

THE FISSION AND FUSION IN
INTERNATIONAL USE OF FORCE:
RELATING UNLAWFUL USE OF FORCE
AND THE WAR CRIME OF
DISPROPORTIONATE FORCE NOT
JUSTIFIED BY MILITARY NECESSITY

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Jus ad bellum and jus in bello are not disparate in operation. There are several points of intersection in the two concepts, commencing with the context in which they apply, and further, in their interpretation of the general principles of proportionality and necessity. Although proportionality connotes divergent theoretical notions depending on the backdrop against which it is set, in practice, these notions are often fused together. However, points of fission (divergence) still persist. The best example of which is in the context of ‘The Crime of Disproportionate Use of Force’ where the difference between the two notions of ‘proportionality’ can be described as the limitations on the overall force used to respond to an armed attack under jus ad bellum as opposed to the balance between the anticipated military advantage weighed against the resulting loss of civilian life under jus in bello. The authors argue that there is need for fusion (convergence) between jus ad bellum and jus in bello particularly in relation to modern war crimes trials in order to ensure that both principles have practical significance. This would ensure further convergence between jus in bello and jus ad bellum. To fulfill the shielding purpose of law in the context of armed conflict, more fusion between these two concepts must be embraced in all fora, including, conceptualization of crime of aggression and distinguishing between combatants and civilians.

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I. INTRODUCTION

The cardinal principle governing *jus in bello* demands a distinction between combatants and civilians and authorizes the attack of the former. In essence, loss of civilian life is prohibited unless it occurs within the context of the principles of necessity and proportionality. In contrast, the cardinal principle governing *jus ad bellum* is that States are not allowed to use force unless done in individual or collective self-defense. Based on the foregoing, then, two questions arise. First, can the use of force in wars of aggression be prosecuted as the war crime of disproportionate force not justified by military necessity? Second, do the principles of proportionality and necessity play an extended role where *jus ad bellum* has been observed, hence creating a wider justification to an eventuality of loss of civilian life or negating lawful use of force to unlawful use not justified by any military necessity?

Prior to the development of modern international law and the advent of the League of Nations and the United Nations, the legal rules that governed the use of force by nations were derived solely from the norms of customary international law. These were norms that would arise from the convergence of general and consistent State

practice and *opinio juris*.¹ Early attempts at developing a concrete and binding legal statement on the prohibition of the use of armed force through multilateral treaties such as the Covenant of the League of Nations,² and the Kellogg-Briand Pact³ proved ineffective and were ultimately replaced by the United Nations Charter.

In this regard, the authors posit that there is need for fusion (convergence) between *jus ad bellum* and *jus in bello* particularly in relation to modern war crimes trials in order to ensure that both principles have practical significance. The principles of proportionality and necessity as used in *jus ad bellum* and as used in *jus in bello* can be fused for practical significance and to bolster the position of *jus ad bellum* and *jus in bello* in enforcement of international criminal law. The authors argue that in the assessment of proportionality and necessity under *jus in bello*, international tribunals can, and have in the past, considered proportionality and necessity in *jus ad bellum*. This makes the case for the fusion of the concepts in the unlawful use of force vis-à-vis the war crime disproportionate use of force, not justified by military necessity.

For easier comprehension, the authors have divided the essay into three broad parts: Part I assesses *jus ad bellum* in a generic sense and its relationship to the cases of disproportionate use of force as viewed from a *jus ad bellum* point of view. Part II then addresses the points of fission (divergence) and fusion (convergence) between *jus ad bellum* and *jus in bello*. Here the authors do not attempt any arguments on whether there should be any kind of fission or fusion between the two broad parts. Part III then endeavors to argue for the construction of

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1. MALCOLM N. SHAW, INTERNATIONAL LAW 73 (6th ed. 2008); JOHN H. CURRIE ET AL., INTERNATIONAL LAW: DOCTRINE, PRACTICE, AND THEORY 120-144 (2007).
 2. Covenant of the League of Nations art. 12, June 28, 1919, 225 Consol. T.S. 188, *available at* http://avalon.law.yale.edu/20th_century/leagcov.asp#art12 [<http://perma.cc/S7PK-VS2R>] (“The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.”).
 3. Kellogg-Briand Pact art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, *available at* <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> [<http://perma.cc/78S2-TGJ6>] (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”).

more fission between the two areas of law using the war crime of disproportionate use of force not justified by military necessity as a backdrop. The last part in this section seeks to draw a case for more fusion by using the dichotomy of combatants and civilians in *jus in bello* and *jus ad bellum* as a focus area. In this part the authors argue for a convergence of the two broad concepts of international law for morally justifiable outcomes. This is done with the background understanding that the two concepts are currently viewed as divergent when it comes to enforcement under international criminal law.

A. Unlawful Use of Force: Assessing Jus Ad Bellum

1. Introduction

While the most common starting point in the assessment of the modern unlawful use of force is the United Nations Charter, the idea of a “just war” is in essence a transformation of older ideas.

Two Catholic saints, Augustine and Thomas Aquinas are credited with formulation of a “just war” doctrine.⁴ This doctrine is characterized by three main principles: the authoritativeness of the initiator of war, just reasons for waging war, and the legitimate intentions of war.⁵ Due to obvious ties of the foregoing writers to the Church, this viewpoint was characteristically founded on natural law.⁶

Although this doctrine has been expanded numerously in subsequent years, the cardinal principles have been maintained, as evidenced by the relevant provisions in the United Nations Charter.⁷

Article 2(4) of the Charter contains the general proscription against the use of force: “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial sovereignty or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁸ This provision is couched in mandatory terms, exposing the seriousness in which the concept of *jus ad bellum* is regarded.

