: Why should civilians on either side be made to pay a price for the failures of politicians on both sides?

Insisting on the absolute separation of *jus in bello* and *jus ad bellum* was also the easiest way to contest the Court’s ambiguous *non liquet* and argue that, despite the Court’s ruling, nuclear weapons were, in fact, contrary to international law. The referral to the ICJ was the result of ‘intensive lobbying’ by an American anti-nuclear NGO,¹²⁸ and there were evidently many who hoped that the resulting decision would find that nuclear weapons were illegal arms. If the ICJ’s finding that nuclear weapons will ‘generally’ violate *jus in bello* is understood as allowing exceptions only for *jus ad bellum* reasons, refuting the acceptability of this formulation by knocking out the relationship between *jus in bello* and *jus ad bellum* necessarily implies that nuclear weapons are, in fact, illegal. Indeed, it is clearly accepted as *lex lata* that the two areas of law must be evaluated independently of one another. For those wishing to find the ICJ’s decision

¹²⁴ Sharma, ‘The Legacy of *Jus Contra Bellum*: Echoes of Pacifism in Contemporary Just War Thought’, 8 *J Military Ethics* (2009) 217, at 219–222.

¹²⁵ T. Merton, *Thomas Merton on Peace* (1976), at 21. See also David Hollandbach, stating that ‘nuclear weapons have introduced a qualitatively new reality into our historical and political experience a reality which may call for a revision of the just war theory’s willingness to legitimate some limited use of force’: D. Hollenback, *Nuclear Ethics: A Christian Moral Argument* (1983), at 43–44.

¹²⁶ J.T. Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (2005), at 25.

¹²⁷ Sharma, *supra* note 124, at 221, 223–224.

¹²⁸ Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’, 10 *Leiden J Int’l L* (1997) 137, at 138.

simply wrong and reinforce the illegality of nuclear weapons, therefore, this particular interpretation of the decision offers the legal equivalent of a slam dunk.

Be that as it may, possibly the most important result of the nuclear weapons decision of the ICJ was that the so-called axiom, unchallenged and unchallengeable, of separation had taken its first legally authoritative hit. For those who were inclined to interpret the ICJ's decision in this way, an interpretation that ironically may have been pushed most forcefully by the decision's detractors, the challenge to the separation of *jus in bello* and *jus ad bellum* could no longer be considered as maverick, but mainstream.

7 Contemporary Debate – From 9/11 to the Gaza Flotilla

In the 2000s the debate over *jus in bello* and *jus ad bellum* expands significantly, increasing in volume and quantity and fracturing in terms of substantive content. Those arguing for conflation of the two areas of law often rely on one of several 'novel' paradigms – humanitarian intervention, 'liberating' occupations, asymmetric wars against non-state actors – each of which gives rise to a diverse set of arguments regarding whether, when, and in what manner *jus in bello* and *jus ad bellum* should relate and all of which, as we have seen, are not particular novel and have antecedents this century.

As in previous decades, these arguments take place against the backdrop of real ongoing conflicts – the 2006 Lebanon War, the 2008 Gaza War, the contemporary conflicts in Afghanistan and Iraq, and the so-called Global War on Terror.¹²⁹ Although it is by no means universal and there are strong contrary voices therein, the arguments for conflation to a large extent emanate from US and Israeli academics and practitioners – and to some extent from the UK – notably because it is argued that the practical and moral anomalies of the separationist *status quo* are most visible in the wars of those communities.

The academic literature that has argued for conflation over the past decade can be separated into three broad categories. First, there is a host of work that advocates for changes to *jus in bello* irrespective of the justness of the parties' causes.¹³⁰ Thus, for example, Kasher and Yadlin have suggested changes to the principles of military necessity, distinction, and proportionality when fighting terrorists¹³¹ because the traditional 'paradigm of warfare rests on assumptions that do not hold for the situation of a state facing terror'.¹³² They specify, however, that the justification for these changes 'does not rest on any particular

¹²⁹ The expression itself is controversial; there can be no neutrality in its presentation so we will just use it from here on in.

¹³⁰ Kasher and Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', 4 *J Military Ethics* (2005) 3, at 7.

¹³¹ They have a relatively unique definition of 'terrorism', which not only limits the activity to non-state actors but can also encompass acts directed solely at military personnel.

¹³² Kasher and Yadlin, *supra* note 130, at 7. See also Kasher and Yadlin, 'Military Ethics of Fighting Terror: A Response', 4 *J Military Ethics* (2005) 60; Kasher, 'The Principle of Distinction', 6 *J Military Ethics* (2007) 152; Kasher and Yadlin, "'Israel and the Rules of War": An Exchange', *New York Rev Books* (11 June 2009); Kasher, 'Irregular Wars: A Philosophical Perspective on International Law and Universal Jurisdiction', 47 *Justice* (2010) 22.

stance with respect to the desired solution of the conflict'¹³³ nor does the framework make any adjustments when dealing with 'freedom fighters' as opposed to 'unjust terrorists'.¹³⁴ Indeed, the authors argue that there is no such thing as a justified freedom fighter who resorts to terrorism – 'acts of terror and activities of terror are always morally unjustified' and 'from the point of view of Military Ethics, a terrorist is a terrorist is a terrorist'.¹³⁵ Gabriella Blum advances a framework for differentiated responsibilities under the laws of war that would potentially constrain the more powerful actor in an asymmetric conflict, and which attempts to operate entirely independently of the perceived justness of the cause.¹³⁶ Other authors who advance different variants of the argument that powerful or weak parties in asymmetric conflicts should be subject to different *jus in bello* standards,¹³⁷ or states fighting enemies that (persistently) violate IHL should have relaxed *jus in bello* standards,¹³⁸ also seem to make these arguments without reference to *jus ad bellum*.

