

# Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law

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## **Abstract**

*The theoretical separation of jus ad bellum and jus in bello provides important protection during armed conflict. It guarantees that jus in bello will apply regardless of the cause of a conflict. However, this distinction has been challenged by the view that in some cases a situation of self-defence may be so extreme, and the threat to the survival of the state so great, that violations of jus in bello may be warranted. The situation is compounded by the confusion of the principles of necessity and proportionality under jus ad bellum and jus in bello in both academic writing and the jurisprudence of international courts. The dangers of blurring the distinction will be elucidated by examining how jus ad bellum considerations have affected the application of jus in bello in armed conflicts between states and non-state actors.*



International law represents, in essence, a struggle against the subjectivity of politics.<sup>1</sup> Nowhere is this more evident than in the law of armed conflict, which seeks to regulate the conduct of states in an apparently extra-legal situation. After more

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than five decades, Lauterpacht's statement that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law',<sup>2</sup> remains relevant. However, in spite of the criticisms that may be levelled against international humanitarian law<sup>3</sup> for its subjectivity and indeterminacy, in reality – when adequately enforced – it offers important protections for victims of armed conflict.

Strict adherence to international humanitarian law has become all the more imperative in the post Cold-War era, as state practice pushes at the limits of *jus contra bellum* in an endeavour to expand its exceptions to include notions such as pre-emptive self-defence, humanitarian intervention, intervention through UN peace enforcement and combating international terrorism. Inherent in some of these notions is the perception of a 'just' or 'legitimate' cause struggling against some grave and immoral evil, justifying, in the eyes of many, a response that goes beyond the boundaries of international humanitarian law. A case in point is the US-led 'war on terror' in which self-defence against the grave threat of terrorism has been invoked to justify all kinds of excesses, while also implying that the terrorist, whose recourse to force is clearly illegal, is prevented from enjoying the protections of international humanitarian law.

This paper makes a case for the separation of *jus ad bellum* and *jus in bello*, the antithesis of the so-called 'just war' theory, which subordinates *jus in bello* to *jus ad bellum* considerations. This principle of separation provides that international humanitarian law binds all belligerents, regardless of who is the aggressor. However, this distinction has been challenged by recent attempts – deliberate or otherwise – to link the two bodies of law. The first section of this article will examine the relationship between *jus ad bellum* and *jus in bello*, with emphasis on the risks associated with any notion that makes the application of international humanitarian law contingent on a valid *jus ad bellum* case. The next section examines the enigmatic decision of the International Court of Justice (ICJ) in the *Advisory Opinion on the Threat or Use of Nuclear Weapons* and the law on state responsibility to discern whether there exists an 'extreme self-defence' or 'state survival' exception that would allow a state to violate international humanitarian law. In the third section, the paper will address how the conflation of the principles of proportionality and necessity under *jus ad bellum* and *jus in bello* and the confusion of the concepts of 'self-defence', 'necessity', 'emergency' and 'military necessity' have further blurred the distinction between these two bodies of law. In this regard, the jurisprudence of international war crimes tribunals since Nuremberg will be examined, with a view to elucidating how it simultaneously reaffirms and undermines the distinction between the two bodies of law. Finally, the paper will show the dangers of blurring the distinction, by examining how

1 Martti Koskenniemi, 'The politics of international law', *European Journal of International Law*, Vol. 1 (1990), p. 4.

2 Hersch Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952), p. 382.

3 Hereinafter used interchangeably with the terms *jus in bello*, law of armed conflict, and laws of war.

*jus ad bellum* considerations have affected the application of *jus in bello* in armed conflicts between states and non-state actors. The aim is to underscore the inherent limits of the ‘just war’ model, as well as to highlight the importance of maintaining the distinction between *jus ad bellum* and *jus in bello* and their limiting principles (necessity and proportionality under *jus ad bellum*, and military necessity and proportionality under *jus in bello*) in all types of conflict.

## The relationship between *jus ad bellum* and *jus in bello*

The relationship between *jus ad bellum* and *jus in bello* has been described as one of inevitable tension. Contemporary *jus ad bellum* prohibits the use of force, with the exception of the right to individual or collective self-defence<sup>4</sup> and Security Council enforcement measures.<sup>5</sup> *Jus in bello*, on the other hand, has as its aim the conciliation of ‘the necessities of war with the laws of humanity’<sup>6</sup> by setting clear limits on the conduct of military operations.<sup>7</sup> Theoretically, *jus ad bellum* and *jus in bello* are two distinct bodies of law; each has different historical origins and developed in response to different values and objectives.<sup>8</sup> In addition, the consequences of violating *jus ad bellum* differ from those attached to violations of *jus in bello*.<sup>9</sup> However, the fact that most of the principles of *jus in bello* predate the prohibition of the use of force<sup>10</sup> led some to conclude that modern *jus ad bellum* has rendered international humanitarian law superfluous. This tension surfaced in the International Law Commission’s first consideration of the codification of the laws of war.<sup>11</sup> Needless to say, this is no longer a view that holds currency. For, in spite of

4 Charter of the United Nations, 26 June 1945, Art. 51.

5 *Ibid.*, Art. 42. See Saul Mendlovitz and Merav Datan, ‘Judge Weeramantry’s Grotian quest’, *Transnational Law & Contemporary Problems*, Vol. 7 (1997), p. 425.

6 1868 St Petersburg Declaration, in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, Oxford University Press, Oxford, 2000.

7 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226 (hereafter *Nuclear Weapons case*), para. 77.

8 Enzo Canizzaro, ‘Contextualising proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war’, *International Review of the Red Cross*, Vol. 88 (864) (2006), p. 791. The principles of *jus in bello* can be traced back to practices of ancient civilizations. Modern *jus in bello* finds its sources in both customary and treaty law, including the Hague Conventions and Regulations, and the 1949 Geneva Conventions and their Additional Protocols (1977). On the other hand, modern *jus ad bellum* finds its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact and the UN Charter. See Malcolm Shaw, *International Law*, 4th edn, Cambridge University Press, Cambridge, 1997, pp. 807–8. See also Judith Gardam, ‘Proportionality and force in international law’, *American Journal of International Law*, Vol. 87 (1993), p. 391.

9 Christopher Greenwood, ‘The relationship between *jus ad bellum* and *jus in bello*’, *Review of International Studies*, Vol. 9 (1983), p. 227.

10 François Bugnion, ‘Guerre juste, guerre d’agression et droit international humanitaire’, *International Review of the Red Cross*, Vol. 84 (2002), p. 528.

11 ‘It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that although the term “laws of war” ought to be discarded, a study of the rules governing use of armed force – legitimate or illegitimate – might be useful ... It was considered that if the Commission ... were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of

the general prohibition of the use of force, armed conflict remains an everyday reality that necessitates some degree of regulation.

### ‘Just war’ theory and the development of the principle of distinction

Attempts to place war within a legal framework date back to the earliest articulation of the theory of ‘just war’, by virtue of which war was considered a ‘just’ response to illegal aggression.<sup>12</sup> Ultimately, it was a means to restore the rights offended by the aggressor as well as a means of punishment. By relying on the validity of the cause for war, this doctrine brought into place a legal regime that reflected ‘the belligerent’s right to resort to force’.<sup>13</sup> As such, belligerents were not placed on an equal footing when it came to the application of international humanitarian law; they had different rights and obligations depending exclusively on the validity of their cause. In essence, if the cause was just, any means to achieving that end could be justified.<sup>14</sup>

There are important moral and logical defences for the ‘just war’ doctrine. According to the legal maxim *ex injuria non oritur jus*, one should not be able to profit from one’s own wrongdoing. In other words, in moral terms, it seemed unacceptable that an aggressor should benefit from the protections afforded by the laws of armed conflict.<sup>15</sup> However, this view was eventually discarded due to the practical and humanitarian considerations underlying the principle of separation.

Although the distinction between *jus ad bellum* and *jus in bello* appeared in the writings of Grotius,<sup>16</sup> Vitoria and Vattel,<sup>17</sup> it was Kant who first, in the nineteenth century, explicitly distinguished between ‘(1) the Right of going to War; [and] (2) Right during War’.<sup>18</sup> This distinction coincided with the rise of the modern nation-state, and the pre-eminence of the notion of *raison d’état*; war came to be seen as a neutral, de facto situation, such that the cause of war was no longer relevant. This view of violence as a process to be regulated in and of itself is what set the stage for the development of the modern laws of war, by severing their ‘historical dependence on the *jus ad bellum*’.<sup>19</sup> However, the distinction did not really become relevant until the use of force became prohibited in international

the United Nations for maintaining peace.’ *Yearbook of the International Law Commission*, United Nations, New York, 1949, p. 281, para. 18.

12 Robert Kolb, ‘Origin of the twin terms *jus ad bellum* and *jus in bello*’, *International Review of the Red Cross*, No. 320 (1997), p. 554.