However, Article 51 of the UN Charter then contains a limited exception to the general prohibition on the use of force:

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4. Sheng Hongsheng, *The Evolution of Law of War*, 1 CHINESE J. OF INT’L POL. 267, 267-301 (2006).
 5. GU DEXIN, ZHAN ZHENG XIN LUN [NEW THEORY OF WAR] 48 (1990); Peter Haggemacher, *Just War and Regular War in Sixteenth Century Spanish Doctrine*, 32 INT’L REV. RED CROSS 434, 436 (1992).
 6. See LI JIASHAN, GUO JI FA XUE SHI XIN LUN [NEW COMMENT ON HISTORY OF INTERNATIONAL LAW THEORY] 43 (1987).
 7. U.N. Charter art. 1, ¶ 1.
 8. *Id.* at art. 2, ¶ 4.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security...⁹

This article, therefore, provides for the permissible cases when a State may use armed force, that is, in situations of individual or collective self-defense. However, there is a caveat attached: there must be a United Nations Security Council Resolution supporting this action. Thus, the assumption here is that when a State takes up arms against another State or entity, said State or entity will be acting in violation of the rule prohibiting the resort to force in international law embedded in Article 2(4) of the UN Charter. This serious violation found in Article 2(4) is termed aggression.¹⁰ The entity who violates this provision against a State would therefore be an aggressor under international law. For purposes of this article, the party that is subject to the aggression will be referred to as the “self-defending State or entity.”

Therefore, what is referred to as unlawful use of force is really the violation of Article 2(4) of the UN Charter. If States or non-State entities resort to use of force other than as authorized under the UN Charter, that use of force is unlawful under international law. This means that while the general rule seems to be founded on the prohibition of the use of force, the use of force in international relations is not unlawful, except as authorized by the United Nations Charter. Despite this sense of general prohibition on the resort to the use of force in the UN Charter, conflict and hostilities that involve the use of armed force remain constant features of the international politics.¹¹

9. *Id.* at art. 51.

10. U.N. Charter, *supra* note 7, at art. 2, ¶ 4. While it seems easy enough, the definition of aggression has been the source of a huge struggle over the years in international relations and politics. Recently in 2010 an amendment has been proposed to the Statute of the International Court of Justice including aggression as an international crime to be recognized by the International Criminal Court (addressed in Part III). *See* Assembly of States Parties, Res. RC/Res.6 (June 11, 2010).

11. Elihu Lauterpacht, *The Legal Irrelevance of the “State of War,”* 62 AM. SOC’Y OF INT’L L. PROC. 58, 59 (1968).

From this general principle on *jus ad bellum* four legal consequences come to bear. The first being that what was previously a legal status of a “declaration of war”¹² no longer exists. States can no longer avail themselves to what was previously known as “belligerent rights.” These rights include “the seizure of enemy ship or other property at sea or on land under the law of naval warfare, the law of land warfare, and the trading with the enemy legislation, as well as rights of visit, search, and seizure exercised with respect to neutral merchant shipping.”¹³

The second is that the law of neutrality has been placed within new confines, although not eliminated entirely. One State may assist another State, but only when that State is acting within the confines of the law, for example when acting in individual or collective self-defense.¹⁴ Previously, there was an obligation for third parties to remain neutral, refrain from assisting belligerents, and to treat combatants neutrally.

The third is that a State that employs force unlawfully cannot validly secure sovereignty over territory captured during war. Fourth, and lastly, the use of force by the State acting lawfully must be proportionate to the degree of force employed against it.¹⁵ This fourth consequence of the unlawful use of force is linked to the *jus in bello* crime of disproportionate use of force not justified by military necessity. This is the limb on which this essay attempts to focus.

While the norm prohibiting the use of force in Article 2(4) of the UN Charter was previously envisioned to be binding as against member States of the UN only, the norm has crystallized into what is known as a peremptory norm of international law or *jus cogens* norm.¹⁶ This is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which

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12. *See Id.* (explaining that the term “war” refers to a narrow legal and technical situation which begins with a declaration of war and ends with a peace treaty).
 13. Richard R. Baxter et al., *The Legal Consequences of the Unlawful Use of Force Under the Charter*, 62 AM. SOC’Y INT’L L. PROC. 68, 68-9 (1968).
 14. IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 402-04 (1963).
 15. *See* Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1144 (1966) (“Elementary principles of . . . international law require that force legitimately used must be . . . somewhat proportional to the provocation.”).
 16. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, 100 ¶ 190 (June 27) (indicating that the I.C.J. has regarded the prohibition of the use of force as being a conspicuous example of a rule of international law having the character of *jus cogens*).

no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁷ Since *jus cogens* is part of international customary law, it is legally binding for all members of the international community, regardless of whether they have expressed their approval or disapproval of a particular norm or not.¹⁸ The violation of *jus cogens* norms creates a right for any State in the international community to seek redress because the obligation that these norms create is held as against the entire international community (*erga omnes*).¹⁹

2. Unlawful use of force in *jus ad bellum*: The Case of Disproportionate Use of Force

As stated in the previous section, one of the consequences of the general principle on the prohibition of the use of force is that a lawful act of self-defense might be negated and made unlawful if it is disproportionate to the aggressor’s initial attack. Thus, in *jus ad bellum* the use of force in self-defense must be strictly confined to a set defensive objective.²⁰ Under *jus ad bellum*, proportionality is applicable to any use of force, be it legally controversial, such as in humanitarian interventions,²¹ or in instances of legitimate use of force authorized by the UN Security Council (UNSC).²² The principle of

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17. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (It is important to stress here however, that the definition is given in the context of the law of treaties and explains the term by effect of these norms as being non-derogable by a treaty. But at the same time, this definition has also been adopted to general international law and has been used outside the field of the law of treaties.).
 18. See Rudolf Bernhardt, *Customary International Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 898, 904 (Rudolf Bernhardt ed., 1992) (“[I]t remains doubtful . . . how long an objector can remain outside the binding force of customary norms.”).
 19. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83, at art. 48 (Jan. 28, 2002) (explaining that rights created by *jus cogens* norms); See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 1, ¶ 33 (Feb. 5) (clarifying obligations under *erga omnes*).
 20. Dapo Akande, *Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, 68 BRIT. Y.B. INT’L L 165, 191 (1997).
 21. See Christine M. Chinkin, *Kosovo: A “Good” or “Bad” War?* 93 AM. J. INT’L L. 841, 844 (1999); See also Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo* 93 AM. J. INT’L L. 834, 839 (1999).
 22. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 631 (Bruno Simma et al eds., 3rd ed. 1994) (illustrating that in this case, proportionality would be measured between the UNSC military action and the general objective that this action is authorized to pursue according to the relevant UNSC resolution).