The second large portion of the literature is those papers which make no explicit statement that the arguments advanced rely on *jus ad bellum* assessments, but nevertheless seem to assume that the adversary is the unjust aggressor. These arguments seemingly offer more extreme changes to the laws of war, at least as regards the specific targeted enemy. Barry Buzan, for example, argues that civilians should be legitimate targets in war to the extent that they 'deserve' or are morally responsible for the actions of their government.¹³⁹ His statement that the 9/11 victims were clearly not legitimate targets,¹⁴⁰ combined with the assertion that when we – i.e., 'Western democracies'¹⁴¹ – decide who to bomb, civilians who elect 'evil' leaders may be legitimate targets,¹⁴² clearly carries the assumption that 'we' are the just party. William Bradford argues that the US should pass legislation – the *Actus Contra Barbarum* – that would withhold all IHL protections from rogue states and terrorists.¹⁴³ Although protections for safeguarding civilians and other

¹³³ Kasher and Yadlin, *supra* note 130, at 4.

¹³⁴ *Ibid.*, at 6.

¹³⁵ *Ibid.*

¹³⁶ Blum, 'On a Differential Law of War', 52 *Harvard Int'l LJ* (2011) 164, at 197. But see Heller, 'On a Differential Law of War: A Response', 52 *Harvard Int'l LJ Online* (2011) 237, at 246–248, available at: www.harvardilj.org/2011/04/online_52_heller/ (noting that Blum does not consistently maintain the separation between *jus ad bellum* and *jus in bello*, and that '[h]er essay stands as an eloquent indictment of that distinction because she demonstrates (intentionally or not) that it is impossible to normatively assess the obligations of the parties to an armed conflict without taking into account the comparative justness of their causes').

¹³⁷ See Rodin, 'The Ethics of Asymmetric Warfare', in R. Sorabji and D. Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions* (2006), at 153, 153–156; see also Kahn, 'The Paradox of Riskless Warfare', 22 *Philosophy & Public Policy Q* (2002) 2, at 8; Kahn, 'War and Sacrifice in Kosovo', 19 *Philosophy & Public Policy Q* (1999) 1, at 4–7.

¹³⁸ See Newton, 'Reconsidering Reprisals', 20 *Duke J Comp & Int'l L* (2009–2010) 361, at 380–381.

¹³⁹ Buzan, 'Who may we Bomb?', in K. Booth and T. Dunne (eds), *World in Collision: Terror and the Future of Global Order* (2002), at 85.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, at 87, 88, 90.

¹⁴³ Bradford, 'Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War', 73 *Mississippi LJ* (2003–2004) 639, at 899.

non-combatants would be retained,¹⁴⁴ the unintentional deaths of civilians near terrorist targets would be ‘reflexively’ acceptable.¹⁴⁵ The rationale is that terrorists are anti-civilizational barbarians committing ‘depredations against civilized peoples’; states fighting terrorists are the ‘defenders of the international community’ and a ‘rationalized IHL’ must incorporate *jus ad bellum* into the calculation, thereby giving the US more leeway and ‘barbarians’ no rights.¹⁴⁶ This naturally assumes that the US is always, at least with respect to ‘rogue states’ and terrorists, the just warrior.¹⁴⁷

Finally, there is a body of work that explicitly tackles the *jus ad bellum/jus in bello* divide. This conflationist literature spans both philosophy and law. Most legal scholars approach the arguments for conflation with a certain amount of trepidation. Although they generally agree that *jus in bello* and *jus ad bellum* should remain as separate spheres, they argue that changes in the nature of the battlefield – asymmetric conflicts, the appearance of non-state actors, UN-authorized forces – have made the original rationales less applicable, at least in a discrete area.¹⁴⁸ This is bolstered by arguments as to why conflation is not only feasible, but unavoidable or beneficial in certain circumstances. Other legal scholars point to the changed goals of permissible armed force to ground their argument for some conflation.¹⁴⁹ Thus, for example, when the Security Council authorizes military action in specific terms, the law applicable to target selection may be affected by the terms and scope of the authorization.¹⁵⁰ Similarly, the explicitly humanitarian goals of wars of liberation or humanitarian intervention may affect targeting decisions or require that the proportionality analysis be modified to provide more protection for civilian life and objects than would normally be the

¹⁴⁴ *Ibid*

¹⁴⁵ *Ibid.*, at 897.

¹⁴⁶ *Ibid.*

¹⁴⁷ Similarly, even though the US government never explicitly articulated that *jus ad bellum* was relevant, there are those who attribute the attempts to deny that *jus in bello* applies in the war on terror and the refusal to give POW status to detainees as at least in part due to ‘a conviction of the justness of the U.S. war’ and the view that ‘the terrorists have so clearly initiated an illegal war’: Danner, ‘Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism’, 46 *Virginia J Int’l L* (2005) 83, at v105, 106–107.