13 *Ibid.*

14 *Ibid.*, p. 555. However, Gardam points out that some scholars emphasize that respect for *jus in bello* was an essential element of traditional and modern just war theory. Gardam, above note 8, p. 395.

15 Hersch Lauterpacht, ‘Rules of warfare in an unlawful war’, in G. A. Lipsky (ed.), *Law and Politics in the World Community (Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law)*, University of California Press, Berkeley, 1953.

16 Gardam, above note 8, p. 396.

17 Kolb, above note 12, p. 557.

18 He also distinguished a third category ‘Right after War’, which he describes as the obligation, rather, to establish peace. Immanuel Kant, *The Philosophy of Law. An Exposition on the Fundamental Principles of Jurisprudence as the Science of Right*, 1887, para. 53.

19 Gardam, above note 8, p. 397.

relations,<sup>20</sup> as it brought to the fore the question of whether an ‘aggressor’ was entitled to benefit from *jus in bello*.

### The fundamental distinction between *jus ad bellum* and *jus in bello*

The law of armed conflict is unique in that it grants rights to individuals (enemy nationals, whether combatants or non-combatants) vis-à-vis a belligerent state. Because of its overriding humanitarian objective, *jus in bello* theoretically applies equally as between all belligerents. This principle, known as the equality of application of international humanitarian law, finds articulation in Article 2 of the 1949 Geneva Conventions and in the Preamble to Additional Protocol I (AP I).<sup>21</sup> The principles of humanitarian law were also formulated with the realization that they should not make the conduct of warfare impossible, neither should they make a criminal out of every soldier. If this were so, the law would simply undermine itself. It is thus recognized that a certain degree of infliction of violence, death and devastation by all belligerents is to be tolerated as a natural consequence of the conduct of warfare.<sup>22</sup>

The humanitarian argument in favour of the separation principle is convincing: essentially, victims on both sides of a conflict are equally worthy of protection. Equally cogent are the pragmatic considerations; it could never be hoped that the belligerents would respect humanitarian law if there were not some element of reciprocity in its application. Arguably, linking *jus in bello* to *jus ad bellum* would lead to either of two equally undesirable scenarios. The first is that *jus in bello* would not apply to a war of aggression in its entirety and hence would bind neither of the parties. Needless to say, such an invitation to unrestricted warfare must be rejected on moral and humanitarian grounds. The second scenario is that *jus in bello* restricts only the aggressor and not the party acting in self-defence. Such a proposition is equally problematic, as, without the element of reciprocity, it is inconceivable that either party will respect the principles of international humanitarian law.<sup>23</sup> This is compounded by the fact that there is always controversy surrounding which party is the aggressor; each will undoubtedly argue that they are acting in self-defence and in complete compliance with *jus ad bellum*.<sup>24</sup>

The implications of the distinction are that *jus in bello* has to be completely distinguished from *jus ad bellum*, and must be respected independently of any

20 Kolb, above note 12, p. 557.

21 Additional Protocol I stipulates that the principles of international humanitarian law ‘must be applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties’. Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), *International Legal Materials*, Vol. 16, p. 1391.

22 The Preamble to Hague Convention IV stipulates that the Regulations are formulated with a view to ‘diminish[ing] the evils of war, so far as military requirements permit’, reflecting the pragmatic approach adopted in the codification of the laws of armed conflict. See 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, in Roberts and Guelff (eds.), above note 6, p. 67.

23 See Lauterpacht, above note 15.

24 See Gardam, above note 8, p. 394.

argument concerning the latter. This is so because ‘the two sorts of judgement are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules’.<sup>25</sup> In other words, ‘the limitation on *jus ad bellum* has no influence on *jus in bello*’.<sup>26</sup> This is so even though the two bodies of law operate simultaneously in many situations. For, although the mainstream view is that the two bodies of law apply at different stages of a conflict (*jus ad bellum* affects the legality of the initial recourse to force, whereas *jus in bello* logically applies after hostilities have begun), it is questionable that this sequential distinction is still relevant. Recent developments have entailed that the two bodies of law no longer operate at different stages; once hostilities begin it is necessary to consider and apply both.<sup>27</sup> *Jus ad bellum* thus applies ‘not only to the act of commencing hostilities’ but also to each subsequent act involving the use of force, which has to be justified by reference to the principles of necessity and proportionality.<sup>28</sup> Simultaneous application of *jus ad bellum* and *jus in bello* should not imply that the two concepts are linked or interdependent. Acts that are in complete conformity with *jus in bello* may nonetheless be prohibited under *jus ad bellum*. Similarly, an attack that is inconsistent with *jus in bello* does not necessarily affect the legality of the use of force.<sup>29</sup>

### **Can *jus ad bellum* override *jus in bello*? Rejecting the ‘state survival’ trump card**

Should the perceived ‘justness’ of a belligerent’s cause modify the application of *jus in bello* as between the parties? This question, which raises questions not only of law but also of competing normative principles, admits no easy answer. Just over a decade ago, the ICJ grappled with this question in its 1996 *Advisory Opinion on the Threat or Use of Nuclear Weapons*. The Court’s controversial conclusion, the result of a process of negotiated compromise,<sup>30</sup> was that international law was unclear on the issue. While such a finding vindicates neither side of the debate, it

25 Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, Basic Books Classics, New York, 1997, p. 21.

26 Daniel Warner, ‘The Nuclear Weapons Decision by the International Court of Justice: Locating the *raison* behind the *raison d’état*’, *Millennium: Journal of International Studies*, Vol. 25 (1998), p. 311. Although the aggressor may not be denied the right to rely on international humanitarian law during the war, this view is questionable in the area of the law of neutrality, and possibly belligerent rights after the cessation of hostilities (including acquisition of title over property, but not rights and duties in Occupation of a humanitarian character). See Lauterpacht, above note 15, pp. 104–10 and Greenwood, above note 9, p. 230.

27 Greenwood, above note 9, p. 222.

28 *Ibid.*, p. 223.

29 Gardam, above note 8, p. 392.

30 See Théodore Christakis, ‘De maximis non curat praetor? L’affaire de la licéité de la menace ou de l’emploi d’armes nucléaires’, *Revue Hellénique de Droit International*, Vol. 49 (1996), pp. 355–99. See also Burns Weston, ‘Nuclear weapons and the World Court: ambiguity’s consensus’, *Transnational Law & Contemporary Problems*, Vol. 7 (1997), p. 384.

unfortunately opens the door to the possibility that *jus ad bellum* may override *jus in bello* in certain circumstances.

### The ICJ *Nuclear Weapons* Advisory Opinion: a return to 'just war' theory?

The *Nuclear Weapons* Advisory Opinion, in its key operative paragraph – paragraph 2E of the *dispositif* – reflects the extent of this controversy. The Court, by a vote of seven in favour and seven against, and with the casting vote of the President, held that

In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>31</sup>

Coupled with the preceding statement that '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', one may be led to the conclusion that the use of nuclear weapons may be justified in 'extreme circumstances of self-defence', even if such use violates international humanitarian law. The endless polemical debates inspired by the perplexing wording of paragraph 2E are manifest in the declarations and separate and dissenting opinions of the judges.<sup>32</sup> As Christakis aptly puts it, 'la construction "pythienne" du paragraphe vise à laisser le champ libre au jeu sans fin des interprétations, avec l'espoir que toutes les possibilités s'excluraient mutuellement, la non-conclusion de la cour ayant le don de changer de forme à volonté, comme le mythique Protée!'<sup>33</sup>

Judge Fleischhauer – who criticized the Court's use of 'hesitating, vague and halting terms' – reached the conclusion that nuclear weapons could be used in violation of international humanitarian law in an extreme situation of self-defence threatening the very existence of the state.<sup>34</sup> Presenting the problem as one of competing principles of international law, he contended that any interpretation of paragraph 2E that gives precedence to international humanitarian law over the

31 *Nuclear Weapons* case, above note 7, para. 2E, *dispositif*.

32 For the first time in its history, each of the Court's judges drafted an individual opinion. Judges Guillaume, Fleischhauer and Higgins and Vice-President Schwebel supported the view that recourse to nuclear weapons is lawful under certain conditions, whereas Judges Shahabuddeen, Weeramantry, Koroma, Ranjeva, Ferrari Bravo and Herczegh held it to be categorically unlawful.

33 Christakis, above note 30, p. 391. 'The "snake-like" construction of the paragraph aims to leave the field open for endless interpretation games, with the hope that all possibilities will mutually exclude each other; the non-conclusion of the Court has the gift of changing forms at will, like the mythical Proteus!' (author's translation).