proportionality is well established in self-defense by States both in State practice²³ and case law.²⁴

3. Unlawful use of force in *jus in bello*: The Case of Disproportionate Use of Force

There are certain principles that underlie the law of armed conflict and must be observed during the occurrence of any type of armed conflict. These principles are especially important as gap fillers when no specific rule governs a certain situation. The traditional approach was anchored on three principles: 1) military necessity, 2) humanity, and 3) chivalry.²⁵

The principle of military necessity enables a belligerent to apply compulsion and force of any kind to the extent necessary to realize the purpose of the war. This concept presupposes controlled force and that the force is necessary to achieve, as quickly as possible, the partial or complete submission of the enemy with the least possible expenditure of lives, resources, and money.²⁶ The principle of humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle confirms the now celebrated principle of distinction, which provides for the basic immunity of civilian persons and property from being attacked during an armed conflict. The principle of chivalry refers to the conduct in armed conflicts where certain recognized formalities and courtesies were observed. These formalities included, for example, the prohibitions against

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23. The following States have made similar statements, *see* Russia (UN Doc S/PV.5489, 14 July 2006, 7); Qatar (UN Doc S/PV.5493, 21 July 2006, 14); China (UN Doc S/PV.5489, 14 July 2006, 11); Japan (UN Doc S/PV.5489, 14 July 2006, 12); France (UN Doc S/PV.5493 (Resumption 1), 21 July 2006, 11); Slovakia (UN Doc S/PV.5493, 21 July 2006, 19); Finland (UN Doc S/PV.5493 (Resumption I), 21 July 2006, 16); Greece (UN Doc S/PV.5489, 14 July 2006, 17 and (UN Doc S/PV.5493 Resumption 1), 21 July 2006, 3); *See also* (UN Doc S/PV. 1320, 16 Nov. 1966, 19) (providing state reactions to military actions conducted by Israel in the past and, in particular, statements in relation to the 1966 Israeli intervention in Jordan of the United Kingdom).
24. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US), Judgment, 1986 I.C.J. ¶ 237 (June 27) [hereinafter Nicaragua v US]; Oil Platforms (Iran v US), Judgment, 2003 I.C.J. ¶ 76-77 (Nov. 6); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, 2005 I.C.J. ¶ 147 (Dec. 19).
25. William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 93 (1982).
26. *See* Robert W. Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49, 54-58 (1980) (explaining the implications of the principle of military necessity).

dishonorable or treacherous conduct and against the misuse of enemy uniforms or flags of truce.²⁷ The days of gentlemanly warfare are long gone, however, and only small vestiges of this principle remain.

The balance between the principle of military necessity and that of humanity then bears upon the principle of proportionality. A military commander is not allowed to cause collateral injury to noncombatants or damage to civilian objects that is disproportionate to the military advantage derived from an operation.²⁸

In *jus in bello* the analysis is based on the incidental loss of civilian life. Proportionality is referred to here in both legal literature,²⁹ as well as international case law,³⁰ in relation to civilians and civilian objects, as requiring that attacks do not cause excessive damage to the latter in comparison with the direct and concrete military advantage anticipated from attacks. Launching an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of both, and which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited under *jus in bello*.³¹

4. Conclusion

From the latter analysis we see that the principle of proportionality plays an important role in the laws of armed conflict. In *jus ad bellum* it gauges the lawfulness of the strategic goals in the use of force for self-defense, and in *jus in bello* it gauges the lawfulness of any armed attack that causes civilian casualties.

B. Points of Fusion: Proportionality Under jus in bello and jus ad bellum

1. Introduction

The most obvious point of fusion between the two notions is the similarity in their field of application. Both notions govern the area of

27. HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 227 (7th ed. 1952).

28. Fenrick, *supra* note 25.

29. Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering* 34 INT'L REV. RED CROSS 98, 109-10 (1994); Hamutal Esther Shamash, *How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality*, 2 ISR. DEF. FORCES L. R. 103, 104 (2006); Bernard L. Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification* 10 CORNELL INT'L L. J. 134, 134 (1977).

30. Prosecutor v Gotovina and Others, Case No. IT-06-90-T, Judgment, ¶¶ 1171, 1172, 1183, 1191 (Int'l Crim. Trib. For the former Yugoslavia Apr. 15, 2011); Prosecutor v. Galic, Case No. IT-98-29-A. Judgment, ¶ 190 (Int'l Crim. Trib. For the former Yugoslavia Nov. 30, 2006).

31. Akande, *supra* 20, at 209.

armed conflict, with both trying to act as restraints upon activity that would be considered legally unjustified. It is well settled for *jus in bello*, for instance, that the means and methods of warfare are not unlimited.³² Proportionality under *jus ad bellum* also has a restraining role in the conduct of hostilities as the self-defending State has to consider the following factors: damage caused to the aggressor State by the defending action, the means used by the State acting in self-defense, and the duration of the whole military operation.³³

The other point of fusion is the balancing nature that each notion requires and the factors that are to be considered when such analysis is being undertaken. Indeed, the two notions of proportionality do not actually require striking a balance between two similar quantities, as any proportionate balance normally does. Rather, they require putting an action in relation to its aim; this action, which includes the damage that it causes, is required not to exceed what is necessary to achieve the intended aim. Basically, this is a teleological balance exercise, which results from the application of a necessity test. In this sense, the two notions of proportionality have a close relationship with necessity.³⁴

2. The Fission: The Crime of Disproportionate Use of Force Not Justified By Military Necessity

The Rome Statute of the International Criminal Court (ICC) defines war crimes as, *inter alia*, “serious violations of the laws and customs applicable in international armed conflict” and “serious violations of the laws and customs applicable in an armed conflict not of an international character.”³⁵ In relation to proportionality, the ICC Statute defines a war crime as the act of:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects.... Which would be clearly excessive in relation to the concrete and direct *overall* military advantage anticipated.³⁶

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 35, July 8, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter Protocol I].