¹⁴⁸ E.g., it is argued that asymmetrical conflict already undermines reciprocity and institutions have stepped in to enforce compliance, making the asymmetrical imposition of obligations less problematic in certain areas. See Benvenisti, ‘The Legal battle to Define the Law on Transnational Asymmetric Warfare’, 20 *Duke J Comparative and Int’l L* (2009) 339 (arguing that in asymmetrical wars against non-state actors the *jus in bello* proportionality test should be expanded to take into account who is responsible for the hostilities, whether one party is pursuing unrelated goals or prolonging conflict). It is also frequently argued that imposing higher obligations on one party would not lead to the same ‘race to the bottom’ that the traditional logic of reciprocity suggests: Megret, ‘Jus in Bello as Jus Ad Bellum’, 100 *ASIL Proceedings* (2006) 121.

¹⁴⁹ I. Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality, and Precautions in Attack Under Additional Protocol I* (2009); Laursen, ‘NATO, the War Over Kosovo, and the ICTY Investigation Critical Essay’, 17 *Am Universities Int’l L Rev.* (2001–2002) 765; Boothe, ‘Targeting’, 78 *Int’l L Studies Series US Naval War Coll* (2003) 173, at 186–187.

¹⁵⁰ Henderson, *supra* note 149.

case.¹⁵¹ Occupation is also a distinct arena, with goals that diverge from those of active combat – it is ‘a means to a policy end’ that involves norms of governance, legal and policy choices that directly relate to the causes of war.¹⁵²

Those writing from a philosophical perspective tend to be much more strident in their assertions. Writers generally draw on an individual rights perspective, often using the morality of individual self-defence to question what the just warrior has done to forfeit his or her right to life, how there can be such a crude distinction between combatants and non-combatants, or how the unjust warrior has any right to harm civilians at all. Numerous authors also question the ethics of insulating the *jus in bello* proportionality analysis from *jus ad bellum* considerations, suggesting that the legitimacy of the overall goal of the war must be incorporated into the *jus in bello* balancing.

One further important line can be drawn within this philosophical conflationist literature. Not all who argue that it is impossible to separate *jus in bello* and *jus ad bellum* argue that the laws of war should therefore be modified. Indeed, some of the strongest voices in this debate are careful to draw a strong line between morality and legality, and in fact defend the existing structure of the international humanitarian law, with perhaps some modifications for domestic laws regarding conscientious objectors.¹⁵³ Most, however, are either silent regarding the relationship between law and ethics,¹⁵⁴ or simply assert that the law should follow morality,¹⁵⁵ often without specifying how, to what end, or in our view seriously grappling with the practical consequences.¹⁵⁶

A large number of scholars, mostly from the legal community, have strongly argued against some or all of these conflationist possibilities.¹⁵⁷ The arguments supporting

¹⁵¹ Megret, *supra* note 148, at 122 (arguing that ‘there is something profoundly in tension between the rhetoric of a “humanitarian” intervention, and taking advantage of all the still rather permissive elasticity of the laws of war.’); Teitel, ‘The Wages of Just War: Comment on Richard Arneson’s Just Warfare Theory and Noncombatant Immunity’, 39 *Cornell Int’l LJ* (2006) 689; Müllerson, ‘Commentary’, 78 *Int’l L Studies Series US Naval War Coll* (2003) 443, at 452.

¹⁵² Giladi, ‘Jus Ad Bellum/Jus in Bello Distinction and the Law of Occupation, the Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context’, 41 *Israeli L Rev* (2008) 246, at 280; Orakhelashvili, ‘Overlap and Convergence: The Interaction between Jus Ad Bellum and Jus in Bello’, 12 *J Conflict & Security L* (2007) 157.

¹⁵³ McMahan, ‘The Sources and Status of Just War Principles’, 6 *J Military Ethics* (2007) 91; McMahan, ‘Morality, Law, and the Relation between Jus Ad Bellum and Jus in Bello’, 100 *ASIL Proceedings* (2006) 112; Hurka, ‘Liability and Just Cause’, 21 *Ethics and Int’l Affairs* (2007) 199; C.A. Coady, *Morality of Political Violence* (2008), at 128.

¹⁵⁴ Arneson, ‘Just Warfare Theory and Noncombatant Immunity’, 39 *Cornell Int’l LJ* (2006) 663; Estlund, ‘On Following Orders in an Unjust War’, 15 *J Political Philosophy* (2007) 213; Evans, ‘In Defence of Just War Theory’, in M. Evans (ed.), *Just War Theory: A Reappraisal* (2005), at 203, 214; U. Steinhoff, *On the Ethics of War and Terrorism* (2007); Lazar, ‘Responsibility, Risk, and Killing in Self-Defense’, 119 *Ethics* (2009) 699.

¹⁵⁵ See, e.g., B. Parabo, *The Proportionate Treatment of Enemy Subjects: A Reformulation of the Principle of Discrimination*, (2008).

¹⁵⁶ Ceulemans, ‘The Moral Equality of Combatants’, *Parameters* (2007) 99.