34 Separate Opinion of Judge Fleischhauer, 35 ILM, p. 834, para. 4. The only other judge on the Court who seems to share a similar opinion is Judge Vereshchetin, who held that the Court was 'debarred' from finding a general rule of international humanitarian law that comprehensively proscribes recourse to nuclear weapons. See Declaration of Judge Vereshchetin, 35 ILM, p. 809, para. 2.



inherent right of self-defence is an incorrect statement of the law. Such a contention would deny a state its legitimate right to self-defence, particularly if recourse to nuclear weapons was the last means available to it.<sup>35</sup> Arguing that the rules of international humanitarian law and the right to self-defence are ‘in sharp opposition to one another’ as far as the use of nuclear weapons is concerned, he referred to the general principle that ‘no legal system is entitled to demand the self-abandonment, the suicide, of one its subjects’.<sup>36</sup> This finding goes beyond the claims of any of the nuclear weapons states that appeared before the Court.

By linking application of *jus in bello* with the reasons for going to war,<sup>37</sup> Fleischhauer’s interpretation skews the ‘classical legal distinction between *jus ad bellum* and *jus in bello*’.<sup>38</sup> Such a view relies on the principle of ‘*raison d’état*’ – a Hobbesian notion that subordinates international humanitarian law to the ‘right’ of state survival, obliterating ‘the distinction between the limitations on self-defence and the limitations within humanitarian law’.<sup>39</sup> It also creates a new threshold, that of ‘state survival’, that gives rise to a different level of self-defence, one in which the state is no longer bound by the circumscriptions of humanitarian law.<sup>40</sup> The right to self-defence thus becomes limitless, with huge implications for the rights of victims of armed conflict, as well as for the security of states. Such a loophole represents new ‘doctrinal terrain’,<sup>41</sup> the danger of which is compounded by the Court’s failure to clarify the scope of that separate category of self-defence, and the possible limitations that may apply to it.<sup>42</sup> According to Akande, ‘there is no basis in international law for introducing the notion of the survival of the state as a legitimate excuse for violating the law of armed conflict’.<sup>43</sup> Such a dangerous proposition, after all, would allow states to justify any violation of international humanitarian law – not specifically related to nuclear weapons – in the face of so-called extreme circumstances that threaten their survival. With no international

35 This is in sharp contrast to the view espoused by Higgins that, ‘in the present case, it is the physical survival of peoples that we must constantly have in view’. See Dissenting Opinion of Judge Higgins, 35 ILM, p. 934, para. 41.

36 Fleischhauer, above note 34, para. 5.

37 Warner, above note 26, p. 311.

38 *Ibid.*, p. 301.

39 *Ibid.* He further contends that the ‘right’ to state survival is a right that ‘has never been heard of before’. Dissenting Opinion of Judge Koroma, 35 ILM, p. 926.

41 Richard Falk, ‘Nuclear weapons, international law and the World Court: A Historic Encounter’, *American Journal of International Law*, Vol. 91 (1996), p. 64.

42 It is further unclear what the Court meant by the ‘very survival of a State’; it could possibly mean the ‘political survival of the government of a State, the survival of a State as an independent entity, or the physical survival of the population’. Michael J. Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’, *American Journal of International Law*, Vol. 91 (1997), p. 430. On the other hand, Weiss contends that the term ‘extreme circumstances’ implies that the exception is to be construed very narrowly (physical destruction of inhabitants, or absorption of the functions of statehood by another state). See Peter Weiss, ‘The World Court tackles the fate of the earth: an introduction to the ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons’, *Transnational Law & Contemporary Problems*, Vol. 7 (1997), pp. 325–6. However, in the light of this, would Kuwait have been permitted to use nuclear weapons against Iraq to repel the 1990 invasion?

43 Dapo Akande, ‘Nuclear weapons, unclear law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court’, *British Yearbook of International Law*, Vol. 68 (1997), p. 209.



arbitrator to determine the existence of such circumstances, allowing states to make a determination of 'extreme self-defence' would inevitably lead to a situation of subjectivity, arbitrariness and unpredictability.

However, did the Court really say that extreme situations of self-defence were unlimited under international humanitarian law? In fact, the Court clearly asserted that any threat or use of nuclear weapons contrary to the provisions of the UN Charter was illegal, and that the exercise of the right to self-defence was limited by the conditions of necessity and proportionality.<sup>44</sup> The Court also affirmed in no uncertain terms that the principles of humanitarian law apply to nuclear weapons.<sup>45</sup> In paragraphs 90 and 91, the Court found that whereas recourse to nuclear weapons was 'scarcely reconcilable' with humanitarian law, it could not ascertain that it would necessarily violate international humanitarian law in every circumstance.<sup>46</sup> This goes hand in hand with the assertions made by nuclear weapons states that such weapons can be used in a variety of different circumstances with different effects. In light of these findings, various interpretations have been advanced to avoid the controversial subordination of *jus in bello* to *jus ad bellum*. One suggestion is that the Court envisioned a scenario in which nuclear weapons could be used within the limits imposed by humanitarian law.<sup>47</sup> This is the conclusion reached by Judge Schwebel in his dissenting opinion.<sup>48</sup>

According to Judge Higgins, the ambiguous wording of paragraph 2E – in particular the peculiar use of the word 'generally' in the first sentence – raises many questions and 'answers none of them'.<sup>49</sup> In her view, it can be presumed that the second sentence of paragraph 2E does not refer to those exceptional circumstances of self-defence where the use of nuclear weapons is compatible with international humanitarian law. It is counterintuitive to suggest that the Court could not judge whether the use of nuclear weapons in a way that complied with both Article 51 of the UN Charter and international humanitarian law was lawful or not. By way of logic, the Court must have been addressing those 'general' circumstances in which recourse to nuclear weapons would contravene humanitarian law – and that 'it is addressing whether in those circumstances a use of force *in extremis* and in conformity with Article 51 of the Charter, might nonetheless be regarded as lawful ...'.<sup>50</sup> To that question, the Court's answer is that it does not know, leaving

44 *Nuclear Weapons* case, above note 7, para. 42. However, it also emphasized that the proportionality principle cannot rule out, a priori, any recourse to nuclear weapons.

45 *Ibid.*, para. 86.

46 The Court was of the view that there was nothing in international law that prohibited nuclear weapons per se. The answer was thus to be found in the examination of these two bodies of law. *Ibid.*, para. 36.

47 See Christopher Greenwood, 'The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law', *International Review of the Red Cross*, No. 316 (1997), p. 65.

48 'The use of nuclear weapons is ... exceptionally difficult to reconcile with the rules of international law applicable in armed conflict .... But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict with those rules of international law. On the contrary, as the *dispositif* in effect acknowledges, while they might 'generally' do so, in specific cases they might not ...'. Dissenting Opinion of Vice-President Schwebel, 35 ILM, p. 840.

49 Higgins, above note 35, para. 25.

open ‘the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful’.<sup>51</sup> This controversial pronouncement of a *non-liquet* is what opened the door to interpretations of the decision that subordinated *jus in bello* to *jus ad bellum*.<sup>52</sup> In order to avoid this controversy, Judge Higgins concludes that recourse to nuclear weapons may be lawful if it complies with the principles of necessity and proportionality. However, as will be further illustrated, this analysis has conflated the proportionality requirements under *jus ad bellum* and *jus in bello*, further contributing to the blurring of the distinction between the two bodies of law.

### The question of competing legal principles

The question of whether or not international humanitarian law forms part of the corpus of *jus cogens* could also shed light on how to resolve the apparent conflict between the two bodies of law. Several of the states that appeared before the Court were of the view that the principles of international humanitarian law were of *jus cogens* nature, and hence could not be trumped by any other principle of international law.<sup>53</sup> Displaying its traditional reluctance to pronounce on the issue of *jus cogens*,<sup>54</sup> the Court used a novel term – ‘intransgressible’ – to describe the principles of international humanitarian law.<sup>55</sup> Arguably, a principle that is ‘intransgressible’ is one that admits no derogation, and is hence also a peremptory norm of international law. However, the Court does not seem to be saying so; it explicitly stated in paragraph 83 that it was unnecessary to make a pronouncement on the *jus cogens* nature of these norms. Has the Court thus invented a new – and rather ambiguous – normative category, that of ‘intransgressible principles of customary international law’?<sup>56</sup> In essence, what the Court seems to be saying is that the principles of international humanitarian law may or may not be of *jus cogens*

50 *Ibid.*, para. 28.

51 *Ibid.*, para. 29.

52 Paragraph 90 set the stage for the controversy that resulted in the pronouncement of a *non-liquet* in paragraph 2E of the *dispositif*. The Court’s pronouncement of a *non liquet* is itself a matter of much controversy. Does it imply that the conduct in question is acceptable (as per the *Lotus* principle)? According to Judge Higgins, rather than pronouncing a *non liquet*, the Court should have embraced the difficult task of weighing the competing legal claims against each other. Higgins, above note 35, para. 37–40. See also Falk, above note 41, p. 66.

53 It has also been argued that at least certain cardinal principles of international humanitarian law form part of *jus cogens*, such as the prohibition of means of warfare that have indiscriminate effects or cause unnecessary suffering. Separate Opinion of President Bedjaoui, [1996] ICJ Rep. 268 and 46, para. 21.