33. *Nicaragua v US*, *supra* note 24, at ¶ 237.

34. Raphael van Steenberghe, *Proportionality under Jus ad bellum and Jus in bello: Clarifying their Relationship*, 45 ISR. L. REV. 107, 113 (2012).

35. Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC].

36. *Id.* at art. 8(2)(b)(iv).

This principle is anchored on the “fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.”³⁷ Proportionality under *jus in bello* is measured by reference to the “immediate aims” of each single military attack, rather than the “ultimate goals” of the broader military action.³⁸

The difference between the two ‘proportionality principles’ can be described as the limitations on the overall force used to respond to the grievance under *jus ad bellum* as opposed to the balance between the anticipated military advantage of attacking a particular objective, weighed against the resulting loss of civilian life under *jus in bello*.³⁹ Steenberghe refers to this distinction as the “general vs. particular dichotomy.”⁴⁰ The two notions also have a fission of foundational logic. While the proportionality requirement in *jus ad bellum* is based on a superior right of the attacked State in regard to the attacker, the legal regulation of the means and methods of warfare is dominated by the principle of the parity of the belligerents and by the concomitant principle of the respect owed by each of them to the interests and values of a humanitarian nature.⁴¹

While in theory both notions seem to be distinct, in practice the two proportionality principles are often merged.⁴² In applying the proportionality principle in *jus ad bellum*, one would have to analyze the choice of weaponry, which then has implications for *jus in bello*.⁴³ On the contrary, Gardam argues that the proportionality requirement in *jus ad bellum* has no humanitarian content: “it was traditionally related exclusively to limitations on the damage of the territory of a state and of third states.”⁴⁴ This paper specifically refutes this

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37. Judith Gardam, *Proportionality and Force in International Law* 87, AM. J. INT’L L. 391, 391 (1993).
 38. Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963, 976 (2008).
 39. Gardam, *supra* note 38.
 40. See van Steensberghe, *supra* note 35, at 115.
 41. Enzo Canizzaro, *Contextualising Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88: 864 INT’L REV. RED CROSS 779, 782 (2006).
 42. *Id.* at 781.
 43. Christopher Greenwood, *Jus ad bellum and Jus in bello in the Nuclear Weapons Advisory Opinion*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 258 (Laurence Boisson de Chazournes et al eds., 1999).
 44. Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 258 (Laurence Boisson de Chazournes et al eds., 1999).

argument as it has negative implications for deterring the arbitrary loss of civilian life, which is considered an important goal in the theatre of war.

C. Constructing a Fusion: The Crime of Disproportionate Use of Force not justified by Military Necessity

1. Conceptualizing the Crime of Aggression

While under *jus in bello* certain grave violations of the Geneva Conventions, the Additional Protocols, and further the violation of the proportionality requirement in Article 8(2)(b)(iv) can be prosecuted as war crimes. The unlawful use of force that violates the proportionality requirement in *jus ad bellum* cannot be prosecuted as such. This problem is compounded by the fact that defining aggression, which is the precursor of a self-defending action from another State, has been highly controversial since day one of the negotiations that culminated in the adoption of the Statute of the International Criminal Court (ICC Statute) by the Rome Diplomatic Conference of Plenipotentiaries in 1998.⁴⁵ Two contentious issues arose in the discussions on the crime of aggression: 1) how was State action going to be translated to individual liability; and 2) what was the role to be afforded to the United Nations Security Council as a filter for prosecutions of the crime of aggression.⁴⁶

The crime of aggression was included in the subject-matter jurisdiction of the ICC,⁴⁷ but the competence of the ICC to prosecute aggression was made subject to the adoption of a definition of the crime and the circumstances under which the ICC could exercise jurisdiction.⁴⁸ Following years of intensive deliberations and negotiations, the matter was finally settled by the Review Conference of the International Criminal Court that was held in Kampala, Uganda on May 31 through June 11, 2010. The definition of the crime of aggression by an individual is based on an act of aggression committed by a State.

The definition adopted in Kampala simply repeats the provisions of the General Assembly Resolution 3314 (XXIX) of December 14, 1974, dealing with acts of aggression.⁴⁹ It defines aggression as the use

45. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L. J. 161, 170-71 (2008).

46. See Silvia A. Fernandez de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L. J. 589, 590 (2002).

47. ICC, *supra* note 36, at art. 5(1)(d).

48. ICC, *supra* note 36, at art. 5(2).

49. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974).

of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition, and then goes on to list a number of acts that constitute acts of aggression. The crime of aggression was defined in Kampala by general agreement, as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The crime of aggression thus came to be defined as (a) a leadership crime; (b) flowing forth from an act of aggression; and (c) subject to U.N. Charter constraints.

The amendments to the ICC Statute approved by the Review Conference will enter into force following ratification of the amendments by no less than thirty States Parties. Furthermore, implementation of the decisions taken in Kampala with respect to the crime of aggression will be kept on ice until at least January 1, 2017, after which a decision to implement the same must again be approved by the same majority of States Parties required for amendments of the ICC Statute. Although this outcome is in a sense disappointing, the fact that nations of the world have now agreed on a definition of aggression will most likely serve as a deterrent against unbecoming military action by trigger-happy regimes.⁵⁰ This outcome was neatly encapsulated by Ambassador Stephen Rapp and Prof. Harold Koh, the leading members of the American delegation as follows:

The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1, 2017. The prosecutor cannot charge nationals of non-state parties, including the U.S. nationals, with the crime of aggression. No U.S. national can be prosecuted for aggression as long as the U.S. remains a non-state party. And if we were to become a state party, we’d still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.⁵¹

Without the ICC having jurisdiction to deal with the crime of aggression today, it seems impossible to find ways of prosecution individuals from aggressor States and self-defending States who use

50. See Johan Van der Vyer, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 U. MIAMI NAT’L SEC. & ARMED CONFLICT L. REV. 1, 2 (2010) (discussing the consequences of entering into force the ICC Statute that the Review Conference approved).