¹⁵⁷ See, e.g., Moussa, ‘Can Jus Ad Bellum Override Jus in Bello?: Reaffirming the Separation of the Two Bodies of Law’, 90 *Int’l Rev Red Cross* (2008) 963; Roberts, ‘The Equal Application of the Law of War: A Principle Under Pressure’, 90 *Int’l Rev Red Cross* (2008) 931; Sassoli *et al.*, *supra* note 3; Sloane, *supra* note 7; Viner, ‘Self-Defense, Punishing Unjust Combatants and Justice in War’, 4 *Criminal L & Philosophy*

separation were well captured by Lauterpacht and Walzer, speaking from the fields of law and morality respectively, and have changed relatively little since these classic articulations. Lauterpacht, whose 1950s arguments were summarized briefly above, offers a highly pragmatic defence of the separation between *jus ad bellum* and *jus in bello*. There are two primary reasons why unequal application during war would result in ‘the abandonment of most rules of warfare’.¹⁵⁸ First, ‘in the present state of international judicial and political organization’ there is no authoritative way to determine who is the aggressor.¹⁵⁹ Secondly, ‘it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from the rules of warfare without being bound by them’. After all, what belligerent would tolerate an enemy that picked and chose the laws of war that were convenient without recourse to retaliation?¹⁶⁰

Walzer, approaching the distinction from the moral perspective, offers a different rationale. The ‘moral reality’ of war is that individual soldiers cannot be held responsible for the *jus ad bellum* justness of an armed conflict:

when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not a crime. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude.¹⁶¹

Here, then, are two justifications for why neither just nor unjust soldiers are morally liable for their conduct in war, so long as they comply with *jus in bello*. The first, which relies on free consent, can be compared to a duel – where both parties agree to the rules and risks of the activity and engage nevertheless because it is a ‘pastime’, exciting or enjoyable.¹⁶² According to Walzer, this ‘case raises no difficulties’.¹⁶³

Philosophical Q (2009) 593; Benbaji, ‘The Responsibility of Soldiers and the Ethics of Killing in War’, 57 *Philosophical Q* (2007) 558; Bouvier, *supra* note 4; Danner, *supra* note 147; Dinstein, *supra* note 8, at 156; Sassòli, *supra* note 118; Schmitt, ‘21st Century Conflict: Can the Law Survive Symposium—International Humanitarian Law: Commentaries’, 8 *Melbourne J Int’l L* (2007) 443; Sparrow, ‘“Hands Up Who Wants to Die?”: Primoratz on Responsibility and Civilian Immunity in Wartime’, 8 *Ethical Theory and Moral Practice* (2005) 299; Walzer, ‘Response’, 6 *J Military Ethics* (2007) 168; Walzer, ‘Response to McMahan’s Paper’, 34 *Philosophia* (2006) 43; Whippman, ‘Redefining Combatants: Comment on Richard Arneson’s just Warfare Theory and Noncombatant Immunity’, 39 *Cornell Int’l LJ* (2006) 699; Zupan, ‘The Logic of Community, Ignorance, and the Presumption of Moral Equality: A Soldier’s Story’, 6 *J Military Ethics* (2007) 41; Bugnion, ‘Jus Ad Bellum, Jus in Bello and Non-International Armed Conflicts’, 2003 *Yrbk Int’l Humanitarian L* (2003) 167; Bugnion, ‘Just Wars, Wars of Aggression and International Humanitarian Law’, 84 *Int’l Rev Red Cross* (2002) 523; Dinstein, ‘Comments on War’, 27 *Harvard J L & Public Policy* (2003–2004) 877; von Heinegg, ‘Commentary’, 78 *Int’l L Studies Series US Naval War Coll* (2003) 203, at 205–206; and Greenwood, ‘The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign’, 78 *Int’l L Studies Series US Naval War Coll* (2003) 35, at 48–53.

¹⁵⁸ Lauterpacht, *supra* note 51, at 212.

¹⁵⁹ H. Lauterpacht, ‘Disputes, War and Neutrality’, in L. Oppenheim (ed.), *International Law*, ii, *Disputes, War and Neutrality* (7th edn, 1952), at 177, 218.

¹⁶⁰ Lauterpacht, *supra* note 51, at 242.

¹⁶¹ Walzer, *supra* note 2, at 37.

¹⁶² *Ibid.*, at 25–26.

¹⁶³ *Ibid.*, at 37.

The second case, where soldiers fight ‘without their freedom’, is more complex. Nevertheless, Walzer reasons, there is a deep instinct that enemy soldiers, even though they may be trying to kill you, are not morally responsible for their actions:

[There is a] sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn’t my enemy in any specific sense; the war itself isn’t a relation between persons but between political entities and their human instruments. These human instruments are not comrades-in arms in the old style, members of the fellowship of warriors; they are ‘poor sods, just like me,’ trapped in a war they didn’t make. I find in them my moral equals. That is not to say simply that I acknowledge their humanity, for it is not the recognition of fellow men that explains the rules of war; criminals are men too. It is precisely the recognition of men who are not criminals.¹⁶⁴

For this soldier, ‘[w]e assume that his commitment is to the safety of his country, that he fights only when it is threatened, and that then he has to fight (he has been “put to it”): it is his duty and not a free choice’.¹⁶⁵ The important distinction for Walzer is whether fighting was a personal choice taken for private motives, or whether it was not a choice at all, but ‘a legal obligation and a patriotic duty’:

[Personal choice] effectively disappears as soon as fighting becomes a legal obligation and a patriotic duty. Then ‘the waste of the life of the combatants is one which,’ as the philosopher T.H. Green has written, ‘the power of the state compels. This is equally true whether the army is raised by voluntary enlistment or by conscription.’ For the state decrees that an army of a certain size be raised, and it sets out to find the necessary men, using all the techniques of coercion and persuasion at its disposal. ... [The men it finds] are political instruments, they obey orders, and the practice of war is shaped at a higher level.¹⁶⁶

In such situations, ‘the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just, and while the basis of that belief is not necessarily rational inquiry but, more often, a kind of unquestioning acceptance of official propaganda, nevertheless they are not criminals; they face one another as moral equals.’¹⁶⁷ As such, ‘their war is not their crime’ as for ‘the war itself, ... soldiers are not responsible’.¹⁶⁸ The people who are responsible are those who exercise ‘tyrannical power, first over their own people and then, through the mediation of the opposing state’s recruitment and conscription offices, over the people they have attacked’.¹⁶⁹

These rationales are bolstered by an examination of the equal applicability of self-defence during war. All combatants are equally morally liable to attack because they bear arms and therefore ‘pose a danger to other people’.¹⁷⁰ This applies even to just combatants who, by fighting, lose ‘their title to life and liberty, ... even though, unlike

¹⁶⁴ *Ibid.*, at 36.

¹⁶⁵ *Ibid.*, at 27.

¹⁶⁶ *Ibid.*, at 28–29.

¹⁶⁷ *Ibid.*, at 127.

¹⁶⁸ *Ibid.*, at 37–38.

¹⁶⁹ *Ibid.*, at 31.

¹⁷⁰ *Ibid.*, at 145.

aggressor states, they have committed no crime'.¹⁷¹ Although the logic of individual self-defence would suggest that a person does not lose their right to life simply by defending themselves against an unjustified, criminal attack, this logic is not applicable during war because of the injection of necessity. In ordinary life, 'the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place.'¹⁷² In warfare, however, soldiers who participate in war, just or unjust, are viewed quite differently. Neither soldier 'is a criminal, and so both can be said to act in self-defence'.¹⁷³

It is a testament to the force of Walzer that these arguments rest at the core of the foundational anti-conflationist voice even today.

8 Reflections on the Current Debate

Despite the apparently radical divergence of the conclusions reached by these two communities, there are some interesting broad commonalities among the separationists and conflationists. Throughout the historical and contemporary discussions, both sides of the debate often rely, explicitly or implicitly, on the principle of equality – the requirement to treat the equal equally. They employ different comparators to determine sameness or likeness. For many of the purists the comparator is a radical ontology: soldiers and civilians as humans, in some deep sense victims of the war who must be shielded as far as possible from its excesses. For the conflationists, the relativists, the comparator includes ethical considerations of the rightness and wrongness in which the soldiers and civilians find themselves. As Uwe Steinhoff argues, applying a different *jus in bello* standard to the aggressor and defender is not the application of a double standard, but rather the application of the same standard for both sides, which, behaving differently, end up being subject to different moral and conventional imperatives.¹⁷⁴

There is also a recurring dialogue that plays out within *jus in bello* rules that reflects struggles over what war is, who has the right to go to war, and who has the right to be effective in the war-fighting effort. There are divergent visions of who, if anyone, should be afforded substantive equality within the traditionally formal equality structure of *jus in bello*.¹⁷⁵

Functional reasoning also plays a critical and divergent role in each narrative. To many of the philosophers, consequentialist considerations are largely irrelevant to the underlying morality of a given situation. Institutions, uncertainty, and the difficult realities that condition individual choice and freedom are all given relatively short shrift in many of the philosophical conflationist accounts. On the other hand, prudential considerations are so integrated with the traditional separationist ethical

¹⁷¹ *Ibid.*, at 136.

¹⁷² *Ibid.*, at 128.

¹⁷³ *Ibid.*

¹⁷⁴ Steinhoff, *supra* note 154.

¹⁷⁵ See Berman, 'Privileging Combat – Contemporary Conflict and the Legal Construction of War', 43 *Columbia J Transnat'l L* (2004–2005) 1.

analysis that it is admitted that if society could produce idealized institutions and perfect knowledge, much of the logic of separation would no longer apply.¹⁷⁶ We noted above the challenging case of the Security Council's *ex ante* authorized use of force. Legal scholarship, which cannot so easily be divorced from the reality of institutions, is required to grapple with the consequentialist calculations. Much of this analysis, however, is prudential reasoning without empirical study. Separation defenders often gesture to history as proof that conflation will lead to a return to barbarity. Conflationists reply that fundamental underlying conditions – democratic responsibility, international institutions, the end of reciprocity – have radically altered the context.

These arguments raise two interesting methodological issues – one rooted in social science and the other in moral philosophy or political theory, neither in law. Is it in fact possible to measure with any degree of social science respectability the kind of impact it is argued conflation would produce? Indeed, it is hard to imagine a methodology that would test whether, and under what circumstances, various legal arrangements would produce optimal results. On the moral analysis, it is, of course, possible to root a defence of the distinction in a separate logic with a different ontology, and reaching to a different set of moral considerations of dignity and humanity. But does moral theory give us the tools to weigh the competing *moral claims* which the two independent logics give rise to? Or does it boil down to a Camus-like existential choice?