54 See Christakis, above note 30, p. 380.

55 This term leaves open many questions: ‘S’agit-il, comme on aurait automatiquement tendance à penser, d’une autre manière pour appeler les principes ‘impératifs’, le *jus cogens*?’ *Ibid.* [Does it mean, as we automatically have the tendency to think, another way of naming the non-derogable principles of *jus cogens*? (author’s translation)]

56 The Court is thus slipping into the dangerous territory of ‘relative normativity’. See Prosper Weil, ‘Towards a relative normativity in international law?’, *American Journal of International Law*, Vol. 77 (1983), p. 413.

nature, but in any case they are not simply regular customary rules, but 'in-transgressible' ones.<sup>57</sup>

In order to avoid simplistic assumptions regarding the admissibility (or otherwise) of violating international humanitarian law in circumstances of extreme self-defence, it is necessary to consider the result had the Court made a determination in favour of the *jus cogens* nature of international humanitarian law. Arguably, in that case, the answer would have been clear-cut: under no circumstances could derogation from such norms be permitted.<sup>58</sup> However, this proposition does not answer the question, but leads us to ask another one: how can we balance two competing norms of *jus cogens* (the prohibition of the use of force, with its built-in exceptions, on the one hand, and the principles of international humanitarian law, on the other)? There seems to be no clear answer in international law. What we have, in effect, is 'a head-on collision of fundamental principles, neither of which can be reduced to the other'.<sup>59</sup> The question thus seems hardly relevant, and the resolution of the paradox lies not in the nature of either body of law, but rather in the nature of the interaction between them and how best to achieve the objectives they seek to serve.

### Does extreme self-defence preclude state responsibility for breaches of *jus in bello*?

In further support of the separation of *jus ad bellum* and *jus in bello*, the 2001 Draft Articles on State Responsibility clearly indicate that international humanitarian law may not be subordinated to *jus ad bellum*. Article 21 of the Draft Articles stipulates that 'the wrongfulness of an act of state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.<sup>60</sup> However, the Commentary states in no uncertain terms that self-defence may not preclude the wrongfulness of violations of international humanitarian law and that a state acting in self-defence is 'totally restrained' by international obligations that are intended to apply as a definitive constraint in armed conflict.<sup>61</sup> Self-defence must be taken 'in conformity with the Charter of the United Nations', an allusion to the conditions of necessity and proportionality. Article 21 is only intended to preclude the wrongfulness of the 'non-performance of certain obligations under Article 2(4) of the Charter provided that such non-performance is related to the breach of that provision'.<sup>62</sup> In other words, the only

57 Christakis, above note 30, p. 381.

58 However, Dominice raises the important question as to 'si le *jus cogens* relève uniquement du droit des traités, ou si ... il prohibe tous les actes matériel ou juridiques qui lui sont contraires'. See Christian Dominice, 'Application par la Cour Internationale de Justice', in *Les Nouvelles Frontières du Droit International Humanitaire*, Institut d'études de droit international, Paris, 2003, pp. 81–8.

59 *Ibid.*

60 James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 166.

61 *Ibid.*, p. 167.

62 *Ibid.*, p. 166.

conduct justified by the principle of self-defence is that which is taken in response to violations of Article 2(4) of the UN Charter and is within the legal limits of necessity and proportionality.

However, this analysis must be taken a step further. In its 1996 decision, the ICJ referred to ‘extreme circumstances’ of self-defence, which if considered as a separate category of self-defence, might fall under another provision of the Draft Articles. A likely candidate is the principle of necessity (Article 25). However, this possibility is to be excluded as, unlike self-defence, necessity ‘does not presuppose a wrongful act on the part of the other State’.<sup>63</sup> But necessity can arise in another context, namely as a pretext, in itself, for violations of international humanitarian law. The pleas of necessity and military necessity are frequently brought up by defendants in war crimes trials to justify violations of international humanitarian law.<sup>64</sup> Necessity may be invoked in some limited circumstances in order to preclude the wrongful conduct of a state. However, the doctrine of military necessity is not covered by Article 25, as it is taken into account in the formulation of the obligations set out in humanitarian conventions, some of which ‘expressly exclude reliance on military necessity’.<sup>65</sup> The concept of military necessity thus cannot justify violations of international humanitarian law, since the purpose of the latter is to subordinate the narrow interests of a belligerent to a higher interest, the dictates of humanity. States adopted these rules in full awareness that they were limiting themselves from complete freedom of action in conducting warfare. As such, military necessity should be seen as a limitation on the rights of belligerents, the effect of which is one of ‘non-necessity’; it is a circumstance that precludes the *lawfulness* of conduct normally allowed.<sup>66</sup> This proposition is an important one, as some states have been inclined to widen the concept of military necessity or invoke a right of self-preservation to justify violations of international humanitarian law. In short, the maxim that *Not kennt kein Gebot* (‘necessity knows no law’) ‘finds no place in *jus in bello*’.<sup>67</sup>

## **Conflating proportionality and necessity under *jus ad bellum* and *jus in bello***

It is contended that any act that contravenes *jus in bello* cannot be considered a proportionate and reasonable measure of self-defence under *jus ad*

63 Marcelo G. Kohen, ‘The notion of state survival in international law’, in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, p. 307.

64 It is important to distinguish between the concepts of necessity as a criminal defence, necessity as a situation precluding the wrongfulness of a state, and military necessity as the condition which allows a belligerent to derogate from the law of peace in order to achieve victory over the enemy. The latter is both an *exception* and a *principle of limitation*. See Paul Weidenbaum, ‘Necessity in international law’, *Transactions of the Grotius Society*, Vol. 24 (1938), p. 113.

65 Crawford, above note 60, p. 185.

66 Commentary to Article 33 (Necessity) of 1996 Draft Articles on State Responsibility, in *ILC Annual Report*, 1996, para. 27.

67 Kohen, above note 63, p. 311.

*bellum*.<sup>68</sup> In support of this proposition, which clearly links *jus ad bellum* and *jus in bello*, the following statement of the ICJ is cited: ‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law’.<sup>69</sup> There are, however, two ways of looking at this statement. According to the first view, in order for any use of force to be legal, it must respect both the *jus ad bellum* limit of proportionality and the principles of *jus in bello*. Proportionality in self-defence is thus a necessary, but not a sufficient, element in determining legality. In other words, any lawful use of force must meet the conditions of both bodies of law, independently. The second interpretation is that in order for self-defence to be *proportionate*, it must respect international humanitarian law. This view unnecessarily conflates *jus ad bellum* with *jus in bello*.

The ICJ has affirmed that under *jus ad bellum* self-defence is limited by the principles of necessity and proportionality.<sup>70</sup> Similarly, the principles of proportionality and military necessity under *jus in bello* place important limitations on how force is used, although they apply in a different manner. Although these principles are, in theory, distinct, they have often been applied in a way that unnecessarily blurs the distinction between *jus ad bellum* and *jus in bello*.

### Proportionality under *jus ad bellum* and *jus in bello*

Prevailing legal scholarship clearly distinguishes between the application of the proportionality principle as a limit to the use of force in self-defence (under *jus ad bellum*) and as a limit to the extent to which the adversary can be injured under *jus in bello*. However, this distinction is not always apparent. Although scholars have expressed concern about the limits of proportionality and the vagueness of its definition, the relationship between its two aspects has been infrequently addressed.<sup>71</sup>

### *Self-defence and proportionality*

The requirement of proportionality in the *jus ad bellum* context limits a state’s ability to resort to force, as well as the degree of force it can use. In other words, such force must only be used defensively and must be strictly confined to that defensive objective.<sup>72</sup> Proportionality remains relevant throughout the duration of the conflict. In other words, a state may not assess proportionality only when determining the initial recourse to force, then dispense with it completely.<sup>73</sup>

68 Greenwood, above note 9, p. 231.

69 *Nuclear Weapons* case, above note 7, para. 42.

70 ICJ, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, [1986] ICJ Rep., para. 194; *Nuclear Weapons* case, above note 7, para. 41.