51. Harold Koh, Legal Advisor U.S. Dep’t of State, U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conf. (June 15, 2010).

unlawful force that is disproportionate and not justified by military necessity.

2. Unlawful Use of Force as a War Crime

Violators of *jus ad bellum* requirements seemingly can still walk away scot-free unless certain practical solutions can be found in the ICC Statute. A practical solution can be constructed from the current international crimes over which the ICC has jurisdiction. The ICC can exercise jurisdiction over the crime of genocide, crimes against humanity, and war crimes.⁵² In the case of unlawful use of force that is disproportionate and not justified by military necessity as a crime, the closest link can be drawn to war crimes.

The ICC Statute distinguishes three categories of war crimes:

1) First, gave breaches under the four 1949 Geneva Conventions. The statute merely repeats the definitions contained in the four Geneva Conventions (Articles 50 of Geneva Convention I,⁵³ 51 of Geneva Convention II,⁵⁴ 130 of Geneva Convention III,⁵⁵ and 147 of Geneva Convention IV.⁵⁶)

2) The second category of war crimes covers other serious violations of the laws of war and customs applicable in international armed conflicts.⁵⁷

3) The third category introduces serious violation of Article 3 common to the Geneva Conventions, which applies to non-international armed conflicts. Common Article 3 includes a prohibition of acts such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

52. ICC, *supra* note 36, at art. 5.

53. Convention (I) for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

54. Convention (II) for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85.

55. Convention (III) relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

56. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

57. These crimes are derived from various sources. They reproduce to a large extent the rules from: the 1907 Hague Convention respecting the Laws and Customs of War on Land Oct. 18, 1907, 2277 T.S. No. 539, 1 Bevans 631; Protocol I, *supra* note 33; the Hague Declaration (III) Concerning Expanding Bullets, Sept. 4, 1900, 187 C.T.S. 459; Geneva Gas Protocol, June 17, 1925, 94 L.N.T.S. 65, 26 U.S.T. 571-72.

The selection of war crimes under the ICC Statute was based on two criteria. First, whether the norm should be part of customary international law, given that not all treaties of international humanitarian law defining war crimes are universally accepted, and second, whether the violation of the norm would give rise to individual criminal responsibility under customary international law.⁵⁸ The concern, therefore, in the current analysis is whether the illegal use of force that is not proportional and which is not justified by military necessity can be prosecuted as a war crime. Does the disproportional use of force not justified by military necessity under *jus ad bellum* qualify as a war crime?

We have already seen that the crime of aggression cannot currently be prosecuted under the Rome Statute. What if an aggressor uses force that is disproportionate and not justified by military necessity—can the individuals who ordered such attacks be found liable for war crimes? What about self-defending States that retaliate with force that is disproportionate and not justified by military necessity? Is the use of such force unlawful? And can individuals who ordered such attacks be found liable for war crimes?

In any armed conflict, civilians are bound to be killed and injured, and property is bound to be damaged or destroyed. In the endeavor to protect non-combatants and civilians in any armed conflict, the law must seek to balance the needs of humanity with the practical inevitabilities of warfare.⁵⁹ The prime example of such a balance is found in Articles 51(5), 57(2) and 85(3)(b) and (c) of Additional Protocol I.⁶⁰ The prohibition here is of “excessive” incidental loss to civilian life, which accepts by implication the occasional unavoidability of incidental losses which are not “excessive.” While this protection for civilian life is a fundamental principle in *jus in bello*,⁶¹ the principle of proportionality regarding defensive attacks in *jus ad bellum* is also aimed at the protection of human life.

Article 8(b)(iv) of the Rome Statute employs similar language to Additional Protocol I when referring to war crimes:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe

58. Herman von Hebel & D. Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 392 (Roy S.K. Lee ed., 1999).

59. Fenrick, *supra* note 25, at 98.

60. Protocol I, *supra* note 33, at art. 8(b)(iv).

61. Michael Bothe, *War Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 397 (Antonio Cassese ed., 2002).

damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Since the language in the Rome Statute is specifically based on the language in Additional Protocol I, it will always be necessary to look back to Additional Protocol I for clarification on aspects of the rule not specifically covered in the Rome Statute.⁶² While the analysis in the Rome Statute can be conducted even on attacks under *jus ad bellum*, the analysis under Additional Protocol I seems to be clearly based on *jus in bello*.

This is one of the great points where a fusion can be constructed. Attacks constructed by States as part of a war of aggression or in self-defense should be analyzed under the strict requirements of the Rome Statute on individual criminal responsibility. But since the origins of such crimes are clearly from *jus in bello* a clear fusion emerges with *jus ad bellum*. Such fusion is by all means desirable because it ensures that the perpetrators of unlawful warfare get just desserts. This deters others who might consider exploiting the gaping hole in the crime of aggression as an advantage for committing war crimes.

The concerns here are: 1) what does it mean to “intentionally launch an attack” with “the knowledge that such attack will cause incidental loss of life to civilians or damage to civilian objects” which will be “excessive” in relation to the “concrete and direct overall military advantage anticipated”, 2) would breaches of *jus contra bellum* by military personnel when waging a war of aggression or in self-defense fit into these broad categories of action?

The rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are important in answering these questions.⁶³ Article 31(1) of the VCLT provides: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This provision explains the first step of the interpretation process, that is, priority should be given to the ordinary meaning of the treaty’s text.⁶⁴ The second step requires that the interpretation proceed under the “context” of the treaty. The term “context” should be understood to automatically include the text of the treaty, the preamble, and possible annexes. The preamble of the Rome Statute provides its

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62. Eric Jaworski, “*Military Necessity*” and “*Civilian Immunity*”: *Where is the Balance?*, CHINESE J. INT’L L. 175, 187 (2003).
63. Vienna Convention on the Law of Treaties, arts. 31 & 32, May 23, 1969, 1155 U.N.T.S. 331.
64. THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 807 (Oliver Corten & Pierre Klein eds., 2011).

object and purpose, which is “to put an end to impunity for the perpetrators of international crimes and thus contribute to the prevention of such crimes”. It is with this object and purpose that we will endeavor to color Article 8(b)(iv) of the Rome Statute with meaning.