The question of methodology pushes us once again to the issue of motive. The contemporary discussion has at times the feature of religious debates, where there are non-negotiable truths, and debate is really a series of declarations aimed at each other (or a matter of scoring debating points), but not an argument with shared premises and agreed methodologies which can prove one right or wrong. This, in turn, impels one to return to the importance of context in explaining the positions that have been adopted.

At one level the contextualization of these arguments is obvious and highly political – a community, be it Israel, the US, or 'Western democracies', is at war, and members of that community naturally want to reshape the rules to improve the chances of success, limit their costs, and score points in the public relations battle. These first-order political arguments are probably most apparent in the arguments that assume without much analysis that 'we' are, and seemingly always will be, 'just'. Moreover, although it is difficult to pinpoint, the opposite is also probably true: opposing rule change is not just a question of principle, but due to the context of the actual disputes in which the debates are arising (i.e., if you think Palestinians are just, you are going to oppose anything that makes it easier for them to be killed). The extent to which this logic can, perhaps unknowingly, impact on the flow of arguments is highlighted by comparing contemporary debates, where IHL rules should be changed in a way that would make it easier to fight terrorists, to the debate in the 1970s, where IHL rules should have been changed in a way that would offer greater protections to 'freedom fighters'.

¹⁷⁶ Walzer, 'Response to McMahan's Paper', *supra* note 157; Walzer, 'Response', *supra* note 157.

First-order political considerations also have an impact on the course of moral discourse. Walzer's account of the separation between *jus ad bellum* and *jus in bello* was driven by his personal unease over the Vietnam War. Setting aside for a moment the undeniable power of his moral and historical arguments, it is possible that an account of why soldiers are not morally blameworthy for participating in an unjust war particularly resonated with a post-Vietnam society. Although there were criticisms of the Walzerian analysis at the time which suggested that unjust warriors should not be excused so easily and the divide between *jus ad bellum* and *jus in bello* was too firm,¹⁷⁷ these criticisms apparently gained little traction.¹⁷⁸ It was not until the last decade, when the US was, at least arguably, engaged in wars of 'defence' in Afghanistan and Iraq, that arguments regarding the injustice equal application does to the just warrior really captured academic and public imagination. It is worth noting that this label of 'political' influence does not necessarily carry with it a connotation of morally objectionable or self-serving manipulation. After World War II, the Danish representative passionately identified with the plight of an unjustly occupied populace. The US, post-Vietnam, was haunted by the moral implications for those sons and daughters who had been sent to kill others in a morally suspect war. Those who assume that 'we' are invariably just bring such passion to the argument that it is tempting to attribute their fervour to an unwavering focus on preserving the lives of 'our' troops. While these arguments can at times be motivated by purely political calculations of what would increase the likelihood of moral, legal, or military victory, they can just as easily be driven by close emotional proximity to those who must live, fight, and die on one side of a conflict.

Going beyond this first cut, however, the arguments do not arrange themselves so neatly, and a variety of interesting positions and blind spots emerge. These second-order arguments often display a corporatist bent, motivated not by the immediate justness or unjustness of the cause but by more institutional considerations. Consistently with the historical analysis, some of the most trenchant contemporary voices in maintaining strict separation come from quarters close to, or even part of, the Red Cross and its associated

¹⁷⁷ See, e.g., Lackey, 'Review: A Modern Theory of Just War', 92 *Ethics* (1982) 533. Walzer also addresses relevant arguments directly in his work. See Walzer, *supra* note 2, at 40 ("But these young men", Robert Nozick argues, "are certainly not encouraged to think for themselves by the practice of absolving them of all responsibility for their actions within the rules of war." That is right; they are not. But we cannot blame them in order to encourage the others unless they are actually blameworthy. Nozick insists that they are: "It is a soldier's responsibility to determine if his side's cause is just . . ." The conventional refusal to impose that responsibility the board is "morally elitist." (*Anarchy, State, and Utopia*, New York, 1974, p. 100.) But it isn't elitist merely to recognize the existence of authority structures and socialization processes in the political community, and it may be morally insensitive not to. I do agree with Nozick that 'some bucks stop with each of us.' A great deal of this book is concerned with trying to say which ones those are.')

¹⁷⁸ The criticisms that appeared most pressing at the time were apparently those that looked at the relationship between the state and the individual, the individual's right to rebel against oppressive regimes, and the ability of the international community to interfere in foreign civil wars. In this way the preoccupation of the philosophical literature very much mirrored the legal community's focus on self-determination and freedom fighters: see Walzer, 'The Moral Standing of States: A Response to Four Critics', 9 *Philosophy & Public Affairs* (1980) 209.

interpretative community. Approaching this position from a reductionist analysis – i.e., not weighing the substantive arguments on their merits but rather as an expression of other considerations – one can see how alarming conflation might be to the position of the Red Cross. The normative juxtaposition between the UN and the Red Cross, and the strain of institutional hostility that emerged as a result, was apparent from the outset. The moral weight of the ICRC's work is premised on humanitarianism and impartiality. It is a world view that is oblivious to the political responsibility of the citizen, preferring a 17th century view that does not engage with or take seriously the democratic and political responsibility of civilians.¹⁷⁹ It also has a particular view of combatants, who, once removed from battle, are 'no longer an enemy, but only a human being'.¹⁸⁰ Questioning the moral legitimacy of equal application of *jus in bello* indirectly brings into question the moral legitimacy of the work that the ICRC has done for over a century. It suggests that, rather than contributing to peace through universal humanitarianism, such impartiality may be immoral, contributing to persecution of the truly innocent and indemnifying the guilty.