71 Gardam, above note 8, p. 392.

72 Akande, above note 43, p. 191.

73 Gardam, above note 8, p. 404.

There is an important doctrinal debate regarding whether this principle implies proportionality to the scale of the attack suffered by the state (backward-looking) or proportionality to the objective that the state acting in self-defence is seeking to achieve (forward-looking). Canizzaro distinguishes between what he calls the quantitative and qualitative tests of proportionality. Under the former, proportionality entails that the defensive action must conform to quantitative features of the aggressive attack, ‘such as the scale of the action, the type of weaponry, and the magnitude of the damage’.<sup>74</sup> On the other hand, a qualitative test focuses instead on whether the defensive act is appropriate in relation to the ends sought, namely to repel the attack. Under this test the defender may depart from an ‘exact correspondence’ with the aggressive attack, which has a significant effect on determining the limits of what is considered proportional.<sup>75</sup> Because of the indeterminacy of the principle of proportionality, it is a term that can easily lend itself to confusion and abuse.<sup>76</sup>

### *Proportionality under jus in bello*

The proportionality principle takes on a different structure under *jus in bello* and is based on a different logic. Assessing proportionality under *jus in bello* entails balancing the harm caused by an attack – in terms of suffering or collateral damage (principles of humanity) – against the value of the anticipated military advantage to be achieved by the belligerent.<sup>77</sup> It is based on the ‘fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy’.<sup>78</sup> It includes both the ‘proportionality’ of civilian collateral damage,<sup>79</sup> as well as the ‘proportionality’ of the degree of injury or suffering caused to combatants<sup>80</sup> in relation to the military ends pursued. 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. It is part of both customary international law and treaty law, as inferred from various provisions of AP I.

### *Conflating the two proportionality principles*

The difference between the two proportionality principles can be described as the limitation on the overall force used to respond to a grievance (under *jus ad bellum*) as opposed to the balance between the anticipated military advantage of attacking a particular objective, weighed against the resulting losses, under *jus in bello*.<sup>81</sup> The

74 Canizzaro, above note 8, p. 783. See also Higgins, above note 35, para. 5.

75 Canizzaro, above note 8, pp. 783–4.

76 However, it is possible that this infinite flexibility is both a strength and a weakness. See Gardam, above note 8, p. 412.

77 Akande, above note 43, p. 208.

78 Gardam, above note 8, p. 391.

79 API, Art. 51(5)(b).

80 *Ibid.*, Art. 35(2).

81 Gardam, above note 8, p. 391. See also Akande, above note 43, p. 191.

proportionality requirement in each of the two bodies of law is based on a different logic. Whereas ‘the legal regulation of the use of force 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 interests and values of a humanitarian nature’.<sup>82</sup> The difference in the normative values underlying *jus ad bellum* and *jus in bello*, with their associated different standards of legality, accounts for the different structure of the two proportionality principles. Although this distinction may be apparent in theory, in practice the two proportionality principles are often merged.<sup>83</sup> Arguably, applying the proportionality principle under *jus ad bellum* has implications for *jus in bello*, such as the choice of weaponry.<sup>84</sup> On the other hand, it has also been argued that the proportionality requirement under *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).<sup>85</sup> Whatever the merits of either argument, the *practical end result* of applying the *jus ad bellum* proportionality principle will be to affect the degree of force used and hence the degree of suffering inflicted upon belligerents. If it is applied as a principle of limitation, it will result in greater protection for the victims of armed conflict. However, this should be distinguished from the notion of proportionality under *jus in bello*, which has a strictly humanitarian objective.

Although there is a large area of overlap between the two proportionality rules, there are also situations where ‘strict application of the *jus ad bellum* standard would make it impossible to achieve the aims of *jus in bello*’.<sup>86</sup> A case in point is the international coalition’s extension of the military campaign against Iraq in 1991 beyond the borders of Kuwait, the use of massive aerial bombardment before the deployment of troops and the large-scale destruction of Iraqi infrastructure essential to civilian life. Arguably, this was essential for the early capitulation of Iraq and hence proportionate in relation to the objective of achieving rapid Iraqi withdrawal from Kuwait. However, in light of the devastating impact on Iraqi civilians, did the choice of targets and the methods and means of warfare employed meet the proportionality test under *jus in bello*, in each separate attack? This proposition is far more questionable.<sup>87</sup> However, a finding that an attack or series of attacks did not meet the proportionality test under *jus in bello* should have no bearing on whether the conflict is a legitimate exercise of self-defence, a notion that many writers fail to recognize. Whereas the first breach is a war crime, a breach of *jus ad bellum* invokes both state and individual criminal responsibility, the latter in

82 Canizzaro, above note 8, p. 782.

83 *Ibid.*, p. 781.

84 Christopher Greenwood, ‘*Jus ad bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion’, in Boisson de Chazournes and Sands, above note 63, p. 258.

85 Judith Gardam, ‘Necessity and Proportionality in *jus ad bellum* and *jus in bello*’, in Boisson de Chazournes and Sands, above note 63, p. 277.

86 Canizzaro, above note 8, p. 781.

87 Gardam, above note 8, pp. 404–05.



the form of a crime of aggression.<sup>88</sup> At another level, some writers have questioned the proportionality (under *jus ad bellum*) of the overall campaign against Iraq, arguing that the use of force was more than that proportionate to the end of repelling Iraq's invasion. According to Walzer, the scale of force used served an 'unjust' aim: the overthrow of Saddam Hussein's regime.<sup>89</sup> Again, such a contention has no bearing on whether the proportionality test was met with respect to each individual military operation under *jus in bello*.

It has been argued that application of the principle of proportionality to the question of recourse to nuclear weapons may reconcile the perceived dichotomy between the use of nuclear weapons in self-defence and the adherence to international humanitarian law standards. In her dissenting opinion to the *Nuclear Weapons Advisory Opinion*, Judge Higgins made the argument that the suffering associated with nuclear weapons (a *jus in bello* consideration) can conceivably meet the test of proportionality when balanced against 'extreme circumstances' such as 'defence against untold suffering or the obliteration of a State or peoples'.<sup>90</sup> An attack is thus 'proportionate' if the 'military advantage' is one 'related to the very survival of a State or the avoidance of infliction ... of vast and severe suffering on its own population'.<sup>91</sup> Arguably, such an interpretation does not place *jus ad bellum* above *jus in bello*, but rather underscores that the extent of damage caused by nuclear weapons is such that it can only be justified by a military objective as important as preserving the state's very survival. However, such an application of the proportionality principle falls into the trap of conflating the proportionality principle under *jus ad bellum* and *jus in bello*. Ultimately, under *jus in bello*, the extent of suffering is to be measured against the 'concrete and direct military advantage anticipated' from an attack. No consideration should be given to the overall goals of the military action, whether they are self-defence against unlawful aggression that threatens to obliterate the state, or otherwise. Conversely, under *jus ad bellum*, the proportionality of the attack is to be measured against the overall military goals such as subordinating the enemy, or fending off or repelling an attack. Conflating the two proportionality principles in such a manner transforms it from a principle of limitation to one that can be invoked to justify a degree of injury and destruction which would otherwise be considered clearly excessive in the proportionality equation under *jus in bello*. In other words, the argument that recourse to nuclear weapons in compliance with *jus ad bellum* 'might of itself' exceptionally make such a use compatible with humanitarian law<sup>92</sup> erroneously confuses proportionality under *jus ad bellum* with that under *jus in bello*.

Since proportionality is a slippery concept, there are bound to be differences in opinion in the course of its application. State practice suggests that the

88 *Ibid.*

89 Walzer, above note 25.

90 Higgins, above note 35, para. 18.

91 *Ibid.*, para. 21.

92 *Ibid.*, para. 25.

perceived legality of a state's recourse to force has a subtle impact on its assessment 'of the means that can be legitimately used to achieve its goal'.<sup>93</sup> In the 1991 Gulf War, for instance, the 'justness' of the Coalition's cause and the 'unjustness' of perceived Iraqi aggression legitimated the aim of minimizing Coalition casualties and hence the pursuit of a policy of aerial bombardment.<sup>94</sup> It is unlikely that the 'international community would have tolerated the scale of civilian casualties ... if it were not for the consensus that Iraq's action had no legal or moral basis'.<sup>95</sup> This analysis can undeniably be extended to encompass the decision to resort to high-altitude precision bombing in the 1999 'humanitarian intervention' (undoubtedly the epitome of the 'just cause') in Kosovo, at the expense of increased civilian casualties. This is unfortunate, since the application of the proportionality principle under *jus ad bellum* should, in fact, limit the degree of damage that can be inflicted on the enemy.

### Necessity under *jus ad bellum* and *jus in bello*

According to the limit of necessity under *jus ad bellum*, a state may not resort to armed force unless it has no other means to defend itself.<sup>96</sup> One of the factors that have contributed to linking *jus ad bellum* and *jus in bello* has been the way in which the separate notions of necessity as a limit to self-defence, and military necessity as a limit to a belligerent's conduct in warfare, have been confused. The terms 'necessity', 'military necessity', 'urgent military necessity', 'self-defence' and 'self-preservation', which all mean different things, have been used interchangeably to justify violations of the laws of armed conflict. Writing in 1952, Dunbar distinguished between 'necessity in the interest of self-preservation' or the use of force in self-defence and 'military necessity' or 'necessity in war', which relates to the actual conduct of hostilities. He argued that owing to the frequent use of the term 'necessity in self-preservation' to justify acts of a hostile nature carried out by states as a matter of military expediency, the meaning assigned to the two concepts became obscured.<sup>97</sup>

### Military necessity and *jus in bello*

In the early classicist writings, infringements of *jus in bello* were tolerated in cases of 'urgent military necessity'.<sup>98</sup> In general, international lawyers 'regard[ed]' military necessity as the *bête noir* of international jurisprudence, destroying all legal restriction and allowing uncontrolled brute force to rage rampant over the battlefield

93 Gardam, above note 8, p. 393.

94 *Ibid.*, p. 404.