Article 31 of the VCLT indicates that the context of a treaty should include the preamble as well as the treaty itself. In addition, the subsequent agreements, such as the Rules of Procedure and Evidence and the Elements of Crimes, are germane to interpretation. Article 32 of the VCLT provides the drafting history, or *travaux préparatoires* of the Statute, as supplementary means of interpretation. for when the ordinary meaning in Article 31 is ambiguous or obscure, or the general rule of interpretation leads to an absurd or unreasonable result.⁶⁵

Article 8(b)(iv) requires that in order for the war crime of disproportionate use of force not justified by military necessity to be committed, there has to be an “intentional launching of an attack.” The fundamental question here remains, what is an “attack” within the meaning of Article 8(b)(iv). The Rome Statute does not define what an “attack” in Article 8 means, but when taken in context especially in relation to Article 8(1), then such an attack has to be large-scale. Therefore, the act of a single soldier shooting a rifle cannot be considered an attack. The provision requires “intentional launching.” Thus, intentionality should be considered the *mens rea* element of the war crime of disproportionate use of force not justified by military necessity. This element requires specific knowledge from the perpetrator that such an attack would have excessive effects on loss of civilian life.⁶⁶

On September 8, 1944, the Germans launched a V2 rocket at London, which was 14 meters (46ft) high and carried a ton (900 kg) of explosives.⁶⁷ The rocket gauged a crater 10 meters (32ft) across, killing three people and injuring twenty-two. This can be seen as a quintessential example of an attack intentionally launched with full knowledge that it would cause excessive civilian casualties without serving any advantageous military aim. The distinction here should not be based on whether the analysis is based on *jus in bello* or *jus ad bellum*. Nor should the analysis on proportionality be influenced on

65. See WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 94 (2004) (discussing the drafting of the Rome Statute).

66. Assembly of State Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes*, 256, ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.2 (2011) [hereinafter *Elements of Crimes*].

67. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1997 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1958 (Yves Sandoz et al. eds., 1987).

these factors when seeking to ensure protection for civilians, in the case where such an attack was self-defensive or one sanctioned by the UN Security Council. This would mean that the individual who ordered such an attack would be found culpable of the unlawful use of force that is disproportionate and not justified by military necessity.

In late January of 1991, as the Gulf War was raging between Iraqi forces led by Saddam Hussein and the UN-backed Gulf War coalition, Saddam successfully launched scud missiles aboard mobile launchers and initiated a series of attacks on Israel, Saudi Arabia, and Bahrain.⁶⁸ In terms of military necessity, these weapons were of low-accuracy, low-reliability, and had little utility as counteroffensive weapons. Within the first week of the attacks, Iraq launched twenty-six missiles against Israel and although they caused relatively little destruction, such attacks fulfill the *mens rea* requirement in Article 8(2)(b)(iv). If such a case is to be prosecuted before the ICC and the number of civilian casualties is shown to be excessive, then it could be very difficult for the perpetrator to disprove that the mental element of the offense was present. This can fill in the lacunae left by the non-prosecution of the international crime of aggression. In the two examples cited above, it would also be impossible to claim that civilian casualties were not the object of such attacks when the missiles “due to their construction, could not be precisely directed at a specific military target.”⁶⁹

The second question under Article 8(2)(b)(iv) is what is the meaning of “excessive” as used to define the disproportionate use of force not justified by military necessity. It should be remembered that this analysis is done in relation to international armed conflicts as required under the elements of crime.⁷⁰ This augurs well with constructing a fusion between *jus in bello* and *jus ad bellum* in the context of prosecuting the war crime of unlawful use which is disproportionate and justified by military necessity. Attacks on civilian populations are clearly forbidden in the context of international armed conflicts in *jus in bello*.⁷¹ It is clear that such killing would be even more reprehensible in the context of aggression under *jus ad bellum* since the primary principle is on the prohibition of resort to armed force. In the case of self-defense, the proportionality is measured as against the aggressive force used. In both cases, from a strictly military point of view, collateral civilian

68. See Sean McKnight, *The Failure of the Iraqi Forces, in THE GULF WAR ASSESSED* 175 (John Pimlott & Stephen Badsey eds., 1992).

69. Heike Spieker, *Civilian Immunity, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 84 (Roy Gutman & David Rieff eds., 1999).

70. *Elements of Crimes, supra* 67 (quoting “The conduct took place in the context of and was associated with an international armed conflict.”).

71. Protocol I, *supra* note 33, at art. 51(2).

life must be lost. The question under Article 8(2)(b)(iv) is whether such loss of civilian life is excessive as compared to the military objective pursued. This analysis can be made in *jus in bello* (immediate military goals) or in *jus ad bellum* (ultimate military),⁷² in the analysis that Steenberghe refers to as the “general vs. particular dichotomy.”⁷³

What is “excessive” in a given scenario might seem very subjective, but a few examples from the past can show that this is not always the case. The raids in Dresden, London, Hiroshima, and Nagasaki during World War II offer clear examples of situations that would be considered excessive. While some commentators have argued that this disproportionate use of force is what ended World War II,⁷⁴ this is a very unsympathetic way of justifying unlawful use of force. Under the strict requirements on proportionality in Article 8(2)(b)(iv), the fatalities witnessed in Hiroshima and Nagasaki would easily constitute “excessive” loss of life. That the United States is not a State Party to the Rome Statute is an argument for another occasion.⁷⁵ It seems clear that the latter attacks by the Allies were not carried out with proportionality and the protection of civilian lives as a major factor in the planning stages. These would fulfill the requirements on the elements of crime under Article 8(2)(b)(iv).⁷⁶

While our analysis of the crime of disproportionate use of force not justified by military necessity has so far been based on international armed conflicts, the vast number of current armed conflicts are non-international. It is regrettable that Article 8(2)(b)(iv) would not apply to non-international armed conflicts. This means certain attacks in the near past that have been criticized as being disproportionate might not fall under the desirable fusion between *jus in bello* and *jus ad bellum* in the context of the crime of disproportionate use of force not justified by military necessity. This is all the more disappointing when one considers recent Israeli attacks in Gaza and the internal conflicts in Syria. ISIS in the Middle East is another threat.