From a more practical perspective, conflation would in a worst-case scenario require that the ICRC decide the *jus ad bellum* issues in order to draw *jus in bello* consequences. Even the less drastic scenario of having to implement an 'uneven' policy based on the determination, even authoritative, by others on such issues would threaten the ICRC's operations. The ICRC's ability to operate relies on absolute neutrality and an apolitical stance, even in the face of *jus in bello* violations. Even if the external determination of aggression was authoritative, it is unlikely that the aggressor state would accept such a characterization. In the case of humanitarian intervention, while the intervening states may welcome their 'saviour' status and perhaps even accept higher standards of *jus in bello* conduct, it is unlikely that the state whose conduct warranted intervention would have a similar view. Acting on the basis of such determinations might jeopardize the ICRC's access to affected populations during a conflict.

These institutional considerations may serve to explain in part the totalistic nature of the anti-conflation arguments. Even a minor concession to conflation would require the ICRC to forgo its neutrality, implicitly questioning the organization's ethical foundations and practically jeopardizing its operations. Changing underlying normative structures has an ability to undermine the effective operation of institutions. This is a possibility that neither the conflationist nor the separationist literature has explicitly addressed, but which may nevertheless inform much ICRC discomfort. Modern terminology may also contribute to this absolutist tendency. In the 1950s, when writers generally referred to the 'laws of war' as opposed to international humanitarian law, there was no implicit assumption that all the pertinent norms were formulated for the benefit of individuals. Indeed, prior to the 1974–1977 Diplomatic Conference and Additional Protocol I, the division between Geneva Law and Hague Law drew sharp distinctions between norms protecting war victims and those regulating the conduct of hostilities.¹⁸¹ The fusing of these two domains, and new ICRC concern regarding the

¹⁷⁹ Even non-democratic regimes had volunteers – Hitler's willing executioners.

¹⁸⁰ Official Records, *supra* note 4, v. CDDH/SR.1, at 11.

¹⁸¹ Bugnion, 'Droit de Genève et droit de La Haye', 844 *Int'l Rev Red Cross* (2001) 901.

Hague Law,¹⁸² precludes acceptance of the distinctions earlier scholars drew between humanitarian laws of war and many of those norms governing states' rights during the conduct of hostilities (e.g., neutrality, occupation). All law of war having become international humanitarian law, any suggestion of conflation necessarily jeopardizes humanitarian goals.

And yet, as hinted above in the course of the historical narrative, there is something very troubling, usually unacknowledged by the separationist totalistic posture, which goes beyond the internal moral and legal debate. It reinforces a view of polity and war which, on the one hand, has an almost implicit 'pacifist' undercurrent: if countries or societies go to war, in some way they are both at fault, they are both uncivilized, and – given the importance of maintaining the 'innocence' of civilians – those to blame are leaders, not populations. It is not just the troubling moral implications of a position which implicitly undermines the distinction between aggressor and defender which is troubling, but the paternalistic, even patronizing, view of 'civilians' and the implicit rejection of the moral responsibilities of democracy.

A more promising avenue could perhaps be achieved by a return to the Principle of Abraham by replacing the rationale of total innocence of all civilians as the justification of their privileged treatment, with a rationale of non-discernment: the inability of discerning among civilians between the responsible and non-responsible. Thus one would acknowledge that in principle the moral responsibility of civilians could be greater than that of combatants who in modern democracies bear arms on behalf of civilian authorities executing the wishes of the people. Abraham was not challenging the principle of punishing Sodom and Gomorrah. He was challenging the actuality if such punishment could not discern and separate the actually guilty from others. The practical outcome would be the same, but how we account for ourselves matters, and here would be an account that would not trade the nobility of humanitarian protection with the nobility of democracy and personal responsibility.

Those who write from the perspective of the military commander can also have a particular corporatist viewpoint that goes beyond simple belief in the justness of a particular war. Although there is still a desire to win the war, it is driven not by a sense of justice but by institutional duty and the ability to imagine actually being in the combatant's shoes. Worried about how to win the war at hand, about institutional and societal duties towards the soldiers who are given a job to do, they seek out changes that will give a reasonable prospect of victory while minimizing casualties.

There is also a legalist thread running through the debates that resists change. This is in part a reaction to perhaps poorly articulated arguments which fail to distinguish between *lex lata* and *lex ferenda*. The insistence on firmly establishing what the law is may also drive the lawyer's first reaction to the philosophical material, which is not similarly bound by external constraints of texts, state practice, and history. Finally, there may be an additional reflex in the lawyer that insists on formal equality over substantive equality – particularly where the lawyer sees few institutions available to judge what substantive equality genuinely means. Unequal application of a set of

¹⁸² *Ibid.*

rules, particularly within a context of highly skewed power dynamics, raises alarms within the legal sphere. The rule of law, it is insisted, must apply to all in equal measure. To do otherwise would be to diminish the little control that law currently has over the international sphere – and the even more reduced control it has over international acts during war.