95 *Ibid.*, p. 412.

96 Gardam, above note 85, p. 278.

97 N. C. H. Dunbar, 'Military necessity in war crimes trials', *British Yearbook of International Law*, Vol. 29 (1952), p. 443.

98 Weidenbaum, above note 64, pp. 116–17.

or wherever the military have control'.<sup>99</sup> The term 'military necessity' was used in the past to mean three different things. First, it was construed in the Lieber code to signify those measures, taken in conformity with international law, to bring about the submission of enemy forces, including the scope and degree of force that may be lawfully employed to destroy enemy life, limb and property.<sup>100</sup> Second, it denoted 'exceptional circumstances of practical necessity' that were expressly mentioned in the Hague Regulations and other relevant conventions, and which allowed certain acts that would otherwise be proscribed.<sup>101</sup> In other words, it included that category of rules which were expressly qualified in the relevant conventions.

The final conception of 'military necessity' was the most controversial and appeared in German scholarly writing on the First World War, although it has been widely discredited since the adoption of the Hague Conventions.<sup>102</sup> Essentially it was based on the German doctrine of *Kriegsraison geht vor Kriegsmanier*, by virtue of which some argued that obligations under the laws of armed conflict 'may be displaced by urgent and overwhelming necessity'.<sup>103</sup> This notion was purportedly based on a fundamental right of 'self-preservation', and entails that a belligerent may disregard international humanitarian law if the observance of its rules will endanger its own armed forces. Proponents of this view based their case on the practical consideration that commanders will inevitably act on it in spite of the existence of any rule to the contrary.<sup>104</sup> However, since the effect of the Hague Conventions was expressly to undermine that doctrine by requiring a balance between military necessity and the dictates of humanity, the question that arose was whether a distinction could be made between mere military necessity and 'dire or genuine necessity'. Scholars advancing this doctrine attempted to draw a line between military necessity in relation to a single military unit, and overruling necessity arising out of 'an extreme emergency of a state as such'.<sup>105</sup> This latter type of necessity was construed as having the force of overruling any law, including the Hague Conventions. However, as previously illustrated, international law envisions no such exception, as affirmed by the Draft Articles on State Responsibility. In effect, historical interpretations of 'military necessity' are now obsolete; it has been repeatedly affirmed that this principle cannot be invoked to justify violations

99 William Gerald Downey, Jr, 'The law of war and military necessity', *American Journal of International Law*, Vol. 47 (1953), p. 254.

100 See General Orders 100, Instructions for the Government of the Armies of the United States in the Field, Art. 14, available at [www.yale.edu/lawweb/avalon/lieber.htm](http://www.yale.edu/lawweb/avalon/lieber.htm) (last visited 25 August 2008).

101 Dunbar, above note 97, p. 444.

102 Weidenbaum, above note 64, p. 110.

103 Dunbar, above note 97, pp. 444–5. Although the doctrine of *Kriegsraison* was essentially non-binding, it was often invoked to circumvent legal obligations. Similar notions can be traced in the declarations of statesmen such as Rostow, who held that '[m]ost states will sacrifice the law of armed conflict if the price of obedience is defeat or annihilation', and Dean Acheson, who stated that '[I]aw simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty ... No law can destroy the state creating the law. The survival of states is not a matter of law.'

104 *Ibid.*, p. 446.

105 Weidenbaum, above note 64, pp. 110, 112–13.

of international humanitarian law.<sup>106</sup> Conversely, it prohibits acts that are not essential to achieve a 'direct and concrete military advantage'.<sup>107</sup> As such, the notion of military necessity 'proscribes, indirectly, what might otherwise constitute lawful acts of warfare by laying down the principle that 'no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances'.<sup>108</sup> However, the concept of 'state survival' as it appears in various interpretations of the *Nuclear Weapons Advisory Opinion* – including Judge Fleischhauer's controversial opinion – strikes dangerous parallels with the *Kriegsraison* doctrine.

## International jurisprudence: simultaneously reaffirming and blurring the distinction

The jurisprudence of international courts has, by and large, affirmed the distinction between *jus ad bellum* and *jus in bello*. Such courts have endeavoured to balance the laws of humanity on the one hand with the practical exigencies of military action on the other, regardless of any *jus ad bellum* considerations, such that the application of *jus in bello* would not render the conduct of warfare impossible. However, what is also notable is the confusion – whether intentional or accidental – of terms such as 'self-defence', 'necessity' and 'military necessity', which may have further contributed to blurring the distinction between *jus ad bellum* and *jus in bello*.

### War crimes trials following the Second World War

At face value it can be argued that the case law of the International Military Tribunal at Nuremberg, which was held in the aftermath of the Second World War, subordinated *jus in bello* to *jus ad bellum* considerations. However, a closer examination reveals that this was not the case, but rather that there was a degree of confusion caused by the inaccurate use of terms such as 'emergency', 'necessity' and 'military necessity' in the Tribunal's case law. For instance, in the *Ministries Trial*, the Tribunal held that

By resorting to armed force, Germany violated the Kellogg-Briand Pact. It thereby became an international outlaw and every peaceable nation had the right to oppose it without becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim. The doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violation of that law.<sup>109</sup>

106 Gardam, above note 85, p. 282.

107 Michael Schmitt, 'Green War: An Assessment of the Environmental Law of the Law of Armed Conflict', *Yale Journal of International Law*, Vol. 22 (1997), p. 52.

108 Dunbar, above note 97, p. 444.

109 *USA v. Weizsäcker et al.*, quoted in Dunbar, above note 97, p. 446.

Although the justification of self-defence was clearly unavailable to Germany as an aggressor, the doctrine of military necessity, which belongs to the domain of *jus in bello*, should apply irrespective of that determination. What appears to have happened in this case is that the Tribunal used the two terms interchangeably. It can be discerned from the Tribunal's application of the concept of military necessity in other cases that its intention could not have been to claim that Germany, as an aggressor, could not invoke 'military necessity' in respect of any of its belligerent actions. In the *Justice Trial*, for instance, the Tribunal dismissed the view that 'by reason of the fact that the war was a criminal war of aggression, every act which would have been legal in a defensive war was illegal in this one'.<sup>110</sup> It proceeded to state that, under such reasoning, 'the rules of land warfare upon which the prosecution has relied would not be the measure of conduct, and the pronouncement of guilt in any case would become a mere formality'.<sup>111</sup> Similarly, in the *Hostages Trial*, the Tribunal emphatically rejected the view that Germany could not invoke the law of belligerent occupation since the occupation was based on an illegal use of force. It stated that

The Prosecution advances the contention that since Germany's war against Yugoslavia and Greece were aggressive wars, the German occupant troops were there unlawfully and gained no rights whatever as an occupant ... [W]e accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime ... At the outset, we desire to point out that international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in the occupied territory.<sup>112</sup>

Quoting Oppenheim, the Tribunal further held that '[t]he rules of international law apply to war from whatever cause it originates'.<sup>113</sup> Of particular relevance is the Tribunal's approach to the plea of 'necessity', which was invoked in relation to two charges: (i) killing of innocent members of the population, and (ii) destruction of property in the occupied territories.<sup>114</sup> With regard to the first

110 *USA v. Alstötter et al.*, Law Reports of Trials of War Criminals, Vol. VI, United Nations War Crimes Commission, London, 1947–9, p. 52.

111 *Ibid.*

112 *USA v. William List et al.* (Case No. 7), Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, 1950, p. 1247.