72. Moussa, *supra* note 39, at 965.

73. Van Steenberghe, *supra* note 35, at 115.

74. See Seth Frantzman, *A Short History of ‘Disproportionate Force’*, SETH J. FRANTZMAN (Jan. 22, 2009), available at <http://sethfrantzman.com/2009/01/22/a-short-history-of-disproportionate-force/> [http://perma.cc/MW74-3L2M] (discussing whether Israel used disproportionate force in response to Hamas).

75. See Luke A. McLaurin, *Can the President “Unsign” a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 94, 94 (2006).

76. Jaworski, *supra* note 63, at 189.

3. Constructing a Fusion: *Jus ad Bellum* and *Jus in Bello* in relation to
Combatants and Civilians

The traditional theory of just war comprises two sets of principles: one governs the resort to war (*jus ad bellum*) and the other governs the conduct of war (*jus in bello*).⁷⁷ It is perfectly possible, and it has been argued, for a just war to be fought unjustly and for an unjust war to be fought justly (in strict accordance with the rules).⁷⁸ This therefore necessitates the use of neutral principles to find culpability for combatants who contravene the rules of the just conduct of war regardless of whether the war is just or unjust. This is the “divergence” view, which posits that the two principles *jus ad bellum* and *jus in bello* should not be considered in a way that conflates the two because it would lead to absurd results.

The “convergence” view on the other hand requires that the analysis of the conduct of combatants (*jus in bello*) be done in such a way that would consider whether the war being fought is just or unjust (*jus ad bellum*). The logical result would therefore be one where if a war is considered unjust, the combatants fighting for the unjust cause can be referred to as “unjust combatants” and thus even if they were to kill legitimate combatants involved in the war, their actions would not be justified under *jus in bello*. The consideration here is that an “unjust combatant” fights for an unjust cause *ab initio*. If a war is fought with just cause and maybe due to its unnecessary or disproportionate nature the combatants in such a case would be “just combatants.”⁷⁹

Supporters of the divergence view find that it makes no difference what kind of conduct unjust combatants display in war where they fight without a just cause. Unjust combatants cannot be held criminally liable for killing legitimate targets while involved in an unjust war. They only are liable when they violate the principles of *jus ad bellum*. Therefore, the moral position for both the unjust combatant and the just combatant is indistinguishable. Walzer has called this situation “the moral equality of soldiers.”⁸⁰ The idea was that international law had no option but to accept war, independent of the justice of its origin, as relations between the relevant states and to regulate it. Hence both parties are in equal position in legal terms.⁸¹

77. These principles have been previously described in this essay.

78. MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977).

79. Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 693 (2004).

80. Walzer, *supra* note 79, at 34.

81. WILLIAM EDWARD HALL, INTERNATIONAL LAW 51 (1904).

4. Distinguishing Combatants from Non-Combatants

Under *jus in bello*, combatants are members of the established armed forces of a government who have a legal right to engage in combat operations.⁸² This characterization seems quite easy to decipher until one examines the realm of non-international armed conflicts, which have increased in recent decades. With increased number of non-international armed conflicts, members of dissident forces, other organized armed groups, and militias are now taking part in hostilities. Individuals in such groups do not enjoy the protection accorded to civilians when they take a direct part in hostilities. They are not, however, entitled to the rights accorded to combatants *strictu sensu*.

Combatants enjoy “combatant immunity” under international law, protecting them from prosecution for death or injury to person or damage or destruction of property resulting from combatants acts that otherwise comply with the law of war in armed conflict.⁸³ A combatant:

(i) Has the right to carry out lawful attacks on enemy military personnel and military objectives;

(ii) Is at risk of attack by enemy military forces at any time, wherever located, regardless of the duties or activities in which he or she is engaged;

(iii) Bears no criminal responsibility:

(a). for killing or injuring;

1. enemy military personnel or

2. civilians taking a direct part in hostilities, or

(b). for causing damage or destruction to property incidental to lawful military operations, provided his or her acts, including the means employed to commit those acts, have been in compliance with the law of war; and

If captured:

(i) Is entitled to prisoner of war status (POW),

82. Protocol I, *supra* note 33, at art. 43(2); MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES (A.P. V. Rogers & P. Malherbe eds., 1999); Under Customary IHL, all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.

83. See *U.S. v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D. Va. 2002) (holding that the defendant was not entitled to lawful combatant immunity).

- (ii) May be detained indefinitely until cessation of active hostilities,
- (iii) Is entitled to humane treatment,
- (iv) May be tried for violations of the law of war, and
- (v) May only be punished for violations of the law of war as a result of a fair and regular trial.⁸⁴

The principle of distinction, which is one of the corner stones of *jus in bello*, requires that all involved in the armed conflict distinguish between combatants and civilians. Combatants must thus distinguish themselves from civilians who don't participate directly in hostilities and so may not be attacked.⁸⁵ This position exists independent of the legality of the war. It has been suggested that the impact of the legality of the war "would mean that the members of the aggressor's armed forces would not be entitled to the rights that legitimate combatants would be entitled to or to be protected by other rules of war."⁸⁶ But the *jus in bello* framework frowns upon this position. International Humanitarian Law (IHL) protects the integrity and dignity of the individuals whether they fight for the aggressor or its victims.⁸⁷ Common Article 2 and 3 of the 1949 Geneva Conventions captures this position clearly by stating that IHL is triggered by the commencement of armed conflicts.

A civilian may convert himself into a combatant at any time when the hostilities are taking place. As a matter of fact, every combatant is a former civilian. Nobody is ever born a combatant, everyone is born a civilian. In the same breadth, a combatant may retire and become a civilian. But at any given point a person is either a combatant or a civilian. An individual cannot (and is not allowed to) be both at the same time, nor can he constantly shift from one position to the other at the same time.⁸⁸

It is clear that combatants, whichever side of the divide they are on, have a moral and legal obligation to respect the *in bello* principles.