Finally, the normative perspectives of human rights and international criminal law have put a very particular lens on the current debate. Whereas pure humanitarianism tends to insist on absolute separation and simply protecting all humans caught up in war, the human rights framework imposes a more complex analysis. While all individuals have fundamental rights, including the right to life, rights violations can be justified. It is not deprivation of life that is forbidden, but *arbitrary* deprivation of life. It is here that we start to see the highly detailed analyses of when killing war may be an acceptable rights violation, and the need to incorporate *jus ad bellum* into the *jus in bello* proportionality analysis. Particularly in situations of asymmetric conflict, the human rights analysis almost automatically imports a law enforcement framework. Rights violations must be necessary – less intrusive means, if available, must be taken. Within this framework, the ‘just’ warrior in an equal contest may more or less be able to follow existing IHL. Once the just party has considerably expanded power as compared to its adversary, however, human rights requirements automatically move towards a law enforcement standard, requiring the just party to effect an arrest where possible. The unjust party, of course, has no right to use any force, lethal or non-lethal.

This human rights position perhaps leads to a more radical position, which again brings us back to a separation argument. There may be, as we noted above, a sense of scepticism about the very claim that war may ever be just, or an assertion that the distinction between just and unjust wars should be substituted with a distinction between desirable and undesirable wars. In this view, the very outbreak of hostilities means that both parties have somehow failed reasonably to negotiate and settle their differences. Thus, the ethical argument goes, in ‘most cases’ the just warrior will also be responsible for the situation of armed conflict and ‘[i]n the absence of any asymmetry between [the ‘just’ and ‘unjust’ warrior] there are no grounds for either losing his right not to be killed by the other’.¹⁸³ This viewpoint also finds reflection in the legal discourse. Here is a line from the recent decision of the Grand Chamber of the European Court of Human Rights in the *Demopoulos* case concerning the Cyprus conflict:

[T]he Court finds itself faced with cases burdened with a political, historical and factual complexity flowering from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. (*Demopoulos*, Recital 85)

It is noticeable how the Court lumps together the aggressor and the defender, the just and unjust warrior, in a kind of ‘plague on both their houses’, and then explicitly states that its task is to protect individuals and shield them – in effect from the follies of the parties.

¹⁸³ Lazar, *supra* note 154, at 702–703.

The consequences are clear – if (at least informally, or *sub silentio*, or subconsciously) one ceases truly to believe in the justness of the just war claim, then naturally the argument to incorporate any *jus ad bellum* considerations into the elaboration of *in bello* obligations loses much of its bite. The unlike warriors become like warriors. As described by Seth Lazar:

combatants on both sides of most wars are indeed symmetrically situated, but not in the way Walzer imagined: rather than killing with equal right, most of the killing they do breaches fundamental duties.¹⁸⁴

...

If warfare is ever to be justified – and pacifism is a serious possibility here – some other reasons must override the rights of the slaughtered. Since even the best wars will be massively duty-breaching endeavors, we should be considerably more cautious about warfare than we currently are.¹⁸⁵

Ryan Goodman proposes replacing ‘just’ and ‘unjust’ with ‘desirable’ and ‘undesirable’. Humanitarian interventions to prevent, say, genocide are desirable. ‘Classical’ conflicts involving use of force are undesirable – regardless of who is aggressor and defender, who legally just and unjust. The debate might represent an interesting regress to the 1800s where the *jus in bello* was pure, since there was much less bite in law to the distinction between the just and unjust. Then, all parties were just. The new tendency is to regard all parties as unjust, in that they were unable to resolve their dispute pacifically, and hence a pure *jus in bello* should be applied to protect the individual from state follies, the key difference being that, instead of an unlimited recourse to war, the focus is on recognition of a near-absolute ‘right to peace’.¹⁸⁶

The shift towards human rights and criminal law perspectives, and away from the ICRC’s initial vision of good works, empathy, and universal humanitarianism reflects a broader trend. Legally and morally we live within a rights world-view, a Hohfeldian perspective that demands a one-to-one ratio of rights and duties. This rights-based discourse has become so ingrained as part of our contemporary culture that we can no longer conceive of duties without corresponding rights.

But this need not be so. Biblical normativity of the type we find in the astonishingly modernist Leviticus 19 is a blueprint for social justice which is rooted entirely on duty rather than rights. There seems to us as much moral heft and practical promise in a norm that appeals to the sense of honour and duty of the soldier, general, statesman, as there is in a world-view which is based on rights and self-interest.

¹⁸⁴ *Ibid.*, at 703.

¹⁸⁵ *Ibid.*

¹⁸⁶ Karima Bennoune, who advocates for a ‘human rights approach to armed conflict’ similarly sees a human rights framework as moving towards a ‘right to peace’ – albeit through the conflation of *jus ad bellum* and *jus in bello*: Bennoune, ‘Toward a Human Rights Approach to Armed Conflict: Iraq 2003 Symposium: Rethinking Reconstruction After Iraq’, 11 *U California Davis J Int’l L. & Policy* (2004–2005) 171.