113 The Tribunal also stated that 'whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other'. *Ibid.*, pp. 1247–8.

114 *Ibid.*, p. 1253. The plea of necessity was also rejected in the *Peleus* trial, which involved the murder of the unarmed crew of the sunken Allied ship *Peleus* under the orders of Heinz Eck, the commander of a German U-boat. In his summing up, the Judge Advocate affirmed that the prohibition of killing unarmed enemies was a fundamental usage of war. However, he added that circumstances might arise which would justify a belligerent's killing of an unarmed enemy person for the sake of preserving his own

charge, the Tribunal found that ‘it is apparent from the evidence of these defendants that they considered military necessity a matter to be determined by them, a complete justification of their acts ... Military necessity or expediency do not justify a violation of positive rules’.<sup>115</sup> The plea was thus rejected because the relevant provisions of the Hague Regulations contained no military necessity qualification, and therefore ‘the rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise’.<sup>116</sup>

The Tribunal’s approach to Count 2 of the indictment, which included devastation of property unjustified by military necessity, further indicates its consideration of the practicalities of waging war as balanced against humanitarian principles. Paragraph 9(a) of the indictment charged General Lothar Rendulic with ordering what became known as the ‘scorched-earth policy’ carried out in the Norwegian province of Finmark.<sup>117</sup> Evidence revealed that Rendulic’s forces, who had been required to withdraw from Norway in an unreasonably short period of time (fourteen days), had become engaged with the superior Russian forces in such a way that it appeared to Rendulic at the time that the scorched-earth policy was necessary to avoid complete subjugation. The Court also pointed out that the evacuation of the civilian population had been carried out ‘with consideration’.<sup>118</sup> Observing that the Hague Regulations were obligatory and superior to the most urgent military necessities except where they specifically provided for the contrary, the Tribunal accepted the defence plea of military necessity. It seemed that, in light of the extreme difficulty confronting the German forces, the destruction could be tolerated by virtue of the express exceptions included in Article 23(g) of the Hague Regulations. The Tribunal concluded that ‘the conditions, *as they appeared to the defendant at the time* were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made’.<sup>119</sup> The decision granted the defendant a large degree of discretion based upon the information that was available to him, and the immediacy with which the action had to be taken.

In the case of *USA v. Krupp et al.*, the Tribunal reached a different conclusion. In this case, it was seen that the measures of expropriation, spoliation and devastation of public and private property violated the law of belligerent occupation, as they constituted measures that were beyond the needs of the German

life, although no such circumstances arose in the present case. Because no judgment was delivered, it is unclear whether the Tribunal found any merit in this view. The *Peleus* Trial, Law Reports of Trials of War Criminals, Vol. I, pp. 11–12.

115 *Ibid.*, p. 1255.

116 *Ibid.* Dunbar draws similar conclusions from the *von Manstein* trial, in which the Advocate-General stated that ‘the purpose of war is the overpowering of the enemy. The achievement of this purpose justifies any means including, in the case of necessity, the violation of the laws of war, if such violation will afford either the means to escape from imminent danger or the overpowering of the opponent.’ However, he advised that ‘the doctrine has no application to the laws of war except where the latter are actually qualified by explicit reference to military necessity’. Dunbar, above note 97, p. 445.

117 The scorched-earth policy involved the devastation of property and evacuation of inhabitants during the retreat of German forces. *USA v. List*, above note 112, p. 1113.

118 *Ibid.*, pp. 1124–36, 1295–6.

119 *Ibid.*, p. 1297 (emphasis added).

occupation and were executed without regard to the local population.<sup>120</sup> The Tribunal rejected the defence that these measures were justified by the ‘great emergency’ which confronted the German war economy, stating that

The contention that the rules and customs of warfare can be violated if either party is hard pressed in war must be rejected ... It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare ... To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.<sup>121</sup>

The Tribunal had to deal with this controversy once more in the *High Command* case. Advancing a ‘just war’ kind of argument, the prosecution contended that ‘the defence of military necessity can never be utilised to justify destruction in occupied territory by the perpetrator of an aggressive war’ as it would result in a ‘farical paradox’.<sup>122</sup> Since Germany had committed the ‘criminal act’ of aggression, it could not extricate itself from the consequences of its unjust war by recourse to the laws of war. The Tribunal rejected this reasoning, holding that the plea of military necessity was, indeed available to Germany; that would not, however, exculpate it from any violations of international humanitarian law. It stated that, were the concept of military necessity to grant belligerents unlimited rights, it ‘would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilised nations’.<sup>123</sup> As such, it rejected the plea with respect to the charge of deportation and enslavement of civilians.<sup>124</sup> However, as concerns the charges of looting, spoliation and devastation of property, the Tribunal reached a similar decision as in the *Rendulic (Hostages)* trial, holding that

[T]he devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances.<sup>125</sup>

120 *USA v. Krupp et al.* (Case no. 10), Trials of War Criminals before the Nuernberg Military Tribunals, Vol. IX, pp. 1338–46.

121 *Ibid.*, p. 1347.

122 *USA v. Wilhelm von Leeb et al.*, Law Reports of Trials of War Criminals, Vol. 12, p. 124.

123 *USA v. Wilhelm von Leeb et al.*, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, p. 541.

124 *Ibid.*, p. 603.

125 *Ibid.*, p. 541.



In these cases, it is evident that the Tribunal applied the principle of military necessity as a limitation rather than an authorization,<sup>126</sup> and strictly allowed for its use as an exception where international humanitarian law permitted such a qualification. In fact, the Tribunal reaffirmed the distinction between *jus ad bellum* and *jus in bello* in two ways. In general, it rejected the claim brought forward by the prosecution that Germany, as an aggressor, was not entitled to invoke international humanitarian law or belligerent rights. Simultaneously, it applied the concept of military necessity to limit Germany's ability to inflict suffering, but not in a way that would make the conduct of warfare impossible, and without regard to the illegality of the war's cause.

### Contemporary international criminal tribunals

Since the trials of the major war criminals of the Second World War there has been a sea change in the substantive rules of international humanitarian law. The four Geneva Conventions were adopted in 1949, and their Additional Protocols in 1977. Coupled with the establishment of the two *ad hoc* international criminal tribunals – for the former Yugoslavia and Rwanda – these developments allowed for the consolidation of the laws of armed conflict and the clarification of their substantive rules, particularly with regard to the most prominent type of conflict of the twentieth and twenty-first centuries, non-international armed conflict. In such conflicts, it is more difficult not only to secure adherence to the principles of international humanitarian law, but also to point out which party has resorted to a 'legitimate' use of force.<sup>127</sup> This concern was evident in the debates surrounding the adoption of Article 1(4) of Additional Protocol I, by virtue of which the provisions of the Protocol were extended to apply to national liberation movements.<sup>128</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) grappled with some of these issues in the final Report to the Prosecutor of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia,<sup>129</sup> considered by some as illegal intervention by NATO, and by others as constituting legitimate 'humanitarian intervention'. The

126 Schmitt, above note 107, p. 52.

127 In *Tablada* the Inter-American Commission on Human Rights stated that the law of armed conflict applies equally as between the parties (the Argentine government and the rebels), who both have the same duties under IHL. It also reaffirmed that 'application of the law is not conditioned by the causes of the conflict'. See Report No. 55/97, Argentina, Doc. 38, 1997, paras. 173–174. Similarly, the Colombian Constitutional Court held that 'the compulsory nature of IHL applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties ... All armed individuals, whether or not they are part of a State force', are under an obligation to respect those rules. See Columbia, *Constitutional Conformity of Protocol II*, Ruling No. C-225/95, para. 8.

128 Various parties abstained from voting on this provision as it was construed as 'making the motives behind a conflict a criterion for the application of international humanitarian law'. See Declaration by the UK, VI, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of IHL Applicable in Armed Conflicts*, Geneva, 1974–7, p. 46.

129 Final Report to the Prosecutor, in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Intersentia, Oxford, 2003, p. 21.

prosecution rejected the contention that the cause of the conflict had any bearings on the application of international humanitarian law. On the one hand, it dismissed the view that because ‘NATO’s resort to force was not authorized by the Security Council or in self-defence, that [it] was illegal and, consequently, all forceful measures taken by NATO were unlawful’.<sup>130</sup> It also rejected the other side of the debate, namely that the so-called ‘good’ party in a conflict was entitled to breach international humanitarian law, whereas the ‘bad’ party had to comply with it. It noted that although the ‘precise linkage between *jus ad bellum* and *jus in bello* is not completely resolved’, as a matter of practice the Tribunal has limited itself to the confines of the latter.<sup>131</sup>

The ICTY’s case law has also avoided the controversial subordination of *jus in bello* to *jus ad bellum*. In the trial of *Kordic and Cerkez*, the ICTY trial chamber addressed the defence plea of self-defence, according to which the actions of the Bosnian Croats were justified because they were engaged in defensive action against Bosnian Muslim aggression. Whereas this is a clear invocation of a *jus ad bellum* argument to justify violations of international humanitarian law, the trial chamber addressed the issue strictly from the perspective of self-defence as a criminal defence. It began by defining self-defence as a ground for excluding criminal responsibility, namely as ‘providing a defence to a person who acts or defends himself or his property (or another person or person’s property) against attack, provided that the actions constitute a reasonable, necessary, and proportionate reaction to the attack’.<sup>132</sup> Since no such defence could be found in the Tribunal’s statute, it turned to the general principles of criminal law and customary international law, as codified in Article 31(1)(c) of the Statute of the International Criminal Court.<sup>133</sup> From there, the Tribunal set out the conditions for lawful self-defence, namely that the act be carried out in response to ‘an imminent and unlawful use of force’ against a ‘protected’ person or property, and that it be ‘proportionate to the degree of danger’.<sup>134</sup> The effect of this approach is that each defensive action or operation would have to be examined on its own merits, rather than making a determination that the war itself was one fought in self-defence. The trial chamber emphasized that, according to the last sentence of Article 31(3)(c), a person’s involvement in ‘defensive’ action is not in itself a ground for excluding criminal liability.