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- 84. W. Hays Parks, *Combatants*, 85 INT'L L. STUD. SERV. US NAVAL WAR C. 248, 261-262 (2009).
 - 85. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 94, ¶¶ 73-87 (July 9).
 - 86. Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L. Q. 283, 289 (1987).
 - 87. Alexander Orakhelashvili, *The Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, J. CONFLICT & SECURITY L. 157, 160 (2007).
 - 88. Yoram Dinstein, *Unlawful Combatancy*, 79 INT'L L. STUD. SERV. US NAVAL WAR C. 151, 152 (2003).

This is what has been referred to as their *in bello* responsibility. This section addresses whether combatants can be held responsible for participating in an unjust war or a war that is incompatible with *ad bellum* principles. Do they, aside from their *in bello* responsibilities, also have an *ad bellum* responsibility? This would place combatants in a dilemma of having to gauge the justice of the war they are involved in and refuse to fight if the conflict contravenes *ad bellum* principles and whether they just have to follow orders regardless of the just or injustice occasioned by the war.

5. Combatants' *in bello* and *ad bellum* responsibility

A distinction has to be drawn between unlawful combatants under *jus bello* and *ad bellum* principles. In *jus ad bellum*, the state of unlawful combatancy, that philosopher Jeff McMahan calls "unjust combatants," starts with the status of the war. This term borrows heavily from the just war theorists. According to the just war theory, a war is not lawful unless it meets an *ad bellum* purpose. If the war contravenes *ad bellum* (is not self-defense, defense of others, or putting a stop to human rights violations), meaning that the combatants are fighting a war of aggression, then all the actions taken by the combatants should be illegal *ab initio*. In *jus in bello*, unlawful combatants are individuals who engage in covert attempts at combatancy and civilianhood at the same time. Persons engaging in military raids at night, while purporting to be an innocent civilian by day are neither civilians nor combatants: they are unlawful combatants.⁸⁹

The study of the legal and moral responsibility in warfare shows that combatants cannot be held responsible for their *ad bellum* violations.⁹⁰ They can be held responsible for any kind of *in bello* violation. Hence, this kind of responsibility is what ethicists have called their "*in bello* responsibility."⁹¹

According to the moral equality of a soldier's position, it would follow that *jus in bello* applies equally to all belligerents.⁹² This idea, that *jus in bello* and *jus ad bellum* principles operate independently of each other as we have already stated, is well developed in international law.⁹³ An example is found in the Iran-Iraq war. While it

89. *Id.* at 154.

90. See YEHUDA MELZER, CONCEPTS OF JUST WAR 83-88 (1975).

91. Carl Ceulemans, *The Moral Equality of Combatants*, 37 U.S. ARMY WAR C. J. 99, 99 (2007).

92. Yoram Dinstein, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)*, 80 AM. SOC'Y INT'L L. 594, 607 (1988).

93. Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. OF INT'L STUD. 221, at 226, 231 (1983).

is generally accepted that Iraq was the aggressor, Iraqi combatants would still have the privileges accorded to legitimate combatants when captured.⁹⁴ They will have, for instance, the rights to prisoner of war (POW) status. This view therefore construes belligerent status in a way detached from the right to go to war in the first place.⁹⁵

Another view maintains the moral equality of soldiers and justifies the separation of the two bodies of law by asserting that an aggressor in an aggressive war can enjoy the whole range of entitlements of war.⁹⁶ Lauterpacht, however, tends to disagree with this view; he observes that before the emergence of the prohibition of war, all belligerents, whatever the cause of their war, were subject to the same laws of war. After the emergence of the prohibition of war, however, there is no longer a legal right to war. Therefore, an illegal war “can no longer confer upon the guilty belligerent all the rights which traditional international law.”⁹⁷ If this is the case, do combatants who target “legitimate” targets commit blatant acts of murder? Can their actions be justified under this view?

Such practical questions call for further analysis of the view that *jus in bello* can operate unaffected by *jus ad bellum*. In terms of combatant responsibility as autonomous individuals, the necessity for such analysis becomes even more important. If we are to follow the International Court of Justice Advisory opinion in the *Nuclear Weapons* opinion; that a use of force that is proportionate under the law of self-defense, must (in order to be lawful) also meet the requirements of the law applicable in armed conflict which compromise, in particular, the principles and rules of humanitarian law.⁹⁸ The concern here is for the development of a more convergent view than the perpetuation of the divergent view.

II. CONCLUSION

There are many points of fusion and fission of *jus ad bellum* and *jus in bello* in the body of the law of war. There has been controversy over the application of the crime of disproportionate use of force not justified by military necessity and whether certain categories of actions can be prosecuted in the ICC when the analysis is based on *jus ad bellum*. We have argued for more fusion in the context of

94. Ashley J. Roach, *Missiles on Target; The Law of Targeting and the Tanker War*, 82 AM. SOC'Y INT'L L. 154, 156 (1988).

95. Orakhelashvili, *supra* note 88, at 162.

96. Josef L. Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313, 313 (1956).

97. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, BRIT. Y.B. INT'L L. 206, 212-214 (1953).

98. Legality of the Threat or Use of Nuclear Weapons, *supra* note 86, at ¶ 42.

prosecuting the war crime of disproportionate use of force not justified by military necessity. Nonetheless, we have argued for some fission when it comes to the treatment of combatants and civilians under the two bodies of law.

It should be remembered that the aim of international law under the auspices of the United Nations is to ensure that there is international peace and security. War in itself is prohibited and States are encouraged to solve their differences through peaceful means. However, the truth of recent times is very different, and armed conflicts continue to reign supreme in most parts of the world. The introduction of the International Criminal Court (ICC) to act as a center for stopping the impunity that is perpetrated in armed conflicts is greatly welcome. Whatever the outcome of the debate is between *jus in bello* and *jus ad bellum* proponents regarding either the separation or conflation of the two bodies, both sides should work towards ensuring sustainable peace and security amongst States.