130 *Ibid.*

131 *Ibid.*

132 ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2, Judgement, 26 February 2001, para. 449.

133 ‘... A person shall not be criminally responsible if, at the time of that person’s conduct: ... (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.’ See 1998 Rome Statute of the International Criminal Court, in Roberts and Guelff, above note 6, p. 667.

134 *Prosecutor v. Kordic*, above note 132, p. 451.

The ICTY has also reaffirmed this principle by applying the concept of military necessity equally, without any distinction between the parties to the conflict. In the *Kordic* trial the prosecution asserted that military necessity ‘does not justify a violation of international humanitarian law insofar as [it] was a factor which was already taken into account when the rules governing the conduct of hostilities were drafted’.<sup>135</sup> However, where the trial chamber unexpectedly departs from the jurisprudence of the post-Second World War tribunals is in its *expansion* of the concept of military necessity. In relation to the charge of attacks against civilians, the ICTY held that ‘prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity’.<sup>136</sup> In *Blaskic*, the trial chamber reached a similar conclusion,<sup>137</sup> which was, however, overturned by the Appeals Chamber.<sup>138</sup> The inconsistency of the ICTY’s jurisprudence on this matter is disconcerting, since, traditionally, there has been no military necessity exception to the principle of distinction. The notion that civilians may not be made the object of attack is a general principle that admits no qualification.<sup>139</sup> To accept that ‘military necessity’ can overrule a principle of international humanitarian law erodes the protections afforded to civilians under *jus in bello*, and departs from the practice of international criminal tribunals that have consistently rejected the plea of military necessity unless it relates to a rule of international humanitarian law that expressly provides for such an exception.<sup>140</sup>

## Contemporary threats to the distinction: war between states and non-state actors

Perhaps the most dangerous threat to the principle of separation of *jus ad bellum* and *jus in bello* arises in the context of what is now known as asymmetric warfare, or conflict between a state and non-state actors. Often labelled by states as ‘terrorists’, these groups come to embody the immoral and ‘unjust’ cause, and are hence judged according to different moral and legal standards. Every act that they commit is criminal and subversive; they are thus not entitled to the rights enjoyed by combatants under international humanitarian law. The perceived (un)justness of the ‘terrorist’ cause is the determinant of the (non-)application of *jus in bello*.

135 *Ibid.*, para. 344.

136 *Ibid.*, para. 342.

137 ICTY, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, Judgement, 3 March 2000, para. 180.

138 ‘[T]he Appeals Chamber deems it necessary to rectify the Trial Chamber’s statement, contained in paragraph 180 of the Trial Judgment, according to which “[t]argeting civilians or civilian property is an offence when not justified by military necessity”.’ It further underscored the absolute prohibition on the targeting of civilians in customary international law. See ICTY, *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, para. 109.

139 Higgins, above note 35, para. 20; AP I, Art. 51 (2).

140 The ICTY’s jurisprudence on wanton destruction of property is more consistent on this matter.

The immorality of the ‘terrorist’ cause justifies the adoption by the state of an equally immoral and extra-legal response.<sup>141</sup>

Although international humanitarian law was originally conceived to apply as between states, the proliferation of intra-state conflict, particularly in the post-Cold War era, has entailed the extension of this body of law to non-state actors.<sup>142</sup> Is it conceivable, however, that the principle of distinction will be upheld in a war between a state and non-state actors? International practice indicates that states remain reluctant to extend the so-called ‘privileges’ of belligerency to non-state actors, adopting instead a ‘just war’ model to defend their violations of *jus in bello*. For instance, counterterrorism measures, justified by reference to the principle of self-defence against the grave and imminent threat of ‘terrorism’, have involved violations of *jus in bello* by the United States in Afghanistan and Iraq, including the toleration of a greater number of civilian casualties, and practices such as incommunicado detention, torture and cruel and degrading treatment.<sup>143</sup> Similarly, countries such as Colombia, Israel and Russia have invoked so-called self-defence measures to justify curfews, house demolitions, extra-judicial killings and other excesses, distorting the limits of ‘necessity’ and ‘proportionality’ in the process.<sup>144</sup> Ironically, this kind of logic is similar to the argument that could be used by the very armed groups the state is attempting to subvert. Although expressed in non-legal terms, such groups equally believe that their cause is both just and superior, excusing disregard for humanitarian considerations. Coupled with a wide and permissive interpretation of necessity to justify targeting civilians (arguably the only means available and hence ‘necessary’ to subjugate the enemy), many such groups fail to recognize that there can be no military necessity that justifies such violations. Neither is there a *casus belli* that can excuse the deliberate targeting of civilians.

The prevalence of the ‘just war’ logic in asymmetric conflicts threatens the validity of the distinction between *jus ad bellum* and *jus in bello*. It is widely argued that the so-called ‘terrorist’ should not be allowed to benefit from the privileges of lawful belligerency including the protections and immunities of international humanitarian law. Like the ‘aggressor’ under the ‘just war’ doctrine, the ‘terrorist’ remains outside the purview of the law, rendering it unlikely that he will adhere to its dictates. This is so because

no amount of legal argument will persuade a combatant to respect the rules when he himself has been deprived of their protection ... This psychological

141 See Theodore Seto, ‘The morality of terrorism’, *Loyola of Los Angeles Law Review*, Vol. 35 (2002), p. 1227.

142 A clear indication is the adoption of the Second Additional Protocol to the Geneva Conventions (1977), as well as the case law of the ICTY and ICTR.

143 See Human Rights Watch, ‘Troops in contact: air strikes and civilian deaths in Afghanistan’, 8 September 2008, available at <http://hrw.org/reports/2008/afghanistan0908/> (last visited 12 October 2008).

144 See, for instance, Housing and Land Rights Network of the Habitat International Coalition and the World Organization against Torture, Joint Urgent Action Appeal, discussing Israel’s policy of house demolitions in violation of international law for alleged reasons of self-defence. See also Amnesty International, ‘Colombia’, *Amnesty International Report 2008*, 2008, available at <http://thereport.amnesty.org/eng/regions/americas/colombia> (last visited 13 October 2008).

impossibility is the consequence of a fundamental contradiction in terms of formal logic ... It is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime because of the mere fact that the act was carried out in the context of a war of aggression.<sup>145</sup>

The question that thus arises is: should the principle of distinction between *jus ad bellum* and *jus in bello* be modified in the case of war between a state and a non-state actor? For obvious reasons, such a proposition is dangerous. It allows both parties to justify their violations by reference to the 'justness' of their cause, as well as to use expansive notions of self-defence and military necessity to excuse their disregard for international humanitarian law. As long as both parties make the application of *jus in bello* contingent on the validity of the other party's *jus ad bellum* case, the result will be a reciprocal failure to ensure respect for the rules of international humanitarian law.

## Conclusion

The dangers of linking *jus ad bellum* and *jus in bello* are evident, which is why the distinction between them has been maintained in theory. Although there are some challenges to this distinction, it is inaccurate to assume that it has become irrelevant or that there exists in international law an exception that would allow states to use force in violation of *jus in bello* in 'extreme circumstances of self defence', 'self-preservation' or 'military necessity'. In order to avoid the controversial subordination of *jus in bello* to *jus ad bellum*, there has been an apparent conflation of the limiting principles of proportionality, necessity and military necessity under the two bodies of law, which has been employed in a way to justify a greater extent of suffering and damage than seems to have been originally envisioned by international humanitarian law. By equating the criterion of 'direct and concrete military advantage' in the *jus in bello* proportionality equation with the *jus ad bellum* concept of 'defence of the state', a wider margin of collateral damage and suffering is tolerated. Similarly, the confusion of the concepts of 'self-defence', 'necessity', 'self-preservation' and 'military necessity', among others, in legal writing and jurisprudence has contributed to linking the two bodies of law. This is coupled with a stretching of the principle of military necessity so that it no longer becomes a limiting concept, but rather one that is invoked to justify violations of international humanitarian law.

Determining the existence of a 'just' or legal *jus ad bellum* cause is essentially a political and hence subjective exercise. Throughout its history, the UN Security Council has largely avoided making a determination of aggression, leaving the matter, essentially, to the discretionary determination of states. Allowing such

145 Bugnion, above note 10, p. 538.

a determination to colour, in any way, the application of *jus in bello* undermines the rule of law in an area of international law that requires strict restraining principles. The matter is even more controversial in the case of conflict between a state and non-state actors, in which both parties tend to subordinate international humanitarian law to *jus ad bellum*. The determination of whether an armed group is involved in ‘terrorism’ or legitimate struggle is a subjective endeavour that should not justify laxity in the application and enforcement of international humanitarian law standards. Neither should the notion of ‘extreme self-defence’ or ‘necessity’ override the imperative of respecting the principles of humanity.